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## May the President Appropriately Invoke God? Evaluating the Embryonic Stem Cell Vetoes

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**MAY THE PRESIDENT APPROPRIATELY INVOKE GOD? EVALUATING THE  
EMBRYONIC STEM CELL VETOES**

**By Samuel W. Calhoun**

**ABSTRACT**

President George W. Bush twice vetoed measures to provide federal funds for embryonic stem cell research requiring the destruction of human embryos. Each veto was premised in part upon his religious beliefs. President Bush's reliance upon his faith provoked a strong negative reaction. This essay argues that this criticism is baseless.

The essay demonstrates that important political leaders spanning three centuries—including Thomas Jefferson, Abraham Lincoln, and Martin Luther King Jr.—have invoked religious beliefs in explaining their positions. The principle of “separation of church and state,” properly understood, is not a persuasive basis for criticizing this religious heritage. President Bush, in relying upon his faith to justify his vetoes, acted in accord with well-established national tradition.

The essay also examines various arguments that religious discourse in the public square is normatively inappropriate and thus should be excluded. All of these critiques fail. Anyone genuinely committed to diversity and to democratic ideals should support a rich array of disputants in public policy controversies, including religious believers openly proclaiming their faith-based values.

**MAY THE PRESIDENT APPROPRIATELY INVOKE GOD?  
EVALUATING THE EMBRYONIC STEM CELL VETOES**

*Samuel W. Calhoun\**

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## **INTRODUCTION**

President George W. Bush's first prime-time television address, on August 9, 2001, was devoted to embryonic stem cell research. After describing his struggle with the issue, he revealed that his position was "shaped by deeply held beliefs," including the belief that "human life is a sacred gift from our Creator."<sup>1</sup> He then announced the very first federal funding of stem cell research, although he limited it to stem cells obtained from embryos that had already been destroyed.<sup>2</sup> Bush believed that using taxpayer funding to encourage further destruction of human embryos would cross "a fundamental moral line."<sup>3</sup> In July 2006, Bush vetoed a bill that "would have allowed taxpayer-financed research on [stem cell] lines derived from embryos slated for destruction by fertility clinics."<sup>4</sup> Bush said that the bill, by supporting "the taking of innocent human life in the hope" of benefiting others, crossed "a moral boundary that our decent society needs to respect."<sup>5</sup> To cross that line would violate "[o]ur conscience and history" as a nation "founded on the principle that we are all created equal, and endowed by our Creator with the right to life."<sup>6</sup> In June 2007, President Bush vetoed another embryonic stem cell research bill that contemplated the deliberate destruction of human embryos.<sup>7</sup> The President, while not explicitly mentioning a "Creator," once more stressed that America is "a nation founded on the principle that all human life is sacred."<sup>8</sup>

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<sup>1</sup> George W. Bush, President, President Discusses Stem Cell Research, (Aug. 9, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/08/print/20010809-2.html>).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Sheryl Gay Stolberg, *First Bush Veto Maintains Limits On Stem Cell Use*, N.Y. TIMES, July 20, 2006, at A1.

<sup>5</sup> George W. Bush, President, President Discusses Stem Cell Research Policy (July 19, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/07/print/20060719-3.html>).

<sup>6</sup> *Id.* President Bush's formal veto message contains no reference to religious faith. It refers only to "ethics" and the "ideals of a decent and humane society." George W. Bush, President, Message to the House of Representatives (Jul. 19, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/07/print/20060719-5.html>).

<sup>7</sup> George W. Bush, President, President Bush Discusses Stem Cell Veto and Executive Order, (June 20, 2007) (transcript available at <http://www.whitehouse.gov/news/releases/2007/06/print/20070620-8.html>).

<sup>8</sup> *Id.* President Bush's formal veto message again does not mention religion, but does refer to the "sanctity of human life." George W. Bush, President, Message to the Senate of the United States (June 20, 2007) (transcript available at <http://www.whitehouse.gov/news/releases/2007/06/print/20070620-5.html>).

President Bush has been roundly criticized for the religious foundation of his position. Ron Reagan Jr., in his 2004 speech at the Democratic National Convention, did not refer to Bush by name, but clearly had him in mind in saying “that the theology of a few should not be allowed to forestall the health and well-being of the many.”<sup>9</sup> Criticism exploded over the 2006 Bush veto. Jonathan Turley in *USA Today* faulted Bush’s “faith-based politics” for what he called its “holy-dot theory”—a reference to the fact that early embryos killed in research are about the size of the dot over the letter “i.”<sup>10</sup> Frank Rich in the *New York Times* was vehement. Bush had canonized “clumps of frozen cells.”<sup>11</sup> Rich hoped “the White House embrace of stem cell fanaticism” would be “a turning point in America’s own religious wars.”<sup>12</sup> It might lead to election losses for what he called America’s own “ayatollahs.”<sup>13</sup> Bush’s 2007 veto produced similar criticism. Bush insisted “on imposing fundamentalist religious views on everyone.”<sup>14</sup> “By means of bald assertion, the White House seeks to enshrine in law what is essentially a religious belief: That all stages of human life are sacred. Hands off.”<sup>15</sup>

This essay argues that President Bush acted appropriately in relying upon his religious beliefs to explain his position on embryonic stem cell research.<sup>16</sup>

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<sup>9</sup> Ron Reagan, Jr., Speech at Democratic National Convention (July 27, 2004) (transcript available at <http://www.pbs.org/newshour/vote2004/demconvention/speeches/reagan.htm>). Reagan acknowledges that religious people are entitled to believe, as “an article of faith,” that destroying an embryo “is tantamount to murder,” but disapproves their acting on this belief. *Id.*

<sup>10</sup> Jonathan Turley, *The Case For Macroscopic Humans*, USA TODAY, July 18, 2006, at 13A. This article was published a few days before the actual veto.

<sup>11</sup> Frank Rich, Op-Ed., *The Passion of the Embryos*, N.Y. TIMES, July 23, 2006, at 12.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* While Rich emphasizes the stem cell veto, he also mentions other issues in his condemnation of Bush’s faith-informed politics. *See id.* Rich obviously is upset by virtually any integration of faith and politics, even if this reaction belies his purported commitment to diversity. *See infra* text accompanying note 168.

<sup>14</sup> Edd Doerr, Letter to the Editor, *Vetoing Stem Cells, Vetoing Life*, N.Y. TIMES, June 22, 2007, at A20.

<sup>15</sup> Editorial, *States Must Lead*, PHILA. INQUIRER, June 25, 2007, at A08.

<sup>16</sup> One doubts that President Bush’s critics would have been mollified had he not explicitly referred to his faith. At the very least, he should be commended for being honest about the presuppositions underlying his actions. *See* E.J. Dionne, Jr., *Idea of Public Reason: Not a*

Religious believers of all faiths—including the President—are entitled to participate in public debate and be explicit about their faith in doing so. Part I demonstrates that Bush acted in accord with a long-established practice in American political life—a tradition embodied in the words and actions of the Founders and of subsequent great leaders. Part II shows that there are no persuasive normative arguments for barring from the public square arguments that are both faith-based and expressed in religious terminology. Part III argues that there is nothing special about a presidential veto to justify the criticism President Bush received.

To avoid being misunderstood, it is important to state what this essay *does not do*. First, it does not address the merits of the stem cell controversy.<sup>17</sup> Second, it does not argue that any particular religious perspective—specifically, Christianity<sup>18</sup>—is of right entitled to pre-eminence in American political life. Third, it does not suggest that Christians all agree with President Bush on the stem cell issue or that there necessarily is an exclusive Christian position on any other public policy issue. Fourth, it does not contend that Christians should try to implement all their moral views through law.<sup>19</sup> Fifth, it does not assert that Christians should always

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*Warrant for Ceasing in the Effort to Live the Truth as We Are Able*, 1 J.L. PHIL. & CULTURE 69, 72 (2007). Such transparency is often a missing trait among politicians.

<sup>17</sup> The embryonic stem cell controversy could perhaps diminish due to the recent announcement of new technology “showing that pluripotent stem cells—cells with the exact properties of embryonic stem cells—can be produced by reprogramming ordinary skin cells obtained harmlessly from donors.” See Robert P. George, *Law and Moral Purpose*, FIRST THINGS: A MONTHLY JOURNAL OF RELIGION & PUBLIC LIFE, Jan. 2008, at 22, 24. This development, while very significant, see Maureen L. Condit, *Getting Stem Cells Right*, FIRST THINGS, Feb. 2008, *passim*, is beyond the scope of this essay.

<sup>18</sup> This essay focuses on Christianity because that is the author’s faith. The arguments made, however, apply to all faiths. Religious believers of *all faiths* are entitled fully to participate in public life, and they are equally entitled to be open about their faith in doing so. An exception to this proposition involves insincere professions of faith. It would be inappropriate to pretend that one’s position is faith-based solely for anticipated political advantage. Doing so would be to deceive the public. For how this limitation applies to Thomas Jefferson, Abraham Lincoln, and John F. Kennedy, see, respectively, *infra* notes 38, 70, 78.

<sup>19</sup> (Non-religious people presumably do not have this goal either.) What laws to seek involves a careful consideration of the faith’s internal principles of self-restraint, see Samuel W. Calhoun, *Grounding Normative Assertions: Arthur Leff’s Still Irrefutable, But Incomplete, “Sez Who?” Critique*, 20 J. L. & RELIGION. 31, 62 n.224 and accompanying text (2004-05), and also the exercise of prudent political judgment.

use explicitly religious language to articulate their faith-based moral views.<sup>20</sup>

Sixth, it does not posit that Christians, or those of any faith, should expect their religious arguments to convince, on religious grounds, even their fellow believers, much less people of other faiths or the non-religious.<sup>21</sup>

## **I. AMERICAN HISTORY SHOWS THAT PRESIDENT BUSH ACTED APPROPRIATELY**

### **(A) GOD—AND THE NATION’S THEISTIC FOUNDATION—UNDER ATTACK**

To the casual observer, it is not a good time to be God. The Almighty has received some rough handling of late. Witness the success of three recent books, Richard Dawkins’s *The God Delusion*,<sup>22</sup> Sam Harris’s *The End of Faith*,<sup>23</sup> and Christopher Hitchens’ *god Is Not Great*.<sup>24</sup> The authors collectively express alarm and disdain for the annoying persistence of a belief in a supernatural deity.<sup>25</sup> They wage a rhetorical war of extermination against God.<sup>26</sup>

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<sup>20</sup> When to do so is a matter of what the faith requires in particular situations, *see id.* at 62 n.225 and accompanying text, and also a matter of prudent political judgment, *i.e.*, the perceived impact of an open appeal to religious faith.

<sup>21</sup> In fact, they should expect that their religious arguments will sometimes be viewed as irrelevant or even provoke a strong negative reaction.

<sup>22</sup> RICHARD DAWKINS, *THE GOD DELUSION* (2006).

<sup>23</sup> SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004). *See also* SAM HARRIS, *LETTER TO A CHRISTIAN NATION* (2006).

<sup>24</sup> CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007). Dawkins, Harris, and Hitchens are three proponents of what Peter Berkowitz calls the “new new atheism,” which differs from “the Enlightenment atheism of the 18th century . . . [by] proclaim[ing] its hatred of God and organized religion loudly and proudly from the rooftops.” Peter Berkowitz, *The New New Atheism*, *WALL ST. J.*, July 16, 2007, at A13. John Micklethwait says that the three men’s books have “torn into religion.” John Micklethwait, *In God’s Name*, *THE ECONOMIST*, Nov. 1, 2007, at 4. For the publishing success of the authors’ books (and other similar books), see Jeffrey A. Trachtenberg, *Hitchens Book Debunking The Deity Is Surprise Hit*, *WALL ST. J.*, June 22, 2007, at B1; and Anthony Gottlieb, *Atheists With Attitude*, *THE NEW YORKER*, May 21, 2007, at 77. For severe criticism of the New Atheists by a self-proclaimed atheist, see Theodore Dalrymple, *What the New Atheists Don’t See*, *THE CITY JOURNAL*, Autumn 2007, at 118.

<sup>25</sup> According to Berkowitz, “the new new atheism . . . lament[s] . . . the perverse and widespread resistance to shedding once and for all the hopelessly backward belief in a divine presence in history.” Berkowitz, *supra* note 24.

