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# A Trinity of Viewpoints on the Moral Perspective in the Public Square: Murray, Kennedy, and Cuomo

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# A TRINITY OF VIEWPOINTS ON THE MORAL PERSPECTIVE IN THE PUBLIC SQUARE: MURRAY, KENNEDY, AND CUOMO

ROBERT JOHN ARAUJO, S.J.\*

## INTRODUCTION

There is within the United States today a current of strong disagreement about how people of faith, especially Catholics, can contribute to the public discussion of governmental functions that involve the administration of the state. This matter is distinct from the important questions of religious freedom, about which we also hear a great deal in the contemporary political discussions and debates, but it nonetheless shares the honorable company of serious engagements regarding the First Freedom as addressed by the Constitution of the United States.

The objective of this Essay is to assess the response of the faithful Catholic—a term often misused today—to the question of the legality of the religious contribution to the moral issues that intersect the making of public policy by considering the positions of three Americans: John F. Kennedy; John Courtney Murray, S.J.; and Mario Cuomo. Other well-known Americans could have also been selected, but these three had clear ideas about the important interrelated issues of First Amendment doctrine, the relationship between religious persons or groups and the state, and the natural, fundamental rights of individuals and groups, including the Church, to participate in robust debate about moral issues that intersect the formulation of law and policy.

## I. SETTING THE STAGE

The United States, by the image of the melting pot, has often been thought of as a land of diversity. Certainly in the context of ethnicity, the American population is one of the most diverse in the world. But on other matters, especially those dealing with important issues of concern to the *res publica*, unity is a relevant and sometimes necessary virtue. For example, in times of grave challenges—for older citizens, Pearl Harbor; for

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younger ones, 9/11—we see the unity of the citizens springing forth as a remedy to calamity that threatens the nation. But on other matters, we tend to embrace the notion of pluralism where many voices have relevant and valuable insights to be shared and considered. Diversity punctuates the religions of the land, too. The First Amendment of the United States Constitution protects the plethora (by non-establishment of religion) and the practices of faith (by the free exercise of religion).<sup>1</sup> But a question surfaces regarding whether this diversity should exist within the voice that calls itself “Catholic.” One can see such diversity in the contrasts between the two NCRs—the *National Catholic Register* and the *National Catholic Reporter*.

In the context of the Catholic community, there are areas in which diversity of opinion exists that is not detrimental to the Church and her members—e.g., diversity of opinion on the use of military force, the morality and legality of capital punishment, or the degree to which the welfare state should perpetuate the status of the poor. However, there are other areas in which the disagreement more than suggests problems—e.g., the issues of abortion, artificial contraception, and same-sex marriage.<sup>2</sup> With the passage of time and in recent years, it is clear that there is also a range of opinions within Catholic circles on the degree to which particular members of the faithful can and cannot participate in the public square on the issues of the day.

For example, in the election year 2008, there was diversity of opinion on the degree to which Catholics could or could not participate in issues dealing with matters concerning the national elections and beyond. For instance, one well-known academic asserted that she had the right to present her views about the important matters then being debated in the public square, but the bishops, who are the principal teachers of the Church,<sup>3</sup> dis-

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1. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

2. Abortion, specifically, has been one of the most neuralgic issues on the American social agenda for the past generation. It remains contentious in the second decade of the twenty-first century.

3. See SECOND VATICAN ECUMENICAL COUNCIL, LUMEN GENTIUM: DOGMATIC CONSTITUTION ON THE CHURCH ¶¶ 20, 21, 25, 37 (1964), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19641121\\_lumen-gentium\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html); SECOND VATICAN ECUMENICAL COUNCIL, DECREE CONCERNING THE PASTORAL OFFICE OF BISHOPS IN THE CHURCH (CHRISTUS DOMINUS) ¶ 2 (1965), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decree\\_19651028\\_christus-dominus\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_christus-dominus_en.html).

agreed.<sup>4</sup> At the time, this academic was a member of a Catholic advisory committee for one of the major presidential candidates,<sup>5</sup> and she strongly criticized some of the bishops for engaging in the activities she, herself, had pursued with far greater vigor than they did.<sup>6</sup> In short, she has established a double standard for Catholic participation in public life. This is a problem considering the fact that she self-identified as a Catholic theologian.

She and other Catholic academics publicly rebuked American bishops because of the proper emphasis that they have placed on the abortion issue.<sup>7</sup> She decried that “when the Catholic church is perceived to be cheerleaders [sic] for one political party a rich faith tradition is badly damaged and loses its prophetic voice.”<sup>8</sup> None of the bishops, she critiqued, endorsed any candidate or political party, but they did speak clearly on the profound evil of abortion and how the Catholic electorate needs to consider this weighty issue. I advance a different view than that presented by this fellow academic. I agree that there can be problems for any member of the Church to speak out for or against a particular candidate; nevertheless, it is appropriate for the bishops, as the Church’s principal teachers who must be true to their office, to address the important issues of the day with sufficient clarity so that their fellow citizens can better comprehend the moral implications of the issues. The bishops have the responsibility to teach that which is reinforced by the natural freedom to do what they ought and must.

When Pope Paul VI concluded the proceedings of the Second Vatican Council in 1965, he rhetorically asked the civil lead-

4. Lisa Sowell Cahill, *U.S. Bishops Damaging Rich Catholic Faith Tradition*, NAT’L CATH. REP. (Oct. 16, 2008), <http://ncronline.org/news/politics/us-bishops-damaging-rich-catholic-faith-tradition>. She further asserted that “the Catholic church has a problem on its hands” because “a few bishops and prelates have come dangerously close to making implicit political endorsements” in the exercise of their proper teaching office of exhorting the faithful to take stock of the moral evil of abortion. In doing so, she seems to think that her own open words and deeds that unambiguously endorse a particular party and its presidential candidate are above her criticism of “a few bishops and prelates.” She further claimed that their activities represent “a disturbing trend for both religion and democracy” while at the same time she implicitly believes that her own actions “support an essential role for faith in public life.” *Id.*

5. Lisa Cahill was a member of Catholic Advisory Committee for President Barack Obama’s 2008 campaign. See *Lisa Sowle Cahill*, BOS. COLL. THEOLOGY DEP’T, <http://www.bc.edu/schools/cas/theology/faculty/lcahill.html> (last visited Apr. 9, 2013).

6. Cahill, *supra* note 4.

7. *Id.*

8. *Id.*

ers of the world what did the Church ask of them. His reply was straightforward:

She asks of you only liberty, the liberty to believe and to preach her faith, the freedom to love God and serve Him, the freedom to live and to bring to men her message of life. Do not fear her. She is made in the image of her Master, whose mysterious action does not interfere with your prerogatives but heals everything human of its fatal weakness, transfigures it and fills it with hope, truth, and beauty. Allow Christ to exercise His purifying action on society. . . . And we, His humble ministers, allow us to spread everywhere without hindrance the Gospel of peace . . . . Of it, your peoples will be the first beneficiaries, since the Church forms for you loyal citizens, friends of social peace and progress.<sup>9</sup>

Clearly the religious freedom of all persons and, therefore, all Catholics is essential to the rights and duties of citizenship. It is evident that there is tension among Catholics regarding the proper role of the moral perspective in the public square and who has the responsibility to articulate it. Moreover, there is a misunderstanding about that role. The diversity of opinion indicates that there is no Catholic unity on which Catholics can speak and what they can say. That is why I suggest that those interested in this dispute may wish to consider the perspectives of Murray, Kennedy, and Cuomo. When the subject is objectively analyzed, it is evident that the Church, through her most authoritative teachers, has an essential role in the policy debates that have moral implications for society.

## II. CAN THERE BE A RELATIONSHIP BETWEEN THE CHURCH AND STATE FOR PURPOSES OF MAKING CONTRIBUTIONS TO THE DEVELOPMENT OF MORAL CONCERNS AFFECTING PUBLIC LIFE?

Here I set the stage by considering the work of three well-known Catholics: John Courtney Murray, S.J., John F. Kennedy, and Mario Cuomo. I shall begin with Murray.

### A. *John Courtney Murray (1904–1967) Sets the Stage*

Unlike the other two individuals whom I consider in this Essay, John Courtney Murray was a Jesuit priest and never elected to public office. He was for his adult life a professor of theology

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9. SECOND VATICAN ECUMENICAL COUNCIL, *Closing Messages of the Council*, in THE DOCUMENTS OF VATICAN II 728, 729–30 (Walter M. Abbot, S.J. ed., Joseph Gallagher trans. 1966).

at the Jesuit theologate in Woodstock, Maryland, until he died in 1967. Although trained to be a professor of dogmatic theology, he developed expertise in the study of church-state relations in the United States. His study began in the 1940s when he commenced his research on church-state issues and the natural law.<sup>10</sup> Although he was instructed by his religious superiors to suspend his work in this field in the 1950s, he returned to this study which culminated in his publication of a book, *We Hold These Truths*, a series of previously written essays, in 1960.<sup>11</sup> In short order, he became a peritus (advisor) at the Second Vatican Council who exercised considerable influence in the drafting of the Council's Declaration on Religious Freedom, *Dignitatis Humanae Personae*.

Father Murray's thoughts on the role of the religious person in the public square are of central concern to this Essay. His focus was what he called "the American proposition," which he considered both "doctrinal and practical, a theorem and a problem"; moreover, it was and remains an "organized political project" founded on Jefferson's "we hold these truths."<sup>12</sup> In the second decade of the twenty-first century, skeptics about truth abound; however, neither Murray, nor for that matter this author, was or is one of them. Unlike the two public officials whose views will be considered in this Essay, Murray did not see Catholic participation in public life as a problem on any front. He began his groundbreaking book by asking and then answering:

[W]hether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism. . . . An affirmative answer to it . . . is one of the truths I hold.<sup>13</sup>

Murray identified three important themes of public argument within the sphere of civil society and the American proposition: (1) public affairs as the matters which are for the advantage of the public, (2) the affairs of the commonwealth which include the quality of the common life, and (3) the constitutional consensus by which the identity of the members of the society and

10. See John Courtney Murray, S.J., *Current Theology: Christian Co-Operation*, 3 THEOLOGICAL STUDIES 413 (1942) for one of Murray's first articles in this field.

11. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1960).

12. *Id.* at vii–viii.

13. *Id.* at ix–x.

the sense of joint purpose are established.<sup>14</sup> But Murray noted early in this book that the American proposition was confronted with a particular problem he called “barbarism.”<sup>15</sup> Murray argued that barbarism can invade even an advanced civilization and manifest itself in “the lack of reasonable conversation according to reasonable laws.”<sup>16</sup> For this conversation to make sense and be fruitful, it must include all the members of the society—including the religious communities that are an inextricable part of its fabric. Moreover, this inclusive conversation is the means by which the society remains civil, or as Murray presented it, “[c]ivility dies with the death of the dialogue.”<sup>17</sup> Of course, the conversation and dialogue are not about pleasantries but about the major issues of the day that concern the *res publica* and, as Murray pointed out, the search for the truth.<sup>18</sup>

While agreeing that freedom is a vital element of the American proposition, he knew that freedom must be exercised in an ordered fashion by a virtuous people who acknowledge as their common objective what ought to be done rather than what people would like to do.<sup>19</sup> This objective is impossible to achieve unless all stakeholders have the opportunity to participate in the essential dialogue critical to the goal. Murray argued that the Catholic perspective on the objective relied on the natural law tradition, which was the foundation of our federal republic.<sup>20</sup> However, in more recent times, this vital element of the American proposition has been disregarded in favor of something that I would call democratic totalitarianism.<sup>21</sup> As one justification for

14. *Id.* at 8–9.

