
CHAPTER VII

RELIGION AND POLITICS

Introduction. After reading about the Establishment Clause in Chapter VI, you know that much First Amendment case law focuses on the relationship between church and state. The debates about those two institutions also raise the broader issues of religion and politics that are addressed in this chapter. If the Establishment Clause requires separation of church and state, are individual politicians then required to ignore their religious faith when they hold public office? Should religious belief be completely separated from public policy?

According to Professor Jacob Neusner, “[b]ecause religion is comprehensive, it is fundamentally about power; it therefore cannot avoid politics.” Jacob Neusner, ed., *God’s Rule: The Politics of World Religions 2* (2003). Religions’ values frequently shape what the political system does. See *id.* In this chapter we examine how that shaping should occur. Part A focuses on American presidents and their interpretation of the connection between their religious beliefs and the obligations of the presidential office. We begin with Senator John F. Kennedy’s famous address to the Greater Houston Ministerial Association, which stated a separationist ideal of religion and public service, and move forward to the rejection of that ideal by some later presidents, including George W. Bush.

In the United States, the president is the chief representative of the nation’s civil religion; in Part B we determine what civil religion is by reading its classic description by Professor Robert Bellah. We also compare and contrast civil religion to ceremonial deism and constitutional faith. In Chapter VI you read the Supreme Court’s opinion in *Lee v. Weisman*, the high school graduation prayer case, in which Justice Kennedy asserted that the First Amendment does not allow the government to establish a civil religion. In this chapter we will ask if the justice’s statement provided an accurate *description* of American public life.

Although the constitutional questions about religion and politics focus on the institutions of church and state, institutions are run by individuals of diverse moral and religious commitments. Part C explores political morality, asking how persons of such different backgrounds can live together in a democracy. We focus on the theory of the philosopher John Rawls, a proponent of political liberalism, which holds that when “discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth. . . .” Rawls provides a touchstone against which our presidents and other politicians can be judged, while their experience furnishes a practical challenge to his

philosophical theory. The chapter ends with a practical issue in Part D: should churches and other religious organizations lose their tax exemptions when they endorse candidates for public office?

We begin with John F. Kennedy's campaign for public office in 1960.

A. PRESIDENTS

Address of Senator John F. Kennedy to the Greater Houston Ministerial Association

September 12, 1960.
Rice Hotel, Houston, Texas.

While the so-called religious issue is necessarily and properly the chief topic here tonight, I want to emphasize from the outset that I believe that we have far more critical issues in the 1960 election: the spread of Communist influence, until it now festers only ninety miles off the coast of Florida—the humiliating treatment of our President and Vice President by those who no longer respect our power—the hungry children I saw in West Virginia, the old people who cannot pay their doctor bills, the families forced to give up their farms—an America with too many slums, with too few schools, and too late to the moon and outer space.

These are the real issues which should decide this campaign. And they are not religious issues—for war and hunger and ignorance and despair know no religious barriers.

But because I am a Catholic, and no Catholic has ever been elected President, the real issues in this campaign have been obscured—perhaps deliberately, in some quarters less responsible than this. So it is apparently necessary for me to state once again—not what kind of church I believe in for that should be important only to me—but what kind of America I believe in.

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 a 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 officials—and where religious liberty is so indivisible that an act against one church is treated as an act against all.

For, while this year it may be a Catholic against whom the finger of suspicion is pointed, in other years it has been, and may someday be again, a Jew—or a Quaker—or a Unitarian—or a Baptist. It was Virginia's harassment of Baptist preachers, for example, that led to Jefferson's statute of religious freedom. Today, I may be the victim—but tomorrow it may be you—until the whole fabric of our harmonious society is ripped at a time of great national peril.

Finally, I believe in an America where religious intolerance will someday end—where all men and all churches are treated as equal—where every man has the same right to attend or not to attend the church of his choice—where there is no Catholic vote, no anti-Catholic vote, no bloc voting of any kind—and where Catholics, Protestants and Jews, at both the lay and the pastoral level, will refrain from those attitudes of disdain and division which have so often marred their works in the past, and promote instead the American ideal of brotherhood.

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 be neither humbled by making it the instrument of any 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.

I would not look with favor upon a President working to subvert the First Amendment's guarantees of religious liberty. Nor would our system of checks and balances permit him to do so—and neither do I look with favor upon those who would work to subvert Article VI of the Constitution by requiring a religious test—even by indirection—for if they disagree with that safeguard, they should be out openly working to repeal it.

I want a chief executive whose public acts are responsible to all and obligated to none—who can attend any ceremony, service or dinner his office may appropriately require him to fulfill—and whose fulfillment of his Presidential office is not limited or conditioned by any religious oath, ritual or obligation.

This is the kind of America I believe in—and this is the kind of America I fought for in the South Pacific and the kind my brother died for in Europe. No one suggested then that we might have a “divided loyalty,” that we did “not believe in liberty” or that we belonged to a disloyal group that threatened “the freedoms for which our forefathers died.”

And in fact this is the kind of America for which our forefathers died—when they fled here to escape religious test oaths that denied office to members of less favored churches—when they fought for the Constitution, the Bill of Rights, the Virginia Statute of Religious Freedom—and when they fought at the shrine I visited today, the Alamo. For side by side with Bowie and Crockett died Fuentes and McCafferty and Bailey and Bedillio and Carey—but no one knows whether they were Catholics or not. For there was no religious test at the Alamo.

I ask you tonight to follow in that tradition, to judge me on the basis of fourteen years in the Congress—on my declared stands against an Ambassador to the Vatican, against unconstitutional aid to parochial schools, and against any boycott of the public schools (which I attended myself)—instead of judging me on the basis of these pamphlets and publications we all have seen that carefully select quotations out of context from the statements of Catholic Church leaders, usually in other countries, frequently in other centuries, and always omitting of course, the statement of the American bishops in 1948 which strongly endorsed church-state separation, and which more nearly reflects the views of almost every American Catholic.

I do not consider these other quotations binding upon my public acts—why should you? But let me say, with respect to other countries, that I am wholly opposed to the state being used by any religious group, Catholic or Protestant, to compel, prohibit or prosecute the free exercise of any other religion. And I hope that you and I condemn with equal fervor those nations which deny their Presidency to Protestants and those which deny it to Catholics. And rather than cite the misdeeds of those who differ, I would cite the record of the Catholic Church in such nations as Ireland and France—and the independence of such statesmen as Adenauer and de Gaulle.

But let me stress again that these are my views—for, contrary to common newspaper usage, I am not the Catholic candidate for President. I am the Democratic Party's candidate for President who happens also to be a Catholic. I do not speak for my church on public matters—and the church does not speak for me.

Whatever issue may come before me as President—on birth control, divorce, censorship, gambling, or any other subject—I will make my decision in accordance with these views, in accordance with what my conscience tells me to be the national interest, and without regard to outside religious pressures or dictates. And no power or threat of punishment could cause me to decide otherwise.

But if the time should ever come—and I do not concede any conflict to be even remotely possible—when my office would require me to either 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.

But I do not intend to apologize for these views to my critics of either Catholic or Protestant faith—nor do I intend to disavow either my views or my church in order to win this election.

