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True God of the Next Justice

J. Gregory Sidak

Articles

TRUE GOD OF THE NEXT JUSTICE

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I. INTRODUCTION

For a decade or more, American constitutional discourse has emitted a detectable odor of bigotry toward Roman Catholics who embrace the papal encyclicals of Pope John Paul II. The day after President George Bush nominated Judge Clarence Thomas to the Supreme Court of the United States in 1991, Virginia Governor Douglas Wilder said that, although the judge was "qualified" to sit on the Court, "he's indicated he's a very devout Catholic, and that issue is before us."[1] The Governor told reporters, "The question is: How much allegiance does [Mr. Thomas] have to the Pope?"[2] At the time, it had been more than three decades since Americans overcame fears of papists in high places to put William Brennan on the Supreme Court[3] and John

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1. *Gov. Wilder Is Questioning Role of Thomas's Religion*, Wall St. J. A8 (July 3, 1991) (quoting Gov. Douglas Wilder).

2. Id.; see also Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 57, 287 n.24 (Doubleday, 1993) ("And then there is the prominent feminist who grumbled in the summer of 1991 that there are too many Catholics on the Supreme Court—discussing Roman Catholics the way that Pat Buchanan discusses homosexuals").

3. See Kim Isaac Eisler, *A Justice for All* (Simon & Schuster, 1993).

Kennedy in the White House.[4] Anti-Catholic prejudice has been cited, however, as a factor in Alfred E. Smith's loss to Herbert Hoover in the presidential election of 1928. Arthur Schlesinger has written that "beneath the surface maneuvers of the campaign was the slanderous undercurrent of religious bigotry—whispers that Smith's election would bring the Pope to America, that all Protestant marriages would be annulled and all Protestant children declared bastards."[5]

The intolerance of Governor Wilder's remarks in 1991 seemed all the more inexplicable because he was the first African American to occupy the governor's mansion in the former capital of the Confederacy, and thus his own electoral achievement testified in some measure to the ability of American democracy to overcome the invidious discrimination of the past. Governor Wilder's remarks caused such indignation that he was forced to retract them the following day.[6] Journalists focused on the possible damage to the governor's political career[7] but overlooked the larger issue: Here was a prominent public official with presidential ambitions who was evidently unaware that Article VI of the Constitution contains the Religious Test Clause, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[8] In addition to that provision, the Senate, in the discharge of its Advice and Consent duties,[9] cannot quiz a Supreme Court nominee about his religion as a condition of confirming him, lest the individual senators violate their own oaths "to support this Constitution,"[10] an obligation that necessarily includes supporting the Constitution's prohibition against religious tests. Perhaps even more surprising than Governor Wilder's remark was the reaction of Senator Orrin Hatch, a Mormon from Utah and a senior Republican on (and future chairman of) the Senate Judiciary Committee: "I think it's fair to ask if [Judge Thomas's] Catholic faith means he would blindly follow the pope. You can

4. See Arthur M. Schlesinger, Jr., *A Thousand Days: John F. Kennedy in the White House* 6-7 (Houghton Mifflin Co., 1965).

5. See Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Crisis of the Old Order, 1919-1933* at 128 (Houghton Mifflin Co., 1957).

6. Donald P. Baker and David S. Broder, *Wilder in Hot Water*, Wash. Post C1 (July 4, 1991).

7. Donald P. Baker, *Contrite Wilder Says He Was Misunderstood*, Wash. Post A1 (July 8, 1991).

8. U.S. Const., Art. VI, § 3, cl. 2.

9. Id. Art. II, § 2, cl. 2 (the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court").

10. Id. Art. VI, § 3, cl. 1.

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."[11] Thus, this prominent Republican on the Senate Judiciary Committee seemed as unfamiliar with the Religious Test Clause as did Governor Wilder.

Despite this evident unfamiliarity of some senior politicians with the Religious Test Clause, it may be regarded as some measure of official toleration of religion that the Supreme Court has never been required to decide a case in which a religious test was required of a national officeholder. As recently as 1961, however, the Court unanimously struck down Maryland's requirement that officeholders declare their belief in the existence of God. Interpreting the Free Exercise Clause[12] and the Establishment Clause,[13] added to the Constitution in 1791 through the First Amendment, Justice Hugo Black wrote for the Court in *Torcaso v. Watkins*, "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'"[14] Laurence Tribe, writing in his influential treatise several years before the Thomas nomination, concluded that, "[a]s a practical matter," the Free Exercise and Establishment Clauses "are dispositive in cases challenging alleged 'religious tests'" such that the Religious Test Clause of Article VI "is now of little independent significance."[15]

On narrow, legal grounds Professor Tribe's assessment may be too sanguine in the case of a judicial nomination, for the con-

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11. Baker and Broder, *Wilder in Hot Water* at C5 (cited in note 6) (quoting Sen. Orrin Hatch).

12. U.S. Const., Amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]").

13. Id. ("Congress shall make no law respecting an establishment of religion").

14. 367 U.S. 488, 495 (1961) (quoting without citation *Everson v. Board of Ed.*, 330 U.S. 1, 15-16 (1947)). In *Everson*, which was decided under the Establishment Clause, the Court further stated: "No person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ." 330 U.S. at 15-16.

15. See Laurence H. Tribe, *American Constitutional Law* 1155 n.1 (Foundation Press, 2d ed. 1988) (citing *Torcaso*, 367 U.S. at 489 n.1; *American Communications Ass'n v. Douds*, 339 U.S. 382, 414-15 (1950); *Anderson v. Laird*, 316 F. Supp. 1081, 1093 (D.D.C. 1970), rev'd on other grounds, 466 F.2d 283 (D.C. Cir. 1972). For analysis of the Religious Test Clause, see Gerald 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 (1987); see also Thomas B. McAffee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 Vill. L. Rev. 17, 93 (1998); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 372 (1996); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 S. Ct. Rev. 83.

firmation or rejection of a nominee would not require Congress to breach the prohibition that "Congress shall make no law" concerning the establishment or free exercise of religion. A confirmation vote (like a legislative chaplaincy) is not the enactment of a law, and thus religious discrimination in the confirmation or rejection of Supreme Court nominees might find a loophole in the First Amendment. More generally, the Wilder imbroglio demonstrated that the development of jurisprudence on the First Amendment's religion clauses should not be taken to obviate an explicit constitutional prohibition of the sort that the Religious Test Clause embodies. Wilder's comments were consistent with Justice Joseph Story's assessment in 1833 that "[t]he framers of the constitution .... knew, that bigotry was unceasingly vigilant in its stratagems, to secure to itself an exclusive ascendancy over the human mind; and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those, who doubted its dogmas, or resisted its infallibility."[16]

Religion and politics may forever be a volatile mix. In any presidential election, the views of a candidate's likely Supreme Court nominees provide a lively topic for debate. In current times, this controversy is surely due in large measure to the fact that nominations to the Court are seen as the vehicle by which the law and politics of abortion change in the United States. In the 2000 presidential election, for example, Vice President Al Gore said, "Not only a woman's right to choose, but a lot of our individual rights and civil rights are going to be at risk if the Republican Party controls the majority on the Supreme Court for the next 30 or 40 years."[17] In June 2000, the Supreme Court struck down, 5-to-4, in *Stenberg* v. *Carhart* Nebraska's prohibition on "partial birth" abortion, and thus produced a new ruling on this controversial subject only weeks before the Democratic and Republican conventions.[18] President Clinton warned on the day of the *Carhart* ruling that the Supreme Court appointments of his successor would determine whether *Roe v. Wade* "will either be maintained or overturned."[19] The same day, in the closely watched U.S. senatorial race in New York, candidate

16. Joseph Story, *Commentaries on the Constitution of the United States* § 971, at 690 (1833) (Ronald D. Rotunda and John E. Nowak, eds., Carolina Academic Press, 1987).

17. Jackie Calmes, *Makeup of Supreme Court Becomes a Campaign Issue*, Wall St. J. A28 (Apr. 4, 2000) (quoting Vice President Al Gore).

18. 530 U.S. 914 (2000).

19. See Press Conference by the President, Weekly Comp. Pres. Doc. (June 28, 2000).

Hillary Rodham Clinton stated: "My position is clear: as a member of the United States Senate, I will not vote for a nominee to the Supreme Court who would oppose *Roe*."[20] She challenged her rival, a Roman Catholic, to take the same pledge.[21] The following week, the *New York Times* reported on its front page, "Vice President Al Gore, the presumptive Democratic nominee, seized on the close vote [in *Carhart*] to warn that Mr. Bush, if elected, would appoint conservative Supreme Court justices hostile to abortion rights."[22]

To be sure, other social issues are swept up in the question of Supreme Court nominations, but none has been so polarizing since the 1970s as abortion. Abortion remains the festering sore of American constitutional discourse.[23] Given that cultural and political dynamic, the religious views of a Supreme Court nominee have become a crude proxy for whether the prospective Justice will vote for or against the perpetuation of a constitutionally protected right to an abortion.[24] The same crude proxy has been

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20. See Hillary in Agreement with *Stenberg v. Carhart*; Supreme Court Decision Reaffirms *Roe v. Wade*, June 28, 2000 <http://www.hillary2000.org/news/articles/000628.html>.

21. See id. Ms. Clinton's rival, Representative Rick Lazio, identified himself as a Catholic. See <http://congress.org/cgi-bin/member.pl?dir=congressorg2&_member=ny02>.

22. See Jim Yardley, *Bush's Choices for Court Seen as Moderates*, N.Y. Times 1 (July 9, 2000); see also Joan Biskupic, *A Divided High Court to Revisit Abortion*, Wash. Post A3 (Apr. 23, 2000) (discussing potential political ramifications of *Carhart* for 2000 presidential election). The subject of abortion and its relevance to Supreme Court nominations was extensively discussed by Vice President Gore and Governor George W. Bush during the first televised debate on October 3, 2000. See *Debate Transcripts: The First 2000 Gore-Bush Presidential Debate* (television broadcast, Oct. 3, 2000) (available at <www.debates.org/pages/ trans2000a.html>).

23. The national discussion of abortion also has affected how religious considerations have influenced the terms of debate on completely different issues. For example, in their 1983 pastoral letter, *The Challenge of Peace: God's Promise and Our Response*, the National Conference of Catholic Bishops articulated a Catholic position on nuclear weapons and deterrence. As George Weigel has noted in his book on the Catholic perspective on war, the debate on abortion informed the bishops' position on nuclear war:

> The bishops urged "reverence for life" throughout American society. Abortion blunted our sense of the sacredness of human life. In a country where the unborn were wantonly killed, "How can we expect people to feel righteous revulsion at the act or threat of killing non-combatants in war?" There were differences between taking life in abortion and taking life in war. Still, the bishops pleaded "with all who would work to end the scourge of war to begin by defending life at its most defenseless, the life of the unborn."

