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## Judicial Selection and the Religious Test Clause

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# JUDICIAL SELECTION AND THE RELIGIOUS TEST CLAUSE

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## INTRODUCTION

American society is simultaneously growing more religiously diverse<sup>1</sup> and more politically divided along religious lines.<sup>2</sup> These phenomena

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1. DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION 1 (2001) (describing America as “radically” more religiously diverse than thirty years ago); see also DAVID BROOKS, ON PARADISE DRIVE 10 (2004) (describing the growth in denominational diversity and its effect on American culture); Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law*, 51 BUFF. L. REV. 127, 127 (2003) (“The last thirty-five years have seen an exponential increase in American pluralism, and in the number and diversity of religions.”).

2. See, e.g., Susan Page, *Churchgoing Closely Tied to Voting Patterns*, U.S.A. TODAY, June 6, 2004, at A1; Peter Steinfelds, *Using How People Worship to Assess Who Votes for Whom, Finding More Than One “Religion Gap”*, N.Y. TIMES, Jan. 31, 2004, at B6; see also Robin Toner, *The Culture Wars, Part II*, N.Y. TIMES, Feb. 29, 2004, § 4, at 1.

thrust many of religion's most controversial intersections with law into the nation's courts.<sup>3</sup> Federal courts wrestle with these issues amidst significant compositional changes requiring heated political battles over selecting those courts' future members.<sup>4</sup> Recent controversies indicate that judicial candidates' religious involvements, views, and motivations will play an increasingly important role in these debates.<sup>5</sup>

This resurfacing of religion in judicial selection brought to light a largely forgotten<sup>6</sup> provision of the Constitution providing that “[n]o

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3. Federal courts recently resolved several contentious disputes involving expressly religious topics such as public funding of religious education and invocations of God in public schools. *See, e.g.,* *Locke v. Davey*, 540 U.S. 712 (2004) (public funding for theology education); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (public funding of religious schools); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (school prayer); *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002) (recitation of “under God” as part of Pledge of Allegiance in public schools), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev'd*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (dismissed for lack of standing). In addition, both federal and state courts have recently faced religiously divisive disputes concerning issues about which religious beliefs motivated advocates on both sides. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in consensual homosexual sodomy); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (abortion); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (same-sex marriage).

4. President George W. Bush will likely appoint at least one Supreme Court justice during his second term. *See* Jeffrey Rosen, *Can Bush Deliver a Conservative Supreme Court?*, N.Y. TIMES, Nov. 14, 2004, § 4, at 1 (exploring what kind of justice Bush may appoint). In addition, lower federal court appointments are increasingly subject to extensive public scrutiny. *See* Will Baude, *Pro Circuit*, NEW REPUBLIC ONLINE, July 21, 2004, at <http://ssl.tnr.com/p/docsub.mhtml?i=express&s=baude072104> (last visited Jan. 14, 2005).

5. *See infra* notes 30–32, 36–43, 52–55, 129–30 and accompanying text. I often refer to prospective federal judges both before and after presidential nomination as “judicial candidates” or “candidates” to avoid as much of the confusing nomenclature of the judicial selection process as possible.

6. Constitutional protection of and from religion is typically discussed in the context of the First Amendment's Religion Clauses. Although scholars devote considerable attention to the Establishment and Free Exercise Clauses, they hardly notice the Religious Test Clause. *E.g.,* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (2002) (discussing the Religious Test Clause for 8 of 937 pages). Popular discourse follows this scholarly tradition by sometimes ignoring the Religious Test Clause's very existence. *See, e.g.,* Walter Isaacson, *God of Our Fathers*, TIME, July 5, 2004, at 62 (“The one clear proclamation on the issue of religion in the founding documents is, of course, the First Amendment.”) (emphasis added). The Clause's few conservationists recognize its unique and oft-overlooked place in American constitutional thought. *See* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. L. REV. 674, 677 (1987) (“All but completely ignored . . . is the only occasion on which the Constitution's makers actually addressed [religion].”) (emphasis in original); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1050 (1990) [hereinafter Levinson, *Confrontation*] (“We should . . . pay special attention to article VI of the Constitution. . . .”).

In some contexts, the Religious Test Clause and the Establishment Clause are closely interwoven. *See* Theriault v. A Religious Office in the Structure of the Gov't Requiring a Religious Test as a Qualification, 895 F.2d 104, 106 (2d Cir. 1990) (considering whether “the protections of the religious test clause are coextensive with those of the establishment and free exercise clauses”); *Anderson v. Laird*, 316 F. Supp. 1081, 1093 (D.D.C. 1970) (“[T]he banning of the religious test oath in the

religious Test shall ever be required as a Qualification” for holding public office.<sup>7</sup> Members of both political parties recently accused their political opponents of violating the Religious Test Clause by considering religion in their judicial selection decisions.<sup>8</sup> The ensuing debate centered on whether religion had impermissibly entered into the respective political branches’<sup>9</sup> traditionally broad discretion in testing the substantive ideologies of judicial candidates by surpassing the textual limitation on that discretion represented in the Religious Test Clause.<sup>10</sup> Although participants in these debates repeatedly invoked the Clause, their arguments failed to sufficiently clarify how the Clause should apply to judicial selection.

This Note attempts to fill that void. Part I begins by proposing a model to provide a more nuanced understanding of “religion” and “ideology.”<sup>11</sup> The model places religious affiliation on one end of a continuum and secularly motivated ideology on the other, and attempts to trace the contours of the line between the two. After describing the model, I turn to religion’s role in judicial selection.<sup>12</sup> Historically, religious affiliation and religiously motivated ideology have played significant roles in judicial selection, although the political branches have rarely considered theology in determining whom to nominate or confirm.

Constitution was to keep the Federal Government from creating an established religion. . . . Thus, from an historical standpoint there is a close connection between the establishment prohibition and the test oath prohibition.”), *rev’d*, 466 F.2d 283 (D.C. Cir. 1972). Professor Stephen Carter alluded to a possible Establishment Clause violation from express discussion of religious belief in Senate nomination hearings. Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 936–37 (1989). However, there is no indication that the Religious Test Clause does not apply to the specific issue of religious tests for federal judicial office. See J. Gregory Sidak, *True God of the Next Justice*, 18 CONST. COMMENT. 9, 11–12 (2001). Regardless, Establishment Clause implications are beyond the scope of this Note.

7. 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.”).

8. In 2002, President George W. Bush announced that he would only nominate judges who believe that “our rights were derived from God.” David Von Drehle, *Judge Blocks Pledge Decision During Appeals; Republicans Seek Political Gain, But Ruling Spurs Bipartisan Ire*, WASH. POST, June 28, 2002, at A6; see also *infra* notes 108–10 and accompanying text. The next year, senators of both parties accused other senators of unconstitutionally considering judicial candidates’ religious affiliations and ideologies. See *infra* note 101 and accompanying text.

9. I describe the president and senate as the “political branches” while recognizing the sometimes political and ideological nature of judicial decisions. See *infra* note 64.

10. See Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 365–66 (1994–95) (describing the Religious Test Clause as a general limitation on political branch discretion).

11. See *infra* notes 18–19 and accompanying text.

12. See *infra* notes 20–55 and accompanying text.

Part II describes the potentially conflicting constitutional provisions at issue.<sup>13</sup> On one hand, the Constitution provides the political branches significant discretion to test judicial candidates' ideologies.<sup>14</sup> On the other, the Religious Test Clause prohibits religious tests for judicial office.<sup>15</sup> By exploring the theoretical underpinnings of ideological tests and the Religious Test Clause's historical roots, I explain that the constitutional values may not be contradictory but that we must delineate some line between "religious" tests and "political" or "ideological" tests.

Part III discusses how other scholars and a few political leaders have applied the Religious Test Clause to judicial selection.<sup>16</sup> Most assume that the Religious Test Clause prohibits tests for religious affiliation or theology. However, there is no consensus about whether testing a candidate's religiously motivated ideology violates the Clause.

Finally, Part IV analyzes which qualities of judicial candidates the Religious Test Clause should deem sufficiently "religious" to be beyond political branch scrutiny.<sup>17</sup> By distinguishing between the Religious Test Clause's appropriate prohibitions and the traditional sphere of ideological inquiry, I suggest that the Religious Test Clause should prohibit denominational and theological tests for judicial office, while it should permit ideological inquiry regardless of possible religious motivation.

## I. RELIGION'S ROLE IN JUDICIAL SELECTION

### A. A Model of "Religion" and "Ideology"

Separating the religious qualities political branches could consider into four general categories helps clarify our understanding of ideology and religion in the judicial selection process, as well as how best to apply the Religious Test Clause to judicial selection. I describe those general categories as religious affiliation, theological beliefs, religiously motivated ideology, and secularly motivated ideology.

On one end of the continuum is religious affiliation. The umbrella term "religious affiliation" includes a candidate's affiliation with a religious group or denomination. The religious denomination with which a candidate identifies can inform the candidate's theological beliefs. In this

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13. See *infra* notes 56–125 and accompanying text.

14. See U.S. CONST. art. II, § 2, cl. 2.

15. See U.S. CONST. art. VI, cl. 3.

16. See *infra* notes 127–48 and accompanying text.

17. See *infra* notes 150–79.

sense, “theological beliefs” describe a candidate’s personal beliefs about God and human relationships with God.<sup>18</sup>

In some cases, a candidate’s theological beliefs motivate that candidate’s ideological views. “Religiously motivated ideological beliefs” are views that do not depend on that candidate’s status as a religious believer *per se*: Individuals could share the same ideological convictions regardless of whether they deduce their ideological views from religious or secular premises. I consider these religiously motivated ideological beliefs separate from religious affiliation and theology because religiously motivated ideological beliefs do not depend solely on a candidate’s status as a religious believer; rather, the term “religiously motivated ideology” describes the direct influence of a candidate’s personal subscription to a particular application of denominational doctrine or theology on that candidate’s future judicial decisionmaking.<sup>19</sup>

On the opposite end of the continuum from religious affiliation are ideological beliefs with purely secular bases. Because I presume that the traditional ideological scrutiny of judicial candidates will continue in the future, discussion of “secularly motivated ideology” will form very little of the analysis below. Instead, I focus on religious affiliation, theology, and religiously motivated ideology.

Admittedly, the boundaries between the four categories sometimes overlap. For example, a judicial candidate’s view on an issue may not be clearly theological or clearly ideological. For some beliefs, the theological and ideological applications may be very difficult to decipher. In this Note, I place a variety of controversies in the category I find most appropriate. But rather than provide answers to all possible eventualities, I suggest these categories as rough generalized areas into which future debates should attempt to categorize particular issues as they arise.

18. *Cf.* AMERICAN HERITAGE DICTIONARY 1794 (4th ed. 2000) (defining “theology” as “[t]he study of the nature of God and religious truth”); WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1223 (1990) (defining “theology” as “the study of religious faith, practice, and experience” and “God and his relation to the world”). *But see* *Locke v. Davey*, 540 U.S. 712, 734–35 (2004) (Thomas, J., dissenting) (arguing that, in the education context, “theology” includes purely secular perspectives rather than only religious perspectives). Thus, I use the term “theology” to describe a certain subset of religious beliefs; I refer to religious beliefs that directly affect a judge’s future decisionmaking as religiously motivated ideology.

19. *Cf.* Richard B. Saphire, *Religion and Recusal*, 81 MARQ. L. REV. 351, 355–56 (1998) (finding that in recusals it is “not the judge’s status as a Catholic *per se* which is claimed to be disqualifying, but the fact that Catholic religious doctrine is . . . opposed to capital punishment and that [the judge] personally subscribes to that doctrine”). This description of religiously motivated ideology includes all views of a candidate—including even those views commonly considered “religious”—that directly affect the candidate’s future judicial decisionmaking.

### *B. The Role of Religious Affiliation*

The political branches historically consider judicial candidates' religious affiliations without regard for the Religious Test Clause.<sup>20</sup> In the mid-twentieth century, religious affiliation of Supreme Court justices and potential justices became so important that some commentators referred to seats by the occupants' religious affiliations.<sup>21</sup> Commentators frequently referred to the "Jewish Seat" and the "Catholic Seat" after the long line of justices identifying with the Jewish and Catholic faiths.<sup>22</sup>

While some have opposed various candidates because of their religious affiliation, a candidate's religious affiliation more often works in the candidate's favor, frequently for non-religious political reasons. In surprisingly few instances, candidates' religious affiliations worked against their nomination. Justices Roger Taney and Clarence Thomas faced opposition from senators suspicious of whether they would be beholden to papal dictates because they were Catholic.<sup>23</sup> Likewise, President Hoover feared nominating Benjamin Cardozo to the Supreme Court because Cardozo would be the second Jewish member of the Court.<sup>24</sup> President Richard Nixon appointed William Rehnquist to the Court despite Rehnquist being a "damned Protestant" and Nixon's temptation to "[t]ell him to change his religion and try to get him baptized" prior to nomination.<sup>25</sup>

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20. THOMAS KARFUNKEL & THOMAS W. RYLEY, *THE JEWISH SEAT* 11 (1978). For example, the Senate Judiciary Committee apparently seeks information about a judicial candidate's religious affiliation as part of its inquiry into the candidate's background. See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 577–78 (2004).

Although historical traditions may sometimes deem otherwise unconstitutional practices constitutional, I presume that the Religious Test Clause still applies in full force to federal judicial selection.

21. KARFUNKEL & RYLEY, *supra* note 20, at 11.

22. *Id.*

23. Barbara A. Perry, *The Life and Death of the "Catholic Seat" on the United States Supreme Court*, 6 J.L. & POL. 55, 58–60 (1989) (discussing senatorial opposition to Taney's Catholicism); Sidak, *supra* note 6, at 10–11 (discussing Senator Orrin Hatch's skepticism of Thomas's Catholicism).