<sup>26</sup> Since this essay is not a full review of the books by Dawkins, Harris, and Hitchens, it does not respond in detail to their various attacks upon the concept of a supernatural God. Their arguments, however, are hardly new. Some, such as the presence of evil in the world, have an ancient lineage. *See* HITCHENS, *supra* note 24, at 267-68 (citing Epicurus). Recent recapitulations of this and other standard objections to a theistic God can be found in the works of Harvard’s Steven Pinker and Edward Wilson. *See* STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* (2002); HOW THE MIND WORKS (1997); EDWARD O. WILSON, *CONSILIENCE: THE UNITY*

The extremism of the authors' assault is readily demonstrated by a modest exercise involving the Declaration of Independence. The Declaration refers to a supreme being four times, most famously in the second paragraph: "We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."<sup>27</sup> This passage makes sense only in reference to a God who was believed to exist and to interact with mankind.<sup>28</sup> The same is true for the Declaration's other references to God. The opening paragraph cites "the Laws of Nature and of Nature's God" as entitling our "one People . . . to assume among the Powers of the earth . . . [a] "separate and equal station."<sup>29</sup> The closing paragraph appeals "to the Supreme Judge of the World for the rectitude of the [signatories'] intentions," and, in pledging their "Lives . . . Fortunes, and . . . sacred Honor" to support the Declaration, expresses their "firm Reliance on the Protection of divine Providence."<sup>30</sup>

Dawkins, Harris, and Hitchens' ideas would radically change the Declaration. To see how, one has only to substitute their opinions of God for the original

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OF KNOWLEDGE (1998); ON HUMAN NATURE (1978). Pinker and Wilson are unpersuasive in proving God's non-existence. For a comprehensive attempt to refute them, see Calhoun, *supra* note 19, at 70-85.

<sup>27</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Jefferson's original draft did not contain the phrase, "endowed by their Creator." He instead referred to men's deriving "from their equal creation 'rights inherent & inalienable.'" PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 134 (1997). But after being "carefully worked over" by the drafting Committee of Five (Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston; *id.* at 43), the document was reported to Congress with this now familiar phrase. *Id.* at 135. Although "endowed by their Creator" more explicitly attributes to God the inherent rights of man, Jefferson's original phrase, "from their equal creation," is no different in substance. Jefferson indisputably believed that God was both mankind's creator and the giver of rights, *see infra* note 43; *see also infra* text accompanying note 53, a fact corroborated by his acquiescence in the drafting Committee's alteration.

<sup>28</sup> For the faith-based perspective with which Abraham Lincoln viewed this passage, *see infra* note 72 and accompanying text.

<sup>29</sup> THE DECLARATION, *supra* note 27, at para. 1. To Jefferson, the "Laws of Nature" did not exist independently of "Nature's God." Rather, "[t]hey came into being by God's decree." EDWIN S. GAUSTAD, SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON 36 (1996). *See* MAIER, *supra* note 27, at 132-33.

<sup>30</sup> THE DECLARATION, *supra* note 27, at para. 32. *See infra* note 36 for a discussion of Congress's, not Jefferson's, authorship of these two references to God.



language. A “pernicious delusion,”<sup>31</sup> not our “Creator,” made all men equal and gave them “unalienable Rights.”<sup>32</sup> An “ancient man-made deit[y,]”<sup>33</sup> not “Nature’s God,” is now the source of “the Laws of Nature.” The signatories no longer appeal to the “Supreme Judge of the World,” but to “the offal of the ancient world.”<sup>34</sup> And the signatories, instead of relying upon “divine Providence,” now invoke “our prehistory . . . [failing to] escape the gnarled hands which reach out to drag us back to the catacombs and the reeking altars and the guilty pleasures of subjection and abjection.”<sup>35</sup>

It is thus clear that Dawkins, Harris, and Hitchens not only repudiate, but also mock, a core concept of the American founding—belief in God.<sup>36</sup> Richard Dawkins not only disparages the Founders’ theism, but also goes to startling lengths to obfuscate it. Dawkins speculates that John Adams and Thomas Jefferson might actually have been atheists or agnostics. In view of Adams’s “devout Christian[ity]”<sup>37</sup> and Jefferson’s authorship of the second paragraph of

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<sup>31</sup> DAWKINS, *supra* note 22, at 31. Hitchens says that our “maker” is not a “who” at all, but instead “a process of mutation.” HITCHENS, *supra* note 24, at 9.

<sup>32</sup> The assertion here is not that Dawkins, Harris, and Hitchens reject human equality or the concept of inherent rights. Rather, the point is that the three emphatically repudiate God as the source. Although the authors do not recognize it, their repudiation of a supernatural deity exposes them to a major epistemological challenge—endowment by God is the only possible substantiation for universal human rights. *See infra* notes 118-123 and accompanying text.

<sup>33</sup> HITCHENS, *supra* note 24, at 7. This man-made God is of necessity “imaginary.” *See* HARRIS, LETTER, *supra* note 23, at 91.

<sup>34</sup> HARRIS, THE END OF FAITH, *supra* note 23, at 47; *see id.* at 25 (“dark and barbarous past”), *see also id.* at 224 (“blood-soaked heirlooms of a previous age”).

<sup>35</sup> HITCHENS, *supra* note 24, at 283.

<sup>36</sup> Pauline Maier, in explaining why Congress added to Jefferson’s draft of the Declaration the two references to God in its final paragraph, states: “Americans held strong religious beliefs in 1776, and the Declaration was meant to state the convictions of the country’s ‘good people.’” MAIER, *supra* note 27, at 149. The completed Declaration, resulting from Congress’s alterations to Jefferson’s draft, was “a public document, an authenticated expression of the American mind.” *Id.* Jefferson later referred to the Declaration as “the genuine effusion of the soul of our country at that time.” Letter from Thomas Jefferson to Dr. James Mease (Sept. 26, 1825), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, at 722 (Adrienne Koch & William Peden eds., 1944).

<sup>37</sup> DAVID MCCULLOUGH, JOHN ADAMS 19 (2001). This is McCullough’s assessment of Adams in 1776. *Id.* at 20. Later in his life, Adams was not an orthodox Christian. *See* JAMES GRANT, JOHN ADAMS: PARTY OF ONE 442 (2005). Since, however, Adams never lost his faith in God, *id.*; MCCULLOUGH, *supra* at 650, his non-conformity does nothing to make him useful to Dawkins. *See infra* note 38.

the Declaration,<sup>38</sup> this is a surprising undertaking. But Dawkins purports to have evidence. To demonstrate Adams's possible atheism, he quotes a single sentence from one of Adams's letters to Jefferson: "This would be the best of all possible worlds, if there were no religion in it."<sup>39</sup> Are Adams's words compatible with atheism? Let Adams speak for himself, in the sentences surrounding the quoted phrase:

Twenty times, in the course of my late Reading, have I been upon the point of breaking out, "This would be the best of all possible Worlds, if there were no Religion in it." !!! But in this exclamati[on] I should have been as fanatical as [here Adams names two men: a former pastor and a former teacher]. Without Religion this World would be Something not fit to be mentioned in polite Company, I mean Hell.<sup>40</sup>

The full quotation clearly shows that Dawkins completely mischaracterizes Adams's views. Regrettably, Dawkins also misleads his readers with respect to Jefferson.

To show Jefferson's agnosticism, Dawkins quotes him as follows: "To talk of immaterial existences is to talk of *nothings*. To say that the human soul, angels,

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<sup>38</sup> Jefferson also was the source of the phrase, "Nature's God," in the Declaration's first paragraph, *supra* note 29 and accompanying text, but he did not author the two references to God in the final paragraph. MAIER, *supra* note 27, at 148-49; *supra* note 36. Concerning Jefferson's religious beliefs, this essay need not concern itself with the long-standing dispute about whether he was an orthodox Christian. See, e.g., GAUSTAD, *supra* note 29, at 91-92. The "new new atheists" deride all beliefs in a theistic God, whatever their form. Dawkins, for example, stresses that he is "not attacking any particular version of God or gods. I am attacking God, all gods, anything and everything supernatural, wherever and whenever they have been or will be invented." DAWKINS, *supra* note 22, at 36. See HARRIS, LETTER, *supra* note 23, at 7 (he dismisses "all religions"). Since the evidence is overwhelming that Jefferson believed in a theistic God, see *supra* notes 27, 29; *infra* notes 43; 59; 65 and accompanying text, the "new new atheists," if only they could view Jefferson accurately, would be compelled to make him a target of their ridicule. Moreover, since Jefferson's belief in God was genuine, he satisfies the qualification for invoking God that this essay imposes. See *supra* note 18.

<sup>39</sup> DAWKINS, *supra* note 22, at 43. In this instance and frequently throughout his book, Dawkins provides no citations for quoted language. Here, Dawkins does not even reveal that Adams's language appeared in a letter to Jefferson. This obviously makes it very difficult for readers to discover its context.

<sup>40</sup> Letter from John Adams to Thomas Jefferson (Apr. 19, 1817), in THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 508, 509 (Lester J. Cappon ed., 1988).

god, are immaterial, is to say they are nothings, or that there is no god, no angels, no soul . . . I am satisfied . . . with the things which are, without tormenting or troubling myself about those which may indeed be, but of which I have no evidence.”<sup>41</sup> Astoundingly, Dawkins again omits language needed to convey Jefferson’s actual position. Jefferson did believe that immaterialism would mean “no god,” but the full quotation shows that he repudiated immaterialism. He instead affirms a belief in a “Creator”/“God” who has a material substance, and wonders when the “heresy of immaterialism, this masked atheism,” crept into the Christian church.<sup>42</sup> One with such beliefs obviously cannot accurately be labeled an agnostic.<sup>43</sup>

How can Dawkins’s spectacular misuse of the facts be explained? Deliberate deception presumably is not the answer. Based on Dawkins’s scholarly accomplishments, one can also eliminate weak analytical skill. Inexcusable sloppiness might be the cause, if, for example, Dawkins relied on a careless research assistant. Another possible explanation is an ideological bias so powerful that Dawkins simply cannot fairly and objectively evaluate the evidence before him. Dawkins’s outrageous mistake thus might identify him as a prime example of what Peter Berkowitz says is also true of Christopher Hitchens: “[He] shows no awareness that his atheism, far from resulting from skeptical inquiry, is

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<sup>41</sup> DAWKINS, *supra* note 22, at 42. Dawkins once again fails to identify the quote or to provide a citation.

<sup>42</sup> Letter from Thomas Jefferson to John Adams (Aug. 15, 1820), in THE ADAMS-JEFFERSON LETTERS, *supra* note 40, at 565, 568.

<sup>43</sup> According to Issac Kramnick and R. Laurence Moore:

Jefferson was not . . . a godless man. He attended church services in Washington and Charlottesville and contributed money frequently to Episcopal, Presbyterian, and Baptist churches. He talked and wrote about his personal religious beliefs and was far from being the impious atheist and infidel depicted by his detractors. He believed fervently in the one God who created all men equal.

Issac Kramnick & R. Laurence Moore, *The Baptists, the Bureau, and the Case of the Missing Lines*, 56 WM. & MARY Q. 817, 817 (1999). See *supra* notes 27, 29; *infra* notes 59, 65 and accompanying text.

the rigidly dogmatic premise from which his inquiries proceed, and that it colors all his observations and determines his conclusions.”<sup>44</sup>

### **(B) MISCHARACTERIZING “SEPARATION”**

The Founders routinely mixed religion and politics.<sup>45</sup> Any notion of separating the two would have been incomprehensible.<sup>46</sup> Hitchens, Dawkins, and Harris, however, totally mischaracterize the Founders’ concept of the proper relationship between religion and public life. The common drum they beat is “separation of church and state.” This is a useful concept, properly understood,<sup>47</sup> but the three authors distort the phrase’s intended meaning. Hitchens says that the Founders

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<sup>44</sup> Berkowitz, *supra* note 24. Dawkins’s disregard of the evidence is a prime example supporting Berkowitz’s statement, concerning the “new new atheists” generally, that “[t]he disproportion between the bluster and bravado of their rhetoric and the limitations of their major arguments is astonishing.” *See id.* Dawkins’s factual distortions are also richly ironic since he derides Christianity for (according to his own misinterpretation) treating reason as the enemy of faith. DAWKINS, *supra* note 22, at 190. *See* HARRIS, END OF FAITH, *supra* note 23, at 23-25, 223 (criticizes religious belief for its disregard of evidence and general irrationality).

<sup>45</sup> *See, e.g.*, MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING (2002); MICHAEL NOVAK & JANA NOVAK, WASHINGTON’S GOD: RELIGION, LIBERTY, AND THE FATHER OF OUR COUNTRY (2006).

<sup>46</sup> In a recent essay, historian Mark Noll cautions against too much emphasis on the Founding Era in current debates over the proper role of religion in public life. Mark Noll, *America’s Two Foundings*, FIRST THINGS: A MONTHLY JOURNAL OF RELIGION & PUBLIC LIFE, Dec. 2007, at 29, 34. His rationale is that in the ensuing years America has experienced second foundings in both religion and politics. *Id.* at 29, 31. Noll argues that understanding the changes wrought by these developments is essential for astute evaluation of modern problems. *See id.* Noll’s insights about societal change are valuable, but do not diminish the importance of accurately understanding how the Founders viewed the concept of separation. Many, including the Supreme Court, continue to emphasize the Founding Era in resolving current disputes concerning religion. Moreover, Dawkins, Harris, and Hitchens affirmatively rely on distortions of the historical record pertaining to the Founders. Finally, as to the general significance of developments since the Founding Era, one should not overlook the critical work of Philip Hamburger, who argues that a broad notion of separation reflects not the actual intent of the Founders, but rather principally results from mid-nineteenth century anti-Catholicism. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 9-11, 193-94, 481-83 (2002).

