2008

Religion and American Politics: Three Views of the Cathedral Section II: Other Works

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Religion and American Politics: Three Views of the Cathedral

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I. INTRODUCTION

In a recent book defending what he sees as a narrow but vital role for the university, Stanley Fish writes that academic enterprises provide "oases of reflection amid the urgencies that press in on us when we are being citizens, parents, politicians, soldiers, entrepreneurs, lawyers, doctors, engineers, etc."[1] He argues that "politically explosive issues" must "be made into subjects of intellectual inquiry" through "academicizing"—"detach[ing] [a topic] from the context of its real world urgency . . . and insert[ing] it into a context of academic urgency, where there is an account to be

* Associate Professor, University of Alabama School of Law. This Article was presented at the Boston College Law and Religion Program's 2008 Symposium, Electing Faith: The Intersection of Law and Religion in Politics Around the World, on March 18, 2008. Thank you to my co-panelists, Fr. Gregory Kalscheur, Lloyd Mayer, and Mark Scarberry, for their helpful comments, to Bill Brewbaker, Marc DeGirolami, Rick Garnett, Kent Greenawalt, Leslie Griffin, Dan Joyner, and Chris Lund for their comments on written drafts, to Jennifer Michaelis for research assistance, and especially to Kelly and Samantha Horwitz for their support and forbearance. I am grateful to the University of Alabama School of Law for its support of this project.

1. STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME 52 (2008).

offered or an analysis to be performed."[2] I sympathize with Fish's account of the typical academic mission and the need to effect at least a partial divorce of the timeless, the true subject of great academic inquiry, from the merely timely, the passing fads and passions of the day. That is all the more true in legal scholarship, which so often sacrifices a deeper search for truth in favor of a relentlessly normative, problem-solving, transient approach.[3]

Yet, when legal scholars and philosophers presume to examine the subject of this Article—the proper relationship between religion and politics—they often fall prey to a contrary, but equally distorting, pressure. When legal scholars prescribe rules of conduct to govern the role of religion in contemporary politics, they must not only avoid the urge to be too timely, to think in terms of particular issues, candidates, or campaigns, but they must also avoid the urge to be so "timeless," so Olympian and *de-haut-en-bas*, as to render their advice impractical or absurd. Here, they fare less well. Many a reader of the literature on this subject has noted that writers in the field propose rules of dialogue that tend to give off the refined vapors of the seminar room or the faculty lounge, not the pugnacious atmosphere of our daily political dialogue.[4]

In this Article, I hope to thread a path through both the timely and the timeless, by examining the eternal question of whether and how religion should involve itself in political debate through the words of the central actors: the political candidates themselves. I want to move the discussion from the seminar room to the war room, as it were, by reviewing and critiquing some of

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2. *Id.* at 27 (emphasis omitted).

3. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 178 (2006) ("Much legal scholarship aims to persuade other people about what legal rule or legal interpretation to adopt. As we have noted, this follows from law's narrow version of normativity—the notion that contributions to legal scholarship are judged in terms of how they might promote prescriptive solutions to legal problems."); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

4. *See, e.g.*, Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 136 (2006); M. Cathleen Kaveny, *Religious Claims and the Dynamics of Argument*, 36 WAKE FOREST L. REV. 423, 428 (2001).

what our politicians have had to say about the role of religion in American politics.

Although this discussion has gone on for so long that it may seem timeless, time has not stood still in the development of either American politics or American religion. Indeed, in examining the movement of political rhetoric on the relationship between religion and public leadership, one cannot help but notice that the rhetoric has evolved with the times. Lawrence Lessig once wrote masterfully about "meaning's vulnerability to changes in context."[5] "At the core" of the law's response to changing context, he wrote, "is an idea of contestability."[6] Ideas can be either contested or uncontested, in the foreground or the background of public attention.[7] Some issues may be the subject of public disagreement, but "stay[ ] quite firmly in the background of social and political life."[8] Contestable issues, by contrast, are the stuff of our greatest public controversies for as long as they remain contestable.[9]

So it is with the relationship between religion and American politics. Americans have always been a religious people, as Justice Douglas famously observed.[10] But to leave it at that obscures a great many changes in what it has meant to be religious in America—changes that track, perhaps, what it means to be American, or even what it means to be religious, in a society whose pluralism and secularism unsettle the easy assumptions of earlier generations. Religious belief, which was once so widespread and so widely shared as to be a common and uninteresting trait, has become increasingly contestable, one among many competing belief systems and values. In turn, that development has meant that, for those Americans who are deeply religious, religion has also become increasingly salient: it has become an ever more powerful, noteworthy, and publicly debated phenomenon. It is thus no con-

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5. Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1801 (1997).

6. *Id.* at 1802.

7. *See id.* at 1804.

8. *Id.*

9. *See id.* at 1802 (defining contestable issues as those that meet two conditions: (1) "there is actual and substantial disagreement about it (that is, . . . it is actually contested)"; and (2) the "disagreement is in the foreground of public life").

10. Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").

tradiction to say that Americans are a people who have become both more religious, in the sense that religion occupies a greater share of their attention and passion, and less religious, in the sense that an increasing number of Americans either profess no religion or have shunted it off to the side.[11]

Any contemporary consideration of the relationship between religion and American politics must thus assume the perspective of religion in an age of *contestability*—an age in which, precisely because religion is of fading importance to many people, it is of increasing importance to others, and in which the very question of religion is subject to vigorous debate and firmly located in the foreground of public discussion. Not surprisingly, political strategies for dealing with the relationship between religion and politics in American life have changed to reflect this era of religious contestability. As suggested below, in the past half-century American political culture has witnessed a move from strategies of *avoidance*,[12] in which politicians have attempted to satisfy suspicious voters by relegating religion to the background, to strategies of *dialogue*, in which politicians have moved religion to the foreground as a way of reaching voters of different faiths and beliefs.

Much of the move from strategies of avoidance to strategies of dialogue is a step in the right direction. Religion belongs in public life, and it neither can, nor should, be expunged from public dialogue and decision-making, however messy and divisive that dialogue may prove.[13] This is not to minimize the very real divisions and hard feelings that may result when religion enters the public stage. But if religion truly exists in an age of contestability, then it is unlikely that any attempt to relegate it to the background

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11. Of course, this rather broad view elides a good deal of history. In offering a general sense of the movement of religion from an uncontestable to a deeply contestable value, I do not mean to slight the degree to which sectarian differences have been a source of controversy from the very beginnings of American history; nor do I mean to ignore the fact that religiosity has expanded and contracted in previous eras, both during and on either side of the nation's Great Awakenings.

12. The phrase is taken from BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 213 (2006) (describing "strategies of avoidance" of religion in the public square practiced by various politicians, particularly those of a liberal or progressive stripe, including John F. Kennedy).

13. For an expanded treatment of this view, see Horwitz, *supra* note 4.

will succeed.[14] Surely it is better, then, to fashion realistic rules of engagement for religious dialogue in American public life.[15]

What follows is an attempt to discern and critique what some of the nation's leading politicians have had to say about the relationship between religion and American politics. This Article will focus in particular on three political figures, all of whom engaged in politics at the highest and most visible level—the quest for the Presidency. Those figures are John F. Kennedy, Mitt Romney, and Barack Obama. Perhaps, by examining the words of these politicians themselves, forged and tested in the crucible of electoral politics, one may learn something about how religion and politics relate at a level that is both muddier and more practical, and thus, offers a sense of the best one may reasonably hope for when religion takes the public stage.[16]

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14. *See, e.g.*, STEVEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 7 (2000) ("Religion, in short, will be in politics. It cannot reasonably be kept out."); Horwitz, *supra* note 4, at 135; Steven Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1634 (1999).

15. *See* Horwitz, *supra* note 4.

16. Let me offer a word about the limited scope of this Article. It is not intended as a work of history. Instead, I have chosen to offer a close reading of each of the central political texts I examine here, reading them afresh and somewhat out of context. Although I have suggested that the relationship between religion and politics has changed with the times, each of these speeches usefully addresses that relationship, and each is rewarding for its own sake and on its own terms.

Nor is this a deeper work of philosophy and jurisprudence on the relationship between religion and politics. For discussions along those lines, see Richard Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1718 n.317 (2006); *see also* CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002); KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008). Such abstract philosophical considerations of the relationship between religion and politics necessarily operate at a fairly high and general level, and the normative proposals they offer are often abstract and provide little guidance for life on the ground. This Article is influenced by those more abstract discussions, but attempts to operate at a more practical level.

II. JOHN F. KENNEDY: THE STRATEGY OF AVOIDANCE

The journey begins with what is surely the most famous contemporary political discussion of the relationship between religion and American politics: John F. Kennedy's speech before the Greater Houston Ministerial Association on September 12, 1960. Kennedy's speech took place in a social setting that was in some ways utterly familiar, and in some ways strikingly different from the present. First, the speech took place in an America in which the prevailing religious sentiment was broad but shallow. As Mark Massa remarks, the role of religion in American public life in the Eisenhower era was one of both "high visibility *and* . . . almost contentless theology."[17] The state of affairs was best characterized by Eisenhower's famous statement: "Our form of government has no sense unless it is founded in a deeply felt religious faith[,] and I don't care what it is."[18] That remark, as Gary Scott Smith suggests, surely was meant less to suggest that *any* religion would do than to signify that "all three major American faiths—Protestantism, Catholicism, and Judaism—supported the moral values and spiritual ideas on which the nation rested."[19] As captured in Will Herberg's classic mid-century work, *Protestant – Catholic – Jew*,[20] the spirit of the age was one of religious piety,[21] but of a decidedly thin brand.[22]

Second, and notwithstanding the emergence of a concept of "Judeo-Christian tradition"[23] that purported to welcome various Christian sects, Kennedy also spoke to a nation in which anti-Catholicism was not only more widespread than it is today[24] but

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17. MARK S. MASSA, CATHOLICS AND AMERICAN CULTURE: FULTON SHEEN, DOROTHY DAY, AND THE NOTRE DAME FOOTBALL TEAM 130 (1999) (emphasis in original).

18. GARY SCOTT SMITH, FAITH AND THE PRESIDENCY: FROM GEORGE WASHINGTON TO GEORGE W. BUSH 254 (2006).

19. *Id.*

20. WILL HERBERG, PROTESTANT–CATHOLIC–JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (1955).

21. *See* MASSA, *supra* note 17, at 130.

22. *See* SMITH, *supra* note 18, at 255 (quoting R.W.B. Lewis, writing in the NEW REPUBLIC in 1954 about the "thin religiosity" of the Eisenhower administration).

23. MASSA, *supra* note 17, at 130.

24. In saying so, I of course do not mean to neglect the continuing presence of anti-Catholic sentiment in America through the present day. *See, e.g.*,

also far more vocal and socially acceptable.[25] Those prejudices were not simply a matter of internecine strife among the deeply religious. Catholicism was also suspect in the eyes of many liberals and progressives of the era, as evidenced by the popularity of Paul Blanshard's critical book *American Freedom and Catholic Power*.[26] As Thomas Berg writes, "[L]iberal intellectuals around mid-century came to define themselves heavily in terms of opposition to the Church, which they viewed as an authoritarian force that threatened reasoned inquiry, democratic politics, and social unity."[27]

Of course, liberals were not the only ones voicing criticism of Catholics; that sentiment was also widespread among religious Americans, particularly evangelicals and other conservative Protestant sects.[28] Here, although much has stayed the same, one gets a sense of how much has changed at the same time. Certain aspects of the mid-century critique of Catholicism, such as the concern over the issue of public support for parochial schools, shared a common theme with criticisms of Catholics evident in both the early Republic and in the nineteenth century, when Catholicism was associated with immigration. Critics feared the Catholic Church as a foreign body in the United States, under the sway of "an organization that is alien in spirit and control."[29] Although it

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MARK S. MASSA, ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE (2d ed. 2005).

25. *See, e.g.*, JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY (2004). For a broader history of law and religion in America that features a substantial discussion of anti-Catholicism in the nineteenth century, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004).

26. PAUL BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER (1949). For a discussion of the book's popularity, and the extent to which it described "fears widely shared in the liberal Protestant 'Establishment' in America . . . in the years immediately after the Second World War," see MASSA, *supra* note 17, at 1–2.

27. Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 124 (2001) (citing John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, J. AM. HIST., June 1997, at 97).

28. *See id.* at 124–25.

29. RANDALL BALMER, GOD IN THE WHITE HOUSE: HOW FAITH SHAPED THE PRESIDENCY FROM JOHN F. KENNEDY TO GEORGE W. BUSH 11 (2008) (quoting BLANSHARD, *supra* note 26, at 4, 5).

was hardly new,[30] it is striking that the language of many of the anti-Catholic religious groups echoed a theme that is now more closely associated with the secular world, that of separation of church and state. Thus, as Thomas Berg notes, the mainline Protestant magazine *The Christian Century* argued that the Catholic Church "would use any method 'to blur the principle of separation of church and state.'"[31] This language differs from the kind of rhetoric one sees today, in which many evangelical Christians, having established schools of their own, now form a community of interest on this and other issues with many American Catholics.[32] This change in rhetoric and argument shows the extent to which the public discourse on the relationship between religion and politics has obscured the shifts in positions and alliances over the years.[33]

The Catholic Church itself has also changed. Its formal position in the pre-Vatican II era remained fairly anti-liberal by modern lights, teaching "that religious freedom was not a moral ideal in itself, but at most a prudential accommodation to the fact of diversity in religious beliefs."[34] That fact may lend a different perspective to some of the fears voiced in those years that Catholicism "was inconsistent with a democratic political system."[35] Certainly some of the criticism of the Church and its role in American politics was more thoughtful and credible, and less poisonous and fervid, than the critics' worst outbursts—the letters and pamphlets likening voting for a Catholic candidate to "voting for a Fascist, a Nazi," and arguing that "[t]he Pope wants rich America under Catholic control."[36]

What the Church's critics failed to see, perhaps, was that any blanket characterization of American Catholics as anti-

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30. *See, e.g.*, HAMBURGER, *supra* note 25.

31. Berg, *supra* note 27, at 126 (quoting Editorial, *Getting Down to Cases*, 64 CHRISTIAN CENTURY 1512, 1513 (1947)).

32. *See, e.g.*, Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 511–12 (2006).

33. For more on this subject, with particular attention to the parochial school funding and school prayer issues, see John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

34. Berg, *supra* note 27, at 133.

35. *See id.* at 136; *see also* BALMER, *supra* note 29, at 37–38.