If I should lose on the real issues, I shall return to my seat in the Senate satisfied that I had tried my best and was fairly judged. But if this election is decided on the basis that 40,000,000 Americans lost their chance of being President on the day they were baptized, then it is the whole nation that will be the loser in the eyes of Catholics and non-Catholics around the world, in the eyes of history, and in the eyes of our own people.

But if, on the other hand, I should win this election, then I shall devote every effort of mind and spirit to fulfilling the oath of the Presidency—

practically identical, I might add, with the oath I have taken for fourteen years in the Congress. For, without reservation, I can, “solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution . . . so help me God.”

Remarks by President George W. Bush on Stem Cell Research

August 9, 2001.

The Bush Ranch, Crawford, Texas.

Good evening. I appreciate you giving me a few minutes of your time tonight so I can discuss with you a complex and difficult issue, an issue that is one of the most profound of our time.

The issue of research involving stem cells derived from human embryos is increasingly the subject of a national debate and dinner table discussions. The issue is confronted every day in laboratories as scientists ponder the ethical ramifications of their work. It is agonized over by parents and many couples as they try to have children, or to save children already born.

The issue is debated within the church, with people of different faiths, even many of the same faith coming to different conclusions. Many people are finding that the more they know about stem cell research, the less certain they are about the right ethical and moral conclusions.

My administration must decide whether to allow federal funds, your tax dollars, to be used for scientific research on stem cells derived from human embryos. A large number of these embryos already exist. They are the product of a process called in vitro fertilization, which helps so many couples conceive children. When doctors match sperm and egg to create life outside the womb, they usually produce more embryos than are planted in the mother. Once a couple successfully has children, or if they are unsuccessful, the additional embryos remain frozen in laboratories.

Some will not survive during long storage; others are destroyed. A number have been donated to science and used to create privately funded stem cell lines. And a few have been implanted in an adoptive mother and born, and are today healthy children.

Based on preliminary work that has been privately funded, scientists believe further research using stem cells offers great promise that could help improve the lives of those who suffer from many terrible diseases—from juvenile diabetes to Alzheimer’s, from Parkinson’s to spinal cord injuries. And while scientists admit they are not yet certain, they believe stem cells derived from embryos have unique potential.

You should also know that stem cells can be derived from sources other than embryos—from adult cells, from umbilical cords that are discarded after babies are born, from human placenta. And many scientists feel research on these type of stem cells is also promising. Many patients

suffering from a range of diseases are already being helped with treatments developed from adult stem cells.

However, most scientists, at least today, believe that research on embryonic stem cells offer the most promise because these cells have the potential to develop in all of the tissues in the body.

Scientists further believe that rapid progress in this research will come only with federal funds. Federal dollars help attract the best and brightest scientists. They ensure new discoveries are widely shared at the largest number of research facilities and that the research is directed toward the greatest public good.

The United States has a long and proud record of leading the world toward advances in science and medicine that improve human life. And the United States has a long and proud record of upholding the highest standards of ethics as we expand the limits of science and knowledge. Research on embryonic stem cells raises profound ethical questions, because extracting the stem cell destroys the embryo, and thus destroys its potential for life. Like a snowflake, each of these embryos is unique, with the unique genetic potential of an individual human being.

As I thought through this issue, I kept returning to two fundamental questions: First, are these frozen embryos human life, and therefore, something precious to be protected? And second, if they're going to be destroyed anyway, shouldn't they be used for a greater good, for research that has the potential to save and improve other lives?

I've asked those questions and others of scientists, scholars, bioethicists, religious leaders, doctors, researchers, members of Congress, my Cabinet, and my friends. I have read heartfelt letters from many Americans. I have given this issue a great deal of thought, prayer and considerable reflection. And I have found widespread disagreement.

On the first issue, are these embryos human life—well, one researcher told me he believes this five-day-old cluster of cells is not an embryo, not yet an individual, but a pre-embryo. He argued that it has the potential for life, but it is not a life because it cannot develop on its own.

An ethicist dismissed that as a callous attempt at rationalization. Make no mistake, he told me, that cluster of cells is the same way you and I, and all the rest of us, started our lives. One goes with a heavy heart if we use these, he said, because we are dealing with the seeds of the next generation.

And to the other crucial question, if these are going to be destroyed anyway, why not use them for good purpose—I also found different answers. Many argue these embryos are byproducts of a process that helps create life, and we should allow couples to donate them to science so they can be used for good purpose instead of wasting their potential. Others will argue there's no such thing as excess life, and the fact that a living being is going to die does not justify experimenting on it or exploiting it as a natural resource.

At its core, this issue forces us to confront fundamental questions about the beginnings of life and the ends of science. It lies at a difficult moral intersection, juxtaposing the need to protect life in all its phases with the prospect of saving and improving life in all its stages.

As the discoveries of modern science create tremendous hope, they also lay vast ethical minefields. As the genius of science extends the horizons of what we can do, we increasingly confront complex questions about what we should do. We have arrived at that brave new world that seemed so distant in 1932, when Aldous Huxley wrote about human beings created in test tubes in what he called a “hatchery.”

In recent weeks, we learned that scientists have created human embryos in test tubes solely to experiment on them. This is deeply troubling, and a warning sign that should prompt all of us to think through these issues very carefully.

Embryonic stem cell research is at the leading edge of a series of moral hazards. The initial stem cell researcher was at first reluctant to begin his research, fearing it might be used for human cloning. Scientists have already cloned a sheep. Researchers are telling us the next step could be to clone human beings to create individual designer stem cells, essentially to grow another you, to be available in case you need another heart or lung or liver.

I strongly oppose human cloning, as do most Americans. We recoil at the idea of growing human beings for spare body parts, or creating life for our convenience. And while we must devote enormous energy to conquering disease, it is equally important that we pay attention to the moral concerns raised by the new frontier of human embryo stem cell research. Even the most noble ends do not justify any means.

My position on these issues is shaped by deeply held beliefs. I’m a strong supporter of science and technology, and believe they have the potential for incredible good—to improve lives, to save life, to conquer disease. Research offers hope that millions of our loved ones may be cured of a disease and rid of their suffering. I have friends whose children suffer from juvenile diabetes. Nancy Reagan has written me about President Reagan’s struggle with Alzheimer’s. My own family has confronted the tragedy of childhood leukemia. And, like all Americans, I have great hope for cures.

I also believe human life is a sacred gift from our Creator. I worry about a culture that devalues life, and believe as your President I have an important obligation to foster and encourage respect for life in America and throughout the world. And while we’re all hopeful about the potential of this research, no one can be certain that the science will live up to the hope it has generated.

Eight years ago, scientists believed fetal tissue research offered great hope for cures and treatments—yet the progress to date has not lived up to its initial expectations. Embryonic stem cell research offers both great promise and great peril. So I have decided we must proceed with great care.

As a result of private research, more than sixty genetically diverse stem cell lines already exist. They were created from embryos that have already been destroyed, and they have the ability to regenerate themselves indefinitely, creating ongoing opportunities for research. I have concluded that we should allow federal funds to be used for research on these existing stem cell lines, where the life and death decision has already been made.

Leading scientists tell me research on these sixty lines has great promise that could lead to breakthrough therapies and cures. This allows us to explore the promise and potential of stem cell research without crossing a fundamental moral line, by providing taxpayer funding that would sanction or encourage further destruction of human embryos that have at least the potential for life.

