

**UNASHAMED OF THE GOSPEL OF JESUS CHRIST:  
ON PUBLIC POLICY AND PUBLIC SERVICE  
BY EVANGELICALS**

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### INTRODUCTION

Picture this scene: The year is 2025, and the occasion, judicial confirmation hearings by the United States Senate’s Committee on the Judiciary. A newly elected president has just nominated an accomplished, mid-career law professor to serve as the next Associate Justice of the United States Supreme Court. The nominee is brilliant. He is also Muslim. After responding to a predictable line of questioning from several stoic United States senators, the nominee faces the following inquisition from a brash, politically ambitious senator from Texas:

Professor, I have letters from the Independent-Fundamentalist-Triple Predestination-Post-Millennial Churches of America and the Greater Zionist-Expansionist-Ultra-Orthodox Cooperation of Jewish Congregations of the United States opposing your nomination to serve on the Supreme Court. The organizations take exception to your recent blog post directed towards the governing board of a private Muslim school reevaluating its statement of faith, a blog post in which you insist upon adherence to what you describe as historic Islamic belief. In particular, you state in the blog entry that you fully embrace the first pillar of Islam, that “there is no god but Allah, and Muhammad is his prophet.” You further affirm the Quranic assertion that Jesus Christ actually did not die from crucifixion, let alone bodily rise from the dead. Your blog urges the Muslim school to strictly teach this traditional Islamic doctrine and tolerate no faculty dissent from it. Professor, do you understand that your public views have marginalized the millions of Americans, both Jews and Christians, who worship not Allah but YHWH? And do you appreciate, professor, that in the minds of a great number of Christian Americans, if Jesus did not die for the sins of the world and arise in victory over sin and

death, their faith is utterly pointless? Do you, sir, maintain that Jews and Christians lack an accurate knowledge of God and how to worship God? And would you still today denigrate the most fundamental beliefs of millions of our citizens? Fellow members of the committee, I do not believe that this law professor represents what this country is supposed to be about. Therefore, I oppose his nomination.

Until recent days, this account of anti-religious acerbity by a United States senator would have sounded like the fanciful tale of a political satirist rather than a bona fide journalistic report.<sup>1</sup> But on June 7, 2017, fiction became fact. Only the minor details of the historic exchange differ from those of the hypothetical narrative. The real hearing occurred before the United States Senate Committee on the Budget.<sup>2</sup> The business before the committee was the nomination of Russell Vought for Deputy Director of the White House Office of Management and Budget (“OMB”).<sup>3</sup> The nominee’s religious beliefs on trial were not Islamic, but Christian. And leading the charge against the nominee was a senator who hails not from Texas, but from Vermont—former presidential candidate Bernie Sanders.

Senator Sanders began his interrogation of Mr. Vought by reading into the record a letter from three organizations expressing concerns over Mr. Vought’s religious views.<sup>4</sup> After

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1. This observation does not ignore that a judicial nominee’s religious beliefs have garnered at least some attention in the history of judicial confirmation hearings. For a discussion, see Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 79–95 (2006).

2. See *Nomination of Russell T. Vought, of Virginia, To Be Deputy Director of the Office of Management and Budget: Hearing Before the S. Comm. on the Budget*, 115th Cong. (2017) [hereinafter *Hearing*]. A video recording of the hearing is available at [https://www.budget.senate.gov/nomination-hearing-for-deputy-director\\_of-white-house-budget-office](https://www.budget.senate.gov/nomination-hearing-for-deputy-director_of-white-house-budget-office) [https://perma.cc/A7V4-MD7R].

3. Vought’s nomination was approved by the Senate Budget Committee shortly after the hearing. See *Budget Committee Approves Vought as Deputy Director of White House Budget Office*, U.S. SENATE COMM. ON THE BUDGET (June 14, 2017), <https://www.budget.senate.gov/chairman/newsroom/press/budget-committee-approves-vought-as-deputy-director-of-white-house-budget-office> [https://perma.cc/4UUT-XK32].

4. *Hearing*, *supra* note 2, at 12–13 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget). The letter, written by the Arab American Institute, Bend the ARC Jewish Action, and Muslim Advocates, reads as follows:

We write to express our deep concerns about the nomination of Russell Vought to the position of Deputy Director of the White House Office of

briefly questioning Mr. Vought on what were characterized as “budget matters,”<sup>5</sup> Senator Sanders extensively probed the theological views that Vought had advanced in an opinion piece concerning an episode at Wheaton College. The full exchange<sup>6</sup> between Sanders and Vought on the latter’s theology is as follows:

Senator SANDERS. Let me get to this issue that has bothered me and bothered many other people, and that is in the piece that I referred to that you wrote for a publication called *Resurgent*. You wrote: “Muslims do not simply have a deficient theology. They do not know God because they have rejected Jesus Christ, His Son, and they stand condemned.”

Do you believe that that statement is Islamophobic?

Mr. VOUGHT. Absolutely not, Senator. I am a Christian, and I believe in a Christian set of principles based on my faith. That post, as I stated in the questionnaire to this committee, was to defend my alma mater, Wheaton College, a Christian school that has a statement of faith that includes the centrality of Jesus Christ for salvation, and—

Senator SANDERS. Again, I apologize. Forgive me. We just do not have a lot of time. Do you believe that people in the Muslim religion stand condemned? Is that your view?

Mr. VOUGHT. Again, Senator, I am a Christian, and I wrote that piece—

Senator SANDERS. Well, what does that say—

Mr. VOUGHT [continuing]. In accordance with the statement of faith of Wheaton College.

Senator SANDERS. I understand that. I do not know how many Muslims there are in America. I really do not know, probably a couple million. Are you suggesting that all of those people stand condemned? What about Jews? Do they stand condemned, too?

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Management and Budget. Mr. Vought has denigrated American Muslims and the Muslim faith. His writings demonstrate a clear hostility to religious pluralism and freedom that disqualify him for any appointment, including that of deputy director of the OMB.

*Id.* at 13.

5. *Hearing, supra* note 2, at 14 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

6. I reproduce the full exchange to ensure that the comments of Vought and Senator Sanders are taken in context.

Mr. VOUGHT. Senator, I'm a Christian. I—

Senator SANDERS: I understand you are a Christian, but this country is made up of people who are not just—I understand that Christianity is the majority religion, but there are other people of different religions in this country and around the world. In your judgment, do you think that people who are not Christians are going to be condemned?

Mr. VOUGHT: Thank you for probing on that question. As a Christian, I believe that all individuals are made in the image of God and are worthy of dignity and respect regardless of their religious beliefs. I believe that as a Christian that is how I should treat all individuals—

Senator SANDERS. And do you think your statement that you put into that publication, “they do not know God because they rejected Jesus Christ, His Son, and that they stand condemned,” do you think that’s respectful of other religions?

Mr. VOUGHT. Senator, I wrote a post based on being a Christian and attending a Christian school that has a statement of faith that speaks clearly with regard to the centrality of Jesus Christ in salvation.

Senator SANDERS: I would simply say, Mr. Chairman, that this nominee is really not someone who is what this country is supposed to be about. I will vote no.<sup>7</sup>

Senator Sanders’s interrogation of Mr. Vought followed the former’s opening statement to the committee, in which he opined that Vought’s expressed theological position “is indefensible, it is hateful, it is Islamophobic, and it is an insult to over a billion Muslims throughout the world.”<sup>8</sup> He again characterized Vought’s defense of Wheaton as containing “strong Islamophobic language,” and remarked that “racism and bigotry cannot be part of any public policy” in a democracy.<sup>9</sup>

After Senator Sanders questioned and denounced Mr. Vought, Senator Cory Gardner cautioned, “I hope that we are not questioning the faith of others and how they interpret their

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7. *Hearing, supra* note 2, at 15–16 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

8. *Id.* at 4 (statement of Sen. Bernard Sanders, Ranking Member, S. Comm. on the Budget).

9. *Id.*

faith to themselves.”<sup>10</sup> In response to Gardner’s concern, Senator Chris Van Hollen opined, “I don’t think anybody was questioning anybody’s faith here. I think the issue that Senator Sanders was raising was whether the nominee was questioning the faith of others.”<sup>11</sup> Senator Van Hollen then suggested that there was some (unstated) link between the “public trust for the whole country” and Vought’s theology.<sup>12</sup> Van Hollen interjected his personal theological views into the committee’s deliberations before referring again to the “public trust”:

I am a Christian, but part of being a Christian, in my view, is recognizing that there are lots of ways that people can pursue their God. So no one is questioning your faith, Mr. Chairman. It is your comments that suggest a violation of the public trust in what will be a very important position.<sup>13</sup>

The context of Mr. Vought’s expression of religious belief that so plainly offended Senator Sanders was his defense of Wheaton College, his alma mater. Like Vought, Wheaton College embraces evangelical theology. Considered by some to be the “Harvard of evangelicalism,”<sup>14</sup> Wheaton College has adopted a Statement of Faith that begins as follows:

The doctrinal statement of Wheaton College, reaffirmed annually by its Board of Trustees, faculty, and staff, provides a summary of biblical doctrine that is consonant with evangelical Christianity. The statement accordingly reaffirms salient

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10. *Id.* at 16 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

11. *Id.* at 17.

12. *Id.* Senator Van Hollen spoke as follows:

So nobody is questioning [Vought’s] faith. The issue is you are now moving from a position where you were a staff member in the Republican Study Committee to somebody who is supposed to uphold the public trust for the whole country. And I think it’s irrefutable that these kind of comments suggest to a whole lot of Americans that, No. 1, their religious philosophy is deficient, and in condemning them because they have rejected Jesus Christ, His Son, you are condemning people of all faiths other than Christians.

*Id.*

13. *Hearing, supra* note 2, at 17 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

14. *See, e.g.,* Jonathan Merritt, *Can Wheaton College Still Claim to Be the “Harvard of Evangelicalism”?*, SOJOURNERS (Dec. 18, 2015), <https://sojo.net/articles/can-wheaton-college-still-claim-be-harvard-evangelicalism> [<https://perma.cc/H8MB-P9VU>].

features of the historic Christian creeds, thereby identifying the College not only with the Scriptures but also with the reformers and the evangelical movement of recent years. The statement also defines the biblical perspective which informs a Wheaton education. These doctrines of the church cast light on the study of nature and man, as well as on man's culture.<sup>15</sup>

In an effort to remain true to its institutional mission and Statement of Faith, Wheaton suspended a Christian political science professor, Dr. Larycia Hawkins, who had publicly opined that Christians and Muslims worship the same God.<sup>16</sup> Vought wrote to support the college in its response to the matter.<sup>17</sup> In an article that appeared in *The Resurgent*, Vought wrote, "I am proud of the school and hope they stand their ground."<sup>18</sup> He then offered three major reasons for his support of Wheaton's decision to place the professor on leave.<sup>19</sup> As ex-

15. *Statement of Faith and Educational Purpose*, WHEATON COLL. [hereinafter *Wheaton Statement of Faith*], <http://www.wheaton.edu/About-Wheaton/Statement-of-Faith-and-Educational-Purpose> [<https://perma.cc/49U6-3LYC>] (last visited Mar. 19, 2018).

16. For a more complete account of the saga at Wheaton, see Ruth Graham, *The Professor Suspended for Saying Muslims and Christians Worship One God*, ATLANTIC (Dec. 17, 2015), <https://www.theatlantic.com/politics/archive/2015/12/christian-college-suspend-professor/421029/> [<https://perma.cc/8T6S-L7GQ>].

17. The college placed the associate professor on administrative leave "in response to significant questions regarding the theological implications" of her statements "about the relationship of Christianity to Islam," statements that appeared incongruous with the school's Statement of Faith. *Wheaton College Statement Regarding Dr. Larycia Hawkins*, WHEATON COLL. (Dec. 11, 2015), <http://web.archive.org/web/20151216161646/https://www.wheaton.edu/Media-Center/Media-Relations/Statements/Wheaton-College-Statement-Regarding-Dr-Hawkins>. This Statement of Faith is reproduced in full, *infra* note 271. Additional background appears in Senator Sanders's opening statement at the committee hearing:

Apparently, the crime that Mr. Vought found so objectionable was a 2015 Facebook post that Miss Hawkins wrote stating, and I quote—this is from Miss Hawkins, the professor of political science: "I stand in religious solidarity with Muslims because they, like me, a Christian, are people of the Book. And, as Pope Francis stated, we worship the same God."

*Hearing, supra* note 2, at 4 (statement of Sen. Bernard Sanders, Ranking Member, S. Comm. on the Budget).

18. Russ Vought, *Wheaton College and the Preservation of Theological Clarity*, RESURGENT (Jan. 17, 2016), <http://theresurgent.com/wheaton-college-and-the-preservation-of-theological-clarity/> [<https://perma.cc/V3XA-3FMP>].

19. "First, the theological issue at stake is very important, as it pertains to what we believe about our savior and Lord, Jesus Christ," wrote Vought. *Id.* Christian belief in the deity and humanity of Jesus "matters immensely for our salvation,"

plained more thoroughly below, the evangelical theological foundation for Vought's perspective on salvation is reflected in various sections of Wheaton College's Statement of Faith.<sup>20</sup>

What is most problematic about the Sanders-Vought exchange is not that Senator Sanders raised the issue of whether a nominee's religious beliefs might affect the nominee's understanding and execution of his public duties. One can imagine any number of situations in which a nominee's religious perspectives are potentially relevant, and a persuasive argument exists that an open-minded, respectful public dialogue in these situations about a nominee's values, including those that are religiously based, is constitutionally permissible, and even politically productive.<sup>21</sup>

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for "[i]f Christ is not God, he cannot be the necessary substitute on our behalf for the divine retribution that we deserve." *Id.* Vought also responded to Dr. John Stackhouse, on whom Dr. Hawkins relied in defense of her statement about worship. See, e.g., John Stackhouse, *Allah and Yhwh . . . and Tash and Aslan*, JOHN STACKHOUSE: WEBLOG (Dec. 17, 2015) [hereinafter Stackhouse, *Allah and Yhwh*], <http://www.johnstackhouse.com/2015/12/17/allah-and-yhwh-and-tash-and-aslan/> [https://perma.cc/U3R3-WY34]; John Stackhouse, *Do Muslims and Christians Worship the same God?*, JOHN STACKHOUSE: WEBLOG (Dec. 16, 2015) [hereinafter Stackhouse, *Worship*], <http://www.johnstackhouse.com/2015/12/16/do-muslims-and-christians-worship-the-same-god/> [https://perma.cc/MG2K-AZBZ]. Dr. Stackhouse acknowledged that "[d]eficient theologies impede our relationship with God and with the world," but cautioned against condemning "their piety as aimed at a completely different deity just because it doesn't include even wonderful and crucial ideas such as the Trinity or the deity of Jesus." Stackhouse, *Allah and Yhwh*, *supra*. Vought responded,

This is the fundamental problem. Muslims do not simply have a deficient theology. They do not know God because they have rejected Jesus Christ his Son, and they stand condemned. In John 8:19, "Jesus answered, 'You know neither me nor my Father. If you knew me, you would know my Father also.[]'" In Luke 10:16, Jesus says, "The one who rejects me rejects him who sent me." And in John 3:18, Jesus says, "Whoever believes in [the Son] is not condemned, but whoever does not believe is condemned already, because he has not believed in the name of the only Son of God."

Vought, *supra* note 18.

Mr. Vought's second major point in his article was that "Wheaton College has every right to insist that academic freedom be enjoyed within the broad parameters of their Statement of Faith" and a "Biblical responsibility to ensure that students are not being taught error." *Id.*

Thirdly, Mr. Vought critiqued "the manner and rhetoric of Dr. Hawkins's response to Wheaton" for a variety of reasons. *Id.*

20. See *infra* Part II.

21. See Horwitz, *supra* note 1, at 133–46.



But the Sanders line of questioning fostered no such dialogue or quest for real understanding. Its tone was hostile and its phrasing was conclusory. It followed Sanders's introductory remarks that painted Vought's words as "indefensible," "hateful," and "Islamophobic."<sup>22</sup> And Sanders's interrogation was unnecessary to determine the simple question of whether Vought would follow the law in performing his public duties. Sanders did not conduct himself in the manner expected of a statesman seeking to understand whether Vought would faithfully serve the country; he conducted himself as one would expect of a partisan executioner handing Vought his own noose. The most plausible interpretation of Senator Sanders's words is that he opposed Vought's nomination primarily because Vought, in solidarity with Wheaton College, had dared to publicly express his theological conviction that salvation from sin is available only through faith in the Lord Jesus Christ. And Senator Van Hollen had Sanders's back. Apparently for Senator Sanders, a condition for serving as Deputy Director of the OMB is either rejecting or not publicly affirming the proclamation of Christ that "I am the way, and the truth, and the life; no one comes to the Father but through Me."<sup>23</sup>

Unfortunately, the Sanders-Vought exchange is not unique, although it is the most poignant case in point. Recent hearings considering judicial nominations to the federal bench have featured similar scrutiny of the views of devout believers, especially those who are historically orthodox within their denominations. To illustrate, while questioning then Notre Dame law professor Amy Coney Barrett, nominee for judge for the United States Court of Appeals for the Seventh Circuit, United States Senator Dianne Feinstein remarked that "the dogma lives loudly within you, and that's of concern when you come to big issues that large numbers of people have fought for years in this

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22. *Hearing, supra* note 2, at 4 (statement of Sen. Bernard Sanders, Ranking Member, S. Comm. on the Budget).

23. *John* 14:6. All biblical quotations in this Article are drawn from the New American Standard Bible. Perhaps it is more precise to say that Senator Sanders apparently objected to the traditional understanding within the church of Christ's proclamation in *John* 14:6, and certainly the interpretation of that proclamation that prevails within evangelicalism.

country.”<sup>24</sup> Apparently concerned about how the Catholic convictions of now Judge (then Professor) Barrett would influence her resolution of cases involving the regulation of abortion,<sup>25</sup> Senator Feinstein further remarked, “Dogma and law are two different things. I think whatever a religion is, it has its own dogma. The law is totally different.”<sup>26</sup> Other senators also questioned the degree to which Barrett’s faith would affect her discharge of judicial duties, and they “seemed troubled by Barrett’s Catholic convictions, particularly on the issues of abortion and same-sex marriage.”<sup>27</sup> When Judge Barrett assured these senators that she would honor the rule of law, they appeared incredulous.<sup>28</sup>

Similarly, when the United States Senate Committee on the Judiciary was considering the nomination of then United States Department of Justice Deputy Assistant Attorney General Trevor McFadden for judge of the United States District Court for the District of Columbia,<sup>29</sup> Senator Sheldon Whitehouse submitted multiple questions for the record<sup>30</sup> to now Judge

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24. See Aaron Blake, *Did Dianne Feinstein accuse a judicial nominee of being too Christian?*, WASH. POST (Sept. 7, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/did-a-democratic-senator-just-accuse-a-judicial-nominee-of-being-too-christian/> [<https://perma.cc/FQT7-FQ5A>]. Professor Barrett, a Catholic, was later confirmed by the Senate. See Brent Kendall, *Divided Senate Confirms Notre Dame Professor to U.S. Appeals Court*, WALL. ST. J. (Oct. 31, 2017), <https://www.wsj.com/articles/divided-senate-confirms-notre-dame-professor-to-u-s-appeals-court-1509490943> [<https://perma.cc/UFJ8-7SUM>].

25. See Emma Green, *Should a Judge’s Nomination Be Derailed by Her Faith?*, ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/politics/archive/2017/09/catholics-senate-amy-barrett/539124/> [<https://perma.cc/9MSP-MFH5>]. (“Feinstein was not convinced that Barrett would uphold *Roe v. Wade* given her traditional Catholic beliefs.”).

26. *Id.* (quoting Senator Feinstein).

27. *Id.*

28. See *id.* (“But when Barrett repeatedly stated that she would uphold the law, regardless of her personal beliefs, they didn’t seem to believe her.”).

29. Now-Judge McFadden was confirmed in late October of 2017. See Tim Ryan, *Nominee for D.C. Federal Breezes Through Confirmation*, COURTHOUSE NEWS SERV. (Oct. 30, 2017), <https://www.courthousenews.com/nominee-dc-federal-breezes-confirmation/> [<https://perma.cc/CXK2-92B9>].

30. See *Nomination of Trevor Neil McFadden: Nominee to the United States District Court for the District of Columbia: Questions for the Record*, 115th Cong. (2017) [hereinafter *Whitehouse Questions*], <https://www.judiciary.senate.gov/imo/media/doc/McFadden%20Responses%20to%20QFRs.pdf> [<https://perma.cc/9ZDV-N3D9>] (questions from Sen. Sheldon Whitehouse, Member, Sen. Judiciary Comm.).

McFadden concerning *Obergefell v. Hodges*.<sup>31</sup> The questions began with the following paragraph:

You are an elected member (until 2020) of the Falls Church Anglican, which broke away from the Episcopal Church largely due to the denomination's consecration of an openly gay bishop. The Falls Church Anglican considers "marriage to be a life-long union of husband and wife" intended for "the procreation and nurture of godly children" and entailing "God-given" "roles of father and mother." In 2015, the associate pastor of the Falls Church Anglican agreed that "if the U.S. Supreme Court decision includes a redefinition of marriage, this will constitute an intrusion of the state on God's institution of marriage 'from the beginning.'"<sup>32</sup>

Senator Whitehouse proceeded to ask McFadden if he believed that the holding of *Obergefell* "constitute[d] an intrusion of the state on God's institution of marriage 'from the beginning.'"<sup>33</sup> Apparently, the mere membership of Judge McFadden in a theologically conservative church was the catalyst for this line of questioning. And somehow, Senator Whitehouse seemingly thought that Judge McFadden's view of whether the result in *Obergefell* is consistent with God's design for marriage bears upon his fitness for judicial service.

