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## Is It Possible to Have a Serious Discussion About Religious Commitment and Judicial Responsibilities?

Sanford Levinson

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ARTICLE

IS IT POSSIBLE TO HAVE A SERIOUS  
DISCUSSION ABOUT RELIGIOUS  
COMMITMENT AND  
JUDICIAL RESPONSIBILITIES?

SANFORD LEVINSON\*

I. INTRODUCTION

One of the explanations for the convening of the conference at which this essay was first presented is that, for the first time in American history, a majority of the Supreme Court consists of Roman Catholics. By any measure, this is a significant development in an American polity that, for much of its history, was anti-Catholic—sometimes virulently so. As a symbolic moment, the shift toward a Catholic Court surely ranks with the earlier moment this decade when both the United States Secretary of State and National Security Advisor were African-Americans. Whatever one's partisan political views, one can only rejoice at this tangible evidence of a far more pluralistic and non-discriminatory America than even the one in which I grew up some fifty years ago, let alone earlier eras of our history.

This may explain the motivation for the conference, but it doesn't explain why I was invited to participate in it. That, I presume, is due to the fact that some sixteen years ago I published an essay titled *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, which was republished in a book of essays of mine entitled *Wrestling with Diversity*.<sup>1</sup> It is perhaps worth noting that the most common topic treated in the nine essays that comprised this book was the *religious* diversity that has long characterized the United States. This religious diversity presents many

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\* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School. An earlier version of this essay was prepared for delivery at the symposium at the University of St. Thomas School of Law, November 10, 2006. I am extremely grateful for the invitation to participate in that symposium and for the kindnesses shown me on that occasion. I am also grateful to Jack M. Balkin and Walter F. Murphy for their responses to that earlier version.

1. Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, reprinted in SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 192 (2003).

obvious challenges that are slighted in the tendency to focus only on racial or ethnic diversity. Consider the fact that most adherents of “diversity” in university admissions or public office, who are usually political liberals, often speak of the importance of hearing the distinctive “voice” allegedly linked to those with certain racial, ethnic, or gender experiences.<sup>2</sup> Yet most of those liberals at one and the same time are prone to suggest that there is something suspicious about similar concerns, and programs, designed to assure the presence of explicitly religious sensibilities in discussions, whether in the classroom or elsewhere.<sup>3</sup> The skepticism about, if not outright hostility to, the overt expression of religious points of view is maximized when discussing public officials, including, of course—and especially—the public office of judge.<sup>4</sup>

Joseph Raz coined the term “epistemic abstinence”<sup>5</sup> to refer to the demand by some important strands of liberal political theory that religious office-holders self-consciously abstain from making reference to arguments based on religious belief in favor of presenting arguments that can be defended on the basis of secular reason alone. As I argued many years ago in an essay examining the use of religious language in the “public square,” this demand seems to treat religiously-inclined citizens as second-class. These religiously-inclined citizens, and only these citizens, are required to “translate” their arguments from one realm (the religious) into the language of another.<sup>6</sup> I argued that the principle of “equal concern and respect” might require opening the public square to religious arguments, though I was considerably more uncertain about their propriety when presented by public officials.

There may, however, be an important consequence of allowing more religious discourse in the public square. To the extent that individuals present themselves to others as significantly constituted by their religious identity, it seems fair to me that they subject themselves to being questioned about the implications of those beliefs for the performance of their public roles. It will not do, for example, to say that “I always ask ‘What would Jesus do?’” and then claim an entitlement, based either on the No Test Oath Clause of Article VI or on the Free Exercise Clause of the First Amendment, to refrain from addressing questions like, “How is it that you discern what Jesus would do?” or “Is it conceptually possible that the law, correctly interpreted, would require acting in ways quite opposite of what Jesus would do? If so, which would take priority?” To the extent that a secular

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2. *See id.* at 11.

3. *See id.* at 47–51, 278–80.

4. *See id.* at 233.

5. *See* Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3 (1990).

6. *See* Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2073 (1992) (review of MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991)).

person can be examined on the implication of her beliefs for the performance of a public role—including membership on a court—the same should be true for someone whose beliefs are presented as religiously based. This, I believe, is required by our commitment to equality. I am sympathetic to claims that religious persons are denied equal concern and respect when they are told they ought not speak in their own voice in the public square. By the same token, I am unsympathetic to the claim that they should be exempt from the same degree of scrutiny of such beliefs that is received by secularists.

