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Book Review

The Tension Between a Godless Constitution and
a Culture of Belief in an Age of Reason

*The Godless Constitution: The Case
Against Religious Correctness*

by Isaac Kramnick & R. Laurence Moore
W.W. Norton & Co. (1997)

I. INTRODUCTION

Would Pat Buchanan, a perennial favorite of the Religious Right, violate the Constitution if he said: "God wants you to vote for John Doe"? Isaac Kramnick and R. Laurence Moore in *The Godless Constitution*¹ would answer this question "Yes!"² If not the letter of the law, then certainly the spirit behind the First Amendment's Establishment Clause and the "No Religious Test" Clause of Article VI would be offended by such a statement.³ What then should be the role of religion in public life?⁴ Should religious leaders be involved in politics? Should voters consider a politician's religious beliefs at the polls?

The Godless Constitution proposes that the founding fathers

1. ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (paperback ed. 1997).

2. "A Catholic bishop is within his rights to urge Catholics to support a constitutional amendment banning abortion, but he steps ever [sic] the line separating church and state if he declares it a sin for Catholics to vote for candidate X." *Id.* at 9.

3. See also Michael A. Berg, *The Religious Right, Constitutional Values, and the Lemon Test*, 1995 ANN. SURV. AM. L. 37, 39 (1995) ("The intrusion of religion into the public sphere can be lamented and politically opposed, even if religiously motivated advocacy is itself constitutionally protected. While political argument in religious terms may offend constitutional values, governmental policy-making that serves religious ends is flatly unconstitutional under the Establishment Clause.").

4. For example, should the strong religious beliefs of a judge disqualify him or her from participation in a case involving abortion? The Ninth Circuit addressed this issue in *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9th Cir. 1995) and decided that they should not.

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deliberately omitted any reference to God in the Constitution in order to “build an impenetrable wall of separation between things sacred and civil.”⁵ Kramnick and Moore argue that the founding fathers relied heavily on Enlightenment theory generally,⁶ and the writings of John Locke specifically, in drafting the Constitution. The result was to create a country where “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”⁷ and where any person may hold public office, regardless of his or her religion or even irreligion.⁸ This figurative wall, according to the authors, is violated when religious groups become too vocal in politics, seek to legislate the individual conscience, support specific candidates solely because of their religion, and encourage others to do the same.

The current state of the “impregnable wall” of church-state separation, according to Kramnick and Moore, resembles Swiss cheese.⁹ They attribute the glaring gaps in the wall to the vigilant and vigilante Christian Right, represented by groups like the Christian Coalition and leaders like Pat Robertson, Ralph Reed, and Pat Buchanan. Consequently, Kramnick and Moore dub the so-called “religious” or “Christian” right the party of “religious correctness,” turning the concept of “political correctness” on its head.¹⁰

The authors argue that the Christian Right violates the spirit of the Establishment Clause, if not the text, by its impermissible entrance into politics.¹¹ Kramnick and Moore concede that religious leaders have every right to become involved in politics, run for office, sit on school boards, etc.; however, they believe that the wall is breached when religious leaders claim that their political party, or a specific political candidate,

5. KRAMNICK & MOORE, *supra* note 1, at 83.

6. See also Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 466 (1996) (“[V]irtually all of the Framers—and indeed the entire founding generation—shared a common background in the epistemology of the Enlightenment. That epistemology was based on reason and empiricism, specifically rejecting faith and revelation.”).

7. U.S. CONST. amend. I.

8. See U.S. CONST. art. VI (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

9. Cf. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 109 (1993) (suggesting that “in order to make the Founder’s vision compatible with the structure and needs of modern society, the wall has to have a few doors in it”).

10. KRAMNICK & MOORE, *supra* note 1, at 13.

11. See *id.* at 130, 162-77.

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is the “right one,” or the one that God supports.¹² They object to the Religious Right’s professions that, unless one views an issue a certain way or supports a specific candidate or political party, one is not Christian; they argue that, by using these improper tactics, the Religious Right manipulates the public’s perception, drawing attention away from important issues.¹³

The Godless Constitution further challenges the Religious Right’s assertion that this is a Christian nation, and criticizes its alleged “flip-flop,” or reversal. Kramnick and Moore assert that, having failed at its attempt to include a Christian God in the Constitution, the Christian Right has changed its tactics and “today is seeking ways to ascribe to the Constitution a religious purpose.”¹⁴ The authors point out that “Americans are continually told that the framers were deeply religious, God-fearing Christians It follows that such religious men drafted a Christian Constitution in which God presides over and inspires a Christian political system.”¹⁵ This misreading of history, coupled with politics of exclusion, is deeply offensive to Kramnick and Moore, who accuse the Christian Right of manipulating history to serve their purposes.

Kramnick and Moore’s interpretation of history (which has received some criticism of its own)¹⁶ describes three leaders—

12. The authors state:

Our Constitution, which did *not* found a nation under God, gives religious people no special claims on the political process; they should not, if they respect Article Six, deem a candidate’s personal religious views of any more relevance than whether a candidate plays golf. It perhaps also implies that when they speak publicly about politics, they should never claim the authority of divine truth.

Id. at 10.

13. *See id.* at 164.

14. *Id.* at 143. “The Constitution was designed to perpetuate a Christian order; the Christian Right’s Focus on the Family informs us.” *Id.* at 27.

15. *Id.*

16. Stephen B. Presser criticizes the historical deficiencies of *The Godless Constitution’s* characterization of the founding fathers’ intent in writing the Establishment and “No Religious Test” Clauses in *Some Realism About Atheism: Responses to The Godless Constitution*, 1 TEX. REV. L. & POL. 87 (1997). Presser refutes the authors’ assertion that the Constitution is godless by pointing to places in the Constitution which recognize an underlying Christian belief. *See id.* at 96-100. He also controverts Kramnick and Moore’s claims that Americans were not particularly religious by pointing out that “many, if not most, of the earliest American colonial settlements were made with religious aims in view, and laws regarding the Sabbath, attendance at church, or required financial support for the church were nearly everywhere in force.” *Id.* at 93. When eleven out of the existent thirteen states had religious test clauses, Presser finds it difficult to conclude that early Americans were not particularly religious. *See id.* at

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Roger Williams, James Madison, and Thomas Jefferson—who were deeply committed to the formation of a secular state where religion and government are separate. They describe a Constitution which specifically omitted reference to God, leaving the responsibility for the teaching of morality and religion in the hands of churches, individuals, and families.

What is the role of religion in public life for Kramnick and Moore? First, they argue vehemently that while religion is not excluded from the public square, “[it] can claim no special privileges.”¹⁷ For the authors, government endorsement or support of religion in any form is per se unconstitutional. Second, Kramnick and Moore assert that “a person’s religious faith, or lack thereof, should never be an issue in partisan politics.”¹⁸ Therefore, any “religious test,” or requirement, however indirect, that a person possess certain religious beliefs or adhere to a particular religion in order to hold public office, violates the Constitution.