These interrogations of the religiously orthodox raise important questions of law, public policy, and religion in our constitutional democracy. The Sanders-Vought exchange is especially instructive, for it demonstrates a degree of religious intolerance, and even hostility, unmatched in other Senate confirmation proceedings. This Article thus focuses on this exchange for the purposes of analyzing its constitutional implications, as well as its more general public policy implications for evangelicals in public service. But it should not be overlooked

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31. 135 S. Ct. 2584, 2597–609 (2015) (holding that the right to marry is a fundamental right inherent in the liberty of a person, and that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may exercise this fundamental right). For a discussion of *Obergefell* and its implications for the continuing federal income tax exemption of private schools that maintain sexual conduct policies, see Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL'Y 255 (2017).

32. *Whitehouse Questions*, *supra* note 30.

33. *Id.* The letter also asked how "ideas about 'God-given' 'roles of father and mother' accord with the legal precedent." *Id.*

that the issues raised by the Sanders-Vought exchange are recurring, and they potentially affect not just evangelical nominees, but also an untold number of historically orthodox believers, in general.

At an intuitive level, Senator Sanders's questions appear suspect under Article VI and under the Religion Clauses of the First Amendment to the United States Constitution. Does not Article VI prohibit government from conditioning federal public service on formal adherence to a religious view (such as universalism)? Does not the Free Exercise Clause of the First Amendment protect citizens from religiously based targeting by government actors? Does not the Establishment Clause prevent government from favoring one religious perspective (for example, some version of universalism) over another (for example, traditional Reformed theology and its understanding of the eternal damnation of the unredeemed)? Part I of this Article evaluates the constitutionality of discharging one's legislative office as Senator Sanders did. This Part concludes that lawmakers who inquire in the manner of Senator Sanders do not violate constitutional rights, at least not in a manner that is remediable, but that they do plainly offend constitutional norms.

Having established the practical constitutional permissibility—but normative constitutional impropriety—of the Sanders interrogation, this Article argues in Part II that his opposition to Vought is unjustified under a sensible public policy analysis. But rather than belabor the obvious objection to Senator Sanders's interrogation—that it violated constitutional norms and exhibited a religious intolerance that should have no place in American democracy—Part II opens a dialogue that is sorely needed in contemporary public policy discourse. It explores in some detail the evangelical claims that Sanders apparently found so objectionable, and how they do and do not bear upon one's capacity for public service. This theological-political analysis is necessary to challenge biases that (unlike Senator Sanders's) may be unspoken but nonetheless operative in the process of governing, and to enhance understanding by government actors of the fitness of evangelicals for public service in the pluralistic United States of America.

I. THE CONSTITUTIONALITY OF RELIGIOUSLY MOTIVATED  
VOTING BY INDIVIDUAL CONGRESSIONAL ACTORS

The interrogation of Russell Vought by Senator Sanders likely strikes many at a visceral level as deeply offensive under constitutional norms,<sup>34</sup> and perhaps even suspect under commonly articulated tests for determining whether state action violates the Constitution.<sup>35</sup> This Part first reviews and analyzes the Religious Test Clause of Article VI of the United States Constitution. This Part then discusses the tests for determining whether a violation of the Establishment Clause or Free Exercise Clause has occurred, the norms that underlie these clauses, and the application of these tests and norms to attempts to disqualify persons from public office on the basis of their faith. Next, this Part surveys Supreme Court decisions interpreting the Speech or Debate Clause of the Constitution, a key to analyzing the constitutional implications of the Vought hearing. This Part concludes that, although the Sanders interrogation contravened commonly accepted constitutional norms, his inquisition, judgmental remarks, and adverse vote are not in technical violation of the Constitution, and in any case are beyond judicial scrutiny.

A. *The Religious Test Clause*

Article VI of the United States Constitution states that “no religious Test shall ever be required as a Qualification to any Of-

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34. See, e.g., Steven Nelson, *Experts: Bernie Sanders Can Vote Against Nominee Based on Christian Beliefs*, U.S. NEWS & WORLD REP. (June 8, 2017), <https://www.usnews.com/news/national-news/articles/2017-06-08/experts-bernie-sanders-can-vote-against-nominee-based-on-christian-beliefs> [https://perma.cc/4C3T-7WSJ] (quoting Professor Michael McConnell as stating “[n]o senator should vote against a nominee based on his or her religion”); *id.* (quoting Professor Richard Epstein for the principle that courts cannot probe legislators’ motives, in part because of the difficulty of establishing the motives of those “who are less explicit than Sanders but harbor these biases”).

35. See, e.g., David French, *Watch Bernie Sanders Attack a Christian Nominee and Impose an Unconstitutional Religious Test for Public Office*, NAT’L REV.: THE CORNER (June 7, 2017, 11:36 PM), <https://www.nationalreview.com/corner/watch-bernie-sanders-unconstitutionally-impose-religious-test-public-office/> [https://perma.cc/48M3-E6NZ] (opining that Sanders engaged in “a disgraceful and unconstitutional line of questioning”).

office or public Trust under the United States.”<sup>36</sup> Very little judicial interpretation of this Religious Test Clause exists,<sup>37</sup> and no court has decided a case under it. Indeed, according to one prominent scholar of constitutional law, Supreme Court precedent under the Free Exercise Clause leaves “little independent significance” for the Religious Test Clause.<sup>38</sup> Still, in part because some commentators have raised the clause in questioning the constitutionality of probing the religious views of nominees for public office,<sup>39</sup> no examination of the Sanders interrogation of Vought would be complete without exploring the meaning of the Religious Test Clause.<sup>40</sup>

A textual analysis of the Religious Test Clause suggests that it forbids the government from requiring prospective federal office holders and other senior government employees,<sup>41</sup> as a

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

37. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Court observed:

When our Constitution was adopted, the desire to put the people “securely beyond the reach” of religious test oaths brought about the inclusion in Article VI of that document of a provision that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

*Id.* at 491 (first quoting THOMAS O’BRIEN HANLEY, *THEIR RIGHTS AND LIBERTIES: THE BEGINNINGS OF RELIGIOUS AND POLITICAL FREEDOM IN MARYLAND* 65 (1959); then quoting U.S. CONST. art. VI, cl. 3). The *Torcaso* Court did not directly apply the Religious Test Clause, however, but instead the Establishment Clause. *See id.* at 492–96.

38. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-2, at 1155 n.1 (2d ed. 1988).

39. *See, e.g.*, French, *supra* note 35.

40. For scholarly commentary on the Religious Test Clause, see ALBERT J. MENENDEZ, *NO RELIGIOUS TEST: THE STORY OF OUR CONSTITUTION’S FORGOTTEN ARTICLE* (1987); Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 *CASE W. RES. L. REV.* 674 (1986); Daniel L. Dreisbach, *The Constitution’s Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban*, 38 *J. CHURCH & ST.* 261 (1996); Horwitz, *supra* note 1; J. Gregory Sidak, *True God of the Next Justice*, 18 *CONST. COMMENT.* 9 (2001); James E. Wood, Jr., Editorial, “No Religious Test Shall Ever Be Required”: *Reflections on the Bicentennial of the U.S. Constitution*, 29 *J. CHURCH & ST.* 199 (1987); Winston E. Calvert, Note, *Judicial Selection and the Religious Test Clause*, 82 *WASH. U. L.Q.* 1129 (2004).

41. The level of seniority of the prospective federal employee that is required to trigger the protection of the Religious Test Clause is unclear. Its terms apply to “a qualification to any office or public trust under the United States.” U.S. CONST. art. VI, cl. 3. Given the broader context in which the clause appears, “any office” or position of “public trust” within the federal government arguably includes a great number of elective and appointive positions.

condition of public service, to formally affirm a religious belief, practice or affiliation.<sup>42</sup> A responsible textual analysis must place the clause within the broader clause of which it is a part.<sup>43</sup> Article VI contains both the Oaths Clause and the Religious Test Clause. The relevant text reads as follows:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and 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.<sup>44</sup>

The primary force of Article VI, Clause 3 is to require federal and state lawmakers, executive officers, and judicial officers to support the United States Constitution by binding themselves through the formal mechanism of an “oath or affirmation.” There is textual and conceptual continuity between the Religious Test Clause and the Oaths Clause, and this continuity informs the meaning of the Religious Test Clause.

The continuity of the Religious Test Clause with the Oaths Clause is suggested by several textual features. First, the Religious Test Clause includes within its scope “any office or public trust” in the federal government, thereby apparently expanding coverage beyond the legislators, executive officers, and judicial officers identified in the Oaths Clause. The Religious Test Clause thus extends a conceptual thread dealing with government officials. Secondly, the Religious Test Clause extends the concept of “qualification” for public office originating in the Oaths Clause.<sup>45</sup> Third, the Religious Test Clause contrasts the imposition of an office-holding qualification in the Oaths Clause (that is, an oath or affirmation to support the Constitution) with the prohibition of a religious test. The con-

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42. See Horwitz, *supra* note 1, at 116 (stating that Article VI, Clause 3 “deals with the single subject of oaths, and it is precisely with oaths, or their equivalent, that the Religious Test Clause is concerned”).

43. See *id.* at 115–16.

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

45. Although the Oaths Clause does not use the term “qualification,” its requirement that the named government officials “be bound by oath or affirmation, to support this Constitution” plainly sets forth a qualification for their service.

trast is made explicit by the conjunction “but,” which functions to join the two clauses for the purpose of contrasting the two. Finally, the text employs a semicolon between the Oaths Clause and the Religious Test Clause. The semicolon signals continuity in the two clauses.

Because of the conceptual and grammatical continuity of the Oaths Clause and the Religious Test Clause, it is sensible, at least as a working hypothesis, to interpret the latter clause as speaking to the same general practice identified in the Oaths Clause.<sup>46</sup> The Oaths Clause plainly addresses qualifications for public office in the form of a binding oath or affirmation to support the Constitution. It essentially requires formal affirmation of loyalty, albeit to the Constitution. Introducing the Religious Test Clause with the conjunction “but” signifies contrast with this formal affirmation of loyalty. The contrast seems to be based on conceptual parallelism; certain federal and state government officials can (and will) be required to formally affirm loyalty to the Constitution, “but” federal officials cannot be compelled to formally affirm loyalty to religion.<sup>47</sup>

This tentative textual interpretation of the Religious Test Clause is not dispositive of the clause’s meaning, nor does it specify precisely what affirmations of loyalty to religion cannot be compelled. The tentative textual interpretation should be scrutinized and informed by other factors, including the clause’s historical context, the sources informing how it was understood at and near the framing of the Constitution, and how the clause functions within the broader constitutional scheme.

Existing scholarship persuasively documents that the historical practice providing the occasion for the Religious Test

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46. See Horwitz, *supra* note 1, at 116 (“In short, it is no accident that the Religious Test Clause was a part of Article VI, clause 3. That clause deals with the single subject of oaths, and it is precisely with oaths, or their equivalent, that the Religious Test Clause is concerned.”).

47. Of course, another possible interpretation of the relationship between the two clauses is that an even greater contrast is intended. For example, one could conceivably argue that the sense of the two clauses is that, whereas certain federal and state government officials can (and will) be required formally to affirm loyalty to the Constitution, federal officials cannot even be pressed upon to explain how their religious views might bear upon the discharge of their duties. Such an expansive interpretation of the Religious Test Clause cuts against the continuity of the two clauses suggested by their common concepts and grammatical links.



Clause was the religious test oaths of England and the rest of Europe.<sup>48</sup> Under the laws requiring these oaths and certain religious practices as a condition for holding public office, would-be public servants were compelled to swear to their positions on specified theological issues to reflect ecclesial loyalty (such as to the Church of England).<sup>49</sup> The use of these oaths “was the historical example that many of the defenders of the Constitution had in mind” in arguing against religious tests.<sup>50</sup> In other words, the historical evil the Framers sought to avoid by the Religious Test Clause was a state-imposed requirement that prospective public servants formally affirm (and, in some cases, ritually adhere to) official church dogma, not a more general inquiry into how one’s religious beliefs might bear upon one’s public service.<sup>51</sup> The historical occasion thus tends to support the tentative, textually based interpretation of the Religious Test Clause previously proffered.

The drafting and ratification history of the Constitution also lends modest credence to the tentative textual interpretation of the Religious Test Clause. Others have ably examined the drafting and ratification history of the clause in greater detail than is necessary here.<sup>52</sup> In brief, the drafting history of the clause is quite minimal.<sup>53</sup> At the Constitutional Convention, the language of the Religious Test Clause was added to the remainder of what would become Article VI, Clause 3 after delegates approved with little discussion a motion made by Charles Pinckney to include the same.<sup>54</sup> This addition followed earlier proposals by Pinckney, including one stating “[n]o religious test or qualification shall ever be annexed to any oath of office under

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48. See, e.g., Dreisbach, *supra* note 40, at 263 & n.8, 264; Horwitz, *supra* note 1, at 104–06; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2176 (2003).

49. The Supreme Court has recognized the burden of these test oaths. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (“[I]t was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way.”).

50. Horwitz, *supra* note 1, at 105.

51. See *id.* at 104–06.

52. See, e.g., Bradley, *supra* note 40, at 687–711; Dreisbach, *supra* note 40, at 269–71, 273–84; Horwitz, *supra* note 1, at 100–13.

53. See Bradley, *supra* note 40, at 691–92; Horwitz, *supra* note 1, at 100–01.

54. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 468 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS].

the authority of the United States.”<sup>55</sup> Perhaps the most that can be said, then, is that there is at least some evidence that the type of “religious test” prohibited by Article VI is one that otherwise could be imagined to be “annexed” to an oath of office. Such evidence suggests the plausibility of the textual reading that the clause is designed to prohibit some type of formal affirmation of religion as a condition to federal public service.

The state ratification debates on the Constitution, as well as the contemporaneous and prevailing use of religious tests in the individual states, also tend to support the tentative textual interpretation of the Religious Test Clause. At the time of the Constitution’s ratification, most states used (and continued to use) religious tests for public office.<sup>56</sup> These tests were generally drafted in terms that made compliance objectively determinable (at least superficially), and it appears that the tests were formulated in such a way that they generally could be administered by requiring formal affirmations or affiliations.<sup>57</sup> Further, from the ratification debates, there is considerable evidence that the type of religious test commonly in view was that in the nature of oaths, affirmations, affiliations, or ritualistic conformity.<sup>58</sup> This evidence further suggests that the generation that ratified the Constitution likely understood the Religious Test Clause to prohibit the government from conditioning federal office-holding upon one’s affirmation of a religious creed or affiliation, or perhaps even on one’s participation in certain religious rites. What the ratification debates do not support is the notion that general inquiries by the electorate and their representatives into the overall religious and moral fitness of would-be public office holders were out of bounds; to the contrary, a number of those who debated the Constitution evinced profound interest in continuing the tradition of selecting only moral,

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55. *Id.* at 335. For a discussion, see Horwitz, *supra* note 1, at 101.

56. See Horwitz, *supra* note 1, at 108–10.

57. To illustrate, states required public office holders to profess belief in Protestantism, hold membership in a Protestant denomination, or (in more liberal states) to profess basic Christian belief. See *id.* at 108–09 (discussing various state requirements). The degree to which these tests were in fact administered in the states by requiring formal religious affirmations or religious affiliations is a separate issue.

58. See *id.* at 113–14.

religious people to public office, and proponents of the Religious Test Clause generally did not argue against this desire.<sup>59</sup>

The final factor that this Article considers in determining the essential meaning of the Religious Test Clause is how it fits within the broader constitutional scheme. Most relevant is how the Speech or Debate Clause informs a proper understanding of the Religious Test Clause. Also important is how the Supreme Court has interpreted the Religion Clauses to essentially eclipse the Religious Test Clause. The final analysis of the essential meaning and effect of the Religious Test Clause must therefore be deferred until Section I.D, which follows an analysis of other constitutional provisions.

*B. Tests for Determining Violations of the Religion Clauses, their Underlying Norms, and their Application to Faith-Based Conditions to Public Service*

Under the First Amendment to the United States Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>60</sup> The Supreme Court’s doctrinal approach for determining violations of the first clause, the Establishment Clause, is discussed in Section B.1.a. The Court’s modern jurisprudence addressing the second clause, the Free Exercise Clause, is surveyed in Section B.1.b. Section B.2 then explains the norms that courts and commentators have understood to underlie one or both Religion Clauses. Section B.3 analyzes the application of these tests and norms to efforts to disqualify candidates from public service on the basis of their religious faith.

A preliminary word about analytical method is in order. Whereas a textual analysis provides decent clues as to the scope of the Religious Test Clause, a textual analysis of the Religion Clauses probably raises as many questions as answers. Further, although the historical occasion and understanding of the meaning of the Religion Clauses are immensely important in informing how the Court should interpret them,<sup>61</sup> I am not

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59. *See id.* at 111–13, 115.

60. U.S. CONST. amend. I.

61. For an exacting study of the historical meaning of, and occasion for, the Establishment Clause, see McConnell, *supra* note 48. For a similar study of the Free

now writing on a blank slate. Although it has scarcely dealt with the Religious Test Clause, the Supreme Court's jurisprudence under the Religion Clauses is vast. The sensible approach for examining the constitutionality of those who interrogate nominees in the manner of Senator Sanders is thus to focus on the substantial body of constitutional law that now exists and to explain it in view of its historical grounding.

1. *Doctrinal Tests and Frameworks*

a. *Establishment Clause Doctrine*

The Supreme Court does not uniformly apply any single test to determine whether a law violates the Establishment Clause.<sup>62</sup> This Section briefly reviews the major tests and doctrinal approaches that the Court has employed in recent years to determine whether state action offends the Establishment Clause.

For a period of over thirty years beginning in 1971, the Court most frequently decided Establishment Clause controversies by applying the three-pronged test of *Lemon v. Kurtzman*.<sup>63</sup> First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion. The *Lemon* test has been applied to invalidate numerous state policies and practices.<sup>64</sup>

*Lemon* has drawn severe criticism,<sup>65</sup> and recent opinions of the Court illustrate its receding influence. For example, in up-

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Exercise Clause, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

62. See *Van Orden v. Perry*, 545 U.S. 677, 685–86 (2005) (plurality opinion) (observing that many recent decisions of the Court do not apply the *Lemon* test).

63. 403 U.S. 602, 612–14 (1971) (finding state financial assistance programs primarily benefitting sectarian schools violated the Establishment Clause because they caused excessive entanglement between the state and religion).

64. Such practices include setting aside periods of silent prayer in public schools, see, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 55–61 (1985), and displaying the Ten Commandments in public schools, see, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

65. The late Chief Justice Rehnquist and the late Justice Scalia were notable critics of *Lemon*. For example, Chief Justice Rehnquist emphasized the Court's unwillingness to apply *Lemon* uniformly and *Lemon's* faulty doctrinal basis. See, e.g.,

holding the constitutionality of a town board's practice of beginning its meetings with a prayer offered by community clergy, the Court in *Town of Greece v. Galloway*<sup>66</sup> approached the Establishment Clause inquiry from the perspective of history and tradition, rather than through the lens of any formal Establishment Clause test. Characterizing *Marsh v. Chambers*<sup>67</sup> as "[finding] those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause,"<sup>68</sup> the *Town of Greece* Court opined that "to define the precise boundary of the Establishment Clause" is unnecessary when history supports the permissibility of the specific practice under examination.<sup>69</sup> The Court framed its inquiry as "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures,"<sup>70</sup> and cited the nation's history of supporting legislative prayer, even those offered in sectarian terms.<sup>71</sup> The Court then stated that "legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of this Court's sessions."<sup>72</sup>

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*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318, 319–20 (2000) (Rehnquist, C.J., dissenting). Justice Scalia famously likened *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," and observed that "five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment). For academic critiques of *Lemon*, see Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5 (1987); Hal Culbertson, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915; Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1 (1984); William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

66. 134 S. Ct. 1811, 1828 (2014).

67. 463 U.S. 783, 793–95 (1983) (holding the practice of the Nebraska legislature in opening each day of its session with prayer by a publicly funded chaplain did not violate the Establishment Clause).

68. *Town of Greece*, 134 S. Ct. at 1818.

69. *Id.* at 1819.

70. *Id.*

71. See *id.* at 1820–24.

72. *Id.* at 1825.

Although *Town of Greece* did not frame its analysis under the *Lemon* test, vestiges of *Lemon* remain in the opinion. Rejecting the argument that the town's practice was coercive to the public attending the meetings,<sup>73</sup> the Court concluded that including "a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers."<sup>74</sup> This "purpose and effect" language is, of course, the substance of the first two prongs of *Lemon*. *Town of Greece* may thus be understood as evaluating the permissible purpose and effect of governmental action through the lens of our nation's history and tradition.

The waning influence of *Lemon* is further illustrated in Chief Justice Rehnquist's plurality opinion in *Van Orden v. Perry*.<sup>75</sup> Having declined to apply the *Lemon* test,<sup>76</sup> the *Van Orden* plurality found no constitutional impediment to exhibiting a monument inscribed with the Ten Commandments on the Texas State Capitol grounds (which featured seventeen monuments and twenty-one historical markers on twenty-two acres of land).<sup>77</sup> Chief Justice Rehnquist (joined by Justices Scalia, Kennedy and Thomas) focused on "the nature of the monument and . . . our Nation's history."<sup>78</sup> The plurality observed the pervasive governmental acknowledgment of the role of God and religion generally, and the Ten Commandments specifically, in our nation's heritage,<sup>79</sup> and concluded that the monument was

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73. *See id.* at 1824-28.

74. *Id.* at 1827. Similarly, the Court opined as follows:

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

*Id.* at 1827-28.

75. 545 U.S. 677 (2005).

76. *See id.* at 685-86 (plurality opinion).

77. *Id.* at 691-92.

78. *Id.* at 686.