15. *Id.* at 13.

16. *Id.*

17. *Id.* at 14.

18. *Id.* at 35.

19. *Id.* at 36.

20. *Id.* at 41 (“Catholic participation in the American consensus has been full and free, unreserved and unembarrassed, because the contents of this consensus—the ethical and political principles drawn from the tradition of the natural law—approve themselves to the Catholic intelligence and conscience. . . . To the early American theorists and politicians the tradition of the natural law was an inheritance. This was its strength; this was at the same time its weakness, especially since a subtle alteration of the tradition had already commenced. For a variety of reasons the intellectualist idea of law as reason had begun to cede to the voluntarist idea of law as will.”).

21. Pope John Paul II made a similar observation in his 1991 encyclical letter *Centesimus Annus* where he stated that “[a]s history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.” POPE JOHN PAUL II, *CENTESIMUS ANNUS* ¶ 46 (1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc)

my position, I rely on Murray's astute observation that is just as true today as it was in 1960 when he published his book:

The tradition of the natural law is not taught or learned in the American university. It has not been rejected, much less refuted. We do not refute our adversaries, said Santayana; we quietly bid them goodbye. I think, as I shall later say, that the American university long since bade a quiet goodbye to the whole notion of an American consensus, as implying that there are truths that we hold in common, and a natural law that makes known to all of us the structure of the moral universe in such wise that all of us are bound by it in a common obedience.<sup>22</sup>

In my opinion, this sentiment is an accurate assessment of the American proposition today and why Murray provided the argument for including the Catholic perspective in the civil affairs of the republic. A component of his justification was the fact that American democracy, as a noble edifice, was like any human effort: if not properly understood and cared for, it could be dismantled into "a tool shed in which the weapons of tyranny may be forged."<sup>23</sup>

One of the tyrannies he recognized was the collapse of the American proposition that would result if the participation of all citizens through civil discourse were to be pushed aside by the political jockeying of powerful interest groups. Murray was an astute man who comprehended that the society attached to the American proposition was altering its outlook so as to detach itself from the natural law foundation of the country. Nonetheless, as a man of hope, Murray understood that the universal moral law had demonstrated itself as the foundation of the good society and that the state/government must be subject to this law

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\_01051991\_centesimus-annus\_en.html. A few years later in his 1995 encyclical letter *Evangelium Vitae*, he made a similar remark when he said,

the original and inalienable right to life is questioned or denied on the basis of a parliamentary vote or the will of one part of the people—even if it is the majority. This is the sinister result of a relativism which reigns unopposed: the "right" ceases to be such, because it is no longer firmly founded on the inviolable dignity of the person, but is made subject to the will of the stronger part. In this way democracy, contradicting its own principles, effectively moves towards a form of totalitarianism.

POPE JOHN PAUL II, *EVANGELIUM VITAE* ¶ 20 (1995), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html).

22. MURRAY, *supra* note 11, at 40.

23. *Id.* at 42.



so as to avoid the consequence of its morphing into a tyranny.<sup>24</sup> Murray also believed that the Catholic community, which still largely adhered to universal natural moral law, ought to be able to continue its contribution to the success of the American proposition that was founded on this law even though other members of American society may have abandoned the consensus that “fashioned the American people into a body politic and determined the structure of its fundamental law.”<sup>25</sup> As Murray reiterated later on, “[t]he origins of our fundamental law are in moral principle; the obligations it imposes are moral obligations, binding in conscience. One may not, without moral fault, act against these articles of peace.”<sup>26</sup> In his estimation, participation by all the stakeholders of the American proposition was essential to the proposition’s success. Remove the participation and the proposition would most likely fail.

B. *A Catholic Politician Seeking and Gaining the White House: John F. Kennedy (1917–1963)*

An excursion through the public record of John F. Kennedy leads to a conclusion that his understanding of church-state relations and the role of the Catholic in public life must be considered in three phases of his political career: (1) as a member of Congress, (2) as a candidate for the Presidency, and (3) as President of the United States.

1. J.F.K. as a Member of Congress

As a young member of Congress in the early post-World War II era, John Kennedy encountered issues that would raise two important topics that have a bearing on the moral perspective intersecting public policy. The first was the relationship between church and state. While this Essay is not about First Amendment issues, *per se*, there are some important matters regarding Kennedy’s understanding of the Amendment that have a bearing on this Essay. The second matter clearly does have a direct bearing on my theme: Kennedy’s understanding of the role of the religious perspective in public life, which, for him, involved matters dealing with church and state relations.

Briefly, the story of John Kennedy’s views on church-state relations begins with a young war hero returning to his home territory with the ambition of seeking high political office. Shortly after his election, he explored ways of demonstrating his

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24. *Id.* at 42.

25. *Id.* at 43.

26. *Id.* at 63.

ability to serve his constituents well by paying attention to their needs and doing something about them. The year was 1947 and the Supreme Court had recently decided *Everson v. Board of Education*.<sup>27</sup> Kennedy and his political counselors were aware of what lurked on the horizon knowing that the wall of separation between church and state was, in Justice Black's words, to be kept "high and impregnable" without any opportunity for "the slightest breach."<sup>28</sup> However, wanting to please many of his Catholic constituents who then lived in his densely populated district, Kennedy introduced a bill in 1949 that would authorize per annum \$300,000,000 in federal aid to states for current educational expenses that would include ten percent set aside for auxiliary services (including bus transportation, health care, and state-approved nonreligious textbooks) for children who went to private and parochial schools.<sup>29</sup> Knowing that the textbook issue was particularly controversial with some legislators, Representative Kennedy indicated his willingness to compromise by deleting the provision about books from his bill.<sup>30</sup> Kennedy was well aware that any assistance benefiting parochial schools would be viewed by his critics as unconstitutional assistance to sectarian institutions, but he was quick to point out that his legislation would only "provide public welfare benefits for the children attending non-public schools, and not support for their schools."<sup>31</sup> While Kennedy won considerable support for his bill, he did not obtain a favorable committee outcome, and the proposal died when the House adjourned.<sup>32</sup>

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27. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (holding that New Jersey's reimbursement for taking public transportation by all school children, including those attending parochial schools, did not violate the Establishment Clause of the First Amendment). Jefferson's phrase of the "wall of separation" was quoted by Justice Black who wrote the majority opinion when he stated that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Id.* at 16. But Justice Black gave a twist to the language of the First Amendment and Jefferson's politically serving statement by concluding that the "wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18.

28. *Id.*

29. See *Reardon's 1952 Compilation Index*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, 49 (1952), available at <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPP-001-004.aspx>.

30. *Id.* at 50.

31. *Id.*

32. *Id.* In the next session of the Congress, Kennedy attempted to amend another bill before the Education and Labor Committee. The amendment would allow state legislatures to use federal money to fund school bus rides for children attending non-public schools; however, the Committee rejected the Kennedy amendment by a vote of 16-9 in March of 1950. *Id.* at 51. The Archdiocese of Boston's newspaper, *The Pilot*, congratulated Kennedy for his efforts in

For the remainder of his time in Congress, Kennedy was careful about how he was perceived in aiding his Church.<sup>33</sup> As an astute politician and aspiring statesman, he exercised care by considering the audience as he chose his words. Thus, in January of 1950, he delivered an address at the University of Notre Dame and took advantage of this opportunity to assuage concerns of those in and outside of the Church regarding religion and its role and presence in public life. In his speech, he acknowledged that each person has both a mind and a soul, an intellect and a will.<sup>34</sup> Because of this synthetic nature of the human person, Kennedy stated that:

[E]very Catholic must believe in the essential dignity of the human personality on which any democracy must rest. Believing this, Catholicism can never adhere to any political theory which holds that the state is a separate, distinct organization to which allegiance must be paid rather than a representative institution which derives its powers from the consent of the governed. . . . [A] Catholic's dual allegiance to the Kingdom of God on the one hand prohibits unquestioning obedience on the other to the state as an organic union.<sup>35</sup>

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an editorial of March 18, 1950, stating that he had on the education amendment represented his constituency courageously. *Id.* at 52.

33. In February of 1968, John Cogley, a journalist who had worked for the Kennedy presidential campaign, gave an oral interview to the Kennedy Library. The transcript of the interview contains Cogley's impression of Kennedy as "as good a Catholic as most" during the time. Cogley saw Kennedy as possessing a "pre-Vatican II notion of Catholicism"; however, Cogley saw in the President the potential to change. As Cogley responded, "I don't think that he would have remained an old-fashioned Catholic given the changes in the Church. But I think his was a very Boston kind of Catholicism. It's complicated. . . . I don't think he was a theologian by any means, but I think he was at least as religiously literate as most Catholic politicians." Interview by John F. Stewart with John Cogley, in Santa Barbara, Cal. (Feb. 20, 1968), available at <http://archive1.jfklibrary.org/JFKOH/Cogley,%20John/JFKOH-JOC-01/JFKOH-JOC-01-TR.pdf> [hereinafter Cogley Interview]. The President's sister, Eunice Kennedy Shriver, took pro-abortion groups to task who argued that President Kennedy would have supported their cause had he lived to an old age. Mrs. Shriver strongly disagreed. As she said, "President Kennedy believed and practiced the value that America should offer a free marketplace for all views, even those of Catholic bishops. He would have resented his words being distorted to confuse and obscure that value. His family resents it, too." Eunice Kennedy Shriver, Letter to the Editor, *J.F.K. Would Have Defended Bishops' Right to Fight Abortion*, N.Y. TIMES, May 13, 1990, at E18.

34. JAMES MACGREGOR BURNS, JOHN KENNEDY: A POLITICAL PROFILE 242 (1961).

35. *Id.* (internal quotations omitted).

Six years later when he unsuccessfully sought the Democratic Party nomination for Vice-President, he took a utilitarian approach to what he presented at Notre Dame by noting that he could not "act as a private individual does" as he had responsibilities to both his constituency and the Constitution.<sup>36</sup> Should there ever arise a conflict between these two elements of his nature that did not involve "a personal moral issue," he found himself "bound to act for the interests of the many."<sup>37</sup> Certainly Kennedy saw a future ahead of him beyond the United States Congress, and he knew that he had to be careful about how he discussed his Catholicism.

While the Congressional Record during these years of Kennedy's legislative service demonstrates his willingness to insert into the record the occasional statement by prominent Catholics on issues of public interest,<sup>38</sup> he stayed clear of further legislative efforts to provide any aid, direct or indirect, to Catholics who sent their children to parochial schools. Religious issues remained distant until 1960 when the opportunity to seek the presidency became a reality.<sup>39</sup> The watershed event that would bridge the separation was his address to the Houston Ministerial Association in September of 1960. It is my contention that this address and the question and answer session that followed were not only an attempt to put to rest the church-state and religion issues for candidate Kennedy; they also became the mechanism by which Kennedy began to consider the second issue pertinent to this Essay—the voice of the Church in the public square. However, before the trip to Houston, Senator Kennedy began to prepare for what could have been a hostile audience by considering what his Catholicism meant and did not mean to him as he edged closer to the highest office of the land.

## 2. J.F.K. as Presidential Candidate

Once he was nominated as the candidate of his party in July of 1960, the questions some people had about how his Catholicism would affect his judgment and action did not disappear.

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36. *Id.* at 243.

37. *Id.*

38. *See, e.g.*, 93 CONG. REC. 301, 302 (1947); 95 CONG. REC. 324 (1949); 96 CONG. REC. 313 (1950); 99 CONG. REC. 326 (1953); 100 CONG. REC. 290, 291 (1954); 103 CONG. REC. 430 (1957); 104 CONG. REC. 375 (1958). He was quite willing to introduce private bills for the relief of Catholic nuns in 1959. *See* 105 CONG. REC. 493 (1959).

