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Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations

Paul Horwitz
University of Alabama - School of Law, phorwitz@law.ua.edu

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Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations

Paul Horwitz[*]

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[*] Associate Professor, Southwestern University School of Law. This paper is based on a talk delivered before the Law and Religion Section of the American Association of Law Schools at its annual conference in Washington, D.C. in January 2006. My sincere thanks to Rick Garnett for inviting me to participate. I have benefited from the opportunity to present this paper to my colleagues at the Southwestern University School of Law, and wish to thank Chris Cameron, Michael Dorff, Michael Epstein, Bryant Garth, Joerg Knipprath, Myrna Raeder, and K.C. Sheehan for their comments on that occasion. Thanks also to Andrew Eveleth for inviting me to present this paper to the Federalist Society chapter at the Pepperdine University School of Law, to Robert Cochran, Doug Kmiec, and Mark Scarberry for their questions, and especially to Joel Nichols for serving as respondent in that discussion. Thanks also to Andrew Holmes-Swanson for dogged research.

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It is interesting how a different nominee changes the standards around this town.

-- Senator Richard Durbin[1]

I. INTRODUCTION

The Religious Test Clause of the United States Constitution is simple enough. It provides, briefly and with seeming clarity and finality, that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[2] And it has generally been assumed that the simplicity of the Religious Test Clause is matched by its unimportance. Although it is the only place in the main text of the Constitution that mentions religion, it is generally ignored.[3] Indeed, it is an almost obligatory move, for those few scholars who have chosen to delve into the history and meaning of this constitutional provision, to cite Laurence Tribe's magisterial treatise on constitutional law, which finds room in its overflowing pages for precisely one *footnote* on the Religious Test Clause.[4] To add insult to

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1 CNN, *The Situation Room*, Oct. 5, 2005 (remarks of Sen. Richard Durbin).

2 U.S. Constitution, art. VI, cl. 3.

3 *See, e.g.,*Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674, 677 (1987 ("Neither court nor commentator has shown any interest in [the Religious Test Clause] as a clue to the Constitution's 'philosophy' of religion"). For notable exceptions to this general lack of interest in the Religious Test Clause, see Bradley, *id.*; James E. Wood, Jr., *"No Religious Test Shall Ever Be Required:" Reflections on the Bicentennial of the U.S. Constitution*, 29 J. Church & St. 199 (1987); Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Test Ban*, 38 J. Church & St. 261 (1996); J. Gregory Sidak, *True God of the Next Justice*, 18 Const. Comment. 9 (2001); Winston E. Calvert, Note, *Judicial Selection and the Religious Test Clause*, 82 Wash. U. L.Q. 1129 (2004); Albert J. Menendez, *No Religious Test: The Story of Our Constitution's Forgotten Article* (1987).

4 *See* Laurence L. Tribe, *American Constitutional Law*, § 14-1, at 1155 n.1 (2nd ed. 1988).

injury, that footnote says little more than that the Clause has "little independent significance."[5]

We might thus fairly conclude that the Religious Test Clause belongs in the category of forgotten or irrelevant constitutional clauses, doomed to desuetude by history and practice and, as Tribe notes, by the ever-expanding jurisdiction of the Religion Clauses of the First Amendment.[6] That conclusion is quickly belied, however, by even the briefest look at our public dialogue. Since 2003, the phrase "religious test" has appeared some *931* times in general news sources such as newspapers and magazines.[7] A Google search for the same phrase turns up *235,000* hits.[8] It would seem that the Religious Test Clause is busting out all over.

The reason, of course, is our recent history of judicial nominations. The Religious Test Clause has become a major part of our discussion of judicial nominees in recent years. The Test Clause arose first in the context of a series of lower federal court nominations, such as that of William Pryor to the Eleventh Circuit, and later in the context of two nominations to the United States Supreme Court that

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[5] *Id.* For the obligatory cites to the Tribe footnote, see Bradley, *supra* note __, at 678; Dreisbach, *supra* note __, at 262 (both citing the first edition of Tribe's treatise). Interestingly, in the very act of foreswearing further work on his treatise, Professor Tribe has suggested that there might be more questions left in the Religious Test Clause than his much-reviled footnote suggests. *See* Laurence H. Tribe, *The Treatise Power*, 8 Green Bag (2d) 291, 303 (2005). As this article will make clear, however, I am not sure I can agree with his statement that the Religious Test Clause indicates that the Constitution "prioritizes the secular over the religious in the public realm." *Id.*

[6] Tribe, *supra* note __, at 1155 n.1.

[7] This number is yielded by a search for "religious test," performed on March 21, 2006, in the LEXIS "News, All (English, Full Text)" database. I have not accounted for duplication of stories or other possible influences on the number.

[8] Again, I have not accounted for duplications or other distortions of this number. Moreover, in tallying search scores on Google, we must keep a sense of perspective: a search for, say, "Anna Nicole Smith" comes up with some 3.1 million hits. Still, in a database in which "commerce clause" yields only 1.2 million hits, the number of hits for the phrase "religious test" is surely significant.

occurred in 2005. In a sense, these latter nominations[9] – the successful nomination of John Roberts as Chief Justice of the United States, and the abortive nomination of Harriet Miers as an Associate Justice on the Supreme Court – present mirror images of each other, with religion playing an apparent role as both a qualifying and a disqualifying feature in those nominations. Taken in combination, these nominations have given rise to loud debate over whether, when, and how religion may enter the subject of federal judicial nominations and confirmations.

Thus, this is a good time to re-examine the Religious Test Clause: to ask hard questions about its meaning and scope, and about its applicability to nominations such as those we have just witnessed. More broadly, it is a good time to talk about the use, and perhaps the abuse, of religion in the public discourse that surrounds judicial nominations and confirmations. More broadly still, this discussion may shed light on the appropriate role of religion in political discourse, whether by public officials or by private citizens.[10]

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[9] The third nomination to take place in 2005, the successful nomination of Samuel Alito, presents a different case. *See infra* notes __-__ and accompanying text.

[10] Although he is making a somewhat different point, I agree with David Hollenbach that the relevant sense of "public" in any consideration of the role of religion in political dialogue extends beyond the statements of public officials themselves, and includes "those components of civil society that are the primary bearers of cultural meaning and value – universities, religious communities, the world of the arts, and serious journalism." David Hollenbach, *Civil Society: Beyond the Public-Private Dichotomy*, 5 Responsive Community, Winter 1994-95, at 22 (cited in Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is Not Illegitimate in a Liberal Democracy*, 36 Wake Forest L. Rev. 217, 237 (2001)). In this article, I take a fairly undifferentiated approach to the role of religion in various aspects of public discussion and the role of various participants in that discussion, whether they are public officials or private citizens. It is possible, however, that the role of different institutional speakers, the norms that might govern their conduct in this or other areas, and the means of enforcing those norms could vary according to the institution in question. *See generally* Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. Rev. 461 (2005).

The subject of this Symposium is "Religion, Division, and the Constitution." This paper certainly falls within the ambit of that discussion. Ultimately, though, it is somewhat different in its orientation. As I will show, the Religious Test Clause in fact has little to contribute in policing the role of religion in judicial nominations. We must turn elsewhere for a guide through this perilous territory. We must struggle to agree upon principles that can guide us in using religion and religious rhetoric in the public discourse and official actions – nominations, confirmations, and votes in opposition to confirmation – that are implicated by the selection of our federal judges. To paraphrase a term that regularly features in current constitutional law scholarship, the true subject of this contribution is "Religion, Division, and the Constitution *Outside* the Courts"[11] – or perhaps even "Religion and Division *Outside the Constitution*."

Part II of this article summarizes the relevant facts with respect to the use of religion in judicial nominations and confirmations.[12] It focuses primarily on the most recent eruption of debates about the role of religion in judicial nominations, beginning in 2003 with a series of controversies over several lower federal court judges, and continuing through the latest series of nominations to the Supreme Court. In recounting this recent history, I will also discuss, in this section and in Part III, arguments that have been raised, both in political discourse and in academic discourse, that using religion as either a disqualifying feature or a qualifying feature of a judicial nomination violates the Religious Test Clause.[13] In the remainder of Part III, I will examine the Religious Test Clause, discussing its role in the constitutional structure in light of its text and history. I will argue that, ultimately, the Religious Test Clause is of

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11 *See, e.g.,* Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 Fordham L. Rev. 1377 (2005). For an early use of the phrase by one of its leading scholars, see Mark Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 Val. U. L. Rev. 437 (1992); *see also* Mark Tushnet, *Taking the Constitution Away From the Courts* (1999).

12 *See* Part II, *infra*.

13 *See* Part III.A, *infra*.

profound historical importance but little present application. The Clause applies to a narrow set of circumstances in which government requires a nominee formally to swear his allegiance to particular faiths or faith propositions, or to disavow that allegiance. It does nothing more. Thus, nothing in the Religious Test Clause ultimately prevents the use of religion in the kinds of statements and actions by various politicians and others that we have seen in the past few years in the context of judicial nominations, whether in opposition to or in support of those nominations.[14] However treacherous the waters we must navigate when we invoke religion in the course of judicial nominations, the Religious Test Clause offers us no beacon. For a variety of reasons, I will argue that this conclusion is not only descriptively accurate, but normatively attractive.

With the textual constitutional provision out of the way, I will argue in Part IV that we can think more productively about the debate concerning the role of religion and religious questioning in judicial nominations if we take this as an occasion for crafting non-constitutional rules – albeit rules that are crafted in the shadow of the Constitution – that might guide and constrain the conduct of public dialogue on religion in the context of nominations. We might call this an effort to craft a "constitutional etiquette" for talking about religion in the public square. Alternatively, we could label it an effort to create an etiquette of pluralism, reflecting our politically and religiously pluralistic society. In other words, I will ask: in light of our constitutional and political traditions, and in light of the religiously and politically diverse and pluralistic nature of our society, is there a set of rules, however loose, that we can formulate to govern how we talk to each other about religious beliefs and their intersection with politics and judicial decision-making?[15] I propose five such principles as a starting point.

To bring things back to the topic of this Symposium, as I have retitled it for my own purposes, I will conclude that

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14 *See* Part III.A-D, *infra*.

15 *See* Part IV, *infra*.

the rules of etiquette I propose below ultimately won't end, and in some cases may actually foment, our divisions on these issues. But we may hope that in the end our discussion will be more thoughtful, meaningful, and genuinely respectful than the shallow sort of divisiveness that has characterized the rhetoric surrounding religion and adjudication in the nomination talk we've seen recently.[16]

II. THE ROLE OF RELIGION IN RECENT JUDICIAL NOMINATIONS

A. Precursors

For purposes of this article, I focus primarily on the successful nomination to the Supreme Court of Chief Justice John Roberts and the unsuccessful nomination of Harriet Miers. It is worth noting, though, that these case studies hardly represent the first time religion has surfaced as a factor in the selection of a Supreme Court Justice or lower federal court judge, or in the debate surrounding the confirmation of a nominee to an Article III judgeship.

At the very latest, the discussion of religion in connection with a federal judicial nominee can be traced back to the mid-19th Century, and the nomination of Roger Brooke Taney as Chief Justice of the United States. Taney's nomination faced substantial, although fruitless, public criticism "on the ground that he was a Catholic, and subject to a 'foreign potentate.'"[17]

Of course, the participation of Catholics in American public office, and the role of Catholicism in the American public sphere more generally, historically has often been subject to vigorous and even vicious criticism.[18] Nevertheless, Catholicism has in fact played a positive role

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16 *See* Part V, *infra*.

17 Barbara A. Perry, *The Life and Death of the "Catholic Seat" on the United States Supreme Court*, 6 J.L. & Pol. 55, 60 (1989) (quoting Carl Swisher, *Roger B. Taney* 317 (1935)).

18 *See generally* Philip Hamburger, *Separation of Church and State* (2002); Noah Feldman, *Divided By God: America's Church-State Problem – And What We Should Do About It* (2005).

in the selection, if not always the confirmation, of a number of Justices between the mid-19th and mid-20th Centuries. Generally, this was because the nominating President was looking to shore up political support among Catholic American voters.[19] Of the 1939 nomination of Justice Frank Murphy, for example, Barbara Perry writes that his Catholic faith "must be considered one of the two or three leading factors in making Murphy the choice to fill [Justice Pierce] Butler's so-called 'Catholic seat.'"[20]

Presidents have thus often deployed a nominee's religion for political purposes, whether or not the nominee's selection was in fact motivated by any deeper regard for that person's faith. At the same time, religion has not always been a plus factor in the nomination or confirmation of Justices or federal judges. For example, President Hoover expressed concern over the nomination of Benjamin Cardozo to the Supreme Court, noting that Cardozo would be the second Jewish member sitting on the Court.[21] Similarly, President Nixon suggested that he was tempted to tell Justice William Rehnquist "to change his religion and try to get him baptized" before nominating him.[22]

These are largely bygone examples, and they do not fit neatly into the context at issue in this paper: the use and discussion of religion in the judicial nomination process, and especially in the Senate confirmation process for judicial nominees. But recent history does offer some salient examples that fall more clearly under this rubric. One of the first and clearest examples of the use of religion in interrogating judicial nominees comes from the nomination of Justice William Brennan. In his confirmation hearings, Brennan was queried by Senator Joseph O'Mahoney of

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[19] *See* Perry, *supra* note __, at 71-81 (discussing the nominations of Justices Edward White, Joseph McKenna, Pierce Butler, and Frank Murphy).

[20] *Id.* at 80.

[21] *See* Winston E. Calvert, Note, *Judicial Selection and the Religious Test Clause*, 82 Wash. U. L.Q. 1129, 1134 (2004).

[22] *Id.* at 1134 (quoting John W. Dean, *The Rehnquist Choice* 231 (2002)).

Wyoming, himself a Catholic.[23] O'Mahoney passed along to Brennan a question put forward by the National Liberal League, a group "purportedly devoted to the separation of church and state," but which argued that no Catholics should sit on the Court, given the nation's "predominantly Protestant" status.[24] The question ran as follows:

> You are bound by your religion to follow the pronouncements of the Pope on all matters of faith and morals. There may be some controversies which involve matters of faith and morals and also are matters of law and justice. But in matters of law and justice, you are bound by your oath to follow not papal decrees and doctrines, but the laws and precedents of this Nation. If you should be faced with such a mixed issue, would you be able to follow the requirements of your oath or would you be bound by your religious obligations?[25]

Brennan replied to O'Mahoney by assuring him that he would follow his oath first and foremost in carrying out his judicial duties, and that "there isn't any obligation of our faith superior to that."[26]

A more recent example of the use of religious discourse in the judicial nomination arena, and a rare explicit example of a Senator stating explicitly that he would refuse to vote for a nominee on at least partially religious grounds, comes from Senator Howell Heflin of Alabama. Heflin explained his decision to vote against the confirmation of Robert Bork as a Justice of the Supreme Court by saying that he was "disturbed by his refusal to discuss his belief in God or the lack thereof."[27] This example is all the more striking given the full context in

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[23] Sanford Levinson, *Wrestling With Diversity* 210 (2003).
[24] *Id.*
[25] *Id.*
[26] *Id.* 211.
[27] Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* 295 (1989).

which it occurred. Heflin himself had raised Bork's religion in the course of his opening statement during the Bork hearings, noting that "[t]here are those who charge that Judge Bork is an agnostic or a non-believer."[28] Heflin then reminded his colleagues of the existence of the Religious Test Clause, telling them that "it should be observed in pursuing any inquiry, be it legitimate or not, as to one's personal religious feelings."[29]

Similar questions came up, albeit more briefly and perhaps more subtly, in more recent Supreme Court confirmation hearings – all of them, perhaps tellingly, involving nominees who were Catholic or assumed to be Catholic. Thus, in the confirmation hearings for then-Judge Antonin Scalia, one Senator, noting Scalia's apparent prior criticism of *Roe v. Wade*,[30] asked how judges should deal with "a very deeply held personal position, a personal moral conviction, which may be pertinent to a matter before the Court."[31] Scalia, anticipating a statement later apparently made by Chief Justice Roberts in the process leading to *his* confirmation,[32] answered that he considered himself obliged to set aside his personal moral convictions in judging a case, and if he could not do so in a particular case would recuse himself.[33]

Similarly, although more directly, during his Supreme Court confirmation hearings Anthony Kennedy was queried about a conversation he had allegedly held with Senator Jesse Helms, in which Kennedy was asked if he knew how Helms stood on abortion and answered, "Indeed I do and I admire it. I am a practicing Catholic."[34] Kennedy

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[28] *Id.* at 294-95.

[29] *Id.* at 295. In discussing Heflin's statements, Sanford Levinson quite rightly questions whether Heflin was sincere in reminding his colleagues of the Religious Test Clause, given his later reference to religion in explaining his vote against confirmation. *See* Sanford Levinson, *Wrestling With Diversity* 221-22 (2003).

[30] 410 U.S. 113 (1973).

[31] Levinson, *supra* note __, at 212.

[32] *See infra* notes __-__ and accompanying text.

[33] Levinson, *supra* note __, at 212.

[34] *Id.* at 213.

answered the question by saying he "admire[d] anyone with strong moral beliefs," but that "it would be highly improper for a judge to allow his or her own personal or religious views to enter in to a decision respecting a constitutional matter."[35]

Finally, the religious beliefs of Clarence Thomas were raised during his nomination, although not in the hearings themselves.[36] Upon his nomination, then-Governor Douglas Wilder of Virginia observed that although Thomas was "qualified" to sit on the Court, "[H]e's indicated he's a very devout Catholic, and that issue is before us. . . . The question is: How much allegiance does [Mr. Thomas] have to the Pope?"[37] In fact, Wilder was wrong: Thomas was not then a practicing Catholic, having converted to Episcopalian, although he returned to the Catholic faith during his tenure on the Court.[38] Wilder quickly retracted his remarks in the face of critical reaction.[39] It is worth noting, however, that Senator Orrin Hatch of Utah responded to the controversy by suggesting that "it's fair to ask if [Thomas's] Catholic faith means he would blindly follow the pope. You can ask the question in a sophisticated way that would be less offensive than what Wilder said, but I don't think he's out of line to raise these questions."[40]

These examples demonstrate that questions about a nominee's religion, or the treatment by a President of a potential nominee's religion as a "plus" or "minus" factor in

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[35] *Id.*

[36] This statement needs some qualification. Although Thomas was not queried about his faith directly, he was questioned at length about his views on the relationship between his views of judging and his views of the "natural law" approach to jurisprudence; natural law, of course, is for many a religiously derived approach to jurisprudence. *See, e.g.,* Walter V. Robinson, *Thomas disavows old stance*, Boston Globe, Sept. 11, 1991, at 1.

[37] J. Gregory Sidak, *True God of the Next Justice*, 18 Const. Comment. 9, 9 (2001) (citations omitted).

[38] *See* Ken Foskett, *Judging Thomas: The Life and Times of Clarence Thomas* __ (2005).

[39] *See* Sidak, *supra* note __, at 10.

[40] *Id.* at 10-11. Sidak cites Senator Hatch's remark as evidence that he was "as unfamiliar with the Religious Test Clause as [ ] Senator Wilder." *Id.* at 11.

selecting that individual for appointment to the Court (albeit more for political than spiritual reasons) are hardly novel. But they hardly capture either the extent of the heat involved in recent invocations of religion in the judicial nomination process, or the rapidity with which religion has surfaced as a prominent topic of discussion in the latest nominations of federal judges and Justices.

B. Recent Precedents: The Bush Administration's Lower Federal Court Nominations

The invocation of religion in the context of judicial nominations truly began to heat up in recent years, in the context of a series of fiercely contested nominations by President Bush of judges to various lower federal courts. Religion played a significant factor in the nomination of Leon Holmes to the Eastern District of Arkansas and Charles Pickering to the Fifth Circuit. But the full flowering of the use of religion in a contemporary debate over a federal judicial nominee came with the extended debate over the confirmation of William Pryor, a nominee for a seat on the Eleventh Circuit.

As a nominee, Holmes was criticized for an article he had co-written with his wife criticizing the use of gender-neutral language. In that article, he quoted from the Biblical language suggesting that in a marital relationship, "the wife is to subordinate herself to her husband."[41] The nomination of Judge Pickering provides a far less straightforward case. Judge Pickering was not, in truth, especially subject to criticism for his faith. The brunt of the criticism of this nominee had to do with arguments that his career

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[41] *See* Leon Holmes & Susan Holmes, Editorial, *Gender Neutral Language, Destroying An Essential Element of Our Faith,* Arkansas Catholic, Apr. 12, 1997, at 10 (quoted in People for the American Way, Leon Holmes Should Not be Confirmed to Federal Bench, July 5, 2004, at 2); Ephesians 5:24 (KJV) ("Therefore as the church is subject unto Christ, so let the wives be to their own husbands in every thing.").

demonstrated "a history of racial insensitivity."[42] Whatever the merits of these arguments, his faith had little if anything to do with the public face of the opposition to his confirmation. Nevertheless, supporters of his nomination suggested, implicitly and explicitly, that Pickering's religion, among other factors, had figured in the opposition to his confirmation.[43]

Surely the most prominent case of the use of religion and religious rhetoric in the recent history of the judicial nomination process, at least until the Roberts and Miers nominations, is that of William Pryor, who now sits on the Eleventh Circuit. Pryor is a devout Catholic[44] and, unsurprisingly, the opposition around his nomination centered on abortion, although Pryor's other public statements also gave rise to arguments that he would seek more broadly to advance Christianity as a judge.[45] In the course of his initial nomination to a seat on the Eleventh Circuit, some Democratic Senators, led by Senator Charles Schumer of New York and Senator Edward Kennedy of Massachusetts, questioned whether Pryor would be able to set aside his personal views in ruling on abortion cases.