79. *See id.* at 686-90.

a “passive use” of the religious text used by Texas (with other monuments) to represent several strands in the state’s political and legal history.<sup>80</sup> However, in the same term that gave us *Van Orden v. Perry*, *Lemon* commanded a majority of the Court in *McCreary County v. ACLU of Kentucky*.<sup>81</sup> In *McCreary County*, the Court struck down two county courthouse exhibits that prominently displayed the Ten Commandments (along with other historic documents indicating the country’s religious heritage). The Court found that the counties had acted with the unlawful purpose of advancing religion, thereby transgressing the first prong of the *Lemon* test.<sup>82</sup> Far from ignoring *Lemon*, the Court applied it expansively, for the Court interpreted its requirement of “a” valid secular purpose to mean one that is “not merely secondary to a religious objective.”<sup>83</sup>

Related to the *Lemon* test is the “endorsement” test first articulated by Justice O’Connor in her concurrence in *Lynch v. Donnelly*.<sup>84</sup> In this case, the Court held that a city’s Christmas display, which included a variety of secular symbols of Christmas in addition to a nativity scene, did not violate the Establishment Clause.<sup>85</sup> The Court reasoned that the city’s intentions to celebrate the holiday and depict its origins were legitimate secular purposes,<sup>86</sup> and that any benefit to religion was “indirect, remote, and incidental.”<sup>87</sup> Justice O’Connor concurred, writing separately “to suggest a clarification of [the Court’s] Establishment Clause doctrine.”<sup>88</sup> She began her analysis by stating that the “Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”<sup>89</sup> Justice O’Connor then recast *Lemon* as follows:

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80. *Id.* at 691–92.

81. 545 U.S. 844 (2005).

82. *See id.* at 864, 867–74.

83. *Id.* at 864.

84. 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

85. *See id.* at 687 (majority opinion).

86. *See id.* at 681.

87. *Id.* at 683.

88. *Id.* at 687 (O’Connor, J., concurring).

89. *Id.*

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.<sup>90</sup>

When the question involves a religious activity in which the state arguably participates, a relevant question is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of the religious activity.<sup>91</sup> The endorsement test reflects the judgment that governmental endorsement of religion "sends a message to nonadherents" of the concept or practice endorsed "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>92</sup> Correlatively, when government disapproves of religion, it "sends the opposite message."<sup>93</sup> The endorsement test has been followed by a majority of the Court on occasion,<sup>94</sup> but never consistently.

Another test for ascertaining a violation of the Establishment Clause is that of "non-coercion."<sup>95</sup> Under this test, a law violates the Establishment Clause if the government's promotion of religion forces the profession of religion or participation in a religious ceremony. The Court has occasionally found govern-

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90. *Id.* at 690.

91. *Wallace v. Jaffree*, 472 U.S. 38, 73, 76 (1985) (O'Connor, J., concurring in judgment).

92. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

93. *Id.*

94. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–10, 316 (2000) (holding unconstitutional the practice of allowing student-elected representatives to pray before high school football games); *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding unconstitutional the prominent display of a nativity scene on government property).

95. *See, e.g., Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part) ("Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" (alteration in original) (quoting *Lynch*, 465 U.S. at 678)).



ment action coercive, even when the government's contribution to the coercion is indirect and lacking any threat of penalty.<sup>96</sup> However, some justices would limit the application of the coercion test to cases involving the threat of actual legal force.<sup>97</sup>

*b. Free Exercise Doctrine*

The Supreme Court announced the current framework for evaluating a Free Exercise claim in *Employment Division v. Smith*.<sup>98</sup> In *Smith*, the Court held that the Free Exercise Clause is not violated merely because a religiously motivated practice is burdened by the application of a neutral, generally applicable and otherwise valid law.<sup>99</sup> In a majority opinion authored by Justice Scalia, the Court framed the constitutional issue of the case as follows:

[W]hether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.<sup>100</sup>

Upholding the state's denial of unemployment benefits, the Court rejected the argument that free exercise of religion is

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96. For example, in *Santa Fe*, the Court found coercion where, through a student election authorized by the school district, a student was selected to deliver an invocation before high school football games. The coercion took the form of social pressure "to participate in an act of religious worship." *Santa Fe*, 530 U.S. at 312.

97. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in judgment) (arguing that the framers of the Constitution understood establishment to embody actual legal coercion); *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (arguing that the coercion of historical concern was that through "force of law and threat of penalty").

98. 494 U.S. 872 (1990). For extensive commentary on *Smith*, see Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953 (1998); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). For a concise discussion of the majority and other opinions in *Smith*, see Johnny Rex Buckles, *Employment Division v. Smith*, in 2 ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES 792 (George T. Kurian & Mark A. Lampert eds., 2016).

99. See *Smith*, 494 U.S. at 878–80.

100. *Id.* at 874.

burdened merely when the state compels an individual to observe a generally applicable law that requires (or forbids) the performance of an act that her religious belief forbids (or requires).<sup>101</sup> The Court affirmed its previous decisions that prohibit Government from regulating religious belief as such.<sup>102</sup> However, the Court opined that applying a neutral, generally applicable law to religiously motivated action has been held unconstitutional only when the right to free exercise of religion is burdened with "other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children . . ." <sup>103</sup> The Court also ruled that the test of *Sherbert v. Verner*,<sup>104</sup> which required the state to justify measures that substantially burden a religious practice by showing that such measures further a compelling governmental interest,<sup>105</sup> does not apply in the case of an "across-the-board criminal prohibition on a particular form of conduct."<sup>106</sup>

A different result obtains when the law burdening religious freedom is non-neutral by design. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>107</sup> the Court held that the enactment of city ordinances prohibiting ritual animal sacrifice violated the Free Exercise Clause.<sup>108</sup> Relying on the test announced in *Smith*, the Court first analyzed whether the ordinances were "neutral" laws of "general applicability."<sup>109</sup> The Court found

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101. *See id.* at 878–80.

102. *See id.* at 877.

103. *Id.* at 881 (citations omitted).

104. 374 U.S. 398 (1963).

105. *See id.* at 402–03.

106. *Smith*, 494 U.S. at 884. The Court did opine in dicta that the Free Exercise Clause is violated if prohibiting the exercise of religion is the object of the law in question, rather than simply the incidental effect of a generally applicable and otherwise valid law. *See id.* at 878.

107. 508 U.S. 520 (1993). For general commentary on *Lukumi*, see Lino A. Graglia, *Church of the Lukumi Babalu Aye: Of Animal Sacrifice and Religious Persecution*, 85 GEO. L.J. 1 (1996); Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335 (1994); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994). For a concise discussion of the majority and other opinions in *Church of the Lukumi Babalu Aye*, see Johnny Rex Buckles, *Lukumi Babalu Aye, Inc. v. Hialeah*, in 3 ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES, *supra* note 98, at 1379.

108. *Lukumi*, 508 U.S. at 524, 531–32, 547.

109. *Id.* at 531–46.

that the ordinances were not “neutral” because the object of the ordinances was to suppress Santeria animal sacrifice.<sup>110</sup> Although the text of the ordinances arguably targeted Santeria worship,<sup>111</sup> its operative effect was definitely to target the religion.<sup>112</sup> Speaking to the latter, the opinion observes that “almost the only conduct subject to” the ordinances was Santeria worship,<sup>113</sup> and the ordinances prohibited more religious activity than necessary to accomplish ostensible city goals.<sup>114</sup> Relatedly, the ordinances failed the *Smith* condition of “general applicability” because of their underinclusiveness; they selectively imposed burdens on religiously motivated conduct but did not regulate nonreligious conduct that undermined alleged governmental interests.<sup>115</sup> Because the ordinances failed the tests of neutrality and generally applicability, they “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”<sup>116</sup> The ordinances failed this test of “strict scrutiny.” First, they were not “narrowly tailored”: they were underinclusive, and the government could have advanced its ostensible interests while burdening religion much less.<sup>117</sup> Moreover, the underinclusiveness of the ordinances revealed the absence of a compelling government interest.<sup>118</sup>

## 2. *Foundational Norms of the Religion Clauses*

The Supreme Court’s Establishment Clause and Free Exercise Clause jurisprudence may be understood as grounded in one or more norms perceived to explain the purpose or purposes of the Religion Clauses. Commonly articulated norms include neutrality (or equality, either among religions or be-

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110. *See id.* at 542.

111. *See id.* at 533–34.

112. *See id.* at 540–42.

113. *Id.* at 535.

114. *See id.* at 538–40.

115. *See id.* at 542–46.

116. *Id.* at 531–32.

117. *See id.* at 546.

118. *See id.* at 546–47.

tween religion and non-religion), religious liberty, and separation of church and state.<sup>119</sup>

*a. Neutrality*

The Supreme Court has often emphasized the neutrality norm as guiding the proper interpretation of the Religion Clauses.<sup>120</sup> Thus, in *McCreary County*, the Supreme Court characterized as the analytical “touchstone” “the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”<sup>121</sup> Reiterating this point, the Court in *McCreary County* characterized religious neutrality as the “central Establishment Clause value.”<sup>122</sup> Indeed, Justice Souter devotes an entire section of his majority opinion to explaining why the neutrality norm has “provided a good sense of direction”<sup>123</sup> in the Court’s Establishment Clause jurisprudence.<sup>124</sup>

Also illustrative is *Epperson v. Arkansas*,<sup>125</sup> in which the Court held unconstitutional an Arkansas statute prohibiting any teacher in a state-supported school or university to teach, or adopt a textbook teaching, human descent from a lower form of animal.<sup>126</sup> The structure and language of the opinion rely on the neutrality norm. At the inception of the Court’s legal analysis, the opinion explicitly articulates and relies upon the neutrality norm:

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119. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 699–700 (Breyer, J., concurring in judgment) (discussing various norms of the Religion Clauses).

120. See, e.g., *Walz v. Tax Comm’n*, 397 U.S. 664, 669–70 (1970) (“Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.”).

121. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

122. *Id.*

123. *Id.* at 875.

124. See *id.* at 874–81.

125. 393 U.S. 97 (1968).

126. *Id.* at 109. The statute was adapted from the notorious Tennessee “monkey law” at issue in *Scopes v. State*, 289 S.W. 363 (Tenn. 1927), a case of Hollywood fame. See *Epperson*, 393 U.S. at 98. Violation of the statute constituted a misdemeanor and resulted in termination of the offending teacher’s employment. See *id.* at 99.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.<sup>127</sup>

Having grounded its opinion firmly on the neutrality norm, the Court applied it to foreclose what it perceived as governmental suppression of dissent from orthodoxy.<sup>128</sup>

So also, in *School District of Abington Township v. Schempp*,<sup>129</sup> the Court found the Establishment Clause violated by a state law requiring that public school classes begin with a reading from the Bible, and a school district's practice of following this law and leading students in reciting the Lord's Prayer on a voluntary basis.<sup>130</sup> The Court so held because "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality."<sup>131</sup>

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127. *Epperson*, 393 U.S. at 103–04 (citing *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)).

128. *See id.* at 104–06. The Court's analysis derives from the neutrality norm, as the following excerpt illustrates:

While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion. This prohibition is absolute.

*Id.* at 106 (citation omitted) (quoting *McCollum*, 333 U.S. at 225).

129. 374 U.S. 203 (1963).

130. *Id.* at 223–24.

131. *Id.* at 226. The Court elaborated on the guiding force of the neutrality norm as follows:

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion

Finally, the Supreme Court has elevated the neutrality norm in its Free Exercise Clause jurisprudence to such a degree that its modern doctrinal framework hinges on the existence of neutrality. Under *Smith*, the Free Exercise Clause is not violated merely because a religiously motivated practice is burdened by the application of a neutral, generally applicable and otherwise valid law.<sup>132</sup> Under *Lukumi*, a court applies heightened scrutiny to a law only when the law burdening religious freedom is non-neutral by design.<sup>133</sup> The Court plainly embraces the neutrality norm as central in applying the Religion Clauses.

*b. Separation*

The United States Supreme Court first explicitly recognized the norm of separation of church and state in a case upholding the constitutionality of a statute criminalizing polygamy, *Reynolds v. United States*.<sup>134</sup> *Reynolds* recounts the history of those arguing for securing better protection of religious liberty under the Constitution:

[A]t the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach

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from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.

*Id.* at 222.

132. See *Emp't Div. v. Smith*, 494 U.S. 872, 878–80 (1990).

133. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

134. 98 U.S. 145 (1879).

actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.” Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.<sup>135</sup>

A number of decisions have likewise recognized the separation norm. For example, in *McCullum v. Board of Education*,<sup>136</sup> the Court found a violation of the Establishment Clause when Illinois relieved schoolchildren of some of the hours of compulsory public education on the condition that they attend special religious classes held on public school premises and taught by privately funded teachers.<sup>137</sup> The Court reasoned that the program utilized “the tax-established and tax-supported public school system to aid religious groups to spread their faith.”<sup>138</sup> This use of tax-supported buildings for the religious instruction of pupils compelled by law to attend public schools “is not separation of Church and State.”<sup>139</sup>

Other decisions of the Court, like *Reynolds*, have accepted the separation norm but found the norm not to have been violated. For example, in *Everson v. Board of Education*,<sup>140</sup> the Court held that New Jersey did not violate the Establishment Clause by using public funds to pay the bus fares of private school stu-

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135. *Id.* at 164 (citation omitted) (quoting Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), in 8 THE WRITINGS OF THOMAS JEFFERSON 113, 113 (H. A. Washington ed., John C. Riker 1857)).

136. 333 U.S. 203 (1948).

137. *Id.* at 209–12.

138. *Id.* at 210.

139. *Id.* at 212.

140. 330 U.S. 1 (1947).

dents pursuant to a general program of paying the fares of students in both public and private schools.<sup>141</sup> Yet the Court fully accepted the separation norm by embracing the imagery of the First Amendment as erecting “a wall between church and state” that “must be kept high and impregnable.”<sup>142</sup>

Similarly, in *Zorach v. Clauson*,<sup>143</sup> the Court upheld the constitutionality of a “released time” program in New York City under which public school students were permitted, with parental authorization, to leave school premises during the school day to attend religious instruction on the grounds of churches and other religious institutions.<sup>144</sup> In so holding, the Court embraced the separation norm without applying it in a manner that is hostile to religious belief and expression. *Zorach* explains that the norm is real, important, and accommodating of religion:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the “free exercise” of religion and an “establishment” of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that, in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; “so help me God” in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our

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141. *See id.* at 17–18.

142. *Id.* at 18.

143. 343 U.S. 306 (1952).

144. *Id.* at 315.



ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."<sup>145</sup>

*c. Promotion of Religious Liberty*

Another norm underlying the Religion Clauses is the preservation and protection of religious liberty. The Free Exercise Clause protects religious liberty by preventing the government from unduly burdening religious exercise, and the Establishment Clause preserves religious liberty by forbidding governmental imposition of religion and by accommodating religious belief and practice.

The protection of religious liberty mandated by the Free Exercise Clause is apparent from its literal terms. But the Court has at times carefully articulated how the Establishment Clause also preserves religious liberty. To illustrate, in *Engel v. Vitale*,<sup>146</sup> the Court held that the Establishment Clause was violated by a New York public school board's requirement that classes begin the day by reciting a formal prayer crafted by the state's Board of Regents.<sup>147</sup> According to the Court, the Establishment Clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."<sup>148</sup> Of most interest for present purposes is the Court's observation that the Religion Clauses "forbid two quite different kinds of governmental encroachment upon religious freedom."<sup>149</sup> The "first and most immediate purpose" of the Establishment Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion."<sup>150</sup> A second purpose of the Establishment Clause "rested upon an awareness of the historical fact that governmentally established religions and

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145. *Id.* at 312–13.

146. 370 U.S. 421 (1962).

147. *See id.* at 424–25, 430–36.

148. *Id.* at 425.

149. *Id.* at 430.

150. *Id.* at 431.

religious persecutions go hand in hand.”<sup>151</sup> Avoiding “this sort of systematic religious persecution” explains why “the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion.”<sup>152</sup> New York’s prescription of an official prayer in the public schools was “inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.”<sup>153</sup> Thus, according to *Engel*, the goal of preserving religious liberty underlies the Establishment Clause, not just the Free Exercise Clause.<sup>154</sup>

*Zorach* also invokes the norm of religious liberty for understanding the Establishment Clause:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.<sup>155</sup>

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151. *Id.* at 432.

152. *Id.* at 433.

153. *Id.*

154. *See also id.* at 425 (“It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.”).

155. *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952). Numerous cases understand the separation norm in a way that is consistent with other First Amendment norms. For example, the separation norm recognized in *Reynolds v. United States* was presented as a means to secure religious liberty. *See* 98 U.S. 145, 164 (1878). Further, in *Everson v. Board of Education*, the Court that strongly acknowledged the separation norm also stated that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does

Under *Zorach*, one value that must shape the Court's understanding of the Establishment Clause is religious liberty. The clause is not violated when government "respects the religious nature" of Americans and "accommodates the public service to their spiritual needs."<sup>156</sup>

### 3. *Application to Faith-Based Conditions on Public Service*

One Supreme Court case squarely applies the First Amendment to religious test oaths. In *Torcaso v. Watkins*,<sup>157</sup> the Court invalidated a Maryland constitutional provision conditioning service in public office on a declaration of belief in the existence of God.<sup>158</sup> Observing the design of Article VI to prohibit the federal government from imposing religious test oaths,<sup>159</sup> the Court quickly turned to the First Amendment to strike down

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not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." 330 U.S. 1, 18 (1947). Likewise, in *Walz v. Tax Commission*, the Court acknowledged the literal impossibility of an extreme notion of separation, and its inconsistency with the First Amendment:

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

397 U.S. 664, 670 (1970). So also, the Court in *Lynch v. Donnelly* observed the metaphoric wall of separation between church and state "is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." 465 U.S. 668, 673 (1984). The same opinion states that the Constitution does not require "complete separation of church and state," but instead "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.*

In her dissent in the recently decided *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), Justice Sotomayor lamented that the majority's decision "leads us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment." *Id.* at 2041 (Sotomayor, J. dissenting). However, it is clear that the Court's understanding of the separation norm has long been shaped profoundly by its concomitant embrace of the neutrality norm and the norm of protecting religious liberty. Indeed, for some jurists and commentators, the separation norm is probably better conceptualized as an instrumental norm than as an ultimate value.

156. *Zorach*, 343 U.S. at 314.

157. 367 U.S. 488 (1961).

158. *See id.* at 496.

159. *See id.* at 491.

the state law.<sup>160</sup> According to the Court, the Establishment Clause of the First Amendment, which is incorporated by the Fourteenth Amendment to apply to the states,<sup>161</sup> at a minimum means the following:

[N]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa.<sup>162</sup>

In *Torcaso*, Maryland had placed its authority “on the side of one particular sort of believers,”<sup>163</sup> and this state bias was constitutionally prohibited:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.<sup>164</sup>

Further, the constitutional infirmity existed even though the Maryland Constitution did not compel belief or disbelief, but rather imposed a condition for public service.<sup>165</sup>

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160. *See id.* at 491–92.

161. *See id.* at 492 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)).

162. *Id.* at 492–93 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1940)).

163. *Id.* at 490.

164. *Id.* at 495 (citations omitted).

165. According to the Court, “that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.” *Id.* at 495–96 (citing *Wieman v. Updegraff*, 344 U.S. 183 (1952)).

The *Torcaso* opinion relies firmly on the separation norm. Invoking “the words of Jefferson,” the Court opined that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”<sup>166</sup> Further relying on the separation norm, *Torcaso* approvingly cited the concurring opinion of Justice Frankfurter in *McCullum*, who affirmed the teaching of *Everson* that “we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.”<sup>167</sup>

In *McDaniel v. Paty*,<sup>168</sup> the Court examined something of the mirror image of the state-imposed condition for public office in *Torcaso*: a clergy disqualification statute. In *Paty*, an ordained Baptist minister had been elected as a delegate to a state constitutional convention. He was later disqualified from so serving under Tennessee law barring clergy from serving as such a delegate or as a legislator. The *Paty* Court found that the state law violated the minister’s right to free exercise of religion.<sup>169</sup> Writing for a plurality,<sup>170</sup> Chief Justice Burger traced the history of the disqualification of ministers from legislative office from England through thirteen American states (including seven of the original states).<sup>171</sup> Although the clergy-disqualification statutes were once considered by some as rational on anti-

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166. *Id.* at 493 (quoting *Everson*, 330 U.S. at 15–16).

167. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 232 (1948) (Frankfurter, J., concurring) (quoting *Everson*, 330 U.S. 1, 59 (1940) (Rutledge, J., dissenting)). The *Torcaso* Court also rejected the argument that *Zorach* had renounced the rationale of *McCullum*. Said the Court:

Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.

*Torcaso*, 367 U.S. 488, 494.

168. 435 U.S. 618 (1978).

169. *See id.* at 629 (plurality opinion).

170. Justices Powell, Rehnquist, and Stevens joined Chief Justice Burger’s plurality opinion. *Id.* at 620.

171. *See id.* at 622–25.

establishment grounds,<sup>172</sup> the plurality found that the state law in question had burdened the minister's free exercise of religion.<sup>173</sup>

The rationale of *Paty* is instructive. In finding the Tennessee constitutional provision at issue in violation of the Free Exercise Clause, the Court approvingly cited James Madison's view that a clergy-disqualification law "punish[es] a religious profession with the privation of a civil right."<sup>174</sup> The Court reasoned, "[To] condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties."<sup>175</sup>

The *Paty* Court also contrasted belief-based penalties and conduct- or status-based penalties. The Court distinguished *Torcaso* on the grounds that the disqualification in *Paty* was based on status, and therefore conduct, rather than belief, as in *Torcaso*.<sup>176</sup> *Paty* affirmed that, had the Tennessee disqualification law deprived ministers "of a civil right solely because of their religious beliefs," no further inquiry would be necessary, for "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."<sup>177</sup> But because the Tennessee law governed conduct (according to *Paty*), the Court would evaluate the law under the then-controlling Free Exercise Clause test of *Wisconsin v. Yoder*.<sup>178</sup>

*Paty* then rejected the position that Tennessee could justify its official bias against public service by clergy:

The essence of the rationale underlying the Tennessee restriction on ministers is that if elected to public office they will necessarily exercise their powers and influence to pro-

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172. *See id.*

173. *See id.*

174. *Id.* at 626 (quoting James Madison, Observations on the "Draught of a Constitution for Virginia" (1788), in 5 WRITINGS OF JAMES MADISON 284, 288 (Gaillard Hunt ed., 1904)).