39. *See, e.g.*, 106 CONG. REC. 375 (1960), where Kennedy introduced statements of prominent persons or articles and editorials about religious bigotry in the United States into the Congressional Record.

During his acceptance speech at the Democratic Party convention in Los Angeles, the Senator broached the topic of religion by acknowledging that his party had taken a "hazardous risk" by nominating a Catholic.<sup>40</sup> While confident that a sufficient number of Americans would not be troubled by his Catholicism, he asserted his intention to reciprocate in good faith with the pledge "to render a free, fair judgment" and to uphold the Constitution and the executive office by rejecting "any kind of religious pressure or obligation" that could interfere with the "national interest."<sup>41</sup> He prudently reminded his audience that this was the case when he served as an officer in the U.S. Navy; moreover, as a member of Congress he repeatedly demonstrated that his religion was "not relevant" to his public duties because of his observance of the "complete separation of church and state."<sup>42</sup> He emphasized that his decisions on "any public policy" would be his own "as an American, a Democrat and a free man."<sup>43</sup> He did not include religion or Catholicism in this litany. Of course, being the good politician who did not want to distance himself from people of faith, he injected scripture passages several times in his acceptance speech.<sup>44</sup>

As the presidential campaign got underway in the late summer and Jewish Americans were preparing to celebrate their high holy days, Kennedy noted that it was possible not only for the different religious groups of the country and the world to live together peacefully, but also to work together productively. As he said, the observance of faith can provide "tremendously significant moral insights that add dimension to my own understanding of man's relationship with God."<sup>45</sup> This was an important concession offered by Kennedy. As the cross-country campaigning intensified and the religious issue kept reappearing, Kennedy would tackle the question "Can a Catholic be President?" by rephrasing the issue as "Can an American who happens to be a

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40. John F. Kennedy, *Address of Senator John F. Kennedy Accepting the Democratic Party Nomination for the Presidency of the United States—Memorial Coliseum, Los Angeles*, AM. PRESIDENCY PROJECT (July 15, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=25966>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. John F. Kennedy, *Statement by Senator John F. Kennedy*, AM. PRESIDENCY PROJECT (Aug. 29, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=74277>.

Catholic be elected President?"<sup>46</sup> He wisely reminded his audience about the constitutional provision of Article VI that there be "no religious test for office." However, rather than relying simply on the First Amendment of the Constitution, he cast the second element of his response as the First Amendment's "separation of church and state."<sup>47</sup>

Upon recognition that the religion question would not disappear, the Democratic National Committee prepared a background memorandum to assist the Senator on the campaign stump.<sup>48</sup> The text began by emphasizing the "separation of church and state"<sup>49</sup> language, which is not contained in the language of the First Amendment but in Thomas Jefferson's 1802 letter to the Danbury Baptist Association and reiterated in the Supreme Court's 1947 *Everson* decision.<sup>50</sup> The highlights of the memorandum included the following points:

1. His rejection of any kind of religious pressure that might interfere with the office of the President or the national interest (an important fact offered to substantiate the claim was Kennedy's fourteen year record in Congress where he observed "complete separation of church and state").
2. He would not be responsive to ecclesiastical pressures or obligations; however, one should not "feel bigoted" about raising "legitimate questions of public policy" that are of concern to particular religious groups.
3. A flat opposition to an "ambassador to the Vatican."
4. It is unconstitutional to direct federal funds to support "parochial or private schools" as the interpretations of the First Amendment by the Supreme Court demonstrate; however, assistance to "fringe matters" such as buses, lunches, and "other services" are a "primarily social and economic and not religious" matter.
5. Regarding the promotion of "artificial birth prevention, abortion, or sterilization," it was not for the United States to use federal resources to impose these practices on "underdeveloped countries" as resources of the world are sufficient

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46. John F. Kennedy, *Speech of Senator John F. Kennedy*, CIVIC AUDITORIUM, PORTLAND, OR, AM. PRESIDENCY PROJECT (Sept. 7, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=25678>.

47. *Id.*

48. See *Background Memorandum Prepared by Democratic National Committee*, AM. PRESIDENCY PROJECT (Sept. 8, 1960) [hereinafter *Background Memorandum*], <http://www.presidency.ucsb.edu/ws/index.php?pid=25702>. Clearly this document was of assistance to the Senator as he prepared for his meeting with the Houston Ministerial Association four days later.

49. *Id.*

50. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

even though their management is not; regarding the United States, "the U.S. Government does not advocate birth control here in the United States;" it would "be the greatest psychological mistake for us to appear to advocate the limitation of the black or brown or yellow peoples."

6. Reliance on the 1948 Statement of the Catholic bishops of the United States denying a "union of Church and State" because Catholic teaching favors "a clear separation" (this is a questionable characterization of the position advanced by the United States Bishops as will be demonstrated).<sup>51</sup>

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51. *Background Memorandum, supra* note 48. See *The Christian in Action: A Statement Issued by the NCWC Administrative Board in the Name of the Bishops of the United States*, in 2 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 1941-1961, 82, 83-89 (1984). Here the bishops took a very different view from the one portrayed in the *Background Memorandum* as they stated that there is an "essential connection between religion and good citizenship" which "is deep in our American tradition." *Id.* at 85. They acknowledged that there is an essential nexus between religion and good citizenship in the United States that is evidenced by the "American tradition" that "religion and morality are the strong supports of national well-being." *Id.* They drew attention to the importance of religion and morality on the Framers' support of "national well-being" as was evidenced by early legislation when Congress reenacted the Northwest Ordinance. *Id.* The bishops also spoke at length about the growth of secularism in America and its "corrosive influence" that banned religion in tax-supported education and that was advancing the destruction of "all cooperation between government and organized religion in the training of our future citizens." *Id.* at 86. In short, the bishops saw the strong emergence of a "legalistic tyranny of the omnipotent state." *Id.* Yet they recognized the merits of the First Amendment as the antidote to secularism in the United States. In this acknowledgment, they understood that the religious pluralism of America did not prohibit the cooperation between religious communities and the state. The separation *and* the ability to cooperate were both consistent with "[a]uthoritative Catholic teaching on the relations between Church and state." *Id.* For the bishops, the clear import of the First Amendment meant that the prohibition of an established church or religion did not preclude the collaboration between God and Caesar. The phrase "a wall of separation between church and state" was but a "loose metaphor" that had to be understood in the American context. *Id.* at 86-87. Otherwise a false reading of the metaphor "would be an utter distortion of American history and law to make that practical policy involve the indifference to religion and the exclusion of cooperation between religion and government." *Id.* at 87. This indifference and exclusion were the shibboleths of "doctrinaire secularism." *Id.* The bishops also noted that recent Supreme Court decisions relying on the metaphor's unintended implications, including *McCullum*, were "entirely novel and ominously extensive" interpretations of the First Amendment. *Id.* They relied on the understanding of the phrase "separation of church and state" offered by Justice Stanley Reed that "a rule of law cannot be drawn from a metaphor." *Id.* at 88. The bishops also recalled the views of Thomas Jefferson and James Madison regarding the ability for religion and the state to collaborate in the state-sponsored University of Virginia. As individuals who played major roles in the founding of the United States, the thoughts and views of Madison and Jefferson

7. Emphasis that religion should never be an issue in the campaign of any American: "Is any one going to tell me that I lost this primary the day I was born and baptized 42 years ago? . . . If religion is a valid issue in the presidential campaign . . . I shouldn't have served in the House, I shouldn't now be serving in the Senate, and I shouldn't have been accepted by the U.S. Navy."<sup>52</sup>

The next stop on the campaign tour was Houston where Senator Kennedy spoke before the Greater Houston Ministerial Association on September 12, 1960. The prepared statement that the Senator delivered is well known; however, what is less well known is the content of the question and answer session that followed the formal address. The Reverend George Reck called the meeting of the Association to order, and stated that the purpose of the gathering was "to give knowledge and enlightenment to the spiritual leaders of our community."<sup>53</sup> The Vice-President of the Association, the Reverend Herbert Meza, indicated that no endorsement of either party's candidate was intended, but the program was "motivated by the religious issues in this campaign" because some insist "that nothing has changed within the Roman Catholic Church"; consequently, the purpose of the gathering was to place the religious issue in a "proper perspective and to determine where the candidate [Kennedy] stands in relationship to that perspective."<sup>54</sup>

Upon taking the podium, Senator Kennedy quickly asserted that "the real issues" of the campaign had been obscured by the fact that he was a Catholic.<sup>55</sup> Consequently, he launched into the famous defense that:

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reflected the legislative intent underpinning the First Amendment: it proscribes an established religion but does not preclude the role of religion in public life. The bishops concluded the 1948 Statement by presenting the case for the "reaffirmation of our original American tradition of free cooperation between government and religious bodies." *Id.* at 89. The bishops "solemnly" disclaimed any plan or aspiration "to alter this prudent and fair American policy of government in dealing with the delicate problems that have their source in the divided religious allegiance of our citizens." *Id.* The bishops pledged their cooperation "in fairness and charity" to all who were concerned about the "establishment of secularism" which, in their estimation, threatened "the religious foundations of our national life" and would prepare "the way for the advent of the omnipotent state." *Id.*

52. *Background Memorandum, supra* note 48 (citation omitted).

53. John F. Kennedy, *Speech of Senator John F. Kennedy, Greater Houston Ministerial Association, Rice Hotel, Houston, TX, AM. PRESIDENCY PROJECT* (Sept. 8, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=25773>.

54. *Id.*

55. *Id.*



I believe in an America where the separation of church and state is absolute—where no Catholic prelate would tell the President (should he be Catholic) how to act, and no Protestant minister would tell his parishioners for whom to vote—where no church or church school is granted any public funds or political preference—and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him. I believe in an America that is officially neither Catholic, Protestant nor Jewish—where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source—where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its official—and where religious liberty is so indivisible that an act against one church is treated as an act against all. . . . That is the kind of America in which I believe. And it represents the kind of Presidency in which I believe—a great office that must neither be humbled by making it the instrument of any one religious group nor tarnished by arbitrarily withholding its occupancy from the members of any one religious group. I believe in a President whose religious views are his own private affair, neither imposed by him upon the Nation or imposed by the Nation upon him as a condition to holding that office.<sup>56</sup>

The Senator highlighted the record of his fourteen years in Congress, his opposition to the appointment of a “Vatican Ambassador” (which would come in 1984), and his opposition to “*unconstitutional* aid to parochial schools.” As I have already pointed out, the Senator believed that some aid for “social services” was permissible if not to the parochial schools themselves then certainly to the students and the families of students who attended parochial schools and that such aid was “constitutional” in that it was consistent with decisions of the Supreme Court.<sup>57</sup> The Senator further explained that on any issue, even those dealing with birth control, divorce, censorship, gambling and other matters, he would make his decision in accordance with the views expressed and “in accordance with what [his] conscience tells

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56. *Id.*

57. After Kennedy was elected President, an essay was published in the *Notre Dame Lawyer* pointing out the “error” of this kind of judicial reasoning. See Paul M. Butler & Alfred L. Scanlan, *Wall of Separation—Judicial Gloss on the First Amendment*, 37 NOTRE DAME LAW. 288 (1962). Whether this essay had any impact on him is difficult to say.