I also believe that great scientific progress can be made through aggressive federal funding of research on umbilical cord placenta, adult and animal stem cells which do not involve the same moral dilemma. This year, your government will spend \$250 million on this important research.

I will also name a President's council to monitor stem cell research, to recommend appropriate guidelines and regulations, and to consider all of the medical and ethical ramifications of biomedical innovation. This council will consist of leading scientists, doctors, ethicists, lawyers, theologians and others, and will be chaired by Dr. Leon Kass, a leading biomedical ethicist from the University of Chicago.

This council will keep us apprised of new developments and give our nation a forum to continue to discuss and evaluate these important issues. As we go forward, I hope we will always be guided by both intellect and heart, by both our capabilities and our conscience.

I have made this decision with great care, and I pray it is the right one.

Thank you for listening. Good night, and God bless America.

Notes and Questions

1. *A Separationist Requirement?* Four non-Protestant Christians, all Democrats, have run for president on a major party ticket: Catholic New York Governor Al Smith in 1928, Catholic Massachusetts Senators John F. Kennedy in 1960 and John F. Kerry in 2004, and Orthodox Christian Michael Dukakis in 1988. The first Jewish candidate on a major party ticket was Connecticut Senator Joseph Lieberman, an Orthodox Jew, who was a vice presidential candidate as Al Gore's running mate in 2000. See James Rudin, *One More Barrier Shattered*; Al Gore Chooses Joseph Lieberman, *Nat'l Catholic Reporter*, Aug. 25, 2000, at 17. Only Kennedy was successful. In this famous address to the Houston ministers, he stated: "I believe in an America where the separation of church and state is absolute." Is a commitment to the separation of church and state necessary to hold elective office in the United States? Must the separation be absolute? Is it more important for religious minorities to express their commitment to separationism than for mainline Protestants to do so?

1976 was dubbed the “Year of the Evangelical” when the Democratic nominee, former Georgia Governor Jimmy Carter, ran against President Gerald R. Ford, and both candidates, especially Carter, appealed openly to their born-again Christian faith. Carter, who is a Southern Baptist, frequently invoked Kennedy’s memory. He observed that the State of Georgia, with its large Baptist population, had voted for Kennedy in 1960, and that Catholics should feel free to support Carter because, like other Baptists including former president Harry Truman, Carter was committed to the *total* separation of church and state. Speech to National Conference of Catholic Charities, in *The Presidential Campaign 1976, I-2*, at 900–01. Did President George W. Bush, who is a Methodist, violate Kennedy’s and Carter’s separationist ideals when he identified the sacredness of life as a basis for his policy on stem cell research? Does Bush’s address convince you that separation of church and state should not be absolute?

In 2000, after Democratic nominee Al Gore selected Jewish Lieberman as his running mate, many journalists compared Lieberman’s nomination to Kennedy’s, asserting either that Kennedy had opened the door for Lieberman or that Lieberman’s selection demonstrated that the United States had grown more tolerant of religious diversity since 1960. Senator Lieberman, however, while acknowledging that Kennedy’s victory had inspired him to a political career, rejected Kennedy’s separationist approach to politics, arguing that religion and politics had become too separate, and called for a reinfusion of religious values into the public square. In an address at the University of Notre Dame, Lieberman argued:

The line between church and state is an important one, and has always been critical for us to draw. But in recent years, I fear we’ve gone far beyond what the framers imagined in separating the two. So much so that we practically banish religious values and religious institutions from our public life. The public square is now what might be called a discomfort zone for discussing our faith in those settings, ironically making religion one of the few remaining socially acceptable targets of intolerance.

Remarks at the University of Notre Dame, FDCH Political Transcripts (Oct. 24, 2000). Lieberman accordingly made frequent references to God and his values throughout the campaign. After Gore first introduced his running mate, for example, Lieberman responded with a reference to the Hebrew Bible:

Dear friends, I am so full of gratitude at this moment, I ask you to allow me to let the spirit move me as it does to remember the words from Chronicles, which are to give thanks to God—to give thanks to God and declare his name and make his acts known to the people. To be glad of spirit, to sing to God and make music to God and, most of all, to give glory and gratitude to God, from whom all blessings truly do flow. Dear Lord, maker of all miracles, I thank you for bringing me to this extraordinary moment in my life.

See Al Gore Announces Connecticut Senator Joseph Lieberman as His Running Mate, CBS News Transcripts, Aug. 8, 2000.

In the Notre Dame lecture, Lieberman identified religion as the source of civic values:

Without the connection to a higher law, it becomes more and more difficult for people to answer the important day-to-day questions that test us. Why is it wrong to lie or cheat or steal? Why is it wrong to settle conflicts with violence? Why is it wrong to be unfaithful to one's spouse, or to exploit children, or to despoil the environment, or defraud a customer or demean an employee?

See Remarks at the University of Notre Dame, *supra*. Is Lieberman recommending the same role for religion in politics that Bush employed in the stem cell speech? Is Lieberman recommending even greater involvement of religion in politics?

Do you prefer President Bush's and Senator Lieberman's approaches to religion and politics to that of President Kennedy? Why would Bush and Lieberman reject the separationist approach? Is it because they are more religious than Presidents Kennedy and Carter? See Joe Lieberman; Brief Article, *Commonweal*, Sept. 8, 2000, at 5 ("The comparison to Kennedy breaks down when we remember that Kennedy was not an observant Catholic in the same sense that Lieberman is an observant Jew. Indeed, if John Kennedy had been as religious as Lieberman, Kennedy would have lost the 1960 election.").

2. *Religious Tests for Office.* Does the United States Constitution require the president to be committed to free exercise, no establishment and/or separation of church and state? Or does it violate the Constitution to expect a president to take a specific position on these legal questions concerning religion? Should all public officials be held to the same standard regarding their position on religion? According to Article VI, "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." In 1960, the same year that Kennedy ran for president, the governor of Maryland appointed Roy Torcaso as a notary public in Montgomery County. When Torcaso went to the county clerk's office to pick up his commission, he was asked to take the following oath:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of Notary Public of The State of Maryland In and For Montgomery County according to the Constitution and Laws of this State. I, Roy R. Torcaso, do declare that I believe in the existence of God.

Torcaso v. Watkins, 223 Md. 49, 162 A.2d 438, 440 (1960). Would you take such an oath? Why or why not? Would you take the oath if the last sentence were omitted? Is the last sentence more troubling to you than the first sentence?

Torcaso challenged the oath under Maryland law, the Free Exercise Clause and Article VI. In June 1960, the Maryland Court of Appeals dismissed Torcaso's challenge, concluding that Article VI did not apply to the states and that no Free Exercise violation occurred because "[t]he petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office." *Id.* at 442. The court concluded its opinion with the following sentence:

If it be assumed, as has been suggested, that the real deterrent to false swearing, in our time, is not the belief in God but the fear of prosecution for perjury, we cannot say that the distinction between believers and non-believers is so patently inappropriate as a security for good conduct, as to make it invidious under the Fourteenth Amendment.

Id. at 444. How do you assess the Maryland court's ruling?

The United States Supreme Court took jurisdiction of Torcaso's appeal on November 7, 1960, the day before the presidential election, and in 1961 overruled the Maryland court on First Amendment grounds, stating that the fact "that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." The Court did not address whether Article VI applied to the states. See *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961). If *Torcaso* had been decided before Kennedy's election, would Kennedy have needed to make the Houston speech?