36. BALMER, *supra* note 29, at 20.

freedom, or anti-separationist, based on the official statements of the Church, hardly reflected the reality that American Catholics had long since emerged as fully participating citizens who shared a common set of values with their non-Catholic neighbors. Indeed, as Garry Wills notes, the rise of Kennedy was coincident with what, until now, was probably "[t]he peak of Catholic prestige and influence" in American public life.[37] Moreover, the critics also neglected the extent to which Catholic intellectual currents were moving in the same pluralistic direction as the laity. As American Catholics were moving into the mainstream of public life, the theologian John Courtney Murray was "articulat[ing] in theory what most American Catholics believed instinctively: religious freedom is a human right, and while church and state need not be rigidly separate and could cooperate fruitfully, the Church should not have a privileged connection with the government."[38] Not long before

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37. GARRY WILLS, HEAD AND HEART: AMERICAN CHRISTIANITIES 457 (2008).

38. Berg, *supra* note 27, at 139; *see, e.g.*, JOHN COURTNEY MURRAY, S.J., THE PROBLEM OF RELIGIOUS FREEDOM (1965). In a very thoughtful response to a draft of this Article, Professor Leslie Griffin has argued that the fact that the Kennedy campaign consulted Murray in drafting Kennedy's address suggests that Kennedy's speech does not constitute a strategy of avoidance or privatization of religion, as I argue here, but rather is part of an effort to find ways of "engag[ing] pluralistically in a country where other people did not hold your (true) faith." Email from Leslie Griffin, Professor of Law, University of Houston Law Center, to Paul Horowitz, Associate Professor of Law, University of Alabama School of Law (Oct. 12, 2008, 12:44 CST) (on file with author). Kennedy advisor Ted Sorenson recalls "reading the text over the phone" to Murray. *See* MASSA, *supra* note 17, at 143. Professor Griffin points to Murray's own work, which did not privatize religion but sought to find ways for Catholics to engage in intercredal cooperation with others without sacrificing their truth-claims, as supporting this reading of the Kennedy speech.

Professor Griffin's perspective on this is an important one. It is worth noting, however, that other students of the relationship between Murray and the Kennedy campaign are skeptical of the notion that Kennedy's speech represents any kind of thorough adoption of Murray's own perspective. *See* MASSA, *supra* note 17, at 142–43, discussing the connection between Murray and Kennedy and arguing that:

> positing such a mentoring role for Murray demands a sophisticated understanding of the Catholic natural law discourse in which Murray was engaged—an understanding that would not have immediately furthered the political goals of Kennedy in

Kennedy sought the presidency, Murray had been sidelined by the Vatican, lending some ammunition to American critics of the Church's role in public and political life.[39] It would not be long, however, before Murray's views enjoyed a resurgence of popularity, not only in American life but also within the Church itself, whose changing views on religious liberty during Vatican II substantially bore Murray's imprint.[40] So the Church's critics were chasing after fading phantoms. It is nonetheless important, however, not to miss the extent to which the Church's views have changed over time, making its mid-century critics' views perhaps seem even more objectionable to modern ears.[41]

All of this simply provides a broader background to Kennedy the candidate and the faith-based criticisms that surrounded him. Looking to Kennedy himself, however, there is some disagreement about the nature and extent of Kennedy's own religious beliefs, although some of the disagreement clearly owes something to the zeal of the defenders of Kennedy's public image. The child of a devout Catholic, Kennedy certainly observed many of the forms of his faith,[42] but "did not appear to be interested in Catholic piety or devotional life."[43] Although his biographer Theodore Sorenson argued against those who suggested that Kennedy was not "deeply religious,"[44] and others who argued that Kennedy "never showed 'any special interest in Catholicism,'"[45] Sorenson himself said that Kennedy never cared "a whit for theology."[46] Kennedy certainly never concealed his faith,[47] but one student of religious faith and the American presidency concludes that Kennedy's "faith

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any event, however conversant Kennedy may have been with scholastic philosophy (an unlikely eventuality).

Id. at 142–43. Murray himself later said that Kennedy was "far more of a separationist than I am." *Id.* at 143.

39. *See, e.g.*, Berg, *supra* note 27, at 135–36.

40. *See, e.g.*, E.J. DIONNE, JR., SOULED OUT: RECLAIMING FAITH & POLITICS AFTER THE RELIGIOUS RIGHT 154–55 (2008).

41. *See* JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING 154–58 (2005).

42. *See, e.g.*, SMITH, *supra* note 18, at 260–63.

43. *Id.* at 260.

44. *See id.* at 261 (internal quotations and citation omitted).

45. *Id.* at 261 (quoting LAWRENCE FUCHS, JOHN F. KENNEDY AND AMERICAN CATHOLICISM 164 (1967)).

46. *Id.* (internal quotations and citation omitted).

47. *See id.*

had much less influence on his thinking and policies than that of . . . other presidents."[48] Rather, and in keeping with those who staffed the administration of the New Frontier,[49] Kennedy was a classic technocrat who "sought to achieve a technically based consensus to direct politics, similar to the one that guided the scientific community."[50] In short, while Kennedy certainly was rooted in Catholic belief and practice, he either was not deeply religious or managed to find a distinction between his religious beliefs and his public role as a politician and policy-maker.

Nevertheless, Kennedy's religion occupied center stage in his candidacy and was the subject of repeated attack on the grounds already discussed: that Catholicism was an "alien" faith, that electing a Catholic as President would effectively place the Pope in the Oval Office, and that a Catholic would tear down the wall of separation between church and state.[51] Kennedy sought unsuccessfully to preempt such criticisms by citing both the Religion Clauses of the First Amendment and the Religious Test Clause of the Constitution, which states that "no religious Test shall ever be required as a qualification to any Office or public Trust under the United States."[52] Under those clauses, he argued, any such criticisms violated the principle that "our government cannot—directly or indirectly, carelessly or intentionally—select any religious body for either favorable or unfavorable treatment."[53]

This rhetorical strategy, however, did not succeed in staving off criticisms of Kennedy's faith. Although Kennedy hoped that his decisive primary victory over Hubert Humphrey in the substantially non-Catholic state of West Virginia would put the issue to rest, it did not.[54] So it was that Kennedy found himself

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48. *Id.* at 260.

49. *See, e.g.*, DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1972).

50. SMITH, *supra* note 18, at 263 (internal quotations and citation omitted).

51. *See generally* BALMER, *supra* note 29, at 10–12; SMITH, *supra* note 18, at 266–71.

52. U.S. CONST., art. VI, cl. 3.

53. *See* BALMER, *supra* note 29, at 13–14. In fact, as I have shown elsewhere, the Religious Test Clause does not forbid candidates from being asked or answering such questions—although it does not forbid them from refusing to answer those questions either.

54. *See* BALMER, *supra* note 29, at 19–31; SMITH, *supra* note 18, at 268.

agreeing to come, like Daniel into the lions' den, to the Rice Hotel in Houston to speak before some three hundred Protestant ministers at the Houston Ministerial Association on September 12, 1960.[55]

Kennedy began his speech by arguing that "[w]hile the so-called religious issue is necessarily and properly the chief topic here tonight," many other issues ought to be "far more critical."[56] Among them were "the spread of communist influence," slums, education, and the space race.[57] Kennedy added, "These are the real issues which should decide this campaign. And they are not religious issues—for war and hunger and ignorance and despair know no religious barrier."[58] As a preliminary approach to his overall strategy of avoidance, Kennedy thus began by minimizing, even scoffing at, any suggestion that religion ought to pose a significant concern for voters.[59] Rather, he suggested, voters ought to focus on the panoply of pressing public issues that confront them on the eve of the election. Read charitably, Kennedy appeared to be suggesting that these issues are not "religious" issues because they pose no significant "religious barrier" to a broad public consensus; all people of good faith, no matter what that faith may be, recognize that these are serious issues.[60]

Read more literally, however, Kennedy could not have possibly meant what he said. As any reader of the Beatitudes, or of many other significant religious texts, surely must understand, "war and hunger and ignorance and despair" are *quintessentially* "religious issues."[61] For many deeply religious individuals, these issues, and the manner in which individuals approach them, implicate any number of deep questions about faith and its manifestation through works. Thus, Kennedy opened his speech awkwardly and in error. These remarks, however, are simply a prelude to a broad-

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55. *See, e.g.*, BALMER, *supra* note 29, at 32.

56. *Id.* at 176. Balmer's book reprints Kennedy's speech in full, and I cite to his book in discussing Kennedy's speech. For a full text transcription of the speech, see President John F. Kennedy, Address to the Greater Houston Ministerial Association (Dec. 12, 1960), *available at* http://www.americanrhetoric.com/speeches/jfkhoustonministers.html (last visited Aug. 8, 2008).

57. *Id.*

58. BALMER, *supra* note 29, at 176.

59. *Id.*

60. *Id.*

61. *Id.*

er, and equally disturbing, approach to the question of the relationship between religion and politics.

Kennedy's speech proceeded to what is surely the most famous passage of the address, prefaced by the statement that "it is apparently necessary for me to state once again—not what kind of church I believe in, for that should be important only to me—but what kind of America I believe in."[62] It is worth quoting at length:

> I believe in an America where the separation of church and state is absolute; where no Catholic prelate would tell the President—should he be Catholic—how to act, and no Protestant minister would tell his parishioners for whom to vote; where no church or church school is granted any public funds or political preference, and where no man is denied public office merely because his religion differs from the president who might appoint him, or the people who might elect him.
>
> I believe in an America that is officially neither Catholic, Protestant, nor Jewish; where no public official either requests or accepts instructions on public policy from the pope, the National Council of Churches, or any other ecclesiastical source; where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials, and where religious liberty is so indivisible that an act against one church is treated as an act against all.[63]

Once again, looking at this passage through political eyes, one can see Kennedy the candidate masterfully attempting to defuse a variety of attacks launched against him by combining them under the general rubric of "the separation of church and state" and the indivisibility of "religious liberty." Thus, at the same time that he denied any authority of a "Catholic prelate" to tell him how to act as President, he also argued that Protestant ministers are forbidden from telling *their* flock how to vote in the election. At the

62. *Id.*
63. *Id.* at 176–77.

same time that he denied the interest in preferring Catholic parochial schools for purposes of public funding, he argued that the same principle barred the voters from denying him the Oval Office simply because of his religious beliefs.

As politically successful as this rhetorical strategy may have been, it is far less satisfying on a close reading. To fully appreciate this, one must consider a later piece of the address:

> Finally, I believe in an America where . . . there is no Catholic vote, no anti-Catholic vote, no bloc voting of any kind, and where Catholics, Protestants, and Jews, at both the lay and the pastoral levels, will refrain from those attitudes of disdain and division which have so often marred their works in the past, and promote instead the American ideal of brotherhood. . . . [My vision of the presidency] represents a great office that must be neither humbled by making it the instrument of any religious group, nor tarnished by arbitrarily withholding it—its occupancy from the members of any one religious group. I believe in a President whose views on religion are his own private affair, neither imposed upon him by the nation, nor imposed by the nation upon him as a condition to holding that office.[64]

Reading both passages together, one can understand why Mark Massa has written that Kennedy's Houston speech can be "seen as a key moment, not only in American Catholicism's 'coming of age,' but also of the articulation of the *terms* of that rite of passage."[65] Kennedy offered a vision of the church-state separation that is at once both liberating and constraining for the participation of religious believers in public life. His vision of separation liberates by eliminating any barriers to the successful participation of religious believers in politics. "No man is denied public office merely because his religion differs from . . . the people who might elect him."[66] It treats separation not only as a formal rule con-

64. *Id.* at 177–78.
65. MASSA, *supra* note 17, at 131 (emphasis in original).
66. BALMER, *supra* note 29, at 176.

straining government action, a statement about whether any government office can be "officially . . . Catholic, Protestant, [or] Jewish,"[67] but as an informal constraint on the decisions of *private* citizens entering the voting booth. If religion has no place in political decision-making, private and public, then it cannot prevent a member of any religion from becoming President. Kennedy thus "became a symbol of American pluralism."[68]

At the same time, Kennedy accepted a high price, not only on his behalf but also on the voters' as well, for the advance of religious pluralism in the American political landscape. He made a private affair of his own religion, severing it from any deep ties of obligation or belief that might color or command his own views on policy. He also went a step further. For if the nation can neither "impose[ ]" religious views on a candidate for office nor treat religion "as a condition to holding that office," then religion ceases to be a valid factor in the voters' deliberations.[69] It becomes "a private affair" for them as well.

This is not, perhaps, the most charitable reading of Kennedy's remarks. Nevertheless, ultimately it is impossible to understand Kennedy's words any other way. Kennedy's compromise with the voters finally requires that neither he nor they should take religion *too* seriously. Rather, it requires that they both should refrain from viewing religion as a source of binding obligation with respect to either his actions in office or their choices as voters. It is not just that this compromise is too costly. It is also impossible, at least in this culture. On a wide range of issues, certainly including the classic hot-button issue of abortion, but extending to questions of war and peace, the necessity and nature of various social programs, and much more besides, religious voters cannot separate what their religion demands from the question of which candidate to support.

Even beyond particular issues, voters have always, wisely or not, asked questions about the *character* of the individuals they select to occupy high elected office. To be sure, a thoughtful religious person *can* conclude that religious differences are not an absolute bar to the kinds of character concerns such as integrity, honor, or honesty that might influence his or her voting decisions.

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67. *Id.* at 177.
68. WILLS, *supra* note 37, at 458.
69. BALMER, *supra* note 29, at 178.

However, the voter *need* not make such a distinction, and on reflection, may conclude in particular instances that this distinction is impossible. Either a sense of what a candidate's religious beliefs say about his or her character, or a view of the virtues, including belief in a particular religious truth, that ought to be present in a particular candidate may preclude a voter from making this sort of distinction.[70]

Ultimately, then, Kennedy is asking the voters to do something that many of them cannot. One might reply that many voters appeared to do just that in 1960. In an era of substantial social consensus and the belief in the problem-solving nature of technology and secular liberal values, Americans demonstrated their willingness to accept the compromise Kennedy offered them. However, the ultimate failure of Kennedy's strategy of avoidance also suggests that this compromise was doomed to fail from the very beginning.

So far, the focus has been on the problems that Kennedy's strategy of avoiding the "religious question" by privatizing religion posed for religious voters. Kennedy's approach, however well it may have corresponded to his own propensities, is equally problematic for candidates and office-holders as well. Kennedy imagined a world in which "no public official either requests or accepts instructions on public policy from the pope, the National Council of Churches, or any other ecclesiastical source";[71] where "no Catholic prelate should tell the President—should he be Catholic—how to act";[72] in which the "chief executive" is "not limited" in the "fulfillment of his Presidential office . . . by any religious oath, ritual, or obligation."[73] Perhaps this suited Kennedy, but it may not be true for other office-holders, particularly other Catholic politicians.[74] They may wish to consider the teachings or instructions of the Pope, or of "Catholic prelates," which are authoritative in some circumstances. Even if they do not consider themselves

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70. *Cf.* SANFORD LEVINSON, WRESTLING WITH DIVERSITY 208 n.38 (2003) ("'Many Protestant groups . . . see no separation between the secular and religious parts of their lives.'" (quoting a letter from Professor Laura Underkuffler)).