[him] to be the national interest, and without regard to outside religious pressures or dictates."<sup>58</sup> He emphasized that he was "not the Catholic candidate for President" but he was "the Democratic Party's candidate for President who happens also to be a Catholic."<sup>59</sup>

While he insisted that he did not speak for the Catholic Church on public matters, and that the Church did not speak for him,<sup>60</sup> he made the following interesting remark, which now appears more mysterious than gratuitous:

If the time should ever come—and I do not concede any conflict to be even remotely possible—when my office would require me either to violate my conscience or violate the national interest, then I would resign the office; and I hope any conscientious public servant would do the same.<sup>61</sup>

He concluded his remarks about the "religious issue" by stating that he would not apologize for the views he expressed to critics of either the Protestant or Catholic faiths nor would he disavow his views or his Church "in order to win this election."<sup>62</sup>

After the conclusion of the formal address, Senator Kennedy entertained a number of questions from members of the audience. Unlike the address itself, the question and answer session is less well known but merits discussion here as some of the questions prompted answers from the Senator which shed light on his views about the role of religion in the public square. In his address, the Senator stated, as he did throughout the campaign, that he would not permit Catholic or other religious leaders to impose their views on him as a public official; however, one of the questions posed by the Reverend F. H. Westmoreland was in reality a request that Kennedy "appeal to Cardinal Cushing" to urge the Vatican to accept the Senator's view on the separation of church and state.<sup>63</sup> In his reply to the question/request, Kennedy reiterated that he would not take directions from any ecclesiastical official; however, in his mind, this was a reciprocal principle in that if he would not permit any ecclesiastical official to tell him what to do in the sphere of public responsibility as a

58. See Kennedy, *supra* note 53.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. John F. Kennedy, *Question and Answer Period Following Speech of Senator John F. Kennedy*, Ministerial Association of Greater Houston, Houston, TX, AM. PRESIDENCY PROJECT (Sept. 12, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=25774>.

public official, neither could he expect that ecclesiastical officials would take action on his demands to them for he, as a public official "do[es] not propose to interfere with their free right to do exactly what they want."<sup>64</sup>

Another important contribution of the question and answer session, which did not emerge during the address itself, was Kennedy's belief that his view of the role of Catholicism was "the view of American Catholics from one end of the country to the other."<sup>65</sup> When pushed again on whether "the Catholic hierarchy has the right and duty" to guide Catholics, Kennedy retorted by first asking the question, "In what area?" If the matter dealt with faith and morals, he "would think that any Baptist minister or Congregational minister has the right and duty to try and guide his flock. If you mean by that statement that the Pope or anyone else could bind me in the fulfillment . . . of my public duties, I say no."<sup>66</sup>

A few days before the Houston speech, Kennedy was in Los Angeles, and he spoke about the need for the President to be a "moral leader" who "must play his role in interpreting the great moral issues" of the day which would include "our crusade for human rights. [The President] must exert the great moral and educational force of his office to help bring equal access to public facilities from churches to lunch counters . . . ."<sup>67</sup> Kennedy was careful to make the connection between the "moral" and the "religious" concerns when he was on the campaign trail.

In viewing the record of the campaign, it is evident that the "church-state" issue (which I construe to be focused on the Establishment Clause of the First Amendment) was the primary constitutional religion issue that surfaced. The free-exercise issue was evident from time to time, but this usually manifested itself in the context of either religious freedom abroad or the ability of any American to pursue any dream without religious discrimination. The other major campaign address delivered by the Senator that focused on religion and religious freedom was delivered in Salt

64. *Id.*

65. *Id.* The Senator elaborated by stating that "why do you possibly doubt that I think that I represent a viewpoint which is hostile to the Catholic Church in the United States. I believe I am stating the viewpoint that Catholics in this country hold to the happy relationship which exists between church and state." *Id.* Perhaps this was akin to the perspective which Pope Benedict XVI stated in his 2006 address to lay jurists when he discussed the concept of "healthy secularism." See *infra* note 182 and accompanying text.

66. See Kennedy, *supra* note 63.

67. John F. Kennedy, *Speech of Senator John F. Kennedy, Shrine Auditorium, Los Angeles, CA*, AM. PRESIDENCY PROJECT (Sept. 9, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=25729>.

Lake City at the Mormon Tabernacle several days after Houston.<sup>68</sup> The Salt Lake City speech was given by a candidate who was seeking votes from another religious minority in the United States. Consequently, Senator Kennedy began the address by expressing his gratitude to the Mormons for their fine examples on many fronts; moreover, he stated his indebtedness to “their successful battle to make religious liberty a living reality.”<sup>69</sup> He opined that, unlike other countries where “religious feuds and holy wars” had torn nations apart, the United States had been spared this tragedy. Kennedy mentioned that religious freedom did not exist in totalitarian states but did in the United States. He took the occasion to distinguish the United States and its form of church-state separation as the place where “freedom under God” rather than “ruthless, godless tyranny” was the reality.<sup>70</sup> His principal targets of religious persecution were those regions dominated by Communist governments; thus, he asserted that, “[h]ere in our land church and state are separate and free—in their lands neither is free, and the church lives in constant fear of the state.”<sup>71</sup> In this address, Kennedy may well have had sincere thoughts about the possibility that religious freedom might be taken for granted in the United States because he indicated that while Americans boast to “foreign visitors” about the country’s material accomplishments, they did not take pride in “our free religious heritage.”<sup>72</sup> As he said, “we have become missionaries abroad of a wide range of doctrines—free enterprise, anticommunism, and pro-Americanism—but rarely the doctrine of religious liberty.”<sup>73</sup> He concluded this major address by contending that the question of religious freedom was neither a partisan nor a legislative issue; rather, it called “for leadership dedicated to our Nation’s spiritual ideals—leadership inspiring in its sense of moral values,”<sup>74</sup> and he asserted with clarity that this was an issue for which the President is responsible by inspiring his fellow citizens of the world.

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68. John F. Kennedy, *Speech of Senator John F. Kennedy, Salt Lake City, Utah, Mormon Tabernacle*, AM. PRESIDENCY PROJECT (Sept. 23, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=74176>.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

### 3. J.F.K. as President

As often happens, what candidates seeking office say and what office holders do once elected can differ.<sup>75</sup> John Kennedy was no exception to this principle. The question of federal aid to parochial schools did not disappear; consequently, President Kennedy did not depart from his formulaic response that he was opposed to any assistance that was “unconstitutional.”<sup>76</sup> When the matter of the United States and the Holy See exchanging ambassadors was raised, the President held firm that the “present methods of communication” were adequate and that the United States embassy in Rome would be able to handle the communica-

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75. It was John Cogley’s view that Kennedy’s Catholicism was more of an electoral issue than a substantive one. As Cogley suggested, “there was nobody at all who suggested that if he ever got elected that Kennedy was ever going to have a problem . . . with Rome.” The campaign staff felt “that the problem was strictly a rhetorical problem and it was strictly a campaign problem; and that once elected, it would finish.” See Cogley Interview, *supra* note 33, at 54–55.

76. For example, at his March 15, 1961 News Conference, the President was asked about the “constitutional issues” involved with federal assistance to “parochial and private schools below the college level,” and he indicated that “loans take many different forms.” John F. Kennedy, *The President’s News Conference*, AM. PRESIDENCY PROJECT (Mar. 15, 1961), <http://www.presidency.ucsb.edu/ws/index.php?pid=8537>. The President was a pragmatic man, and his judgment on this issue would be guided by who was directly receiving the funds and what the federal courts, including the Supreme Court, were saying on the matter. When the question of “tax exemptions” for parents whose children attend private schools, including parochial ones, arose the President again demonstrated his pragmatism by answering that this type of proposal would have to be “examined carefully by the Congress.” *Id.* John Cogley indicated that the President “would bend over backwards—as, for instance, on aid to parochial schools—against the material interests of the Church.” See Cogley Interview, *supra* note 33, at 41. In April of 1962, the President received a letter from a Catholic attorney, Alfred L. Scanlan, who had co-authored an important article in the *Notre Dame Lawyer* (now the *Notre Dame Law Review*) with the late Paul M. Butler. The essay dealt with the subject of federal aid to religious schools and was largely an objective assessment of the issue. However, at the conclusion of the essay, the authors made their pitch for some federal aid to private and religious schools. As they said,

we believe, the achievement of federal assistance to sectarian schools, including its ultimate validation in the Courts, will be realized only because the case for it is sound and because it has been carefully and effectively presented, without rancor or recrimination even toward that vocal minority which opposes aid for parochial schools because it opposes the ancient faith which maintains such schools.

See Butler & Scanlan, *supra* note 57, at 308. It was the aspiration of the authors to overcome the domination of secularism in the United States, *id.* at 307, but the President did not live long enough to see if their reasoned argument would bear any fruit with him.

tion.<sup>77</sup> In short, he would stand firm in his opposition to a diplomatic exchange with the Holy See—no Vatican ambassador!

But on other matters, the President demonstrated less hostility to various kinds of relationships between the state and churches, including the one to which he belonged. To what this is or could be attributable is unclear. The change may have been due to the security that comes from being the office-holder versus the candidate for the office: the former can say things which the latter cannot without jeopardizing an election's outcome. It may have also been a function of the different perspective Kennedy obtained from viewing the world from the Oval Office. In any case, the still-politician-but-now-President had the advantage of having the ultimate office from which he could expand or modify his position on the role of religion in public life. In this context, I return to a point he made on the campaign trail about the moral leadership position of the presidency.<sup>78</sup>

In November of 1961, he reiterated that the "great issue today" involved "the supremacy of the moral law which is initiated, originated, and developed in the Bible, and which has special application here today."<sup>79</sup> These words were expressed in the context of Kennedy's acknowledgement of the limits of the state created by "the supremacy of the moral law" and the rights of citizens which "did not come from the state but rather came from the hand of God."<sup>80</sup> Clearly this was the type of assertion he dutifully avoided making prior to the election.

These public remarks were nevertheless reiterated and intensified a few days later when the President spoke to a gathering of Christians and Jews. Once again the President emphasized the religiously-based "moral direction" that religion provides the nation.<sup>81</sup> In noting his appreciation of this organization's recognition of the important "relationships between the state and religion," the President asserted that the Founding Fathers rec-

77. John F. Kennedy, *The President's News Conference*, AM. PRESIDENCY PROJECT (July 17, 1963), <http://www.presidency.ucsb.edu/ws/index.php?pid=9348>. During this conference, one reporter asked whether recent communications between the Vatican and Iron Curtain countries would be the catalyst for "setting up some regular channel of communication between the United States and the Vatican." *Id.*

78. See *supra* notes 40–47 and accompanying text.

79. John F. Kennedy, *Remarks to the Trustees of the Union of American Hebrew Congregations*, AM. PRESIDENCY PROJECT (Nov. 13, 1961), <http://www.presidency.ucsb.edu/ws/index.php?pid=8437&st=&st1=>

80. *Id.*

81. John F. Kennedy, *Remarks to the Officers of the National Conference of Christians and Jews*, AM. PRESIDENCY PROJECT (Nov. 21, 1961), <http://www.presidency.ucsb.edu/ws/index.php?pid=8454&st=&st1=>

ognized the contributions of religion to public life and there was no reason to prohibit the generation of the 1960s from doing the same. He said, "speaking as President, and personally, we want to emphasize how much your work is appreciated, how valuable it is, and what a service you're rendering."<sup>82</sup>

The President did not hesitate to make similar points when the right occasion before the proper audience arose. For example, at the Tenth Annual Prayer Breakfast in 1962, the President renewed discussion about the "common commitment to the moral order" and "the relationship of the individual to the state."<sup>83</sup> In the global arena, the President was wary of making faith and religion "an instrument of the [C]old [W]ar," but religion was something which separated the free from the tyrannical society. Moreover, it is faith which assists the person to assess "his importance, his sanctity, his relationship to his fellow men, his relationship to his country and his state."<sup>84</sup> Several months later, the President wrote to Pope John XXIII at the beginning of the Second Vatican Council, just days before the Cuban Missile Crisis became public. In his message to the Pope, Kennedy expressed his aspiration that the Council would be able "to present in clear and persuasive language effective solutions to the many problems confronting all of us and, more specifically, that its decisions will significantly advance the cause of international peace and understanding."<sup>85</sup>