The Godless Constitution serves a valuable function in alerting private individuals and politicians of the dangers of the Christian Right’s techniques, and of challenging the historical claims of the Christian Coalition to a Christian Constitution. Notwithstanding these strengths, its weaknesses (an unusable scholarly format, failure to consider the wealth of current scholarship on this issue, and subsequent failure to address key issues) limit the book’s usefulness for those who seek

98 (quoting KRAMNICK & MOORE, *supra* note 1, at 28).

Presser then excoriates Kramnick’s apparently casual reading of the Federalist papers. Kramnick, himself an editor of an edition of the Federalist papers (New York: Viking Penguin, 1987), wrote that “nowhere do they discuss America as a Christian people with a Christian government.” KRAMNICK & MOORE, *supra* note 1, at 31. By pointing to numerous passages in the Federalist papers which refer to the blessings of Providence and prayer, Presser refutes this assertion. *See* Presser, 1 TEX. REV. L. & POL. at 100-02. Presser also undercuts the authors’ reliance on Madison for a strict separationist view by pointing out that the same day that Madison moved in support of Jefferson’s Virginia Bill for Establishing Religious Freedom in the Virginia legislature, he also sponsored a bill for punishing Sabbath breakers. *See id.* at 108; *cf.* KRAMNICK & MOORE, *supra* note 1, at 108. Madison also proclaimed a national day of fasting and prayer in connection with the War of 1812. *See* Presser, 1 TEX. REV. L. & POL. at 108-09. *But see* KRAMNICK & MOORE, *supra* note 1, at 103-04, which indicates that Madison later regretted this decision.

For further criticism of Kramnick and Moore’s strictly godless reconstruction of constitutional history, see Erez Kalir, *Is the Constitution “Godless” or Just Nondenominational?*, 106 YALE L.J. 917 (1996).

17. KRAMNICK & MOORE, *supra* note 1, at 168.

18. *Id.*

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to determine their views in this debate or influence the opinions of others. While the book does not pretend to be the definitive work on the subject, *The Godless Constitution* needs to be more comprehensive and better documented to persuade those with some understanding of the legal, political, and religious arguments involved to accept the authors' view of the appropriate relationship between religion and government.

Part II, which follows, points out the major flaws in Kramnick and Moore's case against religious correctness. Part II.A. discusses the authors' advocacy of self-censorship by religious adherents in political discourse and argues that the authors' advocacy of such restraint, though based in sound public policy, is itself unconstitutional. Part II.B. considers the informal religious test clause our society imposes, and the difficulty of balancing the "No Religious Test" Clause of the Constitution and its intent with the need to consider the character, morality, and ethical stance of political candidates. This section ultimately concludes that although it may be preferable not to consider the religious views of a political candidate, it is not unconstitutional. Part II.C. addresses the authors' creation of a "straw man" of religious correctness to bear the brunt of their gripes, and contends that by painting all religious people as extremists, they ignore the contributions of moderate religious believers in political discourse.

Part III addresses critical omissions in *The Godless Constitution* that greatly decrease the value of the work in current scholarship. Part III.A. addresses the scope of the Establishment Clause and the states' former right, under the Constitution, to make laws respecting religion. Part III.B. discusses ceremonial deism, arguing that the authors should have addressed this issue and found that most forms of ceremonial deism are unconstitutional.

Part IV of this Note concludes that the people of the United States have great latitude in determining how they wish to exercise their freedom of speech and freedom to choose their political leaders. The Establishment Clause, which restrains the federal government from making laws respecting or endorsing religion in any way, does not have a counterpart which restrains the United States citizenry from viewing the world through a religious lens or incorporating religion in public life. Therefore, the authors' case against religious correctness has a weak legal basis.

II. THE CASE AGAINST RELIGIOUS CORRECTNESS

A. *Authors' Implicit Advocacy of Self-Censorship by Religious Leaders and Adherents in Public Discourse*

Kramnick and Moore convey conflicting messages about what participation they believe religious individuals and leaders should have in politics. They repeatedly emphasize that religious leaders should receive no special treatment.¹⁹ Recognizing that "American society especially invites a religious perspective in public debate," they contend "that if you want respect for your ideas, you have to earn it."²⁰ To their credit, the authors recognize that "[t]here are very few religious actions in politics that are unconstitutional. There are simply religious actions in politics that are wise and unwise, generous and ungenerous, informed and uninformed."²¹

Despite these assertions, throughout *The Godless Constitution*, Kramnick and Moore describe what they believe to be legitimate and illegitimate religious involvement in politics.²²

19. See *id.* at 20; see also *id.* at 169 ("Religious leaders can demand no more than the same treatment accorded to business leaders, hot dog vendors, and jubilant proponents of a 'Queer America.'").

20. *Id.* "Wearing a clerical garment to a political meeting is perfectly legal, but it doesn't guarantee you respect or give you the right to go to the head of a long line of speakers." *Id.* at 169.

21. *Id.*

22. The authors differentiate between a

Southern Baptist who is inclined to be conservative on many social issues . . . and a convention of Southern Baptists who have been lobbied by Baptist leaders to vote for conservative candidates because that is what Christians who read their Bible ought to do. Politics in a secular state means that there is no Christian position on whether tax cuts are a good or a bad idea, on whether the terms of congressmen ought to be limited, and whether the capital gains tax ought to be lowered. There are ways in which Christians are influenced by their religion when they take stands on the question of abortion rights, of whether feeding the poor and homeless ought to be a government responsibility, and of whether the United States ought to support the state of Israel. But that influence leads to different conclusions. None of these conclusions represents the voice of God, not in political debate.

Id. at 127-28; see also *id.* at 9.

The Christian Coalition website catalogues different political candidates' views on issues and compares them with its official position (which presumably, for the Christian Coalition, represents God's position). Candidates are then ranked and Coalition members are encouraged to vote for candidates whose views are most consistent with the Christian Coalition's position. The potential result of citizens voting based on the Christian Coalition's rankings, rather than on their own views, is a danger that Kramnick and Moore likely would consider an illegitimate injection of religion into

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The recurring theme is that the expression of religious views in political debate by religious leaders and adherents should be limited. In their view, politicians should not discuss their views of God, clergy should not vocally support specific candidates, and voters should never choose a particular candidate based on his or her religious beliefs.²³ For the authors, there is a line beyond which injection of religious sentiment violates the mandates of the Establishment Clause. The authors feel that the difficulty is “in specifying criteria that tell us when the religious biases of voters become an illegitimate injection of God into politics.”²⁴

It is arguable that in a secular state, competing interests will duke it out and the result will be some kind of middle ground. Instead of looking to “robust debate”²⁵ for a solution, however, Kramnick and Moore advocate a self-censored society, wherein religiously influenced people limit their speech in public forums to conform with the restrictions that apply to the federal government under the Establishment Clause.