175. *Paty*, 435 U.S. at 626 (alteration in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

176. *See id.* at 626-27.

177. *Id.* at 626.

178. 406 U.S. 205, 215 (1972).

mote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, *the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.*<sup>179</sup>

In a footnote, the Court elaborated on this conclusion by observing that Virginia's "struggle for separation of church and state," an endeavor that influenced other states, as well as the federal government, included the participation of "many clergymen vigorously opposed [to] any established church."<sup>180</sup>

In summary, the Court has held that both the Establishment Clause and the Free Exercise Clause forbid government from enacting laws that disqualify one from public service because he does not profess a certain religious belief or because he holds a certain religious status. These decisions are well grounded in the underlying norms of the Religion Clauses: religious neutrality, separation of church and state, and promotion of religious liberty.

### C. *The Speech or Debate Clause*

Under the Speech or Debate Clause in Article I, Section 6, Clause 1 of the United States Constitution, for any speech or debate in the United States Senate or the House of Representatives, Senators and Representatives "shall not be questioned in any other Place."<sup>181</sup> The history of the Clause derives from the

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179. *Paty*, 435 U.S. at 628–29 (emphasis added) (citations omitted).

180. *Id.* at 629 n. 9.

181. U.S. CONST. art. I, § 6, cl. 1. The full text of the clause reads as follows:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

*Id.*

English Bill of Rights,<sup>182</sup> itself the product of decades of conflict between Parliament and English Kings who sought to limit the power of Parliament.<sup>183</sup> Similar free speech or debate guarantees for legislatures appeared in early state constitutions and in the Articles of Confederation.<sup>184</sup> Apparently because the need to protect legislative speech and debate was so widely recognized, the Speech or Debate Clause occasioned little discussion in the Constitutional Convention and in the state ratification process.<sup>185</sup> The apparent historical support for the privilege protected by the clause is evidenced by how closely the clause tracks the language of its antecedent in the English Bill of Rights; by contrast, other legislative privileges enjoyed by Parliament were curtailed or rejected at the Constitutional Convention.<sup>186</sup> Also relevant is the post-Convention defense of the privilege by Thomas Jefferson on the grounds of separation of powers.<sup>187</sup>

The Supreme Court has considered the meaning and application of the Speech or Debate Clause infrequently relative to its exposition of numerous other constitutional provisions. However, the few cases that interpret the clause nicely illumine its general contours.<sup>188</sup> For over a century the Court has rejected an extremely narrow interpretation of the clause. In *Kilbourn v. Thompson*,<sup>189</sup> the Court considered the immunity of legislators whose activities culminated in the wrongful arrest of a prospective witness. Because the United States House of Repre-

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182. See Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1129–30 (1973).

183. For an excellent discussion of the development of the free speech privilege in England, see *id.* at 1122–35. Initially, the free speech privilege protected members of Parliament from judicial actions brought by private individuals. See *id.* at 1122–23. The privilege then “evolved gradually and painfully into a practical instrument for security against the executive, an evolution triggered by basic changes in the functions of the legislature.” *Id.* at 1123.

184. See *id.* at 1136.

185. See *id.*

186. See *id.* at 1136–39. Indeed, the Convention rejected a proposal by James Madison to define the scope of the privilege more precisely. See *id.* at 1139–40.

187. See *id.* at 1141–42.

188. The discussion that follows is a survey of several relevant Supreme Court cases interpreting the Speech or Debate Clause, not an exhaustive discussion or analysis of all cases interpreting the clause.

189. 103 U.S. 168 (1881).



sentatives had no constitutional authority to compel a private citizen to testify before one of its committees, the Court concluded that the witness had been falsely imprisoned when arrested for contempt.<sup>190</sup> Nonetheless, the Court held that the Speech or Debate Clause conferred immunity upon the Speaker of the House and the individual members of the House committee before whom the wrongfully imprisoned witness had refused to testify.<sup>191</sup> In so holding, the Court refused to limit the meaning of the clause “to words spoken in debate.”<sup>192</sup> The rationale for the clause, to encourage elected lawmakers to perform their public duties without fear of civil or criminal prosecution, extends “to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting.”<sup>193</sup> In brief, the clause applies to “things generally done in a session of the House by one of its members in relation to the business before it.”<sup>194</sup>

Later cases affirm and expound upon this early judicial articulation of the meaning of the Speech or Debate Clause. In *United States v. Johnson*,<sup>195</sup> the Court held that a prosecution under a general criminal statute dependent on inquiries into the motivation of a United States representative for a legislative act (a speech on the House floor) contravened the Speech or Debate Clause.<sup>196</sup> In so holding, *Johnson* emphasized the clause’s role in maintaining the constitutional separation of powers.<sup>197</sup>

Subsequently, the Court in *United States v. Brewster*<sup>198</sup> reiterated the importance of distinguishing between a legislator’s acts and motivations, which are protected, from other activities, which are not protected. *Brewster* permitted criminal prosecution of a United States senator under a federal anti-bribery

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190. *See id.* at 196–200.

191. *See id.* at 204–05.

192. *Id.* at 204.

193. *Id.*

194. *Id.*

195. 383 U.S. 169 (1966).

196. *See id.* at 180–85.

197. *See id.* at 181 (stating that the purpose of the Speech or Debate Clause is “to prevent intimidation by the executive and accountability before a possibly hostile judiciary”).

198. 408 U.S. 501 (1972).

statute.<sup>199</sup> The *Brewster* Court did so while embracing the general approach of *Johnson*, which *Brewster* cites for the proposition that “a Member of Congress may be prosecuted under a criminal statute provided that the Government’s case does not rely on legislative acts or the motivation for legislative acts.”<sup>200</sup> *Brewster* distinguishes “purely legislative activities protected by the Speech or Debate Clause”<sup>201</sup> from “a wide range of legitimate ‘errands’ performed for constituents.”<sup>202</sup> The latter activities “are political in nature rather than legislative.”<sup>203</sup> The Speech or Debate Clause is “limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.”<sup>204</sup> Under this analysis, because the indictment for taking a bribe required no inquiry into legislative acts or their motivation, the Speech or Debate Clause did not shield the senator from prosecution.<sup>205</sup>

In *Gravel v. United States*,<sup>206</sup> the Court further explained the scope of protected legislative acts. In *Gravel*, the Court applied Speech or Debate Clause immunity for legislative acts to congressional aides, who function as the alter egos of legislators,<sup>207</sup> but held that a senator’s arranging for private publication of a classified document comprising part of the record of a congressional subcommittee meeting was not a protected legislative

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199. *See id.* at 525–29.

200. *Id.* at 512.

201. *Id.*

202. *Id.* Examples include “the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called ‘news letters’ to constituents, news releases, and speeches delivered outside the Congress.” *Id.*

203. *Id.*

204. *Id.* at 515–16.

205. The Court reasoned as follows:

The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

*Id.* at 526. Further, accepting a bribe is not part of the legislative process. *See id.*

206. 408 U.S. 606 (1972).

207. *Id.* at 616–22.

act.<sup>208</sup> In so holding, the Court elaborated upon the scope of the clause:

The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but “only when necessary to prevent indirect impairment of such deliberations.”<sup>209</sup>

The *Gravel* Court also reiterated that the clause protects voting by members of Congress,<sup>210</sup> and made clear that the clause protects against inquiry into the “motives and purposes behind” the conduct of the senator and his aides at the subcommittee meeting at issue.<sup>211</sup>

The Supreme Court has also established that, when immunity under the Speech or Debate Clause applies, legislators are free not only from civil and criminal liability, but also from myriad forms of judicial interference. Thus, in *Eastland v. United States Servicemen’s Fund*,<sup>212</sup> the issue was whether a court may enjoin the issuance of a *subpoena duces tecum* by the chairman of a Senate subcommittee and on its behalf.<sup>213</sup> The Court

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208. *See id.* at 622–27.

209. *Id.* at 625 (quoting *United States v. Doe*, 455 F.2d 753, 760 (1st Cir. 1972)).

210. *See id.* at 617.

211. *See id.* at 629.

212. 421 U.S. 491 (1975).

213. The Senate subcommittee was investigating a nonprofit organization pursuant to a resolution of the full Senate and for the purpose of studying the enforcement of a federal internal security law. The subpoena commanded production of documents by a bank with respect to accounts of the nonprofit, which ostensibly had been created for the welfare of current and former members of the armed forces. The nonprofit sued the chairman of the subcommittee, nine other Senators, and the chief counsel to the subcommittee to enjoin implementation of the subpoena. The district court denied the motions for injunctive relief and dismissed the action as to individual Senators on the grounds of immunity under the Speech or Debate Clause, but the United States Court of Appeals for the D.C. Circuit reversed and remanded. The court of appeals ordered the district court to

held that the actions of the Senate subcommittee, the named senators, and the subcommittee's legal counsel were "immune from judicial interference" under the Speech or Debate Clause.<sup>214</sup> The Court observed that the purpose of the clause was to ensure the independence of legislators and to reinforce the separation of powers,<sup>215</sup> and that the clause protects against civil and criminal actions as well as against actions brought by private parties and by Executive officials.<sup>216</sup> That the clause applies to private civil actions "is supported by the absoluteness of the terms 'shall not be questioned,' and the sweep of the terms 'in any other Place.'"<sup>217</sup> Moreover, private civil actions disrupt the legislative process and weaken legislative independence.<sup>218</sup> The Court then opined that the issuance of the subpoena fell within the sphere of legislative acts described in prior opinions.<sup>219</sup> In general, the power to investigate inheres in the power to make laws, and issuing subpoenas is a legitimate exercise of the power to investigate.<sup>220</sup> Further, the specific facts surrounding the controversy before the Court pointed to the legitimacy of the subpoena in the context of the subcommittee's purpose.<sup>221</sup> Accordingly, the Speech or Debate Clause provid-

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proceed in accordance with specified guidelines. For a summary of the remedy fashioned by the court of appeals, see *Eastland*, 421 U.S. at 497-500.

214. *Id.* at 501.

215. *See id.* at 502.

216. *See id.* at 502-03.

217. *Id.* at 503.

218. Said the Court:

Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that Members are acting within the "legitimate legislative sphere" the Speech or Debate Clause is an absolute bar to interference.

*Id.* (citing *Doe v. McMillan*, 412 U.S. 306, 314 (1973)).

219. *See id.* at 503-07.

220. *See id.* at 504.

221. *See id.* at 506. Generally, probing "the sources of funds used to carry on activities suspected by a subcommittee of Congress to have a potential for undermining the morale of the Armed Forces is within the legitimate legislative

ed “complete immunity” for subcommittee members and their counsel.<sup>222</sup>

*D. Application of Constitutional Authorities to the Sanders-Vought Matter and Similar Scenarios*

The previous discussion of the Religious Test Clause, the Religion Clauses, and the Speech or Debate Clause illumines the task of determining the constitutionality of the actions of members of Congress who, like Senator Sanders, express disdain for a nominee for public service and apparently vote against the nominee because of the nominee’s faith. Existing precedent compels the following conclusion: legislators who act as did Senator Sanders plainly violate constitutional norms, but they do not violate the letter of the Constitution, at least not in a way that is remediable.

Deeming a nominee unfit for public office solely on the basis of his theological views of salvation from sin is so obviously repugnant to the norm that underlies the Religious Test Clause that little explication is necessary. The underlying norm is one of affording people of all faiths or no particular faith the opportunity to serve their country. People can no more be required to profess belief in universalism as a condition of serving as Deputy Director of the OMB than they can be required to profess belief in theism or atheism.<sup>223</sup>

But this conclusion does not mean that Senator Sanders’s actions violate the letter of the Religious Test Clause. As discussed in Section I.A, the better view is that the clause is implicated only by test oaths or their formal equivalent. Individual legislators, speaking and voting according to their own religious prejudices, are incapable of imposing such a formal religious test.<sup>224</sup>

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sphere.” *Id.* Further, given the Senate’s specific authorization of the subcommittee to investigate possible infiltration of those acting under the influence of foreign governments, the subpoena fell within the province of the subcommittee. *See id.* at 507.

222. *See id.* at 507.

223. *See* Nelson, *supra* note 34 (quoting Professor Paul Horwitz as stating “the values behind the Religious Test Clause and the religion clauses of the First Amendment certainly count against Senator Sanders’s position here”).

224. Indeed, that the Senate Committee on the Budget approved Russell Vought’s nomination demonstrates that Senator Sanders was individually without power to impose a religious test.

The Supreme Court's Speech or Debate Clause jurisprudence confirms the conclusion that courts lack the power to inquire into the religious prejudices of individual legislators for the purpose of setting aside their votes on nominees or finding them liable for violations of constitutional rights. Senator Sanders and others who speak and vote against nominees on account of their religious views enjoy broad immunity under the Clause.<sup>225</sup> The Court has held or stated in dicta that the Clause protects against judicial interference with speech in official assemblies of a full House of Congress, committees, and subcommittees,<sup>226</sup> votes in such assemblies,<sup>227</sup> and other legislative acts.<sup>228</sup> Immunity also reaches the motives of legislators in speaking, deliberating, and voting on matters,<sup>229</sup> whether the action against legislators is civil or criminal.<sup>230</sup> As offensive as religious discrimination in nomination hearings surely is, an individual legislator who speaks and votes in accordance with religious biases may do so with immunity, and his individual actions cannot be set aside.

A similar analysis applies in evaluating Senator Sanders's conduct under the Religion Clauses. Senators who oppose a nominee solely on the basis of her religious beliefs as such, that is, with no legitimate basis for concluding that those beliefs would impair the nominee's ability to discharge public duties,<sup>231</sup> egregiously offend all major norms that have been un-

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A different question would arise if all (or perhaps a majority of) senators voted against a nominee because she failed to comply with some religious preference that the senators shared. If the senators acted pursuant to an agreement, one could argue that such collective action is the substantive equivalent of a formal requirement. Otherwise, the analysis of this Article suggests that no violation of the Religious Test Clause has occurred.

225. See Nelson, *supra* note 34 (quoting Professor Michael McConnell as opining that "senators can vote against nominees for any reason or no reason at all" and still enjoy immunity under the Speech or Debate Clause).

226. See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

227. See, e.g., *Gravel v. United States*, 408 U.S. 606, 617 (1972); *Kilbourn*, 103 U.S. at 204.

228. See, e.g., *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975).

229. See, e.g., *Gravel*, 408 U.S. at 626; *United States v. Johnson*, 383 U.S. 169, 180-85 (1966).

230. See, e.g., *Eastland*, 421 U.S. at 502-03.

231. Throughout this Article, when I refer to disqualifying a nominee "solely on the basis of her religious beliefs as such," I mean to critique the act of disqualifying a nominee when no plausible case has been made that the nominee's religious

derstood to inform a proper understanding of the Religion Clauses. To disqualify a nominee solely on account of her faith is most assuredly a violation of the neutrality norm, which protects those who believe a religious tenet to the same extent that it protects those who do not. Government cannot constitutionally insist, for example, that senior cabinet officials reject the belief that God loves the world and sent His one and only Son to die for the world so that the world might be saved from sin through Him (and only Him). Nor can government, under color of law, constitutionally require a would-be nominee to embrace the religious perspective expressed by Senator Van Hollen in the hearing, that is, that “part of being a Christian” is “recognizing that there are lots of ways that people can pursue their God.”<sup>232</sup> The theological implications associated with “being a Christian,” whether that person is Senator Van Hollen, Russell Vought, or anyone else, are not for government to determine.<sup>233</sup>

Likewise, senators who oppose a nominee because of her religious beliefs that have no plausible bearing on her ability to serve the country offend the other two major norms of the Religion Clauses. The norm of protecting religious liberty is obviously violated when one is pressured to choose between serving the public and recanting one’s theological beliefs. So also, a government actor that assumes a papal role in declaring acceptable theology for nominees to public office has clearly contravened the norm of separation of church and state. Separation of church and state at least means that state actors should not be dictating to nominees what theological positions are and are not “part of being a Christian” (or an element of some other religious doctrinal framework). One would do well to remem-

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beliefs would impair the nominee’s ability to discharge public duties. I do not mean to critique decisions to oppose a nominee when it is clear that her religious beliefs would prevent her from serving. For example, no constitutional norm is offended by voting against a nominee to a senior post in the Department of Health and Human Services whose religious beliefs compel her to oppose the distribution and use of all life-saving pharmaceuticals.

232. *Hearing, supra* note 2, at 17 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

233. *See* Nelson, *supra* note 34 (quoting Professor Paul Horwitz as remarking that Sanders “was not advancing a political view, but a theological one” and that “he has no business telling nominees that they must all believe and testify that that [sic] all roads to Heaven are the same”).

ber what Jefferson meant by the “wall of separation” between church and state in his letter to the Danbury Baptists. The very letter that metaphorically invoked the wall imagery insists that a person “owes account to none other [than God] for his faith or his worship,” and that “the legislative powers of the government reach actions only, and not opinions.”<sup>234</sup> If Russell Vought need account to “none other” than God for his faith, then he need not account to Senator Sanders or Senator Van Hollen. And if legislative powers reach “not opinions,” then they reach not Russell Vought’s soteriological opinions, including those that differ from those of Senators Sanders and Van Hollen.

But violating a constitutional norm is not necessarily the same as violating the text of the Constitution. Whether the Constitution has been violated depends on whether state action is present. A clear case of state action is duly enacted legislation. Assume, for example, that Congress enacts the prejudicial criteria of Senator Sanders (that is, a statutory provision that bars from public service those who believe that Jesus is the only way of salvation from sin). Any codification of the prejudicial criteria of Senator Sanders would not survive constitutional scrutiny. Such codification would violate not only the Religious Test Clause, but also Supreme Court precedent interpreting the Religion Clauses.

The violation of the Religious Test Clause would be manifest, for the codification would be a formal test that the Clause forbids.

Moreover, if federal law disqualified a nominee solely because the nominee’s faith is inconsistent with that preferred by one or more state actors (for example, universalism), the disqualification would plainly violate the Free Exercise Clause under *McDaniel v. Paty*. There the plurality reasoned that Congress is absolutely foreclosed from regulating, prohibiting, or rewarding religious belief,<sup>235</sup> a principle accepted in *Smith*.<sup>236</sup> Denying someone the opportunity to serve in public office on

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234. *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Letter from Thomas Jefferson to the Danbury Baptist Association, *supra* note 135).

235. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion).

236. See *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990).



the basis of religious belief fares no better than other forms of coercive state action.<sup>237</sup>

Similarly, if federal law disqualified a nominee solely because the nominee's faith is inconsistent with that preferred by one or more state actors, the disqualification would transgress the Establishment Clause under *Torcaso v. Watkins*. There the Court emphasized that the government cannot force someone to profess belief or disbelief in religion,<sup>238</sup> even when that compulsion takes the form of a condition for public service.<sup>239</sup> In other words, no law can condition Russell Vought's appointment on disaffirming his belief that salvation from sin is possible only through faith in the Lord Jesus Christ.<sup>240</sup>

Disqualifying a nominee by statutory law solely on the basis of the nominee's faith would also offend the major Establishment Clause tests. Although disqualifying a nominee on account of his congressionally disfavored religious views may or may not violate the first prong of *Lemon*,<sup>241</sup> it would surely be difficult to establish a legitimate secular purpose for forbidding evangelicals like Vought from serving.<sup>242</sup> Moreover, disqualifying a nominee because of her theology would often have the primary effect of inhibiting religion (in violation of the second prong of *Lemon*).<sup>243</sup> In addition, scrutinizing a nominee's theological positions obviously entangles government actors with religion (in violation of the third prong of *Lemon*). Similarly, religion-based disqualification would often run afoul of Justice O'Connor's endorsement test.<sup>244</sup> A reasonable observer would

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237. See *Paty*, 435 U.S. at 626.

238. See *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

239. See *id.* at 495–96.

240. As the Court stated in *Everson v. Board of Education*, government cannot “exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving . . . [governmental] benefits.” 330 U.S. 1, 16 (1947).

241. A secular purpose would exist, for example, for disqualifying from public service those who, on religious grounds, advocate for the genocide of all red-heads. But it would be difficult to find a credible secular purpose for disqualifying someone from service merely because she embraces the doctrine of predestination.

242. Part II of this paper explains why the possible secular concerns of Senator Sanders over Vought's nomination were baseless.

243. To foreclose all of a named religious faith from public service tends significantly to dissuade the observance of that faith.

244. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

naturally perceive the disqualification as an endorsement of the officially approved religious view (such as universalism), and the disqualification would plainly send a message that non-conforming nominees (such as those who confess Christ as the exclusive Way of salvation) are “outsiders” who are “not full members of the political community.”<sup>245</sup> Finally, to require a nominee to disavow previously expressed religious views in order to pass the Senate’s muster is also coercive. The Establishment Clause decisions that focus on coercion<sup>246</sup> provide no sanctuary for statutory religion-based litmus tests for serving in public office.