In April of 1963, President Kennedy returned to his native Massachusetts and delivered an address at the Centennial Anniversary celebration of Boston College.<sup>86</sup> In many ways, the speech was a typical Kennedy address that was designed for the local audience, congratulating it on the many successes of Boston College, and expressing strong hope for its future. But one thing was different about this speech: the attitude of the President in speaking about a recent papal encyclical. His remarks were about Pope John XXIII's April 11, 1963 letter *Pacem in Terris, Peace on Earth*. Kennedy termed it a "remarkable" document that offered a "penetrating analysis of today's great problems, of

82. *Id.*

83. John F. Kennedy, *Remarks at the 10th Annual Presidential Prayer Breakfast*, AM. PRESIDENCY PROJECT (Mar. 1, 1962), <http://www.presidency.ucsb.edu/ws/index.php?pid=9080&st=&st1=>

84. *Id.*

85. John F. Kennedy, *Message to Pope John XXIII on the Occasion of the Opening of the Second Vatican Council*, AM. PRESIDENCY PROJECT (Oct. 5, 1962), <http://www.presidency.ucsb.edu/ws/index.php?pid=8926&st=&st1=>

86. John F. Kennedy, *Address at the Boston College Centennial Ceremonies*, AM. PRESIDENCY PROJECT (Apr. 20, 1963), <http://www.presidency.ucsb.edu/ws/index.php?pid=9156&st=&st1=>

social welfare and human rights, of disarmament and international order and peace . . . .”<sup>87</sup> What made the address all the more interesting was the President’s assessment of the Pope’s letter as a member of the Pope’s flock and as an elected public official. Not only did the President state that the Pope’s words offered “counsel on public affairs that is of value to all men and women of good will,” but, furthermore, “[a]s a Catholic I am proud of it; and as an American I have learned from it.”<sup>88</sup> When the Pope died a few weeks later, the tribute paid by Kennedy to the Pontiff was reiterated in these words:

The ennobling precepts of his encyclicals and his actions drew on the accumulated wisdom of an ancient faith for guidance in the most complex and troublesome problems of the modern age. . . . His wisdom, compassion, and kindly strength have bequeathed humanity a new legacy of purpose and courage for the future.<sup>89</sup>

Where Kennedy’s appreciative recognition of these religious contributions may have gone in the future was arrested by an assassin’s bullet a few months later. Now I turn to another Catholic politician, Governor Mario Cuomo, who had aspirations of being another Catholic elected to the Presidency of the United States.

### C. *Another Catholic Politician: Mario Cuomo (1932-)*

I come to the important address given by New York Governor Mario Cuomo at the University of Notre Dame on September 13, 1984.<sup>90</sup> His address drew much attention then, and still does today, principally for his statement that as a practicing Catholic he could not “support positions which would impose on other people restrictions they find unacceptable” because the positions are based on religious belief.<sup>91</sup> But there is an important nuance residing within the Governor’s address as it dealt not so much with church-state issues but rather with the role of the

87. *Id.*

88. *Id.*

89. John F. Kennedy, *Statement by the President on the Death of Pope John XXIII*, AM. PRESIDENCY PROJECT (June 3, 1963), <http://www.presidency.ucsb.edu/ws/index.php?pid=9245&st=&st1=>. Until his own death, the President would reiterate these sentiments. See, e.g., John F. Kennedy, *Remarks at the Opening Session of the World Food Congress*, AM. PRESIDENCY PROJECT (June 4, 1963), <http://www.presidency.ucsb.edu/ws/index.php?pid=9249&st=&st1=>.

90. The Governor’s edited address was published in the first volume of this journal. See Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor’s Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 13 (1984).

91. *Id.* at 18.



religious perspective in political life—or, as he said, “what is the relationship of my Catholicism to my politics?”<sup>92</sup> At the outset, he was not suggesting that the Church’s hierarchy would tell the faithful for whom they should vote; rather, he argued that the bishops have a proper teaching role on specific issues that “should not be perceived ‘as an expression of political partisanship.’”<sup>93</sup> His endorsement of this perspective was intensified by the statement that the bishops “must [teach], more and more vigorously and more and more extensively.”<sup>94</sup> He further noted, as a lawyer and as a public official, that the First Amendment, while forbidding an established state church, affirms any American’s legal right to rely upon religious belief to formulate the country’s “universal public morality.”<sup>95</sup> This is where more nuance surfaced as the Governor argued that the state should not fund contraception with public funds, not because of Catholic teaching, but because he—as informed by the reason justifying Catholic teaching—thinks that this is a good policy to pursue because of the benefits conferred to public morality and the common good.<sup>96</sup>

However, the Governor expressed doubt as to whether he should assert his right of speech that is religiously informed. As he formulated the concern: should a Catholic governor translate his religiously based values into public law?<sup>97</sup> This is where the Governor began to compromise on what he had asserted earlier by now arguing that matters of public morality must depend on public consensus as to what is right and wrong rather than on an objective determination of rightness and wrongness.<sup>98</sup> In essence, he did not think that religiously informed values should influence public policy and public morality “unless they are shared by the pluralistic community at large, by consensus.”<sup>99</sup> He followed this up with the interesting statement that religious values become contentious when they are used to “impose” policies on others, which they find unacceptable.<sup>100</sup> What he did not consider was that there is often the proposition and imposition of values, determined by political interests, which some, perhaps

92. *Id.* at 13–14.

93. *Id.* at 14 (quoting Statement of Most Reverend James Malone, President, National Conference of Catholic Bishops (Aug. 9, 1984), *reprinted in* 14 ORIGINS 162 (1984)).

94. *Id.* (alteration in original).

95. *Id.* at 16.

96. *Id.* at 17.

97. *Id.*

98. *Id.* at 18.

99. *Id.*

100. *Id.*

many, citizens find unacceptable. Nonetheless, the Governor concluded that the pluralistic community must ultimately decide if the religious proposition/imposition is better left out of public policy-making.<sup>101</sup>

The Governor did acknowledge that Catholics, and presumably members of any other faith community, ought not to be compelled to form their moral opinions as a result of disagreement from other members of the political society. As he asserted, Catholics “should not change what we . . . believe in order to ease our consciences or please our friends or protect the Church from criticism.”<sup>102</sup> These are comforting words given the present day pressures on Catholics and other people of faith to conform to the Health and Human Services regulations pertaining to the Patient Protection and Affordable Health Care Act. But the Governor appeared to be too eager to concede his ground for prudential reasons and judgment.

He then began a brief historical excursion of circumstances where American bishops were “realists” who made “practical political judgment[s]” on difficult issues probably because the Catholic community was then “a small minority” and the goal was not to call burdensome attention to the Catholics who then lived in the United States.<sup>103</sup> Cuomo contended that the American hierarchy was attempting to “balance moral truths against political realities.”<sup>104</sup> While prudential judgment has been a part of Catholic teaching for a long time,<sup>105</sup> the Governor failed to consider that a “long and divisive struggle”<sup>106</sup> has been a part of the American political landscape when major issues dealing with moral concerns (such as war, slavery, etc.) were at stake. Moreover, when one takes account of the political climate in the present age, it is clear that issues generating division and struggle within the society have not disappeared; moreover, from current indications, it is doubtful that they will ever disappear.

At the time of his address in 1984, abortion was the issue causing a “long and divisive struggle.” That issue has not disappeared; moreover, it has been joined by other pressing matters such as publicly-funded contraception, same-sex marriage, and physician-assisted suicide. In 1984, the Governor asserted that the abortion question was “not a failure of government” but of Americans, including Catholics “because we ourselves cannot

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101. *Id.* at 19.

102. *Id.* at 22.

103. *Id.* at 23.

104. *Id.*

105. See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1805–06 (2d ed. 2000).

106. Cuomo, *supra* note 90, at 26.

stop committing the sin.”<sup>107</sup> Lest Cuomo’s message be lost: “The failure here is not Caesar’s. The failure is our failure, the failure of the entire people of God.”<sup>108</sup> But is this really the case? Is this really true? To agree with these propositions made by the Governor is to ignore that the debates on the difficult issues of the day—be they abortion, same-sex marriage, or something else—demonstrate a deep divide in American society that pit objective reason against political will. Thus, it is improbable that all American Catholics are to blame for these “failures”; furthermore, when one considers the outspokenness of the American hierarchy on these issues, it is difficult to see that they, too, are part of the problem rather than part of the solution. Indeed, the recent remarks of high profile Catholic academics<sup>109</sup> regarding bishops overstepping their bounds when making statements about crucial moral issues indicate that the bishops are not complicit in this “failure” even though Governor Cuomo implicated them, too, when he raised the question, “[h]ow do we teach?” so as to avoid the failures.<sup>110</sup> In making his 1984 statement, the Governor indicated that he relied on the concerns expressed by one American bishop who said, “[w]e’re asking politicians to do what we have not done effectively ourselves.”<sup>111</sup> If the antecedent to “what” is to teach correctly, authoritatively, and clearly, things have dramatically changed since 1984, but the problem remains. Why?

Governor Cuomo contended that in 1984 Catholics of all stripes were unable to teach fellow Catholics about problems and their remedies; thus, that is why, without setting the proper example, society will never be able to amend the civil laws to protect that which needs to be protected.<sup>112</sup> The problems with the Governor’s contention take on further significance when one realizes that laws are being made today on all these fronts—abortion, same-sex marriage, embryonic stem cell research, etc.—in spite of solid, clear, moral teaching; laws are changing in such a way as to intensify rather than minimize the problems. The Governor concluded his milestone address by arguing that change for the better will come through persuasion rather than coercion,<sup>113</sup> but as it turns out, in spite of the persuasion, there is coercion, not from the teachers of the faith but from the govern-

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107. *Id.*

108. *Id.*

109. *See supra* note 3.

110. Cuomo, *supra* note 90, at 26 (internal quotation marks omitted).

111. *Id.* (quoting Bishop Joseph Sullivan).

112. *Id.* at 27.

113. *Id.* at 31.

ment of the state that is supposed to be servant rather than tyrant. Contrary to the Governor's 1984 assertions, the problem is not "us"; it resides elsewhere—particularly when the state is influenced by powerful but dark ideas that may appear superficially attractive but contain objectives that are adverse to the common good.

### III. ARE ANY OF THESE VIEWS SUSTAINABLE UNDER A COHERENT THEORY OF CATHOLIC AND CONSTITUTIONAL THOUGHT?

With the positions of each of these three individuals in mind, the question for brief consideration becomes this: do any of them offer a coherent theory that explains the proper role of the religious voice in public life? In particular, do these three Catholics provide an explanation of what this role might be that is consistent with the constitutional framework to which each was responding? Let me now provide some considerations regarding this matter.

#### A. Murray: "We Hold These Truths"

At the outset, I suggest that Murray comes the closest to providing a proper explanation from the perspective of Catholic teaching and constitutional doctrine. Unlike President Kennedy and Governor Cuomo, Father Murray was not a contender for public office and therefore not constrained by those factors which strongly influenced the words and possible deeds of his co-religionists Kennedy and Cuomo. Murray was a keen student of the proper role of the religious voice in the public square, and his contribution to the *Declaration on Religious Freedom, Dignitatis Humanae Personae*, issued by the Second Vatican Council, demonstrates that his natural law approach to civil law and the civil state largely corresponded to the views of the Framers of our constitutional republic and what he termed "the American proposition."

