

SEPARATING CHURCH AND STATE AGAINST
THE CULTURE OF A CHRISTIAN PUBLIC*Andrew Jadick**

I. INTRODUCTION

The First Amendment of the United States Constitution reads in pertinent part, "Congress shall make no law respecting an establishment of religion . . ." ¹ The United States is known to be founded on this separation of Church and State,² which ensures that not only is the government prohibited from restricting a person's right to practice his or her own religion freely, but also prevents any one religion from having an excessive influence over the government.³ This is a noble ambition and one that Americans should certainly be proud of, but the actual implementation of this idea has been less than perfect. When the writers of the Constitution constructed this part of the country's framework, they failed to take into account the religious and moral norms of the world in which they lived.⁴ Those guarantees of the Establishment Clause certainly seem like principles grounded in the idea of equality and fair treatment of all citizens, but how these clauses are read is entirely dependent on culture.⁵ It is possible to read the aforementioned clause and interpret it as "no other religion can be forced upon me and the government cannot prevent me from practicing my religion in any way I deem appropriate." This type of viewpoint, though valid to some, still fails to take into account the effect of the amendment on the government as a whole and on citizens who may not share the same religious beliefs. As a result, those in a religious majority could reason that the government is protecting them from outsiders rather than limiting involvement in

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¹ U.S. CONST. amend. I.

² Jason Lewis, *Military Symbolism or Religious Preference? The Mount Soledad Cross Controversy*, 14 PUB. INT. L. REP. 60 (2008).

³ Stephen M. Feldman, *Principle, History and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 833–34 (1996).

⁴ *Id.* at 844.

⁵ See Michael Kent Curtis, *A Story for All Seasons: Akhil Reed Amar on the Bill of Rights*, 8 WM. & MARY BILL RTS. J. 437, 443 (2000). The Bill of Rights also guarantees equality for all men, which the idea of slavery directly contradicts, yet continued to be an accepted practice until almost 100 years after the passing of the Constitution. *Id.*

any religion. If the majority of the population follows this reasoning, the influence on elections and public policies could lead to a discriminatory and even a hostile national culture towards those in the religious minority.

This Note will explore how religion has played a role in influencing elections and elected leaders in the United States, in addition to how the government's efforts to curtail religious influence in politics has conflicted with a public desire for Christian morals. Section II will describe the government's initial efforts to prevent the undue influence of religion on the government, and the purposes of Constitutional provisions established to further this objective. Section III will demonstrate the central role Christian Protestantism has played in creating and enforcing public policies in contrast to these separation provisions as a result of being the accepted norm of the population. Section IV will investigate this influence over government elections in both presidential races as well as local elections. Finally, I will conclude that while the Establishment Clause clearly provides for a separation between Church and State, the government should assume a more active role in limiting political influence from the majority religious culture that may cause harm to citizens of minority religions.

II. FEDERAL LAWS SEPARATING CHURCH AND STATE

A. The History of the First Amendment

Much of the history of the Establishment Clause of the First Amendment was discussed by the Supreme Court in its first "Religion Clause" case, *Reynolds v. United States*.⁶ The roots of this clause can be traced back to the Virginia Statute for Religious Freedom,⁷ which was written by Thomas Jefferson and received assistance in passing the Virginia General Assembly by James Madison.⁸ This particular statute disestablished the Church of England in Virginia and notably gave freedom of religion to people of all faiths.⁹

Jefferson and Madison sought to include a similar provision in the Constitution of the United States.¹⁰ When the original draft

⁶ 98 U.S. 145 (1878).

⁷ 12 HENING'S STAT. 84 (1785).

⁸ Mark J. Chadsey, *Thomas Jefferson and the Establishment Clause*, 40 AKRON L. REV. 623, 627-28 (2007).

⁹ Richard Albert, *Religion in the New Republic*, 67 LA. L. REV. 1, 29 (2006).

¹⁰ *Reynolds v. United States*, 98 U.S. 164 (1878).

did not include such a clause, a handful of states expressed their concern, and it was eventually added.¹¹ In a future letter to the Danbury Baptist Association, Jefferson took the opportunity to explain the scope of the clause, stating “that the legislative powers of the government reach actions only and not opinion” with the act “building a wall of separation between church and State.”¹² As Thomas Jefferson is regarded as the leading authority of the Establishment Clause,¹³ his statement demonstrates that the purpose of this provision was to prevent Congress from passing laws that could attempt to control opinion, while still allowing Congress the authority to regulate physical actions.¹⁴

There has been much discussion around how the Establishment Clause directly affects government speech.¹⁵ Previous interpretations have suggested that the purpose of the First Amendment was to either create a complete wall of separation between church and state, or generally endorse Christianity as long as they avoided legal coercion.¹⁶ Another, more agreeable interpretation is that the Framers sought to permit government religious speech, but only by utilizing a vocabulary that is inclusive of all faiths.¹⁷ This includes doing away with the notion that America’s founders intended the country to be solely a “Christian nation” rather than a land for all faiths.¹⁸ The Framers refused to include references to “Jesus” in passing bills, and while “God” was certainly referred to many times, it was done so in a way that utilized multiple meanings.¹⁹ Rather than relying on Christian-centric language reflecting the majority culture, they sought to

¹¹ *Id.*

¹² *Id.*

¹³ Chadsey, *supra* note 8, at 623–24.

¹⁴ See e.g., Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U.L. REV. 353 (2004) (finding that in Jefferson’s rationalist view, the right to the free exercise of religious belief was beyond the reach of governmental control, but he believed government could control religious conduct that might conflict with otherwise neutral general laws). *Id.*

¹⁵ See Michael I. Meyerson, *The Original Meaning Of “God”: Using The Language Of The Framing Generation To Create A Coherent Establishment Clause Jurisprudence*, 98 MARQ. L. REV. 1035 (2015).

¹⁶ *Id.* at 1038.

¹⁷ *Id.* This type of speech could be accomplished by applying “theologically equivocal language” while avoiding “sectarian language” and religious directive by the government that would apply only to select faiths. *Id.* at 1039.

¹⁸ *Id.* at 1071.

¹⁹ *Id.* at 1082–83. “Their goal was to produce language that could be embraced by those with orthodox religious views but still permit all others to feel included.” *Id.* at 1083.

strike a balance of general, non-sectarian references to religion and God.²⁰

B. The “No Religious Test” Clause

Not only did the new United States government include the freedom of religion from government as a basic right, but the writers of the Constitution also saw fit to include a clause forbidding any religious tests as a prerequisite for holding public office.²¹ This provision may seem like common sense today, but at the time, it represented a significant departure from the traditions of the English.²² This may have been even more surprising, as it was not uncommon for some original states to include religious tests for potential political officials.²³

There have been several explanations for including this prohibition on the religious tests as part of the clause.²⁴ One popular stance is that the oath of office to uphold the Constitution should be viewed as a substitute for any religious oaths that the colonists may have been used to at the time.²⁵ Under this view America has no unifying national Church (unlike England), but rather is unified through a national civil religion of “worshipping” the Constitution.²⁶ Therefore, there can be no religious test for public office because there is no room for any other “religion.”²⁷

Additionally, including this clause could have been another way for the United States to differentiate itself from a European environment by securing a more civil community.²⁸ This would

²⁰ *Id.*

²¹ U.S. CONST. art. VI, cl. 3. “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” *Id.*

²² Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2110 (1996). At the time, anyone who assumed public office had to take an oath to God and kiss a bible, according to the teachings of their national church. *Id.*

²³ Sanford Levinson, *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113, 120 (1987).

²⁴ Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 979–86 (1996) (finding that oaths themselves have traditionally been seen as religious acts, so it is not known whether the Framers intended to depart from this sort of understanding). *Id.* Just having an oath provision may have been an acknowledgment of divine authority over civil government. *Id.* at 986.

²⁵ Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Levinson, *supra* note 23, at 120–21.

allow the new country's citizens to have a sense of identity and unity with each other and their leaders while not forcing a particular spiritual perspective.²⁹ Unfortunately, though the actual text of the law can make a valid attempt at religious neutrality, such application would prove to be a difficult task in a culture already so steeped in an existing religious identity.