71. BALMER, *supra* note 29, at 177.

72. *Id.* at 176.

73. *Id.* at 178.

74. *See supra* notes 43–54 and accompanying text (discussing the nature and extent of Kennedy's religiosity).

bound by those instructions—if, for instance, the Pope or prelate is advising on a matter that falls outside the scope of the magisterium—they certainly may welcome counsel from those precincts, and might even "request" it. Finally, they may conclude that some commands not only conflict with the Constitution but are superior to it. One response to this prospect is to allow voters to ask these questions of the candidate before he takes office and to judge him by his ability to "fulfill[ ] . . . his presidential office" once he takes it.[75] However, Kennedy's strategy of avoidance, by seeking to eliminate religion from political discourse and decision-making in general, and from voters' decision-making in particular, closes off this avenue of questioning.

Voters and candidates are thus left in a world in which they either pretend that office-holders will face no significant conflicts between their faith and their public obligations, or in which they demand, perhaps futilely, that officials ignore these conflicts. In either case, the voters are left with little remedy when the truth turns out to be more complicated. Sanford Levinson, writing primarily about Justice William Brennan but drawing on Kennedy's speech as well, has aptly characterized this view of a conflict-free world as involving a "comic" view of the Constitution.[76] In this view, the Constitution "provid[es] sufficiently 'happy endings' to legal dilemmas so that, for example, fidelity to the Constitution never require[s] the judge to acquiesce in something truly evil."[77] But to make this assumption and simply privilege the demands of public office above those of religion turns obedience to the Constitution into a form of idolatry.[78] Indeed, Kennedy's compromise, which envelops both office-holders and voters alike, seeks to make constitutional idolaters of us all.

Kennedy's approach does not simply exalt the Constitution, however. In important respects, it also diminishes religion—not simply by treating it as subordinate to public obligations, but by implying that it is trivial. Kennedy does not say so in as many

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75. BALMER, *supra* note 29, at 177.

76. Sanford Levinson, *Is it Possible to Have a Serious Discussion About Religious Commitment and Judicial Responsibilities?*, 4 ST. THOMAS L. REV. 280, 283 (2006)

77. LEVINSON, *supra* note 70, at 215–16.

78. LEVINSON, *supra* note 70, at 283 (quoting a letter from Professor Thomas Shaffer *in* SANFORD LEVINSON, WRESTLING WITH DIVERSITY 215 n.61 (2003)).

words, and he does offer the usual paeans to religious liberty that have graced many a political speech, writing of "an America where religious intolerance will someday end, where all men and all churches are treated as equal."[79] However, this language speaks only in terms of equality; it suggests that all religions are equally important, but it does not explain how important they are. So, it is that Kennedy's Catholicism became incidental. While denying, understandably, that he was "*the* Catholic candidate for president,"[80] Kennedy added that he was "the Democratic Party's candidate for president who *happens* also to be a Catholic."[81] He turned what, for many, is a bedrock aspect of their public and private identity into mere happenstance.

All of this would be startling enough if applied to the world of private actors. To take a standard example, imagine an argument that the Reverend Martin Luther King, Jr. acted wrongly by allowing religion to motivate his struggle for civil rights, that the two must remain separate, and that King was wrong to seek to impose his religiously derived views of the centrality of equality "indirectly upon the general populace."[82] This argument would seem out of place when attributed to King's efforts as a private citizen. However, Kennedy suggested that the calculus is different where public officials are concerned. Kennedy argued that the Constitution itself is interposed between public officials and private actors. As he had in the past,[83] Kennedy raised the Religious Test Clause of the Constitution, arguing that it forbids any voter from "requiring a religious test, even by indirection."[84] On this broad view of the Religious Test Clause, voters are constitutionally disabled from asking religious questions of candidates, or voting against candidates for religious reasons.

This reading of the Religious Test Clause is far too broad.[85] The Clause simply forbids the imposition of formal tests that would preclude someone from taking office, or require a candidate

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79. BALMER, *supra* note 29, at 177.

80. *Id.* at 179 (emphasis added).

81. *Id.* (emphasis added).

82. *Id.* at 177.

83. *See, e.g.*, *id.* at 13; THOMAS J. CARTY, A CATHOLIC IN THE WHITE HOUSE?: RELIGION, POLITICS, AND JOHN. F. KENNEDY'S PRESIDENTIAL CAMPAIGN 71–72 (2004) (paperback ed. 2008).

84. BALMER, *supra* note 29, at 178.

85. *See* Horwitz, *supra* note 4.

formally to avow or disavow a religion or religious precept as a condition of taking office. To read it more broadly, to argue that even "indirect[ ]"[86] religious tests violate the constitutional bar, is to forbid voters and candidates alike from having a meaningful discussion about the ways in which a particular faith conduces, or constrains, an office-holder's performance of his duties.[87] As stated before, this is a dangerous approach. At the same time that Kennedy denied that religion could ever pose a meaningful conflict with the performance of public duties, he also invoked the Religious Test Clause to prevent voters from exercising the political safeguard of asking particular candidates whether *they* are faced with such conflicts, let alone voting to prevent such a conflict-ridden candidate from reaching office.[88] To be sure, many voters might exercise that right unwisely, but Kennedy's cure for this potential ill is as bad as the disease itself.

Although the discussion of Kennedy thus far has been critical, one might add some appreciative notes about his speech. First, Kennedy added a note of sociological detail which was of great importance to understanding the role of Catholics in American politics in 1960 (and today), and which may also have broader implications for understanding the role of religion in American politics more generally. In arguing against those who would hold him accountable for every illiberal statement made by "Catholic church leaders, usually in other countries, frequently in other centuries, and rarely relevant to any situation here,"[89] Kennedy pointed to "the statement of the American bishops in 1948 which strongly endorsed church-state separation, and which more nearly reflects the views of almost every American Catholic."[90] This is important because it suggests that Catholicism is not wholly monolithic and unchanging, and that voters should be aware of its evolving views on the relationship between church and state. Kennedy's statement is also important for its focus on what it means to be an "*American* Catholic" and on the notion that there may be distinctions between what is said in Rome and what is believed in American pews.[91] It suggests that voters should not treat the Church as a specter or a

86. BALMER, *supra* note 29, at 178.
87. *See generally* Levinson, *supra* note 76.
88. BALMER, *supra* note 29, at 178.
89. *Id.* at 179.
90. *Id.*
91. *Id.*

bogeyman, but instead should consider the ways in which both the Church and its members have become fully a part of the fabric of American life, altering both themselves and public life in the process. Kennedy's mention of his own military service, and the sacrifices made in war by his family,[92] serve as forceful reminders that, whatever voters might make of "carefully select[ed] quotations [taken] out of context" suggesting that there is a divide between Catholic belief and public service,[93] in practice Catholic Americans have been every bit as loyal to their country as their non-Catholic brethren. The broader lesson here, perhaps, is that voters cannot make general assumptions about what it means to be Catholic, or Jewish, or Muslim, or a member of any other faith. They must keep in mind the unique and shifting ways in which both religious identity and American civic identity have influenced and accommodated one another, so that one must talk about being an *American* Catholic or Jew or Muslim.

Second, despite his articulation of the comic view that there can be no meaningful conflict between the commands of faith and the commands of public service, Kennedy ultimately acknowledged that there may come a point beyond which compromise is impossible:

> But if the time should ever come—and I do not concede any conflict to be remotely possible—when my office would require me to either violate my conscience or violate the national interest, then I would resign the office; and I hope any conscientious public servant would do likewise.[94]

Thus, Kennedy did finally concede that religion can be important to the conscience of a public servant and that it may even finally prevent him from carrying out his duties consistently with his constitutional oath. Quite rightly, he did not suggest that the mere possibility of such a conflict should disqualify anyone from public office. Rather, he stated that the appropriate remedy here, if a politician simply cannot comply with both sets of obligations, is to leave office. In keeping with his comic view of the Constitution

92. *See id.* at 178.
93. *Id.* at 179.
94. *Id.* at 180.

and his privatized view of religion, he was unwilling to "concede any [such] conflict to be remotely possible."[95] At least, however, he somewhat redeemed both religion and the Constitution by acknowledging the stakes involved in both and rendering them something more than comic.

Third, it is worthwhile to note an important distinction Kennedy made throughout his speech. Although the main current of his address suggests a strategy of avoidance, by arguing that religion simply cannot be a relevant matter for either candidates or voters, he also made a somewhat more subtle point. He argued that the presidency must not be "tarnished by *arbitrarily* withholding [its] occupancy from the members of any one religious group," and later that the election should not be "decided on the basis that forty million Americans lost their chance of being president on the day they were being baptized."[96] In other words, it is not simply the use of religion as a qualifying or disqualifying factor by voters that should be disturbing. It is the refusal to think further and deeper—the blanket assumption by voters that membership in a faith should be disqualifying in and of itself.

Finally, it is worth noting what Kennedy said after the formal address was over, and the fact that he said anything at all. By design, Kennedy spoke to a hostile audience, and he did not leave when the address was over. Rather, he willingly accepted audience questions, a number of them "acrimonious."[97] Kennedy closed his appearance with the following remarks:

> I don't want anyone to think, because they interrogate me on this important question, that I regard that as unfair or unreasonable or that somebody who is concerned about the matter is prejudiced or bigoted.
>
> I think religion is basic in the establishment of the American system, and, therefore, any candidate for the office, I think, should submit himself to the questions of any reasonable man.
>
> My only limit would be that if somebody said, "Regardless of Senator Kennedy's position, regardless

95. *Id.*
96. *Id.* at 177, 180 (emphasis added).
97. *Id.* at 34.

> of how much evidence he has given that what he says he means, I still won't vote for him because he is a member of that church."
>
> I would consider that unreasonable. What I consider to be reasonable in an exercise of free will and choice is to ask Senator Kennedy to state his views as broadly as possible. Investigate his record to see whether he states what he believes and then make an independent and rational judgment as to whether he could be entrusted with this highly important position.[98]

These remarks, again, demonstrate a tension with the thrust of his address. Kennedy did suggest, in keeping with his argument against the arbitrary withholding of support on religious grounds, that religious questions are not necessarily illegitimate in a political campaign and that one may fairly and in an unprejudiced fashion have concerns about the relationship between a particular candidate's religious views and his fitness for office. Commendably, he suggested that these are perfectly reasonable questions and that a candidate may reasonably be expected to answer them, although he adds the important caveat that such questions ought to be voiced in a reasonable manner. These remarks are in some tension, however, with the thrust of his strategy of avoidance—that religion is a "private affair" that should not be raised as a barrier to the holding of public office, and that even indirect inquiries of this sort violate the Religious Test Clause.

At the same time, it is not clear exactly what Kennedy means in his peroration when he suggests that it would be reasonable to "ask [him] to state his views as broadly as possible."[99] These words can be taken in two ways. Kennedy might be suggesting here that the only "views" that should be relevant to public inquiry are views on matters of public policy, thus again excluding religion from the ambit of any reasonable questioning. That seems inconsistent with the rest of his concluding remarks, however. Perhaps the better reading is that Kennedy believes questions on a candidate's religion are acceptable, but should be phrased only in a gen-

98. *Id.* at 34–35.
99. *Id.* at 35.

eral way and should be closely linked to the candidate's actual record in office. That kind of compromise is still a popular one in public discourse about religion and politics, but it is far from clear that such a compromise is either beneficial or acceptable. To permit the public discussion of religion only on the condition that such speech is cast in the broadest possible terms may, in the long run, be even worse than not discussing it at all, and may prove even less respectful of religion than a simple strategy of silence.[100]

In the end, Kennedy's speech, and his broader approach to the relationship between religion and American politics, was a politically successful but deeply problematic attempt to resolve the tension between the two. As Mark Massa has observed, the very fact that Kennedy was pressed on the "Catholic question," and the simple fact of his political victory, presents a painful irony. Kennedy's election demonstrated that someone of even what was then viewed by many as an "alien" faith could hope to succeed in seeking the highest office in the land. But it did so by rendering that faith unimportant, by denying the link between one's own faith and one's performance in public office, and by denying that link on the voters' behalf as well. In short, Kennedy achieved a victory for religious pluralism. But in doing so, he "'secularizfed]' the American public square by privatizing personal belief."[101] It is of little wonder, then, that even some of his closest Catholic allies were ultimately discomfited by the strategy of avoidance Kennedy pursued all the way to the White House.[102]

III. MITT ROMNEY: INCLUSION WITHOUT ENGAGEMENT

Nearly half a century separates John F. Kennedy's speech on religion and politics from the speech given by former Massachusetts governor and 2008 Republican presidential candidate Mitt Romney on December 6, 2007. During that time, religion's role in American politics changed dramatically, as did the role of religion in the United States more generally. That story is too long to tell here, but most readers will be familiar with many of the most salient elements of the narrative: the growth in the number of people who profess no religion at all or treat religion as less central to

100. *See* Horwitz, *supra* note 4.

101. MASSA, *supra* note 17, at 146.

102. *See, e.g.*, MCGREEVY, *supra* note 25, at 213.

their lives; the corresponding increase in the number of Americans who do treat religion as a primary influence and who adhere to ever more fervent religious views; and the rise of evangelical Christianity and its resurgence as a political force.

Religion, in short, has become a more powerful force in American politics in the last half-century, in part precisely because it has become *less* of a bedrock assumption. More Americans have abandoned their faith or have found it anew, and the nation has moved through and past periods of technocratic politics and consensus about the basic liberal values that undergird liberal democracies. In the process, religion has become a more central and powerful force in American politics at the same time as, and *because*, it has become a more contested element of the social fabric.

Beyond the larger social context in which each speech took place, there are other similarities and differences between the two speeches. Kennedy spoke in a period in which Catholicism in America was still the subject of widespread suspicion and prejudice. That hostility, though, was largely above-board, not couched in code words or hints. Also, Kennedy ultimately spoke not to reassure voters that his Catholicism was a commendable quality in and of itself, but to remove fears that he would manifest his Catholic faith in public life. In some ways, Romney, a devout Mormon and scion of past leaders of the church, spoke out of similar needs. As Romney's campaign progressed, the Church of Jesus Christ of Latter-day Saints remained the subject of widespread fears and questions among many Republican primary voters, particularly evangelical Christians, who believed that Mormonism, like Catholicism, was not true Christianity.[103]

Like Kennedy, Romney found himself obliged to confront his doubters and explain his faith and its relationship to the presidency; nevertheless, the differences in the context in which Romney spoke far outweigh the similarities. For one thing, Romney's critics were hardly an organized or public force. Although many individual voters voiced doubts about his faith, anti-Mormon sentiment was neither as open nor as institutionalized as the anti-

103. *See, e.g.*, *Romney Faces Uphill Battle for Evangelical Voters*, (NPR radio broadcast July 5, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=11762390 (last visited Feb. 21, 2009).