Unlike Cuomo and Kennedy, Murray did not recognize a distinctively Catholic voice within this proposition. He explained his position in the footnotes he supplied to a publication of the *Declaration on Religious Freedom*.<sup>114</sup> Murray founded his argument on two principles: (1) the innate dignity of the human person and (2) "the consequent necessity of constitutional limits to the powers of the government."<sup>115</sup> These principles accord with Jefferson's notion of self-evident truths and the purpose of the government to serve its people rather than to be served by them

114. See THE DOCUMENTS OF VATICAN II 675 (Walter M. Abbot, S.J. ed., Joseph Gallagher trans., 1966).

115. *Id.* at 676 n.2.

insofar as the state is established to secure the rights of the citizens.<sup>116</sup> As mentioned earlier,<sup>117</sup> Murray asked a fundamental question about whether religion had any role in relation to the state. Knowing the significance of the question, he supplied the answer:

The question is sometimes raised, whether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism. . . . An affirmative answer to it . . . is one of the truths I hold.<sup>118</sup>

Murray relied on natural law reasoning that was familiar to Jefferson, Madison, and Adams.<sup>119</sup> Murray's understanding of the *res publica* took account of three elements: (1) public affairs as the matters which are for the advantage of the public, (2) the affairs of the commonwealth which include the quality of the common life and (3) the constitutional consensus by which the identity of the members of the society and the sense of joint purpose are established.<sup>120</sup> For the American proposition as a particular *res publica* to work, it was essential that there be a "reasonable conversation about reasonable laws" that would necessarily include the religious perspective.<sup>121</sup> As Murray explained, the natural law, which has been a part of Catholic social thought, enables the citizen to exercise the duties associated with public life by acknowledging three important matters: (1) the human person is intelligent; (2) reality is intelligible and therefore comprehensible by human intelligence; and (3) reality that is comprehended by this intelligence necessitates an obligation (i.e., human laws) to be made, followed, and obeyed.<sup>122</sup> For

116. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

117. See MURRAY, *supra* note 11, at ix-x.

118. *Id.*

119. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 353-54 (1827) (Marshall, C.J., dissenting) ("When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract.")

120. MURRAY, *supra* note 11, at 9.

121. *Id.* at 13.

122. *Id.* at 109; see also John Courtney Murray, S.J., Sermon at St. Matthew's Cathedral in Washington, D.C. (Feb. 15, 1953), available at <http://woodstock.georgetown.edu/library/Murray/1953f.htm>. The role of human intelligence in the natural law was of crucial importance to Murray. As he said at the Red Mass homily in Washington, D.C. in February of 1953,

Murray, it was an “outmoded notion” that the practice of faith is a purely private matter; “[r]eligion is relevant to the life and action of society” as he stated because it often relied on the same mechanisms of natural law theory which contributed to the founding of the American republic.<sup>123</sup> The reasonableness of Murray’s contention gains strength as one considers the fact that faith is a part of a person; moreover, a person cannot be expected to compartmentalize his or her faith from the rest of one’s existence, particularly one’s public life. A person’s public life includes the exercise of rights and attending responsibilities inextricably tied to these rights, which include not only freedom of worship, but also freedom of practice that contributes to matters addressing public morality.

The exercises of rights and duties are a part of common life and seeking the common good which benefits each member of society and the society as a whole—or as the Preamble of the United States Constitution identifies it: the general welfare.<sup>124</sup> As Murray said in his commentary on the *Declaration of Religious Freedom*, there must be a harmony between the citizen’s responsibility to the truth that may be established on religious faith and his right to exercise this responsibility within his proper role in society.<sup>125</sup> Moreover for Murray, there was a reasonable need for the religious perspective to assist in the guidance of the commonwealth by “public testimony” of the members of the faith community.<sup>126</sup> He acknowledged that just as the citizen has duties that correspond to each person’s rights, so does the state have inalienable duties for seeking and preserving the common good that can be protected by authentic religious freedom.

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For the issue is prominently intellectual. The slow attrition of the religious and cultural foundations of our political life and our legal system has been wrought by forces that are intellectual. If they are to be successfully countered, they must be encountered on their own ground. This means a work of intelligence. It means therefore a prior confidence in intelligence as a faculty in man able to go beyond the empirical, able to accomplish a work of philosophical reflection upon experience, able to articulate the length and breadth of human experience into ideas, able then to give these ideas a strength of organic structure that will make them resistant to all corrosive forces, able finally to clothe these ideas in the language of passionate intuition that will burn them into the soul of our own people and the people of the world.

*Id.*

123. THE DOCUMENTS OF VATICAN II, *supra* note 114, at 683 n.11.

124. See U.S. CONST. pmbi.

125. THE DOCUMENTS OF VATICAN II, *supra* note 114, at 676 n.3.

126. *Id.* at 682 n.9.

Murray elaborated upon this in his detailing of the state's duty to the common good and the role of citizens in its preservation. His explanation included the following. First of all, the state has recognized and must continue to recognize that religious freedom is a human right that inheres in the person and is therefore not conferred by the state; nevertheless, the state has the affirmative duty to acknowledge and protect this right.<sup>127</sup> Second, since the state has a general obligation to assist its citizens in the perfection of their public responsibilities, it must not obstruct but rather ought to facilitate citizens' rights and responsibilities that emerge from religious beliefs and practices.<sup>128</sup>

What makes Murray's perspective all the more relevant today to the American proposition is that it is a counterpoint to what I referred to earlier as democratic totalitarianism.<sup>129</sup> This was recognized by the Christian historian of the mid-twentieth century, Christopher Dawson, who noted that the great western democracies, including the United States, would begin their drift to secularism and totalitarianism when they began to exclude Christianity from the public square.<sup>130</sup> In my opinion, Dawson's sentiment is an accurate assessment of the status of the American proposition today when state pressure is exerted to make religion a private matter that has no role in public life. Murray understood the possibility of this happening, yet he was a man of hope who accepted that there is a universal moral law that has faithfully served as the foundation of the good society, and the state/government was subject to this law. So, as long as this good law

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127. *Id.* at 684 n.14.

128. *Id.* Here Murray notes that the state, having limited power, cannot dictate what is true and what is not about religious practice, including participation in the public square. It has a limited competence, "confined to affairs of the temporal and terrestrial order. . . . [G]overnment is likewise forbidden to adopt toward religion an attitude of indifference or skepticism, much less hostility." *Id.*

129. *See supra* notes 21–22 and accompanying text.

130. *See* CHRISTIANITY AND EUROPEAN CULTURE: SELECTIONS FROM THE WORK OF CHRISTOPHER DAWSON 81–82 (Gerald J. Russello ed., 1998) ("The totalitarian state—and perhaps the modern state in general—is not satisfied with passive obedience; it demands full co-operation from the cradle to the grave. Consequently the challenge of secularism must be met on the cultural level, if it is to be met at all; and if Christians cannot assert their right to exist in the sphere of higher education, they will eventually be pushed not only out of modern culture but out of physical existence. That is already the issue in Communist countries, and it will also become the issue in England and America if we do not use our opportunities while we still have them. We are still living internally on the capital of the past and externally on the existence of a vague atmosphere of religious tolerance which has already lost its justification in contemporary secular ideology.").

was made and followed, democracy would avoid the consequence of morphing into a tyranny.<sup>131</sup> He knew that the moral order, which is reflected in the practice of Christian faith, is a pillar of the public order essential to democracy. His justification for this proposition was established upon the need for justice, the need for peace, and the necessity of fundamental moral norms for the preservation of society.<sup>132</sup> Murray recognized that the authentic Catholic community must adhere to universal moral law; therefore, this law is well suited to contribute to the success of the American proposition.<sup>133</sup> By welcoming the moral natural law as proposed by Catholics, the state can promote the American proposition, but by blocking it, the state contributes to its demise.

### B. *Kennedy: From Houston to Chestnut Hill*

It can be said that John Kennedy had an evolving view about the relationship between the church, its members, and the state. So what can be said about the evolution of his understanding of the role of the religious perspective in the public square? One matter is clear: his view changed over the years. While he still had a strong conception about the division between the church and the state, where the division was to be situated had changed.

Kennedy knew that his party had taken a "hazardous risk" by nominating a Catholic to seek the presidency in 1960.<sup>134</sup> It is the opinion of one scholar that Kennedy thought that he could win the White House by secularizing the office of the presidency, that is, by privatizing religion in a country that had become much more pluralistic and no longer essentially Protestant.<sup>135</sup> But when matters of religion really mattered and when the rhetorical flourishes of campaign speeches and press conferences were immaterial, where did he stand on questions dealing with the relationship between religion and government?

In answering this question, one has to reconsider how Kennedy framed the issue: he tackled the question "Can a Catholic be President?" by rephrasing the issue in the following manner—"Can an American who happens to be a Catholic be elected President?"<sup>136</sup> When it was prudent to do so, he reminded his audience about Article VI of the Constitution that there must be "no

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131. MURRAY, *supra* note 11, at 42.

132. THE DOCUMENTS OF VATICAN II, *supra* note 114, at 686 n.20.

133. MURRAY, *supra* note 11, at 43.

134. Kennedy, *supra* note 40.

135. See Mark S. Massa, S.J., *A Catholic for President?: John F. Kennedy and the "Secular" Theology of the Houston Speech, 1960*, 39 J. CHURCH & ST. 297, 317 (1997).

136. Kennedy, *supra* note 46.



religious test" for holding "any office or public trust." Essentially, he used the Constitution to his advantage to remind both skeptic and opponent that not voting for him because of his religion was unconstitutional. In this regard, Kennedy had to appreciate the fact that there were animosities against religion, or at least some expressions of it, during the time of the founding of the Republic; yet, the Framers saw the need to ensure that no one should gain or be denied office solely because of one's religious affiliation. Moreover, he had to understand the fact that since 1789 the nation did not always have the animus towards the presence of religion in public life that surfaced more vigorously in the mid-twentieth century. The speeches and actions of Abraham Lincoln during the Civil War (the Emancipation Proclamation, the Gettysburg Address, his second Inaugural Speech, and their central references to God and religious belief), the opinion of Justice Brewer in *Church of the Holy Trinity v. United States* ("this is a Christian nation"<sup>137</sup>), and the opinion of Justice Douglas in *Zorach v. Clauson* ("we are a religious people"<sup>138</sup>) had to mean something due to the deliberations and conclusions of the Framers' work in Philadelphia.

While trying to distance himself from his Catholicism in order to appease Protestants, as represented by the members of the Greater Houston Ministerial Association, Senator Kennedy had to acknowledge that there were certain truths to the nation's history about a healthy relationship between religion and the government that he could not deny. Thus, his opening affirmation of an "absolute" separation of church and state had to be qualified and modified. Most people of faith would join the Senator in affirming that the country was "officially neither Catholic, Protestant nor Jewish."<sup>139</sup> However, during the Houston speech, he offered an unqualified endorsement of religious freedom that "is so indivisible that an act against one church is treated as an act against all."<sup>140</sup> While he asserted that the President's religious views "are his own private affair,"<sup>141</sup> he did not deny the possibility and probability that his views as an office holder could coincide or be informed by the reasoned justifications of religion and people of faith. If he were to have believed otherwise, he could not have supported the efforts of Christian citizens, such as Reverend Martin Luther King, Jr., for the advancement of civil

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137. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

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

139. Kennedy, *supra* note 53.

140. *Id.*

141. *Id.*

rights.<sup>142</sup> Kennedy may have acknowledged that religion might even triumph over certain but unspecified public duties and that he would not apologize to critics of either the Protestant or Catholic faiths, nor would he either disavow his views or his Church “in order to win this election.”<sup>143</sup> Moreover, he would not presume to tell members of the Catholic hierarchy what they should and should not do regarding any matter including issues dealing with religion in the public square. This is a likely reason why he told the Reverend F. H. Westmoreland, who requested that Kennedy “appeal to Cardinal Cushing” to urge the Vatican to accept the Senator’s view on the separation of church and state, that he, Kennedy, would do no such thing, for religious freedom is a two-way street.<sup>144</sup> Kennedy reiterated that if he would not take directions from any ecclesiastical official regarding the execution of his public duties, neither would he demand that ecclesiastical officials take action on his proposals, for as a public official he “could not interfere with their free right to do exactly what they want.”<sup>145</sup> This did not mean that Kennedy stated unequivocally that he could never talk about public policy issues with religious groups, nor would they be forbidden by the Constitution to talk with him about matters of mutual concern and interest, particularly when issues having moral implications were at stake.