III. EFFECTS ON PUBLIC POLICY

A. A Population Molded by Religion

The major role of religion in day-to-day government activities could not have come as a surprise to anyone living at the time of this country's founding. In the everyday social lives of the American public during the late eighteenth century, the government seemed to have a relatively minor position in relation to the primary communal aspect of religion.³⁰ Religion was at the center of the lives of American people, as the family unit was seen not only as a civil structure, but also an important religious one.³¹ This religious influence laid the foundation for marriage itself, which was treated as a religious institution by the law.³² Legal rules favoring the husband and father as the prevailing figure in families also arose from religious tradition and interpretations of biblical scriptures.³³

Additionally, education was nearly always provided in a strong religious context, ensuring that any future policymaker of the country would have a moral basis on which to base their reasoning.³⁴ Even when public schools maintained by the

²⁹ *Id.* at 121.

³⁰ Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L.J. 149, 152 (1990) (finding that while social issues today are tackled by the government, such problems in the past were addressed and rectified by religious organizations). *Id.* at 156–60. This has been changed by religion becoming a significantly more private matter and the social responsibilities of the government increasing. *Id.* at 160.

³¹ *Id.* at 153. Major life events such as births, marriages, and deaths were commonly recorded in family bibles. Additionally, families had their own pews at churches they attended together. *Id.*

³² See *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). The Supreme Court referred to marriage as a “holy estate.” *Id.*

³³ Berman, *supra* note 30, at 154.

³⁴ *Id.* At this time, it was extremely common for education to be pursued in the home by the family (already established as a religious unit). *Id.* If education was not provided by the family, the only other options were usually religious

government gained additional funding in the mid-nineteenth century, they were not largely supported by the populace because of the fear that inevitable religious influence in public education would not be as strong compared to a family or private sector education.³⁵ In fact, an influential reformer for universal public education—Horace Mann³⁶—spoke of the necessity of a moral curriculum in the establishment of any educational system.³⁷ Because Mann and many others believed that practical morals could never be obtained without religion,³⁸ there was still bound to be some religious influence in public schools.

Religious institutions also played a central role in social welfare in early America, allowing religion to fulfill an essential aspect of the community.³⁹ Even when the government established a public system for communal aid, private religious charities still played an important role and often worked together with secular institutions to administer relief.⁴⁰ The role of the government in social welfare at the time was somewhat minimal not because the state was uninterested in the well-being of its citizens, but rather, it was because religion already played such a central role in the social life of the American people.⁴¹ Religion was established as a significant motivating factor in providing this aid,⁴² and was in turn granted support by the government.⁴³ As a result of these social programs, the public came to depend on religion not only for moral guidance, but also as an important feature of their communities as a whole.⁴⁴

institutions and instruments, such as churches and clergymen. *Id.* Many universities were founded primarily to promote a Christian education. *Id.* at 155.

³⁵ *Id.* at 154.

³⁶ See Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45, 75 (2003). He was called the "Father of the Common School Movement." *Id.*

³⁷ Berman, *supra* note 30, at 154. He "continually emphasized that only through public education could a Christian social consciousness and a Christian morality be inculcated in the population as a whole." *Id.*

³⁸ Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 73 (2002). Proper schooling could not be completed without a strong moral education because it was necessary for any social existence. *Id.*

³⁹ Berman, *supra* note 30, at 156. Parishes routinely donated money and food to those in need, as well as provided support for orphans and poor families. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 157–58.

⁴² *Id.* at 158. Sermons were given to legislatures noting Christian values of charity and the duty to be public servants. *Id.*

⁴³ *Id.* Examples include providing for schools, land, and missionaries. *Id.*

⁴⁴ *Id.*

B. Policy Created by the Courts

Even though early treaties of the United States specifically mention that the country was not founded on the Christian religion,⁴⁵ many government officials and judges still hold on to the view that Christianity was a central component of American identity.⁴⁶ Seeing as older English law included Christianity as part of its common law,⁴⁷ it is simple to see how the tradition carried over to American law regardless of provisions separating Church and State. In numerous opinions throughout the nineteenth century, state courts seemed to consider Christianity as part of American common law.⁴⁸ For example, in *Vidal v. Phila.*,⁴⁹ the Court upheld the invalidation of a contract formed on Sunday while affirming that “Christianity [is] part of the common law of the state [in that] its divine origin and truth are admitted.”⁵⁰ These “Sunday laws” were affirmed in nearly every instance of contention,⁵¹ though eventually the focus shifted away from religious to public health reasons.⁵²

One of the most famous instances of the Supreme Court’s reliance on a Christian component of the common law occurred in

⁴⁵ Treaty of Peace and Friendship, U.S.-Tripoli, art. XI, Nov. 4, 1796, 8 Stat. 154. This treaty states:

As the government of the United States of America is not in any sense founded on the Christian religion-as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen-and as the said states never have entered into any war or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.

Id.

⁴⁶ Eric Mazur, *Dar al-Constitution: Islam and the American Constitutional Order*, 11 CONN. PUB. INT. L.J. 183, 183–84 (2012).

⁴⁷ Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 29–30 (1998). Many English cases referred to Christianity in upholding laws of blasphemy, and equated Christian and political principles. Religion was brought up in court opinions frequently enough that scholars of the time noted, “Christianity [was] part of the laws of England.” *Id.* at 30.

⁴⁸ *Id.* at 31. Examples would be courts in Pennsylvania, Delaware, South Carolina, Arkansas, Tennessee, North Carolina, and Alabama. See also Jaynie Randall, *Sundays Excepted*, 59 ALA. L. REV. 507, 508 (2008).

⁴⁹ 43 U.S. 127 (1844).

⁵⁰ *Id.* at 198.

⁵¹ Banner, *supra* note 47, at 38.

⁵² *State v. Petit*, 77 N.W. 225, 226 (Minn. 1898). When presented with the question of Sunday Laws, the Minnesota Supreme Court noted:

In some states it has been held that Christianity is part of the common law of this country, and Sunday legislation is upheld, in

Church of the Holy Trinity v. United States.⁵³ In this 1892 case about the interpretation of immigration law,⁵⁴ Justice Brewer wrote a unanimous opinion in which he declared that the United States “is a Christian nation.”⁵⁵ Though later criticized by other judges and scholars, at the time, this opinion was indicative of the Christian-centric view of both the law and the country as a whole.⁵⁶ Even today, the fact that the Supreme Court declared such a notion has been proof to some that America’s legal system is based on Christian principles.⁵⁷ Though the words of Justice Brewer must be understood in the context of the times,⁵⁸ such a proposition was more acceptable due to the overtly Christian culture of the nation, which still endures to this day.⁵⁹

Another case that was less particular about the basis of American legal principles—but still called upon normative moral values—was *Bradwell v. State*.⁶⁰ In this 1873 case, the Supreme Court denied a woman the right to practice law in her state, although she met all other qualifications.⁶¹ In upholding the constitutionality of the ban, Justice Breyer set out a general rule

whole or in part, upon that ground. Even if permissible, it is not necessary to resort to any such reason to sustain such legislation. The ground upon which such legislation is generally upheld is that it is a sanitary measure, and as such a legitimate exercise of the police power.

Id.

⁵³ 143 U.S. 457 (1892).

⁵⁴ The basis of this case was a federal law prohibiting U.S. organizations from contracting foreign laborers for employment. *Id.* at 458. Here, a church in New York made a contract with an English citizen to serve as its pastor. *Id.* The Court resolved this case by holding the law did not apply because “laborer” only described unskilled positions, while religious ministers and pastors were considered professional occupations. *Id.* at 472.

⁵⁵ *Id.* at 471. This assertion was used to support the notion that Congress would never intend to prohibit a church in this country from using the services of a Christian minister who happened to reside in a different nation. *Id.*

⁵⁶ Steven K. Green, *Justice David Josiah Brewer and the “Christian Nation” Maxim*, 63 ALB. L. REV. 427, 428 (1999).

⁵⁷ *Id.* This statement has also been relied on in recent times by those desiring a more morality-based reading of the law, arguing that not doing so is corruptly straying from both historical and legal precedent. *Id.* at 429.

⁵⁸ *Id.* Scholars have argued that interpreting this holding as basing American law and government in Christian principles is a misconstruction. *Id.* at 476. “Rather, Justice Brewer was relating what he viewed to be a historical fact and a cultural phenomenon, not a legal mandate.” *Id.*

⁵⁹ *Id.* at 428.