24. KARFUNKEL & RYLEY, *supra* note 20, at 83–84.

25. JOHN W. DEAN, *THE REHNQUIST CHOICE* 231 (2002); see also *NBC News: Today*, 2004 WL 56560132 (NBC television broadcast, Mar. 10, 2004) (interviewing Chief Justice Rehnquist). Upon first hearing Rehnquist's name, Nixon apparently asked his staff whether Rehnquist was Jewish. Jeffrey Rosen, *Rehnquist the Great?*, THE ATLANTIC, Apr. 2005, at 79, 87. If Nixon's concern over Rehnquist's religious affiliation was legally substantive, he may have been pleased to see that Rehnquist's jurisprudence has been less than faithful to Lutheran doctrine. 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).

Religious affiliation has more often aided judicial candidates. In the nominations of at least five Catholic justices, their Catholicism was a decisive factor in the president choosing to nominate them.<sup>26</sup> Presidents and senators generally based explicit consideration of religious affiliation on two rationales. First, some thought that the federal judiciary should be representative of religious and cultural minorities, a view similar to arguments in favor of affirmative action programs.<sup>27</sup> Second, some used religious affiliation as a mechanism through which they could solidify support for their political agendas among the candidate's religious group.<sup>28</sup> Presidents and senators alike have manipulated the selection of Catholic or Jewish judicial candidates to appeal to like-affiliated voters.<sup>29</sup> In 2003 and 2004, some expanded this political manipulation by using candidates' religious affiliations as campaign propaganda against political opponents.<sup>30</sup> Even more recently, the role of conservative evangelicals in

26. See Perry, *supra* note 23, at 71–91 (finding Catholicism a decisive factor in the appointments of Justices Pierce Butler, Frank Murphy, Joseph McKenna, and Edward White); see also Bernard Weinraub, *O'Connor Was Also Reported Contender*, N.Y. TIMES, June 19, 1986, at D26 (describing Scalia's qualifications as including his Catholic lineage); William Safire, *El Nino's Current*, N.Y. TIMES, June 20, 1986, at A31 (quoting a conservative political source describing Scalia's Catholicism as one of his major qualifications for the Supreme Court).

27. KARFUNKEL & RYLEY, *supra* note 20, at 79. "Symbolic importance" of the "growing acceptability" of religious minorities allegedly warrants denominational balance as an important goal in selecting justices. See *id.* at 144; see also Sanford Levinson, *Who is a Jew(ish Justice)?*, 10 CARDOZO L. REV. 2359, 2362 (1989) [hereinafter Levinson, *Jewish Justice*] (finding that Justices Brandeis and Frankfurter may have been appointed more for their Jewish cultural identification than their Jewish religious identification). For the analogies between affirmative action and religion law, see Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 940–41 (2004).

28. KARFUNKEL & RYLEY, *supra* note 20, at 144.

29. Examples of political manipulation abound. Several senators attempted to appease their growing Catholic constituencies by supporting President Cleveland's nomination of Edward White. See Perry, *supra* note 23, at 64. President Franklin Roosevelt "nurtured Catholic support . . . by appointing Roman Catholics to office in unprecedented numbers." *Id.* at 74. Likewise, President Eisenhower considered Justice William Brennan's Catholicism a boost to his efforts to win votes in New England. Rodney A. Grunes & Jon Veen, *Justice Brennan, Catholicism, and the Establishment Clause*, 35 U.S.F. L. REV. 527, 538 (2001); see also KARFUNKEL & RYLEY, *supra* note 20, at 80 (noting that President Eisenhower, "seeking votes in the industrial northeast, named William Brennan to the Court" thereby reinstalling a Catholic Seat on the Court). President Nixon was "consumed by questions about how the . . . religion . . . of nominees would play." David Greenberg, *Admit the Obvious—It's a Political Process: Ideology Governs Judicial Confirmations. Let's Say So*, WASH. POST, July 18, 2004, at B3.

Appeal for the Jewish vote was an "important factor" in the appointment of the line of Jewish justices commonly described as the Jewish Seat. KARFUNKEL & RYLEY, *supra* note 20, at 144. One senator allegedly opposed Justice Brandeis' nomination out of resentment for President Wilson using Brandeis' Judaism as a "play for the Jewish vote." *Id.* at 50.

30. In 2003 confirmation hearings, Senator Orrin Hatch asked circuit judge nominee William Pryor to state his Catholic affiliation. *Nomination of William H. Pryor, Jr., to be United States Circuit Judge for the Eleventh Circuit before the Senate Comm. on the Judiciary*, 108th Cong. 56 (2003)

the 2004 reelection of President George W. Bush has led some to wonder whether the President and his political advisors will seek to repay or build more support within that constituency by appointing a justice who is a conservative evangelical.<sup>31</sup>

Although rare, the political branches have sometimes expressly rejected consideration of judicial candidates' religious affiliations. At least two presidents refused to consider a candidate's religious affiliation after their aides encouraged them to do so.<sup>32</sup> Likewise, Congress twice instructed the president to not take religious affiliation into account when nominating judges.<sup>33</sup> An amendment to Senate rules proposed in 2004 would deem "any question of the [judicial] nominee relating to the religious affiliation of the nominee" out of order.<sup>34</sup> Aside from these

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(testimony of William Pryor). Conservative groups then used Senator Hatch's questioning in television and newspaper advertisements against the Democratic members of the Judiciary Committee. *Capitol Report*, 2003 WL 70481812 (CNBC television broadcast, July 30, 2003) (interviewing Senator Richard Durbin and C. Boyden Gray about the advertisements). The advertisements ran in states with large Catholic populations whose Democratic senators opposed Pryor's nomination. *Id.* For criticism from both sides of the political landscape, compare Richard Cohen, *Bad Faith Advertising*, WASH. POST, July 29, 2003, at A17 (referring to the advertisements as "a demagogic lie"); and 149 CONG. REC. S14,641 (daily ed. Nov. 12, 2003) (statement of Sen. Leahy) (rebuking Republican senators and the groups running the advertisements for "misus[ing] religion . . . by playing wedge politics"); with Byron York, *Catholics Need Not Apply?*, NAT'L REV., July 30, 2003, at <http://www.nationalreview.com/york/york073003.asp> (last visited Jan. 14, 2005). The debate over the allegedly improper use of religion in the Pryor and Pickering nominations denigrated to the levels of profanity. See Agence France Presse, *Cheney Has No Regrets Over Use of F-word to Curse Senator*, June 25, 2004, available at 2004 WL 84617317 (describing Vice President Dick Cheney's use of profanity against a senator when discussing the Pryor and Pickering nominations).

31. Susan Jacoby, *The God Squad*, AM. PROSPECT, Jan. 1, 2005, at 11 ("Leaders of the Religious Right are demanding a hard-line conservative Supreme Court as a payoff for their contribution to the re-election of President George W. Bush."); see also Dan Gilgoff & Bret Schulte, *The Dobson Way*, U.S. NEWS & WORLD REP., Jan. 17, 2005, available at 2005 WL 61434219.

32. See, e.g., Perry, *supra* note 23, at 70 (describing President Taft's refusal to consider Justice White's Catholicism in promoting him to Chief Justice). When President Truman nominated Tom Clark, a Protestant, to the supposed "Catholic Seat," Truman responded to Catholic criticism by stating: "I do not believe religions have anything to do with Supreme Court. If an individual has the qualifications, I do not care if he is a Protestant, Catholic, or Jew." *Id.* at 80. In addition to Taft and Truman, President Bill Clinton apparently did not consider Justices Stephen Breyer's and Ruth Bader Ginsburg's Jewish faith in deciding whether to nominate them to the Supreme Court. See Ruth Bader Ginsburg, *From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?*, 41 BRANDEIS L.J. 229, 235 (2002).

33. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 351 ("It is the sense of the Congress that the President, in selecting individuals for nomination to the Federal judgeships created by this Act, shall give due consideration to qualified individuals without regard to . . . religion. . . ."); Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, 1633 ("The Congress . . . suggests that the President, in selecting individuals for nomination to the Federal judgeships created by this Act, give due consideration to qualified individuals regardless of . . . religion. . . .").

34. S. Res. 207, 108th Cong. (2003); see also Patrick Leahy & Richard Durbin, *Injecting Religion into the Judicial Nominations Process*, at <http://leahy.senate.gov/press/200307/073103f.html>

formal pronouncements, individual senators have sometimes informally discouraged presidents from considering a candidate's affiliation.<sup>35</sup>

### C. *The Role of Theological Beliefs*

The political branches have not traditionally considered candidates' theological beliefs relevant to judicial selection decisions. Theological tests were not commonplace until recently when federal and state judicial selection processes began requiring judicial candidates to profess theological beliefs.<sup>36</sup>

Prior to 2002, the only known theological test applied to a federal judicial candidate was when one senator refused to support Judge Robert Bork's Supreme Court nomination because Bork "refus[ed] to discuss his belief in God or the lack thereof."<sup>37</sup> In 2002, President George W. Bush announced an apparent theological litmus test for potential federal judges.<sup>38</sup> To be nominated by President Bush, a candidate must believe that "rights were derived from God."<sup>39</sup> While it is unclear whether—and perhaps unlikely that—the Administration formally requires profession of that belief, one of President Bush's nominees publicly articulated his

(last visited Jan. 14, 2005) (explaining proposal).

35. KARFUNKEL & RYLEY, *supra* note 20, at 85 (describing Senator William Borah's conversations discouraging President Hoover from considering Cardozo's Jewish affiliation).

36. One politician recently invoked the Religious Test Clause to protect himself from an alleged theological test outside of the judicial selection context. Roy Moore, removed from office as an Alabama Supreme Court judge because he failed to comply with a court order, argued that the Religious Test Clause protected him from being "excluded for acknowledging the sovereignty of God." Allie Martin, *Judge Roy Moore Takes Another High Court Shot at Reclaiming Bench Seat*, May 27, 2004, at [http://news.christiansunite.com/Religion\\_News/religion00993.shtml](http://news.christiansunite.com/Religion_News/religion00993.shtml) (last visited Jan. 14, 2005); see also Moore v. Judicial Inquiry Comm'n of the State of Ala., No. 04-153, 2004 WL 1732771, *passim* (U.S. July 29, 2004), *cert. denied*, 125 S. Ct. 103 (2004).

37. See ETHAN BRONNER, BATTLE FOR JUSTICE 294–95 (1989) (quoting Senator Howell Heflin).

38. Drehle, *supra* note 8, at A6.

39. *Id.* President Bush responded to the Ninth Circuit's original decision in *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002) (holding unconstitutional the practice of reciting the phrase "under God" in the Pledge of Allegiance in public schools), by stating that the decision reinforced "the fact that we need common-sense judges who understand that our rights were derived from God. Those are the kind of judges I intend to put on the bench." Drehle, *supra* note 8, at A6. Incidentally, this view is inconsistent with the Supreme Court's rhetoric. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (noting that constitutional rights are derived from the "consent of the governed"). Liberal political and religious groups responded to President Bush's statement by arguing that the Religious Test Clause precluded Bush's theological test. See, e.g., Press Release, *Americans United for Separation of Church and State, One Nation "Under God": Questions and Answers* (June 26, 2002), available at [http://www.au.org/site/DocServer/One\\_Nation\\_Under\\_God.pdf?docID=154](http://www.au.org/site/DocServer/One_Nation_Under_God.pdf?docID=154) (last visited Jan. 14, 2005); Press Release, *American Humanist Association, Bush Sets Religious Litmus Test for Judges* (June 28, 2002), available at <http://www.americanhumanist.org/press/ActionAlerts/aabushlitmus.html> (last visited Jan. 14, 2005).

belief that “we derive our rights from God” in hearings before the Senate Judiciary Committee.<sup>40</sup>

Recent controversies in state judicial selection similarly display the increasing popularity of theological tests. In early 2004, Florida’s judicial appointment commissions screened potential judges by asking whether each candidate “fears God.”<sup>41</sup> In states with elected judiciaries, special interest groups pressure candidates to publicly disclose their theological viewpoints.<sup>42</sup> In Idaho, an interest group asked state judicial candidates whether they believed in the literal truth of Biblical hell and that “God created all the heavens, earth, creatures, plants, and man.”<sup>43</sup> These state theological tests exemplify what an increased theological scrutiny of federal judicial candidates may look like in the future.

#### *D. The Role of Religiously Motivated Ideology*

Ideological positions motivated by religious affiliation or theology influenced many of history’s leading advocates of civil rights, economic justice, and world peace.<sup>44</sup> Similarly, contemporary judicial politics and selection often revolve around issues about which religious believers greatly care.<sup>45</sup> Such religiously motivated ideological beliefs have long been the subject of presidential and senatorial scrutiny.

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40. *Nomination of William H. Pryor, Jr., to be United States Circuit Judge for the Eleventh Circuit before the Senate Comm. on the Judiciary*, 108th Cong. 56 (2003) (testimony of William H. Pryor).

41. Stephanie Francis Ward, *Judging The Judge Candidates, Queries About Family Life, Religion Draw Fire in Florida County*, 3 No. 3 A.B.A. J. E-REP. 3 (Jan. 23, 2004).

42. *See, e.g.*, *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288, 1289 (11th Cir. 2004) (describing special interest group’s questionnaire regarding judicial candidate’s theological viewpoint).

43. Press Release, *Americans United for Separation of Church and State, Idaho Christian Coalition Grills Judicial Candidates on God, Hell, and Evolution* (May 10, 2000), available at [http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=6430&security=1002&news\\_iv\\_ctrl=1465](http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=6430&security=1002&news_iv_ctrl=1465) (last visited Jan. 14, 2005) (explaining the questionnaire and quoting relevant questions); *see also* John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217, 249–50 (2001) (discussing the religious nature of the Idaho questionnaires).