Professor Akhil Amar has explained the importance and originality of Article VI (which, of course, was part of the Constitution before the First Amendment) in the following manner:

This formal openness to men of any religion or no religion ran well ahead of contemporary Anglo-American practice. Britain's Act of Settlement required that all future English monarchs join in Anglican communion. As of 1787, eleven American states—nine in their state constitutions, no less—imposed religious qualifications on government officials, and no state constitution explicitly barred religious tests for public servants. Article VI thus broke new ground, as did early American practice under Article II. Thanks to the broad power they enjoyed under the liberal eligibility rules of the Constitution, early American electors were free to choose, and did in fact freely choose, presidents of various denominations and even some men with no explicit religious affiliation, such as Jefferson and Lincoln.

Shortly after Americans ratified the federal Constitution, the state constitutional pattern began to change. Among the original states that revised their constitutions in the decade after 1788, all but one moved toward increased religious openness. Three states eliminated all constitutional language requiring religious tests, and a fourth significantly narrowed the scope of religious exclusion. Delaware moved all the way

from requiring belief in the Holy Trinity in 1776 to a flat prohibition on all religious tests in 1792. The influence of the federal Constitution was obvious on the face of the 1792 document, which tracked the Article VI religious-test clause virtually verbatim. Here, too, the federal Preamble process helped propel the state bandwagon toward modernity.

Akhil Amar, *America's Constitution: A Biography* 166 (2005) (footnotes omitted).

If the religious test prohibition was so influential in the eighteenth century that the states began to revise their constitutions in favor of “increased religious openness,” why was the religious test still an issue for Torcaso and Kennedy in 1960? Are Americans still prejudiced against certain religious groups? Can the Constitution prevent prejudice on the basis of religion? See Noah Feldman, *Not in the Heavens, The New Republic*, Feb. 20, 2006, at 21 (“Those present in Philadelphia in the hot summer of 1787 ultimately decided that no Bill of Rights was necessary in their draft Constitution—the promises of religious liberty and non-establishment were still a couple of years away; but the religious test clause was understood to be so fundamental that it made it into the original core document. It represented a break from practice in several of the states. Everyone understood that it opened the door to Catholics and Jews serving in the national government. The clause could not, on its own, preclude political prejudice; but it did hold out the promise that such bias was fundamentally inconsistent with our constitutional project. In a sense, it opened the door to Justice Louis Brandeis and President John F. Kennedy—and now Justice Samuel Alito.”).

3. *Anti-Catholicism and Anti-Semitism.* Religious discrimination—prejudice against immigrant Catholics—was an issue in Smith’s 1928 campaign and Kennedy’s 1960 election, and Lieberman’s supporters feared anti-Semitism in 2000. In a 2000 article, reporter John Seigenthaler recalled the anti-Catholicism that Kennedy faced, especially in the Southern states. After Kennedy won the Democratic primary in Wisconsin, which had a large Catholic population, his poll numbers “plummeted 60 points” in West Virginia. When Kennedy asked why, an aide explained: “just before Christmas nobody in Kanawa County knew you were Catholic. Now everybody in West-by-God-Virginia knows it.” Flyers in that state portrayed the nominee in the following manner: “One drawing showed Kennedy, a puppet, on the knee of the Pope. The caption read ‘Pull my string, Holy Father.’ Then there was one in which JFK, dressed in clerical garb, was reading from ‘The Roman Bible’ a parody of the 23rd Psalm. It began ‘The Pope is my shepherd. . . .’ Another cartoon had the senator genuflecting to kiss the Pope’s ring with the pontiff saying ‘Render unto me the things in your federal treasury.’ Still another showed Kennedy confessing to a priest who said, ‘For your penance let’s have federal aid to parochial schools.’” Another brochure accused Catholics of assassinating President Abraham Lincoln. See John Seigenthaler, *When Religion Issue Threatened JFK*, *The Tennessean*, Aug. 20, 2000, at 17A. The rumors about Catholic

power reached Rome; the jovial Pope John XXIII, who was elected in 1959, after asking a bishop about Kennedy's electoral chances, "jokingly added, 'Do not expect me to run a country with a language as difficult as yours.'" Theodore Sorensen, *Kennedy* 194 (1965).

Anti-Semitism did not have to await a Jewish candidate; the American Nazi Party leader picketed against Kennedy and his Jewish supporters: "'Kikes for Kennedy! Jews for Jack!' said another sign." Seigenthaler, *supra*; see also Jay Lefkowitz, *The Election and the Jewish Vote*, *Commentary*, Feb. 1, 2005, at 61 (noting that the Jewish vote switched to the Democratic Party after the unsuccessful 1928 presidential campaign of New York Governor Alfred E. Smith and that Jews supported Kennedy). Forty years later, some Jews feared a resurgence of anti-Semitism with Lieberman on the ballot. See Jeffrey H. Birnbaum, *A Jew in 2004?*, *Fortune*, June 9, 2003, at 50 ("But he is also a member of a tiny and long-scorned minority. Plenty of people won't vote for him simply because of his religion, whether they admit it or not. And, I'm ashamed to say, lots of Jews are reluctant to back him as well. After suffering years of discrimination, they fear that having too prominent a Jew on the national scene could spark an outbreak of anti-Semitism."). Others wondered if Americans were ready for a Jewish *presidential* candidate or if the tolerance of 2000 extended only to a vice presidential nominee.

While Kennedy was supposed to be taking orders from the pope, Lieberman was accused of putting Israel's needs above those of the United States. Lieberman "was wounded by the suggestion that he might give superior loyalty to Israel. 'My first and only loyalty is to America,' he said." See Seigenthaler, *supra*. Would it be wrong for a Catholic president to take orders from the pope? For a Jewish president to support Israel? For a Catholic or Jewish president to promote policies that are consistent with Catholic or Jewish teaching? See Jay Lefkowitz, *The Election and the Jewish Vote*, *Commentary*, Feb. 1, 2005, at 61 (a candidate's support for Israel is an important factor in explaining the Jewish vote).

Massachusetts Republican Governor Mitt Romney is reportedly a contender for the presidential nomination in 2008, and a Mormon. Would the tolerance accorded Lieberman in 2000 extend to Romney? Consider the following argument that Americans are not ready to elect a Mormon president:

Americans have indeed become more religiously tolerant, but the first Mormon to run for president will clearly have to change some minds. In the late 1960s, the percentage of Americans who said they would not vote for a Jewish or Catholic presidential candidate was in the double-digits; by 1999, those numbers had fallen to 6 and 4 percent, respectively (roughly the same as the percentage of voters who say they wouldn't vote for a Baptist). Compare that to the 17 percent of Americans who currently say they would have qualms electing a Mormon to the White House. That number hasn't changed one whit since 1967, the year that Romney's father considered a presidential run.