Catholic criticism faced by Kennedy.[104] Nor did Romney's faith play precisely the same role in animating his critics that Kennedy's faith did. Unlike the critics of Kennedy, who feared that his Catholicism would control his public decisions, few if any of Romney's critics suggested that he would follow his church's bidding in any way that would steer him away from the conservative path favored by many GOP primary voters. Rather, it was his faith in and of itself, its history, its doctrines, its sheer strangeness, that disturbed these voters.[105] For reasons that can ultimately be linked to the content of his speech, Romney's tactical approach was also different. While Kennedy spoke to a hostile audience and welcomed their questions, Romney spoke before a room packed with supporters and took no questions.

If the context of both speeches shows something of the contrast between them, the content of Romney's speech lays bare these differences even more clearly.[106] In some respects, it offers a commendable move forward from Kennedy's own strategy of avoidance. It describes a relationship between religion and American politics that gives both religious candidates and voters alike far more room to express themselves fully and completely, and paints a far more satisfying picture of the role of religion in public life. At the same time, however, Romney's vision of a politically engaged religiosity commits a common error on the part of many who would argue for the wholesome involvement of religion in public life. It allows religion into public dialogue, but only in a one-sided way, in which religion can be a source of praise but not of thoughtful criticism. In its own way, this strategy, a strategy of inclusion without meaningful engagement, risks trivializing religion every bit as much as Kennedy's own privatizing approach.

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104. *See, e.g.*, Op-Ed., Kenneth L. Woodward, *Mitt Romney is No Jack Kennedy*, N.Y. TIMES, Dec. 5, 2007, at A31.

105. *See* Garry Wills, *Romney and JFK: The Difference*, N.Y. REV. BOOKS, Jan. 17, 2008, at 32 (noting that although "the situations are superficially the same" between Kennedy and Romney's speeches, "the obstacles are quite different"). Wills argues that Kennedy's critics "were more solidly political" in questioning his faith, while the objections to Romney's faith were more "theological and cultural." *Id.*

106. Garry Wills has written, "Kennedy had to convince people that he would not let the Vatican push him around. Romney . . . let evangelicals know that he *would* let them push him around." *Id.*

Romney opens in a manner that is starkly different from Kennedy's own approach. Rather than argue that religion is a distraction from the central issues that face the nation, he embraces it as one of the key issues: "Today, I wish to address a topic which I believe is fundamental to America's greatness: our religious liberty."[107] He promises to "offer perspectives on how my own faith would inform my Presidency, if I were elected."[108] In contrast to Kennedy, Romney argues that anyone "who may feel that religion is not a matter to be seriously considered in the context of the weighty threats that face us" is wrong.[109] More forcefully than Kennedy, he invokes history in support of his view, citing what he describes as the Founders' view that religion is essential in guiding the moral sentiments of the people.[110]

Romney's next argument is somewhat more controversial. He says, "Freedom requires religion just as religion requires freedom. Freedom opens the windows of the soul so that man can discover his most profound beliefs and commune with God. Freedom and religion endure together, or perish alone."[111] This argument lent itself to some criticism, on the grounds that it appears to leave out a purely secular understanding of human freedom, let alone constitutional freedom, and so is dismissive of non-religious citizens.[112] Romney is not alone in his belief that religion is central to a deeper understanding of human freedom, however. Various writers have argued that religion is fundamental to a basic understanding of human rights, whether intrinsically or for historical reasons.[113] Such a belief, however contested it may be, is not necessarily dismissive of the non-religious citizen. It does treat reli-

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107. Mitt Romney, Former Mass. Governor, Faith in America, at *the George Bush Presidential Library in College Station, Texas* (Dec. 6, 2007) (transcript available at http://www.nytimes.com/2007/12/06/us/politics/06text-romney.html (last visited Feb. 20, 2009)) [hereinafter Romney].

108. *Id.*

109. *Id.*

110. *See id.*

111. *Id.*

112. *See, e.g.*, Roger Cohen, Op-Ed., *Secular Europe's Merits*, N.Y. TIMES, Dec. 13, 2007, at A41.

113. *See, e.g.*, KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA (2005); MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS (2008).

gion as a foundation of human freedom; but it does not follow from this that non-religious individuals are not similarly entitled to remain free to believe as they choose. Indeed, the importance of individual choice to religious salvation can serve as a religious basis for protecting atheism or agnosticism every bit as much as religious belief.[114] Thus, the criticism raised against Romney for this statement is overstated.

Similarly, some critics of Romney's speech have argued that it values religion but says nothing about those who have no religious beliefs or have specifically non-religious beliefs. The *New York Times* columnist David Brooks, for example, complained, "Romney described a community yesterday. Observant Catholics, Baptists, Methodists, Jews and Muslims are inside that community. The nonobservant are not. There was not even a perfunctory sentence showing respect for the nonreligious."[115] On its face, this criticism is fair enough. Romney does not mention the non-religious.[116] Neither, however, does Romney single out the non-religious for exclusion, and his omission here can be read as more incidental than intentional.[117] For what it is worth, Romney himself later characterized the omission of non-religious individuals as a missed opportunity, telling an audience that, "[i]n a free society . . . non-believers have just as great a stake as believers in defending religious liberty. . . . Religious liberty and liberality of thought flow from the common conviction that it is freedom, not coercion, that exalts the individual just as it raises up the nation."[118] This is something less than a full-throated defense of the non-religious; it suggests that they too should value religious freedom,

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114. *See, e.g.*, MICHAEL KAMMEN, PEOPLE OF PARADOX 171–73 (1980) (discussing early American Puritan and Congregational support for religious voluntarism and individualism).

115. David Brooks, Op-Ed., *Faith vs. the Faithless*, N.Y. TIMES, Dec. 7, 2007, at A31; *see* Letters, *Romney and the Religion Question*, N.Y. TIMES, Dec. 8, 2007, at A16.

116. *See, e.g.*, Romney, *supra* note 107 (delivering a lengthy paean to various religious groups and omitting any mention of non-religious groups).

117. Brooks speculates, however, that Romney left the non-religious out of his speech "in order to generate howls of outrage in the liberal press." Brooks, *supra* note 115, at A31.

118. The Becket Fund for Religious Liberty, *Romneys Awarded 12th Canterbury Medal – Reiterates that "Freedom Requires Religion,"* May 9, 2008, http://www.becketfund.org/index.php/article/777.html.

but it does not say much about what role they can play as citizens and whether they can be acceptable public office-holders.[119] But it is far from dismissive. In sum, the criticism of Romney on the grounds that he excludes the non-religious is overstated.

Romney goes on to openly equate himself with Kennedy in answering what he believes are "[appropriate] questions regarding an aspiring candidate's religion."[120] Like Kennedy, he says he is "an American running for President" whose candidacy is not defined by his religion.[121] He similarly assures voters that "no authorities of my church . . . will ever exert influence on presidential decisions. Their authority is theirs, within the province of church affairs, and it ends where the affairs of the nation begin."[122] This statement is marginally more welcoming than Kennedy's own speech, inasmuch as it implies that church leaders have *some* authority to speak to their flocks on matters of public concern. At the same time, like Kennedy's speech, it seems to erect some distinction between "church affairs" and "the affairs of the nation." Again, this seems an unstable distinction. Perhaps Romney means to suggest that the only concern of the church is either the inward, spiritual life of the worshipper or matters internal to the church as an institution. For most churches, however, spirituality is not simply private. Faith and its obligations have deep implications for the most pressing public matters.

Moreover, like Kennedy, Romney flirts with what Professor Levinson calls the "comic" view of the Constitution, and what Professor Shaffer labels a somewhat idolatrous view of the Constitution.[123] He does not simply exalt the Constitution by declaring that he "will put no doctrine of any church above the . . . sovereign authority of the law."[124] He also offers a broader defense of this

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119. For more evidence of his views on this point, see Leslie Griffin, *Political Reason*, 22 ST. JOHN'S J. LEGAL COMMENT. 493, 499 (2007) (quoting Romney as saying, "the American people want to see a person of faith lead the nation, and I don't think the American people care very deeply about which brand of faith that is" (quoting Robert B. Bluey, Q & A: Mitt Romney Discusses Iraq War, Reagan's Influence and Gay Marriage, Jan. 1, 2007, *available at* http://www.humanevents.com/article.php?id=18683)).

120. Romney, *supra* note 107.

121. *Id.*

122. *Id.*

123. *See supra* notes 77–78 and accompanying text.

124. Romney, *supra* note 107.

approach, arguing that he subscribes to Abraham Lincoln's description of "America's 'political religion'—the commitment to defend the rule of law and the Constitution."[125] The Presidential oath of office, he says, will "become[ ] my highest promise to God," one that requires him to serve only "the common cause of the people of the United States."[126]

On the one hand, this statement suggests a correspondence between Romney's religious and political duties. It suggests that religion need not present a conflict with politics—that, to the contrary, taking an oath to fulfill one's office with the interests of all citizens in mind can itself become a high religious calling.[127] Romney thus usefully reminds his audience of the ways in which religious faith can support, rather than conflict with, a politician's commitment to public office. The marriage between a politician's public commitments and his faith may not always be as easy as Romney suggests, however. Indeed, in this regard, Romney takes a step further than Kennedy. While Kennedy acknowledges the possibility of conflict between his faith and his office—albeit he doubts that such a conflict is "remotely possible" and says he would resign if such a conflict arose—Romney refuses to concede that such a conflict could *ever* exist. Perhaps the reasons for this lie in the differences between Catholic and Mormon doctrine; perhaps there is simply no room for a conflict between faith and politics in Romney's case. Nevertheless, apart from the fact that Romney's view offers little guidance to politicians of other faiths for whom a conflict might be more conceivable, it is hard not to see a comic view of religion and the Constitution alike when a candidate refuses to admit even the *possibility* that one's office might demand something different than one's faith.

In the next section of Romney's speech, he comes to the heart of those "questions regarding an aspiring candidate's religion" that he considers "appropriate."[128] Rejecting those who would ask himself to "distance [himself] from [his] religion," he says, "I believe in my Mormon faith and I endeavor to live by it. My faith is the faith of my fathers—I will be true to them and to

125. *Id.*

126. *Id.*

127. Judge William Pryor has taken a similar position. *See* William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic*, 24 YALE L. & POL'Y REV. 347 (2006).

128. Romney, *supra* note 107.

my beliefs."[129] He answers the "fundamental question" he says he has often been asked by saying that he "believe[s] that Jesus Christ is the Son of God and the Savior of mankind," while adding that his "church's beliefs about Christ may not all be the same as those of other faiths."[130] Romney continues by saying:

> There are some who would have a presidential candidate describe and explain his church's distinctive doctrines. To do so would enable the very religious test the founders prohibited in the Constitution. . . . It is important to recognize that while differences in theology exist between the churches in America, we share a common creed of moral convictions. And where the affairs of the nation are concerned, it's usually a sound rule to focus on the latter—on the great moral principles that urge us all on a common course.[131]

This is both the most fascinating portion of Romney's speech and the most troubling. Romney simultaneously avows the importance of faith in grounding a political candidate and office-holder, its ability to "urge us all on a common course," and is deliberate and specific in placing a divine Christ at the heart of his own faith—*and* argues that questions about "his church's distinctive doctrines" are out of bounds.[132] Note that this is not simply a warmed-over version of Kennedy's speech. Kennedy argues that no voter should "arbitrarily" deny an entire faith the possibility of holding public office. Romney extends this argument by insisting that no *individual* candidate can be pressed in any detail about his *own* understanding of his religious beliefs and how they relate to his performance of a public office. Professor Noah Feldman has written, sharply but fairly, that this formulation "stak[es] his character and values on his religious beliefs while insisting that no one ask what those beliefs are."[133]

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129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. Noah Feldman, *What Is It About Mormonism?*, N.Y. TIMES MAG., Jan. 6, 2008, at 36.

There are certainly more charitable ways to understand Romney's remarks. One reading, which Professor Leslie Griffin has advanced based on other remarks by Romney, is that Romney's approach is ultimately connected to his praise for Lincoln's language of "political religion." On this view, the only religiously related question voters may soundly ask of a political candidate is about his or her "values," not "individual theologies."[134] Romney is thus putting at issue only the general moral principles to which he subscribes—values that he elsewhere describes as "quintessential American values; that my religious beliefs are consistent with the religious beliefs of other Judeo-Christian faiths, such as a belief in the divinity of God and the need to provide service to others, [and] the preeminence of the family unit."[135]

By trafficking in these generalities, Romney's statements should not be read as raising more complex theological questions and, therefore, cannot reasonably be challenged on those questions. Romney's remarks thus can be read as signaling that he "will govern according to quintessential American values that are not based on his or any other religious tradition."[136] In citing general tenets of Christianity, Romney asks "citizens to be governed only by those ideals 'which they can reasonably be expected to endorse,'"[137] while "free[ing] the political marketplace of ideas from extensive theological debate."[138] Thus, later in his speech, he asserts:

> Perhaps the most important question to ask a person of faith who seeks a political office, is this: does he share these American values: the equality of human kind, the obligation to serve one another, and a steadfast commitment to liberty?

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134. Globe Staff, Interview, Romney Aligns With Christian Right, BOSTON GLOBE, Mar. 17, 2006, at B4 (quoted in Griffin, *supra* note 119, at 499).

135. Interview by Robert B. Bluey, Q & A: Mitt Romney Discusses Iraq War, Reagan's Influence and Gay Marriage, Jan. 1, 2007, http://www.humanevents.com/article.php?id=18683 (last visited Feb. 22, 2009).

136. *See* Griffin, *supra* note 119, at 500.

137. *Id.* at 505 (quoting JOHN RAWLS, POLITICAL LIBERALISM (1993)).

