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### THE AUDACITY OF FAITH

Amidst great expectations President Barack Obama delivered the Commencement Address at Notre Dame on May 17, 2009. The excitement owed partly to protests against the Catholic university's choice to honor someone so famously supportive of legal abortion.<sup>1</sup> Mostly it was eager anticipation of the same provenance: what would Obama say at America's flagship religious institution about the relationship of religious faith to abortion – and to the other pressing moral issues of our time?

The President did not disappoint. At Notre Dame Obama articulated a novel *rapprochement* between religion and contemporary liberalism. Religion had long been the excluded *other* of liberal thought, which characteristically stood for a secularized public square and privatized religious faith. But Obama sang fulsome praises of faith and even – it seemed – welcomed its contributions to public life. The welcome was conditional: Obama reconfigured religion's place in liberal thought by boldly – some would say, audaciously – re-defining faith itself.

I propose in this paper to describe Obama's new liberalism against the background of America's post-World War II church-state regime. That way, the continuity and the novelty of Obama's initiative can be made clear.

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<sup>1</sup> Obama would receive an honorary doctorate, as well as deliver the featured speech.

## I

The keystone in the arch of America's constitutional law of church and state – and still a guiding norm of our political discourse – was constructed by the Supreme Court in *Everson v. Board of Education*.<sup>2</sup> Handed down on February 10, 1947, *Everson* declared that neither the national government nor the states could aid or promote religion, even if government assistance did not discriminate among religions, and even if no one was coerced.<sup>3</sup> Public authority must remain scrupulously neutral, the Court said, between all forms of religious belief and unbelief. Thus did the First Amendment (said the Court) erect a “wall of separation between church and state”.<sup>4</sup> This “wall” protected a secular realm of law and politics. Religion was to be kept private.

Where did this *Everson* master-principle come from? The Justices' opinions were replete with history lessons from the founding of the American republic. The master-principle was, they said, the command of that greatest generation, speaking (as the Court recounted it) largely through James Madison and Thomas Jefferson. *Everson's* history has been subject to such withering scholarly criticism,<sup>5</sup> however, that one may without risk of civic impiety ask: what background ideas about church and state made the Justice so receptive to an improbably secular reading of the founding?

There is considerable evidence that the justices worried about American Catholics' emerging political and cultural power. *Everson* was, after all, a case about public aid to students attending Catholic schools. In conference and in memoranda some members of the Court expressed their desire to stymie the Catholics' raid upon the public treasury.<sup>6</sup> But one may then reasonably ask: why the sudden irruption of Catholic-worry? Was there a critical variable which stirred then slumbering anxiety about Catholic power?

The answer to this question lies, I think, at the bottom of Pearl Harbor and on Normandy's beaches. The war against fascist Germany, Italy, and Japan called forth among American elites a critical examination of the cultural conditions in which such menacing systems germinated. We fought for the “democratic way of life”. But what did “democracy” imply or entail for political culture? How did the conditions of a successful democratic experiment differ from those in which Nazism took root, and flourished?

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<sup>2</sup> 330 U.S. 1 (1947).

<sup>3</sup> 330 U.S. at 15–16.

<sup>4</sup> *Ibidem*.

<sup>5</sup> Including some of my own hand. See: G. Bradley, *Church-State Relationships in America*, Greenwood 1987. In truth, the founders meant by the First Amendment to establish an equality among religions, and not to put “unreligion” on a par with religious belief.

<sup>6</sup> See, for example, the evidence recounted in J. McGreevey's, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928–1960*, “Journal of American History” 1997, Vol. 84, No. 97.

Ambient theory about the cultural conditions of democracy was then a house divided.<sup>7</sup> One group of thinkers held beliefs much like those most visibly articulated in recent years by Pope John Paul II: democracy depends on a citizenry possessed of moral truth.<sup>8</sup> The opposing camp saw moral truth as a phantom, a superstition which, when possessed of citizens' minds, led straightaway to authoritarianism, if not to outright fascism. These folks prized the experimental spirit of science, and were wed to a deep relativism in morals. It is easy to see the Catholic problem arising from these commitments: the Church's perennial devotion to natural law and its own hierarchical governing structure – along with its cultural influence in Italy and Germany (and Franco's Spain) – made it a suspect carrier of authoritarian cultural values.

The pragmatists won. They prevailed on the Supreme Court and among those elites which the Court reflected, and those which the Court shaped. During and shortly after World War II the Court linked our “democratic way of life” to secularism, particularly in public education, in order to sustain a “democratic” culture. A corollary of this linkage was distrust of Catholic schools and opposition to any state support of them. For this reason, public aid to Catholic schools became a staple feature of Supreme Court dockets and of legislative controversy, from 1947 all the way up to the present moment.