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[42] Neil A. Lewis, *Senate Panel Approves Judge's Nomination*, N.Y. Times, Oct. 3, 2003, at A18.

[43] *See, e.g.,* John Cornyn, *Restoring Our Broken Judicial Nomination Process*, 8 Tex. Rev. L. & Pol. 1, 24-25 (2003) (lumping Pickering's status as a "deeply religious man" along with other factors, such as the fact that he is "also a man of the South," to describe the opposition to his confirmation).

[44] Note, however, that the Democratic Senators opposing Pryor pointed out that the first Senator to actually mention Pryor's Catholic faith during the Senate confirmation process was Senator Hatch, chairman of the Senate Judiciary Committee at the time. *See* Helen Dewar, *Appeals Court Nominee Again Blocked*, Wash. Post, Aug. 1, 2003, at A2 ("Democrats complained that they did not even know Pryor was a Catholic until Hatch asked his religious affiliation at a confirmation hearing earlier this summer. Hatch said he asked the question because Democrats had questioned Pryor's 'deeply held' personal beliefs.").

[45] *See, e.g.,* Jan Crawford Greenburg, *Judicial pick faces tough Senate fight; Pryor criticized justices' rulings on abortions, gays*, Chi. Tribune, July 18, 2003, at C12 (noting a speech at a public rally in which Pryor said, "God has chosen, through his son Jesus Christ, this time and place for all Christians – Protestants, Catholics and Orthodox – to save our country and save our courts").

Thus, Senator Schumer asked the nominee, "You feel this so passionately, and you have said repeatedly abortion is murder. . . . Many people believe abortion is wrong, but when you believe it is murder, how can you square that with or how can you give comfort to women throughout American that you can be fair or dispassionate?"[46] Senator Schumer later suggested, in words that would be raised against him repeatedly, that Pryor's "deeply held" views would influence his decisions on the bench.[47] Similarly, Senator Kennedy asked Pryor whether "many of the positions which you have taken reflect not just an advocacy but a very deeply held view."[48]

These questions were met with swift reaction from Pryor's supporters. They argued that opposing a judicial nominee because he strongly holds religious views that influence his position on abortion constitutes a form of disqualification of religious individuals for judicial office. At the Senate Judiciary Committee's party-line vote to send Judge Pryor's nomination to the Senate floor, for example, Senator Hatch charged that "the left is trying to enforce an anti-religious litmus test. It appears that nominees who openly adhere to Catholic and Baptist doctrines, as a matter of personal faith, are unqualified for the federal bench in the eyes of the liberal Washington interest groups."[49] And Senator Jefferson Sessions of Alabama asked, "Are we saying that if you don't believe in that principle [supporting at least some abortion rights], you can't be a federal judge? . . . Are we not saying good Catholics can't apply?"

Supporters of Pryor's nomination outside the Senate took a similar tack. Most prominent among these statements

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[46] Hearing on the Nomination of William H. Pryor, Jr., to be Circuit Judge for the Eleventh Circuit, and Diane M. Stuart, to be Director of the Violence Against Women Office for the Department of Justice: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. 56 (2003) (statement of Sen. Schumer) (June 11, 2003).

[47] *Id.* at 29-30.

[48] *Id.* at 104.

[49] David G. Savage, *Fight Gets Political Over Religion*, L.A. Times, July 24, 2003, at 17.

was an advertisement released by a group called the Committee for Justice. Illustrated with a sign on a courthouse door reading, "Catholics Need Not Apply," the ad suggested that his opponents were "playing politics with religion" by opposing Pryor due to his "'deeply held' Catholic beliefs."[50] It asked, "Don't they know the Constitution expressly prohibits religious tests for public office?"[51]

Similar criticisms were raised elsewhere, both by Senators and by other groups and individuals, many of them sounding in the rhetoric of the Religious Test Clause. For example, the Archbishop of Denver, Charles Chaput, cited the Pryor nomination as evidence that "a new kind of religious discrimination is very welcome at the Capitol, even among elected officials who claim to be Catholic."[52] Hugh Hewitt, a conservative commentator and law professor, quoted Chaput and added that the opposition to Pryor consisted of "[t]he resurrection of anti-Catholic bigotry in the form of a bar to professing Catholics joining the federal appellate bench."[53] Senator Rick Santorum of Pennsylvania alternated between calling the opposition to Pryor a "de facto" religious test,[54] and calling it an actual religious test.[55]

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[50] Bryon York, *Catholics Need Not Apply?*, Nat'l Rev., July 30, 2003, available at http://www.nationalreview.com/york/york073003.asp.

[51] Bryon York, *Catholics Need Not Apply?*, Nat'l Rev., July 30, 2003, available at http://www.nationalreview.com/york/york073003.asp.

[52] Hugh Hewitt, *The Catholic Test, Part 2*, Weekly Standard, Aug. 6, 2003.

[53] *Id.*

[54] Josh Marshall, *No, Sen. Santorum, Catholics aren't a protected class*, The Hill, Aug. 6, 2003, at 13; *see also* NewsHour with Jim Lehrer, July 23, 2003 (quoting Senator Sessions) ("I would just say it this way. Yes, we have a prohibition on a religious test for this body, and I don't think any member on either side would be prejudiced against a person because of the faith that they have. But what if their personal views are consistent with their faith? What if their personal views are sincerely to the [effect] that abortion is morally wrong and it's the taking of innocent life, need they not apply?").

[55] Federal News Service, *Media Availability With Republican Senators*, Aug. 1, 2003 ("And so we have set in motion something that our Founding Fathers would find absolutely despicable, so despicable they wrote it in the Constitution – a religious test for office in the United States of America.").

Others also suggested that the opposition to Pryor's confirmation had been a de facto religious test.[56] Nor did the furor die down after Pryor, having been successfully filibustered for the seat, was eventually given a recess appointment to the Eleventh Circuit. When he was finally confirmed for a permanent position on the court, Democrats and Republicans on the Judiciary Committee again traded blows on the issue.[57]

The Pryor nomination thus set the tone for much of what we would see again in the Roberts nomination. First, we heard more or less indirect suggestions that a nominee's "deeply held" beliefs might affect his ability to faithfully follow the law, particularly on issues such as abortion. This was followed by charges that such a position constituted either a religious test forbidden by the Constitution, or a "de facto" religious test that would amount to the same thing. Finally, the debate devolved into a heated argument over which was more offensive: the religiously tinged opposition to the nominee, or the efforts by the nominee's supporters to characterize that opposition as religiously motivated.

C. John Roberts: Religion As Disqualification

Immediately upon the nomination of John Roberts to fill the seat of Justice Sandra Day O'Connor, and before his subsequent nomination to fill the center seat occupied by the late William Rehnquist, newspaper reports noted Roberts's faithful adherence to his Catholic faith.[58] These observers quickly wondered whether this fact would affect his rulings

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[56] *See, e.g., Scarborough Country*, July 30, 2003 (transcript quoting William Donohue, President, Catholic League ("I am not certain that there is [a] de [jure] test here, which says that if you're a Catholic and accept the church's teachings, you're automatically gone. But that's the effect of it. It's a thinly veiled de facto religious test.").

[57] *See, e.g.,* Hearing, Senate Comm. on the Judiciary, May 12, 2005, [cite] (statements by Senators Leahy, Sessions, Kennedy, and Feinstein).

[58] *See, e.g.,* Todd S. Purdum, Jodi Wilgoren & Pam Belluck, *Court Nominee's Life Is Rooted In Faith And Respect for Law*, N.Y. Times, July 21, 2005, at A1 ("He was raised and remains a practicing Roman Catholic").

on abortion.[59] But the first real discussions of religion and its role in Roberts's nomination and confirmation were not volleys: they were preemptive strikes.[60]

Following the controversy over Pryor's nomination, the first strong efforts to tie religion to Roberts's nomination were made primarily by conservative groups eager to warn Democrats against mentioning Roberts's faith or using it as a disqualifying factor. Indeed, the first real discussion of this issue came even *before* Roberts had been nominated, when, in the run-up to a nomination, a "Catholic-based organization" called Fidelis was formed to fund advertisements "defend[ing] Supreme Court nominees who will likely be attacked because of their faith and deeply-held beliefs."[61] Similarly, immediately after Roberts's nomination, William Donohue of the Catholic League warned that "[a]ny scratching around this area would suggest that there's a veiled religious test by asking questions about his deeply held views."[62]

The Democratic Senators on the Judiciary Committee disclaimed any intention of querying Roberts on his religious views, although they left open the possibility of quizzing him on his "personal views."[63] That did not mean, however, that everyone agreed Roberts should *not* be questioned on his religious views. Thus, in the online publication *Slate*, the writer Christopher Hitchens suggested that it was not only fair to ask Roberts about his religious

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[59] *See, e.g.,* Robin Toner, *Catholics and the Court*, N.Y. Times, Aug. 7, 2005, § 4, at 4.

[60] *See id.* ("All this fury is largely pre-emptive").

[61] Fidelis, News Release, *New Ads Accuse Dean of Religious Bigotry*, June 30, 2005, available at http://www.fidelis.org/press/press_63005.php.

[62] Kevin Eckstrom, *Conservative Catholics on Watch for Questions on Nominee's Faith*, July 20, 2005, 2005; *see also* David D. Kirkpatrick*, For Conservative Christians, Game Plan on the Nominee*, N.Y. Times, Aug. 12, 2005, at A14 (quoting Tony Perkins of the Family Research Council) ("We are going to be vigilant to make sure that there is not this religious litmus test involved . . . . 'Are you a Catholic? Do you really believe what the Catholic church teaches?' These kinds of things shouldn't be part of the discussion").

[63] *Id.* (quoting Senator Edward Kennedy).

views, but it was fair to ask *Catholic* nominees, as opposed to nominees of other faiths, about their beliefs. Hitchens argued:

> [W]e have increasingly firm papal dogmas on two issues that are bound to come before the court: abortion and the teaching of Darwin in schools. So, please do not accuse me of suggesting a 'dual loyalty' among American Catholics. It is their own church, and its conduct and its teachings, that raise this question.[64]

Hitchens added that although "[t]he Constitution rightly forbids any religious test for public office," it is still legitimate to ask "what happens when a religious affiliation conflicts with a judge's oath to uphold the Constitution."[65]

One feature was largely absent in the early days of Roberts's nomination: any use of his faith as a positive indicator of his likelihood of ruling in ways his supporters might favor, rather than as a basis for questioning his ability to fulfill his office. One example did present itself, however. Senator Tom Coburn of Oklahoma "unabashed[ly]" made clear his hope that Roberts's faith *would* influence his views on abortion, saying, "If you have somebody . . . who has that connection with their personal faith and their allegiance to the law, you don't get into the *Roe v. Wade* situation."[66]

It did not take long for religion to work its way into the formal and informal proceedings in the Senate concerning Roberts's nomination. Almost as soon as he began the rounds of Senate offices to meet with the Senators who would vote on his nomination, and perhaps in reaction to the public discussion of his faith taking place outside the

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[64] Christopher Hitchens, *Catholic Justice*, Slate, Aug. 1, 2005, available at http://www.slate.com/id/2123780/.

[65] *Id.*

[66] E.J. Dionne, *God's place on the Supreme Court*, Buffalo News, Aug. 3, 2005, at A7.

Senate, Roberts was asked about his faith by Senators on both sides of the aisle. Most prominently, the law professor Jonathan Turley reported in the *Los Angeles Times* that Roberts was asked, during an informal interview with Senator Richard Durbin of Illinois, what he would do if faced with a conflict between his faith and the law in ruling as a judge. According to Turley's account, Roberts "appeared nonplused and . . . answered after a long pause that he would probably have to recuse himself."[67] Turley suggested that this was "the wrong answer. In taking office, a justice takes an oath to uphold the Constitution and the laws of the United States. A judge's personal views should have no role in the interpretation of the laws."[68] Senator Durbin's office subsequently challenged the story, acknowledging that Durbin had asked Roberts about his faith, but saying Roberts's remarks about recusal had come in response to a question that did not involve religion. Turley, revealing that Durbin had been one of his sources, stood by his story.[69]

Durbin's question, at least as it was reported, led Senator John Cornyn of Texas to complain, "We have no religious tests for public office in this country. . . . And I think anyone would find that sort of inquiry, if it were made, offensive. And so I hope we don't go down that road."[70] But Senator Cornyn himself raised the issue of Roberts's faith in an informal meeting with the nominee, albeit defensively, asking him whether "anything about your faith of religious views . . . would prevent you from deciding issues like the death penalty [or] abortion."[71] Roberts replied, "Absolutely not."[72]

Similar questions were raised during the confirmation hearings themselves, again by Senators on both

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[67] Jonathan Turley, *The faith of John Roberts*, L.A. Times, July 25, 2005, at B11.
[68] *Id.*
[69] *Editor's note*, L.A. Times, July 27, 2005, at B13.
[70] Dionne*, supra* note __.
[71] David D. Kirkpatrick, *Skirmish Over a Query About Roberts's Faith*, N.Y. Times, July 26, 2005, at A13.
[72] *Id.*

sides of the aisle. The first such question was posed by the Republican chair of the Judiciary Committee, Arlen Specter of Pennsylvania, who asked whether Roberts agreed with John F. Kennedy's statement "that he did not speak for his church on public matters and the church did not speak for him."[73] Roberts replied that "nothing in my personal views based on faith or other sources . . . would prevent me from applying the precedents of the court faithfully under the principles of stare decisis."[74] Roberts gave a similar reply to a question from Democratic Senator Dianne Feinstein of California.[75]

The discussion of religion in the course of Roberts's nomination and confirmation hearings sparked a variety of reactions. A number of commentators suggested that some questions about a nominee's religion, or its connection to his judicial work, might be acceptable, if pointless. Thus, Senator Hatch, who earlier had criticized the opposition to Judge Pryor as a form of religious test, said during the Roberts episode that a nominee can be asked about his religious views, although "it's a ridiculous question," since any nominee who rose to the level of consideration for the Supreme Court surely would deny holding the view that his religion would take precedence over more secular sources of law.[76] And Stephen Presser and Charles Rice allowed that a nominee might be questioned on his views on the relationship between law and morality, while arguing that any more specific questions about a nominee's religion would be barred by the Religious Test Clause.[77] Others took a still harder line, asserting that *any* questions about a nominee's religious views would violate the Religious Test Clause.[78]

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[73] Scott Shepard, *Roberts deflects pointed queries*, Atlanta Journal & Constitution, Sept. 14, 2005, at A1.

[74] *Id.*

[75] *See* [cite].

[76] Paul Singer, *Roberts and the Religious Right – and Left*, Nat'l J., Aug. 13, 2005.

[77] Stephen B. Presser & Charles E. Rice, *Religious Tests*, Nat'l Rev. Online, Sept. 13, 2005, available at [cite].

[78] *See, e.g.,* Singer, *supra* note __ (quoting Tony Perkins of the Family Research Council).

I will not lengthen this paper unnecessarily by canvassing all of the views on the Religious Test Clause that were aired during the Roberts nomination. But one example is worth special notice, and that is a letter issued by the Becket Fund for Religious Liberty, a Washington-based religious liberty litigation group.[79] The letter, which was also printed in the *New York Times*, argued that while the days of explicit religious tests might be behind us, "many are urging the United States Senate to apply a subtler form of religious test in the confirmation process, one that would serve to disqualify fervent believers."[80] It said that it was "appalled by the misuse of religion some are urging on the United States Senate."[81] And it added that "a decision to disqualify a nominee based on his or her religion still violates Article VI, and thus the Senator's oath of office."[82] It then threatened to file an ethics complaint against any Senator who, in the confirmation process, "uses religion as a disqualification for federal office."[83] The conclusion of the letter is worth citing in substantial part:

> 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. Then too, the rare nominee whose record provides specific factual evidence of past religious discrimination may be questioned about that evidence. But using fervent religious faith, of any tradition, as itself a disqualification for public office is unconstitutional.[84]

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79 *See* Kevin J. "Seamus" Hasson, Chairman, Becket Fund for Religious Liberty, *Religion and Senate Confirmation: An open letter to U.S. Senators from the Becket Fund for Religious Liberty*, Sept. 6, 2005, available at http://www.becketfund.org/files/c5222.pdf.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

I will return to the Becket Fund's letter later in my discussion.

In sum, the Roberts nomination is noteworthy for the unusually vocal and expansive discussion of religion and its potentially disqualifying role in the nomination of a Supreme Court Justice. I can think of no other High Court nomination up to that point in which religion was so openly and frequently, if clumsily, discussed, and certainly none other in which the participants in the debate so frequently referred to the strictures of the Religious Test Clause.

The Roberts nomination should be no less noteworthy for the fact that, as this discussion indicates, most of the discussion of Roberts's Catholic faith as a potential disqualification was not on the part of his opponents, but rather was part of a preemptive move on the part of his supporters to ensure that religion did *not* feature in the nomination. That move, of course, had the dual effect of both placing Roberts's faith front and center in the confirmation process, and accusing Democratic Senators before they had actually done anything. I do not mean to accuse those Senators or outside groups of strategically, or even cynically, using religion as a political ploy in the management of the nomination, although certainly that is a plausible reading of the evidence. There is, after all, no doubt that the Pryor nomination had primed the expectations of many interest groups that Roberts's Catholicism would be used against him – although, again, the responsibility for that appears to be shared between both supporters and opponents of those earlier nominees. In any event, the Roberts nomination now stands as one of the most prominent examples of the discussion of religion as a potentially disqualifying factor for a Supreme Court nominee.

D. Harriet Miers: Religion As (Unsuccessful) Qualification

Of course, Roberts ultimately sailed through the Senate.[85] Less than a week later, President Bush named Harriet Miers, his White House counsel, as his choice to replace Sandra Day O'Connor on the Supreme Court.[86] Almost as quickly, religion and the Religious Test Clause again became a key subject of the public conversation. This time, however, there were two significant differences: religion this time featured as a *qualification* for office rather than a disqualification, and its invocation was monumentally unsuccessful.

Miers, a former Catholic, converted to an evangelical form of Christianity in her mid-30's, and by all accounts has been significantly influenced by her faith.[87] And the Bush Administration was not shy about promoting Miers's faith in advancing her nomination. The process started even before the announcement of her nomination when, according to news reports, the White House sought the advance approval of religious leaders with standing in the conservative movement before going public with its pick of Miers.[88] Once Miers's nomination began running into resistance among conservative groups – that is to say, almost immediately – the Bush Administration deliberately sought to "regain the upper hand by focusing on the nominee's conversion to evangelical Christianity."[89] It is worth noting, though, that according to one account the promotion of Miers's conversion story had less to do with the view that Miers's faith was a qualification for service on the Court, and more to do with the hope that by stirring up liberal

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[85] *See* Tom Brune, *Hail to the new chief*, Newsday, Sept. 30, 2005, at A3 (noting Roberts's confirmation by the Senate on September 29, 2005, by a vote of 78-22).

[86] *See* Elizabeth Bumiller, *Bush Names Counsel as Choice for Supreme Court*, N.Y. Times, Oct. 4, 2005, at A1.

[87] *See, e.g.,* Edward Wyatt & Simon Romero, *In Midcareer, A Turn to Faith to Fill a Void*, N.Y. Times, Oct. 5, 2005, at A1.

[88] *See, e.g.,* David D. Kirkpatrick, *Conservatives Are Wary Over President's Selection*, N.Y. Times, Oct. 4, 2005, at A24.

[89] Terry M. Neal, *Political Capital Running on Law*, washingtonpost.com, Oct. 7. 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/06/AR2005100600571_pf.html.

opposition, the White House might galvanize conservative support for the nominee.[90]

The administration's outreach strategy yielded some positive early results. The televangelist Pat Robertson used his perch on the "700 Club" to threaten conservative senators who voted against Miers with retaliation if they voted "against a Christian who is a conservative picked by a conservative president."[91] Marvin Olasky, a popular conservative Christian writer, explained his support for Miers by writing, "Maybe it's the judicial implications of her evangelical faith, unseen on the court in recent decades. . . . Friends who know Miers well testify to her internal compass that includes a needle pointed toward Christ."[92] And Jay Sekulow, a well-known litigator for conservative religious causes, said on Robertson's show that the Miers nomination was "a big opportunity for those of us who have a conviction, that share an evangelical faith in Christianity, to see someone with our positions put on the court."[93]

Perhaps most famous was the supportive testimony of James Dobson, chairman of Focus on the Family, who told Brit Hume of Fox News, "We know people who have known her for 20, 25 years, and they would vouch for her . . . . I know the church that she goes to and I know the people who go to church with her."[94] In announcing his support of

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[90] *See id.* (quoting a "Republican strategist involved in the front lines of the battle for the Miers nomination" as saying, "Conservatives love a fight with liberals. . . . And one of the things liberals are scared to death of is organized religion. And Harriet Miers is a born-again Christian. When liberal groups and others begin to read about her affirming the Texas sodomy law, contributing to pro-life groups and her religious faith, they're going to go crazy.").