⁶⁰ 83 U.S. 130 (1873).

⁶¹ *Id.* at 131. The reasoning was that as a married woman, she would not be bound by any express or implied contract necessary between a lawyer and client. *Id.*

that “the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”⁶² Unlike *Church of the Holy Trinity*, the Court here does not base this holding on the Christian status of the law or the country. However, there is still a reference to “the Creator,” which is an essential aspect of natural Christian law.⁶³ Thus, though the Court has consistently avoided declaring a specific deity as having rule over the law of the United States, it is still the views and morals of the judges that control the holding in this case.⁶⁴ For example, the ban on women practicing as lawyers was held constitutional in 1873 not because of stated text in the Constitution, because of the Court’s notion of what natural, God-made laws were.⁶⁵

Even more recently, while courts have been much less prone to rely on religion or morality in determining the law, they have still relied on the interconnected history of this country and Christianity.⁶⁶ An example of these types of cases is religious monuments on government property.⁶⁷ In *Van Orden v. Perry*,⁶⁸ a suit was brought against Texas state officials because a monument of the Ten Commandments was constructed on the grounds of the Texas State Capitol.⁶⁹ It was alleged that the placement of the monument on government property was a violation of the Establishment Clause, and should be removed.⁷⁰ While the Supreme Court admitted the religious significance of the monument, the historical significance was also important.⁷¹ The Court noted that the monument was a Judeo-Christian symbol, but also one important to Texas identity.⁷² Because it was a passive

⁶² *Id.* at 141.

⁶³ Terrance R. Kelly, *Canaanites, Catholics and the Constitution: Developing Church Doctrine, Secular Law and Women Priests*, 7 RUTGERS J.L. & RELIGION 3, 103 (2005).

⁶⁴ Marie Ashe, *Privacy and Prurience: An Essay on American Law, Religion, and Women*, 51 AM. J. LEGAL HIST. 461, 487 (2011).

⁶⁵ Omi M. Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 345–46 (1998).

⁶⁶ William Trunk, *The Scourge of Contextualism: Ceremonial Deism and the Establishment Clause*, 49 B.C. L. REV. 571, 574 (2008).

⁶⁷ See *Van Orden v. Perry*, 545 U.S. 677 (2005).

⁶⁸ 545 U.S. 677 (2005).

⁶⁹ *Id.* at 682. The plaintiff was once a lawyer who had seen the monument on his many visits to use the law library on the Capitol grounds. *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 678. “Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Id.*

⁷² *Id.* at 691. In his dissent, Justice Stevens stated that while some may believe the monument reflects the ideals of Texas identity, it should not matter because “Texas, like our entire country, is now a much more diversified community than it

display that was historically significant, the Court ruled it was not a violation of the Establishment Clause.⁷³ While it is important that the Court did not rely on Christian morality in this holding, the same result is still accomplished: the monument should not be removed. This further demonstrates how the normativity of a particular religion in a country can continue to affect public policy in a manner other religions cannot.⁷⁴ This is just one way how a majority religion can influence the laws of a country.

C. Blasphemy Laws

Probably one of the most apparent results of a national Christian background's effect on policy is the passing of laws against blasphemy. Though bans against blasphemy are no longer legal,⁷⁵ their inclusion in this country's history demonstrates a prior willingness to shape policy in accordance with personal morality rather than pure religious freedom.⁷⁶ As a majority of previous lawmakers had a morality system based upon Protestant teachings, the resulting law naturally favored a worldview against any threats to that religious identity.⁷⁷

It is important to understand that the logical reasoning behind blasphemy laws was not so direct that the government was supporting one particular religion over another.⁷⁸ Rather, it was reasoned that if an individual or organization threatened or attacked God or religion, it was an attack on social order.⁷⁹ Because Christianity was the dominant group, an attack on Christianity

was when it became a part of the United States or even when the monument was erected." *Id.* at 720 (Stevens, J., dissenting).

⁷³ *Id.* at 691–92.

⁷⁴ Arguably, if instead the monument were of a Buddha or Shinto shrine, the Court's reasoning would require their removal because they are not historically significant to the state.

⁷⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952). In 1952, the Supreme Court held that states did not have a legitimate interest in protecting religions from views distasteful to them. *Id.* "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine." *Id.* However, some states still have not repealed their own blasphemy laws, even though they are rarely invoked. Evelyn Aswad, *Why the United States Cannot Agree to Disagree on Blasphemy Laws*, 32 B.U. INT'L L.J. 119, 126–27 (2014).

⁷⁶ Geoffrey R. Stone, *The Second Great Awakening: A Christian Nation?*, 26 GA. ST. U. L. REV. 1305, 1318–20 (2010).

⁷⁷ *Id.* at 1319.

⁷⁸ Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 306 (1998).

⁷⁹ *Id.*

could be interpreted as a general attack on society and cause unrest.⁸⁰ Therefore, when states in America were crafting their policies, it made sense to do everything possible to keep society in check.⁸¹ When the Constitution was written, however, it would make sense for the Establishment Clause to prohibit blasphemy laws because of the obvious effect of favoring one religion over another.⁸² The problem is that this line of thinking does not take into account how Christian Protestantism was a central pillar of society at the time, and that protecting the majority religion would in turn protect all citizens in the community.⁸³

Though currently outdated, it was not uncommon for states to enforce these laws as recently as 1921, demonstrated in *State v. Mockus*.⁸⁴ Here, the defendant gave a lecture in which he ridiculed the basis of Christianity and religion in general.⁸⁵ He was indicted for violating a provision of the Maine constitution against blasphemy,⁸⁶ but argued that he was entitled to religious freedom and freedom of speech.⁸⁷ The court disagreed with his defenses, stating that the public ridicule of a prevalent religion threatens the public order.⁸⁸ The court did not even require evidence of a breach of peace.⁸⁹ Rather, just using words that tend to incite the public were enough under this provision.⁹⁰ Additionally, the court also explained that the blasphemy law was constitutional because if the

⁸⁰ *Id.* at 307. Importantly, it was not blasphemous just to deny Christianity; rather it must be a direct attack intended to insult the deepest religious beliefs of the people. *Id.* at 308.

⁸¹ *Id.*

⁸² *Id.* at 314.

⁸³ *Id.* at 315. “The difficulty with this narrow focus on constitutional language, however, is that it ignores the framework of assumptions and values that will necessarily inform the interpretation of that language.” *Id.*

⁸⁴ 113 A. 39 (Me. 1921).

⁸⁵ *Id.* at 40–41. The Maine Supreme Court very reluctantly reprinted segments he was alleged to proclaim to justify their findings. *Id.*

⁸⁶ *Id.* at 40. The particular section declared that:

Whoever blasphemes the holy name of God by cursing, or contumeliously reproaching God, His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost or the Holy Scriptures as contained in the canonical books of the Old or New Testament, or by exposing them to contempt and ridicule, shall be punished.

Id.

⁸⁷ *Id.* at 42.

⁸⁸ *Id.* at 43. “Public contumely and ridicule of a prevalent religion not only offends against the sensibilities of the believers, but likewise threatens the public peace and order by diminishing the power of moral precepts.” *Id.*

⁸⁹ *Mockus*, 113 A. at 43.

⁹⁰ *See id.*

law did not treat Christianity with such respect, the very fabric of our country and government was under threat.⁹¹ Even though the government no longer directly controls morality through blasphemy laws, there are still areas of law based on the morality of the majority that seek to protect it.