The linkage was most vividly on display in the oral argument of *McCollum v. Board of Education*.<sup>9</sup> In *McCollum* the school board of Champaign, Illinois had agreed to permit local religious leaders to enter the schools once a week, then and there to provide religious instruction to those pupils whose parents had agreed to it. A local woman who was raising her sons as atheists (one of them later became Mayor of Champaign) sued the school district. Her lawyers argued for a straightforward application of *Everson's* no-help-to-religion stricture. Though Catholic schools were not at issue, state authorities were obviously lending a helping hand to religious training, and that breached the just-built “wall of separation”.

The Court heard oral argument on December 8, 1947, just ten months after handing down *Everson*. The school board's attorney understood well where Mrs. McCollum's lawyers were taking the case. So he took dead aim at *Everson* itself. John Franklin argued cogently (in his brief as well as at argument) that the founders left public authority free, under the Constitution, to promote religion so long as there was no discrimination in favor or against particular faiths. According to Franklin, this was what almost everyone understood the First Amendment's ban on “establishment” of religion to mean, until the day before *Everson*. Justice Felix Frankfurter pressed the key linkage upon Franklin:

I put my question again: we have a school system of the United States on the one hand, and the relation it has to the democratic way of life. *On the other hand we have the religious beliefs of*

<sup>7</sup> Here I follow the general outline of Paul Gottfried's fine analysis in *After Liberalism: Mass Democracy in the Managerial State*, Princeton 1999.

<sup>8</sup> See, for example, his 1995 encyclical letter, *Evangelium Vitae*.

<sup>9</sup> 333 U.S. 203 (1948).

*our people*. The question is whether any kind of scheme which introduced religious teaching into the public school system is the kind of thing we should have in our democratic institutions. [emphasis added].<sup>10</sup>

*McCullom* was decided just as the complaining parties prayed it would be – against the school board on the strength of the *Everson* precedent. But the impact of Frankfurter’s point to Franklin could not be confined to the schools. Frankfurter relied (in making that limited point) upon a wider theory of the relationship between faith and democratic institutions and practices. The anchor postulate of that theory was that faith must be privatized to protect (what might be called) an “open” society characterized by free expression and social engineering from the deadweights of dogma and tradition. “Our democracy” presupposed, or entailed, that government would act as if there is no God and, to the extent possible, as if there were no religions, either.

The postulate was a novelty. So was the analytical method. American political elites had long held that our political institutions presupposed a virtuous citizenry possessed of a religious character. But they did not therefore produce an autonomous set of religious symbols or nostrums, conceived for the purpose of hallowing the state and managed by them accordingly. They did not, in other words, construct a *civil religion*. American religion was too strong and too independent from the state for politicians to define – or, even, to significantly shape – what Americans believed about God. Indigenous religious institutions would have to freely imagine and declare America’s role in God’s providential plan for humankind. Indeed, up until around World War II it would have been more readily said that America’s political institutions – “our democracy” – flowed *from* religion (in the event, Protestantism), than the other way around.

The novelty of the immediate post-war settlement wrought in *Everson* and *McCullom* was therefore threefold. First, the political form was clearly ascendant; “democracy” supplied the major premises from which the role of religion was derived. Second, that role was a bit part: religion was to stay out of a desacralized politics. Last and in light of that role, political elites would have to direct and manage the new “civil religion” of secularism, which was conceived precisely to contain the political aspirations of the indigenous faiths.

## II

Another war with a different authoritarian foe soon brought forth a new civil religion. This was actually a *religious* civil religion. It too answered the question about what distinguished the United States’ political system from that of our foreign adversaries. The question this time: what was the Cold War about?<sup>11</sup>

<sup>10</sup> The entire oral argument can be found in volume 5, issue 1 of *Engage*, the magazine of the Federalist Society.