Amy Sullivan, Mitt Romney's Evangelical Problem: Everyone Wants to Believe the Massachusetts Governor's Mormonism Won't Be a Problem if He Runs in 2008. *Think Again*, Wash. Monthly, Sept. 1, 2005, at 13. If the concern with Kennedy was allegiance to the Vatican and the concern with Lieberman was allegiance to Israel, what is the concern with Romney, if Mormonism has its roots in the United States? Do you agree that Americans are not ready to elect a Mormon president? Sullivan also argues that evangelical Christians, not moderate Republicans, pose the greatest threat to Romney's nomination:

Evangelicals don't have the same vague anti-LDS prejudice that some Americans do. For them it's a doctrinal thing, based on very specific theological disputes that can't be overcome by personality or charm or even shared positions on social issues. . . . To evangelicals, Mormonism isn't just another religion. It's a cult.

All of this leaves Romney in a real pickle. Thus far, he's tried to follow in the tradition of other Massachusetts politicians and "pull a John Kennedy," declaring personal faith irrelevant to his qualifications for office. This is a nonstarter. We live in a political era in which, thanks largely to Republicans, candidates are virtually required to talk openly about their religious views. There is no way a Republican, especially in a GOP primary, can avoid the issue—if for no other reason than the press won't let them.

Id. Is it good to live in an era in which "candidates are virtually required to talk openly about their religious views"?

Do you agree with Sullivan's argument about evangelical opposition to Mormon candidates? Do evangelical Christians face discrimination when they run for office? Does evangelical Christianity have a "weirdo factor" that may keep some Christian candidates from election? See Jules Witcover, *Marathon: The Pursuit of the Presidency 1972–1976* 330 (1977) ("Hamilton Jordan's pungent phrase for Jimmy Carter's differentness—'the weirdo factor'—was used in the assumption that an off-beat style of political evangelism, a Southern accent, and, above all, an out-front religiosity were detriments among most voters outside the South.').

Do you think that Muslim, Buddhist, or Hindu presidential candidates would be acceptable to the American people? Do you think they would be more acceptable if they took the Kennedy approach rather than the Bush approach?

4. *Theology and Separation.* One of the leading critics of Kennedy's candidacy was Paul Blanshard, who argued in his books, *Freedom and Catholic Power* and *Communism, Democracy and Catholic Power*, that American Catholics were dangerous to the American political system because of their allegiance to the Vatican; indeed, they were as threatening to freedom as the Soviets. Blanshard's books were popular in the intellectual climate of the 1940s and 1950s, and his ideas were praised by leading Americans such as John Dewey, Albert Einstein, Bertrand Russell,

McGeorge Bundy, and Horace Kallen. See John T. McGreevy, *American Freedom and Catholic Power* 166–68 (2003).

One of Blanshard's fiercest critics was the New York Catholic Jesuit priest and theologian John Courtney Murray. At the time that Kennedy was running for president, the Roman Catholic Church condemned the separation of church and state and taught that Catholicism should be the established religion of every nation. Catholics were taught to tolerate the non-establishment of Catholicism but to aspire to establishment. In other words, they could accept the First Amendment's separation as a matter of expediency but should prefer an established Catholic Church (like Spain's) as a matter of principle.

Murray creatively challenged this theological opposition to separation in a series of scholarly articles published in the 1940s and 1950s. He set the church-state debate in historical context by arguing that the popes' condemnation of European liberalism should not extend to the American setting. In Europe, separation of church and state had restricted the freedom of the church. In contrast, in the United States, separation of church and state protected religious liberty. Hence, Murray argued, American Catholics should not merely tolerate the First Amendment but instead accept it enthusiastically, as good law that promoted freedom.

In 1960, Murray's book, *We Hold These Truths: Catholic Reflections on the American Proposition*, received significant attention. Murray appeared on the cover of *Time* magazine after Kennedy's election; the priest and the president had demonstrated in different ways that Catholicism was compatible with the United States Constitution, and that Blanshard and others were wrong to suggest that Catholics were interested in upsetting the constitutional order. The Catholic Church, however, did not officially accept Murray's ideas until 1965, when the Second Vatican Council (a meeting of the world's Catholic bishops that was called by Pope John XXIII) promulgated a document, the *Declaration on Religious Freedom*, which held that every human person possesses a right to religious freedom that must be protected by the state. See John Courtney Murray, trans., *Dignitatis Humanae* (The Declaration on Religious Freedom), in Walter M. Abbott & Joseph Gallagher, eds., *The Documents of Vatican II* 673–98 (1966); Thomas T. Love, *John Courtney Murray: Contemporary Church-State Theory* (1965).

Were Blanshard and others correct to accuse Catholic citizens of disloyalty because of their religious views? Was Kennedy morally and religiously obligated to follow the church's teaching against separation in 1960? The Catholic bishops supported aid to parochial schools while Kennedy opposed it. Should he have voted with his church? Do you agree that Kennedy, as he promised in his Houston speech, should have resigned if the demands of office would violate his conscience? Or should presidents follow their conscience and stay on the job? Does Bush have the more appropriate approach, mixing conscience and personal religious belief with official decision making?

President Carter's Southern Baptist Church taught a strict theological doctrine of absolute separation of church and state. This commitment meant that Baptists both refused government funding for their own associations and opposed the use of their tax dollars to support other religions. Carter opposed numerous efforts by the Democratic Congress to pass tuition tax credits for parents of private school children. Should Carter have put aside his theological commitment to separation and supported the members of his party who wanted financial support for religious schools? Does it matter that, during the nineteenth century, some Baptists opposed aid because they were "intensely anti-Catholic"? See Rufus B. Spain, *At Ease in Zion: A Social History of Southern Baptists, 1865-1900* 34 (1967).

Southern Baptists also opposed U.S. recognition of the Vatican and reacted fiercely when an earlier Southern Baptist president, Harry Truman, nominated General Mark Clark to be Ambassador to the Vatican. See Leo Pfeffer, *Church, State and Freedom* 302 (1967). Ironically, although Kennedy did not appoint a representative to the Vatican, Carter appointed David M. Walters, the first Catholic envoy to the Vatican. Some Baptists were outraged, and the President of the Southern Baptist Convention sent a telegram to the White House, arguing that the president had violated "the spirit and probably the letter" of the First Amendment. See Telegram from Jimmy R. Allen to President Jimmy Carter (July 8, 1977) (Name File, Southern Baptist Convention, Jimmy Carter Presidential Papers, Jimmy Carter Presidential Library); Carter's Vatican Venture, 30 *Church & State* 171 (Sept. 1977). Do you agree?

Legislation approving an ambassador to the Vatican passed during Ronald Reagan's presidency. When Baptist ministers challenged Reagan's appointment of Vatican Ambassador William Wilson on Establishment Clause grounds, the courts ruled that the judiciary cannot review the appointment of ambassadors because the Constitution commits that choice to executive discretion. See *Phelps v. Reagan*, 812 F.2d 1293 (10th Cir. 1987); *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194 (3d Cir. 1986), cert. denied, *American Baptist Churches in U.S.A. v. Reagan*, 479 U.S. 914 (1986).

Now that you know that the appointment of an ambassador or personal representative to the Vatican is a matter of unreviewable presidential discretion, how do you assess Carter's decision to appoint one and Kennedy's decision not to? Does it surprise you that "[o]nly in his appointment of an envoy to the Vatican did Carter significantly deviate from strict separation"? Richard V. Pierard & Robert D. Linder, *Civil Religion and the Presidency* 231, 241 (1988). Does that mean that President Carter was more influenced by his Baptist faith than by the Constitution? Or are Baptist separation of church and state and First Amendment separation of church and state the same thing?