D. Prescribing Morality

When one of the roles of the government is protecting the people, an issue can arise when the government decides that the public should be protected from obscenity. This is the exact scenario concerning the government regulation of public airwaves, which are another set of policies enshrined in religion. The Federal Communications Commission (“FCC”) is tasked with monitoring television and radio broadcasts in order to protect the public.⁹² According to the Communications Act, the FCC is required to uphold the “public interest, convenience and necessity.”⁹³ While it is true that the government has an interest in protecting the well-being of children from harms of indecency, some have argued that the rationale for the regulations is fixed more on morality and culture.⁹⁴ It is noble to provide protection against corruption, but there may be a problem when those providing guidelines as to what is morally acceptable make those decisions based solely on the moral majority.⁹⁵ Regulations against obscenity can easily disguise regulations based on morality, and when this morality is based on normative Christian decency, protecting majority religious values and “public interest” can be seen as one in the same.⁹⁶

IV. ROLE IN ELECTIONS

⁹¹ *Id.* at 42. “[F]rom the dawn of civilization, the religion of a country is a most important factor in determining its form of government, and that stability of government in no small measure, depends upon the reverence and respect which a nation maintains toward its prevalent religion.” *Id.*

⁹² Lyle W. Denniston, *Constitutional Calvinism: The “Sins” of Broadcasting*, 54 *TEX. L. REV.* 1344 (1976).

⁹³ Communications Act of 1934, Pub. L. No. 73–416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (2012)).

⁹⁴ Lili Levi, “*Smut and Nothing but*”: *The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 *ADMIN. L. REV.* 509, 570 (2013).

⁹⁵ *See id.* at 571–73.

⁹⁶ *See id.* at 571 n. 233.

A. Early Influence

As previously discussed, late eighteenth-century America had a deeply rooted religious identity.⁹⁷ While the Establishment Clause was important enough to merit inclusion in the Constitution—along with the No Religious Test Clause—there were no set guidelines as to how the president should present himself in terms of religion.⁹⁸ Unlike a monarchy, the office of the president is chosen by the people, who would naturally wish to elect a head of state sharing their view of American identity, including religion.⁹⁹ Even though the government could not directly favor one religion over another, the writers of the Constitution did not presume to place that same restriction on the people.¹⁰⁰ As a result, those elected to the office have more often than not been in line with the majority religious beliefs of the time.¹⁰¹

In addition to the character of the presidential office, the inauguration itself was heavily affected by religion.¹⁰² The first inaugural prayers were performed at St. Paul's Chapel by the Chaplain of the Senate.¹⁰³ President Washington added to the religious nature of the inauguration by placing his hand on a bible and adding, "So help me God" to the end of his oath.¹⁰⁴ As the first president, many of the actions performed by Washington have

⁹⁷ Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1, 15 (1994). Though by many accounts America's founders were religious, scholars have emphasized that a widely-held view of many were heavily influenced by the Enlightenment movement, which held that divine truths could not be contrary to reason. *Id.*

⁹⁸ See Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 597 (2011).

⁹⁹ See Kent Greenawalt, *Religion and Public Reasons: Making Laws and Evaluating Candidates*, 27 J.L. & POL. 387, 393 (2012).

¹⁰⁰ See *id.*

¹⁰¹ David Masci, *Almost all U.S. presidents have been Christians*, PEW RESEARCH CENTER (Feb. 12, 2016), <http://www.pewresearch.org/fact-tank/2017/01/20/almost-all-presidents-have-been-christians/>. About half of America's presidents have been either Episcopalian or Presbyterian. *Id.*

¹⁰² See Epstein, *supra* note 22, at 2106. A significant analogy used by the organizers of George Washington's inauguration was the English coronation ceremony, which included the crowning by the Archbishop of Canterbury in a chapel and reciting prayers. *Id.*

¹⁰³ *Id.* at 2107. Today, the inaugural prayers take place at the Capitol, but Christian-centric prayers have remained. *Id.*

¹⁰⁴ Gerald Walpin, *Five Justices Have Transformed the First Amendment's Freedom of Religion to Freedom from Religion*, 31 Touro L. REV. 187, 203–04 (2015) (citing MICHAEL RICCARDS, *A REPUBLIC, IF YOU CAN KEEP IT: THE FOUNDATION OF THE AMERICAN PRESIDENCY, 1700–1800*, at 73–74 (1st ed. 1987)).

become tradition, so even though the No Religious Test Clause does not require any oath to God, it has been repeated by every modern president,¹⁰⁵ though the tradition has faced some opposition.¹⁰⁶ Washington also set an example for future presidents by acknowledging God in official pronouncements¹⁰⁷ and making his opinions known on the important role of morality.¹⁰⁸

While Washington's Christian-centric statements may be acceptable under freedom of expression, what is noteworthy is the public reaction to such comments. It is normal and expected of a president to reference and acknowledge God and his faith.¹⁰⁹ However, when Thomas Jefferson became president, there was a much different reaction to his personal brand of Christianity.¹¹⁰ For example, unlike Washington, Jefferson did not make official proclamations or prayers of thanksgiving as president.¹¹¹ In fact Jefferson was so unique in his stated religious views¹¹² that it was

¹⁰⁵ Epstein, *supra* note 22, at 2110–11.

¹⁰⁶ See Frederick B. Jonassen, *Kiss the Book... You're President...: "So Help Me God" and Kissing the Book in the Presidential Oath of Office*, 20 WM. & MARY BILL RTS. J. 853, 857 (2012) (discussing *Newdow v. Bush*, No. 2:01-CV-00218 (E.D. Cal. July 17, 2001), and *Newdow v. Bush*, 355 F. Supp. 2d 265 (D.D.C. 2005) and *Complaint, Newdow v. Roberts*, No. 1:08-CV-02248-RBW (D.D.C. Dec. 30, 2008)). This tradition has been the subject of suits seeking to bar the use of the phrase, arguing that it is unconstitutional for a government official speaking on behalf of the government to sponsor any religious belief. *Id.*

¹⁰⁷ Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1588 (1989). In his first inaugural address, Washington invoked the assistance of "that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect." *Id.* Also in proclaiming a National Thanksgiving, he asked people to thank that "great and glorious Being . . . for the civil and religious liberty with which we are blessed." *Id.*

¹⁰⁸ *Id.* Part of Washington's farewell address advised, "Reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." *Id.*

¹⁰⁹ Derek H. Davis, *Religious Equality In The American National Order*, 31 NO. 6 GPSOLO 28, 33 (2014). Every president has done so in his inaugural address. *Id.*

¹¹⁰ Elizabeth G. Myers, *Timing Is Everything: The Social Context Behind the Emergence of Separation Ideology During the Presidential Campaign of 1800*, 83 TEX. L. REV. 933, 956 (2005).

¹¹¹ Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 332 (2009).

¹¹² Thomas J. Collidge, *Jefferson in His Family*, in 15 THE WRITINGS OF THOMAS JEFFERSON, CONTAINING HIS AUTOBIOGRAPHY, NOTES ON VIRGINIA, PARLIAMENTARY MANUAL, OFFICIAL PAPERS, MESSAGES AND ADDRESS, AND OTHER WRITINGS, OFFICIAL AND PRIVATE, NOW COLLECTED AND PUBLISHED IN THEIR ENTIRETY FOR THE FIRST TIME IV (Albert E. Bergh ed., 1907). "He did not believe in the miracles, nor the divinity of Christ, nor the doctrine of the atonement, but he was a firm

the first real cause of religious controversy in an American election.¹¹³ He was smeared during the election campaign as a “confirmed infidel”¹¹⁴ and even after he won, his opposition bemoaned the election of a “howling atheist.”¹¹⁵ Because Jefferson held some differing beliefs, clergymen and members of the Federalist Party attempted to control voter behavior in order to win the election.¹¹⁶ Although their attempt ultimately failed, it provided a fitting early example of religion and personal morality affecting the views and potential outcome of an election, regardless of any constitutional safeguards in place.¹¹⁷

B. The Catholic Problem

Religion came to play a much bigger role in elections once the population began to have a flood of immigrants with a variety of religious views.¹¹⁸ During the Revolution, only about 1% of the American population was considered Catholic, so the Protestant majority were under no threat of Catholic influence in politics.¹¹⁹ In the mid-nineteenth century, however, there was a massive influx of Catholic immigrants in America that resulted in about 1.6 million Catholics,¹²⁰ increasing their influence to 5% of the population.¹²¹ As a result of this shift in religious demographics, there was a fear that Catholic immigrants would take control of the political power

believer in Divine Providence, in the efficacy of prayer, in a future state of rewards and punishments, and in the meeting of friends in another world.” *Id.*

¹¹³ Myers, *supra* note 110, at 956. The Federalist opposition attacked Jefferson’s personal religious beliefs, stating that his election “would be an insult to Christian faith” and that Christian duty prohibited his election. *Id.*

¹¹⁴ Mark A. Noll, *The Election Sermon: Situating Religion and the Constitution in the Eighteenth Century*, 59 DEPAUL L. REV. 1223, 1244 (2010).