<sup>11</sup> It was also the accidental civil religion, for it emerged as the handiwork of political leaders by default. As William Inboden tells the story in his masterful and important *Religion and American Foreign Policy 1945–1960*, Cambridge 2008, Presidents Truman and Eisenhower discovered that the nation’s leading religious

God, at least in large part. Historian William Inboden records that President Harry Truman “saw the conflict as nothing less than a religious war”.<sup>12</sup> In a 1951 address to a Washington, D.C. Presbyterian Church, Truman explained that “the danger that threatens us in the world today is utterly and totally opposed to [spiritual values]. The international Communist movement ... denies the existence of God, and wherever it can it stamps out the worship of God”. Both Truman and Eisenhower “constantly reminded Americans of the centrality of religious faith in their national heritage, of the connection between faith in God and human rights and freedoms, of the special responsibility to which God had called America, and of communism’s atheism and hostility to religion”.<sup>13</sup>

Two laws enacted by Congress in 1954 indicate wide support for the Presidents’ interpretation of the superpowers’ animosity. One law put the National Motto – “In God We Trust” – on all American currency. The other added to the Pledge of Allegiance the words “under God”. Proponents of the Pledge Amendment said that it “reflects the traditional concept that our Nation was founded on a fundamental belief in God”. They itemized evidence for their claim, listing (among other documents) the Declaration of Independence and the writings of William Penn.<sup>14</sup> The House Report in favor of amending the Pledge asserted that:

At this moment in our history the principles underlying our American government and the American way of life are under attack by a system whose philosophy is at direct odds with our own ... [Inclusion of “under God”] would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.<sup>15</sup>

“In God We Trust” expressed the same convictions. One speaker at the House hearings explained that “the one fundamental issue which is the unbridgeable gap between America and Communist Russia is belief in Almighty God.” President Eisenhower signed the bill, saying that “from this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school-house, the dedication of our Nation and our people to the Almighty”.<sup>16</sup>

Even the Supreme Court caught the new faith fever. Congressional sponsors of both bills about God quoted the then recent Supreme Court declaration that

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bodies would not partner with each other to popularize the religious meaning of the Cold War. The difficulty on the religious side was not really ideological; almost all believers were united in understanding Stalin as a monstrous enemy of religion. But the Protestant denomination’s fractiousness and, more, their unwillingness to work closely with the Catholic hierarchy left the Protestant mainline on the sideline. Part of this latter resistance owed to earlier *Catholic* refusals to cooperate with Protestants on matters of common concern.

<sup>12</sup> P. 1.

<sup>13</sup> *Ibidem*. The only caveat I would offer to Inboden’s analysis is that this civil religion consisted mostly of propositions – the existence of an Almighty and Provident God Who so created humankind that freedom was essential to persons’ flourishing – that could be vindicated by reason as true. This civil religion did not consist, that is, in patriotic myth.

<sup>14</sup> H. R. Rep. No. 1693 (1954), as reprinted in 1954 U.S.C. Ann. 2339, 2340.

<sup>15</sup> *Ibidem*.

<sup>16</sup> 100 Cong. Rec. 8618 (1954).

“[w]e are a religious people whose institutions presuppose a Supreme Being.”<sup>17</sup> The case was *Zorach v. Clausen*.<sup>18</sup> Decided in 1952, *Zorach* was in tone and substance a new turn of the *Everson/McCollum* “wall of separation”. *Zorach* involved a distinct twist of the *McCollum* facts, a “released-time” program in which public school children were “released” (if the parents were willing) before the end of the school day to go and receive religious instruction at nearby parochial (mostly Catholic) schools. Although no religious teaching occurred on public premises, state authorities were heavily involved in promoting the students’ faith development. Nonetheless, the Court sustained the program, in an opinion which replaced “separation” with “accommodation” as the touchstone of church-state relationships in America. This era of good feelings lasted into the early 1960’s.

### III

Perhaps the most celebrated twentieth-century speech by an American politician about religion and public life was delivered by another young Democratic Senator, one who (like Obama) later became President. The focal point of this talk was also Catholic. It was not (as in Obama’s case) the Catholicity of the audience. It was instead the candidate’s own Catholic faith, and the relationship of that faith to his service as the nation’s Chief Executive.

When John F. Kennedy rose to address Protestant ministers assembled in Houston’s Rice Hotel on September 12, 1960, he was fighting for his political life. The old Protestant suspicion of Catholics’ alleged dual loyalties threatened to doom his race with Richard Nixon for President. Just weeks before the Houston speech, 150 Protestant ministers, led by the redoubtable Norman Vincent Peale, publicly worried that a Catholic president would bow to the hierarchy’s unenlightened (in their view) teachings on birth control, public aid to Catholic schools, and on establishing diplomatic relations with the Vatican.

Kennedy went to Houston to allay these fears. The politics of the speech were complicated, however, by Kennedy’s need to placate Protestants *without* alienating Catholics voters or the episcopal hierarchy. He had learned this lesson the hard way. Kennedy (and his speech-writers, Ted Sorenson, ghost-writer of *Profiles in Courage* and John Cogley, a liberal Catholic journalist) knew that, in a 1959 *Look* magazine interview, Kennedy had taken a wrong turn on the road to appeasement. They had their work cut out.

