Religious Groups in a Free Society

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I. Introduction

In a constitutional republic such as has evolved in this country, where the U.S. Supreme Court exercises great authority over human liberty, how the Court views religion and religious groups and their relationship to the state is of great consequence. In a previous paper I thus explored the Court's understanding of the liberal political tradition and the place of religion in it.[1] There I argued that although the Court's lack of philosophical reflectiveness precludes the drawing of rigid conclusions, one sees in its Establishment Clause jurisprudence suggestions of two different concepts of liberalism. One version stresses the principle of autonomy while the other emphasizes the principle of diversity. I further argued that from about the beginning of the Court's modern Establishment Clause jurisprudence in the middle of the twentieth century until about the mid-1980s the Court's approach to religious liberty was animated by "autonomy-centered" liberalism, which led it to try to confine religion to the private sphere. Since the mid-1980s, however, the Court has placed greater emphasis on diversity, and thus no longer seeks to confine religion to the private sphere but instead to ensure only that government itself does not promote religion. These dissimilar understandings of the liberal political tradition and the role of religion within it lead to quite different conclusions about the meaning of the Establishment Clause and illustrate well that the conceptual framework the Court employs for resolving issues of religion liberty matters a great deal.

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[1] Kevin Pybas, *Two Concepts of Liberalism in Establishment Clause Jurisprudence*, 36 Cumb. L. Rev. 205 (2006).

With this in mind, my focus here is on how the Court and its justices understand or conceptualize religious groups and their role in our shared public life. To be sure, how it views religious groups cannot be divorced from its understanding of the liberal political tradition. Even so, precisely how religious groups are perceived, along with the social vision of the role of religion suggested in these conceptions, merits close examination. For just as the Court's conceptualization of liberalism influences its understanding of the scope of religious liberty protected by the First Amendment, so too does the way in which it views religion and religious groups. One who sees religious groups as sources of social discord, for example, is likely to have a different view of religious liberty than one who believes religious groups to be valuable contributors to the common good. Concentrating on the Court's understanding of religious groups, moreover, adds to our understanding of the Court's political philosophy about how liberal society can be made to work. Because neither the ratification history of the First Amendment nor the plain language of it provides straightforward answers to questions of religious liberty, the Court is relatively free to define the scope of religious liberty along lines it believes most advantageous to the nation.[2] It is thus important to interrogate and evaluate the political philosophies

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[2] Noting that neither the language of the First Amendment nor its ratification history supply clear, incontrovertible answers to questions of religious liberty, Justice Byron White once observed that

> In the end, the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choices among many alternatives. But decision has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting).

animating the choices the Court makes, including the ways in which it conceives of religious groups and their place in liberal society.

In this regard, Kathleen Sullivan has provided a helpful taxonomy of the different ways in which the Court and different members of it have conceptualized or viewed religious groups.[3] These include conceptualizing religious groups as: 1) "dangerous quasi-governments in need of restraint"; 2) "valuable private associations needing autonomy but not public subsidy"; 3) "discrete and insular minorities in need of both equal treatment and affirmative action" and as 4) "ordinary interest groups whose gains or losses in the political process may be expected to even out along with others' over time."[4]

In constructing this taxonomy of religious groups, Sullivan focuses not so much on explicit statements or arguments justices have made about religion but on the approach they take to free exercise and establishment issues. That is, she points to no statements of any justices where they plainly indicate that they think of religious groups in the way she identifies. Rather, she concentrates on the justices' approaches to free exercise and establishment and then says, essentially, that their respective approaches indicate that they are treating religious groups as if they believed them to be quasi-government competitors with the state or valuable private associations or discrete and insular minorities or ordinary interest groups. In constructing her taxonomy Sullivan focuses on two issues: whether the

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[3] Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 Harv. L. Rev. 1397 (2003) [hereinafter Sullivan, *The New Religion*]; Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 Hawaii L. Rev. 449 (2000) [hereinafter Sullivan, *Justice Scalia*].

[4] Sullivan, *The New Religion*, *supra* note 3, at 1403. Although Sullivan focuses on religious groups, she uses the phrases "religion" and "religious groups" interchangeably. They are of course not the same thing. However, in the context of her arguments, and those I will be making, no confusion is introduced by using the terms interchangeably. I will thus follow Sullivan's lead in this regard.

Free Exercise Clause should be read to exempt religiously-motivated conduct from the operation of burdensome general laws and whether the Establishment Clause should be read to permit public funds to be used in religious institutions by means of neutral aid programs, like the school vouchers at issue in *Zelman v. Simmons-Harris*.[5] In Sullivan's cataloging, weak enforcement of the Establishment Clause permits public subsidization of religion through neutral aid programs whereas strong enforcement does not. Weak enforcement of free exercise means a refusal to exempt religiously-motivated conduct from laws of general applicability while strong enforcement would so exempt unless government has a compelling reason for the law and the law is narrowly tailored to achieve that end—essentially the free exercise regime established by *Sherbert v. Verner*[6] but rejected by *Employment Division v. Smith*.[7]

With these definitions in mind, weak enforcement of the Free Exercise Clause paired with strong enforcement of the Establishment Clause suggests that religious groups are "quasi-governments" in competition with the state;[8] strong