44. *See, e.g.*, STEPHEN L. CARTER, *GOD’S NAME IN VAIN* 84, 102, 136 (2000) (noting the religious motivations behind leaders in the Abolitionist, Progressive, and nuclear disarmament movements); Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1012 (2002) (describing religion’s role in civil rights movement).

45. *See supra* note 3. For example, religious believers are often the most vocal advocates on either side of the debates on sexual orientation equality and abortion. *See, e.g.*, Michael J. Perry, *Christians, The Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449, 479 (2001) [hereinafter Perry, *Same-Sex Unions*] (discussing religious motivations behind opponents of same-sex unions); Michael J. Perry, *Religion, Politics, and Abortion*, 79 U. DET. MERCY L. REV. 1, 3 (2001) [hereinafter Perry, *Abortion*] (discussing religious motivations

Although the distinction between religiously motivated and secularly motivated ideological positions is not entirely clear,<sup>46</sup> some candidates and judges have expressly identified specific ideological views as religiously motivated.<sup>47</sup> Examples abound where judges' religious beliefs motivate their decisions on issues concerning economic justice,<sup>48</sup> capital punishment,<sup>49</sup> and criminal sentencing.<sup>50</sup> Indeed, a judicial candidate's views on abortion, capital punishment, and sexual orientation equality are often both issues about which religiously involved judges have strong religiously motivated views and the primary political litmus tests for whether the prospective judge will be nominated and confirmed.<sup>51</sup>

Arguably the most salient example of bipartite consideration of religiously motivated ideology in the recent past is the political branches' constant concern over whether a candidate supports or opposes continued application of *Roe v. Wade*.<sup>52</sup> Presidential candidates make opposition to

behind opponents of reproductive rights).

46. See *infra* notes 175–76 and accompanying text.

47. Aside from issues with obvious religious nexuses, religious influences on judicial decisionmaking are often concealed. See Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. (forthcoming 2005). Indeed, religious motivations are sometimes implicit in the judicial candidate's ideological commitments to seemingly secular topics. See, e.g., VINCENT CRAPANZANO, *SERVING THE WORD* (2000) (drawing parallel between Biblical literalism and legal textualism); Failinger, *supra* note 25, at 646 (finding that religious affiliation and theology could affect a judge's rhetorical style). For an example of how knowledge of a judge's own religion's history can impact their opinion-writing, see *Yates v. El Bethel Primitive Baptist Church*, 847 So.2d 331, 349–53 (Ala. 2002) (Moore, C.J., dissenting) (drawing allusions to Christian history).

48. Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383, 395 (1998) (discussing the religious motivations for Justice Frank Murphy's support for labor unions, New Deal programs, and minimum wage laws); Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1454 (1998) (attributing Justice Ruth Bader Ginsburg's commitment to justice to her Jewish faith).

49. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998); Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305 (2004) (article written by federal magistrate discussing Catholic teachings on capital punishment).

50. Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. DAYTON L. REV. 1, 3 (2000) (finding that "religious beliefs exert a powerful directing influence upon the sentencing decisions of judges"); see also Garvey & Coney, *supra* note 49, at 332, 335 (finding that opposition to capital punishment may cause judges to be more willing to reverse a finding of guilt or make more defendant-lenient discretionary rulings). For an example of a district judge's religious beliefs motivating sentencing of a televangelist, see *United States v. Bakker*, 925 F.2d 728, 740–41 (4th Cir. 1991) (reversing sentence because of the sentencing judge's religious motivation).

51. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 305 (2004) (describing abortion and capital punishment as the primary litmus tests for both political branches); see also Jeffrey Bell & Frank Cannon, *Bush vs. Kerry*, WKLY. STANDARD, Feb. 9, 2004 (noting that Senate Democrats refused to confirm several Bush nominees because of the nominees' views on abortion and sexual orientation equality).

52. 410 U.S. 113 (1973) (holding that a constitutional right of privacy protects a woman's

or support for *Roe* a key campaign issue,<sup>53</sup> and presidents consider a candidate's views on reproductive rights paramount in deciding whom to nominate.<sup>54</sup> Senators suspicious of judicial candidates' religiously motivated opposition to *Roe* criticize and question the candidate about whether the candidate will follow *Roe* or will follow their own religiously motivated ideological convictions.<sup>55</sup>

## II. IDEOLOGICAL TESTS VS. RELIGIOUS TESTS

As explored above, the political branches have frequently considered aspects of a judicial candidate's religion in deciding whether to nominate or confirm. The political branches undertake this inquiry pursuant to their constitutional authority to test the qualifications of judicial candidates.<sup>56</sup> Traditionally, the political branches consider ideology as part of the candidates' qualifications for office.

In apparent contradiction to this traditional scrutiny, the Religious Test Clause prohibits the political branches from requiring religious tests as

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decision whether or not to terminate her pre-viability pregnancy).

53. See, e.g., 2004 Presidential Debate (Oct. 8, 2004), available at 2004 WL 86881918 (debating what kind of judge each presidential candidate would appoint including whether the judicial candidate supports a woman's right to choose); Neil A. Lewis, *Presidential Candidates Differ Sharply on Judges They Would Appoint to Top Courts*, N.Y. TIMES, Oct. 8, 2000, at 28 (describing similar debate in 2000 presidential election).

54. See Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 782 (1997) (noting role of abortion debate in President Clinton's nominating practices).

55. See Levinson, *Confrontation*, *supra* note 6, at 1062–65 (exploring the questions asked and the respective answers of Justices Brennan, Scalia, and Kennedy); Merz, *supra* note 49, at 314–15 (discussing the questions asked of Justices Brennan and Scalia). Despite its possibly dubious constitutionality and questionable practical efficacy, members of both parties generally agree that this “allegiance question” is appropriate. Sidak, *supra* note 6, at 10–11 (quoting Virginia Governor Douglas Wilder and Senator Orrin Hatch as supporting such questioning of Justice Thomas). Candidates commonly respond by declaring their commitment to “follow the law” regardless of their personal religious beliefs and some have committed to recusing themselves were their religious views to collide with the law. Levinson, *Confrontation*, *supra* note 6, at 1063–64; see also James L. Buckley, *The Catholic Public Servant*, 20 FIRST THINGS 18 (1992) (describing his own commitment to recuse himself if his religiously motivated ideology collided with precedent).

The allegiance question has become popular fodder for commentators' speculations on how hypothetical nominees could honestly respond. See, e.g., Levinson, *Jewish Justice*, *supra* note 27, at 2369 (describing hypothetical Orthodox Jewish nominee who believes that idolatry is condemnable); Rodney K. Smith, *Treating Others as our Own: Professor Levinson, Friendship, Religion, and the Public Square*, 38 TULSA L. REV. 731, 737–40 (2003) (describing questioning of a member of the Church of Jesus Christ of Latter-Day Saints); 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, 1119–27 (1990) (exploring similar questions vis-à-vis Quaker and “secular moralist” nominees).

56. See U.S. CONST. art. II, § 2, cl. 2.

qualifications for judicial office.<sup>57</sup> However, as I will explore in more depth in Parts III and IV, this apparent contradiction is merely superficial. The Religious Test Clause's history suggests that its demands may be in accord with ideological testing of judicial candidates. The Religious Test Clause is not a blanket prohibition of all tests touching upon religion; indeed, the Clause's scope is limited to "religious" tests and does not prohibit ideological ones.

### A. *Ideological Tests for Judicial Office*

The constitutional mechanism for staffing the federal judiciary requires approval by both political branches.<sup>58</sup> This bipartite process serves as the only meaningful majoritarian check on a judiciary otherwise considered beyond the reach of majoritarian control.<sup>59</sup> The political branches traditionally fulfill their roles by establishing flexible qualifications<sup>60</sup> including the judicial candidate's background, professional accomplishments, and—often predominately—ideology.<sup>61</sup> Indeed,

57. See U.S. CONST. art. VI, cl. 3.

58. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . ."). Obviously, prior to either nomination or confirmation, Congress must create the relevant judicial office. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

59. Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 628 (2003). The Constitution permits impeachment of federal judges, but judicial impeachment is a rarely invoked and "minor" congressional power. Michael Abramowicz, *Impeaching Judges at the Fringe*, 106 YALE L.J. 2293, 2294 (1997). In fact, in the past two centuries, Congress conducted a mere eleven judicial impeachment trials, only seven of which ended in convictions. Kristofor J. Hammond, *Judicial Intervention in a Twenty-First Century Republic: Shuffling Deck Chairs on the Titanic?*, 74 IND. L.J. 653, 658, 658 n.31 (1999). Experience may have proven Thomas Jefferson prophetic in describing judicial impeachment as a "mere scare-crow." *Id.* at 658.

60. As opposed to several other federal offices, the Constitution does not enumerate qualifications for judicial office. Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 17 (2001). Rather, it implicitly allows the political branches to set qualifications for judicial candidates limited only by the Religious Test Clause. See *infra* notes 98–111 and accompanying text for discussion of the qualifications clauses.

61. Michael J. Gerhardt, *Federal Judicial Selection as War, Part Three: The Role of Ideology*, 15 REGENT U. L. REV. 15, 25–26 (2003) (noting emphasis on ideology over background and professional accomplishments). For an analysis of the qualifications the Senate assesses in judicial candidates, see Lee Epstein, Jeffrey A. Segal & Nancy Staudt, *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. (forthcoming 2005). A growing literature challenges the theoretical underpinnings of ideological scrutiny, arguing that ideology should not play any role—or at least not a significant one—in judicial selection decisions. See, e.g., NORMAN VIEIRA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS* 254 (1998) (arguing that senatorial consideration of ideology threatens a president's ability to nominate whomever he pleases because

ideology has been the most prominent factor in judicial selection since President George Washington's first Supreme Court appointment.<sup>62</sup>

Ideological considerations generally involve assessing how the candidates' views on constitutional interpretation and specific legal issues will impact their future judicial decisionmaking.<sup>63</sup> Recognizing that judges' ideological views may substantively affect their judicial decisionmaking,<sup>64</sup> the political branches manipulate their respective roles

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presidents may not want to expend significant political capital on one nominee); Neil Richards, *The Supreme Court Justice and "Boring" Cases*, 4 GREEN BAG 2D 401, 407 (2001) (arguing that factors such as "temperament, maturity, and demeanor" should play important roles because "[i]t is not enough to have someone who can craft a brilliant opinion in a major constitutional ruling; we need someone who can stay awake and who pays equal attention when the tax cases . . . are 'droning on and on'"); Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 25 CARDOZO L. REV. (forthcoming 2005) (arguing that "character should be of primary importance in the judicial selection process, and political ideology should play a relatively minor role"). Indeed, it may be "difficult to find anyone who is satisfied with the way [federal judges] are appointed today." David A. Strauss & Cass R. Sunstein, *The Senate, The Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1491 (1992). However, for purposes of this Note I presume that the traditional ideological scrutiny by both political branches and by members of both political parties will continue in the future.

62. Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519 (2002) (tracing tradition from President George Washington through President George W. Bush). *But see* Lee Epstein et al., *Borked! The New Politics of Senate Voting on Supreme Court Nominees* (Washington Univ. in St. Louis, Working Paper, Jan. 14, 2005), available at <http://epstein.wustl.edu/research/Bork.html> (last visited Jan. 14, 2005) (arguing that ideology's role has not always been as significant as it is in modern judicial selection). Although presidents have tested judicial candidates' ideologies since Washington, they frequently employed more indirect routes for determining how a candidate would decide cases. Thus, presidents sometimes looked to party identification as a proxy for an explicit ideological test. *See infra* note 65. Ideological tests for how judges would decide future cases became more explicit during the Reagan Administration. VIEIRA & GROSS, *supra* note 61, at 6–7.

63. Chemerinsky, *supra* note 59, at 621 (defining ideology as "the views of a judicial candidate that influence his or her likely decisions as a judge" including the nominee's preferred methods of constitutional interpretation and views on specific legal issues); Albert P. Melone, *Judicial Discretion and the Senate's Role in Judicial Selection: Questioning Supreme Court Nominees*, 16 S. ILL. U. L.J. 557, 562 (1992) ("Ideology is the summary term describing nominee attitudes and values that are particularly relevant to the performance of the judicial function.").

64. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) ("[T]he Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."); Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 40 (2003) ("[T]he conditions of judicial employment enable and induce judges to vote their personal convictions and policy preferences—or in a word their values."). While ideological predisposition may not be the sole determinant of case outcome, empirical research indicates that ideology at least partially affects most judges' decisions. Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 836–43; *see also* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1193–94 (2004) (finding that computer models incorporating non-doctrinal factors and political preferences out-predict legal experts).

These Attitudinalist critiques have their own critics: Legalists argue that judges decide cases by strictly applying "the law—and not the personal politics of individual judges." Harry T. Edwards,

to promote political agendas: Presidents seek to enshrine their political preferences by appointing ideologically likeminded judges,<sup>65</sup> and the Senate asserts its role as an institutional balance by similarly testing candidates' legal and political views.<sup>66</sup> Both branches having equal power

*Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985). Under the Legalist model, judges deduce case outcomes from a defined sphere of statutory and common law rules. John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 87 (1995). Appealing to these "neutral principles" permits judges to decide cases impartially and without resort to ideological preferences. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255 (1997); see also Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 120 (1992) ("Most judges hold deeply internalized role constraints and believe that judgment is not politics."). Despite its notable adherents, many consider the Legalist model as "serv[ing] only to rationalize the Court's decisions and to cloak the reality of the Court's decisionmaking process." SEGAL & SPAETH, *supra*, at 53. While most agree that ideology is not the sole criterion for judicial decisionmaking, the modern conception of law generally views law as the product of political society and of judges as merely some of the political actors in that process. RUGER et al., *supra*, at 1155. For discussions of motivations other than solely ideology or legal doctrine, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10 (1998) (arguing that judges may be driven partially by ideology, but are also "strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act").