Nonetheless, the better view is that the actions of an individual senator in opposing a nominee on religious grounds do not violate the Religion Clauses. When Senator Bernie Sanders spoke and voted against Russell Vought, he did not act on behalf of the Congress, let alone the full Senate or even the Senate Committee on the Budget. His actions lacked the force of law or even the imprimatur of the state. Senator Sanders was speaking solely for himself, and he was casting only his own vote. Although he was a governmental actor, he was not acting as an agent carrying out the business of the government as principal. The United States Federal Government has no power to vote in a Senate committee meeting. Voting is the privilege and responsibility of an individual senator, acting in that capacity. Senator Sanders’s speech and vote were not state action.<sup>247</sup> Because his action was not the action of government, that is, not that of an agent acting on behalf of the government as principal, his behavior is not actionable under the Religion Clauses.

The conclusion that senators who govern in the mold of Sanders are constitutionally free to do so finds support in the Court’s Speech or Debate Clause jurisprudence. Senators and representatives enjoy broad immunity under that clause with respect to their individual legislative acts. Senator Sanders’s

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245. *Id.* at 688.

246. See, e.g., *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in judgment and dissenting in part).

247. See Steven N. Sherr, *Freedom and Federalism: The First Amendment’s Protection of Legislative Voting*, 101 *YALE L.J.* 233, 252 n.96 (1991) (explaining that the votes of legislative minorities “do not themselves constitute government action”).

interrogation occurred at an official Senate committee meeting, at which lawful legislative functions were conducted. His speech is the core of what the Speech or Debate Clause protects, and his vote is protected against judicial intrusion by case law dating from the nineteenth century (indeed, even earlier if one includes English cases).<sup>248</sup> The better view is that Senator Sanders is immune from liability and safe from any judicial inquiry into the constitutionality of his words and vote in opposing Russell Vought.<sup>249</sup>

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248. See Reinstein & Silverglate, *supra* note 182, at 1130 (noting that, in the case of Sir William Williams, even King James II acknowledged that the free speech privilege provided absolute immunity to members of Parliament “for speeches, debates, and votes within the walls of Parliament”).

Professor George Dent, in commenting on a prior draft of this Article, suggested one possible approach for deterring the type of questioning of nominees employed by Senator Sanders: the adoption of a Senate rule that subjects a senator to a potential vote of sanction by the full Senate if that body finds that a senator has probed a nominee’s religious views without demonstrating that those views affect whether she would obey the law in discharging her public duties. The text of the Speech or Debate Clause does not appear to foreclose this proposal, for the proposal requires no “questioning” of a senator’s legislative acts “in any other Place”; the sole “questioning” would occur within the Senate itself.

249. An issue more difficult than the constitutionality of the acts of individual legislators as such is the constitutionality of the action of a legislative body itself when the question of motive arises. In that situation, the Supreme Court’s Speech or Debate Clause jurisprudence and its Establishment Clause jurisprudence are in tension. The former shuns judicial inquiry into motive. The latter, in some cases, looks to legislative purpose, which for some justices appears to include an inquiry into motives. For a thoughtful analysis of the motive-purpose distinction and the problems of probing legislative motive, see Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016). For a critique of searching for legislative motive in applying the Establishment Clause, see Scott W. Breedlove & Victoria S. Salzmann, *The Devil Made Me Do It: The Irrelevance of Legislative Motivation under the Establishment Clause*, 53 BAYLOR L. REV. 419 (2001). For a discussion of how the judiciary has developed in its willingness to review legislative purpose generally, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

Also deserving observation is that even the collective action of a committee or subcommittee of Congress is distinguishable in important respects from legislation. The latter results from action of both full houses of Congress (passing a bill) and the United States President (signing a bill into law), features apparent design (the words and structure of a written statute), frequently spawns statements of purpose (in committee reports or preambles), and binds others in the future through enforcement by the Executive Branch. Whatever the wisdom or folly of attempting to discern the “purpose” underlying legislation in deciding its constitutionality, the context of voting on a nominee by a congressional committee or subcommittee is sufficiently removed from the context of enforcing challenged legislation that the judicial precedent interpreting the Speech or Debate Clause is

In summary, Senator Sanders's hostile opposition to Russell Vought during the hearing to consider Vought's nomination blatantly violated the norms underlying the Religious Test Clause, the Establishment Clause, and the Free Exercise Clause. But his opposition to Vought did not violate the text of the Constitution. And even if this conclusion is debatable, the Court's Speech or Debate Clause jurisprudence renders Senator Sanders immune from judicial interference for his committee conduct.

## II. EVANGELICALS AND PUBLIC SERVICE

Part I explains the literal, practical constitutional permissibility but normative constitutional impropriety of Senator Sanders's interrogation of, and opposition to, Russell Vought. This analysis would end most law review articles. But the analysis of the Sanders-Vought exchange should not end there. Senator Sanders, and perhaps to a lesser extent, Senator Van Hollen, had a real problem with Russell Vought's theology. So strong was Senator Sanders's objection to Vought's theology that it led him to trample one of the great ideals of our constitutional democracy: no one should be denied the opportunity to serve in public office merely on account of religious belief. One suspects that other legislators may similarly quash this ideal in the legislative process without displaying their religious prejudice as blatantly as did Senator Sanders.

Thus, this Article continues with a theological-political discussion to advance a healthy and necessary public dialogue. The Congress and the greater body politic must learn to approach difficult, sensitive matters involving religion and public policy with better information, more rigorous analysis, and more open-mindedness than that on display in the Vought hearings. Part II is offered to help foster these deliberative goods. By better understanding the foundation and implications of the evangelical theology embraced by Russell Vought, those (like Senator Sanders) who might originally dismiss Mr.

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not eclipsed by case law that searches for legislative purpose in assessing the constitutionality of statutes.

Vought and other evangelicals should come to view them in a different light.<sup>250</sup>

What Senator Sanders apparently could not tolerate in Mr. Vought was his understanding of soteriology. In Christian theology, soteriology, from the Koine Greek “σωτηρία” (“salvation,” or “deliverance”),<sup>251</sup> is the doctrine of salvation from sin.<sup>252</sup> Across Christian denominations and church history, there is and has long been a diversity of perspectives on such soteriological questions as the efficacious scope<sup>253</sup> and purpose<sup>254</sup> of the atoning death of Jesus Christ,<sup>255</sup> the timing and nature of the regeneration of the believer,<sup>256</sup> the eternal security

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250. I do not mind adding that these issues are extremely important to me personally. Like Russell Vought, I embrace the tenets of evangelicalism as articulated in this Article. These tenets are theological, not primarily political (and certainly not politically partisan), and I surmise that they flow from the implications of the personal nature, work, and teaching of the One who died and rose again on my behalf. Ensuring that government actors do not impair my constitutional right to exercise these religious convictions is naturally a matter of some priority. But even more than this, these core evangelical commitments not only compel me to respect the rights of all in our democracy, but also challenge me to exceed the standards expected of public servants. Consequently, I am especially interested in explaining why, even apart from the desire to respect constitutional norms, government officials should not exclude evangelicals from public service because of the policy concerns that Senator Sanders and others like him apparently possess. To the contrary, they should welcome service by evangelicals, as well as all Americans, regardless of their creed, who bring values of good will, selflessness, and compassion to the privilege of public service.

251. See WALTER BAUER ET AL., *A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT AND OTHER EARLY CHRISTIAN LITERATURE* 801 (Univ. Chi. Press, 2d ed. 1979).

252. See LOUIS BERKHOF, *SYSTEMATIC THEOLOGY* 415 (combined ed. 1996) (“Soteriology deals with the communication of the blessings of salvation to the sinner and his restoration to divine favor and to a life in intimate communion with God.”); *THE OXFORD DICTIONARY OF WORLD RELIGIONS* 915 (John Bowker ed., 1997) (defining soteriology as “[t]he doctrine of salvation”).

253. For a discussion of the scope of the atonement (such as whether Christ died for all or only for the elect), see ROBERT P. LIGHTNER, *SIN, THE SAVIOR, AND SALVATION* 123–27 (1991).

254. See BERKHOF, *supra* note 252, at 384–91 (discussing theories of the atonement throughout church history); LIGHTNER, *supra* note 253, at 103–23 (discussing theories of the atonement and the purpose for Christ’s death).

255. For a discussion of various historical perspectives on the atonement, see ALISTER E. MCGRATH, *CHRISTIAN THEOLOGY: AN INTRODUCTION* 251–70 (6th ed. 2017).

256. For a discussion, see BERKHOF, *supra* note 252, at 465–79; MILLARD J. ERICKSON, *CHRISTIAN THEOLOGY* 872–75 (Baker Acad., 3d. ed. 2013); LIGHTNER, *supra* note 253, at 219–21.

of the believer,<sup>257</sup> the purpose and effect of water baptism,<sup>258</sup> the destiny of unbelieving humanity,<sup>259</sup> and a great number of other details. But within the orthodox church,<sup>260</sup> and certainly within evangelicalism,<sup>261</sup> emphasis has long been placed on the necessity for personal trust in the Lord Jesus for salvation from sin, based on who Jesus is (the eternal, Divine Son of God the Father) and what He has done (offering Himself as a substitutionary sacrifice for sin and rising from the dead), thereby enabling Him to give eternal life to all who trust in Him for salvation. This Part surveys key concepts of evangelicalism and evangelical soteriology in Section A, then explores what they do and do not imply in Section B.

A. *Evangelicalism and Basic Soteriological Concepts in Evangelical Theology*

A helpful preliminary step in the analysis of evangelicalism and public policy is to adopt a working concept of “evangelical.”<sup>262</sup> Although the term “evangelical” has tended to elude

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257. On the question of the eternal security of the believer and the perseverance of the saints, see BERKHOF, *supra* note 252, at 545–49; ERICKSON, *supra* note 256, at 914–24; WAYNE GRUDEM, SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE 788–808 (1994); LIGHTNER, *supra* note 253, at 228–49.

258. For a survey of different views on the purpose of baptism and related issues, see ERICKSON, *supra* note 256, at 1016–32. For a discussion of various Christian views on infant baptism, see MCGRATH, *supra* note 255, at 401–04.

259. See generally ERICKSON, *supra* note 256, at 940–46 (discussing and evaluating varieties of universalism).

260. In explaining the distinction between orthodoxy and heresy, Oxford University Professor Alister McGrath relies on F.D.E. Schleiermacher’s argument that “the central and distinctive idea of Christianity is that God has redeemed us through Jesus Christ, and through no one else and in no other way.” MCGRATH, *supra* note 255, at 98. “Christian understandings of God, Jesus Christ, and human nature” must comport with this central notion of redemption in order to remain Christian. *Id.* To purport to accept this distinctively Christian idea that God has redeemed humanity through Christ alone, but to explain it in a way that makes redemption impossible, not genuine, or merely optional through Christ, is to commit heresy. See *id.* This Article employs McGrath’s concept of orthodoxy when referring to “orthodox” Christianity and Christians.

261. See *infra* Section II.A; see also ALISTER MCGRATH, EVANGELICALISM & THE FUTURE OF CHRISTIANITY 56 (1995) (stating that “at its heart, evangelicalism is historic Christian orthodoxy”).

262. McGrath traces the term “evangelical” to the sixteenth century, when it referred to Catholic writers desiring the church to embrace a more biblical faith

delineation,<sup>263</sup> an excellent source for appreciating various understandings of evangelicalism, especially as it relates to a controversy involving Wheaton College, is the brief survey promulgated by Wheaton's former program known as the Institute for the Study of American Evangelicals.<sup>264</sup> This institute described a number of major senses of "evangelical."<sup>265</sup> Under the first conception, an "evangelical" is any Christian who embraces a few central doctrines of Christianity and emphasizes certain practices. Evangelicalism under this view is typified by a belief that each person needs to be divinely changed or converted, a commitment to actively live the Gospel, a high regard for the Bible, a theological emphasis on the sacrifice of Christ on the cross, and a tendency to cooperate transdenominationally in evangelism and other ministry efforts.<sup>266</sup> Another perspective views evangelicalism in terms of "an organic group of movements and religious tradition" characterized by a certain style, set of beliefs, and attitude.<sup>267</sup> Such a conception sees a diverse canopy of evangelicalism that envelopes "black Baptists and Dutch Reformed Churches, Mennonites and Pentecostals, Catholic charismatics and Southern Baptists."<sup>268</sup> A third sense of the term "evangelical," particularly in the United States, refers to what began as a primarily Midwestern coalition that arose during World War II to counter "the perceived anti-intellectual, separatist, belligerent nature of the fundamentalist movement in the 1920s and 1930s."<sup>269</sup> Important evangelical leaders of the movement have included

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and practice than that present in the late medieval church. See MCGRATH, *supra* note 261, at 19.

263. See *id.* at 53 ("It is notoriously difficult to give a precise definition of evangelicalism.").

264. The institute closed in December of 2014. For an overview of the institute's history, see *Institute for the Study of American Evangelicals*, WHEATON COLL., <https://www.wheaton.edu/academics/academic-centers/isae/> [https://perma.cc/EA54-36ZP] (last visited Mar. 3, 2018).

265. See Larry Eskridge, *Defining the Term in Contemporary Times*, *Institute for the Study of American Evangelicals*, WHEATON COLL., <https://web.archive.org/web/20170805202658/http://www.wheaton.edu/ISAE/Defining-Evangelicalism/Defining-the-Term> [https://perma.cc/4ZNF-LXYK] (last visited Mar. 24, 2018).

266. See *id.* (relying on the works of David Bebbington and George M. Marsden).

267. *Id.*

268. *Id.*

269. *Id.*

Carl F.H. Henry, Harold John Ockenga and Billy Graham.<sup>270</sup> Moody Bible Institute and Wheaton College have been important educational institutions within the movement.<sup>271</sup> Prominent para-church associations have included the National Association of Evangelicals and Youth for Christ.<sup>272</sup> These and other leading figures<sup>273</sup> have broadened and provided cohesion to evangelicalism.

These and other conceptions of “evangelical”<sup>274</sup> are best viewed as complementary, not mutually exclusive. Broadly, these perspectives point to evangelicalism as both a movement and a faith community characterized by the following: (1) a commitment to the authority of the Bible, (2) an emphasis on salvation as a personal transformation effected by God through personal trust in Jesus on the basis of who He is (that is, God and man) and what He has done (that is, His death and resurrection), (3) a desire to cooperate trans-denominationally to spread the Gospel and meet human needs in the name of Christ, and (4) an effort to engage the culture, rather than retreat from it, intellectually and socially.

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270. *See id.*

271. *See id.*

272. *See id.*

273. The list of people and institutions identified by the Institute for the Study of American Evangelicals is hardly exhaustive.

274. Another way to conceptualize “evangelicals” is to view them as those who historically have focused on three issues: (1) reconciling faith and reason, (2) becoming certain of salvation, and (3) reconciling personal faith with an increasingly secular and pluralistic society. *See Eskridge, supra* note 265 (relying on University of North Carolina professor Molly Worthen).

Alister McGrath, an Anglican and self-described “committed yet critical evangelical,” MCGRATH, *supra* note 261, at 11, sets forth the following “six fundamental convictions” of evangelicalism:

1. The supreme authority of Scripture as a source of knowledge of God and a guide to Christian living.
2. The majesty of Jesus Christ, both as incarnate God and Lord and as the Savior of sinful humanity.
3. The lordship of the Holy Spirit.
4. The need for personal conversion.
5. The priority of evangelism for both individual Christians and the church as a whole.
6. The importance of the Christian community for spiritual nourishment, fellowship and growth.

*Id.* at 55–56.



This brief survey of the meaning of “evangelical” provides theological context for Russell Vought’s articulated soteriological convictions. They align with the evangelical subject of his opinion article, Wheaton College. Wheaton’s Statement of Faith<sup>275</sup> affirms among other doctrines the triune nature of God;

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275. *Wheaton Statement of Faith*, *supra* note 15. It reads in full:

WE BELIEVE in one sovereign God, eternally existing in three persons: the everlasting Father, His only begotten Son, Jesus Christ our Lord, and the Holy Spirit, the giver of life; and we believe that God created the Heavens and the earth out of nothing by His spoken word, and for His own glory.

WE BELIEVE that God has revealed Himself and His truth in the created order, in the Scriptures, and supremely in Jesus Christ; and that the Scriptures of the Old and New Testaments are verbally inspired by God and inerrant in the original writing, so that they are fully trustworthy and of supreme and final authority in all they say.

WE BELIEVE that Jesus Christ was conceived by the Holy Spirit, born of the Virgin Mary, was true God and true man, existing in one person and without sin; and we believe in the resurrection of the crucified body of our Lord, in His ascension into heaven, and in His present life there for us as Lord of all, High Priest, and Advocate.

WE BELIEVE that God directly created Adam and Eve, the historical parents of the entire human race; and that they were created in His own image, distinct from all other living creatures, and in a state of original righteousness.

WE BELIEVE that our first parents sinned by rebelling against God’s revealed will and thereby incurred both physical and spiritual death, and that as a result all human beings are born with a sinful nature that leads them to sin in thought, word, and deed.

WE BELIEVE in the existence of Satan, sin, and evil powers, and that all these have been defeated by God in the cross of Christ.

WE BELIEVE that the Lord Jesus Christ died for our sins, according to the Scriptures, as a representative and substitutionary sacrifice, triumphing over all evil; and that all who believe in Him are justified by His shed blood and forgiven of all their sins.

WE BELIEVE that all who receive the Lord Jesus Christ by faith are born again of the Holy Spirit and thereby become children of God and are enabled to offer spiritual worship acceptable to God.

WE BELIEVE that the Holy Spirit indwells and gives life to believers, enables them to understand the Scriptures, empowers them for godly living, and equips them for service and witness.

WE BELIEVE that the one, holy, universal Church is the body of Christ and is composed of the communities of Christ’s people. The task of Christ’s people in this world is to be God’s redeemed community, embodying His love by worshipping God with confession, prayer, and praise; by proclaiming the gospel of God’s redemptive love through our Lord Jesus Christ to the ends of the earth by word and deed; by caring for

the supreme revelation of God in Christ Jesus; the inspiration and accuracy of the Bible; the crucifixion, bodily resurrection, and ascension of the Lord Jesus; the substitutionary sacrifice of Christ; that “all who receive the Lord Jesus Christ by faith are born again of the Holy Spirit and thereby become children of God and are enabled to offer spiritual worship acceptable to God”; and the bodily resurrection of everyone, unto “the everlasting punishment of the lost, and the everlasting blessedness of the saved.”<sup>276</sup>

The soteriological concepts that seem to have offended the sensibilities of Senator Sanders inhere in the evangelical understanding of how one is removed from the state of condemnation from sin.<sup>277</sup> Mr. Vought’s view, consistent with the position of Wheaton College,<sup>278</sup> is that everyone<sup>279</sup>—regardless of nationality, ethnicity, race, sex, family ancestry, and even religious culture—is born with a propensity to sin<sup>280</sup> and, apart

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all of God’s creation and actively seeking the good of everyone, especially the poor and needy.

WE BELIEVE in the blessed hope that Jesus Christ will soon return to this earth, personally, visibly, and unexpectedly, in power and great glory, to gather His elect, to raise the dead, to judge the nations, and to bring His Kingdom to fulfillment.

WE BELIEVE in the bodily resurrection of the just and unjust, the everlasting punishment of the lost, and the everlasting blessedness of the saved.

*Id.*

276. *Id.*

277. The doctrine of salvation and the doctrine of sin are inseparably linked in Christian theology. See THE OXFORD DICTIONARY OF WORLD RELIGIONS, *supra* note 252, at 915 (stating that “[t]he doctrines of the Fall and of sin are presuppositions” of the saving work of God in Christian theology).

278. See *Wheaton Statement of Faith*, *supra* note 15 (affirming that “all human beings are born with a sinful nature that leads them to sin in thought, word, and deed”).

279. See *Romans* 3:9 (stating “we have already charged that both Jews and Greeks are all under sin”).

280. See *Romans* 7:18–19 (“For I know that nothing good dwells in me, that is, in my flesh; for the willing is present in me, but the doing of the good *is* not. For the good that I want, I do not do, but I practice the very evil that I do not want.”); *Romans* 7:23 (“I see a different law in the members of my body, waging war against the law of my mind and making me a prisoner of the law of sin which is in my members.”); *Galatians* 5:17 (“For the flesh sets its desire against the Spirit, and the Spirit against the flesh; for these are in opposition to one another, so that you may not do the things that you please.”); see also ERICKSON, *supra* note 256, at 575 (“All of us, apparently without exception, are sinners. By this we mean not merely

from union with Christ, stands guilty of sin before the holy,<sup>281</sup> and perfectly and uniquely righteous,<sup>282</sup> God.<sup>283</sup> The propensity to sin is the condition of all humanity after the original rebellion of the first humans in Eden.<sup>284</sup> Grounded in Scripture<sup>285</sup> and expounded upon since the days of the early church, perhaps most memorably in the writings of Augustine of Hippo,<sup>286</sup> this view of the pervasive sinfulness of humanity is widely held across evangelicalism.<sup>287</sup> Further, the traditional evangeli-

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that all of us sin, but that we all have a depraved or corrupted nature that so inclines us toward sin that it is virtually inevitable.”).

281. See 1 *Samuel* 2:2 (“There is no one holy like the LORD, Indeed, there is no one besides You, Nor is there any rock like our God.”); *Isaiah* 6:3 (describing the cry of the seraphim in the heavenly throne room as “Holy, Holy, Holy, is the LORD of hosts”); *Isaiah* 8:13 (“It is the LORD of hosts whom you should regard as holy. And He shall be your fear, And He shall be your dread.”); *Revelation* 4:8 (describing the heavenly worship of four winged creatures proclaiming “HOLY, HOLY, HOLY is THE LORD GOD, THE ALMIGHTY, WHO WAS AND WHO IS AND WHO IS TO COME”).

282. See *Psalms* 7:11 (“God is a righteous judge, And a God who has indignation every day.”); *Isaiah* 45:21 (“And there is no other God besides Me, A righteous God and a Savior; There is none except Me.”); *Romans* 3:5–6 (“But if our unrighteousness demonstrates the righteousness of God, what shall we say? The God who inflicts wrath is not unrighteous, is He? (I am speaking in human terms.) May it never be! For otherwise, how will God judge the world?”).