The real problem with Kramnick and Moore’s position is that the Constitution does not warn against an “illegitimate injection of God into politics.”²⁶ Rather, the Constitution prohibits

politics. See *U.S. Senate 1998 Election Scorecard*, (visited Mar. 11, 1999) <<http://www.cc.org/scorecards/98ES/s98elec.html>>.

23. The authors state:

It is not legitimate for political leaders to mobilize religion in order to invest their argument about moral consequences with certainty, to imagine that their undertaking of God’s will should be shared by everyone. . . . [P]oliticians who run for office claiming God’s backing and who urge voters to make their decisions on the basis of a candidate’s religious beliefs are treading on ground that the Constitution did not want entered.

KRAMNICK & MOORE, *supra* note 1, at 175-76. The authors’ description of “Senator Phil Gramm’s shameless advances to the Christian Right” is illustrative of the type of religious-political speech they condemn. *Id.* at 172. Apparently,

[i]n campaign speeches and mass-mailed letters, Gramm paraded a belief in Christ’s Second Coming to win votes. Quite aside from the issue of the sincerity of his beliefs, which in the political arena is always suspect, Gramm ostentatiously violated the Jeffersonian view that politicians, in deference to the ‘no religious test’ clause, should keep their religious opinions to themselves.

Id.

24. *Id.* at 61.

25. *Gertz v. Welch*, 418 U.S. 323, 361 (1974) (Brennan, J., dissenting).

26. KRAMNICK & MOORE, *supra* note 1, at 61. The only illegitimate injections of religion into politics under the United States Constitution would be through the creation of a religious test act or a national religion by the government. As both of these things are clearly prohibited by the Constitution, the authors’ concern is unwarranted.

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the illegitimate injection of politics into religion. Therefore, regardless of how sympathetic one may be to the argument that the religious biases of voters and politicians should be tempered to consider the diverse citizenry this country boasts, nothing may be done to prevent people from fully using their First Amendment free speech rights to express their religious-based views on political issues.²⁷

Although the framers may have hoped for, and believed in, the separation Kramnick and Moore advocate, as George Washington put it, there is an "absence of any regulation respecting religion from the Magna Carta of our country."²⁸ This appears to prohibit any interference with how churches seek to use their influence. As long as Congress is not legislating conscience or endorsing or promoting any religion, nothing can be done about common citizens who choose not to separate church and state in their own political participation.²⁹ While the Establishment Clause prohibits "government endorsement of a religious viewpoint," when providing conduits for private speech, government must eschew censorship and must fully respect the First Amendment speech rights of such private parties.³⁰ Michael A. Berg outlines the free speech problems triggered by contending that religious speech violates the Establishment Clause:

27. One commentator has noted that [t]he insistence of religious conservatives on having their values reflected in public policy thus poses a provocative question: What is the proper role of religion in American political discourse? Citizens' expressions of religious sentiment are clearly protected by both the religion and speech provisions of the First Amendment. Courts cannot restrain religiously motivated citizens in the exercise of those rights. Moreover, in light of the historic importance of religion as a spur to social reform, any attempt to suppress religious voices as such would be folly.

Berg, *supra* note 3, at 38.

28. KRAMNICK & MOORE, *supra* note 1, at 102.

29. The authors acknowledge that their suggestions cannot be implemented, thereby reducing any possible practical application of their views. "We would be foolish to suggest that there is a fully consistent way to implement the position we defend, and any position with respect to the question of religion and politics in the United States should remain supple and negotiable." KRAMNICK & MOORE, *supra* note 1, at 168. The authors characterize their ideas as a "set of suggestions, which people in this free country are free to ignore but which we think work to the advantage of both politics and religion." *Id.* at 176.

30. Thomas Morawetz, *On Conduits and Voices*, 28 CONN. L. REV. 261, 261 (1996) (quoting Kathleen Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 251 (1996)).

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Citizens' expressions of religious sentiment are clearly protected by both the religion and speech provisions of the First Amendment. . . . It does not follow, however, that political decision-making or argument based on religious tenets is appropriate or wise. . . . [M]uch of the current activism on the part of religious conservatives offends constitutional values.³¹

Religion-based political argument may indeed be "problematic" and "an inapt form of public dialogue" for a number of reasons.³² There is great value to creating a political environment where all citizens feel able to participate equally. To create this environment, it may be necessary to avoid speech which is inaccessible to some participants.³³ Berg suggests, "It is fair to ask participants in politics to restrain their religious impulses in public political speech," even though "asking them to do so in their private decision-making [would be] impractical and intrusive."³⁴ In order to accommodate "a diverse society [which] requires a *lingua franca* by which people with various sources of values may translate their collective will into public policy,"³⁵ Professor Kathleen M. Sullivan insists that "moral disputes may be resolved only on grounds articulable in secular terms."³⁶

Valid public policy reasons thus support Kramnick and Moore's suggestion that religious people censor their political speech, although this arguably would violate principles of free speech.³⁷ However, their suggestion demonstrates a disturbing

31. Berg, *supra* note 3, at 38-39.

32. *Id.* at 57.

33. *See generally*, KRAMNICK & MOORE, *supra* note 1, at 174-76.

34. Berg, *supra* note 3, at 57.

35. *Id.* at 56.

36. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992); *see also* *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

37. As Berg emphasizes,

publicly accessible reasons for government policies are preferable to sectarian justifications because minority religionists cannot fully participate in a dialogue rooted in faith; since no single religious faith can provide a shared language for decision-making, "[t]he common currency of political discourse [must be] nonreligious arguments about human welfare. Public discourse about political issues with those who do not share [the same] religious premises should be cast in other than religious terms."

Berg, *supra* note 3, at 56.

The accessibility arguments posed by Berg and Sullivan are undermined by the fact that they do not seek to impose limits on equally inaccessible secular-based arguments. Many psychological and scientific theories, like religious theories, are widely

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lack of confidence in political leaders, clergy, and laymen. This theory postulates that politicians will be unable to identify arguments that are not substantiated by corresponding secular rationale and, therefore, may not be used as the basis for law. Further, this theory fears that religious leaders will not modify their speech to reach and respect the diverse political audience existing today and questions the ability of religious adherents to think for themselves, as opposed to blindly following their leaders.³⁸

It is true that there are many who do not understand the importance of government equidistance³⁹ and who seek to enshrine their religious beliefs in the law at the expense of people with different beliefs. Nevertheless, in a society where "robust

debated and unverifiable by conclusive evidence. Therefore, even among psychologists and scientists, such theories may not provide a "common currency" for debate. *Id.* These theories are even less accessible to others who may not understand them and do not have the resources or knowledge to test their reliability. Nevertheless, such debatable, speculative, and unconfirmed theories are offered every day without opposition, presumably because there is no moral element to them. A good argument exists that because so many forms of speech are inaccessible, the solution should be for the proponents of psychological or scientific theories or religious beliefs to make the arguments accessible by explaining the context in which they exist. It appears that Kramnick, Moore, Berg, or Sullivan's goal in suggesting that religious adherents limit their speech to secular rationale is to achieve comprehension and a level playing field where all people (religious or not) feel free to participate. Because truly common ground is hard to find, perhaps the solution is not to eliminate discussion of things that are not believed by all (thus eliminating debate itself), but to encourage the explanation of one's views in their context.