65. Strauss & Sunstein, *supra* note 61, at 1506–07; see also Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004) ("Presidents are entirely aware [that ideology effects judicial decisionmaking] and their appointment decisions are undertaken with full appreciation of it."). As one blunt indicator of ideological parity between president and nominee, presidents overwhelmingly appoint judges of the same political party as themselves. James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 153 (2003); see also Patricia M. Wald, *Random Thoughts on a Random Process: Selecting Appellate Judges*, 6 J.L. & POL. 15, 15 (1989) (noting that "card-carrying membership in the right political party has been a *sine qua non*" for both district and appellate nominations). Empirical studies find statistically significant relationships between political party and judicial ideology. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 243 (1999).

66. LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 132–37 (1985). Protection of appropriate checks and balances on executive appointment power is the primary rationale asserted by proponents of extensive senatorial ideological inquiry. See Paul Simon, *The Senate's Role in Judicial Appointments*, 70 JUDICATURE 55 (1986). Restricting the Senate's ideological inquiry would permit the President to "mold the Court in his own image with no meaningful democratic check." Jeff Yates & William Gillespie, *Supreme Court Power Play: Assessing The Appropriate Role of the Senate in the Confirmation Process*, 58 WASH. & LEE L. REV. 1053, 1062 (2001).

Many argue that the Constitution's Framers intended strict senatorial scrutiny of judicial nominees to balance the president's discretion in nominating judges. James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 365 (1989). Among the significant historical evidence cited in support of this proposition is Alexander Hamilton's conception that senatorial scrutiny of judicial nominees would be "an excellent check upon a spirit of favoritism in the President" and would prevent the president from being governed solely by "his private inclinations and interests." THE FEDERALIST NO. 76, at 483 (Alexander Hamilton) (Benjamin F. Wright ed., 1996).

Some opponents of ideological scrutiny criticize the Senate for asserting a role equivalent to the executive's. See, e.g., John S. Baker, Jr., *Ideology and the Confirmation of Federal Judges*, 43 S. TEX. L. REV. 177, 206 (2001) (arguing that the Senate should decide whether to confirm based solely on

to ideologically screen judicial candidates implies that both branches bear equal responsibility for possible political upheaval or overemphasis on purely ideological considerations.<sup>67</sup>

While some criticize the prejudicial nature of ideological scrutiny in the modern political environment,<sup>68</sup> most observers consider ideology a constitutionally permissible and theoretically acceptable factor in judicial selection.<sup>69</sup> By testing candidates' ideological views as qualifications for judicial office, the political branches can together preserve an overall ideological balance in the federal judiciary.<sup>70</sup> Seeking an ideological

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"competence and character"); Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 273-74 (2001) (arguing that the Senate should only consider whether candidates adhere to the judicial philosophy favored by the president); Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEO. J. LEGAL ETHICS 127, 141 (2001) (arguing that the Senate should not consider ideology). However, few critics argue that presidents should not consider ideology when deciding whom to nominate; indeed, restricting the president's ability to scrutinize possible nominees for ideological parity would be much more difficult than attempting to restrict the Senate's prerogative. Cf. Choi & Gulati, *supra* note 51, at 300 (discussing possibility of a president choosing judicial nominees by merit rather than political preferences).

67. Presidents are able to ideologically screen prospective judicial candidates without as much public scrutiny because deliberations occur behind closed doors as opposed to the Senate's practice of holding public hearings with judicial candidates. See Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988) (describing history of public hearings in Senate dating back to 1939); see also Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 403 (2000) (finding that the Senate has asked judicial candidates about their views on specific precedent since at least 1955).

68. See, e.g., Stephen L. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1189-91 (1988). Criticism of ideology's role is also prevalent in the Senate. However, some senators who deride consideration of ideology regarding their own party's nominees often cite ideology as a legitimate consideration when blocking the opposite party's nominees. Compare 149 CONG. REC. S14,533 (daily ed. Nov. 12, 2003) (statement of Sen. Hatch) (arguing that senatorial consideration of President George W. Bush's nominees' ideological views is inappropriate), and Orrin G. Hatch, *Save the Court From What?*, 99 HARV. L. REV. 1347, 1354 (1986) (explaining that Senate rejection of Reagan nominees on ideological grounds "would deny the President his constitutional prerogative and assert a power to select nominees that the Senate was not intended to possess"), with 144 CONG. REC. S6181, 6186 (daily ed. June 11, 1998) (statement of Sen. Hatch) (explaining that, when faced with Clinton nominees, "the effort to reign in judicial activism" should include "opposing potential activist nominees"), and 144 CONG. REC. S1970 (daily ed. Mar. 16, 1998) (statement of Sen. Hatch) (refusing to support Clinton nominee Frederica Massiah-Jackson because of her expansive view of criminal defendants' rights).

69. See, e.g., Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); Chemerinsky, *supra* note 59; Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68 (1991); William Rehnquist, *The Making of a Supreme Court Justice*, HARV. L. REC., Oct. 8, 1959, at 7 (arguing that the Senate should "thoroughly inform[] itself on the judicial philosophy" of nominees before confirming).

70. TRIBE, *supra* note 66, at 110. A number of scholars and politicians support the goal of ideological balance. See, e.g., Marcia D. Greenberger, *Should Ideology Matter?*, 50 DRAKE L. REV. 481, 491 (2002); Cass R. Sunstein, *Should Ideology Matter?*, 50 DRAKE L. REV. 463, 463 (2002); Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19. However, liberals and

balance can promote legal stability while permitting political flexibility in responding to changing dynamics in public attitudes toward the law.<sup>71</sup>

### *B. The Religious Test Clause*

The only religion clause in the unamended Constitution prohibits requiring “religious tests” as a “Qualification” for public office.<sup>72</sup> Thus, the Religious Test Clause prevents the political branches from requiring “religious tests” as a “Qualification” for judicial office in exercising their respective responsibilities to appoint and to confirm judicial candidates. The Constitution’s drafters adopted the Clause as a radical break from European and state religious tests based on denominational affiliation and theological beliefs. In the intervening years, courts have distinguished between beliefs sufficiently “religious” and those considered too political to be within the Clause’s prohibition.

#### *1. Adoption of the Religious Test Clause*

In the centuries preceding the American Revolution, European governments used religious tests to preserve the established church’s political power.<sup>73</sup> European tests typically required positive assertions of denominational affiliation or theological beliefs as a prerequisite for

conservatives alike criticize ideological balance as an improper goal. Compare Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1073, 1106 (2001) (arguing that ideological balance is an inappropriate goal because it would have required Roosevelt to appoint opponents of the New Deal and Johnson to appoint segregationists), with Stephen B. Presser, *Some Thoughts on our Present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, Jr., the Unborn, the Senate, and Us*, 1 AVE MARIA L. REV. 113, 124–25 (2003) (arguing that the goal of ideological balance is merely pretext for liberal substantive biases in the “culture wars”).

71. In their critique of an “ideologically balanced” judiciary, Professors Balkin and Levinson imply that appointing an ideologically representative judiciary would retard legal progress on important issues of civil and constitutional rights. See Balkin & Levinson, *supra* note 70, at 1106. However, the political process from which presidents and senators emerge may safeguard the judiciary against such problems by ensuring that the political branches will appoint and confirm judges as politically forward-looking as the electorate. See Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279, 285 (1957). However, the process alone cannot ensure that judges with lifetime appointments remain throughout their tenure as progressive as the political branches might prefer.

72. U.S. CONST. art. VI, cl. 3.

73. 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, 951 (1996). As the court explained in *Rogers v. Common Council of City of Buffalo*, 25 N.E. 274 (N.Y. 1890), “[d]eclarations, oaths, and tests, as a condition for holding office, had been frequently resorted to by the parliament of Great Britain for the purpose of promoting the prosperity of one religion, or insuring the downfall of another.” *Id.* at 278.

holding public office.<sup>74</sup> Early state constitutions mimicked the breadth of the European tests: the thirteen states with religious tests limited public office on the basis of denomination or theology.<sup>75</sup> Some constitutional provisions reserved public office for Protestants<sup>76</sup> or Christians.<sup>77</sup> Others

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74. Daniel L. Dreisbach, *The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 J. CHURCH & ST. 261, 263 (1996). Starting in 1673, English law required individuals to swear that they did not believe in transubstantiation prior to holding public office and members of Parliament were prohibited from voting if they did not forswear papal authority, belief in transubstantiation, and the veneration of Mary or the Saints. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2176 (2003).

75. Thirteen states imposed religious tests: Ten states directly imposed religious tests through constitutional provisions and three mandated religious tests through more indirect methods. The ten states that imposed religious tests in their early state constitutions are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Vermont. *See infra* notes 76–81.

Connecticut, New York, and Virginia refrained from constitutionally mandating religious qualifications for public office as such. *See* GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787*, at 213 (1989). However, all three states placed indirect religious restrictions on holding office. Connecticut statutorily required professions of theological beliefs to hold public office and constitutionally required public officeholders to swear an oath with the appendage, “So help [me] God.” *See* THE FIRST LAWS OF THE STATE OF CONNECTICUT 67 (John D. Cushing ed., 1982) (describing statute codified in 1784); CONN. CONST. of 1818, art. X, § 1 (1965), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 546 (Francis Newton Thorpe ed., 1993) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] (prescribing oath of office). The New York Constitution limited naturalization to non-Catholics and adopted legislation preventing Catholics from serving in public office. MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* 133 n.33 (1984) (noting that the New York Constitution “required persons born outside the United States to take a naturalization oath renouncing all allegiance to ‘every foreign King, Prince, Potentate, and State, in all matters ecclesiastical as well as civil’” in hopes of limiting papal influence); CHESTER JAMES ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT* 94 (1964) (discussing New York legislation rendering Catholics ineligible for public office). If Virginians elected a non-Christian, “he would have had to serve from jail” because Virginia criminally punished public utterance of non-Christian views and operated a state-supported Anglican church until 1786. Bradley, *supra* note 6, at 683.

Only Rhode Island refrained from imposing a religious test for public office. In its first state constitution, Rhode Island expressly disavowed religious tests. R.I. CONST. of 1842, art. I, § 3, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3222 (“[N]o man shall be . . . disqualified from holding any office; nor otherwise suffer on account of his religious belief . . .”). Rhode Island did require office holders to swear “[s]o help [me] God” as part of the oath of office. *See* R.I. CONST. of 1842, art. IX, § 3, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3231–32.

76. Georgia, New Hampshire, New Jersey, New York, North Carolina, South Carolina, and Vermont limited public office to Protestants. GA. CONST. of 1777, art. VI (1789), *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 779 (preventing from service those not “of the Protestant religion”); N.H. CONST. of 1784, pt. 2 (1793), *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 2460–63 (requiring Protestant religion for senators, representatives, and the state president); N.H. CONST. of 1792, pt. 2 (1793), *reprinted in* 4 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 2477, 2479 (requiring Protestant religion for senators and representatives); N.J. CONST. of 1776, pt. XIX (1844) *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 2597–98 (limiting office to “all persons professing a belief in the faith of any protestant sect”); *supra* note 75 (describing New York’s constitutional and statutory

required public servants to profess beliefs in theological concepts such as the Christian Trinity,<sup>78</sup> Divine inspiration of the Christian Bible,<sup>79</sup> an eternal system of rewards and punishments,<sup>80</sup> or metaphysical attributes of a theistic God.<sup>81</sup>

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prohibitions on non-Protestants holding public office); N.C. CONST. of 1776, pt. XXXII (1835), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 2793 (preventing from public office those “who shall deny . . . the truth of the Protestant religion”); S.C. CONST. of 1778, art. III, art. XII, art. XIII (1895), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3249–52 (requiring Protestant religion for governor, lieutenant governor, privy council, senators, and representatives); VT. CONST. of 1786, ch. II, § XII (1793), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3757 (limiting office to those who “profess the protestant religion”); VT. CONST. of 1777, ch. II, § IX, (1786), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3743 (limiting office to those who “profess the protestant religion”).

77. Maryland and Massachusetts limited public office to any “Christians.” MD. CONST. of 1776, pt. LV (1792), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 1700 (requiring any office holder to declare “his belief in the Christian religion”); MASS. CONST. of 1780, pt. 2, ch. VI, art. I (amended 1821), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 1908 (requiring all elected officials to swear that they “believe the Christian religion, and have a firm persuasion of its truth”).

78. Connecticut and Delaware required belief in the Trinity. THE FIRST LAWS OF THE STATE OF CONNECTICUT, *supra* note 74, at 67 (statute codified in 1784 that denied public office to anyone who denied “any One of the Persons in the Holy Trinity to be God”); DEL. CONST. of 1776, Art. 22 (1792), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 566 (requiring all elected and appointed public officials to declare that “I . . . profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore”).

79. Connecticut, Delaware, North Carolina, Pennsylvania, and Vermont required belief in Divine inspiration of the Christian Bible. THE FIRST LAWS OF THE STATE OF CONNECTICUT, *supra* note 74, at 67 (statute codified in 1784 that denied public office to anyone who denied “the Holy Scriptures of the Old and New-Testament to be of Divine Authority”); DEL. CONST. of 1776, Art. 22 (1792), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 566 (requiring office-holders to declare that “I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration”); N.C. CONST. of 1776, pt. XXXII (1835), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 2793 (requiring office-holders to believe in “the divine authority either of the Old or New Testaments”); PA. CONST. of 1776, § 10 (1790), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3085 (requiring profession that “I do acknowledge the Scriptures of the Old and New Testaments to be given by Divine inspiration”); VT. CONST. of 1786, ch. II, § XII (1793), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3757 (requiring officeholders to give oath declaring that “I do acknowledge the scriptures of the old and new testament to be given by divine inspiration”); VT. CONST. of 1777, ch. II, § IX (1786), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3743 (requiring officeholders to give oath declaring that “I do acknowledge the scriptures of the old and new testament to be given by divine inspiration”).