283. See, e.g., *Isaiah* 54:6 (“For all of us have become like one who is unclean, And all our righteous deeds are like a filthy garment; And all of us wither like a leaf, And our iniquities, like the wind, take us away.”); *Romans* 3:23 (stating that “all have sinned”); *Romans* 5:18 (“So then as through one transgression there resulted condemnation to all men, even so through one act of righteousness there resulted justification of life to all men.”); *James* 2:10 (“For whoever keeps the whole law and yet stumbles in one *point*, he has become guilty of all.”). The statement of universal guilt is a generalization. Many evangelicals believe that people who lack the cognitive ability to grasp the need for salvation (for example, very young children, and the severely mentally challenged) are not held accountable for sin.

284. See *Genesis* 3:1–24. For the consequences of the sin of Adam for the whole of humanity, see *Romans* 5:12–21. For a discussion of original sin, see ERICKSON, *supra* note 256, at 575–83.

285. See *supra* notes 279–80. That the doctrine of sin is rooted in Scripture is important to evangelicals. As McGrath observes, “commitment to the priority and authority of Scripture has become an integral element of the evangelical tradition.” MCGRATH, *supra* note 261, at 59.

286. For a discussion of the debates between Augustine and Pelagius on sin and salvation, see MCGRATH, *supra* note 255, at 330–34.

287. See LIGHTNER, *supra* note 253, at 44 (“Evangelical Christians are in common agreement on man’s exceedingly sinful condition.”).

cal understanding<sup>288</sup> is that one cannot deliver oneself from this state of sin and guilt through one's meritorious effort.<sup>289</sup> No commitment to so many prayers each day, no amassing of hours at the local homeless shelter or hospice, no rigorous program of reading or memorizing the Bible, no perfect attendance at worship services, and not even the giving of one's wealth away to the church or the poor renders one worthy of Divine pardon.<sup>290</sup> Forgiveness of sin is obtainable only by receiving it as a gift from God.<sup>291</sup> And that gift is given through faith in the Lord Jesus Christ,<sup>292</sup> who by His death paid the price for human sin,<sup>293</sup> and through His resurrection was declared the Son

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288. A great number of Christians, even those who may not think of themselves as "evangelicals," would likely embrace many of the soteriological concepts discussed in this part of the Article. One may embrace "evangelical theology" without realizing what to call it.

289. The Apostle Paul stated the matter plainly as follows:

But when the kindness of God our Savior and His love for mankind appeared, He saved us, not on the basis of deeds which we have done in righteousness, but according to His mercy, by the washing of regeneration and renewing by the Holy Spirit, whom He poured out upon us richly through Jesus Christ our Savior, so that being justified by His grace we would be made heirs according to the hope of eternal life.

*Titus* 3:4-7; see also *Romans* 3:27-28 ("Where then is boasting? It is excluded. By what kind of law? Of works? No, but by a law of faith. For we maintain that a man is justified by faith apart from works of the Law."); *Ephesians* 2:8-9 ("For by grace you have been saved through faith; and that not of yourselves, it is the gift of God; not as a result of works, so that no one may boast.").

290. See *Romans* 3:20 (stating "by the works of the Law no flesh will be justified in His sight").

291. See *John* 4:10 (discussing the gift of "living water" that Jesus offered a woman from Samaria); *Romans* 5:17 (explaining the "gift of righteousness" in Christ); *Romans* 6:23 ("For the wages of sin is death, but the free gift of God is eternal life in Christ Jesus our Lord."); *Ephesians* 2:8.

292. See *John* 3:16 ("For God so loved the world, that He gave His only begotten Son, that whoever believes in Him shall not perish, but have eternal life."); *John* 3:18 ("He who believes in Him [that is, God's Son Jesus] is not judged; he who does not believe has been judged already, because he has not believed in the name of the only begotten Son of God."); *John* 11:25-26 ("Jesus said to her, 'I am the resurrection and the life; he who believes in Me will live even if he dies, and everyone who lives and believes in Me will never die.'"); *Romans* 1:16-17 (describing the gospel of Jesus Christ as "the power of God for salvation to everyone who believes," and stating that the gospel reveals God's righteousness "from faith to faith").

293. See *Romans* 3:24-25 (stating that people are "justified as a gift by His grace through the redemption which is in Christ Jesus," who is "a propitiation in His blood through faith"); *Romans* 5:6 ("For while we were still helpless, at the right time Christ died for the ungodly."); *1 Corinthians* 15:3 (stating that "Christ died for our sins according to the Scriptures"); *Ephesians* 1:7 (stating that in Christ "we

of God with power<sup>294</sup> to grant eternal life to those who trust Him for it.<sup>295</sup> There are no conditions to receiving the gift of salvation. Even faith in Jesus is not viewed as a meritorious condition, but instead as the channel for receiving the gift of Divine pardon and renewal,<sup>296</sup> a humble and dependent state of heart, will and mind that essentially says, "I accept your gift, Lord Jesus, on the basis of who you are and what you have done."<sup>297</sup>

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have redemption through His blood, the forgiveness of our trespasses"); 1 *Peter* 3:18 ("For Christ also died for sins once for all, *the* just for *the* unjust, so that He might bring us to God, having been put to death in the flesh, but made alive in the spirit . . ."); 1 *John* 2:2 (stating that the Lord Jesus "is the propitiation for our sins; and not for ours only, but also for *those of the whole world.*").

The author of *Hebrews* explains Christ's sacrifice of Himself for the sin of humanity as a priestly service:

For it was fitting for us to have such a high priest, holy, innocent, undefiled, separated from sinners and exalted above the heavens; who does not need daily, like those high priests, to offer up sacrifices, first for His own sins and then for the *sins* of the people, because this He did once for all when He offered up Himself.

*Hebrews* 7:26–27; see also *Hebrews* 9:12 (stating that Christ entered into the heavenly tabernacle as High Priest "not through the blood of goats and calves, but through His own blood, . . . having obtained eternal redemption").

294. See *Romans* 1:4 (stating that Jesus "was declared the Son of God with power by the resurrection from the dead").

295. See *John* 3:16 (stating that "that whoever believes in Him [that is, the Son of God] shall not perish, but have eternal life"); *John* 3:36 ("He who believes in the Son has eternal life . . ."); *John* 5:24 ("Truly, truly, I say to you, he who hears My word, and believes Him who sent Me, has eternal life, and does not come into judgment, but has passed out of death into life."); *John* 6:27 ("Do not work for the food which perishes, but for the food which endures to eternal life, which the Son of Man will give to you, for on Him the Father, God, has set His seal."); *John* 6:29 ("This is the work of God, that you believe in Him whom He has sent."); *John* 6:40 ("For this is the will of My Father, that everyone who beholds the Son and believes in Him will have eternal life, and I Myself will raise him up on the last day."); *John* 10:27–28 ("My sheep hear My voice, and I know them, and they follow Me; and I give eternal life to them, and they will never perish; and no one will snatch them out of My hand."); 1 *Timothy* 1:16 (stating that Paul received mercy so that "Jesus Christ might demonstrate His perfect patience as an example for those who would believe in Him for eternal life."); 1 *John* 5:13 ("These things I have written to you who believe in the name of the Son of God, so that you may know that you have eternal life.").

296. See MCGRATH, *supra* note 255, at 339 (describing Martin Luther's concept of justification by grace through faith; stating that the phrase does not mean that a sinner is justified "on account of" faith).

297. See LIGHTNER, *supra* note 253, at 160 ("Christ's work alone saves, but unless His Person and work are received by faith, no benefit comes to the individual sinner.").

This understanding of salvation solely as the work of God<sup>298</sup> received through personally trusting the Lord Jesus<sup>299</sup> for eternal life reflects not only a theological perspective of the condition of humankind, but also a view of God's identity and nature. Because human beings cannot "achieve" or "merit" salvation, it arises solely from the grace of God.<sup>300</sup> God's grace, or unearned favor,<sup>301</sup> arises from His love for human beings.<sup>302</sup> The love of God the Father<sup>303</sup> led Him to send His Son, the eternal Word<sup>304</sup> who is one with the Father in essence<sup>305</sup> yet distinct in His personhood,<sup>306</sup> to become the Savior of the world.<sup>307</sup> The Son, eternally God,<sup>308</sup> willingly became a human being,<sup>309</sup>

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298. See *id.* at 139 ("Salvation is from the Lord. It is His work from start to finish.").

299. See GRUDEM, *supra* note 257, at 710 (stating that "saving faith is not just a belief in facts but *personal trust in Jesus to save me*").

300. See *Romans* 3:24 (stating that the believer is "justified as a gift by His [that is, God's] grace through the redemption which is in Christ Jesus"); *Ephesians* 1:7-8 (stating that believers "have redemption through His [that is, Christ's] blood, the forgiveness of our trespasses, according to the riches of His grace which He lavished on us"); *Ephesians* 2:8 (stating that "by grace you have been saved through faith; and that not of yourselves, it is the gift of God"); *Titus* 3:7 (stating that the believer in Christ is "justified by His [that is, God's] grace").

301. See LIGHTNER, *supra* note 253, at 145 ("The grace of God has to do with the undeserved favor He displays toward sinners.").

302. See *Ephesians* 2:4-6 (explaining that, "because of His great love with which He loved us, even when we were dead in our transgressions, [God] made us alive together with Christ (by grace you have been saved), and raised us up with Him, and seated us with Him in the heavenly places in Christ Jesus").

303. See 1 *John* 3:1 ("See how great a love the Father has bestowed on us, that we would be called children of God . . .").

304. See *John* 1:1-3 ("In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things came into being through Him, and apart from Him nothing came into being that has come into being."); *John* 1:14 ("And the Word became flesh, and dwelt among us, and we saw His glory, glory as of the only begotten from the Father, full of grace and truth.").

305. See *John* 10:30 ("I and the Father are one."). That each Person of the Godhead is of one essence is the language of the orthodox articulation of the doctrine of the Trinity. See BERKHOF, *supra* note 252, at 87.

306. See 1 *Timothy* 2:5 ("For there is one God, and one mediator also between God and men, the man Christ Jesus . . ."). The distinct Personhood of each member of the Godhead is also a tenet of the orthodox doctrine of the Trinity. See BERKHOF, *supra* note 252, at 87-88.

307. See *John* 3:16.

308. See *John* 1:1-3, *John* 8:58 ("Jesus said to them, 'Truly, truly, I say to you, before Abraham was born, I am.'"); *Hebrews* 1:1-3 (stating that God "has spoken to us in His Son, whom He appointed heir of all things, through whom also He

lived a perfectly righteous life,<sup>310</sup> and then voluntarily laid down His life as a substitutionary sacrifice for human sin.<sup>311</sup> Salvation requires an act of God because people are helpless to save themselves.<sup>312</sup> But God had to judge human sin in order to maintain justice.<sup>313</sup> One, and only one, could be both a perfect human sacrifice and the Divine Savior. That One must be both God and human—the Lord Jesus Christ,<sup>314</sup> the second Person of the Trinity.<sup>315</sup> God judged the sin of humanity by condemning

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made the world”; describing Jesus as “the radiance of His [that is, God’s] glory and the exact representation of His nature,” and as the One who “upholds all things by the word of His power”; *Revelation* 22:13 (“I am the Alpha and the Omega, the first and the last, the beginning and the end.”). For a summary of the extensive scriptural support for the proposition that Jesus is God, see BERKHOF, *supra* note 252, at 94–95.

309. See *John* 1:14; *Hebrews* 2:14 (“[S]ince the children share in flesh and blood, He [that is, Jesus] Himself likewise also partook of the same, that through death He might render powerless him who had the power of death, that is, the devil . . .”).

310. See 2 *Corinthians* 5:21 (stating that God “made Him who knew no sin to be sin on our behalf, so that we might become the righteousness of God in Him”); *Hebrews* 4:15 (“For we do not have a high priest who cannot sympathize with our weaknesses, but One who has been tempted in all things as *we are*, yet without sin.”).

311. See *Romans* 3:24–25; *Romans* 5:6; 1 *Corinthians* 15:3; *Ephesians* 1:7; 1 *Peter* 3:18; 1 *John* 2:2; *Hebrews* 7:26–27; *Hebrews* 9:12.

312. See *Romans* 5:6 (“For while we were still helpless, at the right time Christ died for the ungodly.”).

313. In response to the rhetorical question, “The God who inflicts wrath is not unrighteous, is He?” the Apostle Paul answered, “May it never be! For otherwise, how will God judge the world?” *Romans* 3:5–6. He then explained that God also maintains justice by judging human sin through the cross of Christ:

[Sinners are] justified as a gift by His grace through the redemption which is in Christ Jesus; whom God displayed publicly as a propitiation in His blood through faith. *This was* to demonstrate His righteousness, because in the forbearance of God He passed over the sins previously committed; for the demonstration, *I say*, of His righteousness at the present time, so that He would be just and the justifier of the one who has faith in Jesus.

*Romans* 3:24–26.

314. See LIGHTNER, *supra* note 253, at 73 (“Bridging the gap between God and man depends upon the union of humanity and deity in Christ.”).

315. The doctrine of the Trinity, expressed in ontological terms, is that God is one essence in three persons. God is eternally Father, Son, and Spirit. Although each Person of the Godhead is distinct, the Godhead is indivisible. Moreover, each Person coinheres with the other Persons (meaning that each Person is present within the Person of each other member of the Trinity). See ERICKSON, *supra* note 256, at 305. For a discussion of the doctrine of the Trinity, see BERKHOF, *supra* note 252, at 82–99; ERICKSON, *supra* note 256, at 291–313.

it in the sinless Christ, who bore the sins of humanity on the cross.<sup>316</sup> Receiving the pardon of the Father through the atonement of the Son,<sup>317</sup> the believer is also regenerated<sup>318</sup> and sanctified<sup>319</sup> by the Holy Spirit,<sup>320</sup> the third Person of the Trinity, who was given by God to believing humanity after the resurrection and ascension of Jesus.<sup>321</sup> In this way, salvation is completely the

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316. See *Romans* 8:3 (“For what the Law could not do, weak as it was through the flesh, God *did*: sending His own Son in the likeness of sinful flesh and *as an offering* for sin, He condemned sin in the flesh . . .”); *2 Corinthians* 5:21 (“He made Him who knew no sin *to be* sin on our behalf, so that we might become the righteousness of God in Him.”); *Galatians* 3:13–14 (“Christ redeemed us from the curse of the Law, having become a curse for us—for it is written, ‘Cursed is everyone who hangs on a tree’—in order that in Christ Jesus the blessing of Abraham might come to the Gentiles, so that we would receive the promise of the Spirit through faith.”); *1 John* 2:2 (stating Jesus is “the propitiation for our sins; and not for ours only, but also for *those of the whole world*”).

317. See *Romans* 5:1–2 (“Therefore, having been justified by faith, we have peace with God through our Lord Jesus Christ, through whom also we have obtained our introduction by faith into this grace in which we stand . . .”); *2 Corinthians* 5:18–19 (stating that God “reconciled us to Himself through Christ and gave us the ministry of reconciliation, namely, that God was in Christ reconciling the world to Himself, not counting their trespasses against them”); *Ephesians* 1:7 (stating that in Christ “we have redemption through His blood, the forgiveness of our trespasses, according to the riches of His grace”); *Colossians* 1:14 (stating that in Christ “we have redemption, the forgiveness of sins”).

318. Regeneration “is God’s transformation of individual believers, his giving a new spiritual vitality and direction to their lives when they accept Christ.” ERICKSON, *supra* note 256, at 872.

319. “Sanctification is the continuing work of God in the life of believers, making them actually holy.” *Id.* at 897; see also *id.* at 899 (“Sanctification is the work of the Holy Spirit.”). Sanctification begins with conversion, progresses during the life of the believer, and is finally accomplished in the glorification of the believer’s new (resurrected) body at the return of Christ. See GRUDEM, *supra* note 257, at 747–53.

320. See *2 Corinthians* 3:18 (“But we all, with unveiled face, beholding as in a mirror the glory of the Lord, are being transformed into the same image from glory to glory, just as from the Lord, the Spirit.”); *1 Thessalonians* 4:7–8 (“For God has not called us for the purpose of impurity, but in sanctification. So, he who rejects *this* is not rejecting man but the God who gives His Holy Spirit to you.”); *2 Thessalonians* 2:13 (“But we should always give thanks to God for you, brethren beloved by the Lord, because God has chosen you from the beginning for salvation through sanctification by the Spirit and faith in the truth.”); *Titus* 3:5–6 (stating that God saved us “by the washing of regeneration and renewing by the Holy Spirit, whom He poured out upon us richly through Jesus Christ our Savior”).

321. See *John* 14:16–17 (stating that, when Jesus has returned to the Father, He “will give you another Helper, that He may be with you forever; *that is* the Spirit of truth”); *Acts* 2:1–4 (describing the coming of the Holy Spirit on believers on the Day of Pentecost).



work of the Triune God,<sup>322</sup> who for love of the pinnacle of His creation did what no merely human being could do alone.<sup>323</sup>

This synopsis of evangelicalism and evangelical soteriology lays the groundwork for examining the implications of evangelical thought for public service by evangelicals such as Russell Vought. As Section II.B explains, biases that evangelicals may encounter in government officials such as Senator Sanders are unjustified.

*B. Implications of Evangelicalism for Public Servants*

The conclusion of Senator Sanders that Russell Vought was “not someone who is what this country is supposed to be about,”<sup>324</sup> and therefore unfit for public service, appears to derive from Senator Sanders’s assessment of Mr. Vought’s evangelical soteriology, or what Senator Sanders assumes are the implications of it. The hostility of Sanders seems more visceral than analytical, for he failed to advance with precision any argument that Mr. Vought’s theology precluded him from constitutionally or otherwise effectively discharging the office which he had been nominated to fill. Senator Van Hollen hardly reasoned any better. When he raised the question of “public trust,”<sup>325</sup> he offered no evidence or logical argument that Mr. Vought’s soteriology would lead him to violate the “public trust” in any way. The failure of Senators Sanders and Van Hollen to advance a reasoned argument renders critical interaction with their comments challenging. One must speculate as to the precise grounds on which Senator Sanders disqualified the evangelical Russell Vought from serving his country, and on which Senator Van Hollen tried to give Sanders cover.

This Section explores possible objections to Mr. Vought, and by extension to any evangelical, that government actors like Senator Sanders may harbor but fail to articulate. I limit the

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322. See LIGHTNER, *supra* note 253, at 143 (stating that “[e]ach of the three members of the holy Trinity—Father, Son, and Holy Spirit—has a vital part” in the salvation of humankind).

323. See *id.* at 140 (“Guilty sinners dead in trespasses and sin and without any merit before God will not and cannot initiate contact with God.”).

324. *Hearing, supra* note 2, at 16 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

325. *Id.* at 17.

discussion to those objections that are suggested in Senator Sanders's interrogation of Mr. Vought. The objections that I examine are the following: (1) evangelical soteriology is mutually exclusive with other faiths, including Islam; (2) evangelical soteriology reflects intolerance of people of other faiths; and (3) evangelical soteriology assumes a view of sin that is offensive.

1. *The Question of Mutual Exclusivity*

Perhaps some object to public service by evangelicals such as Russell Vought because evangelical soteriology insists on certain truths that are inconsistent with the faith claims of other religions. One could point to inconsistencies between Christianity (in general, and specifically evangelicalism) and numerous other religious faiths and forms of spirituality, including Judaism, Hinduism, Buddhism, New Ageism, and Scientology. Because Mr. Vought's opinion piece involved a question of the worship of God by Christians and Muslims,<sup>326</sup> and this question provides context for the exchange between Vought and Sanders, let us focus on the possible objection that Christians hold certain views that are antithetical to Islam (as represented by the teachings of the Quran). My response is (1) they do, and (2) so what?

That certain claims of the Quran and certain claims of evangelical Christianity are mutually exclusive is undeniable. To name some of the most important differences, evangelicals (like other historically orthodox Christians)<sup>327</sup> believe that God is Trinity: the Father, the Son, and the Holy Spirit.<sup>328</sup> The Quran teaches against the Trinity.<sup>329</sup> Correlatively, evangelicals believe that Jesus is the Divine Son of God the Father<sup>330</sup> and also

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326. See Vought, *supra* note 18.

327. Again, in setting forth "evangelical" beliefs, I do not imply that these beliefs are unique to evangelicals. Many orthodox Christians who may not identify with evangelicalism still affirm many or all of the doctrines identified in this Section.

328. For a discussion of the doctrine of the Trinity, see MCGRATH, *supra* note 255, at 299–325. As McGrath explains, the doctrine of the Trinity is vitally important in Christianity because it is inseparable from the Christian understanding of who Jesus is. See *id.* at 301.

329. *Quran* 4:171; 5:73.

330. The deity of Christ is no small matter in orthodox Christianity, as Dallas Theological Seminary Professor Robert Lightner explains:

man. The Quran denies that Jesus is the eternally begotten Son of God.<sup>331</sup> Indeed, the Quran teaches that ascribing deity to Jesus is blasphemous and will result in a fiery judgment.<sup>332</sup> Evangelical theology emphasizes the historical reality and saving nature of the death of Christ by crucifixion and his bodily resurrection.<sup>333</sup> The Quran teaches that Jesus was not even actually crucified.<sup>334</sup> Evangelical Christians believe that deliverance from sin's ultimate penalty is avoided simply by personally trusting in the Lord Jesus Christ for this deliverance.<sup>335</sup> They join the Apostle Paul in affirming, "if you confess with your mouth Jesus as Lord, and believe in your heart that God raised Him from the dead, you will be saved."<sup>336</sup> Like the Philippian jailer who inquired of Paul, should an inquisitive soul ask, "[W]hat must I do to be saved?" an evangelical would echo the apostle, "Believe in the Lord Jesus, and you will be saved . . ."<sup>337</sup> The Quran, in contrast, teaches that judgment will be based on a balancing of an individual's morals, beliefs, and deeds (or character-producing deeds).<sup>338</sup> The full deity and humanity of Christ, and the need of every human being to trust in the resurrected Son of God for eternal life, are the core of the

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An attack upon the deity of the Savior of sinners is an attack upon Christianity itself. There is no room for difference or debate here. To deny that Jesus of Nazareth was fully God is to remove oneself from the historic, orthodox Christian faith.