138. *Id.*

> They are not unique to any one denomination. They belong to the great moral inheritance we hold in common. They are the firm ground on which Americans of different faiths meet and stand as a nation, united.[139]

In Griffin's view, if this is Romney's approach, he is simply following "the Rawlsian standard of public reason."[140]

Another reading might move from the general to a more particular, and sympathetic, appreciation of the dilemma faced by Mormons who seek public office in a nation in which they are a distinct minority. As Professor Feldman observes, to outsiders Mormonism may be seen as presenting an inscrutable juxtaposition of a "wholesome[,] . . . all-American denomination with an idealistic commitment to clean living" with a set of "secret, sacred temple rites and garments" of seemingly "exaggerated oddity."[141] The point here, obviously, is not to criticize Mormon religious doctrine. Rather, it is to expose a tension at the heart of the undoubted success of the Latter-day Saints in American society and politics. On the one hand, the faith's adherents have achieved significant political and social acceptance, only a century after they were harried across the nation. On the other hand, both for "internal and theological" reasons and for pragmatic reasons borne of the very persecution suffered by Mormons over their history, the church has maintained an air of "sacred mystery" about many of its practices and beliefs and has found it politic to "depend[ ] heavily on th[e] avoidance of public discussion of its religious tenets," to refrain from talking about "the precise content of Mormon religious beliefs."[142]

This strategy has largely been successful, and was helped along by "American political norms" that until recently "made religion a taboo subject in polite civil and political society"[143]—norms that emerged in part contemporaneously with, and in part because of, John F. Kennedy's success in convincing voters that he was a public servant first and a Catholic only second. With the collapse of the avoidance consensus, Mormons today find them-

139. Romney, *supra* note 107.
140. Griffin, *supra* note 119, at 500.
141. Feldman, *supra* note 133.
142. *Id.*
143. *Id.*

selves in a somewhat more difficult position in American civil life. Religion is now treated as an entirely legitimate subject of public and political discourse; however, "the combination of secret mysteries and resistance in the face of oppression has made it increasingly difficult for Mormons to talk openly and successfully with outsiders about their religious beliefs."[144] Devout Mormon officeholders seeking to command the allegiance of broader political constituencies thus find themselves in a quandary.

It is easy to sympathize with this dilemma, and one could understand Romney as offering a reasonable resolution of the problem. Romney could be saying that he is willing to share his religious beliefs to the extent that they speak to the broader values that he shares with the American public, and that *only* those broader shared values and their impact on his character as a would-be president are relevant to the discussion. Answering questions about particular doctrines, by contrast, would serve no purpose—not only because Romney and other Mormon politicians should not be assumed to speak for their faith on complex theological matters, but also because those doctrines are not immediately relevant to their character as public servants. Romney's paean to the "great moral inheritance" of values "we hold in common" suggests he may have precisely this approach in mind.[145]

This is an approach that may satisfy many voters. Moreover, it may offer some solace not only to Mormons but also to all politicians of a minority faith, whose religious and political values may be widely shared but not their specific religious beliefs. Certainly it is not hard to sympathize with Romney's desire to convince voters that he is one of them, while seeking to turn the political discussion away from an interrogation of his beliefs on particular questions of doctrine. Ultimately, however, this reading of Romney's remarks is unpersuasive. His remarks are in reality more troubling than these sympathetic treatments would suggest. That is so for two reasons.

First, these friendly readings of Romney's speech are ultimately difficult to square with what Romney actually says and does in the key portion of the speech quoted above. To be sure, Romney makes clear that he will not "confuse the particular teachings of [his] church with the obligations of the office [of President]

144. *Id.*
145. *Id.*

and of the Constitution."[146] But neither does he limit the bounds of acceptable discussion to the nature of his general values, whether religiously derived or otherwise. Rather, he is at great pains to answer the "fundamental question" of what he believes about Jesus Christ—his divinity, his place in the Trinity, and his role for the future of humanity.[147] *This* question he impliedly views as a fitting "question[ ] regarding an aspiring candidate's religion."[148] More than that, he deems it "fundamental" to the public discussion of his fitness for office. He does not suggest that a belief in the divinity of Jesus is necessary for a public servant, and his speech later indicates that he would deny any such requirement; but he appears to believe that it is essential to the voters' understanding and approval of Romney himself. Thus, this is not simply a case of Romney being unwilling to veil his religious beliefs, or of his mentioning his faith as one among many clues to his character; rather, he treats the question of his faith as a vital one. Only *then* does he rule off-limits further questions about the particulars of his beliefs. Not coincidentally, perhaps, it is those very particulars that might cause some Christians to doubt that his theology, or his views concerning the provenance of Jesus, are in fact consistent with mainstream Christian beliefs.[149]

It seems, then, that Feldman's criticism is ultimately true. By invoking specific doctrines about Jesus and treating them as "fundamental" to his candidacy, Romney puts not just his *values*, but his *theology*, at issue, while attempting to argue simultaneously that his theology is beside the point. That is an uncomfortable combination, to say the least. Nor will it do to invoke the Religious Test Clause, as Romney does.[150] Whatever formal tests the Religious Test Clause forbids, it surely does not forbid voters from asking about—or candidates from discussing (or refusing to discuss)—a candidate's religious beliefs before any vote is cast.[151] That is especially true where, as in this case, the candidate himself

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146. *Id.*

147. *Id.*

148. *Id.*

149. *See* Feldman, *supra* note 133.

150. *See* Romney, *supra* note 107 ("There are some who would have a presidential candidate describe and explain his church's distinctive doctrines. To do so would enable the very religious test the founders prohibited in the Constitution.").

151. *See generally* Horwitz, *supra* note 4.

puts those religious beliefs at issue, as Romney does by treating his belief in the divinity of Jesus as an electoral calling card. If it is consistent with the Religious Test Clause for Romney to raise this point, and to call it fundamental, it can hardly be a violation for a voter to challenge its bona fides.[152]

Second, I am concerned about what Romney's approach, understandable as it is, ultimately says about the relationship between religion and politics, and especially what it says about religion itself. This sort of approach is illustrated by a press release circulated by a religious liberty group during the controversy over the propriety of public discussion of the Catholic faith of then-Supreme Court nominee John Roberts. The letter, which drew substantially on the Religious Test Clause, concluded as follows:

> To be sure, not every mention of religion is improper. Religion, like ethnicity or race, is a natural part of one's background and may be referred to as naturally—and as respectfully—as those other things are. . . . But using fervent religious faith, of any tradition, as itself a disqualification for public office is unconstitutional.[153]

It is this combination, the view that religion belongs in public and political discourse, but only if it is referred to "respectfully," that religious believers should ultimately find disturbing, whatever surface attractions it may hold. To suggest that only "any non-anodyne, *critical* mention of religion is impermissible," while general invocations of faith not subject to any probing or criticism are acceptable, "is only a seeming show of respect [for religion]; it is not *genuine* respect."[154]

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152. *See* Levinson, *supra* note 76, at 294.

> It is one thing to raise questions about religion with nominees who have not acted to make religious commitments germane to understanding their performance of their public roles. It is another to ask someone who has made public profession of the importance of his or her religion what precisely was the meaning of those professions.

Id.

153. Letter from Kevin J. "Seamus" Hasson, Chairman, Becket Fund for Religious Liberty, to U.S. Senators (Sept. 6, 2005), *available at* http://www.becketfund.org/files/c5222.pdf.

154. Horwitz, *supra* note 4, at 142.

If anything, this rule of dialogue amounts to condescension rather than genuine respect. If religion is to be welcome in the public square, it must be welcomed on equal terms with other public concerns, and subjected to the same rules of critical dialogue. Public office-seekers may choose not to mention their religion at all, and may refuse to answer any questions on the subject. That is certainly their right, although they cannot argue that they are *compelled* by any rules of public discourse to do so. They may also attempt to limit their discussion to broad generalities about the contribution that religion has made to their values, while avoiding any deeper discussion, as Professor Griffin seems to suggest. This may or may not succeed, and voters are not prohibited from probing deeper. It is important to note, however, that this approach does not foreclose the possibility that voters will reject these values, and thus reject the candidate himself. If citizens genuinely value the importance of religion and religious truth (or at least the *possibility* of religious truth), and if they share with Romney the view that one's subscription to a particular faith or doctrine, such as the divinity of Jesus, is "fundamental" to understanding and supporting an issue or a candidate, then a more detailed, probing, and even critical public discourse about a candidate's faith must remain a possibility.

Kennedy's strategy of avoidance, we have seen, paid too high a price on behalf of other political candidates by allowing anyone to seek public office, but only after treating religion as a private matter for candidates and voters alike. Romney takes a step beyond this, but the price he pays to *reverse* the privatization trend is also too dear. It is a strategy of inclusion without engagement. It permits candidates to mention religion while limiting that discussion to the vaguest generalities and treating any meaningful, let alone critical, discussion of religion and particular religious beliefs as out of bounds. It is a version of religion and religiosity as—pardon the pun—good enough for government work.

The phrase "good enough for government work" speaks to Romney's remarks in two senses. First, by invoking his belief in the divinity of Christ as fundamental to his character and as an acceptable question to ask of him, Romney suggests that he is at least religious enough to do the job of President, a statement that by implication questions whether people who stand outside the Judeo-Christian tradition would be fit for the office. Second, his remarks suggest that religious beliefs that suit a candidate for public service—that literally are good enough for government work—are of

necessity fairly vague and airy concoctions, stripped of doctrine and reduced to little more than a generalized set of values and perhaps a brief profession of belief in Christ. Religion is made public again. But its public status comes at the cost of making it insipid. Something of this spirit is evident in Romney's hymn to the diversity of American faith. He writes of "the profound ceremony of the Catholic Mass, the approachability of God in the prayers of the Evangelicals, the tenderness of spirit among the Pentecostals, the confident independence of the Lutherans, the ancient traditions of the Jews, unchanged through the ages, and the commitment to frequent prayer of the Muslims."[155]

This is pleasant language, but we would do better to reject the flattery. Far from suggesting the meaningful and nuanced differences in faith that both unite and divide the nation in a vibrant religiously pluralistic society, the passage reads like an excerpt from a milquetoast's guidebook to faith, "Let's Go Religion."[156] Although Romney allows for public religious dialogue, it is a rather unsatisfying dialogue. It wants to flatter everyone equally, always keeping in mind the restrictions he would impose on meaningful discussion, rather than to allow Americans to meaningfully and critically examine both their commonalities *and* their differences and to evaluate how those differences might affect a candidate or a voter's approach to politics and public office. For those who hope that religion, for all the divisiveness it may contribute to public dialogue, can also be a source of passion and revelation in public dialogue, surely it is better to welcome the risk of criticism for particular religious beliefs, particularly if some of those criticisms are valid and perspicuous, than to defend against them with a shield of well-meaning blandness and generality.[157]

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155. *Id.*

156. Roger Cohen refers to the passage as displaying "a Wikipedia-level appreciation of other religions." Cohen, *supra* note 112. David Brooks observes:

> In rallying the armies of faith against their supposed enemies, Romney waved away any theological distinctions among them with the brush of his hand. . . . In Romney's account, faith ends up as wishy-washy as the most New Age-y secularism . . . . In order to build a voting majority of the faithful, Romney covered over different and difficult conceptions of the Almighty.

Brooks, *supra* note 115.

157. *See* Horwitz, *supra* note 4, at 146.

In sum, Romney's strategy is one of inclusion without meaningful engagement. It allows religion back into the public square, but only a decidedly tame version of religion. And, for reasons that may be peculiar to Romney's own dilemma as a Mormon in public life, he imposes a rule of dialogue—religious sentiment is permissible so long as it is general, and a candidate can profess a particular faith but need not answer any more precise questions about what that faith entails—that is no dialogue at all. It is a step up from Kennedy's strategy of avoidance, but it is too small a step.

Romney's speech goes on to address a further issue: the content of church-state doctrine. Recall that Kennedy wrote of his vision of an "America where the separation of church and state is absolute."[158] By contrast, Romney writes that while Americans separate church and state

> for good reason, . . . in recent years, the notion of the separation of church and state has been taken by some well beyond its original meaning. They seek to remove from the public domain any acknowledgement of God. Religion is seen as merely a private affair with no place in public life. It is as if they are intent on establishing a new religion in America—the religion of secularism. They are wrong. The founders proscribed the establishment of a state religion, but they did not countenance the elimination of religion from the public square.[159]

Romney concludes on this basis that "[w]e should acknowledge the Creator as did the founders—in ceremony and word. He should remain on our currency, in our pledge, in the teaching of our history, and during the holiday season, nativity scenes and menorahs should be welcome in our public places."[160]

Romney here engages in a mistake that is all too common in public discussion of the role of religion in American public and political life. He decries, quite rightly, the privatization of religion that characterized Kennedy's own speech. Romney, however, con-

158. BALMER, *supra* note 29, at 176.
159. Romney, *supra* note 107.
160. *Id.*

flates several subtle but distinct aspects of religion and public life. First, he confuses the statements of *private* actors within the public *square* with the actions of *official* actors within the public *sphere*. Second, and likewise, he confuses the question of whether religious citizens, office-holders, and arguments should be welcome in the public square with the question of whether there are any limits on the kinds of things government itself may do *officially* to advance or acknowledge (or inhibit) religion.

It is one thing to say that religion should be welcome in public dialogue by private citizens: that everyone who wishes to speak in public should be able to say nearly everything in public, that the public square is as open to religious sentiments and displays as it is to non-religious statements and displays. In that sense, Romney is right. It is another thing to say, however, that the public *sphere*—the realm of specifically *governmental*, and not private, speech—is and must be acknowledged to be God's sphere. There is a crucial difference between arguing that private citizens should be allowed to place "nativity scenes and menorahs . . . in our public spaces,"[161] and arguing that government itself may speak in a religious voice in the public sphere by invoking God "on our currency [and] in our pledge."[162]

Whatever the precise contours of the Establishment Clause may be, there is a difference between arguing that everyone, including religious individuals, must be allowed to participate in public debate and arguing that government may make particular religious statements. While the public square may indeed be open to religious statements by citizens, government itself may well be forbidden to take sides on these very issues.[163] As long as vigorous private speech remains a part of the public square, nothing in this approach establishes a "religion of secularism." To be clear, Romney is no antidisestablishmentarian.[164] Neither, however, has he

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161. *Id.*; *see, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427 (6th Cir. 2004).

162. Romney, *supra* note 107.

163. *See, e.g.*, Knights of Columbus, Council No. 94 v. Town of Lexington, 272 F.3d 25, 34 (1st Cir. 2001) ("Although the Constitution protects private expressions of beliefs, it does not authorize—and sometimes even forbids—citizens' attempts to invoke public backing of their beliefs.").

164. *See* Romney, *supra* note 107 ("The establishment of state religions in Europe did no favor to Europe's churches.").

thought carefully enough about the subtle distinctions between private speech in the public square and speech by government itself and how these ought to affect the proper bounds of church and state.