80. Pennsylvania and Vermont required belief that God was the “rewarder of the good and punisher of the wicked.” PA. CONST. of 1776, § 10 (1790), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3085; VT. CONST. of 1777, ch. II, § IX (1786), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3743; VT. CONST. of 1786, ch. II, § XII (1793), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3757; VT. CONST. of 1777, ch. II, § IX (1786), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3743.

81. Connecticut, North Carolina, Pennsylvania, and Vermont required belief that God possessed certain qualities. THE FIRST LAWS OF THE STATE OF CONNECTICUT, *supra* note 74, at 67 (statute

In light of the European and state tests, the Religious Test Clause's inclusion in the Constitution signaled a significant reversal of course in the new Republic's relationship with religious tests.<sup>82</sup> Charles Pickney originally proposed the Clause as "a provision the world will expect . . . in the establishment of a system founded on republican principles and in an age so liberal and enlightened as the present."<sup>83</sup> While the enlightened inclusion of the Clause was a significant departure from common practice, the Constitutional Convention records leave little explanation for its inclusion in the Constitution.<sup>84</sup> The delegates apparently "never considered the want of a religious test—that grand engine of persecution in every tyrant's hand."<sup>85</sup>

During ratification, the Clause garnered much more attention than at the Philadelphia Convention. Antifederalists argued that religious tests were necessary for preventing non-Christians<sup>86</sup> from holding public office, and proposed tests in place of the Religious Test Clause.<sup>87</sup> The proposed oaths resembled the earlier European and state oaths, requiring public

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codified in 1784 that denied public office to anyone who believed "that there are more Gods than One" or denied "the Being of God"); N.C. CONST. of 1776, pt. XXXII (1835), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 2793 (requiring belief in "the being of God"); PA. CONST. of 1776, § 10 (1790), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3085 (requiring belief that God is the "the creator and governor of the universe"); VT. CONST. of 1786, ch. II, § XII (1793), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3757 (requiring belief in "one God, the Creator and Governor of the universe"); VT. CONST. of 1777, ch. II, § IX (1786), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3743 (requiring belief in "one God, the Creator and Governor of the universe").

82. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1474 (1990) (describing the Clause as a "dramatic departure from prevailing practice").

83. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 122 (Max Farrand ed., 1966); *see also* ALBERT J. MENENDEZ, NO RELIGIOUS TEST 5 (1987).

84. Bradley, *supra* note 6, at 690. Luther Martin, a Maryland delegate, commented that the Convention adopted the Clause "by a great majority . . . and without much debate." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 227 (Max Farrand ed., 1966). Roger Sherman's observation that the Clause was "unnecessary, the prevailing liberality being a sufficient security [against] such tests" is the only recorded debate from the Convention. *Id.* at 484.

85. ANTIEAU ET AL., *supra* note 75, at 107. The vote tally indicates widespread support for the Clause: North Carolina was the only delegation opposed, while Maryland and Connecticut delegates divided. *Id.*

86. SUSAN JACOBY, FREETHINKERS 29 (2004) (finding that "[t]he opposition to article 6 frequently took an anti-Semitic and anti-Catholic tone" and describing one worried critic at the Massachusetts convention as commenting that the Religious Test Clause would permit "a Turk, a Jew, a Roman Catholic, and what is worse than all, a Universalist" to be President); *see also* Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 225 (2002) (describing motivations to prevent non-Christians and those who "did not believe in an afterlife" from holding public office).

87. Strang, *supra* note 86, at 225.

servants to swear devotion<sup>88</sup> to a theistic deity<sup>89</sup> who rewarded the good and punished the wicked.<sup>90</sup>

Rather than proposing an actual religious test, the South Carolina ratifying convention offered a formal amendment to insert the word “other” between “no” and “religious” in Article VI.<sup>91</sup> Supporters of this proposal thought that the existence of any oath implied that officeholders must believe in God and eternal systems of rewards and punishments.<sup>92</sup> They later proposed the same amendment to Article VI in both the House and the Senate during the first congressional session claiming that omitting “other” in the original Constitution was a “mere clerical error.”<sup>93</sup>

These proposals ultimately failed, and the Federalists prevailed by arguing that the tests were “useless, counterproductive, and unnecessary.”<sup>94</sup> The Clause’s supporters successfully defended it as an important protection against political domination by the majority denomination.<sup>95</sup> Oliver Ellsworth responded to Antifederalist doomsday arguments that the Clause would open the doors of public office to Turks,

88. *A New Test*, 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 588 (Merrill Jensen ed., 1978) (originally published in the *New Haven Gazette*, Jan. 31, 1788) (proposing test including swearing to devote oneself to the service of God).

89. *William Williams to the Printer*, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 588, 589 (Merrill Jensen ed., 1978) (originally published in the *American Mercury*, Feb. 11, 1788) (proposing test requiring belief in “one living and true God, the creator and supreme Governor of the world”).

90. *The Society of Western Gentlemen Revise the Constitution*, 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 770, 771 (Merrill Jensen ed., 1978) (originally published in the *Virginia Independent Chronicle*, April 30, 1787) (proposing test requiring “a belief in the one only true God, who is the rewarder of the good, and the punishment of the evil”).

91. Bradley, *supra* note 6, at 698. Vermont tried a similar strategy in its own constitution. In the Vermont Constitutions of 1786 and 1777, public officials had to swear allegiance to Protestantism and swear belief in the divine inspiration of the Christian Bible, that God rewarded the good and punished the wicked, and that God created and governed the universe. VT. CONST. of 1786, ch. II, § XII (1793), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3757; VT. CONST. of 1777, ch. II, § IX (1786), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3743. However, following those religious tests, the constitutions prohibited any other religious test: “And no further or other religious test shall ever hereafter be required of any civil officer or magistrate, in this State.” VT. CONST. of 1786, ch. II, § XII (1793), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3757; VT. CONST. of 1777, ch. II, § IX (1786), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 75, at 3743.

92. Bradley, *supra* note 6, at 698; *see also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 55 (1988) (finding that “some of the ratifiers considered the oath [prescribed by Article VI] to be a genuine *religious* oath . . . [itself requiring] ‘a direct appeal to . . . God’”) (emphasis in original).

93. Bradley, *supra* note 6, at 698 n.146.

94. *Id.* at 698.

95. Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1092–93 (2002). This might have resulted from a selfish empathy manifested in a fear by members of one religious affiliation that they might become the victim of a religious test. Levinson, *Confrontation*, *supra* note 6, at 1051.

Jews, Roman Catholics, pagans, deists, heathens, and Muslims by describing the Clause as a rejection of the “indignity” of English tests that discriminated between members of Protestant denominations in favor of Anglicans.<sup>96</sup> Edmund Randolph agreed that the Clause was necessary to ensure sect equality:

[O]fficers . . . are to swear that they will support this constitution, yet they are not bound to support one mode of worship, or to adhere to one particular sect. It puts all sects on the same footing. A man of abilities and character, of any sect whatever, may be admitted to any office of public trust under the United States.<sup>97</sup>

These early debates indicate that the purpose for including the Religious Test Clause in the Constitution was to prevent the government from implementing denominational or theological requirements for holding public office. Tests on the basis of ideological views were not to be affected by the Clause’s inclusion.

## 2. *No Religious Test as a “Qualification”*

The text and structure of the Constitution indicate that status-based religious qualifications are impermissible. However, the Constitution leaves the relevant decisionmaker free to assess other substantive criteria in deciding whether to nominate or confirm a judicial candidate.

The Constitution requires all “judicial Officers” to “be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United

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96. Bradley, *supra* note 6, at 696–97; *see also* Strang, *supra* note 86, at 225 (“[Antifederalists] derided the exclusion as allowing non-Protestants or non-Christians or even non-theists to gain office in the new national government. . .”). One Antifederalist argued that a religious test should be adopted rather than the Clause because the Clause would permit Catholics to hold public office. Bradley, *supra* note 6, at 700. He further explained, “[t]here is a disqualification, [for Catholics] I believe, in every state in the Union—it ought to be so in this system.” *Id.* (quoting 4 ELLIOTT’S DEBATES ON THE FEDERAL CONSTITUTION 215 (1901) (speech of William Lancaster)). Similar sentiments recurred in later arguments by supporters of religious tests that tests are “beacon[s] to aspirants for office, as an axiom that we prize Religion, and [that] tells the world we are a Christian people.” BORDEN, *supra* note 75, at 46 (quoting delegate to North Carolina constitutional convention in 1835).

97. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 310 (Max Farrand ed., 1966). Iredell also articulated this concern: “[Article VI] is calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution.” Bradley, *supra* note 6, at 709; *see also* John Witte, Jr., *Religious Rights in the Founding Era*, in RIGHTS IN THE FOUNDING ERA (Barry Shain ed., forthcoming) (manuscript at 13–14, on file with author), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=480164](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=480164) (noting the role of sect equality in adopting the Religious Test Clause).

States.”<sup>98</sup> By using the word “but,” the Constitution’s drafters “considered the constitutional oath a substitute for the religious tests the colonists were familiar with under the English established church.”<sup>99</sup> As explored above, the earlier religious tests required membership in a particular religious denomination or profession of theological beliefs.<sup>100</sup>

The Constitution’s drafters prescribed status-based “qualifications” for several federal offices.<sup>101</sup> The word “qualifications” appears only three times in the Constitution’s text<sup>102</sup> and all three offices for which the Constitution specifically enumerates qualifications rely on the relevant individual’s membership in a particular class of citizens: age;<sup>103</sup> citizenship;<sup>104</sup> residency;<sup>105</sup> or holding other offices.<sup>106</sup>

98. See U.S. CONST. art. VI, cl. 3. For a thoughtful analysis of oaths in general, see LEVINSON, *supra* note 92, at 99–107. Providing religious believers the option of affirming their support for the Constitution rather than swearing an oath echoes the principle expressed in the Clause that potential federal judges should not be forced to swear religious allegiance.

The Religious Test Clause is the only explicit exception to the oath requirement. In *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), the attorney for the United States noted that the Framers included the Clause “[s]imply because . . . [they] knew that if the exception was not put in the instrument, there would be the ability to require a religious test.” *Id.* at 355.

99. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984) (internal emphasis omitted).

100. See *supra* notes 74–81 and accompanying text.

101. See U.S. CONST. art. I, § 2, cl. 2 (providing qualifications for serving in the House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (providing qualifications for serving in the Senate); U.S. CONST. art. II, § 1, cl. 4 (providing qualifications for serving as President). The Constitution does not provide specific qualifications for federal judges. See Epstein, Knight & Shvetsova, *supra* note 60, at 17.

102. Other than the Religious Test Clause, electors must have the qualifications required in the relevant state legislature, U.S. CONST. art. I, § 2, cl. 1 (“[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”), and each House of Congress judges the qualifications of its own members, U.S. CONST. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . .”).

103. U.S. CONST. art. I, § 2, cl. 2 (requiring a minimum age of twenty-five as a qualification for serving in the House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (requiring a minimum age of thirty as a qualification for serving in the Senate); U.S. CONST. art. II, § 1, cl. 4 (requiring a minimum age of thirty-five as a qualification for serving as President).

104. U.S. CONST. art. I, § 2, cl. 2 (requiring United States citizenship for at least seven years as a qualification for serving in the House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (requiring United States citizenship for at least nine years as a qualification for serving in the House of Representatives); U.S. CONST. art. II, § 1, cl. 4 (requiring natural born citizenship in the United States or citizenship at the time of the adoption of the Constitution as a qualification for serving as President).

105. U.S. CONST. art. I, § 2, cl. 2 (requiring residence in the state represented as a qualification for serving in the House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (requiring residence in the state represented as a qualification for serving in the Senate); U.S. CONST. art. II, § 1, cl. 4 (requiring United States residency for at least fourteen years as a qualification for serving as President).

106. U.S. CONST. art. I, § 6, cl. 2 (providing as a qualification for both Representatives and Senators that they shall not be appointed to other offices or hold other offices while being a member of either House). In addition, the Fourteenth Amendment provides that individuals

who, having previously taken an oath, as a member of Congress, or as an officer of the United

In contrast to the status-based qualifications, the Constitution provides separate selection mechanisms with broad discretion to consider substantive criteria.<sup>107</sup> Within each of the prescribed selection mechanisms, the Constitution provides the relevant decisionmaker—whether the voting public,<sup>108</sup> the State legislature,<sup>109</sup> the Electoral College,<sup>110</sup> or the President and Senate together<sup>111</sup>—discretion in deciding whether to elect, nominate, or confirm based on any substantive criteria. The only constitutional limitations on the decisionmaker’s prerogative to consider all substantive criteria are the status-based limitations of the qualifications clauses—including the Religious Test Clause.

### 3. *Interpretation of the Religious Test Clause*

The case law interpreting the Religious Test Clause is not extensive and the Supreme Court’s few invocations of the Clause provide little guidance to its contemporary scope.<sup>112</sup> The Court commonly refers to the Clause in largely unhelpful rhetorical flourishes,<sup>113</sup> decides cases under the

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States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

U.S. CONST. amend. XIV, § 3.

107. *Compare* U.S. CONST. art. I, § 2, cl. 1 (providing selection mechanism for members of the House of Representatives), *with* U.S. CONST. art. I, § 2, cl. 2 (providing qualifications for members of the House of Representatives); *compare* U.S. CONST. art. I, § 3, cl. 1 (providing selection mechanism for members of the Senate), *with* U.S. CONST. art. I, § 1, cl. 3 (providing qualifications for members of the Senate); *compare* U.S. CONST. art. II, § 1, cl. 2–3 (providing selection mechanism for presidency), *with* U.S. CONST. art. II, § 1, cl. 4 (providing qualifications for presidency).