George Weigel, *Tranquillitas Ordinis: The Present Failure and Future Promise of American Catholic Thought on War and Peace* 274 (Oxford U. Press, 1987) (quoting National Conference of Catholic Bishops, The Challenge of Peace: God's Promise and Our Response 285, 286, 289 (1983)).

24. For a similar critique, see Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 Yale L.J. 549 (1995) (reviewing Stephen L. Carter, *The Confirmation Mess: Cleaning up the Federal Appointments Process* (1994)).

employed outside the nomination context as well. In 1995, for example, parties to an abortion rights case in the Ninth Circuit petitioned Circuit Judge John T. Noonan, Jr., a Catholic, to recuse himself on the grounds that his "fervently-held religious beliefs would compromise [his] ability to apply the law."[25] Judge Noonan denied the petition for recusal on the grounds that it would violate the Religious Test Clause.[26] Simply put, investigation of a jurist's personal religious beliefs—a privacy issue if ever one existed—has evidently become regarded by many involved in the political discourse as socially justifiable in the defense of, or in opposition to, those constitutional interpretations that have created and extended a woman's right to an abortion. In addition to presenting the quintessential privacy issue under the Constitution, the Religious Test Clause also should be seen as the quintessential example of a rule against unconstitutional conditions. As the Court observed in *Torcaso*, "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution."[27]

Some political figures have resisted this intrusion into matters of religious faith. In the Democratic primaries of the 2000 election, Senator Bill Bradley flatly refused to answer any question from reporters concerning his personal religious beliefs.[28] That position, however, is distinguishable from a Supreme Court nominee's, as Senator Bradley had already announced his position on abortion (he was pro-choice), such that a reporter's inquiry into his religious views would be unnecessary to infer his likely views on abortion. Few sitting judges, in contrast, would publicly express views on a subject that would be so controversial and so likely to generate litigation that might come before their courts. To do so might create an appearance of judicial partiality.

In the remainder of this Essay, I explain that, without the active vigilance of the Senate, the Religious Test Clause is incapable of protecting religious freedom in the face of the intensity

25. *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9th Cir. 1995). Judge Noonan, a former Boalt Hall law professor, is a distinguished scholar on law and religion. See, e.g., John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (U. of California Press, 1998).

26. *Feminist Women's Health Center*, 69 F.3d at 400-01.

27. *Torcaso*, 367 U.S. at 495-96; see generally Richard A. Epstein, *Bargaining With the State* (Princeton U. Press, 1995).

28. See Arthur M. Schlesinger, Jr., *He Won't Tell. Should We Care?*, N.Y. Times § 4, at 19 (Jan. 9, 2000).

of efforts to probe the judicial philosophy of Supreme Court nominees on the subject of abortion. In Part II, I briefly discuss the historical origins of the Religious Test Clause. Despite the noble ambitions of that constitutional guarantee, religious intolerance was directed only a dozen years later at one of America's forefathers of religious liberty, Thomas Jefferson. The guarantee is a fragile one indeed.

In Part III, I examine the relevance of the Religious Test Clause to the nomination and confirmation of Supreme Court Justices and to their personal views about abortion as a theological matter. I argue that it is both intractable and improper for the Senate to question a nominee about either his religious sect or the intensity of his religious devotion. Although I focus on the kind of inquiry by which the Senate would violate the Religious Test Clause, the following analysis would apply equally to the president's use of a religious filter to qualify or disqualify candidates for judicial nominations according to their likely views on abortion as a constitutional matter. A president's use of an abortion litmus test that relied on the religious beliefs of a prospective judicial nominee would be an illegitimate use of the appointment power,[29] and, by obviously violating the Religious Test Clause (and the religion clauses of the First Amendment), would necessarily violate the president's oath to "preserve, protect and defend the Constitution of the United States."[30]

In Part IV, I explain why, in the absence of punishment imposed by the Senate for misconduct by its members, it is unlikely that any public sanction or private remedy would be forthcoming if a senator violated the prohibition against religious tests in connection with a judicial nomination. If the Senate does not take that responsibility seriously, our ability as a nation to vindicate the goal of the Religious Test Clause will, as a practical matter, be limited to the ability of good persons to denounce through strictly nonlegal means the bad ethics of any person who would violate another's freedom of conscience for political gain.

29. See U.S. Const., Art. II, § 2, cl. 2.

30. See id. § 1, cl. 8. The same question arises with respect to the appointment of executive branch officials, such as the Attorney General.

II. ORIGINS OF THE PROHIBITION AGAINST RELIGIOUS TESTS

To any student of American history it should be ironic that a Governor of Virginia would be the one to have pronounced Judge Thomas's religious beliefs relevant to his qualifications to serve on the Supreme Court. Governor Wilder's distant predecessor, Thomas Jefferson, regarded his drafting of the Statute of Virginia for Religious Freedom in 1779 to be one of only three achievements of his remarkable life worthy of inscription on his tombstone.[31] The Supreme Court observed in *Torcaso*:

> It is true that there is much historical precedent for . . . laws [imposing religious tests]. Indeed, it 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. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith.[32]

After the American Revolution, a number of states still had religious tests for officeholders that barred Catholics, Jews, and atheists.[33] Jefferson drafted the Statute of Virginia for Religious Freedom to provide that "proscribing any citizen as unworthy [of] the public confidence by laying upon him an incapacity of being called to the offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right."[34] Thanks to Jefferson's perseverance for more than six years, Virginia enacted his draft statute in 1786 and led the way for other states similarly to dismantle religious barriers. Georgia abolished reli-

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31. See Noble E. Cunningham, Jr., *In Pursuit of Reason: The Life of Thomas Jefferson* 349 (Ballantine Books, 1987). The two other accomplishments in which Jefferson took special pride were the founding of the University of Virginia and the drafting of the Declaration of Independence. Id.

32. *Torcaso*, 367 U.S. at 490.

33. See Richard B. Morris, *The Forging of the Union, 1781-1789* at 172 (Harper & Row, 1987). Professor Morris reports: "The disqualification in the Maryland Constitution barring Jews from public office was not removed until 1825; Rhode Island, not until the adoption of the state constitution in 1842, and North Carolina not until 1868." Id. at 358-59 n.28.

34. Statute of Virginia for Religious Freedom (drafted 1779; enacted 1786), reprinted in Adrienne Koch and William Peden, eds., *The Life and Selected Writings of Thomas Jefferson* 311, 312 (Random House, 1944).

gious tests for office holding in 1789 and was followed by Pennsylvania and South Carolina in 1790, Delaware in 1792, and Vermont in 1793.[35]

A. THE DRAFTING AND RATIFICATION OF THE RELIGIOUS TEST CLAUSE

At the Constitutional Convention in 1787, the Framers thought that the prohibition against religious tests for national officeholders was so elemental that they incorporated it directly into the Constitution, even though they did not adopt the Bill of Rights, with its two religion clauses in the First Amendment, until four years later.[36] Initially, Roger Sherman of Connecticut thought that the prohibition on religious tests was unnecessary because "the prevailing liberality" would be "a sufficient security against such tests."[37] But his optimism was challenged by an impassioned letter on September 7, 1787, to the Convention from Jonas Phillips, a Philadelphia Jew.[38] Phillips implored the delegates to delete from any oath of national office the religious test then found in Pennsylvania's constitution, which required every officeholder to swear that the New Testament was given by divine inspiration.[39] He wrote that such a belief would be "absolutly [*sic*] against the Religious principle of a Jew" and that it would be "against his Conscience to take any such oath."[40] He reminded the Convention that "the Jews have been true and faithful whigs, and during the late Contest with England they have been foremost in aiding and assisting the States with their lifes and fortunes, they have supported the Cause, have bravely

35. Morris, *The Forging of the Union* at 172 (cited in note 33). Jefferson's Statute of Virginia for Religious Freedom has continued to influence the Supreme Court's jurisprudence on the Establishment and Free Exercise Clauses. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1947).

36. U.S. Const., Amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). For an insightful and exhaustive analysis of the history of the Framers' thoughts on religious freedom, particularly the influential thinking of James Madison and Thomas Jefferson, see Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 Notre Dame L. Rev. 433, 440-77 (1999).

37. James Madison, *Notes of Debates in the Federal Convention of 1787*, at 561 (W.W. Norton & Co., 1966 ed.).

38. Letter from Jonas Phillip to the President and Members of the Convention (Sept. 7, 1787), reprinted in 3 Max Farrand, ed., *The Records of the Federal Convention of 1787*, at 78 (Yale U. Press, 1966 ed.).

39. Id.

40. Id.

faught and bleed for liberty which they Can not Enjoy."[41] Phillips concluded his letter with "prayers . . . unto the Lord" that "the almighty God of our father Abraham Isaac and Jacob endue this Noble Assembly with wisdom Judgement and unamity [*sic*] in their Councells."[42] The Framers, of course, did not adopt any religious test, let alone one of the sort that Phillips feared. But the Framers also did not embrace Sherman's initial assessment that the Religious Test Clause was unnecessary.

Further commentary by the Framers on the meaning and perceived importance of the prohibition against religious tests appears in Edmund Randolph's explanation of the new Constitution to the Virginia Convention during the ratification debates in 1788:

> The senators and representatives, members of the state legislatures, and executive and judicial officers, are bound by oath, or affirmation, to support this constitution. This only binds them to support it in the exercise of the powers constitutionally given it. The exclusion of religious tests is an exception from this general provision, with respect to oaths, or affirmations. Although officers, &c. are to swear that they will support this constitution, yet they are not bound to support one mode of worship, or to adhere to one particular sect. It puts all sects on the same footing. A man of abilities and character, of any sect whatever, may be admitted to any office or public trust under the United States.[43]

In the style of James Madison's discussion of factions in *Federalist No. 10*[44] and, more specifically in *Federalist No. 50*,[45] Randolph saw the Religious Test Clause as ensuring that reli-

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41. Id. at 79.

42. Id.

43. Edmund Randolph in the Virginia Convention (June 10, 1788), reprinted in Farrand, *Records of the Federal Convention* at 310 (cited in note 38).

44. The Federalist No. 10 (James Madison) (Jacob E. Cooke ed., Wesleyan U. Press 1961).

45. The Federalist No. 50 (James Madison) (Jacob Cooke, ed., Wesleyan U. Press 1961). Madison wrote:

> Whilst all authority in [the federal republic of the United States] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

Id. at 351-52.

gious sects counterbalance one another to prevent the establishment of a national religion:

> I am a friend to a variety of sects, because they keep one another in order. How many different sects are we composed of throughout the United States? How many different sects will be in congress? We cannot enumerate the sects that may be in congress. And there are so many now in the United States that they will prevent the establishment of any one sect in prejudice to the rest, and will forever oppose all attempts to infringe religious liberty. If such an attempt be made, will not the alarm be sounded throughout America? If congress be as wicked as we are foretold they will, they would not run the risk of exciting the resentment of all, or most of the religious sects in America.[46]

Randolph made these comments three years before the Bill of Rights. His rationale for the Religious Test Clause clearly anticipated both the Free Exercise Clause and the Establishment Clause of the First Amendment.