Romney concludes by praising the religious diversity of the nation "and the vibrancy of our religious dialogue."[165] He offers up an anecdote from the First Continental Congress, in which, amidst the squabbles of the delegates about the possibility of prayer in a group containing a multitude of sects, Sam Adams "rose, and said he would hear a prayer from anyone of piety and good character, as long as they were a patriot."[166] It is fitting that his invocation of Adams echoes President Eisenhower's comment that "[o]ur form of government has no sense unless it is founded in a deeply felt religious faith[,] and I don't care what it is."[167] Elsewhere, Romney has echoed Eisenhower even more directly, asserting that "the American people want to see a person of faith lead the nation, and I don't think the American people care very deeply about which brand of faith that is."[168]

These words exemplify Romney's approach of inclusion without engagement and underscore what is ultimately both unsatisfying and impossible about his approach. Romney seeks to turn back the clock on Kennedy's strategy of avoidance and privatization of religion, and he would set the clock precisely to the nonspecific public religiosity of the Eisenhower era. His speech ultimately argues, if not in so many words, for the proposition that "the American people want to see a person of faith lead the nation,"[169] and he offers them just enough evidence to assure them that he is a sufficiently devoted and devotional man for public office. However, it is just as important for Romney to establish that "the American people [do not] care very deeply about which brand of faith that is,"[170] not because that is true, although it may be, but because his political success depends on its being true. As a result, Romney offers a mix of religion and American politics that allows religion onto the public stage but denies it full speaking status.

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165. *Id.*
166. *Id.*
167. SMITH, *supra* note 18, at 254.
168. Griffin, *supra* note 119, at 499 (quoting Bluey, *supra* note 135).
169. *Id.*
170. *Id.*

Religion is there to nod, smile, and wave, but not to speak meaningfully or be spoken to in kind.

For those who truly value religion as a powerful wellspring of human experience and social change, that status is not enough. It is better for religious individuals to be able to participate fully, vigorously, and vocally in public life; but that entails accepting inquiry and criticism, not just bland praise. Ultimately, accepting critical dialogue on questions of religion is not just a small price to pay. A critical, and sometimes unkind, engagement with religion is ultimately the truest expression of respect for religion's role in the public square.[171]

Moreover, the sentimental journey that Romney's strategy of inclusion without engagement represents is not just unsatisfying. It is also unattainable. It is wishful thinking to believe that one may turn the clock back to the Eisenhower era. American religiosity is not the same as it was in the 1950s, and neither is the social consensus surrounding religiosity. Society is both more religiously vigorous and enthusiastic than it was then, and more splintered and diverse. Societal views about religion's bedrock social role are not as uncontroversial as they once were, and even those who assume a bedrock role for religion may differ vehemently about what that entails. In a phrase, religion's role in public life is now contested and contestable. In this environment, a strategy of inclusion without engagement, however well it once may have worked (or *seemed* to have worked), is now as impossible as it is unsatisfying.

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171. For a similar argument from an explicitly secular perspective, see AUSTIN DACEY, THE SECULAR CONSCIENCE: WHY BELIEF BELONGS IN PUBLIC LIFE (2008).

> So long as the reasons we introduce into public discourse—reasons of conscience included—are regarded by all as open to public scrutiny, then the challenge of subjectivity can be grappled with, if not totally eliminated. Ideally, conversation in politics abides by the norms of all reasoned conversation. Unless we are willing to present others with reasons for what we say that are open to analysis by them, we are engaging in monologue, not dialogue. . . . Honest religious believers have nothing to lose and much to gain by treating their faith as objective in this sense. Susceptibility to criticism is the price of admission to serious public life. But it is a price that they should be willing to pay, for convictions take their strengths from surviving trials, not from avoiding them. Anything less would be a trivialization of religion . . . .

Id. at 51–52.

Romney fails to see that, if religion is not to be excluded from public life altogether, it can only be included in a spirit of genuine public engagement—even if it comes at the high, and perhaps unfair, cost of rejecting Romney the candidate.

IV. BARACK OBAMA: ENGAGEMENT WITHOUT (FULL) INCLUSION?

The final candidate whose words on religion and American politics bear examination needs little introduction right now. As of this writing, that candidate, Barack Obama, is now the President. That alone makes his words worth the attention. Beyond this, though, Obama's words deserve a close and critical reading on their own terms, for his is the most thoughtful and careful of the three speeches examined here, even if not all that he says is right.

Obama offers a rich and meaningful engagement with religion and its role in public life, one that is certainly leagues away from the strategy of avoidance practiced by Kennedy. In some respects, however, the flaws in Obama's speech present a mirror image of the flaws in Romney's speech. Obama too exacts a steep price for religion's place in public life, demanding that religion express itself only in terms that may not come naturally to it. We might think of this as a strategy of engagement without full inclusion. Although Obama's speech is itself a model of the kind of critical dialogue about religion that should exist in public life, the constraints he places on religion are themselves untenable, as his own speech ultimately suggests.

In some ways, Obama enjoyed certain advantages over Kennedy and Romney with respect to the timing and nature of his speech. Obama's address at the conference, "Building a Covenant for a New America," took place on June 28, 2006.[172] Obama was thus still almost a year away from declaring his candidacy for President. The thought of doing so had surely crossed his mind, and so it can hardly be said that he spoke without an eye to that eventuality. Still, even if he knew what was around the corner, it surely helped that Obama was still speaking as a Senator and not a presidential candidate. He was not speaking in the midst of the maelstrom that surrounded Kennedy or Romney by the time they ad-

172. *See* Sen. Barack Obama, "Call to Renewal" Keynote Address, June 28, 2006 (transcript available at http://blog.beliefnet.com/stevenwaldman/2008/11/obamas-historic-call-to-renewal.html).

dressed their own audiences. Moreover, and unlike both Kennedy and Romney, Obama's own faith was not at issue in the public eye, at least at this point in his political career.[173] In this somewhat more comfortable environment, Obama perhaps felt he could better afford a greater degree of candor and specificity than either Kennedy or Romney did. The result is a weighty and detailed discussion of the relationship between religion and political life.[174]

Obama frames his speech at the outset as an effort to "tackle head-on the mutual suspicion that sometimes exists between religious America and secular America."[175] He begins by relating his discomfort at the criticisms he faced in his senatorial campaign against Republican Alan Keyes, who had said, "Jesus Christ would not vote for Barack Obama."[176] Obama recalls that although he offered "the typically liberal response in such debates . . . that we live in a pluralistic society, that I can't impose my own religious views on another, that I was running to be the U.S. Senator of Illinois and not the Minister of Illinois,"[177] his response "did not adequately address the role my faith has in guiding my own values and my own beliefs."[178] Obama argues that this debate is a microcosmic example of "the broader debate we've been having in this country for the last thirty years over the role of religion in politics."[179]

Obama argues that although conservative leaders have effectively managed to talk to voters in religious terms, Democrats have tried "to avoid the conversation about religious values altogether," either by asserting that they are barred from discussing them by the Constitution or by "dismiss[ing] religion in the public

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173. Of course, this would change much later in his presidential campaign, when attention was drawn to the sometimes incendiary rhetoric of his pastor, Reverend Jeremiah Wright. *See, e.g.*, Jeff Zeleny, *Obama Urges U.S. to Grapple With Race Issue*, N.Y. TIMES, Mar. 19, 2008, at A1 (reporting on a speech by Obama in which he "sought to dispel the furor over inflammatory statements by his former pastor").

174. The speech is expanded, although to little additional substantive effect, in Obama's book. *See* OBAMA, *supra* note 12, at 213. I will use the speech rather than the book as my text here.

175. Obama, *supra* note 172.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

square as inherently irrational or intolerant."[180] Such "strategies of avoidance" are a mistake, he argues, because they "fail to acknowledge the power of faith in . . . the lives of the American people."[181] Instead, he calls for "progressives" to "join a serious debate about how to reconcile faith with our modern, pluralistic democracy."[182]

In response to the strategy of avoidance, Obama offers up his own conversion narrative.[183] Beginning with a family background in which a "healthy skepticism of organized religion" was the norm, he found himself working closely as an adult with Christian churches in Chicago whose values he shared but in which "a part of [him] remained removed, detached, . . . an observer in their midst."[184] He came to feel the lack of a "vessel for [his] beliefs," which he ultimately found in the tradition of the historical struggle of the African-American church. This led him to see faith "as an active, palpable agent in the world."[185] In this spirit, he ultimately "walk[ed] down the aisle of Trinity United Church of Christ . . . and affirm[ed] [his] Christian faith."[186]

Like most conversion narratives, this one is ultimately not just about Obama. He seeks to make this an American story, a story about a nation's "hunger" for something more than the material or the quotidian.[187] His journey, he says, bending his narrative toward the larger ends of his speech, is one that "has been shared by millions upon millions of Americans—evangelicals, Catholics, Protestants, Jews and Muslims alike. . . . It is not something they set apart from the rest of their beliefs and values. In fact, it is often what drives their beliefs and their values."[188]

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180. *Id.*

181. *Id.*

182. *Id.*

183. Conversion narratives enjoy a longstanding status as a central trope of American religious speech. *See, e.g.*, PATRICIA CALDWELL, THE PURITAN CONVERSION NARRATIVE: THE BEGINNINGS OF AMERICAN EXPRESSION (1983); PERRY MILLER, THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE (1953); *see also* D. BRUCE HINDMARSH, THE EVANGELICAL CONVERSION NARRATIVE: SPIRITUAL AUTOBIOGRAPHY IN EARLY MODERN ENGLAND (2008).

184. Obama, *supra* note 172.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

This is the launching point for Obama's broader argument that progressives must learn not to "abandon the field of religious discourse."[189] On a narrow level, his argument is tactical. Progressives must learn to address citizens in religious terms, lest, by "forfeit[ing] the imagery and terminology through which millions of Americans understand both their personal morality and social justice," they lose the argument and cede the field to "those with the most insular views of faith, or those who cynically use religion to justify partisan ends."[190] If progressives abandon their hostility to religious discourse in public life, they might "recognize some overlapping values that both religious and secular people share when it comes to the moral and material direction of our country," and "engage millions of religious Americans in the larger spirit of American renewal."[191] Obama also argues, however, that "[o]ur failure as progressives to tap into the moral underpinnings of the nation is not just rhetorical."[192] It also ignores the extent to which the problems that beset society, and the potential solutions to those problems, are deeply rooted in spiritual values, and not just a matter for technocrats "in search of the perfect ten point plan."[193]

From this perspective, Obama reaches a number of conclusions. First, he says:

> [S]ecularists are wrong when they ask believers to leave their religion at the door before entering into the public square. Frederick Douglas, Abraham Lincoln, William Jennings Bryant, Dorothy Day, Martin Luther King—indeed, the majority of great reformers in American history—were not only motivated by faith, but repeatedly used religious language to argue for their cause. So to say that men and women should not inject their "personal morality" into public policy debates is a practical absurdity. Our law is by definition a codification of moral-

189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*

> ity, much of it grounded in the Judeo-Christian tradition.[194]

Obama argues that the gulf "between religious and secular people of good will" must be bridged by the hard work of public discussion: "The tensions and the suspicions on each side of the religious divide will have to be squarely addressed and each side will need to accept some ground rules for collaboration."[195] He sets a number of such conditions.

The first is a recognition of "the critical role that the separation of church and state has played in preserving not only our democracy, but the robustness of our religious practice."[196] This role is increasingly important in a nation containing an ever more diverse array of faiths as well as non-religious citizens. Second, Obama argues that "[d]emocracy demands that the religiously motivated translate their concerns into universal, rather than religion-specific, values. It requires that their proposals be subject to argument, and amenable to reason."[197] He acknowledges that some faith traditions stress the inerrancy of their views, but responds that "in a pluralistic democracy, we have no choice" but to act and argue "in accordance with those things that we *all* see, and that we *all* hear, be it common laws or basic reason."[198]

Third, Obama argues that "any reconciliation between faith and democratic pluralism requires some sense of proportion."[199] As a practical matter, for religious individuals this means recognizing that politics must "accommodate modern life" and thus is unlikely to achieve by legislation the fulfillment of all of their religious and moral beliefs.[200] Obama, however, also counsels "a sense of proportion [for] those who police the boundaries between church and state."[201] Obama states:

> Not every mention of God in public is a breach to the wall of separation—context matters. It is doubt-

194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* (emphasis added).
199. *Id.*
200. *Id.*
201. *Id.*

> ful that children reciting the Pledge of Allegiance feel oppressed or brainwashed as a consequence of muttering the phrase "under God." I didn't. Having voluntary student prayer groups use school property to meet should not be a threat, any more than its use by the High School Republicans should threaten Democrats. And one can envision certain faith-based programs—targeting ex-offenders or substance abusers—that offer a uniquely powerful way of solving problems.[202]

Obama concludes by arguing for the importance of engaging in a thoughtful and good faith dialogue with religious individuals, including those who disagree on various public policy positions, "who are looking for a deeper, fuller conversation about religion in this country. They may not change their positions, but they are willing to listen and learn from those who are willing to speak in fair-minded words."[203] He prays "that we can live with one another in a way that reconciles the beliefs of each with the good of all. It's a prayer worth praying, and a conversation worth having in this country in the months and years to come."[204]

This is a speech that one might think of as characteristically Obamaesque in both its virtues and its flaws. It is a thoughtful, rich, and convincing performance, but in some ways it may offer rather less than meets the eye at first. Although it promises to "join a serious debate about how to reconcile faith with our modern, pluralistic democracy,"[205] it is ultimately as much a political speech about religion as it is a religious speech about politics. Although it says that the "failure [of] progressives to tap into the moral underpinnings of the nation is not just rhetorical,"[206] certainly much of the speech is as much about being a political progressive, and finding rhetorical ways of reaching other progressives (particularly those who are religious), as it is about being religious as such. As Obama acknowledges, part of the point of his speech *is* "rhetorical": he does not want the left to cede the field of "imagery and terminology through which millions of Americans un-

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*

derstand both their personal morality and social justice" to "the Jerry Falwells and Pat Robertsons and Alan Keyeses" of the right.[207] Although he wants progressives to adopt religious rhetoric on issues of common cause and sees that move as natural, he is decidedly less charitable to the religious right, which he describes as having "exploit[ed]" the gap between religious and non-religious Americans.[208] Still, Obama offers a clearer, more detailed, and more thought-provoking exposition of the relationship between religion and politics than either Kennedy or Romney before him. If Obama presents a model of engagement between religion and politics, this speech serves as the best possible evidence of this conclusion, for several reasons.

First, Obama's speech, of the three, offers the richest and most unflinching description of religious faith itself. Unlike Kennedy, who treats his faith as incidental, or Romney, who treats it as central but offers no meaningful particulars, Obama describes a life-world in which faith plays a central part. In his depiction, faith is not simply a "bland, smiley-faced" phenomenon that "cover[s] over different and difficult conceptions of the Almighty."[209] To the contrary, it is a "hunger" for something more than "nothingness."[210] Nor is Obama's faith simply an easily satiating, if unsatisfying, bit of pabulum. Obama acknowledges that "[f]aith doesn't mean that you don't have doubts," that it is part of a fully human and sinful life, and that, even with "God's spirit beckoning [him]," faith did not mean that "[t]he questions [he] had . . . magically disappear[ed]."[211] This is surely a far more fully realized description of the religious experience than anything offered up in the speeches already examined, and that very fact exhibits a significant level of public engagement between a political office-holder and religion.