108. *See* U.S. CONST. art. I, § 2, cl. 1 (providing for election to the House of Representatives by vote of the “People of the several States”); U.S. CONST. amend. XVII (providing for election to the Senate by popular vote).

109. *See* U.S. CONST. art. I, § 3, cl. 1 (providing for election to the Senate by the appointment of the state legislature). The Seventeenth Amendment replaced the appointment of Senators by state legislatures with popular elections. U.S. CONST. amend. XVII.

110. *See* U.S. CONST. art. II, § 1, cl. 2–3 (providing for election of the President and Vice President by the Electoral College).

111. *See* U.S. CONST. art. II, § 2, cl. 2 (providing for selection of “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States” by presidential nomination and Senate confirmation).

112. State courts sometimes apply their state constitutions’ religious test clauses. *See* *State v. Kleypas*, 40 P.3d 139, 218 (Kan. 2001); *Schowgurow v. State*, 213 A.2d 475, 478 (Md. 1965); *Sch. Dist. of Hartington v. Neb. State Bd. of Educ.*, 195 N.W.2d 161, 164 (Neb. 1972); *Wolf v. Sundquist*, 955 S.W.2d 626, 631–32 (Tenn. Ct. App. 1997); *State v. DeMille*, 756 P.2d 81, 84 (Utah 1988).

113. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Connor, J., concurring) (“In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause . . . all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.”); *Everson v. Bd. of Ed. of the Township of Ewing*, 330 U.S. 1, 44 (1947) (Rutledge, J., dissenting)

First Amendment that it could have addressed under the Religious Test Clause,<sup>114</sup> and analyzes the Clause's application in a vague and conclusory manner.

However, the Court has made clear that the Clause prohibits only tests that are, in some substantive way, "religious" and that it does not prohibit all tests that in any way touch upon religion or religiously motivated political views. This is evident in *Torcaso v. Watkins*,<sup>115</sup> where the Court decided the constitutionality of a state oath requiring officeholders to declare a belief in "the existence of God."<sup>116</sup> Warning against "the historically and constitutionally discredited policy of probing religious beliefs,"<sup>117</sup> by requiring profession of "a belief in some particular kind of religious concept,"<sup>118</sup> the Court found the oath an unconstitutional invasion of freedom of belief and religion.<sup>119</sup> While identifying "existence of God" as within the Clause's prohibition, *Torcaso* gave no indication as to what other kinds of religiously related beliefs government could require

("Test oaths and religious qualification for office . . . [are] things none devoted to our great tradition of religious liberty would think of bringing back."); *Girouard v. United States*, 328 U.S. 61, 69 (1946) (noting only that a "test oath is abhorrent to our tradition").

114. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (holding Tennessee's prohibition on clergy as public officials unconstitutional under the Free Exercise Clause because it conditioned the right to free exercise of religion on the surrender of a member of the clergy's right to seek public office). Likewise, lower federal courts often resolve cases under the First Amendment's Religion Clauses that may be appropriately addressed under the Religious Test Clause. See, e.g., *Voswinkel v. City of Charlotte*, 495 F. Supp. 588, 595–97 (W.D.N.C. 1980) (finding that religious affiliation requirement for public office was a religious test and therefore unconstitutional under the Establishment Clause). For an example of an analogous situation in a state court, see *State v. Fuller*, 812 A.2d 389, 407 (N.J. Super. App. Div. 2002) (finding that the state's attempt to prevent individuals from serving as jurors because they were "particularly 'devout' or 'demonstrative' in their faith based on either a religious calling or a manifestation of religious convictions based on attire" was unconstitutional under the Free Exercise Clause).

115. 367 U.S. 488 (1961).

116. *Id.* at 495.

117. *Id.* at 494.

118. *Id.*

119. *Id.* at 494–96. Despite discussing the Religious Test Clause and the First Amendment's Religion Clauses, the Court was curiously vague about which constitutional provision the religious test violated. However, the Court indicated that the Religious Test Clause did not control its decision. See *id.* at 489 n.1 (explaining, without identifying constitutional grounds for the decision, that the Court need not incorporate Article VI to apply to state governments because the judgment is on "other grounds"). While likely unenforceable under *Torcaso*, some states still include religious tests for public office in their state constitutions. See, e.g., Gary R. Govert, *Something There is That Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office*, 64 N.C. L. REV. 1071 (1986) (exploring North Carolina's constitutional prohibition on "any person who shall deny the being of Almighty God" from serving in public office).

of its officials prior to employment.<sup>120</sup> In *American Communications Association v. Douds*,<sup>121</sup> the Court implicitly recognized the limited scope of “religious” tests in summarily concluding that profession of disbelief in communism was not sufficiently “religious” to be within the proper meaning of the Clause.<sup>122</sup>

While *Torcaso* and *Douds* sketch the outer boundaries in distinguishing between religious and non-religious tests, lower federal and state courts find little guidance in the Supreme Court’s interpretations and express confusion as to the Clause’s proper scope.<sup>123</sup> This confusion has led lower federal, state, and military courts to disagree over whether discrimination on the basis of “religious beliefs” violates the Clause.<sup>124</sup> This confusion, the Clause’s rare invocation, and the Court’s expansive readings of the First Amendment’s Religion Clauses, led Professor Laurence Tribe to conclude that the Religious Test Clause is “now of little independent significance.”<sup>125</sup> Despite such concerns, the recent debates over proper application of the Clause to judicial selection indicate that the Clause retains significant importance in at least some areas and “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”<sup>126</sup>

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120. See Bradley, *supra* note 6, at 716–18 (discussing the Court’s vague standard elucidated in *Torcaso*). Likewise, state courts often analyze religious test cases through *petitio principii* reasoning. See, e.g., *State v. Reid*, 91 S.W.3d 247, 289 (Tenn. 2002) (“Religious tests probe religious beliefs.”).

121. 339 U.S. 382 (1950).

122. *Id.* at 414–15. Similarly, the Alabama Supreme Court found that a public official’s decision to not comply with a court order was not a religious test in violation of the Alabama Constitution’s Religious Test Clause. Moore v. Judicial Inquiry Comm’n of State of Ala., No. 1030398, 2004 WL 922668, at \*\*8–9 (Ala. Apr. 30, 2004).

123. See *Idaho v. Freeman*, 507 F. Supp. 706, 729 (D. Idaho 1981) (acknowledging that “it is far from clear what [the Religious Test Clause’s] true scope is or whether it would directly limit the use of religious affiliation as a basis for [judicial] disqualification”).

124. Compare *United States v. Credit*, 2 M.J. 631, 646 (Air Force C.M.R. 1976) (finding that the Religious Test Clause permits inquiry into “religious beliefs” but not religious affiliation), *rev’d on other grounds*, 4 M.J. 118 (C.M.A. 1977), with *Casarez v. State*, 913 S.W.2d 468, 476 n.12 (Tex. Ct. Crim. App. 1994) (“The discriminatory classification of individuals based upon their religious belief is . . . a religious test.”), and *Silverman v. Campbell*, 486 S.E.2d 1, 2 (S.C. 1997) (holding that a state statute requiring profession of “So help me God” at conclusion of oath of office for public notary violated the Religious Test Clause).

125. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1155 n.1 (2d ed. 1988).

126. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 144 (1803) (spelling corrected); see also *Myers v. United States*, 272 U.S. 52, 151 (1926) (“[R]eal effect should be given to all the words [the Constitution] uses.”); *Hurtado v. California*, 110 U.S. 516, 534 (1884) (noting that it would be inappropriate to assume that “any part” of the constitution is “superfluous”).

### III. PRIOR SCHOLARSHIP AND POLITICAL DEBATE

#### A. *The Religious Test Clause's Scope*

Until recently, political leaders and commentators largely ignored the Religious Test Clause.<sup>127</sup> The scarce scholarly commentary applying the Clause to judicial selection generally assumes that the Religious Test Clause prohibits inquiry into a candidate's religious affiliation and theology.<sup>128</sup> However, there is sharp division in both political and academic circles over whether the Clause prohibits considering a candidate's religiously motivated ideology.

The debate over religiously motivated ideology reached its apex in 2003 when the Senate refused to confirm some judicial candidates due in part to the candidates' religiously motivated ideological views.<sup>129</sup> Several senators opposed some of President Bush's judicial nominees because the

127. See *supra* notes 20–55 and accompanying text.

128. Levinson, *Confrontation*, *supra* note 6, at 1072–73 (finding that refusing to confirm an atheist because of his or her rejection of theism “brings one perilously close to the exaction of a test oath that is barred by article VI”); Sidak, *supra* note 6, at 15 (finding the Clause to prohibit inquiry into a nominee's “religious sect or the intensity of his religious devotion”).

For similar conclusory assumptions in the context of judicial disqualification and general judicial decisionmaking, see *In re McCarthey*, 368 F.3d 1266, 1270 (10th Cir. 2004) (assuming without discussion that considering religious affiliation of a judge in a judicial disqualification motion would violate the Religious Test Clause); *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (order of Noonan, J.) (finding that motion asking Judge Noonan to recuse himself because of his Catholic affiliation and theological objection to abortion would violate “the principle embedded in Article VI”); Jake Garn & Lincoln C. Oliphant, *Disqualification of Federal Judges under 28 U.S.C. § 455(a): Some Observations on and Objections to an Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of his Religion and Church Position*, 4 HARV. J.L. & PUB. POL'Y 1, 54 (1981) (finding that Article VI raises two points: ensuring that Catholics and atheists can serve in public office and precluding inquiry into a judge's theology); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 23 (finding that, in the context of judicial decisionmaking, the Clause protects justices from inquiry into their “personal religiosity”).

129. Three of the most controversial nominations include: Leon Holmes, a Catholic, to the Eastern District of Arkansas; Charles Pickering, a Baptist, to the Fifth Circuit; and William Pryor, a Catholic, to the Eleventh Circuit. See John Cornyn, *Restoring Our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, 13–20 (2003) (discussing the nominations of Holmes and Pryor); 149 CONG. REC. S14,528 (daily ed. Nov. 12, 2003) (statement of Sen. Frist) (criticizing opposition to nominations of Pickering and Pryor). After failing to secure Senate confirmation, President Bush granted recess appointments to Pickering and Pryor. Neil A. Lewis, *Bypassing Senate for Second Time, Bush Seats Judge*, N.Y. TIMES, Feb. 20, 2004, at A1. In his second term, President Bush renominated Pryor; Pickering retired. Carl Hulse, *Bush Renominates as Judges 7 Whom Democrats Blocked*, N.Y. TIMES, Feb. 15, 2005, at A12; Neil A. Lewis, *Bush Tries Again on Court Choices Stalled in Senate*, N.Y. TIMES, Dec. 24, 2004, at A1. The Senate finally confirmed Holmes after a contentious debate. See Neil A. Lewis, *After Fight, Senate Agrees to Bush's Choice for Judge*, N.Y. TIMES, July 7, 2004, at A18.

senators believed that the nominees' ideological views were too extreme to merit lifetime appointment.<sup>130</sup>

Senators supportive of the nominations argued that opposition based on the candidates' ideological views on abortion, sexual orientation equality, and gender equality was an unconstitutional religious test because the candidates' views on those issues were religiously motivated.<sup>131</sup> Senators Orrin Hatch and John Cornyn argued that the Religious Test Clause prohibits refusing to confirm a candidate because of their religiously motivated ideology.<sup>132</sup> Senator Cornyn further argued that voting against the candidates would violate the Religious Test Clause because the candidates' views align with their respective denominations' official doctrines.<sup>133</sup>

Professor Eugene Volokh responded by arguing that, if considering ideology is proper, then "it must be proper regardless of whether the candidate's ideology flows from his religion."<sup>134</sup> In Volokh's view, discriminating against an anti-*Roe* judicial candidate is discrimination because of ideology, not discrimination because of religion.<sup>135</sup>

Although frequent references to the Clause color both sides of the debate, there is a vivid lack of consensus regarding the Clause's contemporary application,<sup>136</sup> and neither side has adequately explored the

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130. See, e.g., 149 CONG. REC. S10,457 (daily ed. July 31, 2003) (statement by Sen. Kennedy) ("[Nominee William Pryor's] views are at the extreme of legal thinking.").

131. See, e.g., 148 CONG. REC. S1966 (daily ed. Mar. 15, 2002) (statement by Sen. Hatch) (discussing religious motivations for Pryor's abortion views and arguing that an "abortion litmus test" is effectively a "religious test"); 148 CONG. REC. S1968 (daily ed. Mar. 15, 2002) (statement by Sen. Reid) (defending from critics who argued that senators opposed Pickering's nomination because of Pickering's Baptist affiliation); Orrin Hatch, Letter, *Abortion Stances Based in Religion*, ROLL CALL, Sept. 8, 2003 (arguing that religious opposition to abortion is a religious test).

Much of the debate over Judge Holmes's confirmation focused on his previously published views on gender equality. *Pryor's Example Bears on Holmes Controversy*, MOBILE REGISTER, July 5, 2004; see also Ralph G. Neas, People for the American Way, *Leon Holmes Should Not be Confirmed to Federal Bench*, at [http://www.pfaw.org/pfaw/dfiles/file\\_439.pdf](http://www.pfaw.org/pfaw/dfiles/file_439.pdf) (last visited Jan. 14, 2005) (criticizing Holmes's nomination because of his views on gender equality). Whether Holmes's stance on gender equality is appropriately categorized as a theological belief or an ideological view motivated by his religion is not clear because they could be completely unrelated to his future judicial decisionmaking.

132. See 148 CONG. REC. S1966 (daily ed. Mar. 15, 2002) (statement by Sen. Hatch) (arguing that the Religious Test Clause prohibits testing of ideological beliefs if they are religiously motivated); Cornyn, *supra* note 129, at 19.