“What would Kennedy say in an attempt to quell fears that Catholicism and the Presidency don’t mix?”, journalist Fletcher Knebel asked in *Look*. “In a capsule, his theme is that religion is personal, politics are public, and the twain need never meet and conflict”. Even though Kennedy was quoted as saying, “Whatever

<sup>17</sup> See: p. 2340; Hearings at p. 5.

<sup>18</sup> 343 U.S. 306 (1952).

one's religion in his private life may be, for the officeholder, nothing takes precedence over his oath to uphold the Constitution...”, the damage could not be undone: he had been heard to say that religion was so private that it did not intersect with public matters.

The *Look* piece attracted a great deal of attention – “most of it”, according to historian John Quinn’s astute analysis, “negative”.<sup>19</sup> The Catholic press was especially hostile. One prominent organ stated bluntly that Kennedy had gone “overboard to placate the bigots”. Even some Protestant writers, notably including the Lutheran historian Martin Marty, were alarmed that Kennedy seemed to be (in Marty’s words) “spiritually rootless and almost disturbingly secular”. Kennedy (and Sorenson and Cogley) learned that secularism was, politically, a dead end. So, too, was any candidate’s apparent religious indifference. They needed a new synthesis of liberalism and religious faith.

Between March 1959 and September 1960 the stakes had been raised, and their task still further complicated, by Kennedy’s stance on foreign aid. President Dwight Eisenhower commissioned a study group to look at America’s military assistance programs abroad. This committee, headed by William Draper, concluded that economic development would help inoculate poor foreign countries against the lure of Communism and thus contribute to America’s security.<sup>20</sup> Because “overpopulation” was one source of poverty, the Draper committee recommend that “the United States should make promotion of birth control techniques an explicit item of the technical assistance programs”.

The Catholic bishops denounced the recommendation in a public statement on November 29, 1959. Eisenhower soon backed away.<sup>21</sup> The already all-but-officially-declared Presidential candidate John F. Kennedy backed the bishops, in a statement reported on the front page of the *New York Times*. But Kennedy was now in the politically embarrassing position of being an obedient lamb to the Church’s shepherds.

Kennedy’s escape was brilliant. He concurred with the bishops’ judgment, but for reasons which did not implicate their teaching authority. He said that the proposed policy was a “mistake” on jurisdictional grounds: each country should make its own population policies for itself.<sup>22</sup> Asked specifically whether his position was “in any way” influenced by the bishops’ statement, he ducked: “My judgment on this has been held for many years, and it continues”. Pressed on his first argument by a hypothetical possibility that, if India decided to promote birth control at home, “would this in any way trouble you if you were President, in giv-

<sup>19</sup> Manuscript copy in author’s possession.

<sup>20</sup> See: D. Critchlow, *Intended Consequences: Birth Control, Abortion, and the Federal Government in Modern America*, Oxford 1999, p. 42–45.

<sup>21</sup> *Id* at 44.

<sup>22</sup> NYT article by Reston on p. 1, 11/28/59. Kennedy also said, tellingly, that the United States had not advocated birth control policies in Western Europe, and that “it would be the greatest psychological mistake for us to appear to advocate the limitation of the black or brown or yellow peoples...”

ing aid to a country that followed such a policy?" Kennedy replied that it would not be "wise" for America to cut off aid in that case. He added that if Congress passed a law making aid contingent on a country's population control policies his decision whether to approve it would be based on "my personal judgment as President as to what would be in the interest of the United States".

In his Houston speech, Kennedy said that he had long believed in "an America where the separation of church and state is absolute". He reviewed his record to date on religion-tinged issues, highlighting his abandonment (in 1956) of prior support for a Vatican ambassador, and his present stance against all "unconstitutional" aid to parochial schools. Then he said:

Whatever issue may come before me as President – on birth control, divorce, censorship, gambling or any other subject – I will make my decision in accordance with [...] what my conscience tells me to be the national interest, and without regard to outside religious pressures or dictates.

To forestall criticism that he was a trimmer for political benefit he said: "I do not intend to apologize for these views [...] nor do I intend to disavow either my views or my church in order to win an election". The crucial passage was this, and it played too well to all believers:

[I]f the time should ever come – and I do not concede any conflict to be even remotely possible – when my office would require me to either violate my conscience or the national interest, then I would resign the office, and I hope any conscientious public servant would do the same.