B. RELIGIOUS INTOLERANCE TOWARD JEFFERSON'S DEISM DURING AND AFTER THE ELECTION OF 1800

Questions about the religious beliefs of a presidential candidate figured prominently only twelve years later. That candidate was none other than Thomas Jefferson, the author of the Statute of Virginia for Religious Freedom. Although raised in the Anglican Church, Jefferson by 1800 had embraced deism.[47] As early as 1787 he wrote:

> [R]ead the New Testament. It is the history of a personage called Jesus. Keep in your eye the opposite pretensions: 1, of those who say he was begotten by God, born of a virgin, suspended and reversed the laws of nature at will, and ascended bodily into heaven; and 2, of those who say he was a man of illegitimate birth, of a benevolent heart, enthusiastic mind, who set out without pretensions to divinity, ended in believing

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46. Edmund Randolph in the Virginia Convention (June 10, 1788), reprinted in Farrand, *Records of the Federal Convention* at 310 (cited in note 38); see also Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 42 (U. Press of Kansas, 1985).

47. See Cunningham, *In Pursuit of Reason* at 225 (cited in note 31); Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* 353-54, 956-60 (Oxford U. Press, 1970); Dumas Malone, 3 *Thomas Jefferson and His Time: Jefferson and The Ordeal of Liberty* 481 (Little, Brown & Co., 1962). In her discussion of Jefferson's religious views, Professor Brady notes that Jefferson "often called himself a Unitarian Christian rather than a deist." See Brady, *Fostering Harmony Among the Justices* at 450 n.74 (cited in note 36).

> set out without pretensions to divinity, ended in believing them, and was punished capitally for sedition, by being gibbeted, according to the Roman law, which punished the first commission of that offence by whipping, and the second by exile, or death *in furea* . . . .
>
> Do not be frightened from this inquiry by any fear of its consequences. If it ends in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise, and the love of others which it will procure you. If you find reason to believe there is a God, a consciousness that you are acting under his eye, and that he approves you, will be a vast additional incitement; if that there be a future state, the hope of a happy existence in that increases the appetite to deserve it; if that Jesus was also a God, you will be comforted by a belief of his aid and love . . . . Your own reason is the only oracle given you by heaven, and you are answerable, not for the rightness, but uprightness of the decision.[48]

It is important to place within historical context Jefferson's rationalist attempt to restate Christian teachings as a system of moral philosophy rather than a religion.

In Philadelphia in October of 1789, there was convened another kind of constitutional convention. With the American Revolution, the Anglican Church in the United States changed from the Church of England to the Protestant Episcopal Church of the United States. That change also necessitated the revision and ratification, in 1789, of *The Book of Common Prayer,* to reflect the disestablishment of the Church of England in the United States.[49] The Episcopal Church "was in the first place drawn to those alterations in the Liturgy which became necessary in the prayers for our Civil Rulers, in consequence of the

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48. Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), reprinted in Koch and Peden, eds., *The Life and Selected Writings of Thomas Jefferson* at 429, 432-33 (cited in note 34). Some of Jefferson's writings display outright condescension toward religious expression. In his travel through France in 1787, for example, he noted that farmers in Champagne were clustered in villages rather than dispersed in farmhouses. He therefore asked: "Are they thus collected by that dogma of their religion, which makes them believe, that to keep the Creator in good humor with His own works, they must mumble a mass every day?" Memoranda taken on a Journey from Paris into the Southern Parts of France, and Northern Italy, in the year 1787 (Mar. 3, 1787), reprinted in id. at 135.

49. *The Ratification of The Book of Common Prayer* (1789), reprinted in *The Book of Common Prayer* 8 (Oxford U. Press, 1977 ed.). Apart from Jefferson, the Episcopalians among the nation's founders included George Washington, Patrick Henry, John Jay, Robert Morris, John Marshall, and John Randolph. See Frank S. Mead, *Handbook of Denominations in the United States* 131 (Abingdon Press, 6th ed. 1975).

Revolution," but the Church emphasized that it was "far from intending to depart from the Church of England in any essential point of doctrine, discipline, or worship."[50]

In 1801, the Episcopal Church further established its Articles of Religion, which deleted prior Anglican references to the King or Queen of England being the head of the Church.[51] The 1801 Articles of Religion also detailed the doctrines of the Episcopal Church, such as the Trinity, "the Word or Son of God, which was made very Man," and the Resurrection.[52] In addition, the Articles of Religion required: "The Nicene Creed, and that which is commonly called the Apostle's Creed, ought thoroughly to be received and believed: for they may be proved by most certain warrants of Holy Scripture."[53]

The doctrinal precepts of the former Church of England in America places in context the controversy over Jefferson's religious views in the presidential election one year earlier. His Federalist opponents in 1800 accused Jefferson, in the words of one minister, of "disbelief of the Holy Scriptures" and "rejection of the Christian Religion," and they warned that "the voice of the nation in calling a deist to the first office must be construed into no less than a rebellion against God."[54] The nation, of course, did not reject Jefferson on those grounds, though Federalist attacks of this nature continued even while he was in office.

Jefferson's religious views were intensely rationalist. While president, Jefferson in his leisure time conducted research for his *Philosophy of Jesus,* in which he clipped and assembled passages from the Gospels of Matthew, Mark, Luke, and John to produce a summary of his religious faith and to compare the teachings of Jesus with those of Socrates.[55] In the words of historian Noble Cunningham, this process involved Jefferson's "[e]xcising from the Gospels the supernaturalism that he was convinced was added by later corruptors of the simple moral teachings of Jesus"

50. Preface (1789), reprinted in *The Book of Common Prayer* at 9, 10-11 (cited in note 49).

51. Articles of Religion, Art. XXXVII (Protestant Episcopal Church in the United States of America, Sept. 12, 1801), reprinted in *The Book of Common Prayer* at 867, 875 (cited in note 49).

52. Id., Arts. I, II, IV.

53. Id., Art. VIII.

54. See Cunningham, *In Pursuit of Reason* at 225 (cited in note 31) (quoting William Linn, *Serious Considerations on the Election of a President: Addressed to the Citizens of the United States* (Sherman, Mershon & Thomas, 1800)).

55. Id. at 256.

and leaving "what he regarded as Jesus' authentic words."[56] In his own time, Jefferson's translation of Christian scripture into a rational, moral philosophy of Jesus struck many as unconventional if not heretical. Jefferson later wrote to John Adams that, "by cutting verse by verse out of the printed book, and arranging the matter which is evidently [Jesus'] . . . which is as easily distinguishable as diamonds in a dunghill," Jefferson was able to distill "the most sublime and benevolent code of morals which has ever been offered to man."[57] Among the elements of Christian doctrine that Jefferson rejected—calling them "the imputation of imposture, which has resulted from artificial systems, invented by ultra-Christian sects, unauthorized by a single word ever uttered by [Jesus]"[58]—were "[t]he immaculate conception of Jesus, His deification, the creation of the world by Him, His miraculous powers, His resurrection and visible ascension, His corporeal presence in the Eucharist, the Trinity, original sin, atonement, regeneration, election, orders of Hierarchy, etc."[59]

The controversial nature of such views of Jesus, particularly circa 1800, cannot be overstated. Jefferson's proposition that Jesus was not resurrected from the dead—to take the most significant example—would strike many students of religion, in 1800 or today, as antithetical to the most essential belief within Christianity. Jefferson's system of religious beliefs directly contradicted multiple elements of the Apostles' Creed, the Nicene Creed, and other creeds that are fundamental statements of belief for numerous Christian denominations.[60] Jefferson once de-

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56. Id. at 257.

57. Id. (quoting Letter from Thomas Jefferson to John Adams (Oct. 12, 1813)). Jefferson expressed his views in virtually identical language in a subsequent letter. See Letter from Thomas Jefferson to William Short (Oct. 31, 1819), reprinted in Koch and Peden, eds., *The Life and Selected Writings of Thomas Jefferson* at 693, 694 (cited in note 34). An earlier summary of Jefferson's analysis of the teachings of Jesus was contained in Letter from Thomas Jefferson to Benjamin Rush (Apr. 21, 1803), reprinted in id. at 566. In that letter, Jefferson wrote:

> [My views on religion] are the result of a life of inquiry and reflection, and very different from that anti-Christian system imputed to me by those who know nothing of my opinions. To the corruptions of Christianity I am, indeed, opposed; but not to the genuine precepts of Jesus himself. I am a Christian, in the only sense in which he wished any one to be; sincerely attached to his doctrines, in preference to all others; ascribing to himself every *human* excellence; and believing he never claimed any other.

Id. at 567 (emphasis in original).

58. Letter from Thomas Jefferson to William Short (Oct. 31, 1819) (cited in note 57).

59. Id. at 694 n.1.

60. The Apostles' Creed, reprinted in *The Book of Common Prayer* at 53-54 (cited in note 49); The Nicene Creed, reprinted in id. at 326-27; Quicunque Vult (The Creed of Saint Athanasius), reprinted in id. at 864-65; Definition of the Union of the Divine and

clined a request to serve as a godfather on the grounds that he "had never sense enough to comprehend the articles of faith of the Church," by which he surely meant the Anglican Church.[61]

The controversy over Jefferson's religious view in the presidential election of 1800 shows that, despite the existence of the Religious Test Clause, Jefferson's adversaries showed little toleration for certain religious views in a leader that were likely to offend or frighten traditional Christian believers. Those political adversaries attempted scarcely a decade after the ratification of the Constitution to make Jefferson's religious beliefs a disqualifying factor in the presidential election of 1800. Having survived this political adversity to be elected president, Jefferson wrote in 1803:

> I am moreover averse to the communication of my religious tenets to the public; because it would countenance the presumption of those who have endeavored to draw upon them before that tribunal, and to seduce public opinion to erect itself into that inquisition over the rights of conscience, which the laws have so justly proscribed. It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own. It behooves him, too, in his own case, to give no example of concession, betraying the common right of independent opinion, by answering questions of faith, which the laws have left between God and himself.[62]

Human Natures in the Person of Christ (Council of Chalcedon, 451 A.D.), reprinted in id. at 864. The Catechism of the Episcopal Church explains that the Apostles' Creed and the Nicene Creed "are statements of our basic beliefs about God." An Outline of the Faith Commonly Called the Catechism, reprinted in id. at 845, 851. On the theological significance of retaining (within Roman Catholicism if not also within all of Christianity) the Apostles' Creed as an original statement of Christian faith, see Karl Rahner, *Foundations of Christian Faith: An Introduction to the Idea of Christianity* 449 (William V. Dych, trans., Crossroad, 1978).