Particularly in light of section II.B. *infra*, it appears that much of the American public considers a candidate's religion, or lack thereof, when voting. It follows that the public wishes the politician to express his or her religious viewpoint and to use that position to influence the outcome of political decisions.

38. This is particularly interesting in light of Jefferson's statement about his Statute for Religious Freedom, quoted by Kramnick and Moore: "[I]t is honorable for us to have produced the first legislature who had the courage to declare that the reason of man may be trusted with the formation of his own opinions." KRAMNICK & MOORE, *supra* note 1, at 93.

39. See Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357 (1996), for a discussion of "equidistance" as the appropriate relationship between church and state. Lupu argues that the requirement of government equidistance may be satisfied in most situations through government neutrality towards religion. *Id.* at 357, 362-63. Kramnick and Moore claim that the Religious Right does not understand principles of "government neutrality." KRAMNICK & MOORE, *supra* note 1, at 174. However, what they advocate, and what the Supreme Court requires, is not neutrality. It is complete separationism. Principles of neutrality would allow the government to aid religion as long as it treated all religions alike. Separationism, on the other hand, prohibits the government from aiding, endorsing, or furthering religion in any way. Perhaps Kramnick and Moore would do well to read Lupu.

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debate⁴⁰ is encouraged and protected by the First Amendment to weed out error through the clash of conflicting viewpoints, the way to combat ignorance is through education, not censorship. A population who understands the purpose and benefits of erecting a wall of separation between church and state is less likely to accept religious propaganda from political candidates. Instead, it will focus on the candidate's platform and ability to carry out campaign promises.

Kramnick and Moore accuse the Religious Right of abandoning the founders' faith in religious *laissez-faire*;⁴¹ however, the authors can be accused of doing just that. Religious *laissez-faire* means allowing religious people to bring religion into public life as they desire. It means permitting voters to consider a political candidate's religion and allowing people to support whichever candidate or party they choose to support, based on whatever secular or religious reasons they see fit. Therefore, while public debate centered in secular and moral argument is preferable to religious-based discussion, the Constitution in no way mandates this result. Further, as Stephen Carter argues, "In a nation that prides itself on cherishing religious freedom, it would be something of a puzzle to conclude that the Establishment Clause means that a Communist or a Republican may try to have his or her world view reflected in the nation's law, but a religionist can not."⁴² A system restraining the speech of religious adherents in public debate would allow the liberal left to rage unchecked, while the Religious Right would be forced to hold its tongue.

B. America's Informal Religious Test Clause

Kramnick and Moore correctly argue that, despite a perfectly good "No Religious Test" Clause, the American public and the Christian Right impose their own religious test by making the religious or irreligious beliefs of a political candidate an issue.⁴³ Although there are far more atheists or non-theists now than there were in Colonial America, the number of openly atheist political candidates has not increased propor-

40. *Gertz v. Welch*, 418 U.S. 323, 361 (1974) (Brennan, J., dissenting).

41. See KRAMNICK & MOORE, *supra* note 1, at 85.

42. CARTER, *supra* note 9, at 113.

43. KRAMNICK & MOORE, *supra* note 1, at 60-61, 168.

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tionately.⁴⁴ The authors reason, "To declare oneself a nontheist is de facto to disqualify oneself for the office of president of the United States. One's religion is more of an issue in this country of religious disestablishment than in most countries where religious establishment still exists."⁴⁵

The authors note that the Rhode Island renegade, Roger Williams, wanted no religious test for politicians, believing that "[t]he political skills necessary to preserve civil peace might as easily be found among Jews, or Turks, or Chinese as among people who professed Christianity."⁴⁶ The characteristics of a good ruler were not synonymous with the characteristics of a good Christian.⁴⁷

Still, politicians continue to raise their religious beliefs in political discourse, hoping that it will cause the public to have more confidence and trust in them.⁴⁸ In addition to violating the intent of the Establishment and "No Religious Test" Clauses, the authors claim that such "shameless pandering by politicians" of their professed religious affiliations and beliefs to win votes "is quite literally an exploitation of God," which tends to cheapen religion.⁴⁹ They argue that such pandering undermines the credibility of all who profess to believe in God. Further, they contend that it causes the general public to criticize and doubt those who encourage citizens and politicians to consider religion-based moral and ethical beliefs in making political and legal decisions.⁵⁰

44. *See id.* at 55-56, 168.

45. *Id.* at 56. Unlike countries such as France, which has elected both Jews and atheists "without a great deal of fuss. . . . [t]his country, which abandoned an established church first, has kept an informal test for its highest office the longest." *Id.* at 168. No thanks to the Christian Right, the authors imply.

46. *Id.* at 54.

47. *See id.* at 55.

48. For examples of expression of religious belief by politicians, see the speeches of Rep. Dick Armey, Sen. John Ashcroft, Rep. Tom DeLay, Rep. Newt Gingrich, Rep. John Kasich, Sen. Trent Lott, Sen. Mitch McConnell, Hon. Dan Quayle, Sen. Bob Smith, and Rep. J.C. Watts at the Christian Coalition, Road to Victory 1998 Conference. Transcripts and audio files of their speeches can be found at <<http://www.cc.org/rtv98/speeches/speeches/html>> (visited Mar. 11, 1999).

49. KRAMNICK & MOORE, *supra* note 1, at 56.

50. First, it is hard to believe that it is not government endorsement of religion when President Clinton extols "our duty to pass on to our children the Earth God gave us," emphasizes the need to "live up to [our] God-given potential," and thanks his pastor "for bringing [him] closer to God." President William Jefferson Clinton, *Remarks to Family, Friends, the People of Arkansas, and the People of the United States* (visited Mar. 9, 1999) <<http://www.pub.whitehouse.gov/ur-ires/l2R?urn.pdi://oma.eop.gov/us/>>

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What then are the limits of the “No Religious Test” Clause? Does the Constitution prevent citizens from considering the religion of political candidates? Kramnick and Moore argue that voters should not “deem a candidate’s personal religious views of any more relevance than whether a candidate plays golf.”⁵¹ While the spirit of this clause may dictate such an outcome, it is difficult, if not impossible, to achieve because the morality or integrity of a candidate is always perceived to be at issue. Because it is difficult to separate a candidate’s religion from his or her ethics, the public generally wants to know about a candidate’s religious affiliations.⁵² Just as there are “religious actions in politics . . . that are wise and unwise,”⁵³ there are wise and unwise considerations in choosing a political candidate. While it is arguably preferable for voters to consider platforms and competency and for candidates to focus on issues and plans, it is not unconstitutional for either group to make religious beliefs an issue.⁵⁴ Further, there is no mechanism in law

1996/11/6/2.ext.1>. In 35 of the 49 speeches posted on the website which President Clinton delivered from 1993-1998, Clinton closes his address with a “God bless” of some sort. In eight of the fourteen speeches in which he does not close with “God bless,” there are references to God in the speech, either explicitly or through references to the Bible. That leaves only 6 of 49 speeches in which there is absolutely no reference to God. Three of those six addresses were given in foreign countries. Therefore, the President of the United States has recognized a Judeo-Christian God in 94% of his recent speeches to the American people. To locate copies of President Clinton’s speeches, see <http://www.whitehouse.gov/WH/EOP/OP/html/OP_Speeches.html>. Incidentally, Steven B. Epstein includes “presidential addresses invoking the name of God” in his list of “core” ceremonial deism practices. See *infra* notes 86-88 and accompanying text.