## II. SOME EARLIER EXPERIENCES OF CATHOLICS IN THE PUBLIC SQUARE

Given the lamentable anti-Catholicism that has pervaded much of the American past, it is perhaps not surprising that Catholic nominees for the Supreme Court sometimes face direct questions from senators about the implications of their religious membership for the performance of their duties if confirmed to join the High Court. Thus in my initial article, I examined the confirmation hearings of Catholic nominees to the Supreme Court, including William J. Brennan, Antonin Scalia, and Anthony Kennedy, and pointed out that a common theme of those hearings was the felt need for reassurance, to put it bluntly, that their primary loyalties were to the Constitution (and the United States) rather than to the Vatican and the Roman Catholic Church. Such concerns were expressed both openly and more subtly, but there can be little doubt that they reflected a fear, seen throughout much of our history, about potential for dual loyalty among what many antagonistic individuals used to label “Papists.”

Exemplary in this regard is the question directed at then-New Jersey Justice William Brennan by Wyoming Senator Joseph O’Mahoney, himself a Catholic, who had been pressed by the members of the National Liberal League to ask “would you be able to follow the requirements of your oath [of constitutional fidelity] or would you be bound by your religious obligations?”<sup>7</sup> Lest one believe that the National Liberal League was a latter-day secularist organization, one should be aware that it described the United States as “a predominantly Protestant country” that, presumably, should be extremely wary of having Catholics on its highest court. Recall that only four years later, on September 12, 1960, John F. Kennedy was forced to go before the Greater Houston Ministerial Association, where he delivered the following expression of his religious-political credo:

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 parishoners [sic] for whom to vote. . . .

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7. LEVINSON, *supra* note 1, at 210.

I believe in an America that is officially neither Catholic, Protestant nor Jewish—where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source—where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials. . . .<sup>8</sup>

Justice Brennan presumably approved of Kennedy's reassuring message. After all, he offered the Senate similar assurance that he would of course give priority to the Constitution. According to Brennan, "there isn't any obligation of our faith superior to" the oath to support the Constitution.<sup>9</sup> I presume Brennan believed the Constitution is what I have elsewhere called a "comic" document, providing sufficiently "happy endings" to legal dilemmas so that, for example, fidelity to the Constitution never required the judge to acquiesce in something truly evil (as opposed to merely "suboptimal"). Otherwise, as has been suggested by Thomas Shaffer (one of our most interesting and insightful analysts of the implications of taking one's religious commitments seriously), it would be "idolatry" to give the secular Constitution priority over Divine authority.<sup>10</sup> This is obviously harsh language, but fair—at least if one takes seriously the possibility that there can be tensions between Divine commands and those of the State.

It is obvious that some current members of the Court believe in the possibility of such tensions. In this context, one might recall a notable speech Justice Scalia gave in 2002 at the Chicago Divinity School discussing the death penalty.<sup>11</sup> Not only did he say he would feel compelled to resign if he believed the death penalty to be immoral, presumably because he sees nothing in the positive law of the United States Constitution that prohibits capital punishment, but he also added that any discussion as to the morality or immorality of capital punishment for him necessarily involved reference "to Christian tradition and the Church's Magisterium."<sup>12</sup> Justice Scalia said,

I am . . . happy to learn from the canonical experts I have consulted that the position set forth in *Evangelicum Vitae* [which expresses doubts about the morality of capital punishment] and in the latest versions of the Catholic catechism does not purport to be binding teaching—that is, it need not be accepted by practicing

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8. Senator John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/JFK+Pre-Pres/Address+of+Senator+John+F.+Kennedy+to+the+Greater+Houston+Ministerial+Association.htm>.

9. LEVINSON, *supra* note 1, at 211.

10. *See id.* at 215 n.64.

11. *See* Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17.

12. LEVINSON, *supra* note 1, at 252 (quoting Antonin Scalia).

Catholics, thought [sic] they must give it thoughtful and respectful consideration . . . and I disagree.<sup>13</sup>

Justice Thomas also made a stirring argument while explaining one source of his zealous opposition to the use of racial categories in public policy:

You cannot embrace racism to deal with racism. It's not Christian. . . . Jesus said go and sin no more. That is what I have to do. . . . If I type one word at my word processor in one opinion [justifying the legality of such "racism"] I break God's law. . . . If I write racism into law, then I am in God's eye no better than [slaveowners] are.<sup>14</sup>

Recall that Kennedy could easily tell his listeners he believed in a very sharp separation of church and state. Moreover, even if there is no reason to doubt Kennedy's formal adherence to the Catholic Church, none of his major biographers display a man (unlike, for example, his mother Rose) for whom religious beliefs were particularly important.<sup>15</sup> But there have been significant changes in American political culture in the past forty years, and one of them involves the degree to which some public figures—including Justice Scalia—wear aspects of their religious identities and beliefs on their sleeves. Moreover, in recent years, the Catholic Church and other religious institutions have appeared more willing to make public "demands" of their members who inhabit public office.<sup>16</sup> Any consideration of the confirmation hearings I discuss must take these new realities into account.