<sup>47</sup> Philip Hamburger, who details how the separation metaphor came to encapsulate an erroneous view of the Founders’ understanding of the proper relationship between religion and the civil state, HAMBURGER, *supra* note 46, *passim*, questions whether the metaphor can ever be restored to helpfulness:

[I]t seems to me that however “separation of church and state” was intended by Jefferson or anyone else, it is a standard that has tended to leave many openings for prejudiced understandings and theological discrimination, and it therefore seems necessary to ask whether even cautious, moderate arguments for separation will end up giving legitimacy to a phrase that is likely to be used by other persons in very different ways.

E-mail from Philip Hamburger, Professor of Law, Columbia University School of Law, to Samuel W. Calhoun, Professor of Law, Washington and Lee University School of Law (Feb. 6, 2008) (on file with the author). *See* HAMBURGER, *supra* note 46, at 488-89.

wrote “a democratic and republican constitution that made no mention of god and that mentioned religion only when guaranteeing that it would always be separated from the state.”<sup>48</sup> Dawkins believes that “the founders most certainly were secularists who believed in keeping religion out of politics.”<sup>49</sup> Harris, who wrote *Letter to a Christian Nation* “to arm secularists in our society, who believe that religion should be kept out of public policy,”<sup>50</sup> suggests that Attorney General John Ashcroft was unable properly to enforce separation of church and state because he had the “habit of saying things like ‘We are a nation called to defend freedom—freedom that is not the grant of any government or document, but is our endowment from God.’”<sup>51</sup> Harris apparently expects this language to evoke shocked incredulity from his readers, perhaps along the lines of “How Medieval!” But, to the educated reader, Ashcroft’s words will sound familiar. Jefferson conveyed the same idea in the Declaration’s famous second paragraph<sup>52</sup> and in a later work again used language that clearly foreshadows Ashcroft’s: “And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?”<sup>53</sup>

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<sup>48</sup> HITCHENS, *supra* note 24, at 268.

<sup>49</sup> DAWKINS, *supra* note 22, at 41.

<sup>50</sup> HARRIS, LETTER, *supra* note 23, at viii.

<sup>51</sup> HARRIS, END OF FAITH, *supra* note 23, at 154.

<sup>52</sup> See *supra* text accompanying note 27. The paragraph continues that the purpose of government is to protect these God-given rights and that failure to do so justifies revolution. See *infra* notes 60-61 and accompanying text.

<sup>53</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 163 (William Peden ed., 1955) (1787). President John F. Kennedy, in his inaugural address, prefigured Ashcroft’s language even more closely by referring to the “revolutionary belief for which our forebears fought . . . the belief that the rights of man come not from the generosity of the state but from the hand of God.” John F. Kennedy, ‘The torch has been passed to a new generation of Americans’ (Jan. 20, 1961), in THE PENGUIN BOOK OF TWENTIETH CENTURY SPEECHES 300, 301 (Brian MacArthur ed., 1992). Kennedy went on to pledge that “a new generation of Americans . . . [would be] unwilling to witness or permit the slow undoing of these human rights to which this nation has always been committed, and to which we are committed today at home and around the world.” *Id.* See GARY SCOTT SMITH, FAITH AND THE PRESIDENCY: FROM GEORGE WASHINGTON TO GEORGE W. BUSH 265 (2006). Since what Kennedy and Ashcroft said is virtually identical, Harris presumably would be forced to conclude that Kennedy also was unable to enforce separation of church and state. For an argument that Kennedy, who ended his inaugural address with the assertion “that here on earth God’s work must truly be our own,” ‘The torch,’ *supra* at 303, in fact understood the concept of “separation of church and state” much differently than Harris, Hitchens, and Dawkins, see *infra* note 78.

Harris apparently would have us believe that Jefferson did not properly understand how to separate church from state. Any such obtuseness would be especially ironic, since the phrase, “separation of church and state,” comes from Jefferson’s 1802 message to the Danbury Baptist Association. This document shows that it is Dawkins, Harris, and Hitchens who misunderstand the notion of separation. Jefferson describes the intended impact of the First Amendment’s Establishment and Free Exercise Clauses as “building a wall of separation between Church and State,”<sup>54</sup> *not* Religion and State.<sup>55</sup> He also explains that he views these Clauses “with sovereign reverence” because “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 [legitimate] powers of government reach actions only, and not opinions.”<sup>56</sup> Jefferson’s language thus demonstrates that his

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<sup>54</sup> Address of Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *in* LIFE AND SELECTED WRITINGS, *supra* note 36, at 332, 332.

<sup>55</sup> Daniel Dreisbach sees great significance in

Jefferson’s use of the word “church” rather than “religion” in his restatement of the First Amendment [in the Danbury letter] . . . [It] emphasized that the constitutional separation was between ecclesiastical institutions and the civil state. His choice of language, no doubt, appealed to pious, evangelical Protestant dissenters who disapproved of established churches but believed religion played an indispensable role in public life.

Daniel L. Dreisbach, “Sowing Useful Truths and Principles”: *The Danbury Baptists, Thomas Jefferson, and the “Wall of Separation,”* 39 J. CHURCH & STATE 455, 471 (1997). Elsewhere, Dreisbach argues that Jefferson did not even “intend his metaphor [wall of separation] to represent a universal principle on the prudential and constitutional relationship between religion and all civil government. Rather, it served to delineate the constitutional jurisdictions of the federal and state governments, respectively, on religious matters.” Daniel L. Dreisbach, *Thomas Jefferson and the Danbury Baptists Revisited*, 56 WM. & MARY Q. 805, 811 (1999). See DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 55-70 (2002).

<sup>56</sup> Address of Thomas Jefferson, *supra* note 54, at 332 (this source erroneously substitutes the word “legislative” for “legitimate,” a common mistake; see Dreisbach, “Sowing Useful Truths,” *supra* note 55, at 468 & n.30). The dichotomy between beliefs and actions is typically Jeffersonian. In Virginia’s Statute for Religious Freedom, he wrote “that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.” The Statute of Virginia for Religious Freedom, *in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY xviii (Merrill D. Peterson & Robert C. Vaughan eds., 1988). Perhaps a more famous passage is from his *Notes on the State of Virginia*: “The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.” JEFFERSON, NOTES, *supra* note 53, at 159. This latter statement “probably caused [Jefferson] more difficulty than anything else he said or did during his entire lifetime,” *id.* at 291 n.7, for it led to the charge of atheism, *id.*, a charge that was plainly untrue. See *supra* notes 29, 43; *infra* notes 59; 65 and accompanying text.

wall is meant to insulate religious beliefs and practices from legislative interference,<sup>57</sup> not to separate religion from politics.

Other evidence confirms that Jefferson never intended to insulate politics from religion.<sup>58</sup> The Declaration itself is clear proof.<sup>59</sup> One can hardly imagine an act

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<sup>57</sup> The context of Jefferson's message to the Baptists shows that the legislative abuse he most likely had in mind was an established religion. "Baptists had to sign certificates as to their minority status in order to avoid paying taxes for support of the Congregationalist religious majority in each town, and therefore Baptists resented the establishments and looked to Jefferson for support." HAMBURGER, *supra* note 46, at 156; see Thomas E. Buckley, *Reflections on a Wall*, 56 WM. & MARY Q. 795, 797 (1999). Jefferson's extreme wariness of religious establishments is also evident in his famous statement that he had "sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man," which appears in a letter condemning renewed efforts by certain denominations to obtain "an establishment of a particular form of Christianity through the United States." Letter from Thomas Jefferson to Dr. Benjamin Rush (Sept. 23, 1800), in LIFE AND SELECTED WRITINGS, *supra* note 36, at 557-58. See Edwin S. Gaustad, *Thomas Jefferson, Danbury Baptists, and "Eternal Hostility,"* 56 WM. & MARY Q. 801, 802 (1999). But see HAMBURGER, *supra* note 46, at 148 (arguing that this language demonstrates that Jefferson feared not only religious establishments, but also the threat of "mental tyranny" posed by the clergy).

Philip Hamburger, as just noted, well understands that the context of Jefferson's Danbury letter was a complaint about religious establishments. Nonetheless, he interprets the letter as calling for a broader separation between religion and politics. See *id.* at 155-62; 109-10. For reasons already given, *supra* notes 54-57 and accompanying text, I do not agree with Hamburger on this point. I do agree, however, with his argument that Jefferson's notion of separation (as conceived by Hamburger) was not the religious liberty the First Amendment was intended to protect, see HAMBURGER, *supra* note 46, at 9-10, 101-07, and also with his assertion that this broader view of separation was not embraced by the Baptist recipients of the Danbury letter. See *id.* at 163-80.

<sup>58</sup> Thus, I disagree with Philip Hamburger's conclusion that Jefferson sought not only to separate "church from state," but also "religion from politics." HAMBURGER, *supra* note 46, at 155. Hamburger's principal evidence is an unsent 1815 letter in which Jefferson argues that pastors generally "should not have 'the right of discussing public affairs in the pulpit.'" *Id.* at 151. The letter "suggests how [Jefferson's] advocacy of separation may have been a response not merely to the New England establishments, but to the bondage of clerical influence in a society in which steady habits, Federalist politics, and clerical authority were closely intertwined." *Id.*; see *id.* at 148, 485. Jefferson's letter does not substantiate Hamburger's assertion. First, it addresses only the appropriate role of the clergy, and therefore has limited usefulness in revealing Jefferson's overall view on the proper role for religion in politics. Second, even with respect to the clergy, Jefferson's rationale was not the separation of church and state, but rather the curious point that clergy were, on the basis of their contractual duties to their congregations, bound to limit their pulpit remarks to their area of expertise—religion. See *id.* at 152-54, 181. If a pastor's entire congregation agreed that the pastor could offer instruction from the pulpit on the subjects of law and politics, or if a pastor commented on such subjects only outside the pulpit, Jefferson offered no objection. *Id.* at 154 n.18. Third, Hamburger's assertion does not take into account other evidence showing that Jefferson, in his own words and actions, did not keep religion separated from politics. See Thomas E. Buckley, *Thomas Jefferson and the Myth of Separation*, in RELIGION AND THE AMERICAN PRESIDENCY 39, 43-47 (Mark J. Rozell & Gleaves Whitney eds., 2007); *infra* notes 59-66 and accompanying text.

<sup>59</sup> Other evidence for this claim is that Jefferson, "[t]hroughout his political career and particularly during his presidency . . . repeatedly wove expressions of religious belief into his public

more “political” than the formation of a new government. This new government was necessary to protect unalienable rights endowed by the Creator.<sup>60</sup> It was the King’s usurpation of these rights that justified the Revolution.<sup>61</sup> Consequently, “separation” means the insulation of politics from religion, the Declaration itself violates the principle of separation of church and state.

Jefferson also mixed religion and politics in his early unsuccessful attempts to fight slavery legislatively. In the 1780s, he “envisioned a program of gradual abolition that featured an end to the slave trade, the prohibition of slavery in all the western territories and the establishment of a fixed date . . . after which all newly born children of slaves would be emancipated.”<sup>62</sup> What motivated Jefferson? Joseph Ellis cites “the incompatibility of slavery with the principles on which the American republic was founded.”<sup>63</sup> This explanation is unobjectionable, but these founding beliefs can hardly be called secular. As has been shown, a chief principle of the American republic, enshrined in the 1776 Declaration, was the belief that God granted unalienable rights to all mankind.<sup>64</sup> Jefferson later gave equally irrefutable evidence that his moral condemnation of slavery was premised in his religious beliefs. He feared the wrath of God against the country on account of slavery: “Indeed I tremble for my country when I reflect

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statements.” Buckley, *supra* note 57, at 797. These expressions included repeated invitations to “his fellow citizens to give thanks to God,” *id.* at 799, and frequent “acknowledgement of God’s providential design.” *Id.* These facts lead Buckley to conclude that “to treat Jefferson as a herald of twentieth-century secularism is to read him dogmatically and falsely. He used the consecrated phrase ‘wall of separation’ in writing about church and state, not religion and government. In sharp contrast to some modern historians and legal scholars, he never conflated those couplets.” *Id.* at 800. See JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 19 (2006) (“The wall Jefferson referred to is designed to divide church from state, not religion from politics.”); *id.* at 105 (“Jefferson unabashedly called on God for guidance and blessing in difficult times. In his second inaugural address, he charted the relationship between God and America in some detail, and asked God to begin a new chapter in that story . . .”).

<sup>60</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). It is immaterial that Jefferson was not the original source of this phrase. See *supra* note 27.

<sup>61</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The whole point of the Declaration’s famous second paragraph was to assert “the right of revolution, which was, after all, the right Americans were exercising in 1776.” MAIER, *supra* note 27, at 135.

<sup>62</sup> JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 145 (1996).

<sup>63</sup> *Id.* at 146.