Second, in light of recent scandals, such professions of faith cause the public to question the sincerity of every person who professes a religious belief, thus filling the public with a skepticism that is hostile to religion. See KRAMNICK & MOORE, *supra* note 1, at 56. The argument of *The Godless Constitution*, in part, turns upon “the fears of the founders, thoroughly justified by recent events, that politically partisan uses of religion would turn politics into pandering and undermine the vital moral authority of America’s churches.” *Id.* at 8.

51. *Id.* at 10.

52. Further, candidates generally wish their religion to be known to appeal to an audience that shares their beliefs. Hence, it is unlikely that America’s informal test clause will ever disappear. The only hope is that, as America’s political climate becomes more diverse, a candidate’s professed religion will become less of an issue.

53. *Id.* at 169.

54. Taking a political candidate’s religious views to task is certainly nothing new. A banner printed by the *Gazette of the United States* in the spring of 1800 read, “THE GRAND QUESTION STATED. At the present solemn moment the only question to be asked by every American, laying his hand on his heart, is ‘shall I continue in allegiance to GOD—AND A RELIGIOUS PRESIDENT; or impiously declare for JEFFERSON—AND NO GOD!!!’ ” *Id.* at 91.

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or politics to implement the changes Kramnick and Moore advocate. Because it is perfectly permissible to consider a candidate's religion, along with his or her favorite food and shoe size, Kramnick and Moore's complaints against religious voters and candidates amount to nothing more than a pedantic temper tantrum.⁵⁵

C. The "Straw Man" of Religious Correctness

A critical flaw in Kramnick and Moore's case against religious correctness is the "party of religious correctness" that it creates.⁵⁶ Throughout the book the authors rail against the Christian Coalition generally, and against Pat Buchanan, Ralph Reed, and Pat Robertson specifically. Apart from isolated references to Senator Phil Gramm⁵⁷ and Newt Gingrich,⁵⁸ these are the only three persons whom Kramnick and Moore associate with the Religious Right. While the Christian Coalition is growing in its political influence, it is not the vigilante, right wing extremist group that Kramnick and Moore make it out to be. As one critic put it, "[W]hen [Kramnick and Moore] turn to arguing against today's religious right, they have to concede that actual Christian political spokespersons aren't jackbooted theocrats."⁵⁹

Nevertheless, instead of objectively considering the contributions of the moderate right, Kramnick and Moore "set up a straw man called 'religious correctness' to take the hits they want to score."⁶⁰ The authors do not cite to any specific state-

55. Cf. Scott C. Idleman, *Liberty in the Balance: Religion, Politics, and American Constitutionalism*, 71 NOTRE DAME L. REV. 991, 1013-14 (1996) ("This does not mean, of course, that the Religious Right has committed no transgressions. To be sure, its brand of political participation may often be deemed impolite and even imprudent; at some points, intolerant and exclusionary. As such, it may very well violate free-standing principles of liberal democracy, defy principles of political prudence, threaten social cohesion, and offend the theology of the participants. But standing alone these are not cognizable sins against the Constitution, godless or otherwise. Indeed, there may even be a certain silliness and arrogance in articulating the view that God subscribes to one's political ticket, but—lest the business of government itself come to a halt—silliness and arrogance are not, and have never been, constitutional offenses.").

56. KRAMNICK & MOORE, *supra* note 1, at 13.

57. *See id.* at 172.

58. *See id.* at 27, 31, 165-66.

59. Ray Olson, *Reviews from Booklist*, Dec. 15, 1995 (visited Mar. 23, 1999) <http://www.amazon.com/exec/obidos/ts/book-reviews/039331524X/ref=sim_books/002-4908386-7170860>.

60. *Id.*

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ments or activities of these religiously-affiliated political groups, but refer only to generalities and tendencies. A peek into the activities of these groups shows that they are much less extreme and vocal than Kramnick and Moore allege. Even assuming for the purposes of argument that the radical Christian Right is as extreme as *The Godless Constitution* claims, the authors fail to consider the valuable contributions of mainstream religious people to political dialogue. The authors completely overlook positions "held by moderate, rational, religious citizens who believe that American politics should be neither hermetically secular nor fanatically theocratic."⁶¹ The tails they pin on their scapegoat donkey of religious correctness cannot and should not be applied to mainstream religious people and, consequently, miss the mark.

III. CRITICAL OMISSIONS

The tragic flaw of *The Godless Constitution* is that Kramnick and Moore have written in a political science and historical vacuum. There is a notable absence of law in the authors' analysis. Considering that every issue they discuss is either explicitly legal or is linked to an aspect of the law, the authors should have considered in greater detail the current state of the law and existing scholarship related to the issues involved.⁶² As a result of their failure to do so, the authors disregard a number of critical issues inextricably linked to a discussion of the role of religion in the creation of federal and state policy and law. Two of these issues are addressed briefly below.⁶³

61. Erez Kalir, *Is the Constitution "Godless" or Just Nondenominational?*, 106 *YALE L.J.* 917, 922 (1996).

62. If the authors did engage in such research, they would have done well to document the works consulted. In "A Note on Sources" the authors comment, "Because we have intended the book to reach a general audience, and also because the material we have cited is for the most part familiar to historians and political scientists, we have dispensed with the usual scholarly apparatus of footnotes." KRAMNICK & MOORE, *supra* note 1, at 179. The problem with this statement is that the "general audience" is not made up of historians and political scientists. In their attempt to make the book user-friendly, Kramnick and Moore have alienated readers who do not have independent knowledge of the historical and political movements they refer to and who wish to test the accuracy of their conclusions. Endnotes would hardly have been intrusive in the text and, though time consuming for the authors, would have increased the level of accountability for the authors' claims and, consequently, the intrinsic value of the work.

63. Numerous other issues have been raised by fellow critics of *The Godless Constitution*. See, e.g., Kalir, *supra* note 61. Kalir points out that current court decisions do

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A. *The Scope of the Establishment Clause*⁶⁴

The Godless Constitution fails to address the issue of why the Establishment Clause applies to the States under current law and whether this law is congruent with the intent of the framers and the First Congress.⁶⁵ The authors concede that

not attempt to decide whether this is a Christian nation or godless nation, as do Kramnick and Moore, but rather attempt to decide "what constitutes religious freedom and what religious coercion." *Id.* at 922.