For me, the issues are most sharply delineated in a 1996 contribution by then-Texas Supreme Court Justice Raul Gonzalez to a symposium in the *Texas Tech Law Review* on *Faith and the Law*. "Whether we want to admit it or not," he wrote, "our religious convictions impact every relationship and every aspect of our lives."<sup>17</sup> He observed that "[t]here are some who

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13. *Id.* at 253.

14. *Id.* at 250.

15. Kennedy's most recent biographer, Robert Dallek, describes Kennedy as developing by the time he was at Harvard "an intellectual's skepticism about the limits of human understanding and beliefs." ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY 1917-1963* 59 (2003). Dallek notes that in 1939 Kennedy asked a priest why "we should believe Christ any more than Mohammed," which led the priest to urge Joseph Kennedy to get Jack some immediate religious instruction "or else he would turn into an atheist." *Id.* Moreover, Dallek describes an encounter of Jack with a friend at Harvard who asked him why he was attending church on a Catholic holy day. According to the friend, Jack "got this odd, hard look on his face," replying, "This is one of the things I do for my father. The rest I do for myself." *Id.* There is no evidence that he ever embraced a stronger notion of his relationship to the Catholic Church. It is scarcely surprising, then, that Kennedy had little trouble endorsing what was then the conventional view on the separation of public duty from religious obligations.

16. *See infra* notes 47-58.

17. Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 *TEX. TECH. L. REV.* 1139, 1139 (1996) (emphasis added).

believe that religious beliefs should be private and have no bearing on their work.”<sup>18</sup> To contrast such a view, he noted that,

[O]thers, like myself . . . believe that we are called to live our faith full time, not just on weekends, and that *all* our thoughts, words, and deeds should be impacted by our religious convictions. To me, it is an inescapable fact that our perspective on any issue is influenced by where we place ourselves on the religious spectrum. To deny this fact is to be dishonest.<sup>19</sup>

Justice Gonzalez went on briefly to describe nine cases in which “my relationship with God impacted the way I considered and wrote about the issues presented.”<sup>20</sup> Once again, he emphasized that “[h]ow we experience God and our level of religious commitment (or lack of commitment) impacts our work.”<sup>21</sup>

Justice Gonzalez, who outlines his own falling away from, and then return to, his strongly Catholic identity, might well exemplify what some observers have referred to the present era as the “Third Great Awakening” in our culture, the second having occurred in the 1820s and ‘30s.<sup>22</sup> Most of us are presumably aware that the current President has described Jesus as his favorite philosopher;<sup>23</sup> fewer, I suspect, are aware that his predecessor, President Clinton, had said that,

Sometimes I think the environment in which we operate is entirely too secular. . . . [T]hose of us who have faith should frankly admit that we are animated by that faith, that we try to live by it—and that it does affect what we feel, what we think, and *what we do*.<sup>24</sup>

It is, I think, also appropriate to note that one reason I was impelled to write the article, beyond my general interest in the intersections of religious and secular political identities,<sup>25</sup> was the stimulation provided by a powerful statement by the distinguished Columbia historian Istvan Deak, who has written much on the response to the Holocaust in Middle and Eastern Europe: “Roman Catholicism represents a beautiful anachronism in our age of crazed nationalism; virtually every devout Catholic preserves in his heart some remnant of his denomination’s transnational loyalty and the duty of

18. *Id.* at 1147.

19. *Id.* (emphasis added).

20. *Id.* at 1157.

21. *Id.*

22. See, e.g., JOSEPH A. CONFORTI, JONATHAN EDWARDS, RELIGIOUS TRADITION, & AMERICAN CULTURE (1995).

23. Upon being asked in a presidential debate, “What political philosopher or thinker do you identify with and why?” Then-Governor Bush replied, “Christ, because he changed my heart.” William F. Buckley, Jr., *Bush the Evangelist?*, NAT’L REV., June 5, 2006, at 59.

24. LEVINSON, *supra* note 1, at 241–42 (quoting President Clinton) (emphasis added).

25. See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993), reprinted in *WRESTLING WITH DIVERSITY*, *supra* note 1, at 124.