A contemporary reminder of the conflict between Jefferson's moral philosophy of Jesus and fundamental Christian doctrine is contained in Pope John Paul II's answer to the question, "Is Jesus the Son of God?" See His Holiness John Paul II, *Crossing the Threshold of Hope* 42-49 (Knopf, 1994). Pope John Paul II observes, "Christ does not resemble Muhammad or Socrates or Buddha." Id. at 45. "The uniqueness of Christ," he explains, "[is] indicated by Peter's words at Caesarea Philippi, is . . . expressed by the Creed. Id. at 45-46.

61. Quoted in Willard Sterne Randall, *Thomas Jefferson: A Life* 85 (Henry Holt & Co., 1993).

62. Letter from Thomas Jefferson to Benjamin Rush (Apr. 21, 1803), reprinted in Koch and Peden, eds., *The Life and Selected Writings of Thomas Jefferson* at 567 (cited in note 57).

It is not difficult to imagine that two centuries later, in a considerably more secular America, a candidate or nominee for high public office in the federal government who held as intense or as controversial religious views as Jefferson did in 1800 would be the subject of public speculation and innuendo about the probable influence of his religious beliefs on the discharge of his public duties.

III. RELIGIOUS TESTING OF SUPREME COURT NOMINEES

Because of the controversy that abortion has engendered in American public life since at least the Supreme Court's decision in 1965 in *Griswold* v. *Connecticut*[63] and Pope Paul VI's 1968 encyclical on contraception,[64] it would be naïve to believe that the imbroglio over Governor Wilder's 1991 comments about the nomination of Justice Thomas will not repeat itself in the case of some future Supreme Court nominee, if perhaps in more discreet terms. It is therefore useful to scrutinize more closely the kind of information that religious questioning of Supreme Court nominees would be intended to elicit and to consider the ramifications of such questions. Was it Governor Wilder's understanding of Judge Thomas's religious devotion that prompted the Governor's indelicate remarks? Or was it Judge Thomas's strict schooling in Catholicism per se?

Either prospect leads to an inappropriate line of questions to pose to a judicial nominee. Contrary to what Senator Hatch's remarks in 1991 might have suggested, the Senate would not avoid violating the Religious Test Clause by questioning a Supreme Court nominee's religious beliefs "in a sophisticated way that would be less offensive"[65] than Governor Wilder's statements about the need to question Judge Thomas concerning the extent of his allegiance to the Pope. If anything, more "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.

There is additionally a separation of powers issue here. If the purpose of religious testing is to probe a nominee's likely

63. 381 U.S. 479 (1965).

64. Paul VI, Encyclical Letter *Humane Vitae* (July 25, 1968).

65. Baker and Broder, *Wilder in Hot Water* at C5 (cited in note 6) (quoting Sen. Orrin Hatch).

vote on a particularly controversial constitutional question, such as a legal proposition concerning abortion rights, the nominee would in effect be asked by the Senate (or by the president, in screening the nominee) to render an advisory opinion, in violation of the "case or controversy" limitation on judicial power under Article III.[66] If this argument is correct, it would of course sweep more broadly than simply a prohibition on senatorial questioning of judicial nominees on matters of religion.[67] One possibility is that the Senate is not constitutionally forbidden to elicit advisory opinions by posing questions about religious belief, but neither is a nominee constitutionally required to answer them. This interpretation, however, is hardly satisfactory if its practical effect is to discourage entire denominations of religious believers from entering public service. As I argue below, a nominee suffers a constitutional indignity simply upon being questioned about his religious convictions by those possessing the authority to confirm him to public office. Although this question of advisory opinions is an interesting and subtle one, it would lead the analysis away from the principle focus of this Essay, the Religious Test Clause.

Returning then to the infirmity of religious testing of judicial nominees under the Religious Test Clause, consider now the difficulty of senatorial unease over a nominee's religious sect and over a nominee's religious devotion.

A. OBJECTION TO RELIGIOUS SECT

Governor Wilder might have been concerned not with Judge Thomas' religious devotion per se, but with the possibility that his devotion to Catholic teachings on the specific subject of abortion would predispose him as a Justice of the Supreme Court to vote to uphold statutory regulations on the availability of abortion—as Justice Thomas in fact did during his first year on the Court[68]—or even to vote to overrule *Roe* v. *Wade*.[69]

66. See U.S. Const., Art. III, § 2.

67. See generally *Clinton v. Jones*, 520 U.S. 681, 699 (1997); *Alabama State Fed. of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

68. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

69. 410 U.S. 113 (1973).

1. How Does the Pope Instruct Catholics—and Others—on Abortion?

Given the intensity of discussion of whether a particular Supreme Court nominee would or would not be in the pocket of the Pope, it is useful to interrupt the debate by clarifying first how the Pope has actually instructed Catholics on the subject of abortion. One senses that much of the debate occurs at a level of what proponents and opponents of abortion rights *think* the Pope has said on the subject. Pope John Paul II has provided an accessible summary of his teaching in his essay, *The Defense of Every Life*, published in his 1994 book.[70]

Pope John Paul II begins by positing that "the right to life is the *fundamental right*" and "means the right to be born and then continue to live until one's natural end: 'As long as I live, I have the right to live.'"[71] The application of this principle to the case of abortion presents, in the Pope's assessment, "a particularly delicate yet clear problem"[72]:

> The *legalization of the termination of pregnancy* is none other than the authorization given to an adult, with the approval of an established law, to take the lives of children yet unborn and thus incapable of defending themselves. It is difficult to imagine a more unjust situation, and *it is very difficult to speak of obsession in a matter such as this,* where we are dealing with a fundamental imperative of every good conscience—the defense of the right to life of an innocent and defenseless human being.[73]

Pope John Paul II rejects the logic and rhetoric of "choice." He disputes that "the woman should have the right to choose between giving life or taking it away from the unborn child" because the latter alternative entails "*a clear moral evil*" of violating the commandment against killing another human being.[74] Pope John Paul II sees no exception to this conclusion.[75] His prescription is for "*radical solidarity with the woman,*" through counseling centers and houses for teenage mothers, to help the

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70. See *Crossing the Threshold of Hope* at 204-11 (cited in note 60). A theologically exhaustive presentation of Pope John Paul's teaching on abortion appeared in his encyclical letter issued the following year. See John Paul II, Encyclical Letter *Evangelium Vitae* (Mar. 25, 1995) [hereinafter *Evangelium Vitae*].

71. See *His Holiness John Paul II* at 204-05 (cited in note 60) (emphasis in original).

72. Id. at 205.

73. Id. (emphasis in original).

74. Id. (emphasis in original); see also id. at 210-11.

75. Id. at 205-06.

mother bear her child.[76] "It is not right to leave her alone."[77] The firmness of Pope John Paul II's position reflects his assessment that abortion is "a problem of tremendous importance" with broad ramifications: "*We cannot afford forms of permissiveness* that would lead directly to the trampling of human rights, and also to the complete destruction of values which are fundamental not only for the lives of individuals and families but for society itself."[78]

These are hard words. It is not possible to reconcile Pope John Paul II's instructions on abortion with statutes or court decisions that permit abortion on demand. But the Pope's denunciation of abortion is not limited to criticizing the logic and rhetoric of the pro-choice position. He directly condemns as a matter of religious doctrine the state's role in the legalization of abortion on demand. This condemnation is even more sustained in the Pope's official pronouncements, and even more a direct confrontation to the authority of civil law.

In his 1995 encyclical letter, *Evangelium Vitae*, Pope John Paul II distinguishes between civil law and the moral law: "One of the specific characteristics of present-day attacks on human life . . . consists in the trend to demand a *legal justification* for them, as if they were rights upon which the State, at least under certain conditions, must acknowledge as belonging to citizens."[79] In turn, the Pope argues, such legal justifications derive from the contemporary understanding of democracy. He writes that, "in the democratic culture of our time it is commonly held that the legal system of any society should limit itself to taking account of and accepting the convictions of the majority."[80] This orientation of the legal system to satisfy majority preferences leads, in Pope John Paul II's view, to a moral relativism in which personal responsibility in the matter of preserving human life is abandoned:

> [W]e have what appear to be two diametrically opposed tendencies. On the one hand, individuals claim for themselves in the moral sphere the most complete freedom of choice and demand that the State should not adopt or impose any ethical position but limit itself to guaranteeing maximum space for the freedom of each individual, with the sole limitation of not infringing on the freedom and rights of any other citizen. On

76. Id. at 207.
77. Id.
78. Id. at 208 (emphasis in original).
79. See *Evangelium Vitae* at ¶ 68 (cited in note 70) (emphasis in original).
80. See id. at 69.

> the other hand, it is held that, in the exercise of public and professional duties, respect for other people's freedom of choice requires that each one should set aside his or her own convictions in order to satisfy every demand of the citizens which is recognized and guaranteed by law; in carrying out one's duties the only moral criterion should be what is laid down by the law itself. *Individual responsibility is thus turned over to the civil law, with a renouncing of personal conscience, at least in the public sphere.*[81]

In a manner reminiscent of the countermajoritarian rationale for judicial review in American constitutional law, Pope John Paul II sees the will of the majority as being subject to a higher, moral constraint:

> Democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality. Fundamentally, democracy is a "system" and as such is a means and not an end. Its "moral" value is not automatic, but depends on conformity to the moral law to which it, like every other form of human behaviour, must be subject: in other words, its morality depends on the morality of the ends which it pursues and of the means which it employs . . . . [T]he value of democracy stands or falls with the values which it embodies and promotes.[82]

Pope John Paul II argues that the values embodied in and promoted by a democracy, "such as the dignity of every human person,"[83] have an objective origin in natural law, which he believes must motivate civil law also:

> The basis of these values cannot be provisional and changeable "majority" opinions, but only the acknowledgment of an objective moral law which, as the "natural law" written in the human heart, is the obligatory point of reference for civil law itself. If, as a result of a tragic obscuring of the collective conscience, an attitude of scepticism were to succeed in bringing into question even the fundamental principles of the moral law, the democratic system itself would be shaken in its foundations, and would be reduced to a mere mechanism for regu-

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81. See id. (emphasis added). For a similar critique of the tendency of Congress to debate the use of military force in excessively legalistic terms that tend to obscure what I have called the "moral visibility of collective action," see J. Gregory Sidak, *To Declare War*, 41 Duke L.J. 27 (1991).