Another issue the authors neglect is raised by Alexandra D. Furth who seeks to understand what is this religion we should separate from state. In *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PA. L. REV. 579 (1998), Furth points out the contradictory decisions of courts which indicate that there may be a need for a better understanding of this religion that we are to keep separated from the state. Courts have found crèche displays in public buildings around Christmas to be constitutional and unconstitutional, depending on the setting. Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) with *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Mary Harter Mitchell attempts to define both "religion" and the meaning of "establishment" in *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 690-91 (1987).

Can laws originally based on religious beliefs be defended on secular grounds after the fact? Currently the law requires that every law be based in, or at least supported by, secular principles. See generally *Everson v. Board of Educ.*, 330 U.S. 1 (1947). This means that a law may not stand which is based only on a claim that God disapproves of the regulated behavior. Cf. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963) ("[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."). Some scholars argue that laws whose legislative history reflect any consideration at all of religious principles are per se unconstitutional. See Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407 (1996). Others argue that the intent behind a law should not be inquired into unless "the inquiry is clearly necessary to serve the greater good of preserving religious liberty for all." Berg, *supra* note 3, at 41.

This conflict is important to the issues Kramnick and Moore address, and is particularly applicable to their discussion of the Sunday mail debate. The authors discuss how initially the decision to move and distribute mail on Sundays was a great victory for separationists because the secular needs of the state to have speedy access to news and information overrode the Christian value of resting on the Sabbath day. See KRAMNICK & MOORE, *supra* note 1, at 132-34. Kramnick and Moore brush under the rug the reversal of this holding in the 1950's, by commenting only that the decision to close post offices on Sunday violated the principles behind the Constitution. See *id.* at 142-43. The authors neglect to discuss, however, whether the law not to deliver mail on Sunday can be defended on a secular basis or whether the decision to have no Sunday mail constitutes government endorsement or promotion of Christianity, contrary to the Establishment Clause. Consequently, it is unclear whether Kramnick and Moore would go back to the origin of the law and, because of its religious underpinnings, invalidate the law, or whether they would uphold this and other religion-based laws provided there is sufficient secular basis.

64. See generally Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1117 (1988).

65. For a more detailed discussion of these issues see Steven D. Smith,

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“[t]he religious clauses of the First Amendment to the Constitution placed no constraints on individual states.”⁶⁶ However, in their discussion of the separation of church and state, they make no attempt to distinguish between the rights reserved for state governments under the Constitution and the limits placed on the federal government. The government or “state” is described as being powerless to act in any way relating to religion, and the authors’ only discussion of permissible state involvement in religion is viewed through the eyes of Roger Williams.⁶⁷

The authors act as though the scope of the Establishment Clause is totally unambiguous. There is considerable evidence that the framers and the early American presidents understood that the clause prohibited the federal government from creating a national religion, and empowered the state governments to make, or refrain from making, whatever laws regarding religion they saw fit. Although the Supreme Court has held that the Establishment Clause does apply to the States through the Fourteenth Amendment,⁶⁸ there is considerable evidence indicating that the founders were not opposed to government endorsement of religion, as long as it was instigated by state governments.

Joseph Story, in his *Commentaries on the Constitution*, wrote that “the whole power over the subject of religion is left exclusively to the state governments.”⁶⁹ In the First Congress of 1789, the same day the Bill of Rights was passed, a bill recommending “a day of public thanksgiving and prayer” was introduced.⁷⁰ A representative opposed the bill, stating: “[I]t is a religious matter, and as such, is not proscribed to us. If a day of thanksgiving must take place, let it be done by the authority of the several States.”⁷¹ Although President Adams proclaimed fast days while in office, he later said, “Nothing is more

FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-30 (1995).

66. KRAMNICK & MOORE, *supra* note 1, at 118.

67. *See id.* at 58.

68. *See* *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

69. Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 2 (1996) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (1833)).

70. *Id.* at 5 (quoting 1 ANNALS OF CONG. 949-50 (Joseph Gales ed., 1789) (1st ed. pagination)).

71. *Id.*

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dreaded . . . than the *national* government meddling with religion.”⁷² Adams was not concerned with state involvement in religion, because he considered such matters completely within state jurisdiction.⁷³

The organization of the early states is further evidence of the intent for states to have power over religion. “In 1789, at least six states had government-supported churches.”⁷⁴ Eleven out of the thirteen states had religious test clauses, restricting participation in government to those of particular faiths, to the exclusion of others.⁷⁵ As professor Akhil Reed Amar explains it, “a single national religious regime would have been horribly oppressive to many men and women of faith; local control, by contrast, would allow dissenters in any place to vote with their feet and find a community with the right religious tone.”⁷⁶

Despite this evidence of intent, the Supreme Court later began to interpret the Establishment Clause as a prohibition on both federal and state government involvement in religion. In Justice Black’s decision to ban the practice of school prayer in New York, he stated:

There can, of course, be no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. . . .

. . . [W]e think that the Constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part

72. KRAMNICK & MOORE, *supra* note 1, at 102 (emphasis added).

73. See also Amar, *supra* note 69, at 4-5 (“Thus, while *President Jefferson* in 1802 refused to proclaim a day of religious Thanksgiving, he had done just that as *Governor Jefferson* some 20 years before.”).

74. *Id.* at 2; see also 1 AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 460-61 (1975) cited in *ACLU v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986). Massachusetts was the last state to disengage religion “as an engine of the state” and “end its establishment of religion” in 1833. Leonard W. Levy, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 42 (2d ed. 1994).

75. See THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 221 (1986). Presser uses this fact to refute the authors’ assertion that early Americans were not particularly religious people. See Presser, *supra* note 16, at 98; KRAMNICK & MOORE, *supra* note 1, at 28.

76. Amar, *supra* note 69, at 14.

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of a religious program carried on by government.⁷⁷

Courts have interpreted this decision to mean that the Constitution, provides “that both state and federal governments shall take no part respecting the establishment of religion or prohibiting the free exercise thereof.”⁷⁸

Kramnick and Moore do not consider what happened between 1787 and 1962 to expand the purview of the Establishment Clause to include state governments. Although they admit on the one hand that the Establishment Clause did not bind the states when enacted,⁷⁹ all of their discussion regarding the separation of religion and government implies that this separation applies to all levels of government. Presumably, they agree with the Supreme Court rulings that expand the purview of the Establishment Clause to apply to the states but there is no discussion of the changes that took place in this area or the inconsistencies between the current state of the law and the founders’ intent.