[91] Charlie Savage, *Bush, Promoting Miers, Invokes Her Faith*, Boston Globe, Oct. 13, 2005, at A1.

[92] E.J. Dionne, *Faith-Based Hypocrisy*, Wash. Post, Oct. 7, 2005, at A23. Olasky's reference to "friends who know Miers well" may include the testimony of her friend Nathan Hecht, a member of the Texas Supreme Court, who reportedly was put by the White House "on at least one conference call with influential social conservative organizers" to describe her faith. *Id.*

[93] *Id.*

[94] *Id.*

the nomination, Dobson added in talking to reporters, "Some of what I know I am not at liberty to talk about."[95] Dobson later clarified that some of the information he was holding back came from a telephone call with President Bush's advisor Karl Rove, who had told him other potential picks had declined to be considered for the nomination.[96] He added:

> What [else] did Karl Rove say to me that I knew on Monday that I couldn't reveal? Well, it's what we all know now, that Harriet Miers is an Evangelical Christian, that she is from a very conservative church, which is almost universally pro-life, that she had taken on the American Bar Association on the issue of abortion and fought for a policy that would not be supportive of abortion, that she had been a member of the Texas Right to Life.[97]

Pressed on the extent to which the White House had been using Miers's religious faith as a selling point in talking with supporters, President Bush admitted that Miers's faith had been part of an "outreach effort" to conservatives, but described the effort in fairly innocuous terms, saying, "People ask me why I picked Harriet Miers. . . . They want to know Harriet Miers's background, they want to know as much as they possibly can before they form opinions. And part of Harriet Miers's life is her religion."[98] In effect, the President suggested that while Miers's faith was relevant to an understanding of the nominee as a whole person, he had not chosen her specifically because of her religion and was not championing her faith as such. That assurance might, however, be treated skeptically in light of the President's earlier statement that he intended to

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95 Kirkpatrick, *supra* note __.

96 *See* Family.org, *Transcript of Dobson Comments on Miers/Rove Available Here*, Oct. 11, 2005, available at http://www.family.org/welcome/press/a0038214.cfm.

97 *Id.*; *see also* Terry Eastland, *A Faith-Based Nomination*, Weekly Standard, Oct. 17. 2005 (noting that an aide to Dobson told him "[t]here are some things we learned about her Christian commitment").

98 Kirkpatrick, *supra* note __.

nominate judges who understood that "rights were derived from God."[99]

The President's assurances notwithstanding, most observers – including those who usually supported the Administration – concluded that the White House was indeed selling Miers as a nominee through her religious faith, and objected strenuously.[100] Jan LaRue, the head of the anti-abortion women's group Concerned Women for America, wrote to her organization's members that the actions of the White House and its representatives and supporters was "patronizing and hypocritical."[101] She added that "most of those emphasizing Miss Miers's faith have [previously] resisted any attempt to impose a religious test on any person seeking public office. The Constitution forbids it."[102] The director of another anti-abortion group, the Christian Defense Coalition, told a reporter, "Groups and leaders cannot say religion is off-limits during the Roberts confirmation, and then promote religion during the Miers confirmation for the sole purpose of political gain."[103] Cal Thomas, a conservative newspaper columnist, wrote that the President's use of Miers's faith was troubling given that supporters of the Roberts nomination had already "invoked

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[99] Calvert, *supra* note __, at 1137. The President's statement came in the wake of the Ninth Circuit decision holding that it was unconstitutional to require school children to use the words "under God" in the Pledge of Allegiance. *See Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002), *rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

[100] I cannot say whether or not all of those protests were sincerely motivated by the belief that the administration was wrong to promote Miers on the basis of her faith. Another possibility is that the administration's use of religion to promote Miers merely provided a convenient hook to attack the nomination by individuals or groups who were, by this time, already predisposed to oppose Miers as a nominee to the Supreme Court, fearing that she would not be sufficiently conservative on various issues, or sufficiently skilled on the Court. Of course, some combination of both factors could have played a part in the criticism of the President's use of religion to promote Miers.

[101] Savage, *supra* note __.

[102] Savage, *supra* note __.

[103] *Id.*

the constitutional clause prohibiting a 'religious test' for high office."[104]

Similarly, Tony Perkins of the Family Research Council, who had been out front in criticizing (or anticipating) the use of religion in the Roberts nomination, said, "There should be no religious test. We have argued against those on the Senate that try to disqualify people based on religion, and on the same hand I don't think it should be used to qualify someone."[105] E.J. Dionne, focusing on those individuals who had supported Miers while invoking her faith, suggested that they would "play religion up or down, whichever helps them most in a political fight."[106]

Again, this sampling must stand in for a far greater volume of discussion and criticism of the use of religion by the Bush Administration in championing the cause of the Miers nomination. It might be worthwhile for later purposes to quote just one last player, Senator Richard Durbin of Illinois, who had been criticized for discussing the faith of nominees Pryor and Roberts. Interviewed during the fuss over Miers, Durbin said that asking a nominee about her religion "is a legitimate inquiry as long as it doesn't go too far and too deep. Each of us respect a person for their religious beliefs and it should never be a disqualification for office."[107]

In sum, the Miers nomination stands as a fairly startling example of the use of religion and religious rhetoric in the context of a judicial nomination that serves as an almost exact mirror-image of its use in the Roberts nomination. While Roberts's faith was treated – or, more accurately, while supporters of his nomination warned that it *would* be treated – as a potential disqualifying factor in his nomination, Miers's faith was treated by the Administration, mostly in behind-the-scenes discussions but also somewhat

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[104] Cal Thomas, *Faith and Harriet Miers*, Buffalo News, Oct. 17, 2005, at A11.

[105] MSNBC, *Hardball*, Oct. 12, 2005.

[106] Dionne, *supra* note __.

[107] CNN, *The Situation Room*, Oct. 5, 2005.

openly, as a qualifying factor. While Roberts's faith was raised by his opponents – or, more accurately, while Roberts's supporters warned that his opponents *would* raise the issue of his religious faith – Miers's faith was retailed by her supporters. In either case, the result was the same: the nominee's faith was quickly declared off-limits to public discussion.

E. Samuel Alito: Denouement

By contrast to the Roberts and Miers nomination, religion was largely absent from public discussion of the subsequent and successful nomination of Samuel Alito to replace Miers as President Bush's nominee to replace Sandra Day O'Connor. To the extent Alito's that Catholic faith was discussed, it was primarily in the context of the observation that with his confirmation, a five-member majority of the Court would now be comprised of Roman Catholics.[108] As reporters noted, the response to this prospect was largely a "collective ho-hum."[109] This fact might suggest the extraordinary degree to which Catholic Americans have become viewed as a fully integrated part of American society, as Rick Garnett has suggested.[110]

It is also possible that, as one scholar of the Supreme Court nomination process suggested, "the religion factor no longer matters" in the process.[111] But this statement is surely overstated, given the degree to which religion had played a significant role in the nominations that had occurred immediately before Alito's own nomination. Still, the fact that religion largely dropped out of sight in the course of the Alito nomination might suggest that the religion issue, and by extension the invocation of the Religious Test Clause, has lost political traction as a useful

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[108] *See, e.g.,* Lynette Clemetson, *Alito Could Be 5th Catholic on Current Supreme Court*, N.Y. Times, Oct. 31, 2005, at A23.

[109] Jeff Diamant, *A Catholic-majority court would be a moot issue*, Newark Star-Ledger, Nov. 4, 2005, at 13.

[110] Tom Baxter, *Alito would form Catholic majority*, Atlanta J.-Const., Nov. 1, 2005, at A10 (quoting Prof. Rick Garnett).

[111] Clemetson, *supra* note __ (quoting Professor Barbara A. Perry).

argument in public debate over judicial nominations, at least for the time being.

In itself, this is a significant fact. It suggests that to the extent one is concerned about the use of religion as either a qualifying or a disqualifying factor in judicial nominations, one may be reassured that the political costs involved in raising (or using) religion in a judicial nomination, whether in support of or in opposition to a nominee, mean that the problem is self-limiting. Nevertheless, it should be evident by now that it is unlikely that we have seen the last invocation of religion to support or oppose a nominee. It is thus equally unlikely that we have seen the last invocation of the Religious Test Clause. In particular, as long as either abortion or church-state issues loom large on the American judicial and political agenda, religion will continue to be an important factor in how the public views nominees and, perhaps, a useful tool for those who seek to advance or thwart a particular nominee. Accordingly, it is still worth considering precisely how religion may be used in the course of a judicial nomination, whether as a matter of constitutional law or otherwise.

III. DOES THE RELIGIOUS TEST CLAUSE LIMIT THE USE OF RELIGION BY SUPPORTERS OR OPPONENTS OF JUDICIAL NOMINEES? OR, THE PAST AND PRESENT OF THE RELIGIOUS TEST CLAUSE

A. Prelude: The "Penumbral" Reading of the Religious Test Clause

As this recent history suggests, a number of individuals, including elected officials, academics, representatives of interest groups, and commentators, have turned to the Religious Test Clause in the wake of the increased use of religion and religious rhetoric in judicial nominations, arguing that the Clause prohibits some or all uses of religion either in nominating or in questioning candidates for the federal bench. Before we ask whether they are right in their reading of the Religious Test Clause,

however, we must first flesh out exactly what sorts of arguments have been made in favor of this reading of the constitutional language.

Perhaps the most fully developed argument in favor of a reading of the Religious Test Clause to prohibit Senators from inquiring into a judicial nominee's religion is that of J. Gregory Sidak, who wrote presciently before either the recent series of Supreme Court nominations or the spate of lower federal court nominations that gave rise to the profusion of contemporary discussions of religious tests.[112] Although Sidak's argument is not perfectly clear, its basic outlines are. His argument effectively begins with the proposition that the Religious Test Clause, at its core, "guarantee[s] that a nominee for national office [will] not be made to *divulge* or disavow his understanding of God."[113]

Whether the Religious Test Clause in fact prohibits Senators from asking judicial nominees to "divulge" their faith is a more difficult question than Sidak's blunt statement would suggest. In any event, even that description of the paradigmatic rule of the Religious Test Clause is not enough to suit his purpose of ensuring that judicial nominees, and specifically Catholic nominees, not be questioned on whether their adherence to Church teachings on abortion would preclude them from voting to uphold abortion rights.[114] So Sidak makes a crucial logical leap, arguing that *any* questioning of a nominee on the subject of his religious beliefs – for instance, questioning a nominee on "his religious beliefs on abortion"[115] – violates the Religious Test Clause. Responding to Senator Hatch's one-time suggestion that it is possible to question a nominee on conflicts between his faith and his judicial duty "in a sophisticated way that would be less offensive" than the crude questions raised by Governor Wilder in the wake of the Thomas nomination,[116] Sidak responds that "more

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112 *See* Sidak, *supra* note __.
113 *Id.* at 49 (emphasis added).
114 *See id.* at 25.
115 *Id.* at 49.
116 *Id.* at 10-11.

'sophisticated' and 'less offensive' religious testing of Supreme Court nominees would draw the Senate more deeply into precisely the territory that the Religious Test Clause forbade the government to enter."[117]

Sidak offers a host of strictly pragmatic reasons why it might not be wise or useful to question nominees on either their religious beliefs or the intensity of their beliefs.[118] He argues that such questions violate the presumption that judges can set aside their personal beliefs in ruling on the law; that it is both impractical and improper to dig into such issues; that such scrutiny will only lead to an enforced homogeneity of religious belief among office-seekers; and that the divide between religion and faith is such that it would be "specious and self-important for those in political life to scrutinize a Supreme Court nominee's adherence to religious doctrines according to principles of rational human thought."[119] I do not mean to criticize these arguments, although later in this article I will explore the possibility that we might come up with a set of principles that could lead to more thoughtful discussions of religion in the context of judicial nominations. But it is important to note that Sidak does not raise these arguments on behalf of the view that Senators *ought* not question nominees on any aspect of their faith. Rather, he deploys them to support an expansive view of the Religious Test Clause as *prohibiting* virtually any mention of religion in questioning a judicial nominee. His argument is not simply that, as a practical matter, "any theologically rigorous testing of a Supreme Court nominee by the Senate would be intractable, if not excruciating."[120] It is that "[t]he Framers wisely foreclosed the possibility entirely."[121]

Similar arguments for a broad reading of the Religious Test Clause have been raised by a host of other serious writers, in addition to the more casual efforts to extend the scope of the Clause that arose in the public

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117 *Id.* at 24.
118 *See id.* at 33-40.
119 *Id.* at 39.
120 *Id.* at 50.
121 *Id.*

discussion of religion during the lower federal court and Supreme Court nominations that I have already recounted. For example, Professor Stephen Presser argued in the wake of the Roberts nomination that the Religious Test Clause "reflects the belief of the framers that one's religion is a matter between one's God and one's self, and should not play a role in determining suitability for public office."[122] While he conceded that "[i]t is legitimate for the Senate to explore with Judge Roberts his philosophy of judging, and perhaps even his beliefs about the connection between law and morality,"[123] he argued that any suggestion that Roberts's adherence to any particular faith "is a disqualification for office would be to embrace, *at least analogously*, the evil sought to be prevented by the Constitutional prohibition of religious tests."[124] Accordingly, religious questions ought to be utterly "off-limits" for any judicial or other federal nominee.[125]

Likewise, Senator John Cornyn has argued that the Religious Test Clause prohibits Senators from questioning or opposing judicial nominees on the basis of their "deeply held personal beliefs,"[126] religious or otherwise, on issues such as abortion, the death penalty, or indeed any other issue.[127] He has argued, in short, not just that it is wrong to require a nominee to divulge or disavow his religious faith, but that a nominee's religious faith, or any beliefs that follow from it, can never be relevant to a consideration of whether to oppose a nominee; *any* "use [of] religious beliefs against" a nominee is prohibited, in his view.[128]

The Becket Fund, whose letter to the members of the United States Senate I quoted from at length above, takes a similarly expansive view. Like Sidak, it argues that the Religious Test Clause does not simply prohibit core

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[122] Presser & Rice, *supra* note __.

[123] *Id.*

[124] *Id.* (emphasis added).

[125] *Id.*

[126] Cornyn, *supra* note __, at 16.

[127] *See id.* at 19.

[128] *Id.*

instances of religious tests. Rather, it extends further to bar "subtler form[s] of religious test[s]" that "would serve to disqualify fervent believers."[129] In its view, any use of "fervent religious faith" as "a disqualification for public office is unconstitutional."[130] Given the context in which this letter was issued – immediately following the Roberts nomination, and in the wake of the debate over the use of religion in the confirmation battles over Judge Pryor and others – it is difficult to read this letter as referring only to Senators' demands that a nominee, under oath, divulge or disavow his faith. It seems clear that the Fund meant what it said when it referred to "subtler form[s] of religious test[s]": that it meant to refer to the possibility that a Senator might object to a nominee on the grounds that his deeply held religious views made it impossible to fulfill his judicial office.

In short, a variety of individuals have argued that the Religious Test Clause must be read expansively.[131] If we agree that the Clause bars clear examples of religious tests, they argue, then surely more subtle questioning designed to smoke out a nominee's religious beliefs, or to examine whether a nominee's beliefs affect his views on substantive issues before the courts, or even to explore the relationship between his beliefs and his ability to rule on the cases before him, must also violate the Religious Test Clause. Thus, Sidak quickly moves beyond the view that the Religious Test Clause simply prohibits requiring a nominee to disavow his religion. He argues that "the demand that a judicial nominee explain his religious beliefs on abortion to the Senate is," at worse, "a call to discard the protections of the Religious Test Clause," and says that, "by virtue of his oath to support the Constitution, each member of the Senate has a duty to respect that document's guaranty that a nominee's religious beliefs will play no part whatsoever in the

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[129] Hasson, *supra* note __.

[130] *Id.*

[131] *See, e.g.,* John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 349 (1998) ("[W]e should guard against understanding the religious test clause too narrowly").

evaluation of his qualifications to sit on the Supreme Court."[132]

We might describe such arguments as counseling a "penumbral" reading of the Religious Test Clause. Like Justice Douglas in *Griswold v. Connecticut*,[133] these advocates argue that the Religious Test Clause cannot be understood simply on its terms, for if read that way it would hardly be worth the ink. Instead, we must read the provision in light of the "emanations from [that guarantee] that help give [it] life and substance."[134] We must read it not only on its terms but, as Professor Presser suggests, as extending to those cases that seem "analogously" to present the same kinds of perils that the core terms of the provision were designed to prevent.[135]

We are thus left with two central questions: What is the operational scope of the Religious Test Clause? And how does it affect the proper scope of questioning or voting by Senators, or the choice of nomination and the means of presenting a nominee by the President? In other words, to what conduct, whether by the person choosing a judicial nominee (the President) or by the person scrutinizing and voting on that nominee (the members of the Senate), does the Religious Test Clause extend? And does it serve equally to preclude the use of religion or religiously derived beliefs as a *qualification* for judicial or other federal office, and the use of religion or religiously derived beliefs as a *disqualification* for the same office?

It would appear, from the debate this nation has just experienced, that many of the most prominent voices in the debate believe that the scope of the Clause should be wide indeed, and that it should apply equally to the use of religion as a qualification or as a disqualification. That is, the Senate would have been wrong to consider nominee Roberts's religious views in any way – indeed, to discuss them at all;

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[132] Sidak, *supra* note __, at 49-50.
[133] 381 U.S. 479 (1965).
[134] *Id.* at 484.
[135] Presser & Rice, *supra* note __.

and the President was equally wrong to invoke nominee Miers's faith in promoting her as a worthy choice for the Supreme Court.[136]

Whether recent advocates of that view have taken that position out of principle or for reasons of political convenience, the argument at least has the seeming virtue of consistency. But is that a sufficient argument for the complete prohibition of discussions of religion in the context of judicial nominations, whether in supporting or in opposing them? In short, even if the position is consistent, is it *correct*? Does the Religious Test Clause in fact demand a rule of silence where religion is concerned in considering the fitness of nominees for judicial or other federal offices? To answer that question, we must examine the history of the drafting and ratification of the Religious Test Clause.

B. Four Central Facets of the History of the Religious Test Clause

As Gerard Bradley has noted in his seminal discussion of the Religious Test Clause, the drafting history of the provision is scanty.[137] Few people advocated such a provision in the period before the Constitutional Convention convened in Philadelphia in 1787.[138] It was not until well into the deliberations of the Convention that anyone broached the subject. That occurred on August 20, when Charles Pinckney proposed a variety of provisions that included the statement that "[n]o religious test or qualification shall ever be annexed to any oath of office under the authority of the U.S."[139] Pinckney's proposals

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[136] *See, e.g.,* MSNBC, *Harball*, *supra* note __ (quoting Tony Perkins, Family Research Council) ("[Religion] [s]hould not be a qualifying factor. there should be no religious test. We have argued against those on the Senate that try to disqualify people based on religion, and on the same hand I don't think it should be used to qualify someone.").

[137] *See* Bradley, *supra* note __, at 691 ("There was much discussion of article VI among those who inserted it into the Constitution, but not until *after* they adjourned.").

[138] *See* Dreisbach, *supra* note __, at 269.

[139] 2 *The Records of the Federal Convention of 1787*, at 335 (Max Farrand ed., rev. ed. 1966).

were referred to a committee without any recorded comment, and there is no record of any action on Pinckney's plan.[140] But the issue arose again on August 30, when the Convention agreed to add the words "or affirmation" to the oath required of all government officers in what would become clause 3 of Article VI.[141] Pinckney then rose to move the addition of the words, "but no religious test shall ever be required as a qualification to any office or public trust under the authority of the U[nited] States."[142]

Pinckney's proposal occasioned little debate. Roger Sherman of Connecticut spoke against the proposed language, arguing that it was "unnecessary, the prevailing liberality being a sufficient security [against] such tests."[143] Gouverneur Morris of Pennsylvania and General Charles Cotesworth Pinckney of South Carolina both spoke in its favor.[144] The motion was agreed to without dissent,[145] and the convention swiftly proceeded to approve Article VI in its entirety, with only North Carolina dissenting, and the delegates of either one or two other states offering divided votes.[146] And that, as far as the convention itself was concerned, was that.[147]

While the convention itself hardly troubled itself with the Religious Test Clause, the provision occasioned considerable debate in the post-convention period, as the

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[140] *See* Bradley, *supra* note __, at 692; Dreisbach, *supra* note __, at 270.

[141] *See* Bradley, *supra* note __, at 602; Dreisbach, *supra* note __, at 270-71.

[142] 2 Farrand, *supra* note __, at 468.

[143] *Id.*

[144] *See* Dreisbach, *supra* note __, at 271 (citing 5 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution*, at 498 (Jonathan Elliot, ed., 2nd ed. 1859)).

[145] 2 Farrand, *supra* note __, at 468.

[146] *Id.*; *see also id.* at 468 n.26 (observing that Madison's notes of the convention record Maryland as casting a divided vote, while the *Convention Journal* also recorded Connecticut as divided on the question).