<sup>64</sup> See *supra* text accompanying note 27. For Abraham Lincoln’s theological interpretation of this concept, see *infra* text accompanying note 72.



that God is just: that his justice cannot sleep for ever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events . . . The Almighty has no attribute which can take side with us in such a contest.”<sup>65</sup> To forestall God’s judgment, Jefferson hoped that “total emancipation” would soon come “with the consent of the masters, rather than by their extirpation.”<sup>66</sup>

Jefferson’s frequent mixing of religion and politics is representative of the other Founders.<sup>67</sup> The question remains, however, whether this practice continued beyond the Founding Era.

### **(C) TWO MORE CENTURIES OF INTERMINGLED RELIGION AND POLITICS**

Religion and politics have been intermingled continuously since the Founding Era. This is readily shown by the examples of Abraham Lincoln and Martin Luther King Jr.

#### **(1) Abraham Lincoln**

President Bush’s critics excoriate him for what would seem to be an innocuous act—relying upon principles taken straight from the Declaration—that both life

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<sup>65</sup> JEFFERSON, NOTES, *supra* note 53, at 163. This quote in itself convincingly refutes any notion that Jefferson had a deistic conception of God. If God does not interact with humankind, why should Jefferson have feared God’s justice? See Buckley, *supra* note 58, at 44 (providing other evidence that “Jefferson took God seriously”). Christopher Hitchens argues that he was needlessly anxious—Jefferson’s statement is “as incoherent as it is memorable: given the marvel of a god who was also just there would be, in the long term, nothing much to tremble about.” HITCHENS, *supra* note 24, at 177. Hitchens apparently has a very high view of his own capacity to withstand a just evaluation. Abraham Lincoln was not so dismissive of Jefferson’s concern about God’s justice, but instead relied on it to rebut Stephen Douglas in their famous 1858 debates. Douglas asserted that since Thomas Jefferson never freed his slaves, he could not have meant to include “the negro” when asserting “the equality of all men” in the Declaration. Abraham Lincoln, Fifth Debate With Stephen A. Douglas, at Galesburg, Illinois (Oct. 7, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 207, 216 (Roy P. Basler ed., 1953). Lincoln countered by reminding “Judge Douglas and this audience, that while Mr. Jefferson was the owner of slaves . . . he used the strong language that ‘he trembled for his country when he remembered that God was just.’” *Id.* at 220. Lincoln attributed the Founders’ failure to free the slaves to the fact that “they knew no way to get rid of [slavery] at that time.” Abraham Lincoln, Sixth Debate With Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), in *id.* at 245, 276.

<sup>66</sup> JEFFERSON, NOTES, *supra* note 53, at 163. It is interesting that Lincoln, in his famous Second Inaugural, elaborated on the theme of God’s judgment against the nation due to slavery. See *infra* note 74.

<sup>67</sup> See *supra* note 45.

itself and the right to life are gifts from the Creator.<sup>68</sup> How much more then should these same critics condemn Lincoln, who, in expressing his opposition to slavery,<sup>69</sup> explicitly invoked religion much more than Bush did in his stem cell vetoes.<sup>70</sup> To be sure, Lincoln often cited the Declaration's assertion that all men are created equal without theological elaboration,<sup>71</sup> as did Bush. But Lincoln sometimes went much further. A striking example is his 1858 explanation of the Founders' "created equal" and "unalienable rights" terminology:

This was their majestic interpretation of the economy of the Universe.  
This was their lofty, and wise, and noble understanding of the justice of the Creator to His creatures. Yes, gentlemen, to *all* His creatures, to the whole great family of man. In their enlightened belief, nothing stamped

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<sup>68</sup> See *supra* text accompanying note 6.

<sup>69</sup> Lincoln, of course, used religious language for purposes other than attacking slavery. His various executive proclamations are striking examples. For instance, in 1863 he designated a day for national prayer and humiliation in language that could have just as readily been heard in a pulpit. See Abraham Lincoln, Proclamation Appointing a National Fast Day (Mar. 30, 1863), in 6 COLLECTED WORKS, *supra* note 65, at 155-56.

<sup>70</sup> As Professor Michael Nelson reminds us, presidential piety in public often has "little to do with piety." Michael Nelson, *Introduction* to WILLIAM E. BARTON, THE SOUL OF ABRAHAM LINCOLN xv, xxxvi (U. Ill. Press 2005) (1920). Perhaps Lincoln invoked religion disingenuously, which this essay argues is an inappropriate use of religion. See *supra* note 18. What were Lincoln's personal religious beliefs? Adam Gopnik writes that this is "the most vexed question in all the Lincoln literature." Adam Gopnik, *Angels and Ages: Lincoln's Language and Its Legacy*, THE NEW YORKER, May 28, 2007, at 30, 34. This may well be true, but Gopnik inaccurately concludes that Lincoln "was all his life . . . a profound and declared skeptic." See *id.* (a mistake also made by Hitchens, HITCHENS, *supra* note 24, at 179). The evidence is plainly to the contrary. Testimony gathered by Lincoln's law partner, William Herndon, indicates that Lincoln as a young man indeed had serious qualms about orthodox Christian beliefs. See William H. Herndon & Jesse W. Weik, HERNDON'S LIFE OF LINCOLN: THE HISTORY AND PERSONAL RECOLLECTIONS OF ABRAHAM LINCOLN 354-56 (Da Capo 1983) (1889). But Lincoln gradually experienced a deepening of his faith, in large part precipitated by personal tragedies. The first spiritually significant event was the 1850 death of his son Eddie. See Nelson, *supra*, at xxix-xxxi. Just over a decade later, the 1862 death of his son Willie led Lincoln "increasingly [to] turn[] to religion for solace." DAVID HERBERT DONALD, LINCOLN 337 (1995). By 1864, as Lincoln "[i]ncreasingly . . . brooded over the war and his role in it . . . he drew from the Scriptures such solace that he was prepared to forget his earlier religious doubts." *Id.* at 514. Lincoln expert Paul Angle writes that "there can be little question but that during the last years of his life Lincoln went through a spiritual development with which his former partner was unfamiliar." Paul M. Angle, *Editor's Preface* to HERNDON'S LIFE, *supra*, at xiii, xlv. The exact nature of Lincoln's beliefs is not relevant to this essay, see *supra* note 38, but it is important to recognize that by the 1850s, when Lincoln's political career was revitalized, he had become profoundly religious, with a deep faith in a theistic God. Hitchens' suggestion that Lincoln never lost "a tendency to deism," HITCHENS, *supra* note 24, at 179, is false. Quite apart from the facts already mentioned in this note, the Second Inaugural in itself stands as stunning refutation. See *infra* note 74.

<sup>71</sup> E.g., Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), in 2 COLLECTED WORKS, *supra* note 65, at 398, 406-07; Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in *id.* at 247, 266.

with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by its fellows.<sup>72</sup>

Beyond relying on the Declaration, Lincoln believed that slavery violated Jesus' command that we treat others as we would like to be treated.<sup>73</sup> He also insisted that slavery contradicted the Bible's teaching on the nature of work. For example, in the famous Second Inaugural,<sup>74</sup> Lincoln said, in reference to the prayers of Southerners: "It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces."<sup>75</sup>

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<sup>72</sup> Abraham Lincoln, Speech at Lewistown, Illinois (Aug. 17, 1858), *in id.* at 544, 546. This language makes it irrefutably clear that, to Lincoln, the Declaration's pronouncement of human equality could in no way be characterized as secular. (By the way, one wonders whether, to Lincoln, "the whole great family of man" would include human embryos.)

<sup>73</sup> Letter to George B. Ide, James R. Doolittle, and A. Hubbell (May 30, 1864), *in 7 COLLECTED WORKS, supra* note 65, at 368. See Speech to One Hundred Fortieth Indiana Regiment (Mar. 17, 1865), *in 8 COLLECTED WORKS, supra* note 65, at 360, 361; Fragment on Pro-slavery Theology (Oct. 1, 1858?), *in 3 COLLECTED WORKS, supra* note 65, at 204, 205.

<sup>74</sup> Often hailed as Lincoln's greatest speech, *e.g.*, RONALD C. WHITE, JR., LINCOLN'S GREATEST SPEECH: THE SECOND INAUGURAL (2002), the Second Inaugural is, as Jon Meacham observes, "startling in its religiosity." MEACHAM, *supra* note 59, at 121. "More than any of [Lincoln's] other speeches . . . [it] fused spiritual faith with politics." DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 699 (2005). It is "the greatest example of Lincoln's religious politics . . . plac[ing] God's purposes in the American Civil War front and center." Lucas E. Morel, *Lincoln's Political Religion and Religious Politics: Or, What Lincoln Teaches Us about the Proper Connection between Religion and Politics*, *in RELIGION AND THE AMERICAN PRESIDENCY, supra* note 58, at 73, 82. Most astounding to modern ears, Lincoln surmises that the Civil War is God's punishment against both the North and South for the "'offense'" of slavery. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *in 8 COLLECTED WORKS, supra* note 65, at 332, 333. The severity of this speculation belies any notion that Lincoln spoke religiously only to curry favor with a religious audience. Moreover, there is ample evidence, both before and after the speech, that Lincoln actually believed what he said. See, *e.g.*, Abraham Lincoln, Meditation on the Divine Will (Sept. 2, 1862?), *in 5 COLLECTED WORKS, supra* note 65, at 403-04; Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in 7 COLLECTED WORKS, supra* note 65, at 281, 282; Letter from Abraham Lincoln to Thurlow Weed (Mar. 15, 1865), *in 8 COLLECTED WORKS, supra* note 65, at 356, 356. Lincoln thus shared "Jefferson's belief in a just God who is not oblivious to the injustices committed by those created in His image and who will eventually mete out His wrath on the offenders." LUCAS E. MOREL, LINCOLN'S SACRED EFFORT: DEFINING RELIGION'S ROLE IN AMERICAN SELF-GOVERNMENT 189 (2000). See *id.* at 188, 195; *supra* notes 65-66 and accompanying text.

<sup>75</sup> Lincoln, Second Inaugural, *supra* note 74, at 333. Other examples abound. *E.g.*, Story Written for Noah Brooks (Dec. 6, 1864), *in 8 COLLECTED WORKS, supra* note 65, at 154, 155; Speech at Springfield, Illinois (July 17, 1858), *in 2 COLLECTED WORKS, supra* note 65, at 504, 520; Letter, *supra* note 73. Theologian William Wolf contends that Lincoln "preferred in his later years to express his objection to slavery in terms of a biblical understanding of work rather than in his earlier derivation of it from the 'self-evident truths' of creation." WILLIAM J. WOLF, THE ALMOST CHOSEN PEOPLE: A STUDY OF THE RELIGION OF ABRAHAM LINCOLN 177 (1959). See *id.* at 102-03; MOREL, *supra* note 74, at 186-87.

Lincoln's religious motivations<sup>76</sup> reveal that the principles of freedom and equality for African-Americans are not secular concepts.<sup>77</sup> Martin Luther King Jr. provides further corroboration of this fact.

## **(2) Martin Luther King Jr.**

Martin Luther King Jr. obviously was not an elected official, but his actions were intended to and actually had a tremendous impact on the laws of the nation. President John F. Kennedy, in his June 1963 speech on Civil Rights, clearly echoed King's attack on racial inequality. To Kennedy, the country was "confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution."<sup>78</sup> This two-pronged critique is vintage King,

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<sup>76</sup> The religious premises for Lincoln's opposition to slavery demonstrate the inaccuracy of the claim that Lincoln "did not mix religion and statesmanship." MARK E. NEELY, JR., *THE ABRAHAM LINCOLN ENCYCLOPEDIA* 261 (1982). Lincoln plainly did not believe the Constitution requires that religion be separated from politics, and he has not escaped criticism for infusing his politics with his faith. Edgar Lee Masters believed that Lincoln "wedded religious cant to conservative politics." *Id.* at 206. H.L. Mencken thought that Lincoln's "most memorable feat . . . was his appointment of the Lord God Jehova to the honorary chairmanship of the Republican National Committee." *Id.* at 207.

<sup>77</sup> That Lincoln opposed slavery for religious reasons is particularly striking in view of Garry Wills's thesis in his Pulitzer Prize-winning *Lincoln at Gettysburg*. Lincoln, in his Gettysburg Address, "performed one of the most daring acts of open-air sleight-of-hand ever witnessed by the unsuspecting. Everyone in that vast throng of thousands was having his or her intellectual pocket picked." GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 38 (1992). In a "clever assault on the constitutional past," *id.* at 39, Lincoln undertook nothing less than "a new founding of the nation," *id.*, by which he put the Declaration's "central proposition, equality, in a newly favored position as a principle of the Constitution." *Id.* at 145. He thereby corrected the Constitution, which he viewed as only a provisional and flawed embodiment of the "permanent ideal" of human equality expressed in the Declaration. *Id.* at 101; *see id.* at 39, 86-87.