Numerous scholars disagree with the Supreme Court’s analysis that the Establishment Clause prohibits state involvement in religion. As Amar noted,

[t]he key point is not simply that, as with the rest of the First Amendment, the Establishment Clause limits only Congress and not the states. That point is obvious on the face of the Amendment and is confirmed by its legislative history. (It also, of course, has the imprimatur of Chief Justice Marshall’s opinion in *Barron v. Baltimore*).⁸⁰

77. *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962); see also Roger K. Newman, School Prayer and the Ten Commandments in Alabama, Inaugural Speech in the Shelby E. Southard Lecture Series at Birmingham Southern College (Feb. 6, 1997), in 28 CUMB. L. REV. 1, 2-4 (1997-1998) (commenting on the writing of, and repercussions which arose out of, Justice Black’s decision in *Engel*). But see *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) (upholding the constitutionality of school-led prayer at a university commencement ceremony).

78. Newman, *supra* note 77, at 4 (quoting Justice Thomas Clark); cf. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 221-26 (1963).

79. See KRAMNICK & MOORE, *supra* note 1, at 118 (“The religious clauses of the First Amendment to the Constitution placed no constraints on individual states.”).

80. Amar, *supra* note 69, at 3 (citation omitted). In *Barron*, Chief Justice Marshall described the impetus behind the amendments to the Constitution as a fear that the federal government would overstep its bounds. He wrote, “In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them

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Amar claims that the “original establishment clause . . . is not anti-establishment, but pro-states’ rights.”⁸¹ Accordingly, it is completely ambivalent on the issue of whether laws should be established regarding religion and “simply calls for the issue to be decided locally.”⁸²

The Establishment Clause allows states to retain the power to choose whether to establish a religion.⁸³ To apply this clause against the states to prevent them from becoming involved in religion is to use the clause to attempt to eliminate “a right explicitly confirmed by the Establishment Clause itself!”⁸⁴

Kramnick and Moore acknowledge that the Establishment Clause limits the federal government’s involvement in religion.⁸⁵ However, they do not address how the Establishment Clause came to be applied to the states and the effects of that application on the states. They refer to constitutional intent and imply that the founders’ aim was to completely separate religion from every level of government. The evidence, however, suggests that this was not the case. The authors would have done well to discuss this discrepancy.

B. The Constitutionality of Ceremonial Deism: Is it Constitutional to Pledge Allegiance to this Nation “Under God”?

Steve Epstein describes ceremonial deism as any practice that involves:

- 1) actual symbolic, or ritualistic;
- 2) prayer, . . . reverent reference to, or embrace of, a general or particular deity;
- 3) created, delivered, sponsored, or encouraged by government officials;
- 4) during governmental functions or ceremonies, in the form of patriotic expressions, or associated with holiday observances;
- 5) which, in and of themselves, are unlikely to indoctrinate or proselytize their audience;
- 6) which are not specifically designed to accommodate the free religious exercise of a particular group of citizens; and
- 7) which . . . are deeply rooted in the nation’s history and traditions.⁸⁶

to the state governments. This court cannot so apply them.” *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

81. Amar, *supra* note 69, at 3.

82. *Id.*

83. *See id.*

84. *Id.*

85. *See* KRAMNICK & MOORE, *supra* note 1, at 118.

86. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96

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Examples of ceremonial deism include phrases such as “God save the United States and this Honorable Court”; national holidays celebrating Thanksgiving and Christmas; the use of the Bible to administer the oaths of court witnesses and jurors; and prayers at presidential inaugurations.⁸⁷ Arguably, the continual recognition of God in so many forms amounts to blatant government sponsorship of both religion over irreligion and particular religions to the exclusion of others. Yet for centuries we have winked at every reference to God in these contexts, and have not seriously considered whether they violate the Establishment Clause of the First Amendment.⁸⁸

Alexandra D. Furth points out that the potential reason for continuing to ignore the conspicuous state endorsement of religion as opposed to irreligion, and a Christian God as opposed

COLUM. L. REV. 2083, 2095 (1996). In his book, Epstein describes a fictional United States society in the year 2096 where 75% of the population is Muslim. The nation’s motto, inscribed on the national currency, is “In Allah We Trust.” *Id.* at 2084. The students dutifully repeat the Pledge of Allegiance daily in public schools, stating that America is one nation “under Allah.” *Id.* When required to give testimony in a court, citizens must take an oath by placing one hand on the Koran and swearing to tell the truth, the whole truth, and nothing but the truth, “so help me Allah.” *Id.* at 2085. Put this way, it is incredible how much of public life includes government endorsements of a God, which, though perhaps not exclusively a Christian god, is generally not perceived to be Allah.

While the evidence points to a group of Christian founders, there is also evidence that the founders did consider other religions. When Jefferson’s Statute for Religious Freedom was being passed in 1786, there were suggestions to add the words “Jesus Christ” to the passage which states, “Almighty God hath created the mind free.” *Everson v. Board of Educ.*, 330 U.S. 1, 29 (1947) (quoting A Bill for Establishing Religious Freedom, enacted by the General Assembly of Virginia, Jan. 19, 1786, *reprinted in* 1 RANDAL, *THE LIFE OF THOMAS JEFFERSON* 219-20 (1858); XII HENING’S STATUTES OF VIRGINIA 84 (1823)). Commenting on this in his autobiography, Jefferson wrote, “The insertion . . . was rejected by a great majority, in proof that they meant to comprehend within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohometan, the Hindoo, and the infidel of every denomination.” KRAMNICK & MOORE, *supra* note 1, at 93.

In 1787, William Van Murray, Esq., wrote an essay in the *American Museum* wherein he stated that America

“will be the great philosophical theater of the world,” since its Constitution recognizes that “Christians are not the only people there.” . . . Governments are created, he held, according to the “laws of nature. These are unacquainted with the distinctions of religious opinion; and of the terms Christian, Mohamentan, Jew or Gentile.”

Id. at 40-41.

87. See Epstein, *supra* note 86, at 2095.

88. See *id.* at 2086-87. After analyzing ceremonial deism, past and present, Epstein concludes that “the Supreme Court can and should hold most forms of ceremonial deism to be unconstitutional.” *Id.* at 2091.

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to Allah or Buddha, for example, stems from a fear that America's eroding identity will collapse with the elimination of so many traditional parts of public life that have been present since the birth of this nation.⁸⁹

When faced with these arguments, others contend that if Christian references were good enough for the founders who created the clauses, they are good enough for us.⁹⁰ After all, if the founders intended such exclamations to be prohibited by the Establishment Clause, they never would have used them.⁹¹ This argument alone, however, is insufficient to withstand challenge, because the cultural shape of America has changed radically in the last two centuries.⁹² Although references to God may not have offended any of the early framers, it is clear that in a multi-theistic society, such denomination-specific references do not include all believers and unbelievers underneath its inadequate umbrella.

Why, since so much of Kramnick and Moore's argument hinges on impermissible intrusions of religion in politics and unconstitutional endorsement of religion by the government, did the authors not consider ceremonial deism? Although Kramnick and Moore amply considered the constitutionality of prayer in public schools,⁹³ an issue which the Supreme Court has already decided,⁹⁴ they fail to take the analysis one step

89. See Furth, *supra* note 63, at 581, 613-16.

90. See, e.g., Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

91. See *id.*

92. See Furth, *supra* note 63, at 594-95 ("Establishment Clause analyses constructed on arguments about original intent are dubious. . . . [R]eliance on the rationale and behavior of eighteenth-century lawmakers is misplaced. The meaning and purpose of the Establishment Clause have changed with the social evolution of the nation.").