¹¹⁵ Bartrum, *supra* note 111, at 332.

¹¹⁶ Myers, *supra* note 110, at 956–57.

¹¹⁷ *Id.* at 945.

¹¹⁸ See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 302 (2001).

¹¹⁹ See *id.* at 299.

¹²⁰ Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1123 (1995). There was significant migration in the 1840’s because of Irish Potato Famine. *Id.* Nearly 75% of the 2 million people that left Ireland ended up in the United States, of which 90% were Catholic. *Id.* As a result, the largest church in America by 1850 was the Roman Catholic Church. *Id.*

¹²¹ Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. 479, 490 n.60 (2015) (citing John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 280–81, 318–27 (2001)).

in America.¹²² Afraid of this potential influence, some citizens sought to take control of political power themselves¹²³ and formed the Know-Nothing Party.¹²⁴ This political party had religion at its core, making it a requirement to never support a political candidate deemed to be a Roman Catholic, regardless of their political views or qualifications.¹²⁵ Yet while this movement was popular in some states, such as Massachusetts,¹²⁶ it was opposed by influential politicians—including Abraham Lincoln.¹²⁷ Even though the movement did gain significant traction in the mid-nineteenth century, support for the party ultimately withered as a result of its failure to support an anti-slavery position.¹²⁸

However, the failure of the Know-Nothing Party did not mean that religion was no longer a controversial political issue; there was still a real fear of Catholics in power, and it took until 1928 for a Catholic candidate to be even considered for president: Al Smith.¹²⁹ Smith's nomination was extremely controversial, with anti-Catholicism continuing to escalate even after the election.¹³⁰ Opponents contended that as a Catholic, Smith was an unsuitable candidate for president because he could not truly be loyal to the United States.¹³¹ Rather, the Vatican demanded his exclusive loyalty, and if he became president he would essentially allow the

¹²² Alexander, Angela, "All Men are Created Equal": Abraham Lincoln, *Immigration and Ethnicity*, 3 ALB. GOV'T L. REV. 803, 813 (2010).

¹²³ Jeffries, *supra* note 118, at 301.

¹²⁴ Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 531 (2009). While commonly known as the "Know-Nothings", the actual name of the party was the American Party. *Id.*

¹²⁵ Stephen L. Carter, *Religious Freedom as if Family Matters: A Tribute to Justice Brennan*, 78 U. DET. MERCY L. REV. 1, 5 (2000).

¹²⁶ *Id.* In this state, the Know-Nothings controlled both the state legislature and governorship by the 1850's. *Id.*

¹²⁷ Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMPLE L. REV. 361, 405 (1993).

¹²⁸ *Id.* at 406.

¹²⁹ Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglement Prong*, 7 FIRST AMEND. L. REV. 253, 290 (2009). A major reason that Smith received the Democratic Party nomination was that by the late 1920's, immigrants had swelled to about a third of the total population. *Id.*

¹³⁰ Stephen M. Feldman, *The Theory And Politics Of First Amendment Protections: Why Does The Supreme Court Favor Free Expression Over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 472 (2006).

¹³¹ Edward McGlynn Gaffney, Jr., *Pierce and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491, 524 (2001).

Pope to run the country under Catholic rule.¹³² In part because of the anti-Catholic fervor against him,¹³³ Smith lost the presidency in a landslide defeat to Hebert Hoover.¹³⁴

The very same issue presented itself again in the 1960 presidential election with the nomination of John F. Kennedy, who was the first Catholic to run since Al Smith.¹³⁵ Like Smith, Kennedy faced opposition claiming that a Catholic could not be a suitable candidate for the presidency.¹³⁶ Even though he had strong support from fellow Catholics, when voters learned of his faith, Kennedy lost about 7% of his support.¹³⁷ In response to such ardent criticisms and doubt, Kennedy decided to give a speech addressing the religious issue and assuring the American people his Catholicism did not impact his ability to lead as president.¹³⁸ Kennedy discussed his desire to keep Church and State separate, and that he would not rely on his Catholic faith to dictate his actions as president.¹³⁹ He

¹³² *Id.* at 524–25. To cement his rule, the Pope would “send a horde of monsignors over from Rome to run the country, to the utter ruination of all things American.” *Id.*

¹³³ Michael W. McConnell, *Is There Still a “Catholic Question” in America? Reflections on John F. Kennedy’s Speech to the Houston Ministerial Association*, 86 NOTRE DAME L. REV. 1635, 1640 (2011). Even though Al Smith suffered a great disadvantage because of his Catholicism, it is by no means the only reason he lost the election; Hoover was very popular and was expected to win over any Democratic candidate. *Id.*

¹³⁴ David E. Campbell, *A House Divided? What Social Science Has to Say about the Culture War*, 15 WM. & MARY BILL RTS. J. 59, 66 (2006).

¹³⁵ Michal R. Belknap, *God and the Warren Court: The Quest for “A Wholesome Neutrality”*, 9 SETON HALL CONST. L.J. 401, 406 (1999).

¹³⁶ *Id.* at 407. Many reasons were argued based on his religion: his “candidacy was the product of political machinations by the Papacy,” he would be controlled by the Church, and he would give government money to Catholic institutions. *Id.* Additionally, he was questioned as to whether or not he was as free as any other American to give his first loyalty to the United States. Feldman, *supra* note 129, at 292.

¹³⁷ McConnell, *supra* note 133, at 1642–43.

¹³⁸ Feldman, *supra* note 129, at 292.

¹³⁹ See Senator John F. Kennedy, *Address to the Greater Houston Ministerial Association* (Sept. 12, 1960),

<http://www.americanrhetoric.com/speeches/jfkhoustonministers.html>:

[B]ecause I am a Catholic, and no Catholic has ever been elected [p]resident, 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 [p]resident (should he be Catholic) how to act, and no Protestant minister would tell his

spoke out against his opponents who attacked him on the basis of his faith, saying, “I am not the Catholic candidate for [p]resident. I am the Democratic Party's candidate for [p]resident 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.”¹⁴⁰

Kennedy’s speech was well received,¹⁴¹ and the matter seemed to be put to rest when his opponent Richard Nixon publicly agreed that religious issues should no longer be a part of the campaign.¹⁴² However, public opinion was not so easily swayed, and religion still played a significant role in the voting process and the end result of the election.¹⁴³ Kennedy’s speech and Nixon’s statements were meant to keep religion out of the election process, but ironically Kennedy may have won because of it.¹⁴⁴ Ultimately, the alleged disastrous consequences of a Catholic president never materialized, and afterwards Catholics finally began to truly assimilate with the rest of American society.¹⁴⁵ This was demonstrated a few short years later when President Kennedy was assassinated, and who was considered to have been mourned not “as the Catholic president but simply as the American president.”¹⁴⁶

C. Rise of the Religious Right

Not only was religion used as an argument against electing a candidate, but it also eventually became a popular point in proving a candidate’s electability when they were perceived as properly

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 [p]resident who might appoint him or the people who might elect him.

Id.

¹⁴⁰ *See id.*

¹⁴¹ Peter Braestrup, *Protestant Group Applauds Kennedy for Houston Speech*, N.Y. TIMES, Sept. 14, 1960, at 33. His speech was called “the most complete, unequivocal and reassuring statement which could be expected of any person in his position.”

Id.

¹⁴² Belknap, *supra* note 135, at 407.

¹⁴³ *Id.*

¹⁴⁴ McConnell, *supra* note 133, at 1643. While white Protestants only gave Kennedy 34% of their vote, Catholics were rallied and supported him with 83%, which was enough to lead him to victory over Nixon). *Id.*

¹⁴⁵ Campbell, *supra* note 134, at 69.

¹⁴⁶ *Id.* at 70.