If Wills is correct, one must necessarily conclude that the Gettysburg Address is an astonishing example of imposition of religious faith—for religious reasons, Lincoln substituted a new Constitution for the one his audience had brought to Gettysburg. *See id.* at 38. Wills, however, goes too far by suggesting that the Gettysburg Address, in itself, somehow effected a change in the Constitution. Wills in fact recognizes that Lincoln knew the Constitution could only actually be changed by a constitutional amendment. *See id.* at 136-38, 144. Wills thus is on firmer ground when he refers to the Address as effectuating an "intellectual revolution," *id.* at 40, 147, 175, by best stating what Lincoln had been doing for much of the 1850s, "repeatedly relating all the most sensitive issues of the day to the Declaration's supreme principle." *Id.* at 120; *see id.* at 39-40. Even though the Gettysburg Address did not actually alter the Constitution, Lincoln still stands as a prime example of one willing to impose his religious faith—by forcing his religiously based moral condemnation of slavery upon dissenters via the Thirteenth Amendment. For a more extreme example of Lincoln's willingness to impose his views, *see infra* note 136.

<sup>78</sup> John F. Kennedy, Address (June 11, 1963), in *LET FREEDOM RING: A DOCUMENTARY HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT* 117, 118 (Peter B. Levy ed., 1992). The speech has been called "one of the most important presidential speeches on race relations in the history of the United States." Commentary, *id.* at 117. To Kennedy, "[t]he heart of the question is whether all Americans are to be afforded equal rights and equal opportunities; whether we are going to treat

as evidenced by his *Letter from Birmingham Jail*,<sup>79</sup> in which King cites both the Constitution and religious faith in condemning racial discrimination, but emphasizes religious arguments. To complaints that “the Negro community” should wait before engaging in direct action, King said it had already “waited for more than 340 years for [its] constitutional and God-given rights.”<sup>80</sup> To criticism

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our fellow Americans as we want to be treated.” Address, *id.* at 118. (For how Lincoln relied on this same (religious) principle in criticizing slavery, *see supra* text accompanying note 73). Earlier in his speech, Kennedy recalled the nation’s founding “on the principle that all men are created equal.” *Id.* at 117. Referring to “the Scriptures” and to the Declaration, which indisputably has a theistic premise, *see supra* text accompanying notes 27, 60, is hardly keeping faith out of politics. Kennedy apparently saw no contradiction between these manifestations of faith and his earlier assertion, as a presidential candidate, that he believed in “an America where the separation of church and state is absolute.” Senator John F. Kennedy, Address to the Greater Houston Ministerial Association (Sept. 12, 1960), in RANDALL BALMER, *GOD IN THE WHITE HOUSE: A HISTORY* 175, 176-80 (2008). For Thomas Jefferson’s similar understanding of the principle of “separation,” *see supra* notes 58-66 and accompanying text. Some might argue that Kennedy is a poor example of a political leader who mixed religion and politics—both the depth of his faith and its impact on his public policy decisions have been questioned. *See* GRETCHEN RUBIN, *FORTY WAYS TO LOOK AT JFK* 107 (2005); SMITH, *supra* note 53, at 261, 277-79. There is indeed some basis for skepticism. But there is also countervailing evidence. *See* RUBIN, *supra*, at 93, 112; SMITH, *supra* note 53, at 260-61. One fact is uncontroversial—Kennedy frequently relied upon religion in his public life. The Kennedy Inaugural, *see supra* note 53, and the Civil Rights speech are only two of many examples. *See, e.g.*, SMITH, *supra* note 53, at 264-66. If these many religious references were disingenuous, *i.e.*, included only to achieve some political advantage, Kennedy would be a prime example of the inappropriate mixing of religion and politics. *See supra* note 18. The evidence, however, is too indeterminate to warrant this conclusion.

<sup>79</sup> The April 1963 letter was a response to a published statement from “a group of white clergymen who urged him and Birmingham’s blacks to stop demonstrating.” LET FREEDOM RING, *supra* note 78, at 109. King soon thereafter published it as a book chapter. Martin Luther King Jr., *Letter from Birmingham Jail*, in MARTIN LUTHER KING JR., *WHY WE CAN’T WAIT* 76-95 (1964). It is unclear if Kennedy read King’s *Letter* prior to his June 11 Civil Rights speech. He likely did, as the *Letter* was published in the *New York Post* several weeks before. TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 804 (1988). Moreover, Attorney General Robert Kennedy, the President’s brother, had a copy of the *Letter*. STEPHEN B. OATES, *LET THE TRUMPET SOUND: THE LIFE OF MARTIN LUTHER KING, JR.* 230 (1982). Regardless, King’s influence on Kennedy is undeniable. Taylor Branch says that King’s “urgings” may have led to Kennedy’s speech. BRANCH, *supra*, at 822-23. The evidence Branch cites is clearly supportive. On June 10, the *New York Times* published King’s plea that “above all the President must start talking of integration in moral terms,” *Dr. King Attacks Kennedy Record*, N.Y. TIMES, June 10, 1963, at 20; *see* BRANCH, *supra*, at 822-23, and very early on June 11, King telegraphed Robert Kennedy imploring the Administration to act. *Id.* at 995 n.822. It was later that same day that the President reached the “extraordinary decision to make what amounted to an extemporaneous civil rights address on national television.” *Id.* at 823. Whether or not King’s “urgings” directly determined the timing of Kennedy’s speech (he was also influenced by watching a replay of Governor George Wallace’s “defiance” at the University of Alabama; RUBIN, *supra* note 78, at 25), King definitely impacted the speech’s content. Branch writes that the Civil Rights speech “embraced, even imitated, King’s message.” *Id.* at 834. Stephen Oates would agree: “Watching Kennedy on television, King was elated, because the President’s argument was identical to what King had been saying in his own speeches and writings for two years now.” OATES, *supra* at 244.

<sup>80</sup> King, *Letter*, *supra* note 79, at 78, 81.

for breaking the law, King said that segregation laws, because they did not “square[] with the moral law or the law of God,” were unjust and thus properly disobeyed.<sup>81</sup> King exhorted white moderates “to be co-workers with God” to achieve equal rights.<sup>82</sup> He criticized white ministers who argued that “racial and economic injustice . . . [were] ‘social issues, with which the gospel has no real concern.’”<sup>83</sup> This view reflected “a strange, un-Biblical distinction between body and soul, between the sacred and the secular.”<sup>84</sup> King called for a return to the days when “the [Christian] church was not merely a thermometer that recorded the ideas and principles of popular opinion . . . [but instead] was a thermostat that transformed the mores of society . . . [for example, by] end[ing] . . . such ancient evils as infanticide and gladiatorial contests.”<sup>85</sup> Despite his disappointment in white moderates and the white church, King was confident of ultimate success: “If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands.”<sup>86</sup> One day, the South would recognize that the protestors who “sat down at lunch counters . . . were in reality standing up for what is best in the American dream and for the most sacred values in our Judaeo-Christian heritage.”<sup>87</sup>

Given the overwhelming evidence of the centrality of King’s Christian faith to the struggle for civil rights,<sup>88</sup> it is amusing to watch Dawkins, Harris, and Hitchens squirm to depreciate the role of Christianity in King’s life. Dawkins asserts that King’s religion was “incidental” to his “good deeds” in fighting racism:

“Although . . . [he] was a Christian, he derived his philosophy of non-violent civil

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<sup>81</sup> See *id.* at 82-84.

<sup>82</sup> *Id.* at 86.

<sup>83</sup> *Id.* at 90.

<sup>84</sup> *Id.* at 90.

<sup>85</sup> *Id.* at 91. (One wonders whether King would have viewed “infanticide” as encompassing the deliberate destruction of human embryos.)

<sup>86</sup> *Id.* at 93.

<sup>87</sup> *Id.* at 94.

<sup>88</sup> There is, of course, voluminous additional evidence, such as King’s 1963 “I Have a Dream” speech and his 1965 “Our God Is Marching On!” speech. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 48-49, 227-28 (1993); LET FREEDOM RING, *supra* note 78, at 122-25, 162-64.

disobedience directly from Gandhi, who was not.”<sup>89</sup> Harris makes the same argument.<sup>90</sup> That Gandhi greatly influenced King does nothing to diminish Christianity’s surpassing impact. As the *Letter from Birmingham Jail* makes clear, the *reason* King opposed racism was its incompatibility with God’s moral law. Moreover, the *Letter* itself does not credit Gandhi for King’s chosen tactic of non-violent direct action, but says instead: “I am grateful to God that, through the influence of the Negro church, the way of nonviolence became an integral part of our struggle.”<sup>91</sup> Hitchens deserves special criticism for his treatment of King. While admitting King’s “professed theology,”<sup>92</sup> Hitchens concludes that “[i]n no real as opposed to nominal sense . . . was [King] a Christian.”<sup>93</sup> Surely it is the height of presumption and arrogance for anyone, especially an atheist like Hitchens, to assert that he has better insight into King’s Christian commitment than King himself.<sup>94</sup>

The examples of Lincoln and King establish, as a matter of descriptive fact, that since the Founding Era, religion and politics have been continually intermixed in American public life.<sup>95</sup> Their examples also speak, however, to the question of

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<sup>89</sup> DAWKINS, *supra* note 22, at 271.

<sup>90</sup> HARRIS, LETTER, *supra* note 23, at 12.

<sup>91</sup> King, *Letter*, *supra* note 79, at 87.

<sup>92</sup> HITCHENS, *supra* note 24, at 180.

<sup>93</sup> *Id.* at 176.

<sup>94</sup> See *supra* text accompanying note 44. In any event, Hitchens fails to understand Christianity. His specific reason for labeling King a “nominal” Christian is that King was gentle, while Christianity, as perceived by Hitchens, encourages violence. HITCHENS, *supra* note 24, at 175-76. Hitchens’ evidence is that Christianity teaches everlasting punishment for non-believers. See *id.* The Christian concept of Hell has no logical connection to how Christians are commanded to treat non-believers in this world. As King correctly understood, Jesus, rather than modeling violence, was “an extremist for love: ‘Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you.’” King, *Letter*, *supra* note 79, at 88.

<sup>95</sup> One can acknowledge this fact, but maintain that this continual intermixing contravenes the principle of separation of church and state. This is the position of historian Gordon Wood. He writes that during “the 1830s and 1840s . . . [e]vangelical Christians mounted crusade after crusade against a host of evils, including removal of the Cherokee Indians, lotteries, excessive drinking, bad prison and orphanage conditions, and, most important, slavery. Gordon S. Wood, *Praying with the Founders*, THE NEW YORK REVIEW OF BOOKS, May 1, 2008, at 52, 55. While suggesting that these efforts helped the country, Wood nonetheless believes this “inva[sion] [of] the public square” violated “the idea of a wall of separation.” *Id.* This essay demonstrates that Wood’s conception of the wall is incorrect. The wall was never intended to separate religion from

whether this intermingling is normatively appropriate. Since Lincoln and King were instrumental in the fight for African-American freedom and equality, the answer would seem to be a resounding “yes.” Some have argued, however, that it is *wrong* for religious believers to live out their faith in the political sphere. This essay now turns to these objections.

## **II. THERE ARE NO PERSUASIVE NORMATIVE GROUNDS FOR EXCLUDING FAITH-BASED ARGUMENTS AND ACTIONS FROM THE PUBLIC SQUARE**

Although the Founders, Lincoln, and King did not hesitate to invoke religious faith, maybe they were wrong to do so. Perhaps there are valid reasons for generally wanting to exclude religious discourse and religiously motivated actions from the public square.

### **(A) IRRATIONALITY**

One reason for singling out religious viewpoints for exclusion may be evident in the very phrase, “religious faith.” Sam Harris writes “that faith is nothing more than the license religious people give one another to keep believing when reasons

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politics. *See supra* notes 45-67 and accompanying text. I would thus agree with Professor William Lee Miller:

The separating of church from state certainly has not meant—despite some shrill cries that it should—the separating of religion from politics. Far from it. Churches and churchgoers have been active in American politics and social policy on explicit religious grounds from the American Revolution through the abolition movement and the Civil War and the Social Gospel and the gospel of wealth and the Prohibition movement and the pacifist movement and the Civil Rights Movement . . . and a great deal I am leaving out, down to the Moral Majority and the outbreak of a conservative Christian movement in the present day. There are protests, but the pattern is that one objects to religion in politics when one disagrees with the political position taken but endorses it when one agrees with that position—a “moral” issue is then discerned, and religion-in-politics is then not only acceptable but altogether fitting.