133. Cornyn, *supra* note 129, at 19.

134. Eugene Volokh, *Religion and Ideology*, VOLOKH CONSPIRACY (Apr. 20, 2003), at [http://volokh.com/2003\\_04\\_20\\_volokh\\_archive.html#200180354](http://volokh.com/2003_04_20_volokh_archive.html#200180354) (last visited Jan. 14, 2005).

135. *Id.*

136. Compare 149 CONG. REC. S10,463 (daily ed. July 31, 2003) (statement of Sen. Durbin) (discussing history of Religious Test Clause), with 148 CONG. REC. S1966 (daily ed. Mar. 15, 2002) (statement by Sen. Hatch) (arguing that Religious Test Clause prohibits testing of ideological beliefs if they are religiously motivated), and Hugh Hewitt, *The Catholic Test: Two Hundred Years After the*

Clause's scope within the particular context of judicial selection and the traditional sphere of ideological inquiry.

### *B. Judicial Remedy for Violations*

Ancillary to the debate over the Clause's proper scope are questions about whether the Religious Test Clause provides an enforcement mechanism for prospective judges excluded from nomination or confirmation because of their religion. As a preliminary matter, alleged violations of the Religious Test Clause in the judicial selection context may be nonjusticiable political questions. Under the political question doctrine, federal courts may not decide cases wherein they would be forced to decide an issue despite "a textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>137</sup> The Constitution grants the political branches authority to prescribe and judge the qualifications of judicial candidates.<sup>138</sup> In light of these textual commitments to the political branches, the Religious Test Clause's application in the judicial selection process would seemingly be a nonjusticiable political question. However, the Supreme Court has found several cases involving the qualifications clauses justiciable,<sup>139</sup> and one federal court implied that an alleged violation of the Religious Test Clause could be a justiciable controversy in the appropriate circumstances.<sup>140</sup>

Even if Religious Test Clause cases are justiciable, there is probably no judicially enforceable punishment for either a president or a senator

*Framers Renounced Them, Senate Democrats Have Reinvented the Test Act*, DAILY STANDARD, Aug. 5, 2003, at A06.

137. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The *Baker* Court announced six alternative tests for determining whether a particular case presents a political question:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.*

138. See U.S. CONST. art. II, § 2, cl. 2.

139. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Powell v. McCormack*, 395 U.S. 486, 521 (1969); *Bond v. Floyd*, 385 U.S. 116, 131 (1966).

140. *Newdow v. Eagen*, 309 F. Supp.2d 29, 38 (D.D.C. 2004) (dismissing Religious Test Clause challenge to the House's and the Senate's selection of theist chaplains for lack of standing because hiring congressional officers is an internal practice not involving exercise of congressional power). Whether Religious Test Clause cases in judicial selection are justiciable is beyond the scope of this Note.

violating the Religious Test Clause within the judicial selection context.<sup>141</sup> After evaluating a variety of possible rules and remedies, Gregory Sidak discussed three potential punishment solutions.<sup>142</sup> First, candidates refused nomination or confirmation because of a Religious Test Clause violation could state an implied cause of action in federal court.<sup>143</sup> However, Sidak dismissed an implied cause of action under the Religious Test Clause as unworkable and ineffective.<sup>144</sup> Second, a nominee whose confirmation failed because of a Religious Test Clause violation could receive automatic senatorial confirmation.<sup>145</sup> Sidak believed that this proposal could be unconstitutional because it would prevent the Senate from actually confirming judges, thereby subverting the Advice and Consent Clause.<sup>146</sup> Third, the Senate could punish individual members for their violation of the Religious Test Clause.<sup>147</sup> Sidak found individual punishment the most viable remedy but recognized it as “probably naïve” and likely ineffective.<sup>148</sup>

Whether violations are justiciable and whether there is a judicially enforceable remedy are of little consequence in determining the appropriate scope of the Religious Test Clause in the judicial selection context. The Constitution speaks to all branches of government and both the President and the Senate are obligated to follow its dictates.<sup>149</sup>

#### IV. APPLYING THE RELIGIOUS TEST CLAUSE TO JUDICIAL SELECTION

The tension between the political branches’ traditional consideration of ideology and the Religious Test Clause suggests that some topics of a judicial candidate’s religious associations and views should be impermissible qualities upon which neither presidents nor senators should base their judicial selection decisions.<sup>150</sup> In this Part, I attempt to resolve that tension by balancing the appropriate breadth of the Religious Test Clause against the policies underlying inquiry into a candidate’s

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141. Sidak, *supra* note 6, at 40.

142. *Id.* at 40–49.

143. *Id.* at 40–41.

144. *Id.* at 41–42.

145. *Id.* at 43–45.

146. *Id.* at 45–46.

147. *Id.* at 46–47.

148. *Id.* at 47–49.

149. *Cf.* *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (refusing to “assume that Congress is not alert to its constitutional responsibilities”).

150. *Cf.* Freund, *supra* note 67, at 1163 (“The difficulty of drawing lines between appropriate and inappropriate interrogation . . . suggests at least that committee rules be adopted that would provide senators and nominees with some guidelines. . .”).

substantive ideology. The Religious Test Clause and the judicial selection process should function in tandem to ensure that the political branches will not require denominational or theological qualifications for judicial office while permitting inquiry into judicial candidates' religiously motivated ideologies.<sup>151</sup>

#### A. *Religious Affiliation and Theology*

The Religious Test Clause prevents the political branches from requiring judicial candidates to affiliate with a favored religious group or profess a theological belief as a qualification for office. Previous scholarship generally assumes that the Clause prohibits discriminating between candidates on the basis of denomination or theological beliefs without extended discussion, and the Clause would seemingly be void of any substantive weight if religious affiliation and theology were not within its prohibition of "religious tests."<sup>152</sup> Although the Clause's proscription of discrimination based on religious affiliation and theology may be obvious, exploring the Clause's history and the policies underlying the judicial selection process confirms this traditional assumption.

Denominational prejudice and theological bigotry motivated the Framers to include the Religious Test Clause in the Constitution. Indeed, the Clause was the Framers' response to the European and state religious tests, which limited public office to members of the preferred sect and theological beliefs.<sup>153</sup> Such status-based discrimination against members of a particular religious faith could resurface if denominational or theological considerations played a significant role in contemporary judicial selection.<sup>154</sup>

151. Whether the statutory oath required of federal judges violates the Religious Test Clause is beyond the scope of this Note. The oath requires all federal judges to swear an oath including the statement "[s]o help me God." 28 U.S.C. § 453 (2000); *see also* 5 U.S.C. § 3331 (2000) (requiring similar oath for all federal officers except the President). The Supreme Court of South Carolina found that a similar oath violated the Religious Test Clause. *Silverman v. Campbell*, 486 S.E.2d 1, 2 (S.C. 1997) (holding that a state statute requiring profession of "So help me God" at the conclusion of an oath of office for public notary violated the Religious Test Clause). For an argument that the drafters of the Constitution omitted religious references from the presidential oath in Article II, section 1, clause 8, in order to avoid conflict with the Religious Test Clause, *see* Arlin M. Adams & Charles J. Emmerich, *The Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1630 n.298 (1989).

152. *Cf. Dennis v. United States*, 384 U.S. 855, 879 (1966) (Black, J., concurring in part and dissenting in part) (discussing hypothetical religious affiliation test in light of the Religious Test Clause); Case Comment, *Required Chapel Attendance at Military Academies Held Valid: Anderson v. Laird*, 45 N.Y.U. L. REV. 1286, 1301 (1970) (stating that "[i]f the simple language of the clause" does not prohibit theological tests, "then it does not mean anything").

153. *See supra* notes 73–81 and accompanying text.

154. *Cf. Sidak, supra* note 6, at 9 (arguing that there is a "detectable odor of bigotry" against

In addition to historical evidence, status-based classifications such as religious affiliation and theological beliefs are logical analogues to the other status-based qualifications prescribed by the Constitution. The religious denomination with which one chooses to affiliate and the theology one espouses are quintessential attributes of religious believers as a class. These status-based classifications seem the most likely candidates for coverage by the Religious Test Clause's reference to "Qualifications" for office. In contrast, ideological views, whether deduced from secularly- or religiously-informed premises, do not separate religious believers from non-religious believers on religious status alone.

Regardless of its unconstitutionality, inquiring into a judicial candidate's religious affiliation or theology does not serve the policies underlying traditional ideological scrutiny. As discussed above, the political branches examine candidates' ideological views to predict their future decisions. However, neither religious affiliation nor theology is a reliable indicium of a judge's future decisionmaking.<sup>155</sup> In the religious affiliation context, empirical studies indicate that judges of different religious affiliations may behave differently on the bench.<sup>156</sup> This tendency is outweighed by the generality of the inference from religious

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conservative Catholics in contemporary American politics).

155. For efficiency, I accept that religious beliefs will play some role in judicial decisionmaking without concluding whether this role is proper in a liberal democracy. *See generally* Scott Idleman, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993). For examples of the debate over whether religious beliefs should play a role in political decisions generally, see ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* (2000); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639; Glenn Posner, *Leaders Must Separate Public Role from Private Belief System*, S. ILLINOISAN, Aug. 5, 2004.

156. Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 277, 281 (1995) (finding religious affiliation of federal district judges to affect outcomes of reference to magistrates and in civil rights cases); Sheldon Goldman, *Voting Behavior on the U.S. Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 498 (1975) (finding that Catholic judges favor the "economic underdog" in cases of "injured persons and economic liberalism"); Sisk, Heise & Morriss, *supra* note 20, at 502–03 (finding significant differences between Jewish, Catholic, Baptist, and non-Baptist Protestant judges' decisions in First Amendment Religion Clause cases); Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. SCI. 507, 520–21 (1999) (finding that evangelical Protestant judges are more likely to uphold the death penalty, rule conservatively in obscenity cases, and rule for the employer in gender discrimination cases than are Jewish, mainline Protestant, or Catholic judges); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947–1956 Terms*, 17 AM. J. POL. SCI. 622, 625–26 (1973) (finding difference between Protestant and non-Protestant justices' support for the government in criminal cases). For a popular level discussion of this issue, see Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES MAG., Jan. 30, 2000, at 40 ("It's striking how closely the positions of some of the justices in the church-state cases correspond to their own religious . . . backgrounds.").

affiliation to ideology and the potentially grave risk of political branches acting based on religious bigotry.

First, religious affiliation alone is too simplistic a criterion to reliably predict a judge's future decisionmaking at the judicial selection stage. Indeed, denominational membership is not the primary indicium of religious belief in America partly because choosing to identify oneself with a denomination is not always indicative of belief in that denomination's substantive doctrine.<sup>157</sup> Religious denominations are essentially voluntary associations of individuals, each individual having a different rationale for publicly identifying themselves as a member of the group.<sup>158</sup> Even those who largely adhere to denominational doctrine may not be aware of,<sup>159</sup> or may disagree with,<sup>160</sup> official church doctrine. Yet others may accept church doctrine but support legal frameworks inconsistent with that belief.<sup>161</sup> Because of these problems, presidents and

157. See Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 57 (2000) ("Denominational categories are no longer sufficient or primary religious identifiers for many contemporary Americans.").

158. Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 960 (2004). While some identify as members of religious denominations because they agree with denominational doctrine, some join for more amorphous sociological factors. For example, observant practitioners often refer to less observant members as "secular Jews," "non-practicing Catholics," or "Christmas and Easter Christians"—labels that would not exist but for certain groups of people who choose to identify themselves with a religious denomination but do not fulfill doctrinal attendance and lifestyle requirements. See, e.g., Halberstam, *supra* note 48, at 1441 (noting that Ginsburg is Jewish but "not a religiously observant Jew"); Levinson, *Confrontation*, *supra* note 6, at 1059 (discussing "secular Jew" and "cultural Catholic"); cf. *Justice Ginsburg Reflects on Own Heritage* (Apr. 23, 2004), APWIRE 00:35:50 (reporting that Ginsburg said that "her Jewish heritage and her work as a judge 'fit together symmetrically'"). In *Menora v. Ill. High School Ass'n*, 527 F. Supp. 632 (N.D. Ill. 1981), an Orthodox Jewish plaintiff challenged the state high school sports association's rule against wearing headgear during basketball games. *Id.* at 632–33. The Jewish judge responded to the defendant's recusal motion by emphatically stating: "I am Jewish, but I am not an Orthodox Jew. I do not share the beliefs of plaintiffs, nor do I practice them." *Id.* at 633. Obviously, Judge Shadur did not mind associating himself with Judaism, but made clear his objections to associating his Jewish identity with adherence to certain denominational doctrine.

159. Failinger, *supra* note 25, at 702–03 n.314 ("[A] Justice—of any faith-persuasion—may not understand his own theological tradition."); see also Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1661 (2004) ("[I]n any religious tradition or community, there will be disagreements, dissent, and ignorance.").

160. See, e.g., Perry, *Abortion*, *supra* note 45, at 22 (noting that a majority of both Protestants and Catholics believe that abortion should be legal despite denominational doctrines to the contrary).

161. See, e.g., Mario Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 17–20 (1984) (arguing that Catholic officeholders should not promote policies in line with religious teachings not beneficial to the public at large); Perry, *Same-Sex Unions*, *supra* note 45, at 479 (arguing that even Christians who believe that homosexual relationships are immoral should support same-sex unions); David Brooks, *The Power of Marriage*, N.Y. TIMES, Nov. 22, 2003, at A15 (arguing that religious conservatives, who normally oppose same-sex marriage, should support same-sex marriage).

senators who attempt to infer ideological positions from a candidate's religious affiliation<sup>162</sup> risk relying more heavily on denominational doctrine than does the candidate herself in determining the candidate's ideological positions. Thus, the political branches should not consider religious affiliation a reliable predictor of future decisionmaking.