In 2000, journalist columnist Ellen Goodman criticized "a disconnect between Lieberman's public support for women's rights and his observance of a traditional Judaism that bars women rabbis and consigns women to balcony seating for worship." David Gibson, *Jews Switch from Kvelling to*

Kvetching About Lieberman, Newhouse News Service, Oct. 25, 2000. Is this “disconnect” worthy of public criticism or a commendable action based on separation of church and state?

Other critics feared a vice president or president who faithfully observes the Sabbath, as Lieberman does. Lieberman stops three times a day to pray, wears a yarmulke while he prays, and keeps a kosher diet, carrying kosher meals with him on the road. On Friday night and Saturday he does not drive a car, work or turn on lights. Lieberman attended the Saturday impeachment proceedings against President Clinton by walking to the Capitol. Orthodox Jews are allowed to break the Sabbath if a life is at stake. See J. Michael Parker, *About Orthodoxy; Observers Face Some Challenges*, San Antonio Express–News (Texas), Aug. 19, 2000, at 1A. Should a commitment to the Sabbath prevent Lieberman or other Orthodox Jews from becoming president? Is this different from commitments held by Protestant presidents in the past?

5. *Religious Criticism of Politicians.* Should members of churches or synagogues criticize their representatives on religious grounds, as the Baptists did President Carter when he appointed a personal representative to the Vatican? In 1984, after Catholic New York Governor Mario Cuomo gave a speech explaining why he supported laws allowing abortion despite his own moral and religious opposition to it, New York’s Archbishop John O’Connor criticized both Cuomo and vice presidential candidate Geraldine Ferraro for misrepresenting the church’s teaching about abortion. Ferraro had signed a 1982 letter stating that the Catholic position on abortion was “not monolithic.” See Ari L. Goldman, *New York’s Controversial Archbishop*, N.Y. Times, Oct. 14, 1984, at 38. In 2004, several bishops withheld communion from presidential candidate John Kerry because of his support for abortion rights. See Mark I. Pinsky, *Kerry Takes Communion During Visit to Orlando*, Orlando Sentinel (Florida), Nov. 3, 2000, at A14. In 2000, the head of the Anti-Defamation League (ADL) criticized Joseph Lieberman for using too much religion in his political campaign (“Appealing along religious lines or belief in God,” the ADL wrote to Lieberman, “is contrary to the American ideal.”), while other Jews thought that he was not religious enough. See David Gibson, *Jews Switch from Kvelling to Kvetching About Lieberman*, Newhouse News Service, Oct. 25, 2000. Some Jewish leaders were especially offended after Lieberman told Don Imus that “he ‘skips’ the traditional daily prayer, recited by the strictly Orthodox, in which a Jewish man thanks God for not being created a woman. Lieberman then compounded his trouble by fudging on whether Judaism bars intermarriage.” *Id.* Should church leaders criticize politicians only when they disagree with the candidates’ interpretation of theological teachings? Is such criticism a reason that politicians should not discuss theology publicly?

Churches and synagogues may lose their tax exemptions for endorsing religious candidates; we examine whether this tax rule limits speech critical of presidents in Part D.

6. *Presidential Conscience and Policy.* Should presidents allow their political positions to be influenced by their religious beliefs? See generally Robert Audi, *Religious Commitment and Secular Reason* (2000); Kent Greenawalt, *Private Consciences and Public Reasons* (1995). The separationist presidents believed that their religion should not be the basis of public policy. Although Jimmy Carter opposed abortion because he thought that Jesus would never condone it, he supported *Roe v. Wade* because of his commitment to the separation of church and state. President George W. Bush treated both abortion and stem cell research in a different manner: “he framed it as a moral dilemma. He summoned members of the clergy and ethicists, as well as scientists, to counsel him. He prayed over it.” Jodi Wilgoren & Bill Keller, *Kerry and Religion: Pressure Builds for Public Discussions*, *N.Y. Times*, Oct. 7, 2004, at A30. Moreover, Bush included theologians on his Bioethics Committee and only three of the committee’s eighteen members were full-time research scientists. Elizabeth Blackburn, *Bioethics and the Political Distortion of Biomedical Science*, 350 *New Eng. J. Med.* 1379 (2004).

George W. Bush, the son of President George H.W. Bush, attended both Episcopal and Presbyterian churches with his parents and joined the Methodist Church after his marriage to Laura Welch. See Howard Fineman, *Bush and God*, *Newsweek*, Mar. 10, 2003, at 22. Bush referred frequently to his Christian faith on the presidential campaign trail. The most direct instance occurred in the Republican debate during the Iowa caucuses, when the candidates were asked to name their favorite “philosopher-thinker,” and Bush named “Christ, because he changed my heart.” When asked to explain his answer, Bush added that people who had not experienced Jesus could not understand what he meant: “Well, if they don’t know, it’s going to be hard to explain.” Bush’s answer sparked a debate over whether such explicitly Christian language excluded and alienated non-Christian voters and if it helped him attract the evangelical vote. See Frank Bruni, *Bush Tangles With McCain Over Campaign Financing*, *N.Y. Times*, Dec. 14, 1999. Do you think a presidential candidate should be so explicit about his religious faith? Do you understand what Bush meant?

Bush’s commitment to Christianity is directly reflected in his abortion and stem cell research policies. According to Richard Land, President of the Southern Baptist Convention’s Ethics and Religious Liberty Commission, Bush “believes that the Bible is very clear that life begins at conception, that God is involved when conception takes place, which is what the Bible clearly teaches.” *The Jesus Factor: A President and His Faith*, PBS, Frontline, available at pbs.org. During his first presidential term, Bush signed three major bills supporting embryonic life, and used executive orders and judicial appointments for pro-life ends. During his second term, Bush appeared to accomplish his campaign promise to appoint pro-life Supreme Court justices with the confirmations of Chief Justice John Roberts and Associate Justice Samuel Alito to the United States Supreme Court. And, of course, you read President Bush’s policy on stem cell research on p. 471, *supra*. When Congress sought to surpass the Bush policy limits by passing legislation allowing research on embryonic stem

cells no matter when created, Bush exercised the first veto of his presidency to stop the legislation. See Janet Hook, *Stem Cell Bill Vetoed; Override Effort Fails*, L.A. Times, July 20, 2006, at A1.

Is it appropriate for Bush to base his presidential policies on his biblical belief in the sanctity of life? What if he based his policy on the argument that the embryo receives a soul at the moment of conception or implantation? Are the biblical and ensoulment arguments less valid than basing policy on the latest scientific evidence? Which religious views should be the basis of stem cell policy? See R. Alta Charo, *Case Study: The Ethics of Control*, 2 *Yale J. Health Pol'y L. & Ethics* 143 (2001).

7. *Supreme Court Justices.* Does the religious composition of the courts matter? According to Professor Feldman:

Through 1990, 91 of 104 Supreme Court Justices came from Protestant backgrounds. Eight Justices were Roman Catholic: Roger Taney (appointed in 1835), Edward D. White (1894), Joseph McKenna (1897), Pierce Butler (1922), Frank Murphy (1939), William Brennan (1956), Antonin Scalia (1986), and Anthony Kennedy (1987). Five Justices were Jewish: Louis Brandeis (1916), Benjamin Cardozo (1932), Felix Frankfurter (1939), Arthur Goldberg (1962), and Abe Fortas (1965). [] James F. Byrnes, who served as an Associate Justice for only the 1941–1942 term, was born into a Roman Catholic family, but converted to Episcopalianism when he married in 1906. More recently, two more Jewish Justices have been appointed: Ruth Bader Ginsburg and Stephen G. Breyer. Clarence Thomas was born a Baptist, raised a Catholic, began attending an Episcopal Church, and most recently, returned to Catholicism. In fact, if Thomas is categorized as Catholic, then 1996 marked the first time that a majority of the Justices were not Protestant.

Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine and the Future*, 6 *U. Pa. J. Const. L.* 222, 232 n.41 (2003).

With the confirmation of Justice Samuel Alito to the United States Supreme Court in 2006, the Court for the first time was composed of a majority of Catholics, as Alito joined Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas to form the new majority. Does this event suggest that the United States is more religiously tolerant than it was in 1960, or merely more tolerant of Catholics? Compare the appointment of Jewish Justice Louis Brandeis to the Supreme Court by President Woodrow Wilson in 1916, with its attendant charges of anti-Semitism, with those of two Jewish Justices, Ruth Bader Ginsburg and Stephen Breyer, by President Clinton in the 1990s. According to Professor White, “[a]n undercurrent of anti-Semitism ran through the opposition to Brandeis, reflected in a letter to Taft by Homer Albers, Dean of Boston University Law School, who stated that the ‘difference between William H. Taft and Louis D. Brandeis’ was that ‘the former is distinguished in Jurisprudence and the latter in Jewish prudence!’” See G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology*

and Judicial Reputations, 70 N.Y.U. L. Rev. 576, 596 (1995); see also Philippa Strum, Louis D. Brandeis: Justice for the People 293 (1984); Edward A. Purcell, Jr., Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America 117 (2000); Henry J. Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court 182 (3rd ed. 1992); Winston E. Calvert, Judicial Selection and the Religious Test Clause, 82 Wash. U. L.Q. 1129, 1135 n.27 (2004) (“Symbolic importance” of the “growing acceptability” of religious minorities allegedly warrants denominational balance as an important goal in selecting justices.).

Are Jews appointed to the Court because of their religious background or their cultural background? See Sanford Levinson, Who Is a Jew(ish Justice)?, 10 Cardozo L. Rev. 2359, 2362 (1989) (finding that Justices Brandeis and Frankfurter may have been appointed more for their Jewish cultural identification than their Jewish religious identification). Does it surprise you that Jewish justices vote in favor of separation of church and state and for minority religious claimants more frequently than do other judges? See Gregory C. Sisk, How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases, 76 U. Colo. L. Rev. 1021, 1029 (2005). Would you expect Jewish judges to be separationist judges and Catholics to be accommodationist? See Frank J. Sorauf, The Wall of Separation: The Constitutional Politics of Church and State 220 (1976) (“Nothing explains the behavior of the judges in these church-state cases as frequently as do their own personal religious histories and affiliations. Jewish judges vote heavily separationist, Catholics vote heavily accommodationist, and Protestants divide.”). See also Gregory C. Sisk & Michael Heise, Judges and Ideology: Public and Academic Debates About Statistical Measurement, 99 Nw. U. L. Rev. 743, 764 (2005); Justice Ruth Bader Ginsburg, From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?, 41 Brandeis L.J. 229 (2002); Marc Galanter, A Vocation for Law? American Jewish Lawyers and Their Antecedents, 26 Fordham Urb. L.J. 1125 (1999).

Would William Rehnquist have been a better justice if he had been a better Lutheran? See Marie A. Failing, The Justice Who Wouldn't Be Lutheran: Toward Borrowing the Wisdom of Faith Traditions, 46 Clev. St. L. Rev. 643 (1998) (discussing Justice Rehnquist's Lutheran beliefs and how that influenced his role on the Supreme Court).

Do you think that the justices' votes on their cases are influenced by their religious upbringing? Compare Jay Sekulow, Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions xii–xiii (2005) (“In every one of the cases discussed in this book, the opinion of the justices coincided with the official positions held by the religious denomination that had influenced them.”) with Noah Feldman, Not in the Heavens, *The New Republic*, Feb. 20, 2006, at 21 (“And that is precisely the point: there is no demonstrable direct relationship between justices' religious background or beliefs and their jurisprudence.”).

What should happen if a justice's religious views conflict with the law? Do you agree with Justice Antonin Scalia that judges who disagree with the morality of the death penalty should resign rather than vote against its imposition? See Antonin Scalia, *A Call for Reckoning: Religion and the Death Penalty*, University of Chicago, Jan. 25, 2002, available at <http://pewforum.org/deathpenalty/resources/transcript3.php3>. How does this compare to Kennedy's statement that the choice between violating his conscience and violating the national interest would end in his resignation? See also Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 *Cath. U. L. Rev.* 709 (2004); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 *DePaul L. Rev.* 1047, 1048 (1990); Howard J. Vogel, *The Judicial Oath and the American Creed: Comments on Sanford Levinson's The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 *DePaul L. Rev.* 1107, 1109 (1990); Rodney K. Smith, *Treating Others As Our Own: Professor Levinson, Friendship, Religion, and the Public Square*, 38 *Tulsa L. Rev.* 731 (2003); Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 *Marq. L. Rev.* 383 (1998).

Before President George W. Bush nominated Samuel Alito to the Court, he named his White House aide, Harriet Miers, an evangelical Christian. According to Professor Marsden, evangelical Christians are not a denomination, but find "conceptual unity" in five ideas: "the final authority of Scripture; the historical character of God's saving work in Scripture; belief in salvation through trust in Jesus Christ; the importance of evangelism and missions; and the importance of a spiritually transformed life." George Marsden, *Evangelicalism and Modern America* x (1984). Some people criticized the president for choosing a nominee based on her religious opinions. Others suggested that the nomination was withdrawn after the president's evangelical supporters questioned Miers' commitment to their positions against abortion and gay rights. Was Miers' Christianity relevant to her appointment to the Court? If Miers were a pro-life atheist, would her appointment to the Court be more appropriate? See Carolyn Lochhead, *Miers' Religion Helps Define Her, President Says*, *S.F. Chronicle*, Oct. 13, 2005, at A1; Joe Solmonese, *Original(ist) Sin, Conservatives' Actions Belie Their Stated Beliefs*, *Texas Lawyer*, Oct. 24, 2005, at 38.

Miers was the first Evangelical nominated to the Court since 1931. Does that fact, and her failed nomination, prove that there is still religious discrimination against evangelicals in the United States? Are evangelical Protestants now a distinct group from other Protestants? See Editorial Page, *An "Evangelical Seat"?*, *L.A. Times*, Oct. 17, 2005, at B10 ("A generation ago, Christian evangelicals were largely viewed as part of the broader white Protestant majority; today, they increasingly identify and organize themselves as a minority group."). Should there be an Evangelical seat on the Supreme Court? A Jewish seat? A Catholic seat? Is a Catholic, or Evangelical or Jewish seat on the Supreme Court different from a Woman's seat or a Black or Hispanic seat? Does it violate Article VI to recognize religious seats on the Supreme Court? See *id.* Can Muslim judges

be faithful to the Koran and the United States Constitution? See Sonsyrea Tate, Prince George's Judge Lectures on Islam, *The Wash. Informer*, Sept. 29, 2005 (describing Judge Hassan El-Amin, one of the dozen or so Muslim judges in the country, who believes that "the Qur'an, the Muslims' holy book, and the U.S. Constitution are compatible.").