WILLIAM LEE MILLER, *THE FIRST LIBERTY* 247 (2003). With respect to Miller’s reference to the “conservative Christian movement,” there is evidence that some of its segments are already trying to impact areas beyond those “cultural-social issues” that, as Miller describes, generated the movement in the first place. *Id.* at 248. For example, Pastor Rick Warren, “author of one of the world’s best-selling books, *The Purpose Driven Life*, . . . is both leading and riding the newest wave of change in the Evangelical community: an expansion beyond social conservatism to causes such as battling poverty, opposing torture and combating global warming.” David Van Biema, *The Global Ambition of Rick Warren*, *TIME*, Aug. 18, 2008, at 36, 37-38.



fail. While believing strongly, without evidence, is considered a mark of madness or stupidity in any other area of our lives, faith in God still holds immense prestige in our society.”<sup>96</sup> Harris suggests that all religious believers are either mad or stupid. If this is in fact his belief, one could hope that he still might view religious believers sympathetically, as one might view an eccentric relative: “Good old Uncle Joe! He’s a good soul, but crazy as a loon when it comes to (fill in the blank).” Harris, though, is far from amused by religious believers’ logical deficiencies.<sup>97</sup> Their “flagrantly irrational” beliefs are not to be laughed at, but rather need “eradicating.”<sup>98</sup> Religious beliefs “are increasingly maladaptive.”<sup>99</sup> Parents who raise their “children to believe that they are Christian, Muslim, or Jewish” are practicing a “ludicrous obscenity.”<sup>100</sup>

Given how Harris views religious beliefs, it is obvious he believes faith has nothing useful to contribute to public debate: “We desperately need a public discourse that encourages critical thinking and intellectual honesty. Nothing stands in the way of this project more than the respect we accord religious faith.”<sup>101</sup> Is this credible? Consider, for example, whether Martin Luther King’s

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<sup>96</sup> HARRIS, LETTER, *supra* note 23, at 67. Religious believers would of course contest Harris’s assertion that there is “no evidence” supporting religious belief. My own faith, Christianity, for example, has centuries of sophisticated apologetics to demonstrate the faith’s reasonableness. For an excellent recent book that both examines common objections to Christianity and explores the positive reasons supporting Christian beliefs, see TIMOTHY KELLER, *THE REASON FOR GOD: BELIEF IN AN AGE OF SKEPTICISM* (2008).

<sup>97</sup> With respect to unreasonableness, Harris puts religious belief in the same category as astrology and alchemy (together with people who think Elvis is still alive and those who believe that “aliens have traversed the galaxy only to molest ranchers and their cattle”). See HARRIS, LETTER, *supra* note 23, at 51. Religious believers are self-deceived folk, *see id.* at 54, living a “fantasy life.” See *id.* at 57. Harris is “dumbstruck” by their “denial of tangible reality.” See *id.* at 91. John Micklethwait cites Harris, Dawkins, and Hitchens as examples of “secular intellectuals [who] think that the real ‘clash of civilisations’ is not between different religions but between superstition and modernity.” Micklethwait, *supra* note 24, at 2.

<sup>98</sup> See HARRIS, LETTER, *supra* note 23, at 87.

<sup>99</sup> See *id.* at 80.

<sup>100</sup> *Id.* at 88. According to Dawkins, it is “preposterous” to think “it is normal and right to indoctrinate tiny children in the religion of their parents.” DAWKINS, *supra* note 22, at 339. Hitchens considers religious instruction of the young as “imprint[ing] . . . [them] with . . . propaganda.” HITCHENS, *supra* note 24, at 220.

<sup>101</sup> HARRIS, LETTER, *supra* note 23, at 87.

*Letter from Birmingham Jail* contributed to the Civil Rights Movement.<sup>102</sup> The *Letter* has been called “a classic in protest literature, the most eloquent and learned expression of the goals and philosophy of the nonviolent movement ever written.”<sup>103</sup> Christopher Hitchens also admires the *Letter*: it “is a model of polemic. Icily polite and generous-minded, it still breathes with an unquenchable conviction that the filthy injustice of racism must be borne no longer.”<sup>104</sup> Hitchens reaches this conclusion despite the *Letter*’s overwhelming religiosity,<sup>105</sup> which he never even mentions. Hitchens apparently was able to completely filter out King’s religion—an amazing feat, since to Hitchens “[r]eligion poisons everything.”<sup>106</sup>

Harris might respond that King’s *Letter*, despite its conspicuous Christianity, contained other types of arguments.<sup>107</sup> Some appeals to religious belief stand alone, such as in the proverbial bumper sticker: “God said it, I believe it, That settles it.” Can this type of argument possibly be legitimate?

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<sup>102</sup> One could make the same “usefulness” inquiry not about something King wrote, but about King himself. Did he contribute constructively to the Civil Rights Movement? An affirmative answer is obvious. Yet, without his Christian faith, King as we know him would not have existed. The same is true of Abraham Lincoln. Without his deep religious faith, he would not have been the same person who spoke so profoundly about the moral wrong of slavery.

<sup>103</sup> OATES, *supra* note 79, at 230; see LET FREEDOM RING, *supra* note 78, Commentary at 109 (“one of the most profound statements on the origins and goals of the civil rights movement”). Taylor Branch concludes that the *Letter*, while having no instantaneous impact, became “a famous pronouncement of moral triumph.” BRANCH, *supra* note 79, at 744. For an argument that the *Letter* likely contributed to President Kennedy’s decision to make his impromptu June 1963 televised address on Civil Rights, see *supra* notes 78-79 and accompanying text.

<sup>104</sup> HITCHENS, *supra* note 24, at 173.

<sup>105</sup> See *supra* text accompanying notes 80-87.

<sup>106</sup> HITCHENS, *supra* note 24, at 13. Some reprints of the *Letter* appear designed to keep readers from recognizing King’s emphasis on Christianity. See *Letter from Birmingham Jail* (Apr. 16, 1963), in CIVIL RIGHTS AND AFRICAN AMERICANS 502-09 (Albert P. Blaustein & Robert L. Zangrando eds., 1991) (1968). Not only does the editors’ introduction to the *Letter* fail to mention its pervasive religiosity, see Introduction, *id.* at 501, but their abridgment omits virtually all references to King’s faith. Compare King, *Letter*, *supra*, with *supra* text accompanying notes 80-87.

<sup>107</sup> For example, King warned that the “pent-up resentments and latent frustrations” of African-Americans would make “many streets of the South . . . flow[] with blood” if whites did not support “those . . . who employ[ed] nonviolent direct action.” See King, *Letter*, *supra* note 79, at 87-88. For Jefferson’s analogous warning that perpetuating slavery would result in violent opposition by enslaved African-Americans, see *supra* text accompanying notes 65-66.

**(B) “GOD SAID IT, I BELIEVE IT, THAT SETTLES IT”**

The “bumper sticker” scenario is largely a red herring. Moral arguments in the public sphere seldom are expressed solely in religious terms. President Bush, for example, in addition to stressing the God-given right to life, defended his first veto by reminding us “that we all begin our lives as a small collection of cells.”<sup>108</sup> He also asserted that each human embryo “is a unique human life with inherent dignity and matchless value.”<sup>109</sup> To demonstrate this fact, the President introduced a number of children who began their lives “as a frozen embryo that was created for in vitro fertilization, but remained unused after the fertility treatments were complete. Each . . . was adopted while still an embryo . . . .”<sup>110</sup>

What, though, about those rare situations in which only religious arguments are used? To evaluate the propriety of an actual “bumper sticker” argument, one naturally turns to a consideration of John Rawls’s concept of proper discourse in a liberal democracy.<sup>111</sup> Rawls would permit expressly religious arguments, but only when supplemented, “within a reasonable time, with what could be termed adequate and independent secular grounds.”<sup>112</sup> This requirement of supplemental argumentation, labeled the “*proviso*,”<sup>113</sup> was Rawls’s “test for admissibility [of religious “conceptions of justice”] in public debate.”<sup>114</sup> An exclusively religious argument would therefore be illegitimate under Rawls’s approach. What, though, allows Rawls to set the conditions under which the religious can engage in public discourse? As Michael McConnell states it, “[w]ith due respect to John Rawls, philosophical secularists are not democracy’s gatekeepers, entitled to determine who may participate and on what basis.”<sup>115</sup>

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<sup>108</sup> See President Discusses, *supra* note 5.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* For additional secular arguments for defending embryonic life, see *infra* note 127.

<sup>111</sup> “Anyone seriously concerned today with the role of religion in public life . . . has to account still for where they stand in relation to Rawls.” William J. Wagner, *John Rawls’s Proffer to Believers: A Bargain Called, “The Idea of Public Reason,”* 1 J.L. PHIL. & CUL. 13, 14 (2007).

<sup>112</sup> *Id.* at 15.

<sup>113</sup> *Id.* at 15 n.12 (citation omitted).

<sup>114</sup> *Id.* at 15-16.

<sup>115</sup> Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation*, 1 J.L. PHIL. & CUL. 159, 161 (2007).

Rawls, of course, lacks the authority to impose his view, but he does seek to convince everyone that his “proviso” is “an obligation of citizenship.”<sup>116</sup> “The basic idea . . . is clear enough. Citizens [offering religious arguments should] be aware that not everyone will share their religious premises or regard their arguments as providing good reasons for the policies and principles they favor. They must therefore be ready to make good their religious arguments by supplementing them with . . . ‘properly public reasons.’”<sup>117</sup> This is an unpersuasive rationale for requiring supplemental argumentation for religious arguments.

Many types of arguments, not just religious ones, fail to provide “good reasons” for those who do not share the disputant’s “premises.” The “bumper sticker” critique of religious arguments diverts attention from the fact that secular arguments are routinely made according to the “bumper sticker” model. Consider Richard Dawkins’s promulgation of an “amended Ten Commandments” for the moral life,<sup>118</sup> or Sam Harris’s statement that “[q]uestions of morality are questions about happiness and suffering”;<sup>119</sup> or Christopher Hitchens’ assertion that “[n]o supernatural force [is] required to make the case against racism.”<sup>120</sup> Each of these illustrates what Arthur Leff calls the “‘God-is-me’” approach to morality.<sup>121</sup>

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<sup>116</sup> Paul J. Weithman, *John Rawls’s Idea of Public Reason: Two Questions*, 1 J.L. PHIL. & CUL. 47, 48 (2007).

<sup>117</sup> *Id.*

<sup>118</sup> DAWKINS, *supra* note 22, at 264.

<sup>119</sup> HARRIS, LETTER, *supra* note 23, at 8. *See id.* at 18-19, 23; HARRIS, END OF FAITH, *supra* note 23, at 170-71. This “happiness/suffering” standard is completely unsubstantiated. How would Harris prove wrong someone who asserted that morality consists in *causing* as much unhappiness and suffering as possible?

<sup>120</sup> HITCHENS, *supra* note 24, at 180. Hitchens is wrong. Apart from a God who has decreed the inherent value and dignity of each human life, no convincing objection can be given to devaluing any group of humans. *See infra* notes 121-123 and accompanying text. Hitchens perhaps would respond that “Kant’s principle” would supply the objection: “[A]ct as if the maxim of your action were to become through your will a general natural law.” *See* HITCHENS, *supra* note 24, at 266. But what proof does Hitchens provide to show that Kant’s maxim is morally sound? He merely declares it to be so. For an argument that Kant fails to establish a convincing test for moral action, see Calhoun, *supra* note 19, at 45 nn. 95-96 and accompanying text.

<sup>121</sup> Arthur A. Leff, *Unspeakeable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1235-36. As a way to ground normative propositions, Leff sees the “‘God-is-me’” approach as a form of “‘It is right to do *X* because *P* believes so’ (where *P* = some person or group of persons).” Arthur A. Leff,

What gives these three men standing to make authoritative moral pronouncements?<sup>122</sup> The fascinating thing is that they make very little, if any, attempt to substantiate their views of morality.<sup>123</sup> Pure assertion is thought to be perfectly sufficient.

Although exclusively religious arguments would be entirely appropriate,<sup>124</sup> this is not to say they would always be wise. Religious believers must exercise prudent political judgment in evaluating whether to frame their arguments in ways more likely to persuade those outside their faith community. Should a public policy objective be defended exclusively in religious terms, the arguments will most likely be deemed irrelevant by those outside the faith.<sup>125</sup> This, though, is no justification for a rule presenting religious believers with a stark option—“dress

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*Memorandum*, 29 STAN. L. REV. 879, 882 (1979). It is “the ‘*P = I*’ variation, a sort of radical individualistic intuitionism in which the good becomes what the speaker thinks it is.” *Id.*

<sup>122</sup> To say “‘*It is right to do X because I say so*’” still requires the reply, “‘Who the hell are you[?]’” Arthur A. Leff, *Law and Technology: On Shoring Up a Void*, 8 OTTAWA L. REV. 536, 541 (1976). Leff rejected this and all other standard methods for grounding normative assertions because

[n]one provide[s] a satisfactory answer to what Leff called “‘the grand sez who?’”—a universal taunt by which a skeptic may challenge the standing/competency of the speaker to make authoritative moral assessments . . . Leff argued, as a matter of logic, that no system of morals premised in mankind alone ever could withstand the taunt. His provocative conclusion was that the only unchallengeable response to “‘the grand sez who?’” is ‘God says.’”

Calhoun, *supra* note 19, at 32 (footnote omitted). (It is important to note that Leff’s argument about God’s indispensability was in the abstract only. Leff’s goal was to point out the catastrophic impact of God’s non-existence on moral epistemology. He did not examine whether or not God actually exists and, if so, whether He could ground a workable moral system. *See id.* at 33, 63, 95.)

<sup>123</sup> Dawkins does suggest that his moral values are shared by “almost all . . . ordinary, decent” people. *See* DAWKINS, *supra* note 22, at 264-65. Leff would call this a “‘*P = everyone*’” rationale. Leff, *Memorandum*, *supra* note 121, at 882. Even if the entire world believes that something is right, Leff would “ask, [S]o what?” ‘What is the *ethical* significance of a factual proposition even so universalized?’ . . . The existence of a universally held belief establishes only the existence of that belief. It tells us nothing about what constitutes ‘the right and the good.’” Calhoun, *supra* note 19, at 36 (footnotes omitted).