Second, if the Religious Test Clause permitted the political branches to consider religious affiliation, it would risk allowing the political branches to act out of religious bigotry, thereby contravening the clear intention to place all sects on the same level.

Theological tests suffer a similar problem: People with similar theological beliefs often deduce markedly different political ideologies.<sup>163</sup> Knowing that a candidate believes that rights come from God, is a "God-fearing person," or rejects evolution as a biological theory provides little guidance in discerning how that candidate would actually decide specific legal issues. While such terms could serve as a form of code triggering other meanings, the mere recitation of such a belief does not in itself communicate any substance from which one could infer the candidate's future judicial decisions. Presidents and senators attempting to infer the candidate's ideology from theological beliefs risk lending theology more credit in determining ideology than does the candidate herself. Possibly for these reasons, American legal and political leaders have long considered both religious affiliation<sup>164</sup> and theology<sup>165</sup> irrelevant in distinguishing between public officials. Thus the political branches would be remiss to rely on theological beliefs in attempting to infer a candidate's ideology.

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162. For an example of such inferences, see PAUL SIMON, *ADVICE AND CONSENT* 143 (1992) (explaining that Senator Paul Simon attempted to deduce Justice Thomas's position on abortion from his religious affiliation and the doctrines of the specific church Thomas attended).

163. See Failinger, *supra* note 25, at 702 n.314.

164. Justice Felix Frankfurter thought that denominational differences between judges should not be considered relevant to the judge's performance, for "judges . . . are neither Jew nor Gentile, neither Catholic nor agnostic. [Judges] owe . . . attachment to the Constitution and are . . . bound by [their] judicial obligations." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 646–67 (1943) (Frankfurter, J., dissenting). Political leaders have expressed similar sentiments: Senator Patrick Leahy argued that the Clause precludes considering "[w]hether a nominee goes to church, temple, or mosque, or [nothing at all]." 148 CONG. REC., S2000 (statement by Sen. Leahy) (daily ed. Mar. 18, 2002).

165. Thomas Jefferson was perhaps the most vocal opponent of theological tests. He famously renounced theological tests in the Bill for Establishing Religious Freedom, in which he wrote that capacity to serve in public office should not depend on one's willingness to "profess or renounce this or that religious opinion." A Bill for Establishing Religious Freedom (1786), *reprinted in* MCCONNELL ET AL., *supra* note 6, at 70. Jefferson thought that one's subscription to particular theological beliefs was irrelevant to one's qualification for public office. Waldron Hayes, Jr., *Recent Decision, Public Office, Religion, and the Constitution*, 10 BUFFALO L. REV. 372, 376 (1961) (quoting Thomas Jefferson as saying that "it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.").

Even absent the historical, structural, and theoretical reasons, history suggests that political branch consideration of religious affiliation and theology risks trivializing religious devotion. Both political branches have learned to manipulate electoral support by appointing judges of certain religious affiliations.<sup>166</sup> The political branches have thereby used denominational affiliation for political expediency and calculation rather than respecting religion as formalized personal relationships with a transcendent Reality or as a “manifestation of divinity through reconstituted relationships with others.”<sup>167</sup> These political calculations threaten the Framers’ conception of, and the modern respect for, religious affiliation and theology as personal and non-political.<sup>168</sup>

### *B. Religiously Motivated Ideology*

The Religious Test Clause should not prohibit political branch scrutiny of a judicial candidate’s ideological views motivated by religion. Neither the Religious Test Clause’s history nor its subsequent interpretation indicates that it prohibits discrimination against individuals because of their religiously motivated ideological beliefs. In addition, the policies underlying traditional ideological scrutiny indicate that ideological beliefs should be subjects of inquiry as reliable indicia of judicial decisionmaking.

The European and state religious tests disavowed in the Religious Test Clause did not require profession of ideological beliefs, whereas they did require profession of denominational membership or belief in state-endorsed theology. The Supreme Court distinguished between religious and political tests: the Religious Test Clause prohibits requiring a profession of belief in God’s existence<sup>169</sup> but permits testing for communist ideals.<sup>170</sup> Article VI itself distinguishes between ideological

166. See, e.g., KARFUNKEL & RYLEY, *supra* note 20, at 144 (discussing presidential courting of Jewish vote by appointing Jewish judges); Perry, *supra* note 23, at 74–81 (discussing President Franklin Roosevelt’s use of Justice Frank Murphy’s nomination to solidify support among Catholic voters); Jacoby, *supra* note 31 (discussing President George W. Bush’s using judicial nominations to reward conservative evangelicals).

167. Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. (forthcoming 2005) (manuscript at 15 n.33 and accompanying text); cf. Garnett, *supra* note 159, at 1665 (remarking that American culture often views religious devotion as expressions of “subjective longings, of autonomous self-expression and direction, and of consumer preferences, rather than as a response to a set of proposed truth-claims about the meaning of life and the destiny of the person”).

168. See Hayes, *supra* note 165, at 373 (describing conception of religious belief as non-political).

169. See *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). For more discussion of *Torcaso*, see *supra* notes 115–20 and accompanying text.

170. See *Am. Communications Ass’n v. Douds*, 339 U.S. 382, 414–15 (1950). For discussion of *Douds*, see *supra* notes 121–22 and accompanying text.

and “religious” matters. It requires public officials to swear commitment to ideological beliefs such as support for the Constitution, while it prevents government from establishing religious qualifications.<sup>171</sup> In interpreting Article VI, one state court noted that “[t]he draftsmen of the Constitution did not consider an oath to support the Constitution a religious test, else they violated the restriction in the writing of the requirement. . . . [There is no] inconsistency between the two clauses. . . .”<sup>172</sup>

Likewise, the structure of the Constitution indicates that “religious” tests are a narrower category of criteria than constitutionally permissible substantive selection criteria such as ideology. Ideological views that affect a candidate’s judicial decisionmaking are amorphous criteria in contrast to the rigid status-based qualifications the Constitution prescribes in other contexts. Religiously motivated ideological views such as a judicial candidate’s opposition to abortion or capital punishment do not depend on that candidate’s status as a religious believer *per se*: Individuals deducing such views from religious premises could share the same ideological convictions as individuals deducing views from secular premises.

Testing candidates’ religiously motivated ideological views aligns with historical concern for the political branches’ ability to decide whether to nominate and confirm based on reliable predictions of future judicial decisionmaking.<sup>173</sup> A judge’s ideology, whether deduced from religious or secular premises, affects how that judge fulfills her role on the bench.<sup>174</sup>

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171. U.S. CONST. art. VI, cl. 3 (“[A]ll . . . judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”); *see also* Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 161–62 (1971) (discussing ideological character of oath to uphold the Constitution similar to that of Article VI). This ideological oath could be seen as a religious test itself: “The constitutional oath may not be a ‘religious Test’ for those who define religion as necessarily including affirmations of supernatural beings and theological propositions, but it is surely a test establishing one’s devotion to the civil religion as a predicate condition for the ability to hold office.” LEVINSON, *supra* note 92, at 55.

172. *Smith v. County Eng’r of San Diego County*, 72 Cal. Rptr. 501, 508 (Cal. Ct. App. 1968).

173. In an analogous situation involving jury selection, a military court found that religious beliefs that “cast light on [the prospective juror’s] personal fairness and impartiality” can be the subject of inquiry without violating the Religious Test Clause. *United States v. Credit*, 2 M.J. 631, 646 (A.F.C.M.R. 1976), *rev’d on other grounds*, 4 M.J. 118 (C.M.A. 1977).

174. *See supra* note 64. For example, if a judicial candidate disapproves of homosexual individuals, then that ideological value—whether purportedly motivated by religious or secular premises—likely indicates how that judicial candidate will decide cases regarding rights of homosexual individuals. In *Ex parte H.H.*, 830 So.2d 21 (Ala. 2002), former Chief Justice Roy Moore wrote a concurring opinion arguing that homosexual parents should not be allowed to have custody of their own children because “[h]omosexual conduct is . . . a violation of the laws of nature and of

Unlike religious affiliation and theology, presidents and senators can directly deduce a candidate's likely resolution of specific legal issues by understanding that candidate's religiously motivated ideology.

If the Religious Test Clause proscribed inquiring into a candidate's religiously motivated ideology, it would force the political branches to distinguish between a candidate's political stances motivated by religion and those motivated by non-religious values. Religiously sincere candidates will likely be unable to distinguish their views because "religious beliefs and experiences are likely to be thoroughly intertwined with legal, political, and social influences."<sup>175</sup> If the candidates are unable accurately to separate their own ideological views, presidents and senators are even less able to so distinguish. Similar difficulties arise in defining what beliefs are truly "religious" so as to deem the ideology flowing from them religiously motivated.<sup>176</sup>

Permitting political branches to scrutinize a candidate's religiously motivated ideology puts religiously motivated candidates on the same plane as non-religious candidates. Not scrutinizing religiously motivated ideology implicitly deems religious moral reasoning subordinate to non-religious morality whereas both are merely two sides of the same coin.<sup>177</sup>

nature's God." *Id.* at 26. Whether Moore's belief that homosexuality violated the "laws of nature" (a secular premise) or his belief that homosexuality violated the laws of "nature's God" (a religious premise) motivated his decision makes no difference to the actual outcome of the case: There is no substantive difference between a purported religious motivation such as Moore's and a judicial candidate that claims that homosexuality violates only the "laws of nature" without mentioning "nature's God."

175. Berg & Ross, *supra* note 48, at 394; *see also* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 5 (1988) ("My convictions tell me that no aspect of life should be wholly untouched by the transcendent reality in which I believe . . ."); Carter, *supra* note 6, at 943 (arguing that the goal should be to "treat all moral knowledge as one and once we decide to allow judges to rely on it, not to be fussy about its source").

176. Courts and theologians have struggled to articulate a definition of "religion" properly inclusive of both theistic and nontheistic religious beliefs. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 165–66 (1965) (defining "religious training and belief" as including systems of belief that are "sincere and meaningful [and which occupy] a place in its life of its possessor parallel to that filled by" the traditional theistic belief in God); Malnak v. Yogi, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) (finding that the constitutional definition of "religion" should be interpreted broadly to extend beyond traditional theistic religious beliefs); WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 36 (Modern Library 1994) (1902) ("Religion . . . mean[s] . . . the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine. . . . [T]he relation may be either moral, physical, or ritual. . . ."); PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948) (describing religion as a translation of traditional God imagery into "the depths of your life, of the source of your being, or your ultimate concern, of what you take seriously without any reservation"); Mark A. Boatman, Note, Lee v. Weisman: *In Search of a Defensible Test for Establishment of Religion*, 37 ST. LOUIS U. L.J. 773, 829–30 (1993) (describing difficulties in defining "religion" in Establishment Clause jurisprudence).

177. *See* Thomas L. Shaffer, *On Checking the Artifacts of Canaan: A Comment on Levinson's*

It would also permit candidates and their supporters to play the “religion card,” draping their politics in religious clothing and thereby subverting the traditional scrutiny applied to judicial candidates.<sup>178</sup> If the Clause proscribed inquiry into religiously motivated ideology, those with extreme ideological beliefs on either side of the political debates could claim a religious exemption merely because they could articulate some connection—however tenuous—between their ideology and religion.<sup>179</sup> By permitting inquiry into a candidate’s religiously motivated ideology, the Clause ensures the sect equality sought by its Framers.

### CONCLUSION

In times of contentious debate over the proper relationship between religion and government, the political branches’ respect for constitutional religious freedom protections should be at its zenith. However, presidents and senators have long forgotten the basic protection from religious bigotry in public employment manifested in the Religious Test Clause. The growing debate over the Clause’s proper scope will eventually demand that the political branches grapple with the constitutional limitations on their ability to prescribe ideological tests as qualifications for judicial office. Only by prohibiting inquiry into judicial candidates’ religious affiliations and theological beliefs and permitting inquiry into religiously motivated ideological beliefs can the political branches avoid

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“Confrontation”, 39 DEPAUL L. REV. 1133, 1142 (1990) (“If the guardians of American liberal democracy were serious in their talk of pluralism . . . [n]o moral belief would be silenced because it was also religious.”).

178. For example, Republicans allegedly “use[d] religion as a defense” in Judge William Pryor’s nomination hearings to divert attention from his political beliefs. 149 CONG. REC. S10,462 (daily ed. July 31, 2003) (statement of Sen. Durbin). In Senator Durbin’s view, this permitted him to cast the issue of his political beliefs as an issue of religious faith. *Id.*

179. Some argued that Judge Charles Pickering claimed such a religious exemption from discussing his support for issues considered by critics to be outside the mainstream. Neil A. Lewis, *President Renominating Federal Judge Lott Backed*, N.Y. TIMES, Jan. 8, 2003, at A17 (describing Pickering’s alleged support for strengthening anti-miscegenation laws, his reduction of sentences for defendants convicted of cross-burning, and his work on behalf of segregationist groups); see also Cornyn, *supra* note 129, at 24–26 (arguing that Pickering’s views were religiously motivated and therefore senators should not have considered them). For examples of extremism masquerading as religion in other contexts, see *Bellamy v. Mason’s Stores Inc.*, 508 F.2d 504, 505 (4th Cir. 1974) (describing Ku Klux Klan seeking a religious exemption from Title VII); Nicholas D. Kristof, *Jesus and Jihad*, N.Y. TIMES, July 17, 2004, at A13 (describing best-selling fundamentalist Christian book glorifying the annihilation of all non-Christians). For an example of arguable extremism from the other side of the political spectrum, see *Am. Communications Ass’n v. Douds*, 339 U.S. 382, 414–15 (1950) (exploring party’s argument that communism was a “religious” belief protected by the Religious Test Clause).

the Religious Test Clause prohibition while fulfilling their traditional role of subjecting judicial candidates to ideological scrutiny.

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