Catholics to defy immoral laws.”<sup>26</sup> If anything, “crazed nationalism” seems to describe our own world—and, I regret to say, sometimes our own country—even more in 2007 than in 1989, when Professor Deak wrote. At that moment, after all, one was surrounded by images not only of a stunning victory of the West at the end of the Cold War, but also of what seemed like inevitable movement toward liberal democracy and what then-President George H.W. Bush, on September 11, 1990, was calling a “new world order” that included significant recognition of interdependence and the importance of strengthening international institutions.<sup>27</sup> Francis Fukuyama had just published his famous essay in *The National Interest* entitled *The End of History*,<sup>28</sup> which seems, in 2007, to be an extremely bad joke. More than ever, one might believe, it is important to inculcate in citizens a belief that there are in fact “transnational” loyalties and norms that should be used at least to judge, and sometimes to compel defiance, of immoral positive law.

In any event, I am indeed grateful for the opportunity given me by the organizers of the conference—and as the Supreme Court has become a majority-Catholic institution—to “update” some of the arguments offered in my earlier article, written at a time when there were only three Catholic Justices (Brennan, Scalia, and Kennedy). There are both new data and added opportunities for reflection on the underlying issues of the relationship, if any, between ostensibly “private” religious faith and one’s performance of “public” roles.

### III. RELIGIOUS IDENTITIES AND THE CURRENT COURT

Perhaps it is worth noting that among the five Catholic Justices on the current Court is Clarence Thomas, who has a relatively complex religious history.

At the time Justice Clarence Thomas was confirmed in 1991, he said that despite having been raised Catholic and having spent several years in a seminary, he was not a practicing Catholic. In 1996 he told fellow alumni at Holy Cross College in Worcester, Mass., that he had recently returned to the church . . . .<sup>29</sup>

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26. Istvan Deak, *The Incomprehensible Holocaust*, N.Y. REV. OF BOOKS, Sept. 28, 1989, at 66.

27. See President George H.W. Bush, Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit (Sept. 11, 1990), available at <http://bushlibrary.tamu.edu/research/papers/1990/90091101.html> (“The crisis in the Persian Gulf, as grave as it is, also offers a rare opportunity to move toward an historic period of cooperation. Out of these troubled times, our fifth objective—a new world order—can emerge.”).

28. Later expanded into FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

29. Patricia Zapor, *Catholics, Though Few in Number, Have Lengthy History on High Court*, July 21, 2005, <http://www.catholicnews.com/data/stories/cns/0504224.htm>.



At the very least, this means that whatever other *sturm und drang* was attached to his confirmation hearings, there was presumably no reason to delve into his Catholic identity as of 1991.

No such ambiguity about religious identity was present with regard to John Roberts and Samuel Alito, nor, for that matter, of the less visible, but far more contentious, nomination of William Pryor to join the 11th Circuit Court of Appeals after service as Alabama's Attorney General. In all three nominations, reference was made to the fact of their respective Catholic identities. Although religion seemed to play almost no role in the debate about Roberts and Alito, Pryor appeared to be another matter. The consideration by the Senate of these three recent appointments to the federal bench may shed some light on whether we in the United States have figured out an acceptable way to address the questions raised by serious commitment to one's religious heritage.

Attorney General Pryor, perhaps because he came to the bench from a background as an elected politician in Alabama rather than the far more national elite route that Roberts and Alito followed, had the richest paper trail, including a graduation speech to a Catholic high school in 1997. After acknowledging that the "American experiment is not a theocracy and does not establish an official religion," he went on to declare that "the Declaration of Independence and the Constitution of the United States are rooted in a Christian perspective of the nature of government and the nature of man."<sup>30</sup> I myself would tend to doubt this statement, especially with regard to the Constitution,<sup>31</sup> but the issue is presumably open to debate. In any case, this states only an empirical claim. Mr. Pryor, however, went on to assert a strong normative claim as well: "*The challenge of the next millennium is to preserve the American experiment by restoring its Christian perspective.*"<sup>32</sup> Nothing could be rhetorically further from the kind of separationism evoked by John F. Kennedy.

Justice Gonzalez, of course, was never nominated for membership on the federal bench and therefore never faced the prospect of explaining his article to the Senate Judiciary Committee. Nor, equally obviously, can the Committee call back Justices Scalia and Thomas to explain their post-confirmation (and extra-judicial) comments. Attorney General Pryor was not so lucky. He *was* nominated for the 11th Circuit Court of Appeals, and the nature of his Catholic religious commitments did indeed become a topic of the subsequent hearing. Interestingly enough, though, it was one of Pryor's

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30. Alabama Attorney General William Pryor, Remarks at the McGill-Toolen High School Graduation (1997) (quoted in *Confirmation Hearing on the Nominations of William Pryor, Jr. to be U.S. Circuit Judge for the 11th Circuit: Hearing of the Senate Judiciary Committee*, 108th Cong. 76 (2003)).