[147] *See* Bradley, *supra* note __, at 693.

states debated the issue in their ratifying conventions.[148] Most of the efforts to mine this history for some interpretive clues on the meaning of the Religious Test Clause have focused on two questions: First, *why* did the arguments of the federalists in favor of the Religious Test Clause succeed in the face of opposition to the Clause raised by its antifederalist opponents. In other words, what were the successful arguments in favor of the Clause? Second, what do these successful arguments reveal about the ultimate implication of the Religious Test Clause for broader debates about church-state relations in the United States?

The scholarly treatments of these questions have come up with a variety of answers. Gerard Bradley, who has written perhaps the most distinguished exegesis of the Religious Test Clause, ultimately offers a pluralistic account of the Clause, arguing that the provision ultimately passed not because of any deeply substantive vision of the Clause as prohibiting the consideration of religion in general, or seeking to relegate religion solely to the private sphere. Rather, those who engaged in combat over the value of the provision agreed that the best way to guarantee religious liberty was to ensure equality of sects. The best guarantee of the flourishing of any one sect was to guarantee that a multiplicity of sects could flourish and counteract one another.[149] Bradley ties his reading of Article VI to the broader question of the meaning of the Religion Clauses of the First Amendment, arguing that just as the Religious Test Clause "guarantees sect-equality in public office holding," so the Establishment Clause guarantees sect equality "more broadly"[150] – and that is *all* it does. The Religious Test Clause and the Religion Clauses erect a perpetual motion machine, with the motive engine being the competition among a multitude of religious sects, but they do not require the Supreme Court to enforce visions of neutrality or other substantive goods under the Establishment Clause once the machine is underway.[151]

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[148] For thorough discussion of these debates, see, *e.g.,* Bradley, *supra* note __, at 694-711; Dreisbach, *supra* note __, at 273-84.

[149] *See* Bradley, *supra* note __, at 703.

[150] *Id.* at 712.

[151] *See generally id.* at 724-47.

Similarly, Daniel Dreisbach argues that sect equality was at the heart of the Religious Test Clause.[152] Further, he argues that the best understanding of the Clause's ratification has little to do with religion, and much more to do with federalism. The framers and ratifiers of the Constitution ultimately agreed to deny the federal government the power to impose religious tests because they believed that "religion was a matter best left to individual citizens and the respective state governments,"[153] which in turn would remain free to impose religious tests as a condition for accession to public office. And Robert Natelson has gone a step further, arguing that the Clause's ratifiers would not have thought that it would prevent the Constitution from effectively limiting access to public office to theists, a limitation that he argues is imposed by the requirement in the remainder of Article VI, clause 3, that office-holders take a constitutional oath.[154] Like Bradley, he suggests that this is consistent with a reading of the history of the Establishment Clause itself, which he views as protecting only the rights of those who held some theistic belief.[155]

Some scholars have drawn conclusions that are almost directly contrary to those drawn by Bradley and Dreisbach, and far more separationist in their orientation to church-state issues. For example, James Wood takes the Religious Test Clause as evidence that its ratifiers viewed "the new Republic as a secular state,"[156] and argues on this basis that the resurgence of religion as a subject and a credential in political debate "is contrary to both the letter and the spirit of Article VI of the Constitution of the United

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[152] *See* Dreisbach, *supra* note __, at 294.

[153] *Id.*

[154] *See* Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm. & Mary Bill of Rts. J. 73, 101-12 (2005).

[155] *See id.* at 138. Professor Natelson is careful to separate his reading of the Establishment Clause's original meaning from his views of how the Clause should be read today in light of the vastly increased conditions of religious pluralism in America. *See id.* at 81, 138-39.

[156] Wood, *supra* note __, at 206.

States."[157] He echoes William Lee Miller, whose own history of the discussions concerning religion in the framing and ratification of the Constitution concludes that "in the framing of Article VI . . . the new nation was electing to be nonreligious in its civil life."[158] Others have argued that the framers taught us through the Religious Test Clause that "religion and politics . . . should be rigorously separated."[159] And Isaac Kramnick and R. Laurence Moore have outflanked even these writers, citing the Religious Test Clause as evidence that the founding generation intended a secular order characterized by the title of their book: *The Godless Constitution*.[160]

I agree that the history of the Religious Test Clause can teach us much about its meaning. Perhaps it can teach us something about the operation of the Religion Clauses as well, although that question is beyond the scope of this paper.[161] But I want to take a different approach. Rather

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157 *Id.* at 208.

158 William Lee Miller, *The First Liberty: Religion and the American Republic* 108-09 (1986).

159 George Anastaplo, *The Constitution of 1787: A Commentary* 207 (1989) (describing such views as common, while disagreeing with them). These views at least have a venerable provenance. *See* Joseph Story, *Commentaries on the Constitution* § 1841 (1833) (arguing that the Religious Test Clause "cut[s] off forever every pretense of any alliance between church and state in the national government") (quoted in Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 850 (1985-86)).

160 Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (1996); *see id.* at 29-30 (discussing the Religious Test Clause).

161 Because I have been asked, when presenting this paper, whether the reading of the Religious Test Clause I offer here has any implications for a sound reading of the Establishment Clause, perhaps a brief word in response is in order. I am not sure my reading of the Religious Test Clause does, in fact, carry any implications for a sound reading of either the Establishment Clause or the Free Exercise Clause. In particular, since the Establishment Clause has been at the root of the questions I've received, it seems to me that the narrow reading of the Test Clause I offer here – a clause that, as I explain below, is closely related to the remainder of the text of Article VI, clause 3 – does not offer any *strong* clues about whether the Establishment Clause itself must be read broadly or narrowly. If, as I argue, the Test Clause narrowly bars the formal imposition of test clauses, that conclusion tells us little about how and when government can aid or invoke religion in other circumstances. It is

than focus on *why* the Clause succeeded in the ratification process, I want to ask, simply, *what* the Clause *does*. What, if anything, do the text and history of the Religious Test Clause tell us about its actual operative scope? Professor Bradley, arguing that Article VI and the Religious Test Clause instituted a self-governing machine of religious pluralism, suggests that "it helps to think of article VI as function, not meaning."[162] For this reason, he and the others focus on the "why" and not the "what" of the Religious Test Clause, on why it passed rather than what it does. I propose to examine the Religious Test Clause by narrowing my focus to its narrow "meaning" and not its broader "function" in the Constitution – to focus only on what it does and, for the most part, not on what role it plays in the larger constitutional firmament. Despite this narrow focus, it should become evident that thinking about what the Religious Test Clause actually does should tell us something about the broader issue of religion, division, and the Constitution.

To understand the precise operative meaning of the Religious Test Clause, it is necessary to keep in mind four central facets of the history of the Clause, each of which are ultimately related to the other. First, we must begin where virtually everyone who studies the Religious Test Clause, and those few courts that have addressed it,[163] does: with the historical evil that the framers and ratifiers of the

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possible that the Religious Test Clause could bar certain formal uses of religion in the context of federal office-holding, while leaving room for argument on the separate question of what sorts of formal actions by government – formal invocations, endorsements, aid to religion, or other actions – are barred by the Establishment Clause. Although it is true that Professors Bradley and Dreisbach suggest that the Religious Test Clause and the Establishment Clause are both provisions of limited jurisdiction, and for the same historical reasons, *see* infra notes __-__ and accompanying text, my approach to the historical analysis of the Religious Test Clause is different here, and I take no final position on that question.

[162] Bradley, *supra* note __, at 678.

[163] *See, e.g., Torcasco v. Watkins*, 367 U.S. 488, 490 (1961) ("[I]t was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way").

Constitution surely held fresh in their memory as they met in Philadelphia and in the states to debate the proposed national charter. This was the use of religious test oaths to restrict the assumption of civil office in England to only those whose loyalty was to the established Church of England, and specifically to restrict Catholics and a wide range of Protestant dissenters from participating in the councils of the state.[164] It is important to note how these tests operated: not as general inquiries into the potential office-holder's faith, but as absolute requirements that the office-holder *swear to* a set of religious doctrines. Thus, as Michael McConnell writes,

> The Test and Corporation Acts required that, in order to hold civil, military, academic, or municipal office, it was necessary to have taken communion in the established church within a certain period and to swear an oath against belief in transsubstantiation, the Catholic doctrine that the bread and wine of communion are transformed into the body and blood of Christ. The right to vote for members of Parliament was limited to those who would take an oath forswearing the ecclesiastical or spiritual authority of any foreign prince or prelate, the belief in transsubstantiation, or the veneration of Mary or the saints.[165]

Put simply, the path to public office in England was barred to any who would not be willing to make, *under oath*, "positive assertions of denominational affiliation or

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[164] *See, e.g.,* Dreisbach, *supra* note __, at 263 n.8 (collecting sources discussing the history of test oaths in English law).

[165] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2176 (2003) (citing First Test Act, 1673, 25 Car. 2, c. 2 (Eng.); Second Test Act, 1678, 30 Car. 2, st. 2, c. 1 (Eng.); 6 Ann., c. 23 (1707) (Eng.)).

theological beliefs."[166] Similar tests were erected by other European powers.[167]

This was the historical example that many of the defenders of the Constitution had in mind when they argued that religious tests were "the greatest engine of tyranny in the world,"[168] the "foundation of persecutions in all countries."[169] In a pamphlet distributed in the fall of 1787, after the close of the Constitutional Convention, Tench Coxe compared the workings of Article VI and its Religious Test Clause with the experience of Italy, Spain, and Portugal, which barred Protestants from any "public trust," and England, in which every person "not of their established church, is incapable of holding an office."[170]

Professor Bradley argues that this line of argument by the federalists was "predictable, unimaginative, and presumably had little effect."[171] If one's concern is with *why* the Religious Test Clause ultimately won approval, that

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166 Calvert, *supra* note __, at 1145. It should be noted that these requirements were not always rigorously enforced, *see, e.g.,* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1065-66 (1996), although I do not think this fact would have blunted the sense of the founding generation that such tests were offensive.

167 *See* Calvert, *supra* note __, at 1145. I take no position on *why* these powers erected such tests. Certainly, as Joel Nichols has pointed out to me, the reason need not have been purely, or even primarily, religious in nature. Rather, the test oaths might have been simply a means for these states to resist the incursions of foreign and domestic *political* forces (including the Roman Catholic Church, which during this era was as much a temporal as a spiritual force). *See generally* Laycock, *supra* note __. Although this point offers a useful reminder that religious and political persecution were closely tied in the founding era, it does not affect my analysis in this paper – particularly since the test oaths still operated in large part through the *religious* force of oaths, see *infra* notes __-__ and accompanying text.

168 2 Elliot's Debates, *supra* note __, at 148 (Rev. Isaac Backus).

169 4 Elliot's Debates, *supra* note __, at 200 (Samuel Spencer).

170 Tench Coxe, *An Examination of the Constitution*, in 4 *The Founders' Constitution*, at 639 (Philip B. Kurland & Ralph Lerner eds., 1987).

171 Bradley, *supra* note __, at 707.

may be correct. But our concern here is different: it is with whether those who debated the Clause had in mind a core example of conduct that violated the proposed provision. The historical record suggests that, in England's test legislation, they clearly did. For present purposes, what is significant about these paradigmatic examples of obnoxious test legislation is how they operated: through the sanction of an *oath*, the office-holder was required to avow a specific set of religious beliefs, and effectively disclaim any others. Unlike the modern-day advocates of a penumbral reading of the Religious Test Clause, these test oaths did not trouble themselves with intensity of belief, or with the separation between one's faith and one's political office, for these questions simply were not relevant for their purposes. They simply and narrowly required, as an absolute condition, that the office-holder swear to the doctrines of the established church before entering into his office.

That leads us to the second important fact we must keep in mind in examining the history and meaning of the Religious Test Clause: the profound importance with which most of the members of the founding generation viewed oaths themselves.[172] As Michael Stokes Paulsen has observed, "oaths and extratemporal consequences for lying were taken very seriously indeed by the founding generation."[173] Oaths had "a profound, almost covenantal, significance for the framers – a significance that may be difficult for some fully to understand and appreciate today."[174]

The root of their importance lay in two aspects of the oath.[175] First, to swear an oath was a deeply significant act for religious reasons. It was, as one 19th Century writer

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[172] *See, e.g.,* Vasan Kesavan, *The Very Faithless Elector?*, 104 W. Va. L. Rev. 123, 136-37 (2001) (offering examples).

[173] Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1487 (1997); *see id.* at 1487 n.57 (collecting sources).

[174] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, Geo. L.J. 217, 257 (1994).

[175] For excellent discussions of the history and nature of the oath, see Helen Silving, *The Oath: I*, 68 Yale L.J. 1329 (1959); Helen Silving, *The Oath: II*, 68 Yale L.J. 1527 (1959).

observed, "truly a sacramentum, -- an outward and visible sign of the swearer's conviction of his responsibility to God."[176] Extratemporal punishment for falsely swearing an oath was *presumed*: the oath thus served "not to call the attention of God to man[,] but the attention of man to God – not to call on Him to punish the wrong-doer, but on man to remember that *He will*."[177] A would-be office-holder who thus swore to a set of religious beliefs that he did not hold understood that he held his soul and his self in his hands.[178] The founding generation understood this well.[179]

Second, the religious aspects of the oath, those aspects that made the swearing of a religious proposition a sacred matter, were buttressed by the founding generation's keenly felt sense of honor. As with the religious importance of oaths, the importance of honor to the founding generation may seem increasingly alien.[180] Nevertheless, scholars attempting to recreate the world of the founders as they experienced it have emphasized the degree to which

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[176] Francis S. Reilly, *Judicial Oaths*, Juridical Soc'y Papers XXI, at 440 (1850). *See also* Stephen L. Carter, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* 64 (2000) (observing that test oaths "had special force" in "the Christian tradition").

[177] Simon Greenleaf, *A treatise on the Law of Evidence* § 364(a) (16th ed. 1899) (quoted in Eric Andersen, *Three Degrees of Promising*, 2003 B.Y.U. L. Rev. 829, 848 n.64).

[178] *See* Robert Bolt, *A Man For All Seasons* 139 (1960).

[179] *See, e.g., The Federalist, No. 27*, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the "sanctity of an oath" taken according to the Oath or Affirmation Clause); Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 Geo. Wash. L. Rev. 666, 680 (1999) (quoting President Washington's Farewell Address, in which he asked, "[W]here is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1467 (1990) ("At a time when perjury prosecutions were unusual, extratemporal sanctions for telling falsehoods or reneging on commitments were thought indispensable to civil society").

[180] *See, e.g.,* Peter Berger, *On the Obsolescence of the Concept of Honor*, in *Liberalism and its Critics* 149 (Michael J. Sandel ed., 1984).

"[c]haracter was enormously important to the Founders."[181] The founding generation, operating in a system in which many of the traditional sources of social stability had been upset and in which there was no official aristocracy, relied substantially on a "culture of honor" as a source of social stability and a route to social standing and fame.[182] To falsely swear an oath would have thus have been to damage or even destroy one's own name and standing. Thus, whether for spiritual or reputational reasons, there is no doubt that those who debated the Religious Test Clause and the oath component of Article VI understood full well the gravity of the matter.[183]

Our focus thus far on the historical example provided by England and other European countries, and on the sacredness of the oath, might lead a casual observer to conclude that the modern-day penumbral interpreters of the Religious Test Clause are right. Surely, given this combination of factors, the provision must be read expansively to prohibit any hint of religious inquiry into the fitness of judicial or other nominees. But to these two central facts concerning the origins of the Religious Test Clause, we must add two more observations that may shift our perspective considerably.

The third fact we must take notice of, then, is simply that, notwithstanding the stark language of the Religious Test Clause and the background of English and European test oaths against which it arose, the founding generation was utterly comfortable with the use of religious tests. In the period leading up to the framing and ratification of the Constitution – and, indeed, long after – virtually every new

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[181] David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 Minn. L. Rev. 755, 836 (2001). For especially important studies of this issue, see Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (2001); Douglass Adair, *Fame and the Founding Fathers: Essays by Douglass Adair* (Trevor Colbourn ed., 1974).

[182] *See* Freeman, *supra* note __, at xv.

[183] For a discussion of the role of constitutional oaths in yoking government officials' sense of personal honor to their performance of their offices, see Akhil Reed Amar, *America's Constitution: A Biography* 62-63 (2005).

state, following longstanding tradition, imposed religious tests for office.[184] As Professor Bradley writes, "[R]eligious belief stood at the door of practically every state political office in 1787 America."[185]

Given the religious makeup of early America, it is no surprise that the religious tests that existed in the states at that time served primarily to restrict public office to those of the Protestant faith. Some of these tests were positively worded. For example, the New Jersey Constitution drafted in 1776 stated that only those persons "professing a belief in the faith of any Protestant sect" were fully entitled to hold public office.[186] Similarly, Georgia's 1777 Constitution required that all members of the legislature "be of the Protestant religion."[187] South Carolina's Constitution drafted in 1778 used identical language to restrict a variety of offices to Protestants.[188] New Hampshire took a similar approach.[189] Other states took a more circuitous route to the same end. For example, North Carolina's Constitution

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[184] It should be noted that, as in England, *see* Laycock, *supra* note __, the states did not always observe the strictures of these test oaths religiously, so to speak. *See, e.g.,* Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. Rev. 1693, 1722-34 (2005) (discussing the lack of vigorous enforcement of test oath provisions in post-Revolutionary Georgia); Menendez, *supra* note __, at 8, 11-12 (noting voters' disregard of test oaths in South Carolina, Maryland, and North Carolina). Again, I do not think the occasional non-enforcement of these provisions buries the broader point that the states were largely comfortable with the imposition of religious tests.

[185] Bradley, *supra* note __, at 679.

[186] New Jersey Constitution of 1776, XIX, in 5 *The Federal and State Constitutions, Colonial Charters, Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, at 2597-98 (Francis Newton Thorpe, ed., 1909) (cited in Dreisbach, *supra* note __, at 265).

[187] Georgia Constitution of 1777, art. VI, in 3 Thorpe, *supra* note __, at 779. For a rich discussion of the nature of religious liberty in colonial and early post-Revolutionary Georgia, see Nichols, *supra* note __.

[188] South Carolina Constitution of 1778, arts. III (governor, lieutentant-governor, and privy council), XII (senate), XIII (house of representatives), in 6 Thorpe, *supra* note __, at 3249-52.

[189] *See* Dreisbach, *supra* note __, at 267.

stated that those who "shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State," were ineligible for public office.[190] Other states – particularly those states whose citizens belonged to a variety of Christian denominations – were more liberal in nature, though perhaps not by our lights: they simply restricted office-holding privileges to those of *any* Christian faith,[191] or those who adhered more specifically to a Trinitarian brand of Christianity.[192]

In sum, only *one* state – Virginia, whose Statute for Establishing Religious Freedom, penned by Thomas Jefferson, made clear that the "civil capacities" of citizens should not be affected by "their opinion in matters of religion"[193] – clearly permitted citizens of any faith to hold public office at the time of the ratification of the Constitution.[194] Nor did this situation simply vanish after the ratification of Article VI and its Religious Test Clause. Although the new Constitution and its novel provision did

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190 North Carolina Constitution of 1776, XXXII, in 5 Thorpe, *supra* note __, at 2793. As Bradley notes, this wording did not stop Catholics from taking office in North Carolina, as at least two public officials did (including one who became governor), "on the theory that [they] merely did not affirm that truth." Bradley, *supra* note __, at 682.

191 *See, e.g.,* Maryland Constitution of 1776, Declaration of Rights, XXXV, in 3 Thorpe, *supra* note __, at 1690 (requiring office-holders to make a "declaration of a belief in the Christian religion").

192 *See, e.g.,* Delaware Constitution of 1776, art. XXII, in 1 Thorpe, *id.*, at 566 (requiring office-holders to swear an oath asserting belief in "God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore").