Obama's speech also represents a fuller level of engagement between religion and politics on the political side of the ledger. Rather than simply enlist on one side of the culture war to build a "voting majority of the faithful" or the faithless,[212] Obama emphasizes the importance of engagement on both sides: the need to "tackle head-on the mutual suspicion that sometimes exists be-

207. *Id.* (emphasis added).
208. *Id.*
209. Brooks, *supra* note 115.
210. Obama, *supra* note 172.
211. *Id.*
212. Brooks, *supra* note 115.

tween" *both* "religious America and secular America."[213] He makes clear that political progressives should not "shy away from religious venues and religious broadcasts because we assume we will be unwelcome," thus suggesting that public officials should engage in dialogue within the religious sphere and not simply on the more secular or ecumenical public stage.[214]

Most importantly, Obama rejects Kennedy's characterization of faith as distinct from politics and public life. He refuses to accept any characterization of issues of social justice as being "not religious issues."[215] Instead, he argues that "values and culture," by which he clearly means religious values and culture, play an integral role in questions of public policy.[216] Although he rhymes off a list of standard progressive positions on various public policy issues such as gun control, poverty, education, and so on, in each case he believes religion makes a distinct contribution to understanding and resolving those issues.[217] Echoing Martin Buber, Obama sees in each of these issues a distinctly religious calling "to think in terms of 'thou' and not just 'I.'"[218] Indeed, he recognizes not only that religious values may enter into the public sphere, but that it is impossible for it to be otherwise. "[T]o say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity."[219] Although he briefly attempts to justify some level of church-state separation, he does so on explicitly religious grounds rather than secular ones.[220] Given these

213. Obama, *supra* note 172.

214. *Id.*

215. BALMER, *supra* note 29, at 176.

216. Obama, *supra* note 172.

217. *See id.*

218. *Id.*; *see* MARTIN BUBER, I AND THOU (Walter Kaufmann trans. & ed. 1970).

219. Obama, *supra* note 172.

220. *See id.*

> Folks tend to forget that during our founding, it wasn't the atheists or the civil libertarians who were the most effective champions of the First Amendment. It was the persecuted minorities. It was Baptists like John Leland who didn't want the established churches to impose their view on folks who were getting happy out in the fields and teaching the scripture to slaves. It was the forebears of the evangelicals who were most adamant about not mingling government with religio[n], because they did not want state-sponsored religion hindering their ability to practice their faith as they understood it.

views, Obama can hardly conclude otherwise than he does—that "secularists are wrong when they ask believers to leave their religion at the door before entering into the public square."[221]

Perhaps *because* Obama's view of religion's role in public life is so rich and nuanced, and because it is not simply an effort to use religion to corral together a voting majority, as David Brooks argues was Romney's intent,[222] Obama also makes a more natural place for the non-religious in describing religion's role in the public square. Rejecting the suggestion that "every progressive suddenly latch on to religious terminology," he says, "I would rather have someone who is grounded in morality and ethics, and who is also secular, affirm their morality and ethics and values without pretending that they're something they're not. . . . None of us need to do that."[223] This is arguably a more persuasive and inclusive use of common "American values" than Romney's,[224] whose speech hints that the truest and most trustworthy American values are specifically religious (and perhaps "Judeo-Christian") ones. Because Obama unabashedly acknowledges the centrality of religion to his own moral values, and the broader connection between religion and morality for most citizens, he is free to suggest that non-religious citizens can be equally decent and valuable voters and public office-holders.

In short, Obama's speech offers a model of political engagement in the religious sphere, and religious engagement in the public sphere. It is a decided step away from Kennedy's strategy of avoidance, and a more meaningful version of engagement than the somewhat pallid one offered by Romney. But is this an *inclusive* form of engagement? Even if Obama's speech itself engages with religion in a thoughtful way, do the rules he prescribes in his quest to "reconcile faith with our modern, pluralistic democracy"[225] allow for the genuine inclusion of religious citizens in public life? Recall Obama's argument that "[d]emocracy demands that the religiously motivated translate their concerns into universal, rather than religion-specific, values. It requires that their proposals be

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Id.

221. *Id.*

222. Brooks, *supra* note 115.

223. Obama, *supra* note 172.

224. *See supra* Griffin, *supra* note 119; notes 120–124 and accompanying text.

225. Obama, *supra* note 172.

subject to argument, and amenable to reason."[226] He says that "in a pluralistic democracy, we have no choice" but to act and argue "in accordance with those things that we *all* see, and that we *all* hear, be it common laws or basic reason."[227] This is an entirely common move in liberal theory.[228] In particular, it has been associated with John Rawls's argument for the primacy of public reason in political argument.[229] It suggests that it is at best imprudent, and at worst morally impermissible, for public arguments to be voiced in religious terms.[230]

In some versions of this argument, religious individuals may raise religious arguments in public, but their reasons cannot be *exclusively* religious; they must also be accompanied by publicly accessible reasons.[231] Obama's version appears to be even stricter than that. It demands absolute translation of religious arguments into publicly accessible language rather than simply requiring religious reasons to be joined with publicly accessible ones. In dropping Rawls's "proviso" that religious reasons "may be introduced in public reason at any time, provided that in due course public reasons . . . are presented sufficient to support whatever the comprehensive [religious] doctrines are introduced to support,"[232] Obama outdoes Rawls himself.

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226. *Id.*

227. *Id.* (emphasis added).

228. *See* Griffin, *supra* note 119, at 495 (noting that Obama's language "appears to be consistent with the ideals of many liberal theorists who have argued that appeals to religion in politics should be 'publicly accessible' or 'publicly justifiable,' stated in terms of 'public reason' or 'secular reason,' in the language of universal values instead of sectarian beliefs"). Griffin goes on to suggest, however, that Obama in fact does not reflect the Rawlsian liberal tradition, but ultimately smuggles in his religious positions through secular language. I address Griffin's views in more detail below. *See infra* notes 233–38 and accompanying text.

229. *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 756 (1997).

230. *See* JEFFREY STOUT, DEMOCRACY AND TRADITION 64–66 (2004) (summarizing and critiquing Rawls's position).

231. *See id.* (characterizing Rawls as having shifted from the stricter to the more permissive restriction on religious arguments); *see also* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

232. *See* JOHN RAWLS, POLITICAL LIBERALISM li-lii (paperback ed. 1996); Rawls, *supra* note 229, at 756.

What should we make of these remarks? Consider the view offered by Professor Leslie Griffin. Griffin perceptively observes a tension between Obama's demand that religious individuals translate their arguments into publicly accessible terms and what he says elsewhere. In *The Audacity of Hope*, Obama relates a discussion with a lesbian supporter who is disappointed that he has "referred to his religious beliefs in order to explain his opposition to gay marriage but not civil unions."[233] Griffin notes that Obama is led as a result of this conversation to "reflect more deeply, not on common values, but about his Christian faith," suggesting that rather than translate his own concerns into universal values, Obama "turned for insight to the teaching of his own faith about a contested moral and legal question."[234]

Griffin uses this passage to argue that Obama is ultimately not Rawlsian enough. Obama, she argues, "violate[s] the standard of public reason."[235] Even translation "merely hides [the problem], leaving politicians to govern according to religious beliefs as long as they discover a secular rationale . . . for governmental action."[236] She would prefer that politicians "employ public reason as the starting point," not only for their public arguments but also for their very "decision-making on matters of law and politics."[237]

My objection is the reverse of Griffin's. Although Obama's speech itself exemplifies what one might hope for in an ideal world of engagement between religion and politics, the rule he sets forth for public dialogue is not a genuinely inclusive one. As the price of political participation for religious individuals, they are required to put their arguments in a language that may be alien to them.[238] Such a requirement, as Jeffrey Stout notes, is "counterintuitive, given that it seems so contrary to the spirit of free expression that breathes life into democratic culture."[239] This requirement of translation is neither particularly helpful nor especially fair. The hot-button example of abortion may provide an example. Obama says:

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233. *See* OBAMA, *supra* note 12, at 223; Griffin, *supra* note 119, at 495.

234. Griffin, *supra* note 119, at 495.

235. *Id.* at 499.

236. *Id.* at 502.

237. *Id.*; *see generally* Leslie Griffin, *Good Catholics Should Be Rawlsian Liberals*, 5 S. CAL. INTERDISC. L.J. 297 (1997).

238. *See, e.g.*, STOUT, *supra* note 230, at 72 (citations ommitted).

239. *Id.* at 68.

> I may be opposed to abortion for religious reasons, but if I seek to pass a law banning the practice, I cannot simply point to the teachings of my church or evoke God's will. I have to explain why abortion violates some principle that is accessible to people of all faiths, including those with no faith at all.[240]

Now, doubtless it is true as a practical matter that a strictly religious argument for the banning of abortion is less likely to garner substantial political support than an argument that buttresses religious arguments with broader "accessible" reasons that will appeal to a wider constituency. This does not demonstrate, however, that one is *obliged* to point to these wider reasons.

Moreover, at some level, and particularly on "especially intractable political questions" such as abortion, "*[e]veryone* holds some beliefs on nonreligious topics without claiming to know that they are true."[241] Whether the abortion debate should rest on the potential life of the fetus, the moral gravity of abortion, the autonomy of the mother, or some other grounds such as privacy or the limited domain of the state, does not depend on reasons that are subject to reasoned debate past a certain, fairly shallow point. These questions are subject to what Justice Holmes famously called his "can't helps,"[242] even if explicitly religious reasons are set to one side. They are the sorts of issues about which one is likely to be "unable to produce an argument that would give [one's] interlocutors reason to accept [one's] premises."[243] It may be that few, if any, of our "most deeply engrained commitments,"[244] secular or religious, are truly and absolutely universal, subject to argument, or amenable to reason. Even if they were, the question for many would remain why this should be the default rule, and not some other default. As a practical matter, however, it is unlikely that many have ready access to those reasons, even if they can be said to exist.

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240. Obama, *supra* note 172.

241. STOUT, *supra* note 230, at 87 (emphasis added).

242. *See* Benjamin Kaplan, *Encounters With O.W. Holmes*, 96 HARV. L. REV. 1828, 1850 (1983); *see also* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 23–27 (2000); Oliver Wendell Holmes, Jr., *Ideals and Doubts*, 10 U. ILL. L. REV. 1, 2 (1915).

243. STOUT, *supra* note 230, at 87.

244. *Id.*

Thus, *contra* Obama, it is unreasonable and unfair to demand that religious reasons be translated into publicly accessible language. That does not mean that religious individuals may not *choose* to use publicly accessible language, whether on its own or in combination with religious language. They may do so for politically pragmatic reasons, or because they think those publicly accessible arguments are *good* arguments that they too find persuasive. But this is not an *obligation*. It certainly should not apply to religious individuals in particular any more than it should apply to holders of any other "can't help" moral or political beliefs.[245] Citizens are not *required* to be Rawlsian liberals, even if doing so would help them win more political battles. To the contrary, as Nicholas Wolterstorff observes, it violates the norms of liberal democracy for "citizens to be morally constrained from deciding and discussing political issues as they see fit."[246]

Obama might respond that "in a pluralistic democracy, we have no [other] choice"[247] than to impose a rule of translation. But there are other choices. At least two writers have offered thoughtful alternatives to the rule that Obama proposes. Michael Perry offers a somewhat more restrictive version, although it is certainly far more permissive than Obama's translation requirement.[248] He proposes a model of "ecumenical politics," in which religious individuals are free to "rely on [their] convictions, not only in making political choices, but in publicly deliberating about and in publicly discussing them."[249] Yet he expects religious individuals to engage in dialogue in the public square in a spirit of "fallibilism and pluralism."[250] That is, they should "accept[ ] the 'ideal of self-critical rationality,' the relentless scrutiny of one's own beliefs and the

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245. For a short but incisive take on this question, see Christopher J. Eberle, *Religious Reasons in Public: Let A Thousand Flowers Bloom, But Be Prepared to Prune*, 22 ST. JOHN'S J. LEGAL COMMENT. 431 (2007).

246. NICHOLAS WOLTERSTORFF & ROBERT AUDI, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE 94 (1997) (emphasis omitted).

247. Obama, *supra* note 172.

248. *See* MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991). For an insightful review, see Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061 (1992).

249. PERRY, *supra* note 248, at 112.

250. *Id.* at 100.

acknowledgement that they are subject to revision,"[251] and they should admit the possibility of learning from people of other religious and moral backgrounds.[252]

Perry's approach is certainly capable of criticism.[253] His approach, however, is more welcoming than Obama's. It allows religious arguments into the public square unfettered by any absolute requirement of public reason, although it suggests that religious citizens must be prepared to be self-critical when they engage in public argument. This is a step up from translation, even if it is an insufficient one.

Jeffrey Stout offers an even more admirable picture of religious participation in public life in his recent book *Democracy and Tradition*.[254] Although it is perhaps more of a rejection of the Rawlsian rule of public reason[255] than a programmatic description of the relationship between religion and politics, it nevertheless offers an illuminating picture of how dialogue might take place in a liberal democracy among people who do not share common premises.

The key to Stout's picture of dialogue in these circumstances is "immanent criticism," an approach in which individuals "either try to show that their opponents' religious views are incoherent, or . . . try to argue positively from their opponents' religious premises to the conclusion that the proposal is acceptable. What they do *not* do is argue from a purportedly common basis of reasons in Rawls's sense."[256] His vision of dialogue as immanent

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251. Levinson, *supra* note 248, at 2069 (quoting PERRY, *supra* note 248, at 100).

252. *See* PERRY, *supra* note 248, at 100.

253. *See* Levinson, *supra* note 248, at 2073–74 (arguing that these requirements would exclude many religious individuals from public dialogue); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991) (same).

254. *See* STOUT, *supra* note 230. For an article that focuses on somewhat different aspects of the book, see Marci A. Hamilton, *What Does "Religion" Mean in the Public Square?*, 89 MINN. L. REV. 1153 (2005).

255. *See* Franklin I. Gamwell, *The Question of Democracy*, 57 DEPAUL L. REV. 997, 1006 (2008) (situating Stout as presenting "a decided alternative to Rawlsian liberalism" but arguing that their approaches share in common the assumption "that democracy itself neither has nor requires any moral ground beyond the principles of presuppositions located in its own historicity").