82. See *Evangelium Vitae* at 70 (cited in note 70).

83. See id.

> lating different and opposing interests on a purely empirical basis.[84]

The Pope therefore urges nations to reconcile their civil laws with moral law.[85]

Pope John Paul II's exhortation in this regard invokes the same notions of inalienable rights found in the Declaration of Independence and of fundamental rights of the Supreme Court's late twentieth-century jurisprudence, though obviously to different effect than the Court's creation and extension of a constitutional right to abortion on demand:

> It is . . . urgently necessary, for the future of society and the development of a sound democracy, to rediscover those essential and innate human and moral values which flow from the very truth of the human being and express and safeguard the dignity of the person: values which no individual, no majority and no State can ever create, modify or destroy, but must only acknowledge, respect and promote.
>
> Consequently there is a need to recover the *basic elements of a vision of the relationship between civil law and moral law*, which are put forward by the Church, but which are also part of the patrimony of the great juridical traditions of humanity.
>
> [C]ivil law must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person, rights which every positive law must recognize and guarantee. First and fundamental among these is the inviolable right to life of every innocent human being. While public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause more serious harm, it can never presume to legitimize as a right of individuals—even if they are the majority of the members of society—an offence against other persons caused by the disregard of so fundamental a right as the right to life. The legal toleration of abortion or of euthanasia can in no way claim to be based on respect for the conscience of others, precisely because society has the right and the duty to protect it-

84. See id.

85. One person commenting on a draft of this Essay remarked of this passage by Pope John Paul II: "It seems to me that the Pope is getting dangerously close to the investiture conflicts of the middle ages where the Pope's predecessors succeeded for a time in placing the Church above the State. Popes invested kings with their secular authority. If we follow the Pope's line of reasoning, would we not be moving to a modern version of investiture?"

> self against the abuses which can occur in the name of conscience and under the pretext of freedom.[86]

In essence, Pope John Paul II goes toe to toe with secular court decisions that base abortion rights on a notion of a fundamental human right. The Pope defends his position by citing the Catholic Church's statements on human rights, as well as Saint Thomas Aquinas's view that an unjust law violates natural law and thus is not legitimate law.[87] Pope John Paul II therefore rejects the legitimacy of civil law that permits abortion: "Disregard for the right to life, precisely because it leads to the killing of the person whom society exists to serve, is what most directly conflicts with the possibility of achieving the common good. Consequently, a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law."[88]

The Pope states plainly that abortion is a "crime[]which no human law can claim to legitimize," and he counsels that "[t]here is no obligation in conscience to obey such laws; instead there is a *grave and clear obligation to oppose them by conscientious objection.*"[89] His scriptural support for such conscientious objection includes the account in Exodus of the Jews in captivity in Egypt:

> In the Old Testament, precisely in regard to threats against life, we find a significant example of resistance to the unjust command of those in authority. After Pharaoh ordered the killing of all newborn males, the Hebrew midwives refused. "They did not do as the king of Egypt commanded them, but let the male children live." But the ultimate reason for their action should be noted: "*the midwives feared God.*" It is precisely from obedience to God—to whom alone is due that fear which is acknowledgment of his absolute sovereignty—that the strength and the courage to resist unjust human laws are born."[90]

Although Pope John Paul II gives specific direction to legislators who must vote on legislation regulating abortion,[91] he has no specific words for judges who will review such legislation. He notes, in a sentence reminiscent of Jefferson, that the "right to

86. See id. ¶ 71 (emphasis in original).
87. See id. ¶¶ 71-72.
88. See id. ¶ 72.
89. See id. ¶ 73 (emphasis in original).
90. See id. (quoting Exodus 1:17) (citations omitted; emphasis in original).
91. See id.

demand not to be forced to take part in morally evil actions .... may require the sacrifice of prestigious professional positions or the relinquishing of reasonable hopes of career advancement."[92] A Catholic judge, therefore, is left to take guidance from the following general statement by the Pope on conscientious objection:

> Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God's law. Indeed, from the moral standpoint, it is never licit to cooperate formally in evil. Such cooperation occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person committing it. This cooperation can never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it. Each individual in fact has moral responsibility for the acts which he personally performs; no one can be exempted from this responsibility, and on the basis of it everyone will be judged by God himself.[93]

Thus, the Pope's teaching on abortion is judgmental and unequivocal. In his exhaustive biography of the Pope, George Weigel calls the language of *Evangelium Vitae* "unsparing" in its criticism of the legitimation of abortion by law-governed democracies.[94] The Pope's condemnation of abortion admits no exceptions and is not qualified in lawyerly terms of which trimester is permissible for the procedure or whether parental notification is required. According to Pope John Paul II, the state's role in legitimizing abortion is contrary to natural law and moral teaching. The civil law conferring abortion rights therefore lacks legitimate authority in his view. The Pope's absolute opposition to abortion rests on a fundamental right to life and a duty not to violate one of the Ten Commandments given to Moses on Mount Sinai.[95]

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92. See id. ¶ 74.

93. See id.

94. See George Weigel, *Witness to Hope: The Biography of Pope John Paul II* 757 (Harper Collins, 1999).

95. See *Crossing the Threshold of Hope* at 210 (cited in note 60). Michael Novak reminds me that the Pope fortifies his argument through faith by drawing upon reason also: Scientific advances enable one to say that a fetus is life and, moreover, is a human life that is uniquely distinct in a genetic sense from the mother's human life. See note 115.

2. How Would the Senate Interrogate a Catholic Nominee on His Adherence to the Pope's Instructions on Abortion?

To justify religious interrogation of a nominee because he is a Catholic, and thus would be presumed to obey the Pope's instructions on matters such as abortion, would be to invite the Senate to trespass onto precisely the terrain that the Framers forbade. Suppose that members of the Senate Judiciary Committee asked a judicial nominee questions like, "Is it your religious belief that life begins at conception?" and "Does your religion consider abortion to be murder?" The rather plain implication of such questions would be that affirmative answers would result in certain Senators voting either for or against the nominee's confirmation. Other questions might seem less inflammatory, more dryly academic: "Do you agree with paragraph 72 of Pope John Paul II's encyclical *Evangelium Vitae* that it is necessary for the civil law to conform with moral law?" It does not require a particularly imaginative sequence of questions of this sort to lead the nominee to within an inch of the concluding proposition in a statement of religious doctrine, such as *Evangelium Vitae.*

Jefferson wrote in the Statute of Virginia for Religious Freedom that testing for politically appealing religious beliefs would "corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it."[96] As a student of the Gospel, Jefferson surely knew that, of the twelve Disciples present at the Last Supper, one could be made by the fear of the civil authority to deny three times in a single night ever knowing Jesus, and another could be bribed into betraying him.[97] If Jefferson was correct in his assessment of the temptation presented by "worldly honors and emoluments," then one could hardly imagine in the modern American political sphere a better example of such bribery of conscience than a senator's tacit (if not explicit) offer to support a nominee's lifetime appointment to the Supreme Court if he will renounce publicly those contentious tenets of his religion that annoy a particular political faction whose influence the senator cannot ignore. The suspicion with which the Constitution views

96. Statute of Virginia for Religious Freedom at 312 (cited in note 34).

97. See, e.g., Matthew 26:69-75 (denial by Peter of any knowledge of Jesus); id. at 26:47-56 (betrayal of Jesus by Judas Iscariot).

such questioning should be a safeguard for individual liberty that pro-choice and pro-life groups both applaud with equal gusto.

B. OBJECTION TO RELIGIOUS DEVOTION

There is an alternative interpretation of Governor Wilder's remarks that is less offensive to Catholicism as a religious sect, but it is an interpretation that nonetheless reveals other unpalatable facets of religious tests. Governor Wilder's reference to Judge Thomas' "very devout" religious beliefs could be understood to imply that there should be a sliding scale of senatorial scrutiny of judicial nominees that depends on the perceived moderation or extremity of each nominee's particular religious beliefs. Someone with "very devout" beliefs presumably must be more closely scrutinized than someone with tepid religious beliefs or no religious beliefs at all. After all, one could argue, the very devout nominee might be a religious fanatic.[98]

There are four problems with the Senate's attempting to scrutinize the intensity of a nominee's religious devotion. Those problems are insuperable and thus merely underscore the wisdom and importance of the Religious Test Clause as an absolute bar to such inquiry.

1. The Presumption That Justices Cannot Set Aside Personal Beliefs

Scrutiny of a nominee's religious devotion tacitly presumes that a Justice of the Supreme Court will decide cases in accordance with his personal religious beliefs rather than the Constitution of the United States that he has sworn to support.[99] This presumption discards the rather elemental principle that our nation at least aspires to have a Judiciary obedient to the rule of law. Judge Noonan of the Ninth Circuit summarized the difficulty of such thinking in his 1995 denial of a petition that he recuse himself from an abortion case because of his Catholicism:

> It is a matter of public knowledge that the Catholic Church, of which I am a member, holds that the deliberate termination of a normal pregnancy is a sin, that is, an offense against God and against neighbor. Orthodox Judaism also holds that in most instances abortion is a grave offense against God. The

98. This theme is explored more generally in Carter, *The Culture of Disbelief* (cited in note 2).

99. U.S. Const., Art. VI, § 3, cl. 2.

> Church of Jesus Christ of Latter-Day Saints proscribes abortion as normally sinful. These are only three of many religious bodies whose teaching on the usual incompatibility of abortion with the requirements of religious morality would imply that the plaintiffs' business [the provision of abortions] is disfavored by their adherents. If religious beliefs are the criterion of judicial capacity in abortion-related cases, many persons with religious convictions must be disqualified from hearing them. In particular, I should have disqualified myself from hearing or writing *Koppes* v. *Johnston*, upholding the constitutional rights of an advocate of abortion.[100]

It is not a satisfactory response, Judge Noonan reasoned, to say that abortion cases are special and thus deserve extraordinary rules of recusal that turn on a judge's religious beliefs:

> The plaintiffs may object that the disqualification applies only to cases involving abortion; they are not disqualifying Catholics, Jews, Mormons and others from all judicial office. This distinction . . . [is] unworkable. The plaintiffs are contending that judges of these denominations cannot function in a broad class of cases that have arisen frequently in the last quarter of a century. The plaintiffs seek to qualify the office of federal judge with a proviso: no judge with religious beliefs condemning abortion may function in abortion cases. The sphere of action of these judges is limited and reduced. The proviso effectively imposes a religious test on the federal judiciary.[101]

To Judge Noonan's assessment one may add that the tacit presumption that a jurist will decide a case on the basis of his personal religious beliefs rather than on the basis of the law provides no rationale for why a jurist's religion should compromise his objectivity more than his politics or gender or race would. Surely we would not disqualify nominees to the Court because they were devout Democrats or Republicans at some point in their careers. Surely we would not disqualify a gay man from serving on the Court in the belief that his sexual orientation, rather than his judicial philosophy, would determine how he would rule on gay marriage or a case that might overrule *Bowers* v. *Hardwick*.[102] Surely we would not disqualify an African American from serving on the Court because, as an attorney ear-

100. *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (citation omitted; citing 850 F.2d 594 (9th Cir. 1988)).