Quinn reports that the speech did the job. It was generally well-received and, most important, "this time there was no criticism from Catholic quarters".<sup>23</sup> Kennedy managed to straddle the "wall of separation" by promising to decide matters according to the "national interest", and not according to "outside" religious "pressure" or commands. But Kennedy's promissory note did not endorse the secularization of American public life, nor did he promise to privatize his own Catholic faith. In fact, his remarks implied the superiority of religious obligation to public duty, and invited admiration of the candidate's overriding devotion to his faith. Kennedy solved the problems presented by his renewed profession of fealty to Catholic teaching by promising not to impose his Catholicism on the body politic. He did so at little cost to himself by prophesying that he would not have to face that painful choice.

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<sup>23</sup> P. 23 of ms.



## IV

John F. Kennedy was inaugurated President in January 1961. Before his assassination 34 months later the Supreme Court adopted an unflinchingly secularist reading of the First Amendment's Establishment Clause. The definitive case was *Engel v. Vitale*.<sup>24</sup> In that litigation, some parents of public school students challenged New York's practice of opening the day with the prayer: "Almighty God we acknowledge our dependence on thee, and we ask your blessing on us, our parents, and our country".

The parents' attorney declared to the Court in oral argument that his purpose was to preserve religious liberty. The only way to do that, William Butler argued, was to "keep religion out of our public life." Butler soon made explicit the implication that "liberty" equals "private". Later in the argument Butler was asked: "is it your position that our public schools, by virtue of our Constitution, are frankly secular institutions?" He answered: "Absolutely yes." That was his "ultimate position", Butler added emphatically.

Those defending the prayer made the contrast with Butler as clear as it could be made. Bertram Daiker, who represented local school officials, said:

[H]ere is where my friend [Butler] and I depart in our thinking. Since the earliest days of this country, going back to the Mayflower Compact, the men who put our country together have publicly and repeatedly recognized the existence of a Supreme Being, a God.

Later on, Porter Chandler, standing up for intervening parents who favored the prayer, said that petitioners "are now seeking to [...] eliminate all reference to God from the whole fabric of our public life and of our public educational system."

The Court, save for Justice Stewart, seemed to be on Butler's side. Stewart pressed Butler hard to distinguish the Regents' prayer – "Almighty God we acknowledge our dependence on Thee" – from: "I pledge allegiance to [...] one nation under God." Butler faltered, as he did, too, when pressed to distinguish other divine adornments of public life – "in God We Trust," "God Save this Honorable Court," and the like.

The Court's opinion in *Engel* asserted that the purpose of the Establishment Clause was to forestall "union" of government and religion, to leave "religious functions to the people themselves and to those the people choose to look to for religious guidance." The Establishment Clause expressed the "principle" that religion is "too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate". This was a candid declaration that religion was private, for the Court made clear that *whenever* the civil magistrate gets religion it *is* an "unhallowed perversion". It was not as if there were two kinds of contact between church and state – those which amounted to "unhallowed perversions", and those which did not. *Engel* established a lasting removal of God and religion from public

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<sup>24</sup> 370 U.S. 421 (1962).

space, what the late Richard John Neuhaus famously described as the “naked public square”. One measure of its effect can be seen in Supreme Court decisions about vestigial observances, such as perfunctory blessings at public school ceremonies<sup>25</sup> and seasonal religious figurines on public property – nativity scenes and the like.<sup>26</sup> By the 1980’s *all* such commemorations presented serious constitutional issues, and some were declared unconstitutional by the Supreme Court.

Another measure of how far American politics by the 1980’s had been mortgaged to secularism was the 1988 Presidential campaign. In one campaign appearance Republican candidate George H.W. Bush was invited to recall his feelings about being shot down by Japanese fire:

Was I scared floating around in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well, you back to fundamental values. I thought about Mother and Dad and the strength I got from them – and God and faith and the separation of Church and State.<sup>27</sup>

Bush’s thoughts that day in World War II near the Aleutians were, one presumes, tweaked by his expectation in 1988 that the American voter wanted the faintest whiff of a public man’s religiosity accompanied by assurances that, of course, God and Caesar remained securely at home in their strictly separate domains.