This is why his address in Salt Lake City offers germane insight.<sup>146</sup> This speech was given by a candidate who was seeking votes from another religious minority in the United States. Given the history of the Church of Jesus Christ of Latter Day Saints, Kennedy emphasized his indebtedness to “their successful battle to make religious liberty a living reality.”<sup>147</sup> But what exactly did this mean? Kennedy mentioned that religious freedom did not exist in totalitarian states but did in the United States. What was the significance of this? He acknowledged that the United States was and is a place where “freedom under God” rather than “ruthless, godless tyranny” is the reality.<sup>148</sup> As discussed previously, the question of religious freedom was neither a partisan nor a legislative issue; rather, Kennedy asserted it was an issue for which the President is responsible for inspiring his

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142. See John F. Kennedy, *The President's News Conference*, AM. PRESIDENCY PROJECT (Sept. 13, 1962), <http://www.presidency.ucsb.edu/ws/index.php?pid=8867>.

143. Kennedy, *supra* note 53.

144. *Id.*

145. *Id.*

146. Kennedy, *supra* note 68.

147. *Id.*

148. *Id.*

fellow citizens. This is where the issue of moral leadership on vital issues comes into play and how the religious perspective can assist in the formation of morality as it intersects the critical civic questions of the day.

Kennedy acknowledged in November of 1961 that the great issues of the day did involve “the supremacy of the moral law which is initiated, originated, and developed in the Bible, and which has special application today.”<sup>149</sup> He further realized that in a nation claiming to be free and democratic, the state had to be regulated by “the supremacy of the moral law” where the rights of citizens “did not come from the state but rather came from the hand of God.”<sup>150</sup> Like John Courtney Murray, Kennedy realized that the Founding Fathers valued the contributions of religion to public life when he told his fellow citizens representing different religious groups that he had to “emphasize how much your work is appreciated, how valuable it is, and what a service you are rendering.”<sup>151</sup>

It may have been the events surrounding the Cuban Missile Crisis in the fall of 1962 that carried over into 1963 that opened the eyes of the President even more to the moral voice religion can provide to the *res publica*. The Second Vatican Council, which would deal with concerns of faith and the pressing issues of the day, had just convened for the first time as the Cuban Missile Crisis was emerging. Pope John XXIII, attentive to what was going on in the world, spoke about “the savage threat of war” in his opening address of the Council.<sup>152</sup> In his good-will message to the Pope, delivered at the commencement of the Council, Kennedy expressed his aspiration that the Council would be able “to present in clear and persuasive language effective solutions to the many problems confronting all of us and, more specifically, that its decisions will significantly advance the cause of international peace and understanding.”<sup>153</sup> These were not the words of the committed advocate of the “absolute separation of church and state” but something else.

As 1962 became 1963, the conclusion of the earthly lives of Pope John and President John were not far away. But the contri-

149. John F. Kennedy, *Remarks to the Trustees of the Union of American Hebrew Congregations*, AM. PRESIDENCY PROJECT (Nov. 13, 1961), <http://www.presidency.ucsb.edu/ws/index.php?pid=8437&st=&st1>.

150. *Id.*

151. *Id.*

152. *Pope John XXIII's Address to Open the Council*, PAPAL ENCYCLICALS ONLINE (Oct. 11, 1962), <http://web.archive.org/web/20070808180613/http://www.rc.net/rcchurch/vatican2/j23open.txt>.

153. Kennedy, *supra* note 85.

butions of the Pope to the President's work would not go unrecognized. Thus, Kennedy's words at Boston College in April of 1963 are so revealing.<sup>154</sup> During the Centennial Anniversary celebration of Boston College, Kennedy's remarks about Pope John XXIII's April 11, 1963 letter *Pacem in Terris, Peace on Earth* provided one bridge between church and state that the President had long appeared to deny. Not only did the President state that the Pope's words offered "counsel on public affairs that is of value to all men and women of good will," but he went on to say, "[a]s a Catholic I am proud of it; and as an American I have learned from it."<sup>155</sup> As Kennedy's life would end in a few months, we shall never know to what extent he would have engaged the ideas of an overtly religious person and leader in formulating his own views, but clearly the April 20 speech at Chestnut Hill, Massachusetts indicated that there was a change in Kennedy's views.

### C. Cuomo: Proposition Is Not Imposition

Lastly, I reconsider Governor Cuomo's Notre Dame speech of September 13, 1984.<sup>156</sup> Two main points emerge upon reconsideration. The first deals with his personal devotion to the teachings of the Catholic Church; the second is counterintuitive to the first point, *viz.*, as a practicing Catholic, he could not "support positions which would impose on other people restrictions they find unacceptable" because the positions are based on religious belief.<sup>157</sup> This last point becomes all the more important when one considers his own statement, "What is the relationship of my Catholicism to my politics?"<sup>158</sup> There is little doubt that Governor Cuomo acknowledged the existence of the question: are religious faith and the work of the state discordant? On the one hand, he acknowledged several times during his Notre Dame address that the bishops have a proper teaching role on specific issues that "should not be perceived 'as an expression of political partisanship.'"<sup>159</sup> Moreover, he recognized that the bishops "must [teach] more and more vigorously and more and more extensively."<sup>160</sup> Given his public office and his legal training, he

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154. Kennedy, *supra* note 86.

155. *Id.*

156. For the Governor's address see Cuomo, *supra* note 90.

157. *Id.* at 18.

158. *Id.* at 13-14.

159. *Id.* at 14 (quoting Statement of Most Reverend James Malone, President, National Conference of Catholic Bishops (Aug. 9, 1984), *reprinted in* 14 ORIGINS 162 (1984)).

160. *Id.*

affirmed every American's legal right to rely upon religious belief to formulate the country's "universal public morality."<sup>161</sup>

Nonetheless, the Governor expressed doubt about asserting his right of speech that would include any reference to his views being religiously informed. As he rhetorically asked: should a Catholic governor translate his religiously based values into public law?<sup>162</sup> This is where the Governor began to compromise on what he had asserted earlier about religion's role in public life: notwithstanding earlier remarks about religion's importance, he stated that matters of public morality must depend solely on the public consensus of what is right and wrong.<sup>163</sup> In short, religion could not have a role in developing the moral perspective for the public square. Cuomo did not think it proper or legal that religiously informed values should influence public policy and public morality unless they are widely shared.<sup>164</sup>

Having framed the issue this way, did he intend to preclude the possibility of such a sharing? If he did, it would be impossible for him to reconcile the actions of those Christians who, as Christians, lobbied for the abolition of slavery or the enactment of civil rights legislation. Perhaps he meant to emphasize that the intersection of religious views and the promulgation of public policy was permissible only if the religious values were not contentious and would not "impose" policies on others that they would find unacceptable.<sup>165</sup> But reality would dispel such a theory, as there were many citizens who did not want the abolition of slavery or the enactment of civil rights legislation. But both objectives became a reality notwithstanding the Christian roots of each and the opposition toward these goals that were so controversial for many Americans. This is where a major flaw in the Governor's address becomes exposed. He did not acknowledge, as did Kennedy, that there could be a common ground of moral opinion and leadership shared by both the religious and secular communities. Slavery's abolition and the passage of civil rights legislation surely imposed on those who disagreed with the objectives of these initiatives, but the lack of pluralistic consensus did not arrest the state from taking action to implement both policies that were rooted in reason shared with the religious communities.

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161. *Id.* at 16.

162. *Id.*

163. *Id.* at 18.

164. *Id.*

165. *Id.*

One important issue, which escaped the Governor's discussion, concerned the formulation and promulgation of laws. The legislative process often imposes policies on many people with which they disagree once those laws are enacted. But the imposition takes place nonetheless, not because it is religious, not because it is secular, but because it is moral and because it is right—at least in some cases. In other cases, laws are made and imposed notwithstanding their dubious nature. So should the religious view be excluded from consideration in the legislative process even though it is moral and right? This was a matter ably addressed by Father Murray in his 1948 Wilmington Address when he analyzed the *McCullum* decision before an ecumenical gathering and predicted its logical but unfortunate repercussions. Murray, astute observer that he was, noted that everyone was satisfied with the release time instruction plan that the Champaign education district had worked out with religious organizations and citizens; as he said, "Everybody was satisfied with it. Everybody, that is, except a certain Mrs. Vashti McCollum . . . . And she wanted it stopped."<sup>166</sup>

In spite of the prodigious support within the local community whose overwhelming majority agreed to a program that forced no one to believe in something (an occurrence that would seem to correspond to Governor Cuomo's consensus), Mrs. McCollum imposed her beliefs on everyone else that confounded the unanimity of the community. This is what the meaning of the "absolute separation of church and state" became in 1948. Moreover, the *McCullum* decision's impact had a deleterious effect on the historic collaboration between religious groups and the government, and changed this relationship into one of hostility towards "the interests of religion in American society."<sup>167</sup> *McCullum* not only eviscerated the role of religion in public life, but it also attacked the principle of subsidiarity by undermining the freedom of the local community to oversee its management of educational and related affairs.<sup>168</sup>

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166. John Courtney Murray, *A Common Enemy, A Common Cause*, FIRST THINGS, Oct. 1992, at 29, 30.

167. *Id.*

168. The concept of subsidiarity was developed in the context of Catholic social thought in Pope Pius XI's 1931 encyclical letter *Quadragesimo Anno* (On Reconstruction of the Social Order) commemorating the fortieth anniversary of Pope Leo XIII's encyclical letter *Rerum Novarum*. See POPE PIUS XI, *QUADRAGESIMO ANNO: ON RECONSTRUCTION OF THE SOCIAL ORDER* ¶ 80 (1931). In his encyclical, Pius XI defined subsidiarity in this fashion:

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the

This is one circumstance that should have prompted the Governor to correct his position that the religious perspective should not influence public policy because it imposes its views on the non- or other-believer. There are many occasions when religious views, even though they deal with the most contentious issues of the day, should be considered, not because they are religious but, because of their foundation in objective reason, a reason that should appeal to any intelligent person who comprehends the intelligible reality of the situation that necessitates a response by the nation.

Governor Cuomo thought he had an answer, though. He contended that Catholics of all stripes were unable to teach fellow Catholics about the problems facing the nation and how to address them morally and patriotically. Without having the proper example from fellow believers, the religious members of society will never be able to make civil laws to protect that which needs protection.<sup>169</sup> The problems with the Governor's contention takes on further significance when one realizes that laws dealing with abortion, same-sex marriage, embryonic stem-cell research, etc. are being changed from voices that claim to be moral. However, the religious voices on these important matters tend to become all the more marginalized simply because they are viewed as religious, without looking at and considering the rational arguments they contain.