Christian.¹⁴⁷ In the 1970s, evangelical Christians were seen as a strong political force in response to a perceived increase in polarizing liberal and immoral issues.¹⁴⁸ The basis was that there was “an assault on the moral fabric of American society,” which could be made right by electing suitable religious presidents.¹⁴⁹ This movement had some success,¹⁵⁰ and by 1980 Jerry Falwell formed the Moral Majority—an organization whose sole purpose was to support changes in the federal government based on fundamental moral principles.¹⁵¹ Ronald Reagan was easily able to gain their support for his 1980 presidential campaign, giving speeches where he proclaimed the Bible as not only his spiritual guide, but also a guide for his policy.¹⁵² While Reagan did question the appropriateness of accepting formal endorsements from religious leaders, he praised conservative Christians in giving new life to American politics, and that central component to his campaign led to his success in the 1980 presidential election.¹⁵³

Even though the Religious Right soon weakened and the Moral Majority disbanded in 1985,¹⁵⁴ it by no means put a halt on the public’s desire for a religious (Christian) president.¹⁵⁵ The next presidential election that saw a major return to this moral movement was in 2000.¹⁵⁶ With the help of his primary strategist

¹⁴⁷ Mark G. Valencia, *Take Care of Me When I Am Dead: An Examination of American Church-State Development and the Future of American Religious Liberty*, 49 SMU L. REV. 1579, 1624 (1996).

¹⁴⁸ *Id.* These movements included civil rights, abortion, feminism, the sexual revolution, drug use, pornography, and an expanded federal government. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Corrine Parver, *The Politics of Dying: How the Religious Right Has Come to Influence the Right-To-Die Debate*, 15 TEMP. POL. & CIV. RTS. L. REV. 449, 457 (2006) (stating their influence was helpful in Jimmy Carter’s (a born-again Baptist) winning campaign in 1976).

¹⁵¹ *Id.* at 458.

¹⁵² Howell Raines, *Reagan Backs Evangelicals in Their Political Activities*, N.Y. TIMES, Aug. 23, 1980, at 8. “Indeed, it is an incontrovertible fact . . . that all the complex and horrendous questions confronting us at home and worldwide have their answer in that single book.” *Id.*

¹⁵³ Stephen A. Newman, *From John F. Kennedy’s 1960 Campaign Speech to Christian Supremacy: Religion in Modern Presidential Politics*, 53 N.Y.L. SCH. L. REV. 691, 701 (2008).

¹⁵⁴ The movement was split in part by the far right 1988 presidential candidate Pat Robertson, who was a key figurehead of the movement but had too extreme views to garner sufficient support. Parver, *supra* note 150, at 459. Additionally, the Moral Majority could not raise enough funds through direct mailing, and had too strict moralist tactics. *Id.* One more reason for their loss of influence was the televangelist scandals that took place in the late 1980’s. *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 461.

Karl Rove, George Bush relied on religion as a political tool early on to sway voters to his side.¹⁵⁷ He was “famous for including a constant stream of religious language in his speeches” and this ability to communicate directly to religious voters allowed him to secure their confidence and support.¹⁵⁸ Even though he was not the only candidate expressive about his religion,¹⁵⁹ Bush was seemingly the most successful in courting voters by focusing on religion and morals.¹⁶⁰ This strategy met even more success in his 2004 reelection campaign¹⁶¹ against Democratic candidate John Kerry.¹⁶²

The 2008 presidential election once again had a significant religious focus on both candidates.¹⁶³ The Republican nominee, John McCain, had previously not felt entirely comfortable aligning himself with the religious right, which lost him the nomination to George Bush in 2000.¹⁶⁴ To rectify this and gain the necessary additional support, McCain sought endorsements of influential political religious leaders and named Sarah Palin as his running mate.¹⁶⁵ Palin was a born-again Christian and her views made her a very popular pick that brought support from many religious members of the party.¹⁶⁶

Even though McCain and Palin were vigorously fighting to capture the religious right, the majority of the religious media

¹⁵⁷ Newman, *supra* note 153, at 701. When asked in a 1999 debate who his favorite philosopher was, he responded that it was Jesus. *Id.*

¹⁵⁸ Jason Carter, *Toward a Genuine Debate About Morals, Religion, Politics, and Law: Why America Needs a Christian Response to the “Christian” Right*, 41 GA. L. REV. 69, 76 (2006).

¹⁵⁹ Al Gore stated that his faith was at the center of his life, and he would often ask himself what Jesus would do in facing difficult questions. Daniel O. Conkle, *Religion, Politics, and the 2000 Presidential Election: A Selective Survey and Tentative Appraisal*, 77 IND. L.J. 247, 253–54 (2002).

¹⁶⁰ Newman, *supra* note 153, at 701.

¹⁶¹ Parver, *supra* note 150, at 463. In this election, “moral values” was listed as the most important issue to the majority of voters, of which eight out of ten supported George Bush. *Id.* Bush also dominated the Evangelical vote four to one. *Id.* at 462.

¹⁶² Kerry was a Catholic, but unlike Kennedy, he did not have to face much criticism for his Catholicism. Campbell, *supra* note 134, at 66. Rather, he was accused of not being Catholic enough. *Id.* One major hurdle he could not overcome was his support of abortion rights, which many Catholic bishops had vehemently spoken out against. *Id.* at 66–67.

¹⁶³ Newman, *supra* note 153, at 714.

¹⁶⁴ *Id.* at 719. During this earlier campaign, he had condemned conservative Christian leaders of being intolerant. *Id.*

¹⁶⁵ *Id.* at 720–21.

¹⁶⁶ *Id.* at 721. Palin opposed abortion in all cases, including rape and incest; believed in Bible as literal truth; and spoke strongly about the power of prayer. *Id.*

coverage focused on the Democratic candidate, Barack Obama.¹⁶⁷ Much of the media's coverage on Obama and religion were stories about whether or not he was a Muslim.¹⁶⁸ Although both his biological father and stepfather were Muslim, Obama himself had converted to Christianity in his twenties.¹⁶⁹ There was speculation, however, that Obama was only pretending to be a Christian, because some believed a Muslim would never be elected president.¹⁷⁰ A significant percentage of Americans believed this rumor during the campaign and after,¹⁷¹ but it ultimately did not matter as Obama won the presidency.¹⁷²

What is interesting, however, is the reason that a candidate's religion would even matter and why these rumors were so controversial in the first place. According to a 2012 Gallup poll, about half of Americans would not vote for a Muslim candidate for president, even if he or she were otherwise generally well-qualified.¹⁷³ Unlike Kennedy's Catholicism, where voters worried his faith would be detrimental to the office because he would take orders from the Pope, there was nothing about Islam itself that might render it incompatible with the office of president.¹⁷⁴ Rather, the fear appeared to come from a connection between the Islamic faith and terrorism.¹⁷⁵ As it was believed, if Obama were Muslim,

¹⁶⁷ David Fontana, *Obama and the American Civil Religion from the Political Left*, 41 GEO. WASH. INT'L L. REV. 909, 912 (2010). 53% of the media's references to religion had to do with Obama's religion, while only 19% dealt with Palin, 9% to McCain, and 1% to Obama's running mate Joe Biden. *Id.*

¹⁶⁸ *Id.* Discussions about his potential Islamic faith comprised about 30% of the stories. *Id.*

¹⁶⁹ Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 435 (2012).

¹⁷⁰ *Id.* at 439.

¹⁷¹ Michael Dimock, *Belief that Obama is Muslim is Durable, Bipartisan – but Most Likely to Sway Democratic Votes*, PEW RESEARCH CENTER (Jul. 15, 2008), <http://www.pewresearch.org/2008/07/15/belief-that-obama-is-muslim-is-durable-bipartisan-but-most-likely-to-sway-democratic-votes> (showing that in July 2008, a PEW research poll reported that 12% of registered voters believed Obama was a Muslim, while only 57% were sure he was Christian).

¹⁷² Paradise, *supra* note 169, at 415.

¹⁷³ Jeffrey M. Jones, *Atheists, Muslims See Most Bias as Presidential Candidates*, GALLUP (Jun. 21, 2012) <http://www.gallup.com/poll/155285/atheists-muslims-bias-presidential-candidates.aspx> (showing it was reported that 58% would vote for a Muslim, while 40% would not).

¹⁷⁴ Denise A. Spellberg, *Could a Muslim be President? An Eighteenth Century Constitutional Debate*, 39 EIGHTEENTH CENTURY STUDIES 485 (2006) (explaining that even though it was feared, there were still predictions that because of the No Religious Test Clause, it was possible that a Muslim could become president).