31. See, e.g., ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* (rev. ed. 2005).

32. Pryor, *supra* note 30 (emphasis added).

strongest supporters, Utah Senator Orrin Hatch, who, after describing Pryor as “a devout pro-life Catholic,” went on to say that, whatever his “personal faith,” he had “never, to my knowledge, allowed [it] to interfere with what the law is.”<sup>33</sup> For me, this suggests one of two things: a) as suggested earlier, it is a happy truth that there is simply no conflict between what is required by American law and the teachings of the Catholic Church; or b) at the end of the day, one’s religious faith, however “deep” and “committed” it may be, is to be subordinated to the demands of the secular law. Caesar reigns triumphant over any potentially conflicting religious commands. Perhaps, after all is said and done, the “Christian perspective” leaves Christians free to collaborate with what they view as evil.

There may, of course, be other more nuanced possibilities. One might, after all, cite Romans 13 for the proposition that civil authorities, even if not Catholic themselves, are best viewed as God’s magistrates.<sup>34</sup> Perhaps there remain Catholics who share the view articulated by Pope Gelasius I, who in the year 494 reassured the Roman Emperor Anastasius that his “imperial office was conferred upon him by divine disposition,”<sup>35</sup> but, frankly, I would be surprised. More likely, perhaps, is an argument that deference to civil authorities is conducive to maintaining civil peace and avoiding “scandal,” which is no small virtue of the Catholic doctrine.<sup>36</sup> After all, an Orthodox Jew, who might also be viewed by some as having religious commitments that might run counter to secular law, could cite the long-established doctrine *Dina De-Malchuta Dina* (“the law of the land is law,” including law made by non-Jewish officials).<sup>37</sup> I presume that similarly pragmatic desire to avoid “scandal” and preserve public order would allow a committed Catholic judge to enforce what he or she deemed to be immoral—perhaps even “evil”—laws at least under some circumstances. One might, of course, be interested in the views of serious Catholics on such issues, especially when they are nominated for judicial office. One of the most gripping discussions at the symposium presented by the University of St. Thomas School of Law’s Law Journal involved an extremely high-level consideration of the doctrine of “cooperation” within Catholic theology.<sup>38</sup> This invokes the circumstances under which a committed Catholic can par-

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33. *Id.*

34. *Romans* 13:1–2 (ENGLISH STANDARD VERSION) (“Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore whoever resists the authorities resists what God has appointed, and those who resist will incur judgment.”).

35. LEVINSON, *supra* note 1, at 207 n.37.

36. I continue to be grateful to Robert George for educating me in the nuances of natural law jurisprudence. *See id.* at 226 n.85.

37. Rabbi Herschel Schachter, “*Dina De’malchusa Dina*: Secular Law as a Religious Obligation,” in *HALACHA AND CONTEMPORARY SOCIETY* 85 (Alfred S. Cohen ed., 1983).

38. Edward A. Hartnett, Remarks at the University of St. Thomas School of Law Symposium: Catholicism and the Court (Nov. 10, 2006).

ticipate at all in a legal process involving presumptively immoral outcomes, such as abortion or, for some, capital punishment.

Far from embarking on such a conversation, Vermont Democrat (and Catholic) Patrick Leahy was upset with the fact that Senator Hatch had referred to Pryor's Catholic commitments at all. He argued that the Constitution in effect requires "religion-blindness" on the part of senators deciding whether to confirm a nominee, whether or not it requires similar "blindness" to race, gender, or any other personal attribute in a similar situation. For Leahy, the rationale for treating religion as special—i.e., compelling blindness to its reality—is based directly on the Constitution's "no religious test" clause of Article VI.<sup>39</sup> "The beauty of our First Amendment and the beauty of our prohibition against religious tests is it means just that, and that is why we have had people of faith, of all faiths who have given so much to the government of this country. . . ."<sup>40</sup> He made this argument, incidentally, while justifying his own opposition to Pryor, claiming that it was on the basis of what Leahy regarded as Pryor's own cramped legal views and not at all because of suspicions about his religious commitments.

Republican Senator Arlen Specter agreed with Leahy about the basic issue of what might be termed religious interrogation: "I would hope," said Specter, "that this committee would not inquire into anybody's religion. There are enough questions to inquiry into and enough substantive matters that that ought to be out of bounds."<sup>41</sup> Specter was clearly upset that Pryor had described *Planned Parenthood v. Casey* as "the worst abomination of constitutional law in our history," and he was not assuaged when Pryor described the case as not only "unsupported by the text and structure of the Constitution," but also as having "led to a morally wrong result. It has led to the slaughter of millions of innocent, unborn children. That's my personal belief."<sup>42</sup>

For whatever reason, including, perhaps, the discomfort expressed by Senators Leahy and Specter at the injection of Attorney General Pryor's religious views, the Catholicism of then-Judges Roberts and Alito seemed to play an absolutely minimal role in the hearings on their respective nominations for the Supreme Court. It was not wholly absent, but it was certainly muted. California Senator Diane Feinstein did ask Judge Roberts a perfectly reasonable question about his views on the separation of church and state, to which he replied, "I do know this: that my faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don't look to the bible [sic] or any other religious

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39. "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 2.