93. See KRAMNICK & MOORE, *supra* note 1, at 165-66.

94. Because the authors chose to address only issues which the Supreme Court has already decided (for example, Sunday mail, Christian amendments to the Constitution, aid to parochial schools, and abortion, to name a few) and failed to tackle a controversial issue like ceremonial deism, they leave a gap in their analysis which must be filled. It is impossible to infer how Kramnick and Moore would decide these issues because even Roger Newman, who agrees that school prayer is unconstitutional, distinguishes ceremonial deism like "God save the United States and this honorable Court" from prayers in schools because, presumably, children's minds are more impressionable than those of adults. See Newman, *supra* note 77, at 7.

Even among those who would agree that prayer in schools and religious displays

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further by questioning courtroom, congressional, or other public ceremonial prayers.⁹⁵ Perhaps the reason Kramnick and Moore do not address ceremonial deism is because it is such a controversial issue. Ceremonial deism is tightly woven into the fibers of American culture. The feeling that we are a nation chosen by and favored of God contributes to the country's strong patriotism.⁹⁶ Next to a declaration that we are a nation under God, or even God's nation, apple pie pales in its ability to inspire national pride and feelings of security and safety. And so the authors join with the courts in sidestepping what would be a painful and messy surgical process, threatening the nation's identity and offending many.

IV. CONCLUSION

The authors of *The Godless Constitution: The Case Against Religious Correctness* bring two claims against the Religious Right. First, they claim that its intense political involvement violates the intent of the framers who sought to keep religion and politics separate. Second, they claim that by making a political candidate's religious beliefs an issue, the Christian Right endorses the use of an informal religious test which violates the Constitution.

In these two ways, the authors assert that groups like the Christian Coalition have overstepped their bounds and have penetrated the sacred wall between church and state.⁹⁷ Thus,

in government buildings are inappropriate, it is unlikely that most would agree to remove the motto "In God We Trust" from the nation's currency, or to eliminate Christmas as a national holiday.

95. The closest Kramnick and Moore come to addressing the issue of ceremonial deism in its various forms is when they state, "The framers erected a godless federal Constitutional structure, which was then undermined as God entered first the U.S. currency in 1863, then the federal mail service in 1912, and finally the Pledge of Allegiance in 1954." KRAMNICK & MOORE, *supra* note 1, at 143.

96. In Kramnick and Moore's opinion, the party of religious correctness "asks that we perpetuate in public rhetoric the notion that the United States is an instrument of divine providence." *Id.* at 174.

97. Even if *The Godless Constitution* is merely "an attempt to rail against the so-called 'religious' or 'Christian' right," as some complain, *see* Presser, *supra* note 16, at 87-88, such criticism is not entirely unwarranted due to the extremism demonstrated by some religious groups, whose lack of tolerance of those with other beliefs clearly violates the Christian doctrines they profess of understanding and respect for others. *See, e.g.,* Robert Dreyfuss, *The Holy War on Gays*, ROLLING STONE, Mar. 18, 1999, at 38; Berg, *supra* note 3, at 45 ("I want you to just let a wave of intolerance wash over you. I want you to let a wave of hatred wash over you. Yes, hate is good.") (quoting Bob Caylor, *Terry Preaches Theocratic Rule*, THE NEWS-SENTINEL (Fort Wayne, Ind.), Aug. 16,

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The Godless Constitution serves the valuable purposes of alerting the Christian Right that its claims to a Christian Constitution and a Christian nation are not well founded, and forcing individuals and politicians to consider the propriety of their own views and those of the Religious Right regarding the appropriate distance between church and state.⁹⁸

Despite these strengths, the weaknesses of *The Godless Constitution* greatly decrease its ability to achieve the aforementioned purposes. First, there is no remedy available for the claims Kramnick and Moore bring against the Religious Right. The limits the authors seek to place on the ability of religious leaders and adherents to publicly practice religion and express their beliefs have no legal basis. The authors' implicit advocacy of self-censorship by religious leaders in public speech violates free speech principles, and is not mandated by the Constitution. Their criticism of the politically active Religious Right does not consider its value in balancing the unchecked Liberal

1992, at 1A (quoting sermon by Randall Terry, the founder of Operation Rescue)). Statements like this from the extreme right couldn't be farther from Jesus Christ's instructions to "love one another" and "love your neighbour as yourself." *John* 13:34-35 (King James).

There appears to be a temptation among members of the Religious Right to codify the doctrines of their churches in the law, so that people will not have a choice of how to live. By promoting prayer in schools, the church does not have to worry if the parents in their congregations are not totally committed to teaching their children to pray in the home, because the state will take care of it. However, as Newman argues, "Prayer belongs in our churches, synagogues, and homes. If families did their job in this area, schools would not have to be involved. . . . 'We have a very easy remedy,' President Kennedy said after the school prayer case, 'and that is to pray ourselves.'" Newman, *supra* note 77, at 10-11.

In the majority of cases, the result the Religious Right seeks to achieve by involving government in religion is something the Religious Right could achieve itself. If children were taught creationism in the home along with evolution in school, there would be no need for lawsuits about the school curriculum of a science department. See *Edwards v. Aguillard*, 482 U.S. 578 (1987). Therefore, the simple solution is for religious people to live their beliefs, rather than seeking to legislate the individual conscience of Americans nation-wide in matters where no valid secular purpose is achieved by the law or policy at issue.

98. See Idleman, *supra* note 55, at 992. Idleman suggests that *The Godless Constitution* serves three valuable purposes. First, it challenges the Religious Right's historical analysis of the origins of the Constitution, debunking their claim that this is a Christian nation with a Christian Constitution. Cf. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (wherein Justice Brewer states: "this is a Christian nation"). Second, it empowers citizens to scrutinize their own views on the interaction of religion and politics. Third, it aids "government officials subject to the influences of the Religious Right" in evaluating "the propriety of those influences in relation to the interpretation and execution of their public obligations." Idleman, *supra* note 55, at 992.

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Left and paints the entire religious community as extremists, rather than considering the valuable contributions of moderate religious adherents in politics. In addition, the authors' argument that religious Americans have created an informal religious test clause for their leaders does not recognize a voter's right to consider a candidate's religion, if a voter so chooses.

Second, critical omissions in *The Godless Constitution* seriously limit its value. Kramnick and Moore do not recognize that the prohibitions placed on the Federal Government by the Establishment Clause were not meant to apply to states and individuals. Further, the authors sidestep such controversial issues as ceremonial deism, and opine instead on issues which have already been decided by the Supreme Court to their satisfaction. For these reasons, Kramnick and Moore's "Case Against Religious Correctness" must be dismissed for "failure to state a claim upon which relief may be granted."⁹⁹

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99. FED. R. CIV. P. 12(b)(6).