101. Id. at 400-01.

102. 478 U.S. 186 (1986).

lier in her career, she advocated principles of affirmative action that the Court considered and rejected.

Similarly, it is inappropriate to refer to "the Jewish seat" on the Court, for that phrase implies that Jews as a religious and ethnic group have a different perspective on constitutional interpretation from that of gentiles. Such thinking harkens back to stereotypes from an earlier era. Six years after Louis Brandeis's appointment to the Supreme Court by President Woodrow Wilson in 1916,[103] Harvard's president proposed the imposition of a quota on the admission of Jews, until public indignation—including a powerful letter from alumnus Learned Hand—shamed the university into backing down.[104] It is no more appropriate to speak today of "the Jewish seat" on the Court being either vacant or occupied, for it is incompatible with the Religious Test Clause (as well as the Establishment Clause of the First Amendment) for any number of seats on the Court to be regarded as reserved for, or excluded from, any particular religious group.

2. The Impracticality and Impropriety of Assessing the Intensity of Religious Devotion

Inquiry into a nominee's religious devotion would require the Senate not simply to identify his religious beliefs, but to gauge their intensity, which surely would transform the inquiry from the presumptuous to the farcical. In the analogous situation of a petition for recusal, Judge Noonan explained the impracticality and impropriety of measuring the intensity of a jurist's religious devotion:

> True, the plaintiffs qualify my beliefs as "fervently-held" as if to distinguish my beliefs from those that might be lukewarmly maintained. A moment's consideration shows that the distinction is not workable. The question is whether incapacitating prejudice flows from religious belief. The question is to be judged objectively as a reasonable person with knowledge of all the facts would judge. As long as a person holds the creed of one of the religious bodies condemning abortion as sinful he must be accounted unfit to judge a case involving abortion; the application of an objective, reasonable-person

103. See Philippa Strumm, *Louis D. Brandeis: Justice for the People* (Harvard U. Press, 1984); Howard M. Sachar, *A History of the Jews in America* (Alfred A. Knopf, 1992).

104. See Learned Hand, *Christians and Jews* (1922), in *The Spirit of Liberty* 20 (U. of Chicago Press, 3d ed. 1960).

> standard leads inexorably to this conclusion if the plaintiff's contention is supportable. No thermometer exists for measuring the heatedness of a religious belief objectively. Either religious belief disqualifies or it does not. Under [the Religious Test Clause of] Article VI it does not.[105]

The case of Justice Thomas underscores the impracticality of the Senate's attempting to supply that religious "thermometer." Justice Thomas was educated by nuns in a parochial school and studied in the seminary briefly, yet he divorced and remarried and reportedly was attending an Episcopal church when nominated to the Supreme Court.[106] The Senate Judiciary Committee, a body whose prestige does not derive from its reputation for theological insight, surely would stray outside its institutional competence to inquire, before a television audience of millions, into a Supreme Court nominee's adherence to or deviation from the tenets of Roman Catholicism. The spectacle of the Senate's determining whether a nominee is a devout or a lapsed Catholic would, of course, never occur. To avoid personal embarrassment and political injury, senators quite understandably would not care to reveal, in the process of questioning a Supreme Court nominee, their own possibly limited understandings of religious doctrine.

3. Inducing a Safe Homogeneity of Religious Belief and Expression

Even if the Senate were competent to gauge a nominees' religious devotion, such scrutiny would encourage a safe homogeneity in the religious beliefs and expressions of those who aspire to high public office. This danger is another dimension of Jefferson's admonition that religious tests imposed by government would "corrupt the principles of that very religion it is meant to encourage."[107] As the Supreme Court noted in *Torcaso*, religious tests, even if constitutional, would be counterproductive to the extent that they created a disincentive for honest persons to aspire to public office. The Court observed that Oliver Ellsworth, "a member of the Federal Constitutional Convention and later Chief Justice of this Court," published a letter in December 1787 denouncing religious test oaths on the grounds that "test-laws are utterly ineffectual: they are no security at all; because

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105. *Feminist Women's Health Center*, 69 F.3d at 400 (citation omitted).
106. *In the Pocket of the Pope?*, Wash. Post A18 (July 6, 1991).
107. Statute of Virginia for Religious Freedom at 312 (cited in note 34).

men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences . . . ."[108]

One must seriously question whether a devout Amish Mennonite or Mormon or Hasidic Jew or Christian Scientist ever would be willing to endure the public humiliation of being made to explain under oath to the Senate Judiciary Committee the reasons why his adherence to a level of religious devotion that substantially exceeds the rather secular American norm would pose no threat to his objectivity as a Justice of the Supreme Court. For example, would an Orthodox Jew who refuses to eat swordfish on the grounds that it has no scales[109] be able to apply "local community standards" to an obscenity case originating in a socially liberal city, such as Berkeley, California or Cambridge, Massachusetts? What could he say to prove to the Senate that the orthodoxy of his religious beliefs would not predispose him in a case that required applications of a legal standard that embodies a more popular or more homogeneous social attitude? This argument concerning popular distrust of uncommon religious belief and expression would apply with even greater force to Muslims, Buddhists, Hindus, Sikhs, Baha'is, and followers of other religions with which most Americans may be personally unfamiliar. As the Court in *Torcaso* noted, in the debate of the North Carolina Convention on the adoption of the U.S. Constitution, James Iredell, "later a Justice of this Court," said of the Religious Test Clause: "It is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?"[110]

Justice Story wrote in 1833 that the lesson to be drawn from the use of religious tests in England before the American Revolution was that, in matters of religious belief, "the pains and

108. *Torcaso*, 367 U.S. at 494 n.9 (quoting Paul Leicester Ford, *Essays on the Constitution of the United States Published During Its Discussion by the People, 1787-1788* at 170 (Historical Printing Club, 1892)).

109. According to Jewish dietary laws, "only fish that have fins and scales are permitted to be eaten." Shlomo Pesach Toperoff, *The Animal Kingdom in Jewish Thought* 71 (Jason Aronson Inc., 1995) (citing Leviticus 11:9; Deuteronomy 14:9).

110. *Torcaso*, 367 U.S. at 495 n.10 (quoting Jonathan Elliot, 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 194 (1836-45)).

penalties of non-conformity" are "enforced with a stern and vindictive jealously."[111] It is worth remembering that, more than a decade after Justice Story wrote these words, and more than half a century after the ratification of the Constitution and the Bill of Rights, the Mormons fled Illinois for the land that was to be named Utah when, following years of violence and intimidation against the members of this religious sect, their prophet, Joseph Smith, was murdered in jail by a mob along with Hyrum Smith, the church's patriarch.[112] Although Protestants and Catholics do not wage holy wars against one another in modern America, even genteel expressions of intolerance—the danger inherent in the "sophisticated" and "less offensive" questions that Senator Hatch envisioned in 1991—may nonetheless succeed in intimidating those with heterogeneous religious beliefs from fully participating in civil society.

4. Compelling Rational Explanations for Beliefs, Through Faith, in Divine Mysteries

A recurrent theme in both the Old Testament and New Testament is the difference between belief through faith and belief through reason.[113] Indeed, Pope John Paul II issued an encyclical letter on faith and reason in 1998.[114] Inquiry into a nominee's religious devotion would inject the rationalism of which lawyers are so enamored into questions that are inherently insusceptible to rational explanation. It is hard to imagine, for example, that pro-choice Catholics who, for purposes of the abortion debate, rejected on scientific grounds that human life begins at conception would not simultaneously take offense if told that their rejection of that proposition through rational reasoning made all

111. See Story, *Commentaries on the Constitution* § 971 at 691 (cited in note 16).

112. See, e.g., Mead, *Handbook of Denominations* at 98 (cited in note 49); Davis Bitton and Leonard J. Arrington, *The Mormons and Their Historians* 7 (U. of Utah Press, 1988).

113. A classic example from the New Testament is the story of Jesus' healing of the servant of the Roman centurion at Capernaum in Galilee. See Luke 7:1-10. The centurion had treated the Jewish elders well and had even helped them to build a synagogue. So, when the centurion's servant fell gravely ill, the elders came to Jesus to implore him to go to the centurion's home to heal the servant. As Jesus approached the house, the centurion emerged and told Jesus that he was not worthy to have Jesus enter his home. The centurion explained that, as a man accustomed to authority, he knew that Jesus needed only to will that the servant be healed for it to happen. Jesus was amazed and told those following him that he had not encountered anyone with greater faith, even in Israel. The centurion returned to his house, where the servant emerged, cured.

114. John Paul II, Encyclical Letter *Fides et Ratio* (1998).

the more inconsistent their continued belief through faith that the Virgin Mary immaculately conceived the Son of God.

I do not mean to suggest that a Catholic, employing reason rather than faith, could only conclude that human life begins at some moment after conception.[115] Rather, the point here is that belief through faith in the Creation, the Immaculate Conception, the Trinity, the Resurrection, and the Second Coming does not begin with, rely on, and end with an epistemological foundation in rationalism.[116] In the language of economics, reason is not a substitute for faith; reason may instead be a complement to faith. The Cambridge theoretical physicist and theologian John Polkinghorne has argued this thesis rigorously in several penetrating books.[117] Similarly, in private conversations Michael Novak has conveyed this point with the metaphor that reason can provide the trellis upon which climbs the living rose, faith.

Religion addresses the transcendent, and for that reason 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. Indeed, to do so would be tantamount to the establishment of Jeffersonian deism as the state religion. As the Episcopal Church stated in its Articles of Religion, issued in 1801, "The Power of the Civil Magistrate extendeth to all men, as well Clergy as Laity, in all things temporal; but hath no authority in things purely spiritual."[118] In strikingly similar language, a delegate to the North Carolina Convention on the adoption of the U.S. Constitution stated that the Religious Test Clause "leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority."[119] If divine mysteries are

115. Compare Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 Stan. L. Rev. 599, 625 (1991) (proposition that life begins at conception is "virtually unintelligible"), with Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 Yale L.J. 2475 (1997) (refuting Professor Rubenfeld).

116. See, e.g., Karl Rahner, *The Trinity* 46 (Joseph Donceel, trans., Crossroad Publishing Co., 1970) ("It is evident that the doctrine of the Trinity must always remain aware of its mysterious character, which belongs to the divine reality, insofar at least as we are concerned, now and forever, hence also in the blessed vision. For even in the vision God remains forever incomprehensible.").