256. STOUT, *supra* note 230, at 69 (emphasis added).

criticism is decidedly conversational.[257] A discussant who cites religious views against an opponent will "draw [her interlocutor] into a Socratic conversation on the matter, take seriously the objections [raised] against [her] premises, and make a concerted attempt to show . . . how [the interlocutor's] idiosyncratic premises give [the interlocutor] reason to accept [her] conclusions."[258] One can thus "express[ ] one's own" religious "reasons for a political policy while also directing fair-minded, nonmanipulative, sincere immanent criticism against one's opponent's reasons," and vice versa.[259]

Of course, not many political conversations begin as "Socratic conversation[s]," and fewer still end that way. Moreover, it may seem that "immanent criticism" is just another way of packaging Perry's requirement of fallibilism. However, Stout's vision of dialogue as immanent criticism is not as impractical as others. Many citizens, whether they are making religious arguments or not, engage in at least some form of discussion in the public square, and it is not too much to expect them to listen to and engage each other's premises when they do. In any event, political dialogue regularly takes place around premises that the discussants cannot fully justify or describe. Thus, immanent criticism is no more impractical where religious premises are concerned than where purportedly non-religious premises such as autonomy are involved.

Moreover, Stout's vision has two great virtues. First, it is more genuinely respectful of religion and its role in the public square and in individuals' lives than a rule of translation.[260] Immanent criticism does not require that one accept another's religious (or non-religious) premises or abandon one's own. It simply asks that one listen and respond to those premises, treating them as entry points into a deeper and more meaningful conversation. There is nothing disrespectful about this. To the contrary, it respects the

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257. In a thoughtful article, Marc DeGirolami, drawing on the work of Michael Oakeshott, explores and extends the metaphor of a conversation in considering the role of religion in public education. *See* Marc O. DeGirolami, *The Problem of Religious Learning*, 49 B.C. L. REV. 1213 (2008).

258. STOUT, *supra* note 230, at 72.

259. *Id.* at 85, 88 (recommending an approach in which one "express[es] [one's] actual (religious) reasons for supporting [a] policy . . . while also engaging in immanent criticisms of [one's] opponents' views").

260. On the importance of genuine respect in framing the dialogue between religion and politics, see Horwitz, *supra* note 4, at 141–43.

very fact that people may hold to these comprehensive convictions more deeply than they do to particular publicly accessible reasons.[261]

Second, and contrary to the arguments of Richard Rorty, the inclusion of religious premises in political conversation through a model of immanent criticism is not a "conversation-stopper."[262] As Stout observes, religion is, at the least, no more of a conversation-stopper than anything else. All manner of purportedly publicly accessible reasons on matters of political controversy approach the status of "faith-claim[s]," inasmuch as they are "beliefs on nonreligious topics" that one holds "without claiming to know that they are true."[263] Moreover, even when religious reasons "lead to a momentary impasse" in conversation, that need not be the end of the dialogue.[264] "One can always back up a few paces, and begin again, now with a broader conversational objective" and expressing one's reasons "in greater detail."[265] By contrast, a rule that demands translation, either as an absolute rule (as Obama's speech appears to suggest) or as an accompaniment to religious reasons (as Rawls's proviso suggests), ultimately reaches a point at which the religious individual must either reach for language he or she considers false or unpersuasive, or dissemble, or fall silent.[266] Such a policy, compared to the candid approach of immanent criticism, "would itself be a conversation-stopper."[267]

It is thus possible to construct a rule of dialogue between religion and politics that is far preferable to, if messier than, Obama's rule of translation. In a pluralistic democracy, there *is* another choice—a regime of both engagement *and* inclusion. In this regime, the starting presumption is that political speech about religion, and religiously premised debate about politics, should be the same as political speech in general: "uninhibited, robust, and wide-open," in the Supreme Court's classic formulation.[268] One can presume that religion is an open subject for political debate,

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261. *See* STOUT, *supra* note 230, at 72.

262. *See* RICHARD RORTY, *Religion As Conversation-Stopper*, *in* PHILOSOPHY AND SOCIAL HOPE 168 (1999).

263. STOUT, *supra* note 230, at 87.

264. *Id.* at 90.

265. *Id.*

266. *See id.* at 90–91.

267. *Id.* at 90.

268. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

and religious premises can be presumed to be valid premises for public argument. Contrary to Obama's approach, which engages religion but prescribes a rule of translation that amounts to non-inclusion of those who are unwilling to phrase their reasons in publicly accessible terms, no one need reach for publicly accessible terms. One may adopt and argue from any premises one wishes, but those religious premises are themselves always open to criticism—both self-criticism, as in Perry's description of fallibilism, and the criticism of others.

Sometimes these engagements will be productive and sometimes they will not. On occasion, a religious premise may illuminate conversation on a matter of public concern, even for those who do not share that premise. On other occasions, a person holding out a religious justification for a particular policy can be engaged on the question of how his argument applies to other policies, as when one examines religious arguments against abortion for consistency with policies such as the death penalty, or social policies that arguably favor the conditions of life, such as basic health or welfare policies.[269] Of course, one may simply reject a particular religious premise from an external perspective. Even here, though, the result is not necessarily a stopped conversation. Rather, the participants in such a debate can arrive at a sharpened realization of the basis for their differences with each other. Sometimes that may lead to convergence on the points on which they agree, albeit for different reasons.[270] At other times, it may lead to a clarified understanding of their "can't helps," and a mutually respectful standoff.

Of course, one can readily imagine a far more uncharitable and far less productive conversation. But there are possible responses to this as well. One can try to come up with general rules of "etiquette" that might help channel and improve political dialogue about and stemming from religious premises.[271] On the other

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269. *See, e.g.*, OBAMA, *supra* note 12, at 221 ("In judging the persuasiveness of various moral claims, we should be on the lookout for inconsistency in how such claims are applied.").

270. *See generally* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

271. For one such attempt, see Horwitz, *supra* note 4, at 133–44. *See also* STOUT, *supra* note 230, at 85; RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY (1996).

hand, one can simply exercise the right not to participate in political dialogue when it involves religious issues. Romney took this approach, although his speech makes apparent that, perhaps for strategic reasons, he also wished to argue that it was wrong for his critics even to *ask* detailed questions about his faith and its implications. He wanted to have the benefits, but not the costs, of an inclusive regime.

Finally, a few words are in order about Obama's discussion of church-state doctrine, which somewhat parallels Romney's own remarks on the subject. Obama argues that "any reconciliation between faith and democratic pluralism requires some sense of proportion" on both sides of the religious/secular divide.[272] Obama errs on both sides of the divide.

First, Obama argues that Americans are "intuitively" wise in understanding that some religious premises "may be modified to accommodate modern life," as in the case of "Catholics [who] practice birth control" or "some of those opposed to gay marriage [who] nevertheless are opposed to a Constitutional amendment to ban it."[273] Obama says that religious leaders "need not accept such wisdom in counseling their flocks, but they should recognize this wisdom in their politics."[274] Obama is right, both as a matter of pragmatic politics and for deeper reasons, that not every religious individual should assume that the state should decisively resolve every issue in her favor. Some issues should be left for resolution to the political process or should remain permanently up for grabs—either because individual rights demand it or because the state's limited domain does not reach far enough to force an authoritative resolution of the matter. For some individuals, gay marriage is certainly one such question; for others, abortion may be.

These conclusions, however, do not say anything important about "proportionality" in the sense that Obama seems to mean it. To be sure, those who hold strong religious convictions must direct their intellects and consciences to the difficult question of how their views should translate into policy conclusions in particular contexts. It is certainly not the case, however, that "proportionality" means that a religious individual is *required* to modify or water down his strongly held religious views simply *because* of the need

272. Obama, *supra* note 172.
273. OBAMA, *supra* note 12, at 220–21.
274. *Id.*

to "accommodate modern life." If one in fact concludes, after careful deliberation, that one's religious views on a particular matter are inflexible, one need not modify those views. A Catholic voter *might* conclude that the state should not absolutely bar the availability of birth control, either because it violates the Constitution or because any leviathan state with the power to do so could just as well abuse this power in the future. But it would hardly be disproportionate for her to retain her own belief in the wrongness of birth control, and to refuse to accommodate her *own* practices to "modern life." "A sense of proportion" is largely irrelevant to such questions.

Obama adds that "a sense of proportion should also guide those who police the boundaries between church and state."[275] In saying so, he appears to commit a species of Romney's error. He conflates a policy of public engagement by *citizens*, in which religious voters and officials need not check their beliefs at the door of the public square, with the question of what sorts of *government* actions are themselves permissible or impermissible in such a regime. He is surely right that "[n]ot every mention of God in public is a breach to the wall of separation."[276] Obama is also right in most of the positions he takes on the particular constitutional questions that he brings up. The use of public property by "voluntary student prayer groups" and the opening of public funds on an equal basis to "certain faith-based programs" are not constitutionally impermissible, and may in fact be a consequence of a larger regime of engagement and inclusion.[277]

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275. *Id.*

276. *Id.*

277. *Id.* Note, however, that even here Obama is not fully inclusive. His proposal for the support of faith-based social services along with similar secular programs, voiced later in the campaign, would, for example, limit the ability of such programs to discriminate against "the people [they] hire." Jeff Zeleny & Michael Luo, *Obama Seeks Bigger Role for Religious Groups*, N.Y. TIMES, July 2, 2008, at A1. Although Professor Martha Minow, who reportedly advised the Obama campaign on this issue, suggested that "there's [nothing] too controversial" about this restriction, this surely understates the extent to which any such limitations are at least open to debate. *See* Peter Steinfels, *In Wooing the Religious, Obama Hits 6-Word Snag*, N.Y. TIMES, July 5, 2008, at B5 (noting disagreement on the question of whether government can restrict faith-based hiring by religious beneficiaries of federal social services funds); Zeleny & Luo, *supra* note 277, at A1, A14.

It is not enough, however, to say that "[i]t is doubtful that children reciting the Pledge of Allegiance feel oppressed or brainwashed as a consequence of muttering the phrase 'under God.'"[278] Whether or not those who are personally offended by such policies should retain a "sense of proportion" about these policies as private indviduals, those who are actually charged with "polic[ing] the boundaries between church and state" are in a different position.[279] Indeed, in a regime of genuine inclusion and engagement, it may be that a firm maintenance of the church-state boundary with respect to *official* government speech, however minor, is both the cost and the consequence of allowing vigorous religious speech in the public and political arena. Just as religious individuals should not be forced to couch their public arguments in "publicly accessible" terms, so it is possible that government itself, when acting officially, must leave such issues up for grabs and cannot itself couch its own statements in explicitly religious terms.

There is thus a good deal in Obama's remarks that merits critical reflection and not just praise. The speech itself is a model of engagement between religion and politics. By its very language and the themes it addresses, it contemplates a world in which religious language and religious arguments are fully welcomed in the public square. The speech demonstrates that, contrary to those who have worried that even attempting to voice religious arguments in public debate will either be intolerably divisive[280] or a "conversation-stopper,"[281] it *is* possible to have a discussion about religion and politics that is rich, detailed, and even controversial without becoming uncivil. Religion need not pay for its entry into the public square with the coin of blandness offered up by Romney. At the same time, Obama's insistence on a rule of "translation," and the "sense of proportion" he suggests should animate religious believers who enter the public square, suggests that his model is incomplete and unsatisfactory. It offers and exemplifies a policy of engagement; but it falls short of a true policy of inclusion.

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278. Obama, *supra* note 172.

279. *Id.*

280. *See* Garnett, *supra* note 16 (discussing and critiquing the use of "divisiveness" in Establishment Clause doctrine).

281. RORTY, *supra* note 262.

V. CONCLUSION

For all the surface continuity in the debates over religion and politics from Kennedy's age to the present, something important has changed. Religion has increasingly become a contested and contestable concept in our society. That is not to say its star has dimmed; indeed, it glows far more hotly and brightly than it did when Kennedy spoke in Houston. Neither religion in general, however, nor any single faith or faith tradition, are now assumed to be the only star in the firmament. Even those who hold ever more fervently to their faith, and to the belief that faith plays a vital and inescapable role in American political and public life, do so precisely in part because that very belief has become contestable. The themes may not have changed; one can readily understand Kennedy, Romney, and Obama as speaking in the same language about the same issues. The fact that they are speaking the same language, however, should not obscure the fact that the nature of the conversation—what others assume, what others accept, and what others question—*has* changed.

Precisely because religion and politics exist today in an age of contestability, it is important to turn to political speakers like Kennedy, Romney, and Obama for insight, and not just to the many thoughtful academic voices on this issue. To be sure, the speeches examined in this Article may be imperfect in part because each speaker delivered his respective speech in the public arena rather than the seminar room. But this could in fact be a virtue. Kennedy, Romney, and Obama did not have the luxury of nuance, but neither did they have the freedom to treat the question of religion's relationship with politics as a philosophical abstraction. Their speeches took place where religion and politics actually interact: in the messy, contingent, and sometimes uncivil world of public debate. Since that is where any resolution of the conflict between religion and politics must actually occur, it may be especially worthwhile to consider how politicians, the masters of the art of the possible and practical, would resolve it.

In that light, and in keeping with the combination of stability and change seen in the march of time from Kennedy's age to today, one might understand all three of these speeches, taken together, as reflecting both stability *and* change. All three candidates take on the same basic issue of how religious candidates and voters should act in a religiously pluralistic democracy. At the same time, there has been a change in how they would resolve this issue.

The tune has changed from a strategy of avoidance to a gradually increasing strategy of public inclusion *of* religion, in Romney's case, and public engagement *with* religion, in Obama's case.

The next step, and the best one, is one of both inclusion and engagement. It is one in which, contrary to Kennedy, one need not privatize one's religion in order to enter the public square. It is one in which, contrary to Obama, one need not couch one's religious arguments in publicly accessible language in order to participate in public debate. Finally, contrary to Romney, it is one of genuine engagement, which is ultimately the truest expression of respect for religion. One need not admit religion into the public square at the cost of rendering it banal, or insist that any difficult and unpleasant questions about religion are out-of-bounds. Rather, once citizens conclude that religion is, or at least can be, of fundamental importance in public debate and decision-making, they must accept that religion, like any other issue or motivation, can be the subject of public debate, criticism, and even derision.

That does not mean Americans *must* ask such questions, let alone ask them in a hot-tempered manner. Rather, conversations about religion and politics should be just that—conversations.[282] As Kennedy argued, and as his very willingness to answer questions from a hostile audience in Houston suggested, these conversations should be a genuine dialogue rather than an arbitrary granting or withholding of support on religious grounds. Americans should not treat these conversations as taboo, however, as Kennedy and Romney suggest, or be forced to adopt a strictly secular voice, as Obama proposes.

This model of inclusion and engagement is in some ways the most difficult of the alternatives. It may lead to greater open divisiveness would than either a strategy of avoidance or a partial strategy of inclusion or engagement. But it will also lead to the best, most meaningful, and most honest dialogue.[283] Public discussion at the intersection of religion and politics "will be less anodyne but also less antiseptic" than it is now.[284] In the end, the model of engagement and inclusion is the only truly authentic, respectful, and fair alternative we have.

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282. For more on the conversational model, see DeGirolami, *supra* note 257.

283. *See* Horwitz, *supra* note 4, at 146.

284. *Id.*