40. *U.S. Senator Arlen Specter (R-PA) Holds Hearing on Judicial Nominations: Senate Judiciary Committee*, 109th Cong. 9 (2005).

41. *Id.*

42. *Id.*

source.”<sup>43</sup> She did not follow up with a question, for example, on his reactions to Justice Scalia’s description of his felt need to study with care the approach of the Catholic Church to the issue of capital punishment. Scalia did not study this, recall, to ascertain the meaning of American law, but, rather, to determine whether he could, in good conscience, sit in such cases or, on the contrary, might feel under a duty to recuse himself or even to resign. I might note that recusal did figure in Judge Alito’s hearing, but only with regard to his sitting in a case involving a mutual fund in which he owned some shares. Nothing was said about “moral” recusal. One of the witnesses against Judge Roberts, Dr. Susan Thistlethwaite, president and professor of theology at the Chicago Theological Seminary, indicated that she had reservations about whether Judge Roberts “believes in the dream that is the United States of America,” but she made no allusion to his religious commitments in her brief statement to the Senate Judiciary Committee.<sup>44</sup>

During the Alito hearings, at least one witness (Kate Michelman of the National Abortion Rights Action League) and two Democratic senators (Vermont’s Patrick Leahy and Delaware’s Joseph Biden) did allude to their own membership in the Catholic Church. Biden, for example, described himself as an “Irish Catholic kid from Claymont.”<sup>45</sup> But this was presumably to underscore the point that their opposition to Alito’s nomination in no way stemmed from “anti-Catholic” bias. (I do not know, however, if anyone within the Catholic community accuses them of being “self-hating Catholics,” an accusation sometimes leveled at Jews who self-consciously advert to their religious identity when criticizing Israel.)

Although Senator Specter literally led off his questioning, as Committee Chair, by asking about Alito’s views on the “right to privacy” and, of course, *Roe v. Wade*, there was no mention at all of the fact that he is Catholic or that Catholicism might be relevant in determining his support, or lack of same, for the protection of women’s reproductive rights. One could read the entire transcript of Justice Alito’s appearance before the committee without discovering, save through the otherwise inexplicable allusions by Catholic Senators Biden and Leahy, to Alito’s own Catholicism.

From one perspective, this represents a triumphant moment in American political development. One need not be Catholic to recognize that throughout American history antagonism against Roman Catholics has been pervasive. One might have even expected this antagonism to become more

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43. *U.S. Senator Arlen Specter (R-PA) Holds Hearing on Roberts Nomination: Senate Judiciary Committee*, 109th Cong. 88 (2005).

44. *Confirmation Hearing for Judge John G. Roberts to be Chief Justice of the United States: Panel VI of the Hearing of the Senate Judiciary Committee*, 109th Cong. 7 (2005).

45. *Transcript: U.S. Senate Judiciary Committee Hearing on Judge Alito’s Nomination to the Supreme Court* (Jan. 11, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011101335.html>.

pronounced as the center of American Protestantism has shifted from what used to be called “mainstream” churches to more self-consciously Evangelical ones linked with religious traditions that in living memory viewed the Church as the Whore of Babylon—thus the felt need for Kennedy to pay his peculiar pilgrimage to Houston. This has most certainly not been the case more recently. As James Davison Hunter suggested some fifteen years ago, the most important fault lines in American culture are no longer those among Protestants, Catholics, and Jews, but, rather, between those who identify themselves strongly as “religious” and those who are, when all is said and done, far more secular.<sup>46</sup>

#### IV. TWO CHEERS (AT MOST) FOR RETICENCE

Still, I want to suggest that one should offer, at most, two cheers—and definitely not three—for the reticence about religion articulated by Leahy and Specter and manifested in the hearings on Roberts and Alito. One might, I suppose, believe that, as with John Kennedy, Roberts and Alito are not “serious” about their Catholicism, though there is no reason at all to believe that this is the case. What can be said about both of these men, though, is that they were, by and large, extremely cautious in their self-presentations over the years as they moved steadily forward toward the higher public offices to which they presumably aspired. Neither was remotely so revealing in their pre-nomination careers as Justice Gonzalez or Attorney General Pryor, and one would be more than a bit surprised if either turns out to be so plainspoken, with regard to their religious commitments, as Justices Scalia and Thomas. So one question is obviously whether the absence of any serious examination of the nature of their religious commitments is person-specific. This then encourages us to ask whether a different result would indeed be legitimate with regard to Gonzales and Pryor—or, for that matter, Justices Scalia or Thomas had either been nominated to succeed William Rehnquist as Chief Justice.