Wall-fetishism was not solely a Republican preoccupation. In the same campaign some Greek Orthodox Church officers provided the Democratic counterpoint to Bush’s war story. They were asked about Michael Dukakis’ standing in their church. They wouldn’t say, and scolded their interlocutors. The Archdiocese said that,

with regret, we have observed recent attempts being made to inject religion into the political life of this nation, in direct contradiction to the First Amendment, and we will not become party to this effort.<sup>28</sup>

*Engel* established a secularist paradigm for America’s public spaces and institutions. By itself, however, *Engel* did not settle the constitutionality of government aid to parochial schools. *Engel* did not say or imply that, though religion was the province of home and church, its practice within such “private” settings could never be assisted by public authority. And, for several reasons, the 1960’s were a propitious time for exploiting this possibility.

One reason was evolving attitudes towards helping parochial schools. One 1961 Gallup poll showed that 57 per cent of Americans wanted no federal funds to go to parochial schools. By 1963 49 per cent *favoured* inclusion, with only 44 per

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<sup>25</sup> See for example: *Lee v. Weisman*, 505 U.S. 577 (1992) (middle-school graduation invocation).

<sup>26</sup> See for example: *Lynch v. Donnelly*, 465 U.S. 668 (1983).

<sup>27</sup> Quoted in: G. Bradley, *Church Autonomy in the Constitutional Order*, “Louisiana Law Review” 1989, Vol. 49, No. 1057.

<sup>28</sup> *Ibidem*.

cent opposed.<sup>29</sup> Part of this change may owe to the martyred Catholic President's popularity. Part must also be due to receding fears of the Church's political and cultural power; the Sixties may have been a tick of the clock from the Fifties, but they were a whole different time in both American society and within the Catholic Church. In addition, a characteristic feature of the Johnson Administration's "Great Society" programs was to promote many theretofore "private" goods while respecting the recipients' freedom of choice – as the federal government did with the arts, early childhood education, domestic relations (including public provision of "family planning" services), and special education. Because the Great Society pioneered creative integrations of personal freedom and public assistance, the shibboleth that government could scarcely touch religion without perverting it was already passé.

In fact, the landmark federal aid to education act of 1965 extended a hand to all special needs children, whether they attended public or Catholic school. The Supreme Court took a similarly forgiving view of state aid to Catholic schools in 1968, when it revisited the question for the time since *Everson*. In *Board of Education v. Allen*, the Justices approved New York's program of textbook subsidies for children in parochial (again, mainly Catholic) schools.<sup>30</sup> And in 1970 the Court sustained the constitutionality of exempting religious institutions from property and other sorts of taxes.<sup>31</sup>

Then, an abrupt about-face. For reasons which have yet to be adequately explored by scholars, the Supreme Court struck down a parochial school aid law for the first time in 1971 (in *Lemon v. Kurtzman*). The most stringent of these decisions – the last of which occurred in 1985–was *Committee for Public Education v. Nyquist*,<sup>32</sup> in 1973.

The high-water mark of this campaign occurred in 1985, when the Court in related decisions struck down two states' administration of the 1965 "Title I" federal aid programs. In one case<sup>33</sup> the Grand Rapids, Michigan School District implemented this congressional directive to meet the special needs of all students through a "Community Education and Shared Time" program. Salaried *public* school personnel taught courses in parochial schools during regular school hours to parochial school students. In addition, adult education courses, taught by parochial school teachers working "part-time" for the district, were offered after school in the parochial school buildings.

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<sup>29</sup> C. Degler, *Aid for Parochial Schools – A Question of Education, Not Religion*, "New York Times", January 31, 1965. Degler was a very prominent Stanford University historian.

<sup>30</sup> 392 U.S. 236 (1968).

<sup>31</sup> *Walz v. Tax Commission*.

<sup>32</sup> 1 (2002). 403 U.S. 602 (1971). For a fuller description of the turn-about, see: G. Bradley, *An Unconstitutional Stereotype: Catholic Schools as 'Pervasively Sectarian'*, "Texas Review Law & Politics Scholars" Vol. 7, see my TX article.

<sup>33</sup> *Grand Rapids School Dist. V. Ball*, 105 S. Ct. 3216 (1985).

The Shared Time courses were “remedial” or “enrichment” courses generally unavailable in the private schools. The adult courses duplicated ones available in local public schools.

The Supreme Court determined that the program “impermissibly advanced religion” in three ways; First, the teachers participating in the programs might – the Court opined – become involved in internationally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs might provide a crucial “symbolic” link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.<sup>34</sup>

New York City encountered a Catch-22 in its implementation of Title I.<sup>35</sup> Only public school teachers, monitored by public school supervisors, were involved in the remedial and guidance services offered in the largely Catholic private schools. This effectively insured against improper religious advancement, but just as effectively insured an impermissible church-state entanglement.