193 Dreisbach, *supra* note __, at 268.

194 As Bradley and Dreisbach note, with some disagreement between them and relying on different sources, New York's 1777 Constitution did not provide for a religious test, but state legislation enacted in 1788, and similar legislation enacted in 1801, did require office-holders to swear an oath abjuring allegiance to any "foreign prince, potentate and state, in all matters ecclesiastical as well as civil" – an oath that, if taken seriously, would have been taken to bar Catholics from public office. *See* Dreisbach, *supra* note __, at 268; Bradley, *supra* note __, at 682. Other states, such as Vermont and Massachusetts, carried similar anti-Catholic oath requirements. *See* Bradley, *id.*

appear to spur "a liberalizing trend in the states,"[195] that trend took some time to come to fruition, and some states actually reinstated religious tests for public office.[196] As late as 1961, the Supreme Court was faced with a Maryland law requiring those holding state office to declare their belief in the existence of God.[197] Perhaps tellingly, other restrictions specifically barring clergy from serving as public officers took still longer to disappear, and were part of some states' laws as late as the 1970's.[198] Taken together, these state constitutional provisions and statutes make clear that the founders believed in religious tests for office both before and after they ratified article VI."[199]

Note that, in describing Virginia's Statute for Establishing Religious Freedom, I wrote above that it permitted citizens "of any faith" to serve in public office.[200] It is just possible, on the basis of that statute's text, that it would have permitted citizens of any faith or of *no* faith to hold public office. But what was possible in theory was unthinkable in practice. This leads us to the fourth and final central facet of the history of the Religious Test Clause: its framers and ratifiers, and certainly the citizens of the several new states, thought it unimaginable that non-Christians should hold public office. Indeed, most of them would have agreed that even the thought of non-Protestants holding public office was disagreeable.[201] As to atheists, it would have been close to inconceivable to the founding generation that such men would even wish to attain public office, let alone that they should succeed in doing so.[202]

This sentiment in favor of the holding of public office only by those of sufficient moral character to merit such an honor and responsibility – moral character generally

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[195] Dreisbach, *supra* note __, at 272.
[196] *See id.* at 272-73.
[197] *See* Wood, *supra* note __, at 206.
[198] *See id.* at 205-06.
[199] Bradley, *supra* note __, at 683.
[200] *See* p. __, *supra.*
[201] *See* Bradley, *supra* note __, at 680.
[202] *See id.* at 697.

being taken to be synonymous with allegiance to a Christian sect[203] – can be found in a profusion of statements during the period in which the nation debated the Religious Test Clause, a selection of which will have to stand in here for he whole. It is evident, for instance, in Theophilus Parsons's speech in the Massachusetts ratification debate, in which he said, "No man can wish more ardently than I do that all of our public offices may be filled by men who fear God and hate wickedness."[204] It is found in the Reverend David Caldwell's statement to the North Carolina convention that "even those who do not regard religion, acknowledge that the Christian religion is best calculated, of all religions, to make good members of society, on account of its morality."[205] And it can be seen in the statement of Colonel William Jones to the Massachusetts convention that "if our public men were to be of those who had a good standing in the church, it would be happy for the United States, and that a person could not be a good man without being a good Christian."[206] In short, in "a society in which it was widely accepted that civil government depended upon religion and upon the morality it inculcated,"[207] it was self-evident that belief in God, whether or not one was willing so to swear in public, was a precondition of fitness for public office.[208]

This was, of course, a key ground of antifederalist opposition to the Constitution and its Religious Test Clause.[209] In keeping with the Christian demographics of the young nation, and the unthinkable nature of atheists attaining to public office, the prime concern was that the Clause would admit to the councils of state untrustworthy persons of a variety of alien faiths – or, in those states that

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[203] *See* Natelson, *supra* note __, at 103.

[204] 2 Elliot, *supra* note __, at 90 (cited in Dreisbach, *supra* note __, at 281 n.110).

[205] 4 Elliot, *id.*, at 199.

[206] 2 Elliot, *id.*, at 119.

[207] Philip Hamburger, *Separation of Church and State* 66 (2002); *cf.* Stephen L. Carter, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* 5 (2000) ("Politics needs morality, which means that politics needs religion").

[208] *See* Bradley, *supra* note __, at 697.

[209] *See, e.g.,* Dreisbach, *supra* note __, at 281-84; Natelson, *supra* note __, at 102-03.

were firmly Protestant, that it would admit to federal office Catholics whose first allegiance was to the will of that foreign potentate, the Pope. Countless state ratification debates rang with worries that the Clause would lead to the prospect that "a Turk, a Jew, a Rom[an] Catholic, and what is worse than all, a Universal[ist] may be President of the United States."[210] In the face of such opposition, the federalists offered a host of responses, such as the argument that a test oath was unnecessary to stave off this eventuality because "a good and pious people 'will choose for their rulers [only] men of known abilities, of known probities, of good moral characters."[211]

It is the difficulty of understanding how the federalists could have overcome such settled objections that has led other scholars, such as Professor Bradley, to ask why and how the federalists succeeded in arguing for the Religious Test Clause. But our purposes here are different. We can, for now, rest with the conclusion that whatever arguments won the day for the federalists, they surely had nothing to do with convincing the antifederalists that men of no religious faith, or the wrong faith, were fit for public office.[212] For both the proponents and the opponents of the

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[210] Bradley, *supra* note __, at 696 (quoting II C. Wingate, Life and Letters of Paine Wingate 487 (1930) (letter of Sullivan to Belknap on Feb. 26, 1788)); *see generally id.* at 696-97; Dreisbach, *supra* note __, at 283.

[211] Dreisbach, *id.* at 281 (quoting 2 Elliot, *supra* note __, at 119 (speech of Reverend Mr. Daniel Shute to the Massachusetts ratifying convention)).

[212] The failure fully to recognize this point may sometimes lead to amusing errors in our own day, as the recent invocation of the history of the Religious Test Clause in the context of the judicial nomination debates suggests. For example, during the initial debate over the Pryor nomination, Hugh Hewitt, a law professor and commentator, argued that the Clause suggested that the framers had "agreed that this country would not be burdened by such bigotry against Catholics or any other unpopular religious group." Hugh Hewitt, *The Catholic Test*, The Daily Standard, Aug. 4, 2003, available at [cite]. Professor Hewitt cited in support of this proposition a letter from Luther Martin to the Maryland legislature in which Martin stated, "there were some members [of the Constitutional Convention] so unfashionable as to think, that a belief in the existence of a Deity, and of a state of future rewards and

Clause, the debate was not over "the desirability of staffing the new government with orthodox Protestants" – or perhaps, for some of the debaters, orthodox Christians – but only whether the Religious Test Clause was the proper means of doing so.[213]

In sum, we can draw four central propositions from the history surrounding the framing and ratification of the Religious Test Clause, and indeed from much of our subsequent history. First, the founding generation had before it a historical example of pernicious test oaths, drawn from the European powers and especially England. Those measures drew their power precisely from the fact that they required public office-holders to *swear* to particular religious doctrines. Second and relatedly, the founding generation took oaths seriously, both for religious reasons and because the swearing of oaths was closely tied to the broader consciousness of the centrality of honor to good conduct and future fame. Third, notwithstanding the first two principles, the founding generation was entirely comfortable with the use of religious tests, at least in the

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punishments would be some security for the good conduct of our rulers, and that, in a Christian country, it would at least be decent to hold out some distinction between the professors of Christianity and down-right infidelity or paganism." *Id.*; *see* 2 Farrand, *supra* note __, at 227. Hewitt cites this statement as evidence that "the majority of Framers couldn't even conceive of a situation where atheists would be denied office on the basis of their non-belief." *Id.* The same statement by Martin was picked by the New York Sun, editorializing against the use of religious tests in the course of the Roberts nomination. *See* Editorial, *The Religious Test*, N.Y. Sun, July 27, 2005, at 8. In fact, Luther Martin, who appears to have opposed the Religious Test Clause in the Convention, was speaking sarcastically. *See* Bradley, *supra* note __, at 689 & n.83, 693; Dreisbach, *supra* note __, at 271; Natelson, *supra* note __, at 103 n.150 (placing Martin's statement in the column of evidence of antifederalist opposition to the Religious Test Clause); Menendez, *supra* note __, at 8 (also counting Martin as an opponent of the Religious Test Clause). Thus, far from supporting Hewitt or the newspaper's point, Martin's sarcastic outburst underscores the degree to which severing religion from public office-holding was unthinkable to many of the founding generation. As to the argument that the majority of the framers could not conceive of a situation where atheists would be denied office, surely this is only because they could not have conceived of atheists being nominees for public office in the first place.

[213] Bradley, *supra* note __, at 699.

states themselves. Finally, they were comfortable with such tests, despite the example of England's test oaths, because they were convinced that religion was essential to morality, and morality was essential to fitness for public office.[214]

C. The Narrow, But Deep, Religious Test Clause

Drawing on these intertwined principles, we can now arrive at a sound interpretation of the Religious Test Clause itself. The proper conclusion to be drawn from this history is that the operative force of the Religious Test Clause is significant but narrow. The Religious Test Clause does what it says: it prohibits the use of religious tests as a formal requirement for would-be federal office-holders. That is, the Clause prohibits Congress or the President from requiring office-holders to swear allegiance to some particular faith, or some particular set of religious doctrinal propositions, as a condition for attaining to public office. It bars the imposition of the kinds of test oaths that were prevalent in the laws of England and the European powers in the founding era, and that were present in the states in the founding era but rejected by virtue of the ratification of Article VI. And that is *all* it does.

This reading of the Religious Test Clause is consistent with the first two facts that I have highlighted in this section: the existence of the Religious Test Clause as a rebuke to European practice, and the seriousness with which the founding generation took oaths. That the founders were aiming at precisely, and *only*, the requirement that an office-holder swear to a proposition with which he could not agree – and thus that the office-holder risk both his soul and his sacred honor – is evident in the language that was used to describe the dilemma faced by office-holders in the face of religious tests. Perhaps the most famous example of this is a letter written by Jonas Phillips, a Jewish resident of Philadelphia, to the President and members of the Constitutional Convention in September 1787. Phillips

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214 *See, e.g.,* Natelson, *supra* note __, at 102.

urged the Convention to avoid placing any religious test in the Constitution that might resemble the test applied to Pennsylvanians by that state's constitution, which required a statement of belief in the truth of the New Testament. Phillips wrote:

> [T]o swear and believe that the new testement was given by devine inspiration is absolutly against the religious principle of a Jew[,] and is against his Conscience to take any such oath – By the above law a Jew is deprived of holding any publick office or place of Goverment . . . .[215]

In one of his *Landholder* articles, published in the wake of the Constitutional Convention, Oliver Ellsworth, a member of the First Congress and later Chief Justice of the United States, effectively agreed with Phillips' description of the dilemma of the religious test. Ellsworth described religious tests in this way:

> A religious test is an act to be done, or profession to be made, relating to religion (such as partaking of the sacrament according to certain rites and forms, or declaring one's belief of certain doctrines) for the purpose of determining whether his religious opinions are such, that he is admissible to a publick office.[216]

And although there is good reason to conclude that the views taken by Thomas Jefferson on the relationship between religion and public office were not representative of those of his fellow citizens,[217] he captured the same idea of the precise problem with test oaths when he described them as "laying upon [an office-holder] an *incapacity* of being

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[215] Jonas Phillips to President and Members of the Convention, Sept. 7, 1787, in 4 *The Founders' Constitution*, *supra* note __, at 638.

[216] Oliver Ellsworth, *Landholder No. 7*, Dec. 17, 1787, in 4 *The Founders' Constitution*, *id.*, at 639.

[217] *See* Bradley, *supra* note __, at 688; Dreisbach, *supra* note __, at 282-83.

called to offices of trust and emolument, unless he profess or renounce this or that religious opinion."[218] The same thought was voiced by another Virginian, Edmund Randolph, who told that state's ratifying convention that, under the Religious Test Clause, federal officers would be "*bound*" by oath to support the Constitution, but would not be "*bound* to support one mode of worship, or to adhere to one particular sects."[219]

We thus can draw from the words of those writing and speaking at the moment of ratification the clear understanding that the Religious Test Clause was meant specifically to apply to any imposed oath that would require the oath-taker to *swear* to a religious belief, or to disavow such a religious belief, as an absolute condition of public office in the new federal government. This is the core meaning of the Religious Test Clause.

But, contrary to the views of some scholars,[220] and the public pronouncements of many of those who spoke out in the wake of the Pryor, Roberts, and Miers nominations,[221] that is as far as we should be willing to go. The Religious Test Clause admits of no penumbral emanations. Whatever arguments can be made by analogy[222] or otherwise for its extension to other situations, it does not reach an inch further than its core prohibition.

That this is so should be evident from the two other historical facets of the Religious Test Clause that I have highlighted above: the founding generation's profusion of state religious tests, and their belief that persons without faith, or who professed the *wrong* faith, were simply not fit for public office because they lacked the appropriate moral character for office. Whatever else may be said about the

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218 Bradley, *supra* note __, at 688 (quoting Jefferson's 1776 draft Bill for Religious Freedom) (emphasis added).

219 3 Elliot, *supra* note __, at 204-05 (Edmund Randolph), in 4 *The Founders' Constitution*, *supra* note __, at 644 (emphasis added).

220 *See, e.g.,* Garvey & Coney, *supra* note __, at 349.

221 *See supra* notes __-__ and accompanying text.

222 *See* Presser & Rice, *supra* note __.

founding generation's decision to approve the Religious Test Clause, it can hardly be said that the Clause's ratification signaled a clear rejection of the view that religion was irrelevant to fitness for public office. No more did it support the view that citizens and legislators were obliged to utterly ignore a potential office-holder's religious beliefs when considering whether that person was an appropriate candidate for public office. They may have agreed not to impose a religious oath as a formal barrier to public office; but they certainly did not agree to banish such considerations from their own scrutiny of those seeking public office.

We may draw a similar conclusion even if we ignore history for the moment, or keep it only in the background, and focus on the text of Article VI, clause 3, itself. Much may be gleaned simply from reflection on the fact that the Religious Test Clause was placed where it was. Recall that the whole text of clause 3 reads:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.[223]

The Religious Test Clause was thus a book-end to the requirement in clause 3 that holders of public office "under the United States" swear an oath of allegiance, or affirm their loyalty to, the Constitution.[224] That fact again

[223] U.S. Const., Art. VI, cl. 3.

[224] As Professor Bradley and others have noted, while the Oath Clause of clause 3 bound both federal *and* state officers to take an oath to support the Constitution, the Religious Test Clause itself applies only to federal officers, not state officers. *See* Bradley, *supra* note __, at 693. That fact is of little relevance to this paper. But it is consistent with the arguments I have advanced above: that the founding generation was largely comfortable both with religious tests and with the motivation

underscores that what the framers and ratifiers were concerned with was the requirement that individuals swear religious *oaths* as a requirement for the attainment of public office. In short, it is no accident that the Religious Test Clause was a part of Article VI, clause 3. That clause deals with the single subject of oaths, and it is precisely – and *only* – with oaths that the Religious Test Clause is concerned.[225]

The narrow reading that I have offered of the Religious Test Clause, as applying only to a narrow category of requirements that office-holders swear oaths subscribing to or denying particular faiths or faith tenets, is thus arguably consistent with the best available understanding of the text, history, structure, and purpose of this provision of the Constitution. And this reading should be no disappointment to those who have argued for a broader reading of the Religious Test Clause, for it is also the soundest approach to that Clause.

It is sound, first and foremost, because, to return to the theme of the Constitution *outside* the courts, it "distributes responsibility for constitutional law broadly."[226] By "constitutional law," in this case, I am not referring simply to the provisions of our Constitution itself, but more broadly to "the fundamentals of our political order."[227] An expansive reading of the Religious Test Clause like that offered by Sidak and others effectively reduces the scope of *popular* responsibility for our "political order." By drawing a broad constitutional boundary around an ever-expanding set of inquiries into the fitness of various potential federal office-holders, it reduces the discretion of those elected

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behind them, that only good men should attain public office; and thus that the Clause should be read as narrowly as possible, to prohibit only officially imposed religious test oaths, narrowly understood, for federal office.

[225] *See* Bradley, *id.* at 692 (noting that "the 'subject of religion' is not mentioned [in the Constitutional Convention] at all until after, *and only because of*, proposals to bind all state and federal officers to the Constitution by 'oath.'") (emphasis added).

[226] Mark Tushnet, *Taking the Constitution Away From the Courts* x (1999).

[227] *Id.*

officials who are responsible for selecting and passing on those nominees. Moreover, in so doing, it assigns the role of monitoring the conduct of those elected officials to the courts, or to various other official mechanisms for monitoring and disciplining the decisions of those officials.[228] As the boundary of what is "constitutional" or "unconstitutional" expands, the realm of *political* accountability perforce must diminish. To constitutionalize every question that ought to be left for popular resolution in the political arena is thus to diminish the scope of popular ownership of and responsibility for the conduct of our national politics.

To say that the President may nominate an individual to public office for religious reasons, or that a Senator may oppose the confirmation of that nominee for religious reasons, is thus not the same thing as saying that either the President or individual Senators *ought* to do so. Sidak may be right that such inquiries are, more often than not, "intractable, if not . . . excruciating."[229] If so, voters remain free to lobby against such misuses, to speak out loudly against them, and to cast votes in elections or run for office themselves. But, outside the narrow scope of the intolerable test oaths that the Religious Test Clause clearly prohibited, the best remedy – the *only* appropriate remedy – for the perceived misuse of religion by elected officials is a *political* remedy. And that is as it should be in any vigorous and properly functioning political system. Those who have deliberately adopted the language of the Religious Test Clause to effectively argue that the Constitution precludes the exercise of discretion by elected officials in any area touching on religion and judicial or other nominees, and who thus diminish the realm of *political* accountability for such officials, do no favors for our constitutional order.

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[228] *See generally* Sidak, *supra* note __, at 40-50 (examining remedies that might be available either in the courts or in the rules of the Senate itself for disciplining Senators who violate his expansive version of the Religious Test Clause); Hasson, *supra* note __ (threatening to bring complaints against any Senators who violate the Religious Test Clause under the Senate's disciplinary process).

[229] *Id.* at 50.

This reading of the Religious Test Clause is also sound because, as I hope I have shown, those who crafted and agreed to the Religious Test Clause hardly intended to suggest that religion was irrelevant to a nominee's fitness for federal office.[230] And, however much things have changed in the intervening two centuries, they were right to think so.

That this proposition is true might be illustrated by two hypothetical examples, one perhaps a little more far-fetched than the other. First, imagine that, to fill the next vacancy on the Supreme Court, the President turns to an ardent worshipper of Satan.[231] Assume, further, that this Satanist's beliefs take the form of advocating and working toward "the triumph of evil forces over good in the universe."[232] I assume under my reading of the core meaning of the Religious Test Clause that the Senate could not impose an oath requirement demanding that this nominee renounce Satan and all his works. But what if individual Senators were uncomfortable with the idea of confirming such a nominee (an otherwise qualified one, let us assume) to a seat on the nation's highest court? More importantly, what if the Senators were willing to accept the *fact* that the nominee worshipped Satan, but remained concerned that rooting for the triumph of evil over good is inconsistent with the judicial office the nominee was set to assume? Or that such a nominee would be unable to fairly judge the religious or other legal claims of Christians, Jews, or other religionists? Or that any promise made by the nominee that his Satanist views would not affect his judging were untrustworthy? An expansive reading of the Religious Test Clause in effect demands that the these questions be

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230 *See supra* notes __-__ and accompanying text.

231 That the example is far-fetched can perhaps be seen in the observation of observation of Michael Newdow, the plaintiff in the notorious Pledge of Allegiance case, in oral arguments before the Court, that even openly atheist individuals are unlikely to win election to public office. *See* Transcript of Oral Argument at 44-45, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 961 (2004) (No. 02-1624).

232 Wikipedia.org, *Satanism,* available at http://en.wikipedia.org/wiki/Satanism (last viewed March 26, 2006). As the entry goes on to note, many of those who advocate some form of Satanist philosophy eschew any such goals.

swept off the table. But they are hardly irrelevant to the considerations a reasonable Senator would have to take into account in deciding whether to confirm such an individual to an office that carries with it lifetime tenure.[233]

To take a far less far-fetched example, assume that a nominee holds the view that she is obliged, for religious reasons, to oppose the death penalty in every way, and that these obligations must take precedence over any obligations to follow the requirements of the civil laws. Could such a nominee, if sitting as a district court judge, fairly preside over a trial in a capital crime, and particularly over the sentencing phase of that trial? If sitting as a Justice, could she fairly review appeals from capital convictions, or impartially judge claims that the death penalty is unconstitutional, in whole or in part? Or, if the judge took the view that recusal was required in all capital cases, would the fact that the judge was effectively precluded from sitting in a number of cases of this magnitude be just cause for concern about this individual's fitness for judicial office?[234]

Would a Senator be disabled from pursuing these questions? Or could that Senator reasonably conclude that because capital cases are a significant and important part of the work of the federal courts, she is entitled either seek to assure herself that the nominee would be able to hear such

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[233] *Cf.* Carter, *supra* note __, at 65 ("The notion that I, as a voter, should never take into account the religious affiliation of a candidate means that I would be acting in an illiberal fashion were I to oppose a nominee who belonged to the Christian Identity movement or the World Church of the Creator, both adamantly racist groups that consider themselves religious. If the religious beliefs of the candidate give me serious and relevant information, I, as a voter, will surely take that information into account.").

[234] Ironically, given that his nomination was one of the first to give rise to arguments that the Religious Test Clause precludes any discussion of religion in questioning a judicial nominee, Judge William Pryor has stated that recusal is the appropriate remedy for judges who face "situations in which [their] religious convictions came into conflict with the law." Marlin Caddell, *Pryor: Faith helps his role as judge*, Crimson White Online, April 4, 2006, http:www.cw.ua.edu/vnews/display/v/ART/2006/04/03/4430b7b0abe39. I do not mean, of course, to suggest that Pryor's own position neatly tracks that of the judge in the hypothetical offered above.

cases, or to decline to affirm such a nominee? Particularly given the fact that at least one sitting Justice has taken the view that any judge holding such a view might be obliged to resign his or her office,[235] I do not think it would be correct, or sound, to conclude that a Senator could not openly and reasonably take such considerations into account in questioning a nominee and in casting a final vote for or against such a nominee.[236]

In either case, the point of these hypotheticals should be evident: a nominee's religious beliefs *may* be relevant to the performance of his or her judicial office, in ways that are sufficiently clear and significant that a President choosing a nominee, or a Senator questioning or voting on a nominee, is entitled to consider them. It is one thing to say that a nominee may not be forced to voice or disclaim particular religious views under oath. It is quite another to say that no one else is entitled even to consider that nominee's views. To the extent that an expansive reading of the Religious Test Clause bars such inquiries, it is inconsistent with both the

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[235] *See* Antonin Scalia, *God's Justice and Ours*, First Things: A Journal of Religion and Public Life, May 2002, at 17; Antonin Scalia, *Religion, Politics, and the Death Penalty*, Address at University of Chicago Religion & the Death Penalty Conference (Jan. 25, 2002), available at http://pewforum.org/deathpenalty/resources/transcript3.php3 (suggesting that the choice for such judges "is resignation rather than simply ignoring duly enacted constitutional laws and sabotaging the death penalty").