117. See, e.g., John Polkinghorne, *Belief in God in an Age of Science* (Yale U. Press, 1998); John Polkinghorne, *Science and Theology: An Introduction* (Fortress Press, 1998).

118. See Articles of Religion, Art. XXXVII (Protestant Episcopal Church in the United States of America, Sept. 12, 1801), reprinted in *The Book of Common Prayer* at 867, 875 (cited in note 49).

119. See Elliot, 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* at 200 (cited in note 110), cited in *Torcaso*, 367 U.S. at 495 n.10.

indeed the work of a supreme being, then those mysteries hardly need to stoop to the limits of rational human understanding.

IV. IS THERE ANY EFFECTIVE PRIVATE REMEDY OR PUBLIC SANCTION FOR VIOLATION OF THE RELIGIOUS TEST CLAUSE?

If we ascribe legal meaning to each clause of the Constitution and exclude the possibility that entire clauses of that document are merely hortatory bromides for good government, then we must ask: What private remedy would be available to the nominee to public office who had been subjected to a religious test? What public sanctions would lie against government officials who subjected a nominee to the religious test? The answers are surprising. The nominee has no effective private remedy. For a senator violating the Religious Test Clause, the only effective public sanction would be that which the Constitution empowers the Senate to impose under its internal rules for punishing misconduct. There is not likely to be any judicially enforceable public sanction against a senator who violates the Religious Test Clause.

A. THE ABSENCE OF AN EFFECTIVE PRIVATE REMEDY FOR THE NOMINEE FOR THE VIOLATION OF HIS RIGHTS UNDER THE RELIGIOUS TEST CLAUSE

"The very essence of civil liberty," said the Supreme Court in *Marbury* v. *Madison*, "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[120] A nominee who has been subjected to questioning in violation of the Religious Test Clause, however, has no viable private remedy against the senator committing the violation. That conclusion also holds, for slightly different reasons, for government officials other than senators.

1. Does an Implied Cause of Action Exist under *Bivens*?

A violation of the Religious Test Clause is a violation of a nominee's constitutionally guaranteed right of religious freedom. Such a violation therefore should give rise to an implied cause of action under an explicit constitutional provision, as in *Bivens* v. *Six Unknown Named Agents*.[121] Congress has not created an

120. 5 U.S. (1 Cranch) 137, 163 (1803).

121. 403 U.S. 388 (1971). For a discussion of the deterrent rationale of *Bivens*, see

equally effective statutory remedy for violation of the Religious Test Clause that would substitute for an implied cause of action under the Constitution.[122] Nor are there "special factors counseling hesitation in the absence of affirmative action by Congress."[123] Senators discharging their Advice and Consent duties in connection with judicial nominations are not timid; nor should they collectively be presumed to harbor invidious motives. Thus they would not seem the least bit "likely to be unduly inhibited in the performance of their duties by the assertion of a *Bivens* claim."[124] Thus, although it obviously would be a case of first impression, a *Bivens* claim by a judicial nominee against a senator for violation of the Religious Test Clause would, in principle, seem well founded. But there are two immediate problems with such a theory, one legal and the other practical.

The legal difficulty would be to identify a remedy. If, for simplicity, we assume that the rejected Supreme Court nominee is already an Article III federal judge with life tenure, it is possible that his harm could consist of the difference between his current salary and that of a Supreme Court Justice. But if the nominee were instead more handsomely paid than a Supreme Court Justice (as in the case of many partners in law firms and many distinguished law professors), then the financial harm would be nonexistent. But obviously lawyers do not aspire to be appointed to the Supreme Court to get rich, any more than African Americans in the 1950s sat at Woolworth lunch counters in the South to savor the cuisine. Therefore, predicating the measure of harm to the rejected nominee on forgone income is a silly exercise. Just as the harm to a person of being denied a public accommodation on account of race is impossible to measure in dollars, so also is it impossible to measure in dollars the harm to a judicial nominee of being rejected from the Supreme Court on account of his religious beliefs. It is no easier to measure the (presumably lesser) harm to a nominee of being confirmed only after having been subjected to improper religious questioning by the Senate.

What then is the nominee's measure of harm? Harm to reputation is a possibility. But as a practical matter, the Su-

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FDIC v. Meyer, 510 U.S. 471, 485 (1994).

122. See *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992); *Bush v. Lucas*, 462 U.S. 367, 380-90 (1983); *Chappell v. Wallace*, 462 U.S. 296, 299-304 (1983); *Schweicker v. Chilicky*, 487 U.S. 412, 425 (1988).

123. *Bivens*, 403 U.S. at 396-97.

124. *McCarthy v. Madigan*, 503 U.S. 140, 151 (1992).

preme Court's attenuation, on First Amendment grounds, of the law of defamation of public figures since *New York Times Co. v. Sullivan* would deny a rejected nominee any viable tort remedy resembling libel or slander.[125] Unless a violation of the Religious Test Clause would automatically trigger punitive damages, there would be a serious risk that a *Bivens* actions predicated on such a violation would be dismissed under Rule 12(b)(6) for failing to state a cause of action upon which relief can be granted.[126]

Perhaps the remedy sought would be no more than a declaratory judgment that a particular senator had violated the Religious Test Clause.[127] Such a private remedy might publicly humiliate the offending senator. But it is unlikely to be pursued for a second, more practical reason. A person whose nomination to the Supreme Court has failed because of religious bigotry cannot be expected to prolong his hardship by filing a lawsuit against a U.S. senator. In the public's eye, such an action could paint the nominee as a Captain Ahab, embittered to the point of obsession.

If the person urging the Senate's use of a religious test were himself not a member of the Senate, then a *Bivens* action would fail entirely. In Governor Wilder's case, for example, no *Bivens* action for violation of Judge Thomas's civil rights could have extended to the governor because he lacked the "color of law" for purposes of infringing the Religious Test Clause. In such a case, the injured nominee would have to resort to common law tort theories of defamation and the like. As noted above, however, such claims would have no serious chance of success in light of the nominee's status as a public figure under *New York Times Co. v. Sullivan* and the speaker's own ability to assert his own rights under the First Amendment to speak freely and to petition government.

2. The Speech or Debate Clause as a Bar to Punishment

Even a senator making public comments about a nominee's religious beliefs would, in most circumstances, elude any private remedy by virtue of the immunity conferred on him by the Speech or Debate Clause, which provides that, "for any Speech

125. 376 U.S. 254 (1964).

126. Fed. R. Civ. Proc. 12(b)(6).

127. Cf. *Anderson v. Laird*, 316 F. Supp. 1081 (D.D.C. 1970), rev'd on other grounds, 466 F.2d 283 (D.C. Cir. 1972) (seeking declaratory ruling that the Religious Test Clause had been violated).

or Debate in either House, [a member of Congress] shall not be questioned in any other Place."[128] The immunity conferred, however, is only for speech or debate occurring "in either House." If a senator were to advocate on the editorial page of the *New York Times* that the Senate reject a particular Supreme Court nominee unless he disassociated himself from certain teachings of his religion, the Speech or Debate Clause would not grant immunity.[129] The senator's comments would not have been made "in either House" of Congress. Of course, on these facts it is not clear that the senator would need any immunity, as his remarks might not even be considered to manifest state action with respect to the Senate confirmation process.

Nonetheless, if the senator subsequently inserted into the *Congressional Record* a verbatim copy of his op-ed piece from the *New York Times*, the speech or debate presented in the newspaper then would be transformed into "Speech or Debate [occurring] in either House." A court would surely find unpalatable a spurned judicial nominee's theory of harm that would require the court to reject legislative immunity on the grounds that a senator uttered speech offensive to the Religious Test Clause in the *New York Times* before uttering identical speech within Congress.[130]

3. Automatic Confirmation of the Nominee

The Wilder imbroglio in 1991 illustrates some of the difficulties associated with identifying a private remedy for violations of the Religious Test Clause. That Governor Wilder promptly apologized for his remarks spoke well of his decency,[131] but it hardly repaired the injury from his having told reporters that Judge Thomas' allegiance to the Pope had to be publicly scrutinized. Like a prosecutor's improper remark to a jury, Governor Wilder's remark could not be expunged from the public consciousness even if he sincerely regretted having made it. The remedy in the case of prosecutorial misconduct in a criminal

128. U.S. Const., Art. I, § 6.

129. See *United States v. Brewster*, 408 U.S. 501, 512 (1972); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

130. Cf. *Doe v. McMillan*, 412 U.S. 306, 313 (1973); but see Laurence H. Tribe, 1 *American Constitutional Law* 1019 (Foundation Press, 3d ed. 2000) ("Plainly, it would be untenable if the Speech and Debate Clause were used, for example, to preclude a court from inquiring into whether legislators' statements indicated that a particular statute was enacted out of racial animus or for a forbidden reason under the Establishment Clause.").

131. Baker and Broder, *Wilder in Hot Water* at C1 (cited in note 6).

prosecution is a mistrial. A new jury must be impaneled to hear the evidence without the biasing remark. But the mistrial analogy does not fit a violation of the Religious Test Clause. There is only one jury pool—the Senate—and it cannot restore the veil of ignorance once it has been removed by improper inquiry into a nominee's religious beliefs. Note also that analogizing the Senate confirmation of nominees to a trial underscores how candidates for national elective office who encounter religious discrimination have no similar process-oriented remedy. In practical terms, their recourse is limited to being more appealing to the electorate than their opponents, which Thomas Jefferson and John F. Kennedy successfully did in 1800 and 1960, respectively, but Alfred E. Smith failed to do in 1928.[132] But this political remedy is circular: If a person holding a minority religious belief faces bigotry in an election, his remedy is to gain an electoral majority. This would seem to be a satisfactory remedy only in cases in which the religious bigotry was ineffectual.

The closer analogy than a mistrial for prosecutorial misconduct may be to a coerced confession in violation of the Self Incrimination Clause of the Fifth Amendment.[133] The nominee is being made to testify against himself in the sense that the intended purpose of the religious test is to elicit information that would disqualify the nominee, in the view of his senatorial interrogators, from holding public office. Indeed, the concern over compelling the nominee to disclose his religious beliefs should be even greater than the justifiably great concern over compelled self-incrimination, for the nominee's compelled disclosure about his beliefs is not literally "incriminating" in the least. The purpose of the nominee's compelled disclosure is to determine his fitness for public office, not his fitness for criminal conviction and punishment.