## V

The tide of privatization began rolling out in 1990, and it has slowly, but steadily, receded since. Many scholars have noted this undeniable shift. One says that “the image of separation” is “fading out”.<sup>36</sup> Another claims that the “Court has abandoned much of its earlier separationism”.<sup>37</sup> A third maintains that the Court has “been driving notions of separation of church and state to the constitutional periphery”.<sup>38</sup> And still another holds that the Court has embarked on a “wholesale” revision of doctrine which “would abandon any pretense of church/state separation”.<sup>39</sup>

One significant doctrinal change assures that the public square is now open to religious expression. Cases beginning in 1993 (*Lamb’s Chapel*<sup>40</sup> and, later, *Rosenberger*<sup>41</sup>) nearly eradicated discrimination against religious speech, institu-

<sup>34</sup> See: 105 S. Ct. At 3223-24.

<sup>35</sup> *Aguilar v. Felton*, 105 S. Ct. 3232 (1985).

<sup>36</sup> I. Lupu, *The Lingering Death of Separationism*, “George Washington Law Review” 1994, Vol. 62, p. 230, 279.

<sup>37</sup> J. Witte, *God’s Joust, God’s Justice: Law and Religion in the Western Tradition*, Michigan 2006, p. 211.

<sup>38</sup> T. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, “Northwestern Law Review” 2007, Vol. 100, No. 1096, p. 1115.

<sup>39</sup> S. Gey, *Life After the Establishment Clause*, 110 “Virginia Law Review” 2007, Vol. 110, No. 1–2. Steven Smith has collected these observations in his excellent new book, *The Disenchantment of Secular Discourse*, Harvard 2009.

<sup>40</sup> *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

<sup>41</sup> *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995).

tions, and individuals *as, or on the precise grounds of being*, religious. Where the religious activity (or speech or writing) can be assimilated to a class of actions which can be described without reference to religion, constitutional norms of viewpoint equality open wide the gates to the public forum. And so, if a local public library sets up a lecture series on “family issues,” it may not exclude a speaker such as Dr. James Dobson, because he brings a religious perspective to the subject. Beginning in 1992 the Court also relaxed its strictures against parochial school aid,<sup>42</sup> culminating in the decision upholding the Cleveland voucher program in *Zelman v. Simmons-Harris*.<sup>43</sup> Political rhetoric has kept abreast of these changes, so much so that the most recent successful Presidential candidates – George W. Bush and Barack Obama – conspicuously and often identified themselves with vibrant traditions of Protestant Christianity.

## VI

It is a commonplace to observe that Barack Obama is a “post-” President: post-partisan, post-racial, post-baby boomer. He is also the first Democrat and the first liberal President to break free of the “privatization” (or, in constitutional parlance, “strict separationist”) paradigm for religion and public life which has characterized liberalism, and the Democratic party, since the 1960’s.

His Notre Dame speech was suffused with religious references and musings about religious faith. Its wording and tone – its mood, if you will – were decidedly faith-friendly.

Obama advised the graduates to “hold firm” to their faith, for example, because it would prove to be an invaluable anchor and guide through life’s journey. The President referred, gently, to his own faith journey. He said that he “was not raised in a particularly religious household”, but that he now stood “in the Christian tradition”.

This tradition supplied to Obama a supervenient vocabulary and a deeper meaning to what anyone can accept as common sense. He described the earth as “God’s creation”. He took account of the manifold “imperfections of man” – including “all the cruelties large and small that “those of us in the Christian tradition understand to be rooted in original sin”. President Obama also spoke religious *esperanto*, of a “law that binds people of all faiths and no faith together”. This norm exists, he asserted, in “Christianity and Judaism; in Islam and Hinduism; in Buddhism and humanism. It is, of course, the “Golden Rule” of “love”.

Obama stood gratefully before his Catholic hosts. He congratulated Notre Dame for its “open hearts”, “open minds”, and “fair-minded words”. The late Car-

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<sup>42</sup> See, e.g.: *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>43</sup> 36 U.S. 639 (2002).

dinal Archbishop of Chicago Joseph Bernadin, and legendary Notre Dame President Father Theodore Hesburgh, were, he said, especially admirable exemplars of the salutary effects which religion could have on civic life.

President Obama stood before the Class of 2009 “as President and as an African-American”. And so he praised the profound Christian witness of the Rev. Martin Luther King, Jr., martyr in the righteous battle for African-Americans’ civil rights.