[236] Despite the reference to Justice Scalia and his discussion of the relationship between Catholicism and the death penalty, I do not think this hypothetical actually tracks the situation for Catholic judges. Scalia, for one, argues that because the Church's teachings on this issue are not binding, Catholic judges are not subjected to this Hobson's choice. *See* Scalia, *id.* For thoughtful discussions of this issue, see, *e.g.,* Kenneth Williams, *Should Judges Who Oppose Capital Punishment Resign? A Reply to Justice Scalia*, Va. J. Soc. Pol'y & L. 317 (2003); Garvey & Coney, *supra* note __, at 305-06 (arguing, *pace* Justice Scalia, that Catholic judges "are morally precluded from enforcing the death penalty" in some cases, and should recuse themselves if they believe it is morally impossible to enforce the death penalty, although Catholic judges should not be forced to recuse simply because they identify as Catholic); Douglas W. Kmiec, *Roberts and Rome*, OpinionJournal, July 29, 2005, http://www.opinionjournal.com/taste/?id=110007034.

loudly expressed views of the founding generation and with our own common sense.[237]

Third, an expansive reading of the Religious Test Clause as prohibiting any and all "subtle[ ] form[s] of religious test[s]"[238] is unsound – and a narrow reading of the Clause is perforce sound – because the line between religious beliefs and religiously derived beliefs is so blurred that an expansive reading risks constitutional metastasis.[239] Religious beliefs themselves easily shade into – indeed, may be inseparable from – "beliefs on political issues" that are themselves grounded in religious beliefs. And these are issues that often lie at the heart of a Senator's reasonable decision to confirm or oppose a nominee, not to mention the President's decision to nominate an official not just to the federal judiciary, but to all manner of other offices to which the Religious Test Clause would be equally applicable.[240] It cannot reasonably be the case that *all* such inquiries are placed beyond the pale by the Constitution.[241] Such a reading simply does too much damage to too many things: to our understanding of the founders' own view that religion was relevant to fitness for public office; to our own view that Presidents and Senators may reasonably consider how various nominees' views would affect their policy positions or their ability to carry out their office; and to the view that such concerns are best left to the realm of political discretion.

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[237] *Cf.* Carter, *supra* note __, at 61 ("If, as Teddy Roosevelt said, the President has a responsibility to go to church, we would violate no solemn principle by asking him which one").

[238] Hasson, *supra* note __.

[239] For a careful discussion of religiously derived beliefs, see Perry, *supra* note __, at 225-26; *see also* Robert Audi, *Religiously Grounded Morality and the Integration of Religious and Political Conduct*, 36 Wake Forest L. Rev. 251 (2001).

[240] *See* Eugene Volokh, *Religious Test Clause*, Volokh Conspiracy, April 28, 2005, available at http://volokh.com/archives/archive_2005_04_24-2005_04_30.shtml#1114707103.

[241] For example, given the centrality of a judge's views on the judicial task to his or her fitness for office, the Religious Test Clause could hardly be read to forbid questioning a judicial nominee who has advocated, for religious reasons, a natural law approach to judging. *See, e.g.,* Robinson, *supra* note __.

Again, I do not argue that all such inquiries, whether by a nominating President or by a Senator scrutinizing that nominee, would be wise or well-advised. I simply want to argue that the Religious Test Clause could not possibly be understood, then or now, to have such wide jurisdiction that it would absolutely prohibit any decisions involving, or inquiries concerning, a nominee's religious beliefs, let alone concerning that nominee's religiously derived beliefs on political or legal issues.[242]

Finally, for broader reasons rooted in a sound understanding of the role of religion in public debate, the narrow reading of the Religious Test Clause is sound because it honors the view that there is nothing about religious beliefs that presumptively disqualifies them from inclusion in any aspect of public discussion. The literature on this issue is voluminous,[243] and this is not the place to fully develop those arguments. Suffice it to say that I proceed from the position that religion, and the perspective of religious believers speaking authentically in their own voices, has a wealth of contributions to make to our own public dialogue.[244] Religious groups can be a site of resistance and social change;[245] and because religion may draw on sources of belief and argument that fall outside the sphere of common liberal concepts, religious groups and individuals may offer a source of new ideas to a public debate that would otherwise grow stale.[246] Thus, as Martha

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[242] *See also* Calvert, *supra* note __, at 1166 (arguing that the Religious Test Clause permits inquiry into a nominee's "religiously motivated ideological beliefs). Calvert argues that the Clause does prohibit inquiry concerning judicial nominees' "religious affiliations and theological beliefs." *Id.* Since I believe the Clause, properly read, only prohibits the narrow category of official test oaths designed to force a nominee either to subscribe to or to disavow particular religious faiths or religious tenets, I part company with him here.

[243] *See infra* note __.

[244] *See* Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. Toronto Fac. L. Rev. 1, 48-53 (1996).

[245] *See id.* at 50-52.

[246] *See id.* at 52-53.

Minow has written, "religiously inflected arguments and perspectives bring critical and prophetic insight and energy to politics and public affairs."[247]

Nor should religion and religious talk be valued simply for the extrinsic benefits they provide to liberal democracy. They should also be valued because our liberal polity itself is composed of millions of individuals who wish to speak in a religious voice.[248] In my view, nothing in our system of democracy prevents them from doing so,[249] and nothing *should* prevent them from raising religious arguments if they wish. At the very least, to the extent that it is true that many participants in the public dialogue surrounding judicial nominations, along with the dialogue on every other political issue, are in fact acting in part from religious motivations, it is better that such motivations be fully aired – both to ensure that those who proceed from such motivations be fully represented in the public debate, and to ensure that others may critically examine and engage with those ideas.[250]

Although I address these arguments at somewhat greater length below,[251] there is no doubt that much more

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[247] Martha Minow, *Governing Religion*, in *One Electorate Under God? A Dialogue on Religion & American Politics* 144, 146 (E.J. Dionne Jr., Jean Bethke Elshtain & Kayla M. Drogosz eds., 2004).

[248] *See* Jean Bethke Elshtain, *God Talk and the Citizen Believer*, in *One Electorate Under God? A Dialogue on Religion & American Politics* 94, 94 (E.J. Dionne Jr., Jean Bethke Elshtain & Kayla M. Drogosz eds., 2004) ("God talk, at least as much as rights talk, is the way America speaks. American politics is indecipherable if it is severed from the interplay and panoply of America's religions.").

[249] *See* Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is Not Illegitimate in a Liberal Democracy*, 36 Wake Forest L. Rev. 217 (2001).

[250] *See, e.g., id.* at 230 ("Because of the role that religiously grounded moral beliefs inevitably play in the political process, then, it is important that such beliefs, no less than secular moral beliefs, be presented in public political argument *so they can be tested there*") (emphasis in original); J. David Bleich, *Godtalk: Should Religion Inform Public Debate*, 29 Loy. L.A. L. Rev. 1513, 1516 (1996) (favoring "full and frank dialogue" over requiring religious individuals to mute or rephrase religiously derived arguments).

[251] *See* Part IV, *infra*.

has and could be said about such questions. Nevertheless, I take it as a given for present purposes that welcoming religious believers and religious arguments into the public square is a positive good. It may then seem ironic that this proposition counsels in favor of a narrow reading of the Religious Test Clause, when that reading allows Presidents or Senators to oppose or exclude certain nominees on the basis of their faiths. But the appearance of irony is misleading. From the normative perspective I adopt here, it is better that religion be allowed into the public debate, even if it may sometimes lead to what seem like anti-religious arguments (although those arguments might themselves be religiously derived) against a nominee. That risk should, for religious believers who wish to engage in the public square, be far preferable to the alternative of excluding religion and religious inquiry from the terms of debate altogether. Thus, those who adopt the perspective that religion ought to be permitted in public debate, and that public officials ought to be able to speak or act out of religious motivation, ought also to agree that religion cannot be excluded from the particular public debate surrounding judicial nominations. They should perforce favor the narrow reading of the Religious Test Clause I have offered here.

I therefore must conclude that the best reading of the Religious Test Clause is the narrowest. The Religious Test Clause does what it says – it prohibits the official imposition of test oaths requiring nominees for federal public office, as a condition for that office, to claim or disclaim a particular religion or a particular set of religious propositions. It does nothing more.[252] If we are to seek any more help in this area

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[252] Careful readers may discern an enjoyable irony in what I have written so far, although this irony was not commented on much, if at all, during the public debate over the role of religion in the Roberts and Miers nominations, or during the debate over the role of religion in the nominations of the lower federal court judges who preceded them. Many of those who argued for the most expansive interpretations of the Religious Test Clause were the same individuals – both public commentators and elected officials – who regularly have argued for narrow interpretations of the rest of the Constitution, based on the original understanding of the constitutional text or on a narrowly textualist reading of the Constitution. Given the ample historical

in situations that lie outside the narrow scope of the Clause, it must perforce come from the Religion Clauses of the First Amendment – if there is any help at all.

This may seem a bitter pill to some of the advocates of the penumbral reading of the Religious Test Clause. The Religious Test Clause would seem to cover hardly anything of importance if it is to be understood on the narrowly drawn terms I have offered here. It *must* mean something more!

To this there are two responses, I think. The first is that the Religious Test Clause carries so little weight today because it is a victim of its own success. As Professor Bradley has observed, "Congress has abided the pluralistic settlement" he descries in the Religious Test Clause: it simply has not imposed the kinds of religious tests, narrowly understood, that the Clause was intended to prohibit.[253]

The second is to remind advocates of an expansive reading of the Clause that if it seems as if the Clause accomplishes little, it is not because *it* has changed, but because *we* have. To its framers and ratifiers, it would have seemed revolutionary to discard in the constitutional plan the ability to force nominees to attest to their moral fitness for office by means of a religious oath.[254] The debate over

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material suggesting a narrow reading of the Religious Test Clause, and its fairly plain terms, it is curious that they should have argued in this context for what can only be called a "living Constitution" interpretation of this constitutional language.

[253] Bradley, *supra* note __, at 715.

[254] *See, e.g.,* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, U. Pa. L. Rev. 1559, 1576 (1989) ("Given the long history of test oaths, this provision [the Religious Test Clause] represented a significant achievement"); Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J. L. & Religion 355, 359 n.15 (1994-1995) ("The decision by the Convention that the federal government should have no religiously-based conditions for office-holding was, therefore, a significant advance for religious liberty at the federal level"); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1513 n.450 (quoting John Leland, *The Rights of Conscience Inalienable*, reprinted in *The Writings of the Late Elder John Leland* 179, 219-20 (L.F. Greene ed., 1845) (1791) (citing the Religious Test Clause as one of the features of the Constitution that make it "a

the Clause confirms that those who witnessed its birth *did* understand it as revolutionary. If we see things differently today, it is because we are far more casual about the significance of oaths themselves – their compulsive power and the threat they pose, if sworn falsely, to one's soul and one's honor.[255] As I observed above,[256] the footprint of the Religious Test Clause may be small, but its importance within that narrow scope, at least to its progenitors, was profound. If we see the Religious Test Clause today as insignificant, or largely irrelevant, or of impossibly small scope, this view has little to do with the Clause itself, and everything to do with the success of the Clause – and the debased nature of the seriousness with which we take oaths in the present day.[257] That may mean the Clause seems to have little to do in the present day. So be it. This does not change the fact that we do not honor the true nature and meaning of the Religious Test Clause by extending it beyond its narrow scope, as some proponents have suggested.

D. Present-Day Implications: Of Roberts, Miers, and Others

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novelty in the world" and "the best national machine that is now in existence")); *cf.* Laycock, *supra* note __, at 1095 ("Even if [Kathleen Sullivan] were right that the war of all against all continues 'by other means,' the change in means would be one of the greatest advances of human history").

[255] *See* Sherman J. Clark, *Promise, Prayer, and Identity*, 38 Tulsa L. Rev. 579, 583 (2003) (raising the possibility that "formal oaths are simply irrelevant [today] – anachronistic holdovers from bygone ages, with neither meaning nor significance apart from the legal consequences we choose to attach to the breach of certain sworn obligations").

[256] *See* p. __, *supra*.

[257] *See, e.g.,* Berger, *supra* note __; Paulsen, *supra* note __. The fact that loyalty oaths aimed at Communism were so hotly contested in the 1950s might indicate that the importance of oaths has not faded as much as I suggest in the text. *See* Clark, *supra* note __, at 583. But there is reason to think that the opposition to the 1950s loyalty oaths stemmed more from the broader political principles involved in those debates than from the fact that *oaths* were involved in those controversies. *See id.* at 590.

With the proper interpretation of the Religious Test Clause in hand, we can now proceed to a sound examination of the use of religion in the Roberts and Miers nominations. Recall the questions asked above: To what conduct, whether by the person choosing a judicial nominee (the President) or by the person scrutinizing and voting on that nominee (the members of the Senate), does the Religious Test Clause extend? Does it preclude the use of religion as either a disqualification or a qualification for judicial or other federal nominees? Recall, too, that a number of voices in the recent debate suggested that the Religious Test Clause was, or would have been, violated by both the President's selection and promotion of Harriet Miers based on her religion, and the Senate's questioning and/or rejection of John Roberts based on his religion or religiously derived beliefs.[258] We can now ask whether this consistent view was also the right one.

Given what I have argued so far, my conclusion should be evident. Neither case falls within the core of classic Religious Test Clause violations. Thus, neither case – nor the cases of William Pryor and the other lower federal court judges whose confirmation hearings provoked a controversy – raised real Religious Test Clause concerns. Those who argued for an expanded reading of the Religious Test Clause, and thus argued that the Clause was implicated by both the Roberts and Miers nomination and confirmation controversies, had the virtue of consistency. Unfortunately, they were consistently wrong.

Take the Roberts nomination first. Remember that the concern here was that, in the words of one commentator, "[a]ny scratching around th[e] area [of Roberts's faith or faith-derived beliefs] would suggest that there's a veiled religious test by asking questions about his deeply held views."[259] Thus, the question is whether the individual

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[258] *See, e.g.,* MSNBC, *Harball*, *supra* note __.

[259] Kevin Eckstrom, *Conservative Catholics on Watch for Questions on Nominee's Faith*, July 20, 2005, 2005 (quoting William Donohue); *see also* David D. Kirkpatrick*, For Conservative Christians, Game Plan on the Nominee*, N.Y. Times, Aug. 12, 2005, at A14 (quoting Tony Perkins of the Family Research Council) ("We are going to be

members of the Senate, if they inquired into the nature or intensity of Roberts's beliefs, in order either to find out what his stance was on questions involving abortion or to ask whether he could faithfully follow the law where such questions arose, would violate the Religious Test Clause.

I think, given what I have said so far, that the Religious Test Clause cannot be said to extend to such inquiries. The Clause prevents the formal imposition of true religious tests as a precondition to the assumption of public office. But it does not, as a matter of text, history, or sound policy, prohibit inquiries about a nominee's beliefs on issues likely to come before the federal courts, or inquiries into his faith as a means of ferreting out those views. Nor, certainly, does it prohibit inquiries designed to smoke out whether a nominee with deeply held beliefs – religious or otherwise – can nevertheless faithfully apply the applicable law. None of these inquiries amount to a requirement that a nominee literally pledge his allegiance to a particular faith or a particular set of religious doctrines. It is true that such inquiries would require the nominee to answer *under oath*, and a central feature of the Religious Test Clause is its relationship to oaths. But such inquiries would not amount to a literal requirement that a nominee *subscribe* to a particular faith or faith tenet, under penalty of extratemporal punishment. Thus, a Senator who wished to inquire into nominee Roberts's religious beliefs, or into the nature and intensity of his religiously derived beliefs concerning policy matters likely to come before the Supreme Court, would face only a possible political penalty for doing so; she would not run afoul of the Religious Test Clause.

Would that calculus change if a Senator instead demanded that Roberts avow or disavow particular beliefs about abortion, whether religious or secular, policy-oriented or legally-oriented, during confirmation hearings? Would it change if the Senator cast a vote against him on the basis of

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vigilant to make sure that there is not this religious litmus test involved . . . . 'Are you a Catholic? Do you really believe what the Catholic church teaches?' These kinds of things shouldn't be part of the discussion").

his religiously derived beliefs (saying, for example, "I feel so strongly about abortion rights that I cannot support any nominee who fervently believes that abortion is wrong")? More strongly, would it change if the Senator cast a vote against him on the basis of his *religion* (saying, bluntly, "I will not vote for any Catholics")?

Again, I think the answer must be no in both cases. On a strictly formal basis – but that is, of course, precisely the sort of reading of the Religious Test Clause that I have argued is appropriate – neither would involve the precise evil the Clause was aimed at: the "*formal* [imposition] of sectarian affiliation [requirements] as a precondition for public office."[260]

It is true that both votes would involve a formal action of some consequence: the casting of a vote. But an individual Senator's "no" vote is not the same thing as the *Senate* imposing a test oath as a *formal* condition applicable to any or all nominees as the cost of admission to the bench; and it is this, and only this, that the Clause prohibits. Moreover, as the history of the Clause suggests, the founders and ratifiers surely believed that, apart from the elimination of formal test barriers, they were fully entitled to judge the fitness of would-be office-holders. To suggest they would therefore be barred from voting against a nominee whom they were convinced was, whether for religious reasons or any other reason, unfit for the sacred trust of public office stretches the Religious Test Clause too far. Again, a Senator might be expected to incur a *political* cost for casting such a vote, or at least for saying that he had voted against a nominee for those reasons. That is as it should be. But the Religious Test Clause itself would not speak to the propriety of such votes.

The question is no different if we shift our focus to the question whether the President would have been entitled to nominate Harriet Miers simply because of her faith, whether in whole or in part; or whether he would have been

[260] Sanford Levinson, *Wrestling With Diversity* 197 (2003) (emphasis added).

entitled to nominate her because he thought her faith signaled her religiously derived position on particular legal questions, whether they involved abortion, gay rights, or something else altogether; or whether he would have been entitled to promote her, however grossly, by invoking her membership in a particular religious faith. Indeed, the question would be no different if the President had pledged in 2002 not just to nominate only judges who understood that "rights were derived from God,"[261] but to nominate only judges who believed in God, or in a particular faith tradition. Simply to promote a nominee based on her faith ranges far afield from the substantive evil of a test oath. While it may seem like a closer question whether a President can limit himself to religious nominees, or select particular nominees based on their faith, the history of the Clause makes clear that those who made up the federal government were fully entitled to seek individuals of good character to fill public offices, and that religious belief, or even particular religious affiliations, were assumed to be a sterling mark of good character. That evidence is buttressed by the blunt fact that Presidents have in fact long selected nominees on a variety of bases, *including* faith, well after the Religious Test Clause became part of our Constitution. The fact that it was not until well into the 19th Century that a Catholic Justice joined the Court, and not until the 20th Century that the Court saw its first Jewish Justice, is surely strong circumstantial evidence that Presidents took such matters into consideration all the time.[262]

So a President who acted in this manner would not violate the Religious Test Clause either.[263] This should not

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[261] Calvert, *supra* note __, at 1137.

[262] *See generally* Perry, *supra* note __.

[263] Mark Scarberry has asked the interesting question whether it matters, for purposes of my analysis, whether a President uses religion in selecting and promoting a nominee not because he is seeking to advance the nominee's religion as such, but because he believes the Supreme Court, or the federal judiciary in general, would benefit from nominees who come from a diverse set of religious backgrounds, just as a President might consciously seek to select judges from a variety of racial and ethnic backgrounds. Given my narrow reading of the Religious Test Clause, it does not. On the other hand, it seems to me that if one takes

occasion too much concern, however. The Miers nomination richly suggests that even a hint of religious favoritism by the President in his nomination choices, or the misuse of religion as a vehicle for promoting a particular nominee, carries with it the risk of significant political penalties. But that does not alter the fact that the Religious Test Clause would not preclude the President from so acting.