<sup>124</sup> This essay does not purport to have fully explored Rawls’s criticism of exclusively religious arguments. Doing so is unnecessary due to the rarity of such arguments in the real world. For a more comprehensive critique of Rawls, see McConnell, *supra* note 115 *passim*.

<sup>125</sup> *See supra* notes 20-21 and accompanying text.

up” your argument with so-called secular reasons or “shut up.”<sup>126</sup> These alternatives make a mockery of any meaningful concept of freedom of expression.

### **(C) IMPOSITION OF FAITH**

A final reason<sup>127</sup> for generally wanting to exclude religious discourse and religiously motivated actions from the public square might be the alarm that many people, including Bush’s critics, feel when they perceive someone else is trying to impose their religious faith.<sup>128</sup> Then—Senator Barack Obama stated that, on the 2004 campaign trail he made the “typically liberal” statement that in a pluralistic society he should not impose his religious views on another.<sup>129</sup> On reflection, however, he now thinks that it is wrong “to ask believers to leave their religion at the door before entering into the public square.”<sup>130</sup> He cites Abraham Lincoln and

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<sup>126</sup> Since arguments framed exclusively in God-denying terms would be irrelevant to those of faith, fairness would require that this same option be presented to those making exclusively non-religious arguments.

<sup>127</sup> An additional criticism one sometimes sees is that a faith-based public policy automatically violates the Establishment Clause. Consider the implications of such a stance. As has been shown, the Declaration of Independence’s pronouncement of human equality and unalienable rights is faith-based. *See supra* notes 27-28 and accompanying text. Does the Declaration then violate the Constitution? If so, then so would the actions of Abraham Lincoln against slavery, and the actions of Martin Luther King Jr. against racial inequality, for the efforts of both men were imbued with religious faith. *See supra* notes 69-87 and accompanying text. Similarly, John F. Kennedy’s call for Civil Rights legislation would be constitutionally infirm. *See supra* note 78 and accompanying text.

There is another major weakness in any Establishment Clause attack on faith-based action in the public sphere. The Supreme Court has repeatedly said that no Establishment Clause violation occurs from the mere fact that a governmental action implements a policy that coincides with a religious belief. *Bowen v. Kendrick*, 487 U.S. 589, 604 n.8, 605-606 (1988) (rejecting a facial challenge to the Adolescent Family Life Act); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (upholding abortion funding restrictions); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (upholding a Sunday closing law). Embryonic life can be defended with secular, *i.e.*, not explicitly religious, arguments. The starting point is the scientifically indisputable fact that human life—a living human organism—begins at conception. *See* ALEXANDER TSIARAS, FROM CONCEPTION TO BIRTH: A LIFE UNFOLDS 5-7, 16, 41-42, 50-51, & 83-111 (2002). The value of this living organism can be defended on secular grounds. *See* ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 19-22 (2008). President Bush in fact included secular arguments in explaining his vetoes. *See supra* text accompanying notes 108-110.

<sup>128</sup> Professor Stephen Carter says that “‘imposing religious beliefs’” is an “awful phrase.” CARTER, *supra* note 88, at 22. “[I]n contemporary political and legal culture, nothing is worse” than the charge that “you are intent on imposing your religious beliefs on other people.” *Id.*

<sup>129</sup> Barack Obama, ‘*Call to Renewal*’ Keynote Address (June 28, 2006), available at [http://obama.senate.gov/speech/060628-call\\_to\\_renewal/print.php](http://obama.senate.gov/speech/060628-call_to_renewal/print.php).

<sup>130</sup> *Id.* Former presidential candidate Mitt Romney has also criticized those who would seek to eliminate religion from the public square:

Martin Luther King Jr. as reformers who “were not only motivated by [their] faith,” but “also used religious language to argue for their cause.”<sup>131</sup>

The examples of Lincoln and King reveal a major flaw with the knee-jerk pejorative connotation attached to the phrase “imposition of faith.”<sup>132</sup> Lincoln imposed his faith on those who wanted to preserve the institution of slavery.<sup>133</sup> King and other “leaders of the civil rights movement... made no effort to disguise their true intention: to impose their religious morality on others, on the dissenters who would rather segregate their hotels or lunch counters....”<sup>134</sup>

But did Lincoln and King impose their faith in a negative sense? Each viewed his actions as simply doing what was right. Lincoln believed slavery to be wrong, and King believed racial inequality to be wrong, but for each man belief alone was not sufficient. If something is wrong, one should treat it as a wrong.<sup>135</sup> As a

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[I]n recent years, the notion of the separation of church and state has been taken by some well beyond its original meaning. They seek to remove from the public domain any acknowledgment of God. Religion is seen as merely a private affair with no place in public life. It is as if they are intent on establishing a new religion in America - the religion of secularism. They are wrong.

Mitt Romney, *Faith in America*, Speech at the George Bush Presidential Library (Dec. 6, 2007), available at <http://www.mittromney.com/Faith-In-America>.

<sup>131</sup> Obama, *supra* note 129. At the April 2008 Compassion Forum at Messiah College, Senator Obama once again cited King and Lincoln in arguing that people of faith have the right to express religious values in religious terms in the public square: “[I]magine Dr. King . . . in front of the Lincoln Memorial and having to scrub all his religious references, or Abraham Lincoln in the Second Inaugural not being able to refer to God.” Interview by Campbell Brown and Jon Meacham with Barack Obama, then-Senator (April 13, 2008), available at [http://www.realclearpolitics.com/printpage/?url=http://www.realclearpolitics.com/articles/2008/04/barack\\_obama\\_at\\_the\\_compassion.html](http://www.realclearpolitics.com/printpage/?url=http://www.realclearpolitics.com/articles/2008/04/barack_obama_at_the_compassion.html).

<sup>132</sup> See *supra* note 128.

<sup>133</sup> See *supra* note 77; *infra* note 136.

<sup>134</sup> CARTER, *supra* note 88, at 229. Peter Levy writes “that the modern civil rights movement . . . sought to turn the ideals of the Declaration of Independence and Christian morality into a reality for all of America’s citizens.” LET FREEDOM RING, *supra* note 78, at 1-2.

<sup>135</sup> To King, recognizing that segregation was a “disease” was not enough. See King, *Letter, supra* note 79, at 83. To those who called “‘Wait!’” in an effort to delay his “direct-action campaign,” King responded that freedom would never be attained unless “demanded by the oppressed.” *Id.* at 82-83. Lincoln, in his famous speech at the Cooper Institute, also stressed the need for action. Since he believed that slavery was wrong, he could not refrain from trying to stop its spread to the territories. See Abraham Lincoln, Address at Cooper Institute (Feb. 27, 1860), in 3 COLLECTED WORKS, *supra* note 65, at 522, 550. He urged his audience not to let fear keep them from acting: “LET US HAVE FAITH THAT RIGHT MAKES MIGHT, AND IN THAT FAITH, LET US, TO THE END, DARE TO DO OUR DUTY AS WE UNDERSTAND IT.” *Id.*

nation, we praise both Lincoln and King for acting as they did. Should our praise diminish because their concepts of right and wrong were premised in their religious faith?<sup>136</sup> Similarly, President Bush believes, on religious grounds, that intentionally destroying human embryos is morally wrong, no matter how worthy the motivation. He therefore acted consistently with that belief via his vetoes. Why then should President Bush, with respect to the appropriateness of invoking his religious faith, be viewed any differently from Lincoln or King?

### **III. IS A VETO A SPECIAL CASE?**

Mario Cuomo, in an editorial written prior to the President's vetoes, suggests a possible basis for targeting faith-based vetoes for criticism. According to Cuomo, "our pluralistic political system adopts rights that arise out of consensus, not the dictates of religious orthodoxy."<sup>137</sup> Thus, if a law "financing stem cell research on leftover embryos" were ever passed, it would be wrong for the President to veto it "as an expression of his religious faith."<sup>138</sup> The suggestion is that a veto is anti-democratic. Another Bush critic states this point more emphatically—the veto establishes "by fiat a policy favored mainly by people who share [his] religious view."<sup>139</sup>

This "veto as fiat" critique of Bush fails. Cuomo's consensus-driven vision of politics is inaccurate, whether by "consensus" he means total or general

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<sup>136</sup> In the Second Inaugural, Lincoln expressed a resolve to act "with firmness in the right, as God gives us to see the right." Lincoln, Second Inaugural, *supra* note 74, at 333. Part of that "right" was "to finish the work we are in," *i.e.*, the military defeat of what he called "the insurgents." *See id.* at 332-333. This is the ultimate form of using public force to impose a religious viewpoint. *See* DAVID S. REYNOLDS, JOHN BROWN, ABOLITIONIST x (2005) ("[I]s there any question that Lincoln and his generals did not, in effect, end up following Brown's lead by condoning God-ordained violence?") *But cf.* WILLS, *supra* note 77, at 189 (arguing, erroneously in my view, that "the work" to which Lincoln referred was "the unfinished work" of implementing the proposition of human equality emphasized in the Gettysburg Address).

<sup>137</sup> Mario M. Cuomo, Op-Ed., *Not on Faith Alone*, N.Y. TIMES, June 20, 2005, at A15. Cuomo also emphasized governing by consensus in his celebrated 1984 speech at Notre Dame: "Our public morality . . . the moral standards we maintain for everyone, not just the ones we insist on in our private lives, depends on a consensus view of right and wrong." Mario M. Cuomo, *Religious Belief And Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 18 (1984); *see also* MARIO M. CUOMO, WHY LINCOLN MATTERS: TODAY MORE THAN EVER 136 (2004).

<sup>138</sup> Cuomo, Op-Ed., *supra* note 137.

<sup>139</sup> Editorial, *supra* note 15.



agreement. Frequently, by very close votes, one group's conception of right and wrong is imposed on the losing side. Yet Cuomo writes as if imposition never exists because nothing is ever done until everyone (or almost everyone) agrees.

In fact, Cuomo causes needless confusion by his misuse of the word "consensus." Elsewhere, he makes clear that in principle it is unobjectionable for religious believers to attempt to win majority support (*i.e.*, consensus is not mandated) for their faith-based morality:

[T]he same amendment of the Constitution that forbids the establishment of a state church affirms my legal right to argue that my religious belief would serve well as an article of our universal public morality. I may use the prescribed processes of government . . . to convince my fellow citizens, Jews and Protestants and Buddhists and non-believers, that what I propose is as beneficial for them as I believe it is for me . . . .<sup>140</sup>

Under this interpretation, President Bush could appropriately make religious arguments in attempting to win a majority for his opposition to embryonic stem cell research, but he was wrong to act decisively on the matter, via his veto, absent majority support. This is simply another way of stating the "veto as fiat" argument.

Strictly speaking, a presidential veto is not anti-democratic. Although a veto, unless overridden, operates by definition to frustrate the majority will as reflected in the legislation passed by Congress, the veto power exists only because the

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<sup>140</sup> Cuomo, *Religious Belief And Public Morality*, *supra* note 137, at 16-17. Cuomo's 2005 Op-Ed reiterates "the right of believers to advocate for changes in our civil law that correspond with their own view of morality." Cuomo, Op-Ed., *supra* note 137. Cuomo is perfectly willing to accept any impositions of faith that occur when a losing minority is compelled to acquiesce in the majority will. "Every day Americans who abhor the death penalty, contraceptives, abortions and war are required to pay taxes used in part for purposes they consider offensive. That is part of the price we pay for this uniquely successful democracy." *Id.*

Constitution, adopted by the people, creates it.<sup>141</sup> Equally important, Bush was *elected* as President. His supporters chose him as the person they wanted to exercise all of the powers of the chief executive, including the veto power.

Moreover, Bush did nothing new in relying upon God in a veto message.<sup>142</sup> President Andrew Jackson twice referred to God in his famous veto of a bill to recharter the Bank of the United States.<sup>143</sup> One instance might be dismissed as non-substantive: Jackson, in the final paragraph, calls the country to “firmly rely on that kind Providence which I am sure watches with peculiar care over the destinies of our Republic.”<sup>144</sup> Elsewhere, however, Jackson emphasizes the bill’s failure to accord equal justice to the rich and poor,<sup>145</sup> contrary to the principle that Heaven follows with rain, “shower[ing] its favors alike on the high and the low.”<sup>146</sup>

Exercise of the veto power is not the only situation in which Presidents have relied upon religion to take decisive action without awaiting majority approval.<sup>147</sup>

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<sup>141</sup> Justice White’s statement concerning Supreme Court jurisprudence is even more applicable to the veto power: “Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing.” *Thornburgh v. Am. Coll. of Obst. & Gyn.*, 476 U.S. 747, 787 (1986) (White, J., dissenting). If the Court’s “constitutional adjudication,” nowhere expressly authorized by the Constitution, does not violate democratic principles, then a President’s veto, pursuant to a power expressly granted, U.S. CONST. art. I, § 7, cl. 2, obviously does not do so.