So far considered, though, there is little in Obama’s Notre Dame speech which would rankle an ardent religious privatizer. Everyone agrees that faith can be a source of *personal* courage and comfort. No one objects to a political leader’s faith insofar as it shadows, semantically, what reason and experience disclose, nor when faith confirms common knowledge or illumines it in a further way. But in no such instance is religion the peculiar source or indispensable justification for a norm by which public affairs are governed.

Those committed to a strict separation of church and state do not object to public endorsements of religion insofar as it cultivates tolerance and justice and “openness”. Indeed, secularism arises (in part) precisely from the fear that religion inculcates contrary attitudes. Insofar as particular religious traditions – those of Father Hesburgh or Dr. King, for example – stand for mutual forbearance and respect, endorsing them is fine too.

On the main question before the house – abortion – Obama offered nothing new, either.

I do not suggest that the debate surrounding abortion can or should go away. Because no matter how much we may want to fudge it – indeed, while we know that the views of most Americans on the subject are complex and even contradictory – the fact is that at some level, the views of the two camps are irreconcilable. Each side will continue to make its case to the public with passion and conviction. But surely we can do so without reducing those with differing views to caricature.

But then President Obama said something novel and quite extraordinary, He appeared to welcome – or, at least, to accept – the contributions of believers to public debate, but only *after* devaluing their distinctive contributions:

Remember [...] that the ultimate irony of faith is that it necessarily admits doubt. It’s the belief in things not seen. It’s beyond our capacity as human beings to know with certainty what God has planned for us or what He asks of us. And those of us who believe must trust that His wisdom is greater than our own.

And this doubt should not push us away from our faith. But it should humble us. It should temper our passions, cause us to be wary of too much self-righteousness. It should compel us to remain open and curious. This doubt should remind us even as we cling to our faith to persuade through reason, through an appeal whenever we can to universal rather than parochial principles, and most of all through an abiding example of good works and charity and kindness and service that moves hearts and minds.

Here President Obama speaks not only – and not even mainly – about the personal satisfactions of believing. He does not say or imply that the satisfactions

of faith are properly limited to the private realm of church, family, individual. The President instead considers the terms of public argument over moral issues integral to the common good. But what he says *about* is pertinent to faith as such (private and public); it is offered in a cautionary tale for the believer at large. Obama opines about the lifetime companion of faith: doubt – and virtues which that inevitable and inescapable doubt imply should be cultivated among the faithful. And note especially well: this epistemological modesty is an implication or corollary not of democracy or of liberalism, but of religious faith itself.

This modesty is not derived from the political form (as the *Everson* project was from “democracy” and the Fifties civil/natural religion was from our “form of government”.) Nor is Obama’s recovery indebted to modernism in religion, which looks upon its effects on believers with great ambivalence (due to servility, credulity, carrier of a cramped morality), and its claims to true knowledge as uncomprehendingly naive about the ineffable, if not irrational nature of religion. Obama’s position is not indebted to post-modernism, in the specific way that some writers who doubt the foundations of all claims to possess knowledge argue that religious claims are just as well-, or just as ill-, founded as are “secular” claims. But there are very grave problems with Obama’s analysis of faith. He confuses the divine realities – which are indeed beyond human comprehension – with what human beings can know about them. Indeed, he appears to use the incomprehensibility (to human beings) of God as the basis for claiming that what we think we do know about God is inherently “doubt[ful]”, and thus tentative, revisable. But this logic is unsound, and the conclusion is false. We may readily acknowledge that the cosmos remains beyond our grasp, even as we are confidently in possession of some genuine knowledge of its properties and operations.

Obama also seems to dismiss without argument the possibility that unaided reason can know certain truths about divine realities, such as those to which the founders dedicated this country: the existence of a creator God Who providentially cares for humankind and whose moral law for the guidance of human affairs can be discerned in Nature. Obama also ignores the likelihood (which reasons also suggests) that such a God would engage humankind in further divine-human communication which such an omnipotent being could surely make *effective*. So, Christians’ belief that all persons are equal in dignity because each is a brother and sister in the one Lord would be, it appears, “doubt[ful]”.

## Conclusion

The President’s political sway ensures that his Notre Dame departure will shape American political culture, perhaps powerfully as our society continues its drift away from the crude separationism ascendent since World War II. Obama’s speech amounts to a developed exit strategy from the “naked public square”.

Its success depends upon whether American believers recognize themselves in the President's portrait of them.

The profile of faith on offer from the President will also have practical repercussions throughout the world, especially as he seeks to engage Muslims in terms of mutual respect and understanding. The question abroad is, too, whether Obama has projected a true likeness of those who believe in Islam.