¹⁷⁵ Yaser Ali, *Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1049–50 (2012).

that meant he shared a faith with the enemies of America, which would make him unsuited for the office of president.¹⁷⁶

Opinions were not altered drastically in polls during the 2016 election, but there were changes.¹⁷⁷ A June 2015 Gallup poll reported that 60% of U.S. adults would vote for a potential Muslim presidential candidate.¹⁷⁸ While not substantial, this is still a majority that has slightly grown from polls conducted during previous elections.¹⁷⁹ Also noteworthy in this poll is that 58% of voters would support an atheist presidential candidate.¹⁸⁰ The percentage of Americans who would not vote for either a Muslim or an atheist candidate are nearly identical, which could suggest that the reasons for withholding their votes could also be similar.¹⁸¹ These polls indicate that just having a religion is not enough; to have a real chance at being elected president, it is inferred that a candidate still needs to be a Christian.¹⁸² This reasoning could be based on a multitude of factors, including solely wanting a leader to share the views of the majority¹⁸³ to believing that America is a Christian nation and thus can only be led by a Christian.¹⁸⁴

V. POLICY SUGGESTIONS

A. *The Need for Reform*

It is not difficult to see how this focus on adherence to a strict, normative Christian-based foundation of politics and law could lead to a form of discrimination against citizens that are members of minority religions.¹⁸⁵ It is very possible that while observing personal values and beliefs set by the majority culture,

¹⁷⁶ *Id.* at 1050.

¹⁷⁷ Lydia Saad, *Support for Nontraditional Candidates Varies by Religion*, GALLUP (JUN. 24, 2015), <http://www.gallup.com/poll/183791/support-nontraditional-candidates-varies-religion.aspx>.

¹⁷⁸ *Id.*

¹⁷⁹ See Jones, *supra* note 173 (noting this is up 2% from the previously discussed 2012 poll).

¹⁸⁰ Saad, *supra* note 177.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1379 (2015). Nearly 40% of Americans say that atheists disagreed with their vision of society. *Id.*

¹⁸⁴ Newman, *supra* note 153, at 692. During his presidential campaign, John McCain “told an interviewer that he believed the U.S. should be governed by a Christian president, because this was a Christian nation.” *Id.*

¹⁸⁵ James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. U. L. REV. 65, 69 (1997).

the morals and views of those citizens belonging to other religions are too easily set aside or looked over.¹⁸⁶ Though it is indeed important for individuals to live by their own codes and values—and of course freedom of worship is guaranteed by the First Amendment—it is also essential for members of the government, who are elected by the people, to hold in their interest all citizens of their state or country, not just those that may share their own views.¹⁸⁷ Therefore, while we should take care to not restrict the right of anyone to express personal religious beliefs, the government should enact more procedures that inhibit elected officials from relying on those personal values in passing and enforcing discriminatory policies.

There are a multitude of potential solutions that will not succeed in solving this issue. Firstly, though we should take care to not discriminate against minority religions in creating policy through a majority-focused view, the solution should not be to outright ban all potential religious speech by the government or government officials. Though this idea has been argued,¹⁸⁸ it is an extreme step that seems to ignore significant cultural considerations and what the Establishment Clause set out to achieve.¹⁸⁹ Also, religion should not be forbidden as a discussion point in the election process. While that practice could arguably lead to fairer results for minority religions, picking and choosing what citizens are allowed to base their votes on is a very slippery slope that should not have a place in a democratic country. Additionally, religion for many candidates plays an important role in shaping them as individuals. By not allowing religion to be referenced, citizens would not have a complete understanding of their electable candidates.¹⁹⁰ Furthermore, individuals or groups consisting of marginalized religions or atheists should not be given preferential

¹⁸⁶ *Id.*

¹⁸⁷ Greenawalt, *supra* note 99, at 388–89.

¹⁸⁸ Some scholars have presented the argument that the Establishment Clause requires the government to have an “official agnosticism” stance that prevents any possible religious speech or symbolism. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 206 (1992).

¹⁸⁹ Meyerson, *supra* note 15, at 1038. The framers of the Constitution understood the difference between government action and government speech. *Id.* While the federal government was restricted in funding or regulating a particular religion, the government could still reference religion without implying that it favored one over another, or in doing so treated those not in the majority religion as second-class citizens. *Id.* Rather than refusing to acknowledge any religion for fear or raising one above the others, the Framers “strove to create a civil vocabulary that could encompass all people, regardless of their faith.” *Id.* at 1039.

¹⁹⁰ Greenawalt, *supra* note 99, at 405.

treatment to counteract the implementation of discriminatory procedures currently in place. A true solution should not solely mend the results of certain policies, but rather to observe and consider how the underlying process itself might be improved.

As previously discussed, the influence of majority religious culture leads to various oppressions against citizens of minority religious beliefs.¹⁹¹ It is important to note that this does not necessarily mean any harm comes from a place of malice. Rather it is just natural that differences in religious culture compel a lack of inclusiveness when only one is at the center of policy.¹⁹² However, because of these differences, religious minorities have not been given an even playing field in the United States compared with those who hold majority religious beliefs. As a result, we should pursue remedies through policies seeking to protect all religious rights, not just those of the majority.¹⁹³

B. Educating a Culture

In order to help facilitate these changes that stem from religious culture, a good approach might be to try to modify the underlying culture itself to be more inclusive. Though that is easy to suggest, undertaking such a task is no simple matter. One method of avoiding a Christian-centric operation in politics would be to push for the majority of the population to no longer have a Christian-based view of morality and principles, which could be done through measures such as implementing education and political reforms that only seek to focus on non-Christian ideologies. This of course is no real solution at all because the issue would not be resolved at its core: the majority would still influence and shape the implementation of laws that would naturally result in discrimination against the minority. In addition, just because up until now the majority religion in America has been Protestantism, it does not mean that this will always be the case. Additionally, demographics in America vary greatly from area to area, and the majority culture in one city or state could be completely different

¹⁹¹ James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 248 (1999).

¹⁹² Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 267 (2003).

¹⁹³ In Free Exercise cases, for example, claimants who belong to mainstream Catholic or Protestant religions are much more likely to be victorious than those belonging to any other minority religion. *Id.* at 251.

than that of another.¹⁹⁴ It is important for American culture to be accommodating for all religions so that the minority, whatever it may be, can feel included with the rest of the public and uninhibited in the practice of their values.¹⁹⁵

A central area where this type of cultural and political change could take hold is in the education process. It was discussed earlier how culture can be shaped through education, so one way we can attempt to include minority religions as part of American culture is to embrace them in the educational system. In many instances, minority religious groups may run their own schools in order to instill their own religious culture that may not be possible in a secular education program run by the majority.¹⁹⁶ Even though it is important for those of minority religions to continue imparting their own culture, this separation of education may cause a problem by fragmenting social institutions along religious lines, thereby further dividing minorities from the majority by educating children in completely different ways.¹⁹⁷ Rather than encouraging this segregation, we should have procedures supporting the interaction of various religious cultures in the education system so that in growing up, children come to understand religions and values other than their own, thereby inciting an American culture of understanding. This interaction is important because “it serves to dissolve the barriers between groups that permit the abuse of discrete and insular minorities.”¹⁹⁸ In order to encourage this communication and introduce those in the religious majority to these new principles, educational programs should include examinations of various faiths and the cultural values that are encompassed by each.

¹⁹⁴ Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 958 (2004).

¹⁹⁵ *Id.* at 961–62.

¹⁹⁶ Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1047–48 (2013). Not only are public schools not able to teach moral values important to religious families, oftentimes the political and social agendas fostered by a public education system are contrarian to those desired and practiced by the religious families. *Id.* at 1048.

¹⁹⁷ Alan Brownstein, *Evaluating School Voucher Programs Through a Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 903 (1999).

¹⁹⁸ *Id.* at 923–24.