LIGHTNER, *supra* note 253, at 67

331. *Quran* 112:1–4.

332. See *Quran* 5:72 ("They do blaspheme who say: 'Allah is Christ the son of Mary.' But said Christ: 'O children of Israel, worship Allah my Lord and your Lord.' Whoever joins other gods with Allah, Allah will forbid him the garden and the Fire will be his abode. There will for the wrong-doers be no one to help.").

333. See MCGRATH, *supra* note 261, at 66–67 (stating that "evangelicalism places a special emphasis on the centrality of the cross of Christ" and that the death of Christ on the cross is "the unique, necessary and sufficient basis of salvation, which both demonstrates the full extent of God's love for us and establishes the centrality of Christ to Christian worship and adoration").

334. *Quran* 4:157–158.

335. See GRUDEM, *supra* note 257, at 710 ("Saving faith is trust in Jesus Christ as a living person for forgiveness of sins and for eternal life with God.").

336. *Romans* 10:9.

337. *Acts* 16:30–31.

338. *Quran* 7:8–9; 21:47. See generally Ibrahim Amini, *Scale of Deeds*, AL-ISLAM.ORG, <https://www.al-islam.org/resurrection-maad-quran-ayatullah-ibrahim-amini/scale-deeds> [https://perma.cc/8HXN-24J9] (last visited Mar. 24, 2018).

Christian faith. The Quran disputes every aspect of this core (other than the recognition that Jesus was a human). The inescapable conclusion is that the Quran disputes absolutely foundational elements of evangelical soteriology (indeed, more generally, historically orthodox Christian soteriology) based upon the Person and work of the Lord Jesus Christ and the helpless condition of humanity apart from faith in Christ. Fundamental differences between Islam (as represented by the teachings of the Quran) and Christianity, especially how each religion views God and Christ, are what Russell Vought was addressing in his article.<sup>339</sup>

Thus, to the extent that Senator Sanders and other political office-holders spot doctrinal incompatibility between evangelical soteriology and the teachings of Islam's most revered source of doctrine, they are correct. But that brings us to the second prong of my response: so what? Mutual exclusivity between evangelical soteriology and Islamic teaching is hardly grounds for asserting the unfitness of Russell Vought, any other evangelical, or any Muslim for public service. By definition, mutual exclusivity is just that—*mutual*. The proposition that evangelical soteriology flatly contradicts the belief system of millions of Muslim Americans can be restated as the proposition that Islamic theology flatly contradicts the belief system of millions of evangelical Americans.<sup>340</sup> Indeed, orthodox Christi-

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339. This fact, which appeared to escape Senator Sanders, was firmly grasped by a staff writer for *The Atlantic*:

Quoted in the context of his piece, Vought's statement about Muslims carries a different meaning from what Sanders was implying: He was deconstructing [Wheaton College Professor] Hawkins's theological claims about the relationship between Islam and Christianity.

Emma Green, *Bernie Sanders's Religious Test for Christians in Public Office*, ATLANTIC (June 8, 2017), <https://www.theatlantic.com/politics/archive/2017/06/bernie-sanders-chris-van-hollen-russell-vought/529614/> [<https://perma.cc/5SPH-MCCN>].

340. The statement in the text is an application of simple logic. If  $A \neq B$ , then  $B \neq A$ . That mutual exclusivity "runs both ways" is obviously true in the case of religion, and Senator Sanders's inability to recognize it in the context of Vought's analysis is troubling:

It's one thing to take issue with bigotry. It's another to try to exclude people from office based on their theological convictions. Sanders used the term "Islamophobia" to suggest that Vought fears Muslims for who they are. But in his writing, Vought was contesting something different: He disagrees with what Muslims believe, and does not think their faith is satisfactory for salvation. Right or wrong, this is a conviction held by

anity in general is mutually exclusive with what the Quran teaches in important respects, just as there are major inconsistencies between traditional understandings of every major world religion and the doctrines of others. Even universalism embraces propositions that are inconsistent with any religion teaching that a certain path of faith or obedience is necessary for enlightenment, access to heaven, or other form of spiritual advancement.

More broadly, mutual exclusivity exists among all kinds of belief systems. Atheism is mutually exclusive with any theistic perspective. Nihilism<sup>341</sup> is mutually exclusive with any religion or philosophy that finds meaning and asserts values in life. In contemporary politics, Americans hold mutually exclusive positions on such matters as the role of government in delivering health care, immigration policy, taxation, and the propriety of funding faith-based organizations and abortion providers. In short, mutual exclusivity is a certainty in all but the most homogeneous of societies.

Thus, mutual exclusivity between evangelical soteriology and traditional Islam is completely unremarkable. If Russell Vought and other evangelicals are disqualified from public service, mutual exclusivity cannot legitimately explain their disqualification.

## 2. *The Question of Tolerance*

Senator Sanders appears to believe that Mr. Vought should not be allowed to serve in public office because he is or would be intolerant of Muslims specifically, or perhaps more general-

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millions of Americans—and many Muslims might say the same thing about Christianity.

*Id.*

To further illustrate the point, as observed by Dr. Jeremy Evans in commenting on a prior draft of this article, if Senator Sanders's view is that holding theological positions that are mutually exclusive with the views of other Americans is disqualifying, Senator Sanders would disqualify himself. His objections to the views of Mr. Vought illustrate mutual exclusivity between Sanders's beliefs and Vought's beliefs. Or to put the matter more bluntly, consistent logic compels the conclusion that, if Vought's views of salvation in Christ alone are "Islamophobic," then Sanders's mutually exclusive views are "Christophobic" (or at least "Evangelicalphobic").

341. See THE OXFORD DICTIONARY OF WORLD RELIGIONS, *supra* note 252, at 699 (defining nihilism as "[t]he view that positive claims (in metaphysics, ethics, epistemology, religion, etc.) are false").

ly, of anyone who holds viewpoints (at least religious ones) that differ from his own. After all, Sanders characterized Vought's theological views as "hateful"<sup>342</sup> and "Islamophobic."<sup>343</sup>

"Intolerance" is not self-defining. Four possible senses of the term will be discussed to determine if any are sufficient to justify the position of Senator Sanders. One sense of the term, easily refuted, is intolerance as "disagreement." Mr. Vought disagreed with any understanding of salvation from sin other than one grounded in personal faith in the Lord Jesus Christ. But objecting to a nominee because of his or her "disagreement" with others is just another way of articulating the mutual exclusivity objection. Mr. Vought disagrees with the Quranic teaching on Jesus and salvation because it is mutually exclusive with evangelical (and any orthodox) Christian soteriology. Insofar as mutual exclusivity between a candidate's views of various issues and the views of at least some other Americans is inevitable and inconsequential, objecting to a nominee merely because the nominee "disagrees" with millions of Americans on religious, philosophical, ethical, or other issues is nonsense.

But Russell Vought did more than possess disagreement with millions of Americans; he expressed that disagreement openly. Thus, perhaps Senator Sanders considers Mr. Vought "intolerant" because he had the audacity to express disagreement with millions of Americans on the question of soteriology publicly.

A little reflection should lead one also to reject this second sense of intolerance—open disagreement with others. Liberal democracies thrive on full and frank deliberation. Constitutionally, the United States normalizes the value of open discussion by protecting the freedoms of speech and the press. These rights are central to the proper functioning of our republic.<sup>344</sup> We value public deliberation in our political discourse, as well as in our discourse about social, religious, medical, and many

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342. *Hearing, supra* note 2, at 4 (statement of Sen. Bernard Sanders, Ranking Member, Senate Comm. on the Budget).

343. *Id.*

344. Indeed, the Speech or Debate Clause is designed in part to ensure the unrestrained ability of legislators to discuss and vote freely upon matters before Congress. It would be a grim irony indeed were one to adopt this second sense of intolerance when Senator Sanders is himself shielded from constitutional scrutiny so that he may engage in open debate.

other types of issues. Robust public deliberation cannot take place if people are stifled from expressing views that challenge the views of others. To object to a nominee on the grounds that he or she has taken public positions that differ from those of others, even two million of them, is to reject the value of public deliberation in a liberal democracy. That approach to intolerance would also tend to reward cowards and hypocrites, both of whom would be more likely to survive the nomination process than would their more outspoken colleagues. The nomination process should instead not penalize nominees merely because they have participated in controversial public discussions of important issues. Equating “public disagreement” with “intolerance” has no place in America.

These first two senses of “intolerance” are content-neutral. But it appears that Senator Sanders believed that Mr. Vought was or would be intolerant of others not simply because he had disagreed with them, or had done so publicly. Senator Sanders’s own words reflect a conclusion that Mr. Vought’s evangelicalism, or at least how he articulated it, is substantively intolerant. Is evangelical soteriology “intolerant” in the sense of implying disrespect or mistreatment, perhaps discriminatory treatment, of those who are not evangelicals? That Senator Sanders had this concern is evident from his questioning Mr. Vought about whether his views are “respectful of other religions,”<sup>345</sup> as well as Sanders’s opening remarks to the committee in which he characterized Vought’s views as “Islamophobic” and “hateful.”<sup>346</sup> Sanders also included “Islamophobia” in the list of items comprising “discrimination of all forms.”<sup>347</sup> He then referred to “progress in becoming a less discriminatory and more tolerant society,” opined that “we must not go backwards,” and announced that the nomination “of an individual who has expressed such strong Islamophobic language is simply unacceptable.”<sup>348</sup>

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345. *Hearing, supra* note 2, at 15 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).

346. *Id.* at 4 (statement of Sen. Bernard Sanders, Ranking Member, Senate Comm. on the Budget).

347. *Id.*

348. *Id.*

Because of the inflammatory rhetoric of Senator Sanders, whether evangelical theology is substantively intolerant in the sense of fostering disrespect for others must be squarely addressed. There is no escaping the imperative of analyzing this issue thoughtfully under the rationale that doing so is politically impolite. Evangelicals such as Vought deserve better than the likes of Sanders's charged and conclusory pronouncements of abhorrence. Senator Sanders essentially prosecuted Vought's evangelical soteriology in a trial-like setting and then rested his case.<sup>349</sup> Vought's views require a fair hearing.

Mr. Vought attempted to assure Senator Sanders that he harbored no intolerance in the sense of hatred or discriminatory proclivity. Mr. Vought responded to Senator Sanders by stating his belief that every human being is made in the image of God and is worthy of respect.<sup>350</sup> To those uninitiated in Christian theology, invoking the creation of human beings in the "image of God" as a solid foundation for treating everyone respectfully, indeed with equal dignity, may sound like running for cover. But to a serious Christian, including an evangelical, the creation of humanity in the image of God means that every person, of every nation, tribe, and tongue, is sacred, and must be treated as such. Wayne Grudem, a professor of Theology and Biblical Studies at Phoenix Seminary, says it well:

Every single human being, no matter how much the image of God is marred by sin, or illness, or weakness, or age, or any other disability, still has the *status* of being in God's im-

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349. Senator Van Hollen's attempted whitewashing of Senator Sanders's inquisition was demonstrably counterfactual. Van Hollen defended Sanders by telling Vought that "nobody is questioning your faith." *Id.* at 17 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget). This denial of reality is comically stunning. Of course Sanders was questioning Vought's faith. He did it repeatedly. He asked several questions about whether Vought believed that those who did not accept Jesus Christ as Savior would be "condemned" and whether that view was disrespectful or Islamophobic. *See id.* at 15. The whole context of Vought's article (to which Sanders objected) was the central importance of who Jesus is and what He has done. To reject the saving work of the Divine Jesus is to reject the orthodox Christian concept of God, Christ, and salvation from sin. To question Vought about his views on the matter is clearly to "question his faith." Indeed, it is to question him on matters that are among the most central elements of his faith.

350. *See Hearing, supra* note 2, at 15 (statement of Russell T. Vought, To Be Deputy Director, Office of Management and Budget).



age and therefore must be treated with the dignity and respect that is due to God's image-bearer. This has profound implications for our conduct toward others. It means that people of every race deserve equal dignity and rights. It means that elderly people, those seriously ill, the mentally retarded, and children yet unborn, deserve full protection and honor as human beings.<sup>351</sup>

Because Mr. Vought focused on the "image of God" in his response, I will first examine its relevance to this third sense of "intolerance" that concerned Senator Sanders.

The creation of humanity in the image of God (often referred to in theological discourse in its Latin form, the *imago Dei*<sup>352</sup>) is taught from the first chapter of Genesis<sup>353</sup> and is affirmed in Wheaton College's Statement of Faith.<sup>354</sup> In terms of the most basic implications for civilized society, creation in God's image is reason not to take innocent human life.<sup>355</sup> But being made in God's image implies much more than refraining from homicide, and this point is recognized in evangelical theology and the Scripture that evangelicalism so highly regards. Humanity is "crown[ed] . . . with glory and majesty,"<sup>356</sup> and superior to the rest of the physical creation.<sup>357</sup> To bear God's image implies the duty and privilege of reflecting God and His character.<sup>358</sup> Theologians have observed that the reflection of God's likeness is multi-dimensional, including such features of humanity as rationality,<sup>359</sup> spirituality,<sup>360</sup> and relationality<sup>361</sup> (among oth-

351. GRUDEM, *supra* note 257, at 450.

352. See, e.g., MCGRATH, *supra* note 255, at 327.

353. *Genesis* 1:26–27 ("Then God said, 'Let Us make man in Our image, according to Our likeness; and let them rule over the fish of the sea and over the birds of the sky and over the cattle and over all the earth, and over every creeping thing that creeps on the earth.' God created man in His own image, in the image of God He created him; male and female He created them.").

354. See *Wheaton Statement of Faith*, *supra* note 15 (affirming that "God directly created Adam and Eve, the historical parents of the entire human race; and that they were created in His own image, distinct from all other living creatures").

355. See *Genesis* 9:6.

356. *Psalms* 8:5.

357. See *Psalms* 8:6–8.

358. See BERKHOF, *supra* note 252, at 220 (stating that the image of God includes "true knowledge, righteousness, and holiness").

359. See *id.* at 221 (stating that that the image of God includes "intellectual power, natural affections, and moral freedom"; stating that humans have "a rational and moral nature").

ers).<sup>362</sup> The *imago Dei* links the creation of humanity with other important biblical themes, doctrines and commands, including the doctrine of the Trinity,<sup>363</sup> soteriology,<sup>364</sup> and the command to love others as oneself.<sup>365</sup>

As to the relationship between the *imago Dei* and the treatment of others, James makes the connection explicit. He teaches the inconsistency of blessing God, on the one hand, and cursing human beings, on the other.<sup>366</sup> In pointing out the inconsistency, James notes that human beings “have been made in the likeness of God.”<sup>367</sup> James teaches that one who blesses God should also bless those who are made in God’s image. Honoring God requires that we love people, who are made in God’s image.

The teaching is reminiscent of that of the Lord Jesus. An expert in the law once asked Jesus to identify the “great commandment” in the law. The Apostle Matthew reports the response of Jesus as follows:

And He said to him, “YOU SHALL LOVE THE LORD YOUR GOD WITH ALL YOUR HEART, AND WITH ALL YOUR SOUL, AND WITH ALL YOUR MIND.’ This is the great and foremost commandment. The second is like it, ‘YOU SHALL LOVE YOUR NEIGHBOR AS YOURSELF.’ On these two commandments depend the whole Law and the Prophets.”<sup>368</sup>

Like James, Jesus taught correspondence between one’s vertical relationship (that between God and people) and one’s horizon-

360. See *id.* at 222 (“Another element usually included in the image of God is that of spirituality.”).

361. See GRUDEM, *supra* note 257, at 447–48.

362. See generally ERICKSON, *supra* note 256, at 457–74 (discussing the meaning and implications of the creation of human beings in the image of God); GRUDEM, *supra* note 257, at 442–50 (same).

363. See Stanley J. Grenz, *Theological Foundations for Male-Female Relationships*, 41 J. EVANGELICAL THEOLOGY SOC’Y 615, 622 (1998) (“The doctrine of the Trinity makes clear that throughout eternity God is the fellowship of the three persons. No wonder, then, that God’s image-bearers best reflect the divine nature in their relationality.”).

364. See GRUDEM, *supra* note 257, at 445 (describing redemption in Christ as a progressive recovering of the image of God).

365. See ERICKSON, *supra* note 256, at 471 (discussing reasons that humans are made in God’s image and noting God’s intention that “humans be bound together with one another in love”).

366. See *James* 3:9–10.

367. *James* 3:9.

368. *Matthew* 22:37–40.

tal relationships (those among people). One cannot legitimately separate love for God and love for those who are made in His image—all people.

The inclusivity of the command to love one's neighbor, who is also made in the *imago Dei*, is quite striking in Luke's similar account of the testing of Jesus by an expert in the law.<sup>369</sup> After correctly crystallizing the moral standard required by the law into the two great commandments cited above, the lawyer then asked Jesus, "Who is my neighbor?"<sup>370</sup> Jesus responded by telling perhaps the most famous parable of all, the Parable of the Good Samaritan.<sup>371</sup> The hero of the parable was, of course, a Samaritan—a man who was *other* than those surrounding Jesus: he was from *another* culture that embraced *other* religious perspectives, and his family tree branched through *other* nationalities and ethnicities. But it was this *other* man's love of a fellow human being that Jesus held up as exemplary for loving one's neighbor as oneself. This Samaritan did much more than merely pay lip service to "tolerating" someone of a very different background. He loved the *other* generously and tenderly, and even at some risk to his own personal safety. That is what it means to love one's neighbor. That is an important aspect of what it means to reflect the *imago Dei* and to honor it in a fellow human being.

Thus, when Russell Vought responded to Senator Sanders's question of whether he was Islamophobic by insisting that he believed everyone to be made in the image of God and therefore worthy of respect, Vought was drawing upon a theological tradition that views love for other human beings, including those of other faiths and nationalities, as a foundational moral imperative that follows from the creation of humanity in the image of God.<sup>372</sup> Vought was essentially saying, "Of course I would not mistreat a Muslim for being Muslim. A Muslim is

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369. See Luke 10:25–37.

370. Luke 10:29.

371. Luke 10:30–37.

372. See, e.g., ERICKSON, *supra* note 256, at 473 (listing implications of the doctrine of the *imago Dei*, including the sacredness of human life and the "universality of the image"; observing "there is dignity to being human" and stating "[w]e should not be disdainful of any human being"; reasoning that creation in the image of God means that "depriving someone of freedom through illegal means, manipulation, or intimidation is improper").

created in the image of God, just as I am, and is therefore of equal dignity and worth.”

Indeed, an unbiased perusal of Mr. Vought’s argument reveals his inclusive and evangelistic motive for objecting to the statement of Dr. Hawkins, the Wheaton political science professor who claimed that Christians and Muslims worship the same God. In his article criticizing her statement, Vought reasoned as follows:

Why downplay the primacy of Jesus Christ in having a relationship with God? Does Dr. Hawkins really want to send a confusing (albeit highly nuanced) message to the world (and many of her own Christian students) in which the quick takeaway for many people will be that they do not need to know this Jesus Christ who claims to be their God and King? How does that lead to more brothers and sisters in Christ? It doesn’t.<sup>373</sup>

“What brothers and sisters?” one may ask. The answer is obvious: those who currently do not know Christ. In other words, Vought was arguing for the imperative of adhering to the Gospel message univocally to the end that those who hear it and trust in Jesus will become Vought’s brothers and sisters in Christ. The aim of Mr. Vought was not the exclusion of Muslims. Rather, by upholding the distinctively Christian message of salvation through personal faith in the God-man, the Lord Jesus, Vought looked to expand His family of faith to include Muslims and others who do not know this Jesus for who He is.

In embracing the prospect of “leading more brothers and sisters to Christ,” Mr. Vought was adhering to one of evangelicalism’s distinctive priorities—broadly inclusive evangelism.<sup>374</sup> This evangelical imperative follows directly from the teaching of Scripture. The Apostle Matthew records that the Lord Jesus, after His resurrection and prior to His ascension, commanded His disciples to proclaim the Gospel message to all people, throughout the world.<sup>375</sup> Luke affirms this international com-

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373. Vought, *supra* note 18.

374. As McGrath observes, “the intense joy of knowing Christ makes it natural for evangelicals to wish to share this experience with those whom they love, as an act of generosity and consideration.” MCGRATH, *supra* note 261, at 76.

375. See *Matthew* 28:18–20 (“All authority has been given to Me [Jesus] in heaven and on earth. Go therefore and make disciples of all the nations, baptizing them in

mission in the first chapter of Acts.<sup>376</sup> And the Apostle Paul belabored the point that the community of those who receive Jesus Christ by faith constitutes an inter-ethnic, international body bound in unity.<sup>377</sup>

But what of Mr. Vought's article supporting the academic suspension of Dr. Hawkins for asserting that the worship of Allah is the worship of the Trinity? How can supporting this suspension be "tolerant"? The short answer is that context matters. Mr. Vought was not opining on the suspension of a professor at a public school, a non-sectarian private school, or a private Muslim school. One would be rightly concerned, for example, had Mr. Vought blogged that the Harvard Law School should not hire a promising faculty candidate, perhaps a scholar of Islamic law, merely because the scholar supports the worship of Allah. The mission of a large, secular law school is perfectly consistent with hiring both nonbelievers and believers from all types of religious traditions. Such is not the case with Wheaton College. Wheaton may be a liberal arts college, but it is and has always been an evangelical Christian school. Ensuring that its faculty members fully support its Statement of Faith is not an "intolerant" (that is, a "disrespectful" or "demeaning") activity, nor is supporting the school for requiring adherence to its Statement of Faith. Further, if one believes that the consistency between the remarks of the suspended professor and Wheaton's Statement of Faith is a debatable matter, it hardly follows that to opine in favor of the school's side in the debate is "intolerant" in the sense of disrespecting or mistreating the professor or maligning Muslims.