But one should not believe this is a question relating only to the individual nominees. One is surely entitled to take into account the extent to which the institutional Catholic Church has, in the almost two decades since I began my inquiries into this subject, attempted to play an ever-greater role with regard to influencing American politics. This influence is not limited to only what might be termed “wholesale” intervention concerning such issues as abortion, capital punishment, the privation visited upon the poor, and the like. It also includes a more “retail” emphasis on particular American political figures, especially if they are Catholic themselves, who are pressured by the institutional church to conform to its teachings. John Kerry, for example, was barred from receiving communion by St. Louis

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46. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

Archbishop Raymond Burke.<sup>47</sup> Presumably, this action had been encouraged by what a writer in *The National Review* described as a January 2003 “doctrinal note” issued by the Vatican “reiterating the obligation of Catholic politicians to oppose abortion. Days later,” Ramesh Ponnuru noted, “the [B]ishop of Sacramento . . . told California governor Gray Davis not to receive communion.”<sup>48</sup> Lest one believe that this is an entirely new development or that its politics are inevitably conservative, he also noted that “in 1962, Archbishop Rummel of New Orleans excommunicated segregationist politicians who had tried to block the integration of church schools.”<sup>49</sup> I would be surprised indeed if non-Catholic political liberals did not applaud this dramatic intervention into the politics of the deep South.

It is surely interesting that in April 2004 then-Cardinal Joseph Ratzinger sent a letter to Washington, D.C. Cardinal Theodore McCarrick, in which the person who is now Pope Benedict XVI wrote:

Regarding the grave sin of abortion or euthanasia, when a person’s formal cooperation becomes manifest (understood, in the case of a Catholic politician, as his consistently campaigning and voting for permissive abortion and euthanasia laws), his Pastor should meet with him, instructing him about the Church’s teaching, informing him that he is not to present himself for Holy Communion until he brings to an end the objective situation of sin, and warning him that he will otherwise be denied the Eucharist. When “these precautionary measures have not had their effect or in which they were not possible,” and the person in question, with obstinate persistence, still presents himself to receive the Holy Eucharist, “the minister of Holy Communion must refuse to distribute it.”<sup>50</sup>

As if things were not sufficiently complicated, note also that on June 22, 2006, at the Mass celebrating the installation of Donald Wuerl as the new Archbishop of Washington, D.C., “Archbishop Pietro Sambi, the representative of Pope Benedict XVI, was seen giving Holy Communion to pro-abortion Senator and former Presidential candidate John Kerry.”<sup>51</sup> I leave it to others to decode the meaning of this event.

It may well confirm Hunter’s insight about the cultural realignments now going on in American society that Evangelical Protestants appear to be more inclined to support the denial of communion to Kerry and other pro-

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47. David Paul Kuhn, *Kerry’s Communion Controversy*, CBS NEWS, Apr. 6, 2004, <http://www.cbsnews.com/stories/2004/04/06/politics/main610547.shtml>.

48. Ramesh Ponnuru, *Rites and Wrongs: The Politics of Communion*, NAT’L REV., May 31, 2004, <http://www.nationalreview.com/flashback/ponnuru200410191027.asp>.

49. *Id.*

50. John-Henry Westen, *Highest Authorities in Vatican Back Denial of Communion to Pro-Abortion Politicians*, LIFE SITE, July 5, 2004, <http://www.lifesite.net/ldn/2004/jul/04070501.html>.

51. John-Henry Westen, *Papal Nuncio Gives Communion to John Kerry—Likely Unintentional*, LIFE SITE, June 26, 2006, <http://www.lifesite.net/ldn/2006/jun/06062605.html>.

choice candidates than are Roman Catholics themselves. Thus an August 2004 poll found that 72% of Catholic respondents disapproved of refusing communion to politicians “whose views on abortion, stem-cell research and euthanasia run contrary to church teachings,” whereas only 47% of Protestant Evangelicals appear to have disapproved of such actions.<sup>52</sup>