The remedy for a coerced confession in a criminal case is exclusion of the tainted confession and all evidence that can be proximately traced to the coerced confession. As a practical matter, such exclusion of highly probative evidence of guilt may produce an acquittal of the defendant. The rationale for that rule is that it deters police misconduct.[134] In the case of a Su-

132. See note 4.

133. U.S. Const., Amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself").

134. *Miranda v. Arizona*, 384 U.S. 436 (1966); see also *Dickerson v. United States*, 530 U.S. 428 (2000). Any analogy can be stretched to the breaking point, and admittedly I grossly oversimplify here the constitutional jurisprudence and scholarship on the right

preme Court nomination, however, the mere exclusion by the Senate of any evidence of the nominee's religious beliefs would fail to provide the necessary deterrent effect. The nominee is not analogous to a suspected criminal, as the nominee's revelation of his religious beliefs does not constitute any legitimate basis for rejecting his nomination (the analogy to "guilt" on grounds of religious belief). The more closely analogous remedy for violation of the Religious Test Clause would be automatic confirmation of the nomination, which would more closely correspond to the *practical effect* in a criminal trial of excluding self-incriminating evidence that was unlawfully obtained—namely, acquittal.

There are several obvious problems, however, with employing such a remedy for violations of the Religious Test Clause. First, it finds no textual basis in the Constitution. It is debatable whether the Senate could be said to have discharged its Advice and Consent duties if a nomination were "confirmed" without an affirmative act of senatorial consent. Perhaps the Senate could, *ex ante*, enact a rule providing that its unanimous consent shall be deemed to have been given to a nomination whenever a senator has infringed the nominee's religious liberty by violating the Religious Test Clause. But a determination that such an infringement had occurred would itself require a vote by the Senate. As a practical matter, therefore, such a rule would differ in outcome from an ordinary confirmation vote only if the Senate would vote to find a violation of the Religious Test Clause with respect to a nominee who would have been unlikely to have been confirmed for other reasons. A person should be confirmed for appointment to the Supreme Court because he or she is extraordinarily able, not because he or she is a "victim."

Second, automatic confirmation would enable one senator's misconduct to disenfranchise all of the remaining members of the Senate on the question of whether to confirm or reject a specific nomination. Furthermore, the prospect of automatic confirmation could lead to strategic behavior by those seeking a "free pass" for the nominee: A contrived controversy over the nominee's religious belief could be constructed by supporters of

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against self-incrimination under the Fifth Admendment. For an insightful analysis, see Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1484 (1997) (reviewing Akhil Reed Amar, *The Constituation and Criminal Procedure: First Principles* (Yale U. Press, 1997)).

the nominee in the hope that it would lead to the nominee's automatic confirmation.

Third, the Constitution requires the advice and consent of the Senate on matters of presidential nominees in part to inform the electorate of the qualities that make a nominee worthy or unworthy to hold high public office. This informative process is for the education and benefit of the electorate, and not solely an inwardly focused exercise of the Senate's prerogative. Such discourse would be foreclosed by resort to the remedy of automatic confirmation.

In short, automatic confirmation would be unwise and probably unconstitutional because it would gut the Senate's Advice and Consent powers in the most consequential of all judicial nominations. One can imagine that, the first time that an automatically confirmed Justice joined a 5-4 decision of the Supreme Court, a private party would file a lawsuit alleging that the Court's majority decision was not lawfully issued; the theory would be that the opinion (overturning the 5-4 holding of *Carhart*, for example) was joined by someone never properly confirmed for appointment to the Court.

Though not a viable proposition, the thought experiment of automatic confirmation nonetheless is useful because it highlights an important asymmetry of two default rules regarding a lack of concurrence between the legislative and executive branches: If the Senate simply declined to vote upon a nomination, it would not "pass" automatically, as would a bill presented by Congress to the president but not signed by him within ten days (as long as Congress did not adjourn).[135]

B. SENATORIAL PUNISHMENT OF MEMBERS VIOLATING THE RELIGIOUS TEST CLAUSE

The Religious Test Clause does not appear to support any judicially enforceable punishment of a senator that would serve to deter future violations of the Clause. The most that might be realistically expected would be that the Senate would reprimand and fine a senator for violating the Clause and disqualify him from voting on the nomination that he had tainted by his improper remarks.

135. See U.S. Const., Art. I, § 7, cl. 2.

In its entire history, the Senate has expelled only fifteen members, including fourteen who had been charged with supporting the Confederacy during the Civil War.[136] The Senate has considered expulsion in other cases, but it either has found the member not guilty or has failed to act before the member left office.[137] In 1995, for example, the Senate Committee on Ethics recommended that Senator Robert W. Packwood of Oregon be expelled for sexual misconduct and abuse of power. He announced his resignation the following day and left the Senate within a month, without an expulsion vote by the Senate as a whole.[138] Since 1789, the Senate has censured an additional nine members.[139]

Given the infrequent use of expulsion and censure, it is probably naïve to suppose that the Senate would have any appetite to punish one of its members for violating the Religious Test Clause. If that is the case, then the Senate's reluctance will have reduced this explicit constitutional guarantee to having no greater legal significance than a book on etiquette.

1. Disqualification of a Senator from Voting on the Nomination

Section 5 of Article I provides: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[140] This provision would empower the Senate, acting under "the Rules of its Proceedings," to punish a senator who had violated the Religious Test Clause by barring him from participating in the confirmation vote on the nomination in question, as well as any further hearings or debate on the matter. In the extreme (but unlikely) case, the Senate could disqualify the offending member from voting by expelling him entirely.

The most obvious deficiency of relying on disqualification or expulsion as a remedy is the one mentioned earlier. If one senator taints the confirmation proceeding, the fact that he is disqualified from voting and ninety-nine others remain to vote on the nomination in its tainted state does nothing to remove the

136. See Anne M. Butler and Wendy Wolff, *United States Senate Election, Expulsion and Censure Cases, 1793-1990* (Gov't Printing Office, 1995); <www.senate.gov/learning/brief_20.html>.

137. See Butler, *United States Senate Election* (cited in note 136).

138. See id.

139. See <http://www.senate.gov/learning/brief_20.html>.

140. U.S. Const, Art. I, § 5, cl. 2.

taint. Even expulsion would not change this situation. Thus, while some might regard disqualification as a necessary remedy, it would not be a sufficient one.

Furthermore, as the episode involving Judge Thomas teaches, Governor Wilder was not a senator (or even a federal officer) and thus was in no position to require that Judge Thomas submit to a religious oath as a condition of the confirmation of his appointment to the Supreme Court by the Senate. Governor Wilder had no vote on the nomination. Thus, one could correctly say that *Governor Wilder's* comments could not violate the Constitution. Indeed, it is doubtful that any attempted punishment of Governor Wilder for his comment would survive First Amendment scrutiny. These factors simply underscore the insidious nature of public debate over a nominee's religious beliefs: A senator opposed to the nominee need not personally question the person's religious beliefs, as there will be other nationally known political figures not in the Senate who could raise such questions before the press. Unless a senator could be proven to have conspired with someone outside the Senate to infringe the nominee's rights under the Religious Test Clause, it is highly unlikely that any punishment could be imposed on anyone, either by the Senate or by a court.

2. Reprimand and Fine Ordered by the Senate under Its Power to Punish Members for Disorderly Behavior

The Speech or Debate Clause guarantees that a senator would not be questioned on his remarks "in any other Place" than "either House" of Congress. But that guarantee does not mean that *Congress* could not question the senator concerning his remarks. Although it might be considered presumptuous for the House to question a senator about his remarks on a judicial nominee, the Senate clearly could, as noted earlier, punish or expel a senator if it deemed such action to be appropriate.

In connection with a proceeding to punish or expel a senator for violation of the Religious Test Clause, the Senate presumably could question the member if he chose to appear to defend himself in a hearing on an order to show cause why he should not be disciplined. Given the collegiality of the Senate owing to its smaller size and longer terms than those in the House, and given the requisite two-thirds vote for expulsion of a member, it would seem unlikely that the Senate would expel a

member for violating the Religious Test Clause.[141] A more likely, less harsh punishment than expulsion would be a reprimand accompanied by a Senate order that the disorderly member pay a fine, which the Senate could then give to the nominee suffering the violation of his rights under the Religious Test Clause. There is a recent, well-known model for imposing a fine as a penalty for misconduct, albeit in the House rather than the Senate: In January 1997, the House of Representatives reprimanded Speaker Newt Gingrich for ethical misconduct and fined him $300,000.[142]

The Senate could further demand from the disorderly senator, upon implicit threat of more serious punishment such as expulsion or demotion from choice committee assignments, that he formally apologize to the nominee in a letter that the Senate would order to be published concurrently in the *Congressional Record* and posted on the Internet. To have teeth, the apology and publication would have to be ordered to occur before the Judiciary Committee's vote on the nomination.

Because such an order by the Senate would be taken pursuant to its explicit powers under Article I to discipline its members, it is extremely unlikely that a court would be willing to review the order. Rather, the court would more likely regard the case as presenting a political question that has been textually assigned to the legislative branch by the Constitution.[143]

CONCLUSION

The Framers guaranteed that a nominee for national office would not be made to divulge or disavow his understanding of God. This simple rule has been lost in judicial nominations, however, as the controversy over abortion has come to dominate every other topic of discourse in American constitutional law. Apart from whatever one thinks of abortion and the Supreme Court's jurisprudence on the subject, this debasement of the process of nominating and confirming Justices to the Supreme Court is to be lamented. At its worst, the demand that a judicial nominee explain his religious beliefs on abortion to the Senate is a call to discard the protections of the Religious Test Clause in

141. See *United States v. Brewster*, 408 U.S. 501, 518 (1972); but see *Powell v. McCormack*, 395 U.S. 486 (1969).

142. See Adam Clymer, *House, in a 395-28 Vote, Reprimands Gingrich*, N.Y. Times A1 (Jan. 22, 1997).

143. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

the name of advancing some other preferred constitutional right. At its best, any theologically rigorous religious testing of a Supreme Court nominee by the Senate would be intractable, if not also excruciating. The Framers wisely foreclosed the possibility entirely.

Although the Religious Test Clause is a fundamental constitutional protection of individual liberty, a violation of the Clause evidently fails to produce, in either legal or practical terms, any private remedy for the nominee. The Religious Test Clause also fails to provide any judicially enforceable public sanction for the offending senator. Unless the Senate steps in to fill the void, the abortion debate—or some equally divisive moral debate that will inevitably arise in the future—will reduce the Religious Test Clause to being no more than hortatory in connection with nominees to the Supreme Court. The Senate could provide the effective remedy and sanction that are needed by reprimanding and fining members who violate the Religious Test Clause, by disqualifying them from participating in the confirmation vote for the nominee whose religious freedom has been infringed, and by ordering that their fines be paid to the nominee.

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 evaluation of his qualifications to sit on the Supreme Court. If the Senate fails to recognize the significance of the Religious Test Clause, it will retreat from the Constitution's monumental achievements for religious freedom and permit senatorial evaluation of a nominee's qualifications to degenerate into precisely the kind of inquisition that Thomas Jefferson eloquently denounced and the Framers subsequently forbade.