C. Government Speech

To further this policy of inclusiveness, the government should be more careful in regard to its own use of religious speech. Part of this process is to address how exactly the framers intended the Establishment Clause to affect and guide government speech.¹⁹⁹ As previously discussed, the framers of the Constitution sought to allow religious speech by the government, but only if it was applied generally to all faiths.²⁰⁰ Because it would follow the original intent of the framers, the modern American government should seek to enact policies following this reasoning. By purposefully avoiding religious expression favoring the majority-held faith, the government can more successfully avoid religious oppression.²⁰¹

One method of addressing this important feature of inclusiveness is to enact policies that seek to discourage the election of officials based purely on religious grounds. Even though there has been a tradition of religious activism in elections, this nature of engagement often results in the division and exclusion of minority religious principles at issue.²⁰² Of course, this type of deterrence cannot be done by limiting the religious speech of candidates directly, and for good reasons. Firstly, it would almost certainly violate the free speech provision under the First Amendment.²⁰³ Additionally, even if a candidate does not advertise their particular religious beliefs, the public generally has an understanding of what they are anyway.²⁰⁴ To counteract this, the federal government should utilize procedures that discourage the reliance on religion during elections by deterring elected officials from relying on personal morals in endorsing laws.

It is important to note that it has already been held unconstitutional for legislation to be passed for strictly religious reasons,²⁰⁵ so naturally that is not an issue that must be addressed

¹⁹⁹ Meyerson, *supra* note 15, at 1038.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1094.

²⁰² Valencia, *supra* note 147, at 1622–23.

²⁰³ Alan M. Hurst, *The Very Old New Separationism*, 2015 B.Y.U. L. REV. 1, 52 (2015).

²⁰⁴ Frederick B. Jonassen, “So Help Me?”: *Religious Expression And Artifacts In The Oath Of Office And The Courtroom Oath*, 12 CARDOZO PUB. L. POL’Y & ETHICS J. 303, 369 (2014).

²⁰⁵ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Supreme Court established a test to determine whether a government action was permissible. *Id.* According to the Court, the statute “must have a secular legislative purpose,” the principal or primary effect “must be one that neither advances nor inhibits religion,” and it

in this Note. Nevertheless, there is still extensive argument about how substantially religious considerations may be taken into account in passing legislation and proclaiming judicial decisions.²⁰⁶ In elections, candidates stress their religious convictions as means to demonstrate reasons that may guide their policies.²⁰⁷ In turn, religious minorities may be alienated because they may not share in these views; this should be remedied in part by encouraging an approach for public reasons in enacting policy and law.²⁰⁸

D. Improving Elections

In elections, if religious reasons serve as important foundations for voting, it ultimately divides voters along faith lines.²⁰⁹ To avoid this unhealthy division, the focus should instead be more greatly shifted to supporting public reasons. That is not to say religion should not be relevant in an election; many times religion is at the center of a candidate's life, and in order to fully understand the candidate the voter should know of his or her religious convictions.²¹⁰ Voters may decide on particular candidates because their religious beliefs could serve as a guide for reasoning policy, and have the freedom to do so.²¹¹ The problem arises when a particular candidate's faith is held up as a reason to vote for him or her over another person. This could be avoided if instead candidates stressed that rather than relying on personal moral principles for enacting law, they would instead depend on public reasons that would serve to benefit citizens regardless of their beliefs, even if the result might be contrary to the lawmaker's own religious values. This practice would also serve to provide a greater understanding of what a candidate's practical policies might be. As a result, even if a person decides which candidate to vote for based solely on religion, there would be no certainty that just because he or she has a

"must not foster an excessive government entanglement with religion." *Id.* at 612–13.

²⁰⁶ Greenawalt, *supra* note 99, at 338.

²⁰⁷ *Id.* at 388–89.

²⁰⁸ *Id.* at 389. "The idea of public reason is that within a liberal democracy some or all political decisions should be made on the basis of such reasons, which should derive from premises of liberal democracy and accepted methods of determining facts," rather than "comprehensive views about the nature of human beings and the world around us." *Id.*

²⁰⁹ *Id.* at 405.

²¹⁰ *Id.* at 405–06.

²¹¹ *Id.* at 406.

particular set of beliefs that all future lawmaking decisions would be based on them.²¹²

While these policies may certainly help curtail the reliance on Christian-based morals in lawmaking, it could be a difficult process to encourage both voters and candidates to view political reasoning from a different perspective. Although the government should absolutely not control how lay citizens should determine their own political viewpoints in how laws should be enacted and enforced, there is more leeway with the government's influence over government officials themselves. Freedom of religion is paramount to the lives of many citizens, even when those citizens are chosen to represent many other people. However, the Supreme Court has stated before, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."²¹³ This may be one of those situations where the limitations on the freedom of government officials may help protect the greater freedom of American citizens. By enacting policies that may place a more rigid limitation on an elected official's ability to consider their own personal moral principles in passing legislation, citizens of minority religions (who may have insufficient representation of their own in government) may still be protected against a culture with principles potentially incompatible with their own.

Another unfortunate consequence of this issue is the overabundance of representatives who belong to the religious majority.²¹⁴ While ultimately the religion of any official should not affect their lawmaking reasoning, certain influences by culture alone are unavoidable, and so more effort should be taken into encouraging a wider variety of cultural values among elected officials. A quota would not be an effective method for approaching this issue because it does not solve the motivating problem, and might encourage even more discrimination. A better idea would be to implement policy that addresses concerns citizens may have for non-Christian elected candidates. As stated earlier, procedures that support the focus of lawmaking decisions based on public reasons

²¹² *Id.* at 407. For example, a Catholic could still support the right to abortion even if he is personally morally against it, and a fundamentalist Protestant could be guided only by science in following issues where the Bible might say otherwise. *Id.*

²¹³ *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

²¹⁴ See *Faith on the Hill: The Religious Composition of the 114th Congress*, PEW RESEARCH CENTER (Jan. 5, 2015), <http://www.pewforum.org/2015/01/05/faith-on-the-hill>. Over 90% of members of Congress identify as Christian, most of which are Protestant. *Id.*

rather than religious reasons might dispel the notion of supporting one candidate over another based exclusively on religious principles.²¹⁵ Not only would this policy allow those of minority religions to be less apprehensive about discriminatory effects, but it would also reassure Christian voters that voting for a non-Christian candidate would have the same political reasoning, because they as well would not be able to base policies solely on their minority religion.

E. Encouraging Inclusion

“The true measure of a nation's commitment to religious freedom, it would seem, lies in its treatment of religious minorities or outgroups.”²¹⁶ If America wants to be seen as a bastion of religious freedom, then it should do more to improve the political consideration of those in the religious minority. Solely providing for and accommodating normative Christian principles in enacting laws naturally leaves aside those who also deserve protection and support. Those of minority religious beliefs should not be disregarded, despite some government officials believing the Constitution holds otherwise.²¹⁷ Rather, the government should seek to follow policies that encourage inclusion and nondiscrimination that gives citizens of all religions a part in American culture.

VI. CONCLUSION

This Note began by looking at this country's mission to provide for the freedom of religion it so proudly guarantees. While there have been many accomplishments in pursuit of this ideal, it has ultimately been a flawed undertaking because the goals have been set and achieved amidst a culture of the religious majority. The initial attempts in the Constitution laying the groundwork for religious tolerance and acceptance, while noble, have subsequently been misapplied as a result of this majority-influenced culture. This country has been molded by religion from its foundation through

²¹⁵ See *infra* note 208.

²¹⁶ Feldman, *supra* note 192, at 227.

²¹⁷ *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting). In a 2005 dissent, Justice Scalia stated, “it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.” *Id.*

religious influence on the family unit, the educational system, and social welfare programs in the community. Policies were created by the judicial system seeking to protect the culture so influenced by the majority religion, and the government has a history of enacting legislation with the purpose of protecting religion directly, or protecting the associated values. As a result of this permeation of normative religious values, the public has sought and elected officials that share their moral values, who in turn continue to rely on these values in creating and enforcing laws. However, this could be remedied by implementing policies that limit the possible influence of only majority religious principles, and procedures that seek to provide for inclusiveness and acceptance for citizens of every variety of belief. The underlying American culture focused on majority religions can be reformed by supporting education examining a variety of religious backgrounds and principles. Additionally, progress can take place in the government by encouraging inclusive religious speech and limiting reliance on personal morality in enacting legislation. In order to truly achieve the American goal of religious freedom, there should be a stronger focus on preventing the political and legal exclusion of citizens who may not share the religious principles of the majority moral culture.