## V. CONCLUSION

In any event, it seems to me that we need to develop a far more sophisticated understanding of when it is indeed proper to interrogate individuals who either proclaim commitment to pervasive—i.e., distinctly non-“pietistic”—religious values, and/or are members of institutional churches (and this goes well beyond the Catholic Church) that make strong efforts to encourage conformity on the part of their membership to the basic tenets of the denomination. I want to emphasize, incidentally, that I see nothing necessarily wrong with such efforts. There is no overriding reason why the Catholic Church, or any other institution, must conform its views to those of persons outside the relevant faith communities. I have thus written sharp criticism of Princeton University historian Sean Wilentz,<sup>53</sup> who I believe rather thoughtlessly denounced Justice Scalia’s speech, mentioned earlier, concerning his views on capital punishment. As I noted, Justice Scalia quite explicitly did *not* say that “Catholic justices” were obligated to interpret the Constitution to be in line with the Church’s teachings. What he *did* say is that, were he faced with an unbridgeable conflict between what he saw as the commands of the Constitution and those of his Church, he would feel compelled either to recuse himself or to resign from the bench.<sup>54</sup>

My point, therefore, is not to take a particular position on the relationship between membership in a religious community that makes its own demands for obedience and participation in public life as a role-bound public official. Rather, I think this is a truly important issue that demands far more discussion than it has received. The question is whether any of that discussion, assuming it is proper in the first place, may take place during Senate hearings on judicial nominations. We have already seen that Senator Leahy invoked the No Test Oath Clause of Article VI, and I have discovered that many people believe that it serves to answer the questions I have raised above in the negative. That is, the Clause does render inappropriate any questions that touch on a nominee’s religious views—period.

I continue to be unconvinced, especially, and perhaps exclusively, when it is the nominees themselves who have in effect encouraged such

52. Julia Duin, *Denial of Communion Disapproved*, WASH. TIMES, Aug. 25, 2004, <http://www.washtimes.com/national/20040824-115323-3008r.htm>.

53. Sean Wilentz, *From Justice Scalia, a Chilling Vision of Religion’s Authority in America*, N.Y. TIMES, July 8, 2002, at A19, available at <http://select.nytimes.com/search/restricted/article?res=F00D16F73B550C7B8CDDAE0894DA404482>.

54. See LEVINSON, *supra* note 1, at 253.

questions by making such comments as those quoted earlier in this article. It is one thing to raise questions about religion with nominees who have not acted to make their religious commitments germane to understanding their performance of their public roles. It is another to ask someone who *has* made public profession of the importance of his or her own religion what precisely was the meaning of those professions. Perhaps one might analogize this to the proper scope of a cross-examination. There are, of course, many subjects that are protected against further inquiry if they were not raised on direct examination; but if they *have* come up on direct examination, then there is nothing at all problematic about exploring them further on cross-examination. So it is, I would suggest, with religious views that the nominee has herself declared to be important in defining her identity and conception of public service.

Jack Balkin has pointed out that Article VI is concerned generally with the supremacy of the Constitution.<sup>55</sup> Immediately preceding the No Test Oath Clause, after all, is a requirement that every public official take an oath “to support this Constitution.” Is it required that we read the No Test Oath Clause to protect public officials who might be averse to “support[ing] this Constitution” in circumstances, however remote, where they might come into conflict with one’s religious obligations from even discussing such possibilities before being confirmed for a lifetime position on the bench? One can readily understand the No Test Oath Clause as a means of protecting nominees from inquiry into theological questions that most of us would regard as completely irrelevant, because non-germane, to questions of constitutional fidelity. Wars may have been triggered over the doctrine of transubstantiation, and there may be grave differences of opinion about the Immaculate Conception, but it is difficult indeed to discern the relevance of either to standard-form constitutional interpretation. And, ultimately, one may rejoice in a reading of Article VI that renders it unconstitutional for Congress to require that one believe in God at all in order to hold public office. But it is a decidedly different matter to read the Clause to prevent furthering a conversation that in substantial measure was initiated by nominees themselves.

It would be altogether understandable if one simply rejected the possibility of sophisticated questioning and analysis from bloviating senators ostensibly engaging in the performance of their constitutional duty to “advise and consent” to presidential nominations to the judiciary. Perhaps this disrespect for the senators leads one to be overly tolerant of patently disingenuous responses by nominees when asked, perhaps ineptly, to reflect on the tangled complex jurisdictional overlaps between the domains of God and Caesar. And perhaps it justifies a “prophylactic” reading of Article VI that

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55. Conversation with Jack Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School (2006).



simply rules out-of-bounds any questions at all touching on religious beliefs, even if the questions are sparked by the nominees' own statements prior to nomination. But I am increasingly convinced that such disrespect and concomitant tolerance for evasion is simply another sign that we may be unable to engage in genuinely serious discussion of what, for over two millennia, have been among the most important issues of political theory, whether secular or religious.

I am extremely grateful for the opportunity to raise such questions in what I regard as one of the most interesting law schools in America. I would be even happier, though, if it were possible to discuss these issues in a serious way outside of the walls of the legal academy.