The Governor concluded his milestone address by stating that change for the better will come through persuasion rather than coercion; but as it turns out, in spite of his "persuasion" thesis, there remains coercion, not from the Church's teachers but from the state that is supposed to be servant rather than tyrant.<sup>170</sup> Contrary to the Governor's belief and assertions of almost three decades ago, the problem is not "us." The problem is with the kind of state that is influenced solely by the ideologies

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State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.

*Id.* In the *McCollum* case, the Supreme Court majority disregarded what the local community had essentially concluded was a lawful program consistent with the First Amendment. See *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

169. Cuomo, *supra* note 90, at 27.

170. *Id.* at 31.

of secularist lobbies that do not object to imposing their problematic views on the rest of society.

#### IV. A SYNTHETIC THESIS: A PERMISSIBLE AND NATURAL RELATION OF GOD AND CAESAR

##### A. *Contributions of Murray, Kennedy, and Cuomo: The Basis for a Viable Theory*

It is my contention that elements of each of the perspectives toward religion's role in public life that I have discussed, be they positive or negative, provide a framework for a viable and legal theory for this role. However, the contributions of each of the three individuals do not possess the same value in the formulation of this theory. Some of their elements offer a positive contribution, while others raise important issues that need to be considered even though they present reasons for restraining or silencing the religious voice in the *res publica*. Father Murray made the strongest, positive contribution. He is followed by the evolving view of President Kennedy. Governor Cuomo's overall position offers the weakest attitude about the intersection of the religious position and the making of public policy, but he does raise questions that the advocates for the religious role must nonetheless consider as they make their argument. Many of the points raised by these three individuals were addressed by the bishops of the United States in their 1948 statement to which Senator Kennedy declared his agreement. I suggest that this 1948 statement offers the basis for constructing a viable theory of a healthy relationship between the positions of the church and civil society dealing with important public policy matters.

##### B. *The Synthesis*

The history of the American republic is one in which the proper role of religion in public life has been debated since the Framers completed their work on the Constitution. In addition, the question of religious liberty and what this liberty means in public life goes back to the founding of the English colonies in the seventeenth century. This history was one with which James Madison, the chief architect of the First Amendment, was familiar as he crafted the language of the amendment and formulated the intention and purpose surrounding the language.

As both Father Murray and John Kennedy made observations agreeing with the bishops' statement, I begin the construction of the synthesis with the 1948 statement that explained the views of the Catholic hierarchy regarding the proper role of the



Christian in the public square.<sup>171</sup> It may be that Kennedy was not familiar with the details of the text, but it is very likely that Murray was. The catalyst for the bishops' November 1948 statement was the *McCullum* case, then recently decided by the Supreme Court.<sup>172</sup> Prior to the release of the bishops' statement, in May of 1948, Murray addressed the same Supreme Court decision in language that reflected that used by the bishops six months later. It would appear that the drafters of the bishops' statement were familiar with and relied upon Murray's earlier work commenting on *McCullum*. The following passages from both texts will explain my contention. Father Murray had this to say about *McCullum*'s impact on religion in public life when he spoke in Wilmington:

Mr. Black's opinion has astonished lawyers by its brevity; there is no appeal to legal argument or to history. The lengthy historical and legal argument advanced by the counsel for the Champaign County school board is curtly dismissed. Mr. Black simply says that the Court made a rule of constitutional law in the *Everson* case and we appeal to it now in striking down the Champaign plan. The interesting thing is that when the rule of law was made in the *Everson* case, no argument was advanced to support it. And it was a new rule of law. It gave a developed meaning to the First Amendment that the First Amendment never before was thought to bear within it. . . . [The people] will, I think, agree with Mr. Reed that our constitutional separation of church and state "is not an absolute prohibition against every conceivable situation in which the two may work together, any more than the other provisions of the First Amendment—free speech, free press—are absolutes."<sup>173</sup>

Elsewhere in the Wilmington address, Father Murray said: Jefferson did want a wall of separation between government and the church as such; but he did not think it necessary—in fact, he thought it very undesirable—that there should be a wall of separation between government and religious education. And he freely lent the cooperation of the University he founded to "instruction in religious opinion and duties" by the various sects of his State. Neither he nor James Madison considered that this was any violation of U.S. constitutional requirements. As Reed puts it: "The

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171. See generally *The Christian in Action*, *supra* note 51.

172. See generally *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948).

173. Murray, *supra* note 166 (quoting *McCullum*, 333 U.S. at 254 (Reed, J. dissenting)).

difference between the generality of his statements on separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech." . . . [T]he *McCullum* decision cannot be approved by the religious conscience, because it is a legal victory for secularism, especially in our public school system. It is, in effect, an act hostile to the interests of religion in American Society.<sup>174</sup>

In their statement, the bishops captured much the same sentiment in similar language several months later:

Lawyers trained in the American tradition of law, life, and government will be amazed to find that in the *McCullum* case the majority opinions pay scant attention to logic, history, or accepted norms of legal interpretation. . . . The carefully chiseled phrases of the First Amendment are defined by the misleading metaphor "the wall of separation between church and state." This metaphor of Jefferson specifies nothing except that there shall be no "established church," no state religion. . . . As was pointedly remarked in a dissenting opinion: "A rule of law cannot be drawn from a metaphor." A glance at the history of Jefferson's own life and work would have served as a warning against the broad and devastating application of his "wall of separation" metaphor that we find in this case. . . . Jefferson clearly showed in action that his concept of "separation of church and state" was far different from the concept of those who now appeal to his metaphor as a norm of interpretation. As the rector of the State University of Virginia, Jefferson proposed a system of cooperation between the various religious groups and the university which goes far beyond anything under consideration in the case at hand. And Mr. Madison, who had proposed the First Amendment and who led in carrying it through enactment by Congress, was one of the visitors of the University of Virginia, who approved Jefferson's plan. . . . We feel with deep conviction that for the sake of both good citizenship and religion there should be a reaffirmation of our original American tradition of free cooperation between government and religious bodies—cooperation involving no special privilege to any group and no restriction on the religious liberty of any citizen. . . . For secularism is threatening the religious foundations of our national life and

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174. *Id.*

preparing the way for the advent of the omnipotent state.<sup>175</sup>

As the language of both texts is compared, it is evident that first Murray and then the bishops shared a positive sentiment, which was much later endorsed by Kennedy in 1960, about cooperation and collaboration between religion and government. Upon further analysis of these texts, it is also clear that the free exercise provision would reinforce the claim that religion is able to engage others in the public square in the exercise of one's constitutional right to do so. In addition, the sentiments of Jefferson and Madison are in accord with the views expressed by Murray and the bishops, as noted in the quotations above. Realization of this agreement between the eighteenth and twentieth centuries may have been the motivating force that enabled President Kennedy to concede that he could learn from the religious perspective that offered moral instruction about a pressing public policy issue.

If Jefferson and Madison could acknowledge the compatibility, why not Kennedy as well? After all, reason is not the monopoly of secularism or the enlightenment. It is a human commodity, as Father Murray indicated, possessed and exercised by the human person's "intelligence-comprehending-intelligible-reality."<sup>176</sup> As he also argued, a false and flawed understanding about the role of religion in public life is a shaky justification on which to generate "an impenetrable barrier to cooperation between [the church and the state] upon which the good of society depends[.]"<sup>177</sup> The Christian voice has demonstrated time and again that the religious view does not generate an establishment problem, particularly when the views it wishes to present in public policy debates are based on human intelligence comprehending intelligible reality in order to propose laws and policies beneficial to the common good. If it were otherwise, would the abolition of slavery or the civil rights legislation of the 1960s have occurred when they did?

## V. CONCLUSION

In serving as the harbinger of the American bishops' November 1948 statement that was adopted by John F. Kennedy, John Courtney Murray set the stage for what would come to be

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175. *The Christian in Action*, *supra* note 51, at 87–89.

176. Robert John Araujo, SJ, *More on JFK and the Issue of Church and State*, MIRROR OF JUSTICE (Mar. 25, 2012, 3:42 PM), [http://mirrorofjustice.blogs.com/mirrorofjustice/araujo\\_robert/page/6/](http://mirrorofjustice.blogs.com/mirrorofjustice/araujo_robert/page/6/).

177. Murray, *supra* note 166.

known as “healthy secularity,” that is, a rational relationship between the church and state where each entity has its proper sphere of influence and which does not prohibit collaboration and cooperation between the two, as human intelligence comprehending intelligible reality would infer.<sup>178</sup> Murray did not adopt the “absolute separation” thesis often relied upon by Kennedy when he, Kennedy, was looking for political support from those who questioned his religious affiliation. But Kennedy could and possibly did change. Murray was steadfast. Throughout most of Murray’s life, the guiding thought upon which he relied was the voice that served as a counterpoint to that of the “barbarians” in our midst who had little interest in the foundation of the American proposition. A central theme of this voice was the natural law upon which Murray relied because he saw that it was not the enemy but the ally of the citizen who was also a religious person. The term “barbarian” was used by Murray to explain the person who may very likely be well-educated (at least in some respects) but who was also “a child of the wilderness, untutored in the high tradition of civility . . . engaged in the construction of a philosophy to put an end to all philosophy.”<sup>179</sup> In short, the barbarian pursued the objective of undermining “rational standards of judgment” by corrupting “the inherited intuitive wisdom by which people have always lived.”<sup>180</sup> These points permitted the construction of a theory about the proper relationship between the church and state and the correct role of the religious voice in civic life.

For Murray, this inheritance of intuitive wisdom included religion, its voice, and its authentic role in civic affairs and public life. Toward the end of his life, John Kennedy confessed to seeing the wisdom Murray possessed and used throughout his life, the wisdom that the church and the polis are not enemies but distinct institutions that can and should have mutual interests and perspectives on many fronts. Unfortunately, Governor Cuomo did not recognize this as one penetrates his Notre Dame address. In the final analysis, he saw the application of this objectively reasoned wisdom as an imposition, rather than a meritorious proposition that could influence, for the better, the commonweal by advancing the common good.

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178. See, e.g., Pope Benedict XVI, *Address of His Holiness Benedict XVI to the Participants in the 56th National Study Congress Organized by the Union of Italian Catholic Jurists* (Dec. 9, 2006), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/december/documents/hf\\_ben\\_xvi\\_spe\\_200612\\_09\\_giuristi-cattolici\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/december/documents/hf_ben_xvi_spe_200612_09_giuristi-cattolici_en.html).

179. MURRAY, *supra* note 11, at 12.

180. *Id.*

To understand Murray, one must understand the central role of the natural law as I have explained his perception of it. It was the natural law that was the defense to the legal mechanisms and interpretations of the barbarian who rejects "the traditional role of reason and logic in human affairs."<sup>181</sup> For Murray, the intellectual, the spiritual, the moral, and the legal were inextricably related in the intelligent person who had the capacity to comprehend objectively the surrounding reality and then formulate moral norms appropriate to the circumstances, not because religious belief specifies, but because objective reason dictates. At the crux of the history of the American proposition was Christian civilization, which has served as the antidote to barbarism and "the decadence of moral corruption and the political chaos of formlessness or the moral chaos of tyranny."<sup>182</sup>

Murray saw the committed barbarian of his era as the well-educated and influential person who questioned the religious believer, especially the believer who understood the foundations of the republic, foundations which were forgotten by many in Murray's time, have remained forgotten by many, and are alien to many in the present age. It is not for the sake of the believer, but for the sake of the barbarian that the religious perspective must still be welcome in the civil discourse of the present age. If not, the discourse will be a monologue, a monologue that inexorably leads to a decline and fall of noble ideals and the nation that was built upon them.

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181. *Id.*

182. *Id.* at 13.