It would thus seem that many of the loudest voices in the debate over the use of religion during the Roberts and Miers nominations were simply and consistently wrong. If President Bush selected Harriet Miers in part because of her faith, and promoted her on that basis, he did nothing wrong, at least as far as the Religious Test Clause is concerned. Nor would any Senators have been wrong, constitutionally speaking, to query John Roberts on the relationship between his faith and his future as Chief Justice, or even to vote against him on the basis of his faith. Both actions might quite properly have been condemned politically, but should not be condemned on the grounds of the Constitution's commands. This means that Senator Cornyn,[264] Professor Presser,[265] and the leaders of the Becket Fund,[266] the Family Research Council,[267] the Christian Defense Coalition,[268] and Concerned Women for America,[269] among others, were wrong in their comments on the occasion of one or both of the recent nominations. On the other hand, this reading of the Religious Test Clause vindicates the views of such figures as Senator Durbin, who allegedly quizzed Roberts

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seriously the penumbral reading of the Religious Test Clause that I have attempted to refute in this paper, that reading would bar the use of religion in judicial nominations for *any* purpose, including this one. After all, it is not clear that, to the extent that President Bush selected and promoted Harriet Miers on the basis of her religion, he was doing anything other than promoting her for the sake of providing representation on the Supreme Court bench for evangelical Christians. Yet he was still criticized for mentioning religion at all in the context of that nomination.

[264] *See* Dionne, *supra* note __.

[265] *See* Presser & Rice, *supra* note __.

[266] *See* Hasson, *supra* note __.

[267] *See* Singer, *supra* note __.

[268] *See* Savage, *supra* note __.

[269] *See* Savage, *supra* note __.

about conflicts between his faith and the law,[270] and Senator Hatch, who said Senators were fully entitled to ask a nominee about his religious views.[271]

Beyond these most recent examples, though, my reading of the Religious Test Clause also suggests that a number of other writers on the Clause – both academic and judicial – have overstated the scope of the Clause, or misapplied it. To take one prominent example, Sanford Levinson has written some of the most thoughtful, rich examinations of the nature of loyalty oaths and religious tests in the academic legal literature.[272] And Levinson says much, I think, that is exactly right about the relationship between faith and judicial duty, and the permissible scope of questioning about a nominee's faith.[273] In particular, as what I have written here should make clear, Levinson is right to say that despite the Religious Test Clause, a Senator may question a nominee about her "religious views as the basis of further conversation about their implications relative to public office."[274] But it follows from my discussion so far that Levinson is wrong to write that "it would be illegitimate to make dispositive a nominee's belief – or lack thereof – in God, since a conscientious senator should be unable to take into account any answer to that question."[275] This is a minor error compared to the wealth of important observations about the Clause that Levinson makes in his work; but it is an error nonetheless.

Similarly, where the Religious Test Clause is concerned as in other areas, the Supreme Court may be final,

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[270] *See* Turley, *supra* note __.

[271] *See* Singer, *supra* note __ (noting that Senator Hatch added that such questions were unlikely to yield fruitful results, and so were "ridiciculous").

[272] *See, e.g.,* Levinson, *supra* note __; Sanford Levinson, *Constitutional Faith* (1988).

[273] *See generally* Levinson, *supra* note __, at 192-232.

[274] *Id.* at 223.

[275] *Id.* at 221.

but it is not infallible.[276] In *Girouard v. United States*,[277] one of the few judicial opinions discussing Article VI,[278] the Court addressed a provision of the Naturalization Act of 1906 that had been read to bar from citizenship those aliens who were unwilling to take up arms on behalf of the United States.[279] The Court said it would avoid any construction of the statute that would require anyone to "forsake his religious scruples to become a citizen."[280] In so ruling, it drew in part on the Religious Test Clause, arguing that the Clause would have prohibited a similar provision barring him from public office, and that the naturalization statute similarly must be read narrowly in light of the nation's traditions, which view test oaths as "abhorrent."[281]

Professor Bradley observes that the history of test oaths in the states hardly demonstrates that they were clearly viewed as "abhorrent" in every circumstance.[282] Beyond this, however, the reading of the Religious Test Clause I have offered suggests that the Court in *Girouard* need not – could not, really – have appealed to the Clause in service of its reading of the naturalization statute. The statute did not require those wishing to naturalize to claim or disclaim any religious faith as a condition of citizenship; indeed, new citizens take substantially the same oaths as office-holders, as the Court noted.[283] Rather, it simply asked the would-be citizen whether he was unable to fulfill what Congress apparently saw as a key condition of fitness for citizenship. Nothing about this smacks of the kind of religious test that the Clause actually forbids. I doubt, in fact, that the Court was right even to suggest that the Clause would have forbidden asking similar questions of putative federal public office-holders. Would it actually forbid a President from requiring that those who occupy the office of, say, Secretary

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276 *Cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final").

277 328 U.S. 61 (1946).

278 *See* Bradley, *supra* note __, at 679.

279 Naturalization Act of 1906, § 4, 34 Stat. 596.

280 *Girouard*, 328 U.S. at 66.

281 *Id.* at 69.

282 Bradley, *supra* note __, at 679.

283 *See Girouard*, 328 U.S. at 65.

of Defense be willing in theory to carry out the same actions as the nation's soliders?[284] I do not say that the decision in *Girouard* was utterly wrong. For one thing, it might have been a fair reading of the statute. More importantly, the same result might have been reached by a fair reading of the Free Exercise Clause. But it should not have been attained by a misreading of the Religious Test Clause.

A more prominent example, at least for students of the Religious Test Clause, is the order of Judge Noonan of the Ninth Circuit, who of course is also an accomplished scholar of law and religion,[285] in *Feminist Women's Health Center v. Codispoti*.[286] In this case, plaintiffs demanded that Judge Noonan recuse himself from an appeal involving a racketeering action against anti-abortion protestors who were picketing an abortion clinic, apparently on the grounds that his religious beliefs (Noonan is Catholic) prevented him from impartially hearing the appeal.

Judge Noonan quite rightly rejected the motion. But he took a curiously circuitous route to get there. His order does not base his decision directly on the federal judicial recusal statute,[287] although the only substantive case cite he offers in his brief order is to a Ninth Circuit case discussing judicial recusal.[288] Instead, Judge Noonan turns the opinion into a discussion of the Religious Test Clause, arguing that any contention that he recuse himself because of strongly-held religious beliefs "stands in conflict with the principle embedded in Article VI."[289] Judge Noonan argues that, to the extent the motion is based on the fact that his beliefs are "fervently-held," it is impossible to arrive at an objective

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[284] *Cf.* Volokh, *supra* note __ (observing that Presidents often condition Executive Branch appointments on a nominee's policy views or deeply held beliefs, in ways that would run afoul of a broadly interpreted Religious Test Clause).

[285] *See, e.g.,* John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (1998).

[286] 69 F.3d 399 (9th Cir. 1995).

[287] *See* 28 U.S.C. § 455.

[288] *See Codispoti*, 69 F.3d at 400 (citing *Moideen v. Gillespie*, 55 F.3d 1478, 1482 (9th Cir. 1995)).

[289] *Id.* at 400.

measurement of that standard: "No thermometer exists for measuring the heatedness of a religious belief objectively. Either religious belief disqualifies or it does not. Under Article VI it does not."[290] He concludes by rejecting the argument that the disqualification motion would be no less objectionable if it would apply only in abortion cases, since such a "proviso effectively imposes a religious test on the federal judiciary."[291]

For the reasons I have offered, Judge Noonan cannot be right. Of course an individual judge's religious beliefs *may* (or may not) disqualify him from hearing and deciding a case, just as any opinion or belief that rises to the level at which a judge's "impartiality might reasonably be questioned" may disqualify him.[292] Not every case rises to this level, and certainly not every instance of religious belief, even one that touches on an issue before the court, does. But the Religious Test Clause does not preclude judges or parties from raising this issue simply because religion is involved. The Clause simply prohibits a particular, and *formal*, use of religious test oaths as a barrier to public office. It does not suggest that religion is always and everywhere irrelevant to fitness for office, or to a judge's ability to sit in a given case, as both sitting Justices[293] and scholars[294] have recognized. Judge Noonan appears to have invoked the Religious Test Clause in search of a more comprehensive ruling precluding future parties even from raising the question of disqualification. But he is still mistaken: the Religious Test Clause of Article VI "embed[s]" a rule, not a principle.[295]

I save for last the Supreme Court's decision in *Torcasco v. Watkins*,[296] the Court's most important and complete statement about the Religious Test Clause. Since

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290 *Id.*
291 *Id.* at 401.
292 28 U.S.C. § 455(a).
293 *See* Scalia, *supra* note __.
294 *See* Garvey & Coney, *supra* note __.
295 *Codispoti*, 69 F.3d at 400.
296 367 U.S. 488 (1961).

the Court was ruling on a *state* law,[297] the Religious Test Clause was technically unavailable to it, since that provision only applies to federal office-holders.[298] The Court nevertheless employed the history of Article VI, and its abhorrence of test oaths, in striking down the state test oath at issue in that case as a violation of the Religion Clauses of the First Amendment.[299]

I have no particular objection to this ruling, save perhaps for its unduly romantic and brief history (somewhat characteristic of the Court's approach to history during this era) of the Religious Test Clause itself. But *Torcasco* forms a nice companion to *Codispoti*, and the two form a nice ending to this section. Both serve as useful reminders that a legal system without an expansive Religious Test Clause is not without other tools to achieve similar ends where they are appropriate. As Professor Tribe remarked long ago now, in some cases the Religion Clauses themselves will do the work that a penumbral Religious Test Clause would.[300] Thus, a similar result could have been reached in *Torcasco* through the Religion Clauses without any need to rehearse the history of the Religious Test Clause. Similarly, Judge Noonan's opinion reminds us, not that the recusal statute is inapplicable to cases involving judges' decisions whether to sit or not in a given case where their religious beliefs might be relevant, but that it in fact offers a sharper-edged tool than the Religious Test Clause to distinguish between those cases that genuinely affect a judge's ability to sit impartially in a case and those that do not. Finally, as I have been at some pains to urge, the political process itself is the first and best remedy to the misuse of religion by and with regard to public officials – including the use of religion in and around the Roberts and Miers nominations themselves.

In sum, an expansive reading of the Religious Test Clause is as unnecessary as it is unsound. Ultimately, a narrow reading of the Religious Test Clause, one that

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297 *See id.* at 489.

298 *See supra* notes __-__ and accompanying text.

299 *See Torcasco*, 367 U.S. at 490-96.

300 *See* Tribe, *supra* note __, at 1155 n.1.

confines it to the precise evil it was aimed at, is not only the reading compelled by the text, history, and structure of the Constitution; it is also the best and wisest reading of that provision.

IV. THE CONSTITUTIONAL ETIQUETTE OF RELIGION IN THE CONTEXT OF JUDICIAL NOMINATIONS

A. Introduction

The previous section has argued, in effect, that the Religious Test Clause has nothing to say about the use of religion and religious rhetoric in and around judicial nominations. Apart from what little work, if any, the Religion Clauses of the First Amendment might do here, the broader point is that, for the most part, we can simply take the Constitution out of the equation altogether in this context. For those who believe the Constitution's footprint ought not be so large that it leaves us with little room to work out these issues in the political arena, with what little wisdom we as a people can muster, this should not be a bad thing.

Just because constitutional law runs out short of this point, however, that does not mean that our sense of constitutional propriety should as well. Even if the Religious Test Clause does not speak to the use of religion in the discourse surrounding the nomination and confirmation of federal judges, it still ought to be possible to come up with *some* principles that might productively govern our discussion of religion in such circumstances. Call it "constitutional etiquette," if you will.[301] Or, to put it slightly differently, call it the etiquette of pluralism.

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[301] As with the last time I attempted to coin a phrase to describe a new idea in constitutional law, *see* Paul Horwitz, Grutter'*s First Amendment*, 46 B.C. L. Rev. 461, 563 n.472 (2005), I found late in the game, well after I had patted myself on the back for my neat phrasing, that someone else had already coined the same phrase. *See* Alan E. Brownstein, *Prayer and Religious Expression at High School Graduations: Constitutional Etiquette in a Pluralistic Society*, 5 NEXUS 61 (2000).

Whatever the label, the point is the same. The Constitution, or at least the Religious Test Clause, does not preclude the use of religion as a qualifying or disqualifying factor for judicial nominees, or the employment of religion and religious rhetoric in discussing those nominees. But we who live under the Constitution, and who attempt every day to fulfill the promise of the society it has begotten, a society of diverse, passionately held views and of extraordinary religious pluralism, should not take that as a release from our own responsibilities. We ought to be able to craft guidelines for public discussion that provide some model of *how* to use or evaluate the use of religion in this context.

In this brief section, I offer five principles that might help improve the use of religion and religious rhetoric in this area, and employ them to evaluate whether or not the use of religion in the Roberts and Miers nomination lived up to what should be our guiding principles of discussion in this area.[302] In doing so, I note that this discussion necessarily stands in the shadow of a much larger discussion concerning the role of religion and religious dialogue in a liberal democracy.[303] That discussion concerns the question whether either the Constitution itself, or general principles of liberal democracy, "prohibit[ ] the use of religiously grounded arguments in public life or about public matters."[304] More broadly still, much has been written about the proper use of religious language in public discussion.[305]

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[302] A similar, though not identical, set of guiding principles is offered by Ronald Thiemann. *See* Ronald F. Thiemann, *Religion in Public Life: A Dilemma for Democracy* 135-41 (1996).

[303] The literature on this subject is voluminous. For a mere sampling, see, *e.g.,* Richard Garnett, *Religion, Division, and the First Amendment*, 94 Geo. L.J. (forthcoming 2006), Notre Dame Legal Studies Paper No. 05-23, at 61-62 n.310 (collecting sources).

[304] *Id.* at 61.

[305] For a small but exemplary sample of this discussion, see, *e.g.,* Jay D. Wexler, *Framing the Public Square*, 91 Geo. L.J. 183, 201-06 (2002); Eugene Garver, *Why Should Anybody Listen? The Rhetoric of Religious Argument in Democracy*, 36 Wake Forest L. Rev. 353 (2001); Theodore Y. Blumoff, *The Holocaust and Public Discourse*, 11 J. L. & Religion 591 (1994-1995); Anthony E. Cook, *God-Talk in a Secular World*, 6 Yale J. L. & Human. 435 (1994); Sanford Levinson, *Religious Language and the Public Square*, 105 Harv. L. Rev. 2061 (1992).

Very little has been written, however, specifically about the use of religious language in the narrower context of judicial nominations.[306] I write, then, on what is practically a blank slate, at one remove from the din of voices arguing on closely related subjects.

I want to use this fact to my further advantage by acknowledging frankly that I bracket much of this larger debate. I proceed from the assumption – one that is well borne out by the evidence I have mustered above in my discussion of the recent uses of religion in the context of judicial nominations – that religion will often, perhaps inevitably, be a part of the discussion of judicial nominations and confirmations. I thus do not bother to discuss here the broader normative question of whether and when religion may enter into our public dialogue, or into the decision-making of public officials. Religion does, and *will*, enter into that dialogue. It does, and *will*, influence the public and private decision-making of public officials.[307] We are left, then, with the question of what rules of constitutional etiquette might govern this dialogue.[308] Thus, although this discussion surely is influenced by my reading of that literature, I put it largely (although not entirely) to one side here.[309]

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[306] *See* Levinson, *supra* note __, at 209 (noting, for example, that Kent Greenawalt, who is, in my view, the foremost scholar writing in this area, leaves the judicial confirmation process "basically undiscussed" in his work).

[307] Steven Shiffrin takes a similar approach. *See* Steven Shiffrin, *Religion and Democracy*, 74 Notre Dame L. Rev. 1631, 1634 (1999); *see also* Carter, *supra* note __, at 7 ("Religion, in short, will be in politics. It cannot reasonably be kept out.").

[308] *See* Perry, *supra* note __, at 236 n.46 ("It is not *whether* but *how* people should talk [when they bring religion into political debate]; what qualities of character and mind should they bring, or try to bring, to the task").

[309] Similarly, the question of whether judges may themselves draw on religion in their decision-making is outside the scope of this article. For discussions of that question, see, *e.g.,* Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 Va. L. Rev. 515 (2005); Teresa S. Collett, *"The King's Good Servant, But God's First": The Role of Religion in Judicial Decisionmaking*, 41 S. Tex. L. Rev. 1277 (2000); Kent Greenawalt, *Private Consciences and*

Finally, and on a related point, let me emphasize that I do not offer these rules of etiquette in a strongly normative fashion, and do not suggest that they ought to *bind* the participants in the public debate in any strong sense. No one supposes that any rule of etiquette – what fork to use, when to open doors for others, and so on – will or should apply invariably to every situation, or that there are no occasions on which good manners are best left unobserved. Still more, then, we should not suppose that every full-throated use of religion that violates one or another of the principles I offer below will always be inappropriate. Plain talk, bluntness, and even rudeness are sometimes valuable aspects of our public dialogue, even if at other times they retard or distort that dialogue. This is as true of religious talk as of any other kind of political talk.[310] The principles of constitutional etiquette I offer here are not meant to turn the public arena into the equivalent of a college seminar or a debating society.[311] I thus offer these rules of constitutional etiquette as criteria by which we can aspire to sound manners in public dialogue, and against which we can assess the value and propriety of various participants in the public dialogue, and nothing more.

B. Transparency

The first principle that might govern our use of religion and religious rhetoric in the context of judicial nominations is *transparency*. That is to say, if religion is to factor into the thinking and decisions of public officials deliberating on whom to nominate and whether to confirm, it ought to do so clearly and openly. More particularly, public officials who decide privately to nominate an

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Public Reasons 141-50 (1995); Stephen L. Carter, *The Religiously Devout Judge*, 64 Notre Dame L. Rev. 932 (1989).

[310] *See* Scott C. Idleman, *Liberty in the Balance: Religion, Politics, and American Constitutionalism*, 71 Notre Dame L. Rev. 991, 992 (1996) (noting "our constitutional commitment to unrestrained religious participation in law and politics, no matter how offensive or imprudent its implications").

[311] *See* Kaveny, *supra* note __, at 428.

individual because of his or her religion, or who decide privately to support or oppose a judicial nominee because of that nominee's religion, should say so publicly.[312] Of course, the principle of transparency is not unique to this narrow set of circumstances.[313] But it may be particularly important in this setting, for reasons I will suggest below.

The transparency principle arguably was most crucial to, and most violated in, the case of the Miers nomination. Here, my criticisms specifically concern the conduct of the Bush Administration. I do not believe that a President, or his administration, is barred from discussing a nominee privately, including holding private discussions about that nominee with religious supporters such as Dr. Dobson. Nor do I think an administration should be unable specifically to discuss a nominee's *religion* privately with its religious supporters. But the content of those discussions should not differ materially from the discussions it is willing to hold, and the arguments it is willing to make, in public.

In the case of the Miers nomination, if the reported evidence is to be believed, the Bush Administration failed this simple rule of constitutional etiquette. The Administration appears to have offered one set of justifications for its nomination of Ms. Miers *publicly*, and to have offered another set of justifications – this time, an explicitly religious set of justifications – *privately*, in its discussions with Mr. Dobson and other religious supporters. Nothing prevents, or should prevent, an administration with

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[312] Although my emphasis is different, Ronald Thiemann proposes a similar principle as a subset of a proposed governing principle of "moral integrity" in religious public discourse, arguing that moral integrity entails, among other things, "consistency of speech" by public officials when speaking to different constituencies, and "consistency between speech and action." *See* Thiemann, *supra* note __, at 137. The transparency principle is also consistent with the argument I have offered above, *see supra* note __ and accompanying text, that religion should be permitted in public debate because, as long as many people in fact act out of religious motivation, we ought to be able to confront and discuss those views in public.

[313] For a discussion of government transparency in somewhat different circumstances, see, *e.g.,* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 Hastings L.J. 983 (2005).

advancing religious arguments privately with religious supporters. But it is disturbing if an administration offers one set of justifications for a nominee *publicly*, and another set of motivations – including the nominee's faith and the implications of that faith for his or her jurisprudence – through private channels.

These violations of the rule of transparency are significant for at least two quite different reasons. First, to the extent that we believe the Religious Test Clause does not apply in the context of judicial nomination rhetoric because we believe religion and religious reasons ought to be as welcome in the arena of public debate and decision-making as any other reasons, failing to transparently discuss religion when it is a motivating factor does a disservice to this value. Although the government decision-maker (in this case the President) may be acting for plausible tactical reasons, he is implicitly saying by his action that religion is shameful in public life, that it *ought* to be relegated to the sphere of private thinking and private discussion.

Second, as I have argued, the fundamental force constraining the misuse of religion in the judicial nomination context is not the Constitution; rather, it is the simple constraining pressure of ordinary politics. A violation of the rule of transparency seeks to circumvent this constraint. A public actor ought to discuss the role of religion in judicial nominations in ways that are broadly acceptable to his or her electorate; failing that, that official ought to be held accountable for the failure to do so.

If the evidence is to be believed, the Bush Administration in the case of Harriet Miers was willing to use religion in selling her privately, but largely unwilling to say so publicly, and largely unwilling to bear the political cost of its seeming private conviction that her religion *was* relevant to her fitness for office. This serves neither the valued and welcome role that religion ought to play in political dialogue in a liberal democracy, nor the principles of political accountability that ultimately constrain *all*

publicly voiced reasons for decision-making by public officials.