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the name of the Father and the Son and the Holy Spirit, teaching them to observe all that I commanded you; and lo, I am with you always, even to the end of the age.").

376. See *Acts* 1:8 ("[Y]ou will receive power when the Holy Spirit has come upon you; and you shall be My witnesses both in Jerusalem, and in all Judea and Samaria, and even to the remotest part of the earth.").

377. See, e.g., *1 Corinthians* 12:13 ("For by one Spirit we were all baptized into one body, whether Jews or Greeks, whether slaves or free, and we were all made to drink of one Spirit."); *Galatians* 3:28 ("There is neither Jew nor Greek, there is neither slave nor free man, there is neither male nor female; for you are all one in Christ Jesus."); *Ephesians* 4:4-6 ("There is one body and one Spirit, just as also you were called in one hope of your calling; one Lord, one faith, one baptism, one God and Father of all who is over all and through all and in all."); *Colossians* 3:10-11 ("[T]here is no distinction between Greek and Jew, circumcised and uncircumcised, barbarian, Scythian, slave and freeman, but Christ is all, and in all.").

Alas, even if Mr. Vought and Wheaton College misanalysed the theological implications of the professor's comments, the conclusion should be simply that their viewpoint was theologically mistaken, not disrespectful or demeaning.<sup>378</sup>

One may invoke anecdotes where certain evangelicals have failed to live up to their theological standards, just as one may cite examples of a great number of individuals, religious and otherwise, who have fallen short of their ideals. But any notion that Mr. Vought, by virtue of the evangelical theology expressed in his support of Wheaton College, should be expected to disrespect or mistreat anyone who does not share his religious tradition is misplaced. Mr. Vought's theological convictions impel him to show respect, decency, and kindness—and even beyond these, love—to those who do not think like him, Muslim or otherwise. Vought's convictions certainly do not render him a bigot.

### 3. *The Question of Offensiveness*

Perhaps Senator Sanders and certain other members of Congress consider Mr. Vought's evangelical soteriology "offensive," just as the city stewards of Hialeah, Florida apparently found the practice of Santeria animal sacrifice offensive in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*. Quite apart from observing that a legislator contravenes the norms underlying the Religion Clauses by disadvantaging those whose religion is deemed "offensive," I challenge those offended by Mr. Vought's soteriology to consider (1) whether objectively baseless, but real, feelings of the offensiveness of a nominee's religious viewpoints should be accorded much (if any) weight in confirmation hearings; and (2) whether the substance of Mr.

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378. Lael Weinberger aptly writes as follows:

It would be worthwhile for Christians to have conversations about what it means to claim that Muslims and Christians (and Jews, and Mormons) "worship the same God." Whatever you think the right answer is, it doesn't do anyone any good to deny that there are good-faith arguments to be heard from both sides. Throwing around accusations of bigotry or of false motives makes it harder, not easier, to have a reasonable and productive conversation.

Lael Weinberger, *Disagreement, Charity, and Islam*, FIRST THINGS: FIRST THOUGHTS (Dec. 22, 2015), <https://www.firstthings.com/blogs/firstthoughts/2015/12/disagreement-charity-and-islam> [<https://perma.cc/3U8N-72Y5>].

Vought's soteriology provides an objective, relevant basis for taking offense (that is, whether his soteriology reflects negatively on his ability to serve his country effectively). I answer each question in the negative.

As a threshold matter, determining objectively relevant grounds for feeling offended may sound paradoxical, insofar as the taking of offense is always subjective; only a particular subject knows whether and how he feels offended. But not all offense is the same. Some legislators might oppose a nominee because of any number of the nominee's characteristics that might offend someone somewhere, but for no reason relevant to public service (for example, because the nominee is blond, bald, financially successful, extroverted, pensive, pale, or Midwestern). I will first focus on this type of offense, one that is purely subjective, not based on a nominee's ability to serve in public office.

Disqualifying a nominee for no reason other than that some may be offended by the nominee's religious views is ill-advised. Most obviously, this treatment of a nominee is dishonorable and counterproductive. The practice ignores the strengths of a nominee, instead relying on the happenstance that some personal characteristic having nothing to do with the ability to engage in public service will control the fate of the nomination. Such dismissal of a nominee is unfair to the nominee, who deserves to be evaluated on the merits of her likely ability to serve the country. The practice also disserves the United States federal government, which benefits from the appointment of capable public officials. Moreover, rejecting a nominee simply because the nominee's religion may offend others for no reason germane to public service runs counter not only to the norms that undergird the Religion Clauses, but also to the broad values of the First Amendment. We protect not just the exercise of religion that may offend, but also speech, publication by the press, and assemblies that may offend. The First Amendment itself reflects a value judgment that avoiding offense *merely for the sake of avoiding offense* is not a keen governmental priority. Further, there is really no sensible reason for legislators who oppose nominees because of their "religious offensiveness" to stop with religious folk; constituents may be just as unjustifiably offended by those with different philosophical views, social practices, places of birth, hair styles, and

preferences in movies, music or video games, etc. Accepting “tendency to offend” as a criterion for opposing a nominee would therefore stifle numerous forms of diversity in public life. Such a practice is hardly prudent in a nation that purports to embrace pluralism. In short, that some may be personally “offended” by an evangelical nominee’s theological convictions is not by itself a legitimate reason to reject the nominee.<sup>379</sup>

The next question is whether a legitimate objective basis exists for rejecting Mr. Vought as someone whose religious views are offensive. Any number of objectively observable facts would be grounds for disqualifying a nominee. Consider a different nominee with a record of violence, emotionally bullying subordinates, or marching in mobs through college towns while wielding tiki torches and shouting racial epithets. Many of us find these actions terribly offensive, but the reason that the nominee should be rejected is not the offense that we justifiably feel, but the objectively observable grounds that render the nominee unfit for service. The country is not well served by those who attempt to dehumanize or physically harm others as a matter of course.

The question, then, is whether Mr. Vought’s view of sin and salvation itself (on its own terms) provides objective grounds for disqualifying him from service. Let us focus on that aspect of Mr. Vought’s theology that apparently offended Senator Sanders—Vought’s belief that only those who have trusted in Christ Jesus for salvation from sin will escape the wrath of God. I will treat Vought’s acceptance of this proposition as the observable fact that may offend some people. Although the precise reason that this belief may have offended Senator Sanders is not perfectly clear, it may have to do with a concern

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379. With respect to the specific facts surrounding the Vought hearing, that some may be offended by Vought’s view of the sinful condition of humanity simply because it conflicts with their personal sensibilities, such as their assessment that they are not that sinful, does not provide objective grounds for disqualifying him from office. The government has no business arbitrating divergent theological assessments of the condition of humanity in selecting public servants. Offense taken at Vought’s understanding of sin and salvation, with no showing of its relevance to his conduct in office, is thus precisely the type of offense that is irrelevant. This observation in no sense denies that some people may genuinely feel offended by the message that they are sinners. *See, e.g.,* LIGHTNER, *supra* note 253, at 43 (“The Gospel is offensive because it strips people of all room for pride in human accomplishment.”).



that Vought's belief inherently demeans non-Christians. Sanders used the terms "Islamophobic" and "respectful" in repeatedly questioning Vought about his views that Muslims stand "condemned." The senator thus may have worried that Vought's soteriology *on its own terms* implied disrespect for people of others faiths, or an aversion to them.<sup>380</sup> I will therefore frame the issue that may have concerned Senator Sanders as follows: does Russell Vought's evangelical perspective on sin and salvation inherently imply an aversion towards, or disrespect for, Muslims specifically, or non-Christians generally? The answer is an emphatic "no."

Evangelical soteriology is inseparable from the doctrine of sin.<sup>381</sup> The doctrine of sin assumed by Mr. Vought's comments and widely accepted within evangelicalism is the biblical doctrine that everyone, prior to trusting in Christ for salvation, exists in a state of sin and condemnation.<sup>382</sup> The Apostle John writes that such was the teaching of Jesus.<sup>383</sup> The Apostle Paul taught likewise.<sup>384</sup> The evangelical understanding of sin is not that condemnation results from one's being a "worse" sinner than another, but simply from one's being a sinner. And, as Mr. Vought's *alma mater* Wheaton College affirms,<sup>385</sup> every human

380. I have already explained why evangelical theology in general would compel Mr. Vought to show actual respect to those outside of his faith. See *supra* Section II.B.2. The proposition examined here is different, for it focuses narrowly on whether evangelical soteriology on its own terms disrespects those who reject it, rather than the ethic one would expect an evangelical to follow in life.

381. The link is not conceptually difficult to grasp. See, e.g., LIGHTNER, *supra* note 253, at 43 ("Before anyone can be redeemed, he must accept God's estimate of his sinfulness.").

382. See, e.g., ERICKSON, *supra* note 256, at 559 (stating that "sin is a barrier to the relationship between God and humans, bringing them under God's judgment and condemnation"); LIGHTNER, *supra* note 253, at 36 ("Outside of Christ we stand condemned before God and in need of His salvation . . ."); *id.* at 42 (stating that, without salvation in Christ, people "are already judged by God").

383. See *John* 3:18 ("He who believes in Him is not judged; he who does not believe has been judged already, because he has not believed in the name of the only begotten Son of God."); *John* 3:36 ("He who believes in the Son has eternal life; but he who does not obey the Son will not see life, but the wrath of God abides on him.").

384. See, e.g., *Ephesians* 2:1 (stating "you were dead in your trespasses and sins"); *Ephesians* 2:3 (stating "we too all . . . were by nature children of wrath, even as the rest.").

385. See *Wheaton Statement of Faith*, *supra* note 15, which states as follows:

being is a sinner and therefore unworthy of entering into the glorious presence of the one and only, holy God.<sup>386</sup> Thus, when Russell Vought spoke of condemnation, he was speaking of the divine-legal status of everyone apart from Christ. He was not saying that Muslims deserve to be condemned any more than Christians, or that they lack the moral approbation due Christians or other non-Muslims. It is not a matter of relative merit or comparative morality.

Indeed, in evangelical theology, one's deliverance from condemnation is not a question of merit or moral achievement at all, except for the merit and perfect character of Christ Himself.<sup>387</sup> Jesus described salvation as a gift to be received through faith,<sup>388</sup> not a prize to be awarded through moral achievement. To the same effect, the Apostle Paul described salvation as a gift,<sup>389</sup> and emphasized that it is not a result of good works.<sup>390</sup> The source of salvation is the grace of God, not anything within

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WE BELIEVE that our first parents sinned by rebelling against God's revealed will and thereby incurred both physical and spiritual death, and that as a result all human beings are born with a sinful nature that leads them to sin in thought, word, and deed.

386. See, e.g., *Romans* 3:23 ("All have sinned and fall short of the glory of God.").

387. In his letter to the church at Philippi, the Apostle Paul acknowledges that he relies not on "a righteousness of my own derived from the Law, but that which is through faith in Christ, the righteousness which comes from God on the basis of faith." *Philippians* 3:9. Paul is thus writing that it is the righteousness of God in Christ that makes Paul righteous before God, not Paul's own righteousness.

388. See, e.g., *John* 3:16 ("For God so loved the world, that He gave His only begotten Son, that whoever believes in Him shall not perish, but have eternal life."); *John* 4:10 ("Jesus answered and said to her, 'If you knew the gift of God, and who it is who says to you, 'Give Me a drink,' you would have asked Him, and He would have given you living water.'"); *John* 7:37-38 ("Jesus stood and cried out, saying, 'If anyone is thirsty, let him come to Me and drink. He who believes in Me, as the Scripture said, "From his innermost being will flow rivers of living water.'").

389. See, e.g., *Romans* 3:24 (stating that those who trust in Jesus are "justified as a gift by His grace through the redemption which is in Christ Jesus"); *Romans* 6:23 ("For the wages of sin is death, but the free gift of God is eternal life in Christ Jesus our Lord."); *Ephesians* 2:8 ("For by grace you have been saved through faith; and that not of yourselves, it is the gift of God . . .").

390. See, e.g., *Romans* 3:28 ("For we maintain that a man is justified by faith apart from works of the Law."); *Ephesians* 2:9 (describing the believer's salvation "not as a result of works, so that no one may boast"); *Titus* 3:5-6 (stating that God "saved us, not on the basis of deeds which we have done in righteousness, but according to His mercy, by the washing of regeneration and renewing by the Holy Spirit, whom He poured out upon us richly through Jesus Christ our Savior").

humanity itself.<sup>391</sup> Thus, not even faith itself is a moral basis for salvation in evangelical theology.<sup>392</sup> Rather, faith in Christ is the medium for receiving the gift of salvation from God.<sup>393</sup> The believer in Christ does not somehow “deserve” salvation “because of” faith. Rather, the believer in Jesus receives the gift of salvation through trusting in Christ (that is, in His Person and His work) for salvation.

Thus, if Senator Sanders assumed that Mr. Vought’s evangelical soteriology implied a belief that Muslims somehow are less deserving of salvation than are Christians—or, stated another way, that Muslims deserve condemnation more than Christians—his assumption reflects a lack of theological understanding. In evangelical theology, nobody “deserves” salvation, be he Christian, Muslim, Jewish, Buddhist, Hindu, agnostic, atheist, or anything else. Salvation is not awarded to the deserving. Rather, by God’s grace it is given to those undeserving souls who trust in Christ for it.

Conceivably, Senator Sanders misunderstood Mr. Vought’s theology in a different way. Perhaps Sanders reasoned that, if Vought believes that Muslims will be condemned, it must also mean that Vought’s belief system implies that God does not love or care about Muslims, and therefore this belief system is inherently demeaning or disrespectful of Muslims and other non-Christians. Once again, any such inference from Mr. Vought’s theology is erroneous.

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391. That salvation arises from the grace of God is nicely summarized in the following excerpt from Paul’s letter to the Ephesians, which repeatedly refers to God’s grace:

But God, being rich in mercy, because of His great love with which He loved us, even when we were dead in our transgressions, made us alive together with Christ (by grace you have been saved), and raised us up with Him, and seated us with Him in the heavenly *places* in Christ Jesus, so that in the ages to come He might show the surpassing riches of His grace in kindness toward us in Christ Jesus. For by grace you have been saved through faith . . . .

*Ephesians* 2:4–8; see also *Romans* 3:24 (stating that the believer is “justified as a gift by His [God’s] grace through the redemption which is in Christ Jesus”); *Titus* 3:7 (stating that the believer in Christ is “justified by His [God’s] grace”).

392. See LIGHTNER, *supra* note 253, at 160 (“Man’s faith is not the cause of his salvation.”).

393. See *id.* (stating that salvation “is always *through* faith by God’s marvelous grace”).

The scriptural basis for Russell Vought's theology is clear in affirming that God loves all human beings and longs for them to trust in His Son to receive the gift of salvation. The Apostle Paul said that God "desires all men to be saved and to come to the knowledge of the truth,"<sup>394</sup> and cited his own past of terrorizing the church<sup>395</sup> to illustrate how God offers salvation to everyone, even the worst of sinners.<sup>396</sup> He taught that God, "because of His great love with which He loved us, even when we were dead in our transgressions, made us alive together with Christ."<sup>397</sup> Similarly, the Apostle Peter taught, "The Lord is not slow about His promise, as some count slowness, but is patient toward you, not wishing for any to perish but for all to come to repentance."<sup>398</sup> The Lord Jesus similarly demonstrated and taught of God's love and open invitation of salvation to all who would trust in Him in conversations with the Jewish rabbi Nicodemus,<sup>399</sup> a socially stigmatized Samaritan woman,<sup>400</sup> and two sisters grieving the death of their brother,<sup>401</sup> as well as in his public teaching ministry.<sup>402</sup>

For Russell Vought and other evangelicals, God the Father so loves people who are currently living in a divine-legal state of condemnation that he gave His eternally beloved Son as a sacrifice for their sin, and He ever yearns for them to trust in Him for eternal life. So also, Christ the Son willingly sacrificed Himself because of His love of humankind.<sup>403</sup> Far from carrying any

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394. 1 *Timothy* 2:4.

395. See *Acts* 8:1–3; 1 *Timothy* 1:13.

396. The Apostle Paul said it this way:

It is a trustworthy statement, deserving full acceptance, that Christ Jesus came into the world to save sinners, among whom I am foremost of all. Yet for this reason I found mercy, so that in me as the foremost, Jesus Christ might demonstrate His perfect patience as an example for those who would believe in Him for eternal life.

1 *Timothy* 1:15–16.

397. *Ephesians* 2:4–5; see also *Romans* 5:8 ("But God demonstrates His own love toward us, in that while we were yet sinners, Christ died for us.").

398. 2 *Peter* 3:9.

399. See *John* 3:1–21.

400. See *John* 4:7–38.

401. See *John* 11:1–46.

402. See, e.g., *John* 6:26–40.

403. See *Galatians* 2:20 ("[T]he life which I now live in the flesh I live by faith in the Son of God, who loved me and gave Himself up for me . . ."); *Ephesians* 5:2

negative implications about God's love for those outside the fold of the Christian faith, evangelical soteriology is founded on God's love for people who have yet to embrace Christ the Savior. Further, evangelical soteriology instructs those who have received the gift of salvation—and therefore have known and benefitted from God's love—to recognize the inherent value of all bearers of God's image, to treat them accordingly, and to seek their spiritual blessing. These evangelical imperatives are to be lived out for the good of every soul inhabiting the center of the celestial sphere, from the Western Sahara to Washington, from Vietnam to Vermont. To believe or act otherwise would be to disaffirm the nature of the love of God, a love upon which evangelicals and other orthodox Christians have staked their eternal destiny.

Any further speculation on how Senator Sanders may have misinterpreted Mr. Vought's soteriology in some slightly different way likely would not advance the analysis meaningfully. The general point is clear. Mr. Vought's soteriological views imply no disrespect of, or hatred towards, Muslims or anyone else. They imply quite the opposite. Vought's soteriology is firmly grounded in the love of God for all of humanity, no matter where they were born, what language they speak, what they look like, or what they have thought about God for their entire lives. Vought's views are not objective grounds for disqualifying him or other evangelicals from public service, even if some might find them offensive for reasons unrelated to the discharge of governmental duties.

### III. CONCLUSION

United States senators can and should do better than to ascribe disrespectfulness, discriminatory propensities, and hatred to nominees for public office merely because those nominees hold theological views that contravene the claims of other religious adherents or the sentiments of secular elites. Senators who chastise nominees for holding fast to doctrinal principles in conflict with those of other religions or the sensibilities of

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("Christ also loved you and gave Himself up for us, an offering and a sacrifice to God . . ."); *Revelation* 1:5 (stating that Jesus Christ "loves us and released us from our sins by His blood").

areligious political leaders palpably violate the norms of the Religious Test Clause and the Religion Clauses of the First Amendment. But offending these norms is not equivalent to transgressing the letter of the Constitution. Although a line of questioning, like that of Senator Sanders in his interrogation of Russell Vought, may be entirely inappropriate, it is not necessarily unconstitutional. Inquiring in the manner of Senator Sanders falls short of imposing a religious test, and it does not constitute state action in violation of the Religion Clauses. The absence of a constitutional infraction on account of such questioning, or at least the nonexistence of a remediable constitutional breach, is further supported by a number of Supreme Court cases interpreting and applying the Speech or Debate Clause.

The analysis of Senator Sanders's interrogation of Mr. Vought must not end with a constitutional pass and a stern censure, however. The objection of Sanders to Vought's bold, evangelical claim that salvation from sin exists exclusively through the Lord Jesus Christ invites a broader discussion of whether authentically evangelical nominees are, by virtue of their theology, unfit to serve the public in a religiously pluralistic, democratic republic. A careful review of evangelical theology, and particularly evangelical soteriology, compels the conclusion that Russell Vought, and other evangelicals like him, are perfectly capable of serving the country nobly while holding firmly to their faith. That evangelical views and, more broadly, historically orthodox Christianity are incompatible with certain dogmas of other religions implies neither derogation of, nor disrespect for, adherents of other religious traditions. Far from suggesting that others may be discriminated against or otherwise mistreated, an evangelical ethic compels generous, even sacrificial, love of others, including those of other races, nationalities, creeds, and cultures. And the evangelical understanding of the universal love of God for humanity, embodied in the Person and work of Christ, drives the evangelical to embrace a globally inclusive vision of evangelism and to harbor hope for all of humanity to receive the grace of God through faith in the Lord Jesus. Living with this conviction and hope is wholly compatible with public service.

Senators who sit in judgment seats in confirmation hearings would do well to consider carefully their own biases against those with religious views unlike their own, be they evangeli-

cal Christians, members of Christian denominations not typically associated with evangelicalism, traditional Muslims, Reform Jews, modern Hindus, agnostics, atheists, or anyone else. Senators would do even better to also learn more about the faiths of nominees before disparaging them as bigots.

And as for evangelicals and other orthodox Christians considering whether to endure the possible spectacle of subjecting themselves to the type of antagonistic questioning endured by Russell Vought, they may rest assured that no legitimate public policy rationale disqualifies them from serving their country merely because of their faith-based commitments. Rather, they can face their inquisitors with full confidence in their theology of love and hope for all of humanity, even as did the Apostle Paul, when he wrote the following words:

I am not ashamed of the gospel, for it is the power of God for salvation to everyone who believes . . . .<sup>404</sup>

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404. *Romans* 1:16.