<sup>142</sup> That Bush likely would rely upon God in making public policy decisions should come as no surprise to those who voted for him. Many presumably supported Bush *because* they wanted a President who would make faith-influenced decisions. Some no doubt supported him for different reasons, but no one could reasonably claim unawareness of Bush’s faith or its importance to him.

<sup>143</sup> See *Veto Message—Bank of the United States* (July 10, 1832), in *THE STATESMANSHIP OF ANDREW JACKSON* 154-76 (Francis Newton Thorpe ed., 1909).

<sup>144</sup> *Id.* at 176.

<sup>145</sup> *Id.* at 158, 175.

<sup>146</sup> *Id.* at 175 (a clear allusion to *Matthew 5:45*). Jackson also made a number of admittedly secular objections to the rechartering. See *Veto Message*, *supra* note 143.

<sup>147</sup> Another example is President Ford’s pardon of Richard Nixon. Ford thought that the pardon was best for the country, but he also believed that “as a humble servant of God, [he would] receive justice without mercy if [he failed] to show mercy.” Gerald R. Ford, *Pardon of Richard Nixon* (Sept. 8, 1974), in *BALMER*, *supra* note 78, at 189-93. See *BALMER*, *supra* note 78, at 159, 161. As Ford noted in his address, a President has express constitutional authority to issue pardons. Ford, *supra* (citing U.S. CONST. art. II, § 2, cl. 1). Still, a pardon is contramajoritarian in the sense criticized by Cuomo. Ford’s pardon of Nixon was in fact contramajoritarian, as public

In September 1965, President Lyndon Johnson issued Executive Order 11246, which is credited with giving the first real teeth to the notion of affirmative action as a remedy for past discrimination.<sup>148</sup> The explanation for Johnson's bold move can be found in the commencement address, "To Fulfill These Rights," which Johnson delivered the preceding June at Howard University.<sup>149</sup> Johnson spoke eloquently of what fairness demands: "You do not take a man who, for years, has been hobbled by chains, liberate him, bring him to the starting line of a race, saying 'you are free to compete with all the others,' and still justly believe that you have been completely fair."<sup>150</sup> But what characteristics of Negroes (as Johnson referred to African-Americans) make us care whether they are treated fairly? They were "citizens"<sup>151</sup> and "Americans,"<sup>152</sup> but also "children of God" to whom "wrong" had been done by the ancient "enmities of the heart" caused by racism.<sup>153</sup> Johnson ended his address by quoting what "[t]he Scripture promises."<sup>154</sup>

In criticizing Bush, Cuomo applied the "fiat" critique in a highly selective manner. Whatever Cuomo may think of President Johnson's contramajoritarian act,<sup>155</sup> he clearly approves of Martin Luther King's use of massive civil

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disapproval "was a major factor, perhaps the decisive factor, in [his] failure to win election in his own right in 1976." See BALMER, *supra* note 78, at 190.

<sup>148</sup> See PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 55-57* (2002); KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 203* (2001).

<sup>149</sup> See COOPER, *supra* note 148, at 56.

<sup>150</sup> Lyndon B. Johnson, President, Howard University Commencement Address (June 4, 1965), in *CIVIL RIGHTS*, *supra* note 106, at 559, 560. Randall Balmer writes that Johnson "gleaned from his parents at least the rudiments of a kind of 'golden rule' Christianity." BALMER, *supra* note 78, at 52. His mother taught him that the strong should care for the weak, and this principle "informed Johnson's domestic initiatives . . . his concern for those less advantaged was most apparent in his push for civil rights." *Id.* at 52-53.

<sup>151</sup> Howard University Commencement Address, *supra* note 150, at 560.

<sup>152</sup> *Id.* at 561.

<sup>153</sup> *Id.* at 565.

<sup>154</sup> *Id.* at 566. Johnson quoted from the Apocrypha, 2 *Esdras* 14:25.

<sup>155</sup> As with a veto, see note 141 and accompanying text, an executive order, strictly speaking, is not anti-democratic, assuming the President has the legal authority to issue the particular order in question. See MAYER, *supra* note 148, at 18-19. Still, an executive order, like a veto, is contramajoritarian according to Cuomo's meaning of that term. Johnson's executive order implementing affirmative action committed the federal government to a public policy that continues to be highly controversial.

disobedience to achieve racial equality.<sup>156</sup> While this tactic may have the ultimate goal of changing the law,<sup>157</sup> in the pre-reform period, however long,<sup>158</sup> its impact, undeniably, was to thwart majority will.<sup>159</sup> Yet King did not postpone acting decisively on his faith-based views until he could convince the majority.<sup>160</sup>

Cuomo himself has a history of acting decisively to implement his beliefs. As Governor of New York, he repeatedly vetoed legislative attempts to reinstate the death penalty.<sup>161</sup> How, then, can he criticize Bush? Presumably, by attempting to distinguish his vigorous opposition to the death penalty, maintained in the face of majority opposition, from Bush's vetoes. To Cuomo, because science cannot

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<sup>156</sup> As Governor of New York, Cuomo "signed legislation . . . establishing a state institute that will encourage the study [of King's] methods and philosophy in New York schools and colleges." *Cuomo Signs Bill on Dr. King*, N.Y. TIMES, Sept. 9, 1988, at B2.

<sup>157</sup> King described his overall objective as:

bring[ing] to the surface the hidden tension that is already alive. We bring it out in the open, where it can be seen and dealt with. Like a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural medicines of air and light, injustice must be exposed, with all the tension its exposure creates, to the light of human conscience and the air of national opinion before it can be cured.

*Letter*, *supra* note 79, at 85. In the short term, the goal in Birmingham was "to create a situation so crisis-packed that it [would] inevitably open the door to negotiation." *Id.* at 80.

<sup>158</sup> What if King had never been successful in accomplishing legal reform? One cannot imagine that this failure would have altered Cuomo's (or anyone else's) admiration for King. If this supposition is correct, it demonstrates that Cuomo does not in fact view deference to majority will as a general bar to religiously motivated acts designed to frustrate the majority.

<sup>159</sup> Cuomo presumably would see no hypocrisy in his applauding King but criticizing Bush for their respective contramajoritarian activities. But what is the distinction between the two cases? Is it only that Cuomo believes that racial inequality is so immoral that even anti-democratic measures against it are warranted, but he does not believe this about the destruction of embryos? Why, though, should Cuomo's view of morality—and consequent latitude with respect to overriding majority will—be accorded more significance than Bush's? For the rejection of Cuomo's asserted distinction based on what science can prove about the born and preborn, see *infra* notes 161-165 and accompanying text.

<sup>160</sup> Other evidence is King's efforts to convince President Kennedy to issue executive orders against segregation. King exhorted the newly elected President to "give segregation its death blow through a stroke of the pen." MAYER, *supra* note 148, at 8 (quoting Martin Luther King Jr., *Equality Now: The President Has the Power*, THE NATION, Feb. 4, 1961, at 91, 93). After Birmingham, King, "[i]n both his public and private comments . . . [emphasized] the pressing need for unilateral executive action on civil rights." DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 267 (1986); see BRANCH, *supra* note 79, at 816.

<sup>161</sup> See Mario M. Cuomo, Speech at the College of St. Rose (Mar. 20, 1989), in CONGREGATION OF THE CONDEMNED 259, 260 (Shirley Dicks ed., 1991); Father Matthew Regan "Catholics and the Death Penalty," in FRONTIERS OF JUSTICE: VOLUME 1: THE DEATH PENALTY 112, 114 (Claudia Whitman & Julie Zimmerman eds., 1997).

prove ““when a fertilized egg becomes sacred,””<sup>162</sup> Bush must have acted on religious faith alone.<sup>163</sup> Opposition to the death penalty is different because it “deals – unarguably – with the life of a mature, and usually adult, human being.”<sup>164</sup>

Cuomo fails to grasp the key distinction between scientific fact and moral judgment. That a particular human organism is “mature” or “adult” is a scientific fact,<sup>165</sup> but science tells us nothing about how much, if any, value it should be accorded. Adult human beings have been ruthlessly devalued, individually and according to assorted classifications, throughout human history. That Cuomo accords greater value to adult humans than to embryonic humans results from a moral value judgment not different in kind from the judgment President Bush makes about embryonic humans. Why should Cuomo’s perception of morality—including his willingness, contrary to majority will, to protect the life of the former but not the latter—be entitled to more deference than Bush’s?

## **CONCLUSION**

President Bush did nothing inappropriate in stating his religious premises to explain his vetoes of embryonic stem cell research legislation. Faith-based values

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<sup>162</sup> Cuomo, Op-Ed., *supra* note 137. By ““sacred,”” Cuomo appears to mean an entity that can rightly be called a human being with a right to life. *See id.* As argued in the text, see *infra* text accompanying note 165, science alone can never determine when a human organism achieves this key benchmark, regardless of stage of development.

<sup>163</sup> *See* Cuomo, Op-Ed., *supra* note 137.

<sup>164</sup> Mario M. Cuomo, *Persuade or Coerce? A Response to Kenneth Woodward*, COMMONWEAL, Sept. 24, 2004, at 13, 15. Presumably, this alleged distinction also explains Cuomo’s approval of former Illinois Governor George Ryan’s contramajoritarian anti-death penalty measures. In 2000, Ryan placed a moratorium on executions in Illinois, Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1, followed in 2003 by a blanket commutation of all death penalty sentences. Jodi Wilgoren, *Citing Issues of Fairness, Governor Cleans Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, § 1, at 11. For these acts, Ryan received two awards from Death Penalty Focus, a non-profit organization dedicated to abolishing the death penalty (Mario Cuomo serves on its Advisory Board): the 2001 Mario Cuomo Act of Courage Award and the 2003 Rose Elizabeth Bird Commitment to Justice Award. *See* <http://www.deathpenalty.org/index.php?pid=dinner>. Ryan’s speech defending his commutation only indirectly relied upon religion, but it was suffused with moral arguments. *See* George H. Ryan, Address at Northwestern University College of Law (Jan. 11, 2003), *available at* [http://www.stopcapitalpunishment.org/ryans\\_speech.html](http://www.stopcapitalpunishment.org/ryans_speech.html). Ryan acted decisively “to do the right thing,” *id.*, contrary to imposed death sentences, without waiting until he won majority support.

<sup>165</sup> “Maturity” is a scientific fact only in reference to physical development.

have played a significant role throughout American history. Bush acted in accord with this long-established national tradition.

Bush also did nothing normatively inappropriate. Attempts to delegitimize religious points-of-view cannot be justified by charges of irrationality or imposition-of-faith fears. Both are bogus critiques of religious discourse and action in the public square. Disagreement about important subjects often involves the clash of foundational presuppositions. Many who seek to muzzle religious believers and preclude faith-based action are attempting to privilege their own atheistic or agnostic metaphysical presuppositions before the contest begins.<sup>166</sup> This then enables them more easily to impose their own values upon society. All law is the imposition of someone's values.<sup>167</sup> So-called secular values are not entitled to a priori preference.

Anyone seeking to squelch religiously motivated argument and action exposes himself or herself as someone lacking a true commitment to diversity. Consider the illogical conclusion to Frank Rich's *New York Times* editorial lambasting President Bush's stem cell vetoes. Rich endorses the criticism of Senator Joe Lieberman by the Anti-Defamation League, which deemed his "incessant Bible thumping (while running for vice president in 2000) . . . 'inappropriate and even unsettling in a religiously diverse society such as ours.'"<sup>168</sup> Astoundingly, and ironically, Rich and the League appear quite content to exclude Bible-thumpers as legitimate participants in political debate in our "religiously diverse society." To them, diversity obviously has its limits.

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<sup>166</sup> This would not be true of those Rawlsians who say that ultimate truth claims are contestable and religious believers are permissible disputants. *See supra* text accompanying notes 111-114. Rawlsians, however, maintain that religious truth claims must be bolstered by secular arguments. *See id.* This essay, while acknowledging that it may be prudent for believers to do so, rejects any such requirement. *See supra* text accompanying notes 124-126.

<sup>167</sup> As President-Elect Obama has stated: "[T]o say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity. Our law is by definition a codification of morality . . ." Obama, *'Call to Renewal,' supra* note 129.

<sup>168</sup> Rich, *supra* note 11.

A diverse discourse is valuable precisely because it contains points of view and leads to action that some participants will disagree with or even abhor.<sup>169</sup> The clash of competing ideas will sometimes, perhaps often, create discomfort, but this is an inevitable cost of a genuine allegiance to democratic ideals.<sup>170</sup>

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<sup>169</sup> Any branding of faith-based arguments as illegitimate in the public square is the principal target of this essay. As previously stated, *supra* note 21 and accompanying text, one should expect that faith-based arguments often will not persuade even those of the same faith, much less those of a different faith or no faith at all. This essay therefore asserts no objection to anyone's *disagreeing* with a faith-based argument. The line between perfectly appropriate critique and an inappropriate assertion that faith-based arguments have no rightful place in civic discourse may not always be easy to discern.

<sup>170</sup> See *supra* text accompanying note 126.