C. Consistency

The second rule of constitutional etiquette I want to suggest should govern in this area is *consistency*. An argument for or against the use of religion in the context of a particular judicial nomination ought to apply consistently in the case of later nominations.[314] Again, this principle is not unique to the context of religious discussion, let alone the use of religion in judicial nominations. But the fact that we have been presented recently with judicial nominations – Roberts's and Miers's – that presented mirror images of each other makes this principle particularly relevant to this discussion. For purposes of the Religious Test Clause – indeed, regardless of that Clause – qualification and disqualification are obviously two sides of the same coin. One may argue that religion is relevant as a qualifying *and* a disqualifying factor, or as neither, but not that it is permissible in one case and forbidden in their other.

Many of the voices in this debate passed the test of consistency by opposing the use of religion in either case.[315] I have already argued that these arguments were wrong; the use of religion was permissible in both cases.[316] But at least those arguments carried the virtue of consistency. Those who had argued that religion could not be used to disadvantage a nominee they might support in the case of Roberts were willing to constrain themselves from using religion to their advantage in the case of Miers.[317]

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[314] Again, Thiemann arrives at a similar point, arguing that his proposed norm of moral integrity requires "integrity of principle," meaning that "[c]itizens should seek in their public lives to apply their moral principles consistently across a variety of cases." Thiemann, *supra* note __, at 137.

[315] *See supra* notes __-__ and accompanying text.

[316] *See supra* notes __-__ and accompanying text.

[317] Of course, I may be too charitable in this description; perhaps these advocates argued against the use of religion in the Roberts case because it would disadvantage a nominee they favored, and argued against the use of religion in the Miers case because it embarrassed and hamstrung the Bush Administration, hurting the nomination of a

Not every group that spoke out was as consistent. Recall the letter sent to the members of the Senate by the Becket Fund for Religious Liberty during the Roberts nomination, which argued that any Senator who used fervent religious belief as a disqualification for public office would violate the Religious Test Clause.[318] One would have expected a similar outcry when the mirror image of this tactic appeared in the Miers nomination. Yet when the administration apparently sold Harriet Miers to its supporters privately on the basis, in part, of her faith and its relation to her likely jurisprudence, no threat letters were forthcoming. Both actions must be improper, or both must be proper. I think the Fund was wrong on the merits of that question. But if, as the Fund suggested, we *should* be concerned about "subtler form[s] of religious test[s]"[319] when they are used as *dis*qualifications for public office, we ought to be equally concerned about subtler forms of religious tests as *qualifications* for office. Thus, the Fund, at least, failed this second principle of constitutional etiquette.[320]

D. Nuance

The third principle I wish to offer here is a plea for *nuance*. Religious faith plays a profoundly important role in people's lives, yet a profoundly complicated one. Discussions of religion in political contexts, and particularly in the context of judicial nominees – whether a nominee's religion affects the formation of his policy views, whether those views in turn influence his capacity to fulfill his office as a judge, and whether it matters how "deeply held" those

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nominee they actually disfavored. But given the consistency of their outward actions, I am willing to concede the compliment to them.

[318] *See* Hasson, *supra* note __.

[319] *See id.*

[320] In Thiemann's terms, as I read them, the failure to follow up on the Becket Fund's earlier letter with an equally full-throated statement during the Miers nomination warning the President that he was acting improperly would violate the norms of consistency between speech and action, and of integrity of principle.

beliefs are – should account as much as possible for those nuances in religious belief, and for the nuances in the relationship between personal religious beliefs and official conduct.[321] Our public discussions ought to at least attempt to capture some of the full flavor of these complications.[322] Both the Senators raising questions about nominees' faith in the case of the Roberts nomination and its precursors, *and* their critics, fared poorly indeed if judged by this rule of constitutional etiquette.[323] For a nation in which faith is so important to so many, in such complicated ways, this is dispiriting.

A genuinely nuanced understanding of the role of faith in a nominee's life, had it been in evidence during the recent nominations, would have involved a greater appreciation of at least three nuances involved in the relationship between religion and official conduct.[324] First, it would have entailed an appreciation for the nuances involved in religious doctrine itself. For example, it was only with the Roberts nomination that public discussion really began acknowledging the potential differences in obligation between Catholic lawmakers and Catholics who interpret and enforce the law,[325] let alone the different forms

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[321] *Cf.* Steven D. Smith, *Augustinian Liberal*, 74 Notre Dame L. Rev. 1673, 1678 (1999).

[322] *Cf.* Cook, *supra* note __, at 444-47 (offering an example of how such discussions might be conducted).

[323] This point is perhaps captured best by Senator Durbin's statement, during the Miers nomination, that asking a nominee about her faith "is a legitimate inquiry as long as it doesn't go too far and too deep." CNN, *The Situation Room*, *supra* note __. The real problem, in fact, is that, having raised such questions, many of those public officials *were* too shallow in their questioning.

[324] The first two nuances I discuss here are thoughtfully examined in Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. Rev. 1645 (2004).

[325] *See, e.g.,* Congregation for the Doctrine of the Faith, *Doctrinal Note On Some Questions Regarding The Participation of Catholics in Political Life*, Nov. 24, 2002, available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html (last viewed March 27. 2006); Ramesh Ponnuru, *Two A. Sullivans*, The Corner, Nov. 4, 2005, available at http://corner.nationalreview.com/05_10_30_corner-archive.asp#081867 (last viewed March 27, 2006).

of obligation that may affect Catholic judges carrying out different functions in different cases.[326] It is far from clear whether the Senators who questioned nominee Roberts,[327] let alone public commentators such as Christopher Hitchens,[328] appreciated these fine distinctions.

Second, in discussing religion, we should appreciate the differences in how individuals understand, interpret, and *apply* doctrine, even in hierarchical faiths.[329] To say generally that a nominee is an adherent of a particular faith may not reveal much about her own views about what this faith demands, or about which demands she is willing to obey or disobey. I suspect that some of the supporters of nominee Miers, who assumed and stated publicly that her faith told a complete story about what sort of Justice she would be and who later soured on her as a nominee,[330] did not fully appreciate this nuance.

Finally, both supporters and opponents of a judicial nominee who are intent on discussing the role of religion in evaluating that nominee's fitness should appreciate the nuances apparent in the difference between a nominee's sense of his religious beliefs and his sense of his judicial

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[326] *See, e.g.,* Frank-Paul Sampino, *The Moral and Legal Obligations of Catholic Judges*, Dappled Things, http:www.dappledthings.org/lent06/essay03.php (suggesting that "confusion about the moral obligations of Catholic judges is understandable," because the Church has offered no clear answers on this point and "there has been precious little discussion of this problem even among lay Catholic intellectuals") (emphasis omitted); Stephen Bainbridge, *Judges' Faith* Does *Matter*, Belief.net, Nov. 4, 2005, available at http://www.beliefnet.com/story/178/story_17839.html (last viewed march 27. 2006); Garvey & Coney, *supra* note __, at 317-31; John H. Garvey, *The Pope's Submarine*, 30 San Diego L. Rev. 849 (1993).

[327] *See supra* notes __-__ and accompanying text.

[328] *See* Hitchens, *supra* note __.

[329] *See, e.g.,* Garvey & Coney, *supra* note __, at 344-47; Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. Toronto Fac. L. Rev. 1, 10 (1996); *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981).

[330] *See supra* notes __-__ and accompanying text.

duty.[331] Here, I'm not convinced that some supporters of nominees like Ms. Miers fully appreciated those nuances. In sum, a lack of appreciation for the principle of nuance in discussing the religious beliefs of judicial nominees can afflict both critics and supporters of a nominee who holds a particular faith.

E. Genuine Respect

The fourth principle that I want to suggest should guide the public discussion of religion where judicial nominees are concerned may prove slightly more controversial, although it sounds attractive enough: the principle of *genuine respect* for religion.[332] One of the reasons that religion should not be excluded from public discussion, or from the public square more broadly, is that to do so fails to show genuine respect for the vital role of religion in people's lives, and for all that it contributes to our public dialogue.[333] Moreover, such policies of exclusion are equally disrespectful to the religious individuals who make up a substantial part of the polity, and who wish to participate equally in our political dialogue without being constrained to remain silent about those values and motivations that drive them the most deeply. To ask them to

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[331] For general discussion, see, *e.g.,* Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* 102-04 (1997); Kent Greenawalt, *Private Consciences and Public Reasons* 141-50 (1995); Stephen L. Carter, *The Religiously Devout Judge*, 64 Notre Dame L. Rev. 932 (1989).

[332] For a somewhat different take on the role of respect in crafting principles for sound inclusion of religion in public dialogue, see Thiemann, *supra* note __, at 146-37. For a valuable gloss on Thiemann's proposal, see M. Cathleen Kaveny, *Religious Claims and the Dynamics of Argument*, 36 Wake Forest L. Rev. 423, 431-32 (2001).

[333] *See generally* Horwitz, *supra* note __, at 48-53; *see also* John A. Coleman S.J., *Public Religion and Religion in Public*, 36 Wake Forest L. Rev. 279 (2001). I should make clear that, in pointing to the ways in which religion may contribute to our politics, I am not suggesting that there are not other, less pragmatic reasons to value religion. *See, e.g., id.* at 53-56 (offering reasons to protect religion as core self-expression, as compulsion, and for its own intrinsic value); John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. Contemp. Legal Issues 275 (1996) (arguing that we protect religion because it is important in its own right).

do so is more than disrespectful; it is a form of violence. As Michael Perry has observed, asking a religious individual to bracket her religious convictions as a price of entry into political discussion is the same as asking her "to bracket – to annihilate – essential aspects of one's very self."[334] Thus, genuine respect for religion involves welcoming it into the terms of debate in the public square, including discussions of judicial nominees, whether by office-holders or by members of the broader public.

But it is no more respectful of religion's role, its importance, to demand a sanitized version of discussions of religion, one that always praises and never critiques. If religion is relegated to little more than "superficial use[s] of God, as a nice bow to wrap around the public official's package of promises"[335] or the private citizen's perfunctory invocations of faith, that can hardly be called real respect. If religion is to enter into public dialogue, it is appropriate to understand and expect that some criticism – hopefully thoughtful, but quite possibly stringent nonetheless – will be mixed in with the praise.

The failure fully to observe this principle of genuine respect was evident in at least one of the arguments raised during the Roberts nomination, in this case by the Becket Fund for Religious Liberty.[336] The Fund concluded its letter to the members of the United States Senate, warning them of disciplinary action should they engage in "subtle[ ]" religious tests, by writing that

> not every mention of religion is improper. Religion, like ethnicity or race, is a natural

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334 Michael Perry, *Morality, Politics and Law: A Bicentennial Essay* 181-82 (1988).

335 Cook, *supra* note __, at 438.

336 *See* Hasson, *supra* note __. If I have focused unduly on the Becket Fund's letter in this article, it is not a sign of enmity or disrespect. In fact, I have personal and professional ties to the Fund and applaud much of its work on behalf of religious claimants. My criticisms of the Fund's letter to the members of the Senate reflect honest disagreement with the arguments made there, not lack of respect for the work it does.

> 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.[337]

As I read the letter, the Fund seems to suggest that it is permissible to mention religion in public discussion only if that discussion is lightly and trivially complimentary. It seems to suggest that any non-anodyne, *critical* mention of religion is impermissible. That is only a seeming show of respect; it is not *genuine* respect. If anything, this rule of dialogue seems to me to be closer to condescension than to genuine respect.

Rather, a genuinely respectful treatment of religion in the public square, one that takes religion seriously, as we should, means that religious views, and the policy or jurisprudential conclusions that they *may* imply, ought to be entitled to be subjected to praise *or* criticism. Religion is a profound force in public life, and like any powerful force, there is no reason to think it may not be harmful as well as beneficial.[338] Thus, the Becket Fund was wrong: religion is *not* like ethnicity or race. For these purposes, it more closely resembles ideology, politics, and other strongly held beliefs. As with those factors, we should agree that religion may quite properly, as a price of admission to the public square, be equally subject to both praise and honest and thoughtful criticism. It should be recognized for both its

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[337] *Id.*

[338] Although I disagree with many of her other claims, I think this point is carefully and fully substantiated by Marci Hamilton in her recent book. *See* Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of Law* (2005). *See also* Blumoff, *supra* note __, at 623-24; William P. Marshall, *The Culture of Belief and the Politics of Religion*, 63 L. & Contemp. Probs. 453, 462 (2000); William P. Marshall, *Religion As Ideas: Religion As Identity*, 7 J. Contemp. Legal Issues 385, 388-91 (1996); William P. Marshall, *The Other Side of Religion*, 44 Hastings L.J. 843 (1993). To say that religion, or religious individuals or groups, may be harmful, however, is not to say that they are *uniquely* harmful. *See* Carter, *supra* note __, at 19, 21.

benefits and its dangers.[339] Under a principle of genuine respect, the President, Senators, and public commentators were fully entitled to praise judicial nominees such as Roberts and Miers for the moral character their faiths suggested. But they were also fully entitled, if they believed it was appropriate, to criticize the effects those faiths might have on the soundness of their judicial views.[340]

F. Humility

Finally, in thinking about how each of us can engage in religious talk in the public square, or how those of us who are non-religious can engage *with* religious ideas in the public square, we might keep in mind a virtue that one might hope always characterizes our efforts to enter public dialogue: that of humility.[341] Humility does not counsel us to refrain from any religious or secular judgments at all, or to disengage from the public square altogether. But it reminds us that we are, each of us, "finite and sinful men, contending against others who are equally finite and equally sinful."[342]

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339 *See* Kramnick & Moore, *supra* note __, at 169 ("Religious leaders are free to say whatever they like in this country and to enter politics if they like. There are very few religious actions in politics that are unconstitutional. There are simply religious actions that are wise and unwise, generous and ungenerous, informed and uninformed.").

340 As Michael Perry notes, applying a principle of genuine respect to the use of religion in public debate is not only good for the polity at large; it may also be good for the religious believer. *See* Michael J. Perry, *Morality, Politics, and Law* 183 (1988) ("[W]e [who bring religion into public political argument] must be willing to let our convictions be tested in ecumenical dialogue with others who do not share them. We must let ourselves be tested, in ecumenical dialogue, by convictions we do not share. We must, in short, resist the temptations of infallibilism.").

341 I am humbly indebted to Joel Nichols for reminding me of the importance of this virtue.

342 Reinhold Niebuhr, *Zeal Without Knowledge*, in *Beyond Tragedy: Essays on the Christian Interpretation of History* 246-47 (1937), quoted in Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. Rev. 1567, 1606 n.188 (1995). Professor Berg argues that a Niebuhrian approach to the question of religious participation in lawmaking might lead to a requirement that religious individuals participating in politics "present

Humility may be the greatest virtue anyone can bring to public debate, and the most difficult to attain. Certainly it may be the most difficult to evaluate – in ourselves as well as others. Nevertheless, it is well worth including in any sound set of principles of etiquette for the discussion of religion in the judicial nomination process. And it is a virtue that applies alike to the religious and the non-religious, to those who promote nominees on the basis of their faith and to those who raise questions about particular nominees based on their faiths.

For a person who wishes to bring his or her faith to the task of judging, or who wishes to promote a nominee on this basis of his or her faith, it requires that they remember that they see through a glass darkly, and that a nominee's effort to live his or her faith through judicial office will be subject to "his own limits, [and] the difficulty in applying general religious truths to complex real-world problems."[343] For those who would criticize a nominee's faith, or argue that the nominee's "deeply held beliefs" would prevent him or her from serving the judicial office with honor, humility counsels a corresponding recognition. It requires that these critics remember that things are not always as simple or as dire as they seem; that a religious nominee may act far differently than a non-religious critic is eager to assume; and that the would-be critic of such a nominee needs to proceed with caution, understanding that the nominee's religious faith, and the manner in which he attempts to live that faith, may be far more nuanced than the critic may have initially assumed.

Nothing in the principle of humility, I think, means that a nominee may not be promoted or criticized, selected or voted against, on the basis of his or her faith. But it

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arguments in accessible terms" – that is, that they present their arguments in terms that can be understood by others outside their faith tradition. *Id.* at 1620. I am not sure that humility requires any such thing; rather, it requires those who offer public arguments to think searchingly and self-critically about *any* arguments they offer, whether secular or religious in nature.

[343] *Id.* at 1624.

reminds us that in our "world of multi-lingual discourse," in which both religious and non-religious individuals engage each other in the public square, we ought always to be conscious of our own limits, and strive to make our arguments with "humility and tolerance."[344]

V. CONCLUSION: RELIGION, DIVISION, AND CONSTITUTIONAL ETIQUETTE

In this contribution, I have suggested that the mirror-image versions of the use of religion in judicial nominations that we witnessed in the Roberts and Miers nominations provide us with a fruitful opportunity to re-examine the scope of the Religious Test Clause. I have argued that while the force of the Clause is deep, its footprint is small, its scope limited. Properly read, it is confined to a narrow, now largely abandoned, set of circumstances in which government imposes *formal* test oaths requiring public office-holders to swear allegiance to a particular faith, or a particular set of religious tenets and practices, or requires them to swear an oath disclaiming a faith or a set of religious tenets and practices. And that is all it does. Past this point the writ of the Religious Test Clause does not run.

Thus, contrary to the loudest voices in the debate surrounding the Roberts and Miers nominations, the President was fully entitled to nominate and support nominee Miers on the basis of her faith, and the members of the Senate would have been fully entitled to question and oppose nominee Roberts on the basis of his faith. If there are any remedies for this state of affairs, they must lie in the political process itself.[345]

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[344] Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J. L. & Religion 337, 368 (1995-1996).

[345] *See* Idleman, *supra* note __, at 1031 ("The Constitution ultimately entrusts We the People, whether directly or by our representatives, with the final responsibility of judging the propriety and merit of religious activism in the political sphere, no matter how unseemly or unwarranted that activism may be").

With the question of religion in judicial nominations thus placed largely outside the writ of the Constitution, I have suggested that we might nevertheless craft rules of "constitutional etiquette" to govern the ways in which we discuss religion in such contexts, and have offered five such principles: principles of *transparency*, *consistency*, *nuance*, *genuine respect*, and *humility*.

Of course, there is no guarantee that we can properly formulate the rules that ought to govern our discourse when religion enters the lists of public debate, whether in the context of judicial nominations or elsewhere – let alone that, even if we could come up with such a list of rules, anyone would observe it. The evidence I have offered from the Roberts and Miers nominations and their predecessors suggests we regularly fail to pass even the most basic tests when we seek to hold such conversations.[346] One response to this state of affairs might be despair.[347] We might react by suggesting that we ought to shut up entirely – an approach that we seem to have opted for by default during the nomination of Samuel Alito – or to limit ourselves to talking only in terms of generally available liberal dialogue.

Neither of these options is really satisfactory. The latter option, which simply excludes religion from public dialogue, is troubling because it ignores the wealth and importance of religion in public dialogue and public action, and disserves those for whom such a requirement might

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[346] *Cf.* Wexler, *supra* note __, at 205 ("It may be unfair and un-American to craft a procedural bar to religious arguments in the public square, but that does not necessarily mean that lifting the bar will result in a public discourse that is substantively better than the one we have now").

[347] *Cf.* Levinson, *supra* note __, at 231-32 ("What is interesting is not whether law and morality are inevitably and inextricably connected in the practical doing of constitutional analysis, for surely the answer is yes, but how we come to terms with this fact on those occasions when it is most important to state the fundamental creed of our constitutional order, such as confirmation ceremonies. Generally speaking, I think we do a fairly terrible job of it. A process that leads men and women of undoubted intelligence and integrity to say things that they cannot possibly wish to have represented as their genuine reflections on complex and important matters scarcely provokes admiration.").

force them from the public square altogether.[348] The former option has its evident merits.[349] But it too ignores the profound importance of religion to democratic dialogue. And it is finally unrealistic: as the Roberts and Miers nominations suggest, this kind of talk is inevitable. It is better, then, that we at least begin the task of attempting to develop and encourage some set of meaningful rules, or etiquette, for talking about religion in a useful way in the public square.

Allow me to conclude with the theme of this collection of articles: religion and division. The rules of etiquette I've suggested will not eliminate the potentially divisive nature of religion in a pluralistic society. In particular, if treating religion with *genuine* respect means subjecting it to criticism as well as praise, it is possible that the approach I have suggested – one in which the Constitution bars nothing from discussion, in which religion is subject to wise or unwise invocation and subject to wise or unwise attack, and we have only the rules of the dialogue and the constraining force of politics to guide us – would ultimately produce *more* division, rather than less.

In my view, though, at least in the realm of the public and political dialogue in which we all engage, differences and divisions are simply inevitable on religion, as they are on any other important topic.[350] And so they should be, if we are to have discussions that are worth our time. If we can nevertheless encourage that public dialogue to include religion within the scope of the terms of debate, while doing so in a way that is at least somewhat more transparent, consistent, nuanced, genuinely respectful, and humble, we may find that we are far better off: that our discussions will be less anodyne but also less antiseptic, less polite but richer and more honest. In those perhaps Utopian

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[348] *See* Stephen L. Carter, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* 2 (2000).

[349] *Cf.* Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* § 6.54, at 189 (C.K. Ogden ed. & trans., 1922) ("Whereof one cannot speak, thereof one must be silent").

[350] *See, e.g.,* Garnett, *supra* note __, at 68.

circumstances, a little more division will be a very acceptable price to pay for a lot more meaningful discussion.