8. *Ministers, Clergy and Politics*. Is it constitutional to bar ministers and rabbis from political office because of the separation of church and state? Although thirteen states originally banned clergy from office, by 1977 only Tennessee did so. The Tennessee Constitution barred ministers and priests from holding seats in the state legislature:

Whereas ministers of the gospel are, by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no minister of the gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the legislature.

Tenn.Const., Art. VIII, § 1 (1796). Paul McDaniel was a Baptist minister who filed as a candidate for delegate to the state constitutional convention. His opponent, Selma Cash Paty, sued to remove his name from the ballot. The Tennessee Supreme Court ruled that his disqualification from office did not burden McDaniel's religious belief (free exercise) and that the Establishment Clause's concern to avoid divisiveness in politics justified his disqualification. *Paty v. McDaniel*, 547 S.W.2d 897, 903 (Tenn. 1977). Was the Tennessee court's ruling consistent with *Torcaso v. Watkins*, supra, pp. 476-77?

The United States Supreme Court ruled that Tennessee had encroached upon McDaniel's religious freedom by conditioning his access to public office upon his abandonment of his religious faith. The plurality concluded, however, that *Torcaso* was not controlling because *Torcaso* involved religious belief (which the state may absolutely not regulate) and *McDaniel* covered religious conduct, which the state may regulate. The Court subjected regulation of religion to strict scrutiny under *Sherbert v. Verner* and *Wisconsin v. Yoder*, and rejected Tennessee's argument that the Establishment Clause was an interest of "the highest order" that justified the restriction because ministers might promote their own religion in office; "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *McDaniel v. Paty*, 435 U.S. 618, 629 (1978).

Is the distinction between belief and action persuasive in this context? See *id.* at 634 (Brennan J., concurring) (freedom of belief encompasses practicing religion to earn a livelihood). Is *McDaniel* really distinguishable from *Torcaso*? See *id.* at 634-35 ("The plurality . . . draws what I respectfully suggest is a sophistic distinction between that holding and Tennessee's disqualification provision. . . . I simply cannot fathom why the Free Exercise Clause "categorically prohibits" hinging qualification for office on the *act* of declaring a belief in religion, but not on the act of discussing that belief with others."). Justice Brennan also concluded that the clergy

provision violated the Establishment Clause. Do you agree that banning clergy from political office is an unconstitutional establishment of religion? Or do you agree with Tennessee's argument that the Establishment Clause gives reason for the state to keep ministers out of politics in order to eliminate "religious divisiveness or strife"? *Id.* at 646.

Justice White invalidated the provision under the Equal Protection Clause, arguing that Free Exercise did not apply because *McDaniel* was not compelled to abandon his ministry. Is that a better constitutional argument? Is Article VI a better basis for *Torcaso* and *McDaniel* than either the Free Exercise or the Establishment Clause?

Why would a member of the clergy want to hold political office? Should a priest, minister, rabbi or imam fear that his or her religious work will be diminished by engaging in political activity? Or should he view the political arena as the appropriate place to fulfill a religious calling to seek justice? J. Philip Wogaman, a professor of social ethics and minister to President Clinton, argues that two traditional Christian approaches to religion and politics are now outdated. The first is "the traditional Roman Catholic viewpoint that the church should use the state for its own institutional enhancement and to secure cultural victories over competing religious bodies." This perspective died at the Second Vatican Council thanks to the work of John Courtney Murray, *supra*, p. 481. The second perspective that has "virtually collapsed" is the Protestant fundamentalism that held that "the church should have nothing to do with politics since the church's only proper business is the saving of individual souls." Many evangelical Christians abandoned this viewpoint and moved into American politics in the mid-twentieth century; they were especially energized to political activity in opposition to the presidency of evangelical Jimmy Carter. See J. Philip Wogaman, *Christian Perspectives on Politics* 31–32 (1988). Are these positions really outdated or are they faithful to the Christian message to seek justice, or to render unto Caesar the things that are Caesar's? But see John Howard Yoder, *The Politics of Jesus* (1972) ("withdrawal" from the world is the wrong way to think of the Christian church; the church lives its own type of witness to the world as an alternative community.).

Christians may adopt numerous other perspectives toward political activity. They may, for example, reject politics in any form as pacifists or anarchists, or pursue the "liberation of the world's oppressed peoples from their bondage," or promote democracy as a high political value. Wogaman, *supra* at 33–91. They may believe that politics is immoral or amoral or moral. See Leslie Griffin, *The Problem of Dirty Hands*, 17 *J. Rel. Ethics* 31 (1989). Traditionally, African-American ministers such as Martin Luther King, Jr., Jesse Jackson, or Al Sharpton were encouraged to run for political office or to support political candidates from the pulpit. See Joseph R. Washington, Jr., *Black Religion and Public Policy: Ethical and Historical Perspectives* v (1978). The Black Churches served as the first independent institutions for African-Americans in the United States. Because these churches were political as well as religious institutions, they did not emphasize separation of church and state, but instead have "always per-

ceived the ineluctable relationship between religious belief and political action.” See Robert Michael Franklin, *Religious Belief and Political Activism in Black America: An Essay*, 43 *J. Rel. Thought* 63 (1986–87); see also Peter J. Paris, *Black Religious Leaders: Conflict in Unity* (1991); Peter J. Paris, *The Social Teaching of the Black Churches* (1985); Leslie Griffin, *Catholics, Blacks, Evangelicals: Three Versions of the Public Church*, 1 *New Theology Rev.* 20–42 (1988). In contrast, American Roman Catholic priests traditionally avoided political office until the Second Vatican Council, when several priests and nuns ran for and were elected to office in order to promote the church’s commitment to social justice. Pope John Paul II, however, ordered them to abandon political office because it was inconsistent with their Christian ministry. See Madonna Kolbenschlag, ed., *Between God and Caesar: Priests, Sisters and Political Office in the United States* (1985).

Would you vote for a member of the clergy to become president?

B. CIVIL RELIGION

Given the concerns about separation of church and state, religion and presidents in Part A, do you think the following addresses by the presidents make appropriate or inappropriate use of religious language?

Second Inaugural Address of Abraham Lincoln

March 4, 1865.

FELLOW-COUNTRYMEN: At this second appearing to take the oath of the Presidential office there is less occasion for an extended address than there was at the first. Then a statement, somewhat in detail, of a course to be pursued seemed fitting and proper. Now, at the expiration of four years, during which public declarations have been constantly called forth on every point and phase of the great contest which still absorbs the attention and engrosses the energies of the nation, little that is new could be presented. The progress of our arms, upon which all else chiefly depends, is as well known to the public as to myself, and it is, I trust, reasonably satisfactory and encouraging to all. With high hope for the future, no prediction in regard to it is ventured.

On the occasion corresponding to this four years ago, all thoughts were anxiously directed to an impending civil war. All dreaded it, all sought to avert it. While the inaugural address was being delivered from this place, devoted altogether to saving the Union without war, insurgent agents were in the city seeking to destroy it without war—seeking to dissolve the Union and divide effects by negotiation. Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish, and the war came.

One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These