[5] 536 U.S. 639 (2002) (upholding an Ohio law subsidizing the religious school tuition of students who had previously attended a failing public school).
[6] 374 U.S. 398 (1963). In Sherbert the Court declared unconstitutional on free exercise grounds a state law disqualifying a Seventh-Day Adventist from unemployment benefits because she refused to work on Saturday, her Sabbath day.
[7] 494 U.S. 872 (1990). In Smith the Court distinguished Sherbert and Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting on free exercise grounds Old Order Amish teenagers from state compulsory school attendance laws) and applied rational basis review to uphold a state law criminalizing the use of peyote, even when used for religious purposes. The Court concluded that the free exercise clause does not exempt religiously-motivated conduct from neutral laws of general applicability. Although Smith involved free exercise rights of individuals, Sullivan and many other commentators interpret Smith as applying also to religious groups. I am not sure that such an interpretation is warranted. For an argument that Smith does not necessarily limit the religious liberty of religious groups in the way that it does the religious liberty of individuals, see Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. Rev. 1633. Nevertheless, because the scope of Smith is not central to my arguments here, I will follow Sullivan's characterization of the decision even as I question it.
[8] Sullivan, *The New Religion*, *supra* note 3, at 1403-05.

enforcement of both establishment and free exercise suggests that religious groups are valuable private associations;[9] strong free exercise enforcement combined with weak establishment enforcement implies that religious groups are discrete and insular minorities;[10] and weak enforcement of both establishment and free exercise indicates that religious groups are ordinary interest groups.[11] These different conceptualizations of religious groups suggest, in turn, different visions about religion's place in liberal society. The belief that religious groups are best understood as quasi-governmental competitors with the state implies a "secularist" vision of society.[12] Regarding religious groups as valuable private associations corresponds with a "separationist" social vision.[13] Conceptualizing religious groups as discrete and insular minorities yields an "accomodationist" approach to religion in public life.[14] Finally, an "assimilationist" social vision is implied in seeing and treating religious groups as just another type of interest group.[15] See figure 1.

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[9] *Id*. at 1405-07.
[10] *Id*. at 1408-09.
[11] *Id*. at 1409-11.
[12] Sullivan, *Justice Scalia*, *supra* note 3, at 457. *See infra* notes 17-32 and accompanying text. Unfortunately, there is some confusion in Sullivan's writings as regards the enforcement approach that follows from viewing religious groups as state-like entities in competition with the state. In Sullivan, *Justice Scalia*, *supra* note 3, at 454, she links strong free exercise and strong establishment enforcement with the approach that sees religious groups "as quasi-governments." Yet in Sullivan, *The New Religion, supra* note 3, at 1403-05, she links the pairing of weak free exercise enforcement and strong establishment enforcement with the religious-groups-as-quasi-governements view. I'm not sure how to account for this confusion. As will become clear below, however, it makes the most sense to link weak free exercise enforcement and strong establishment enforcement with the quasi-government view, as this approach leaves the least public space for religion. I will thus treat this connection as capturing her considered view.
[13] Sullivan, *Justice Scalia*, *supra* note 3, at 452-56. *See infra* notes 33-60 and accompanying text.
[14] *Id*. at 458-60. *See infra* notes 61-72and accompanying text.
[15] *Id*. at 461-63. *See infra* notes 73-83 and accompanying text.

Figure 1

Views of religious groups	Enforcement of Free Exercise Clause	Enforcement of Establishment Clause	Social Vision
Quasi-governments	weak	strong	secularism
Valuable private associations	strong	strong	separationism
Discrete and insular minorities	strong	weak	accommodationism
Ordinary interest groups	weak	weak	assimilationism

The purpose of this paper is to explore and critique both the various approaches to religion Sullivan identifies and her own recommendations as regards establishment and free exercise. She argues that the best approach to religious liberty pairs strong free exercise enforcement with strong establishment enforcement.[16] I agree with her on free exercise but not for the reasons she gives. And I think that because of the vast welfare state that has arisen since the New Deal, strong establishment enforcement unnecessarily restricts religious liberty. My aim then is two-fold. In Part II I flesh out Sullivan's classification scheme for the purpose of better illuminating it. The objective is to clarify the similarities and differences among the different approaches to free exercise and establishment that Sullivan catalogs. In Part III I criticize strong establishment enforcement, weak free exercise enforcement, and Sullivan's arguments about religious liberty, including her reasoning in favor of strong free exercise enforcement. The thrust of my critique of these approaches is that in different ways each prioritizes casual, unsubstantiated assumptions about the requirements of social stability over religious liberty. The First Amendment, indeed the Bill of Rights as a whole, was intended to expand the sphere of human liberty over against governmental intrusion. The First Amendment thus establishes a presumption favoring liberty,

[16] Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 222 (1992) ("I favor a strong position on both [free exercise and establishment]."

which must be the basis for our thinking about the role of religion in a free society. Yet Sullivan and all too often the Court begin not with a reflection on liberty and how in the context of an expansive regulatory state it can be protected and promoted for the religious and non-religious alike, but with abstract suppositions about civic peace. This theorizing in the clouds, I argue, seeks to convert the First Amendment from a guarantor of religious liberty into a guarantor of an unsubstantiated, hazily conceived notion of social stability. In Part IV I summarize my arguments and conclusions.

II. Four views of religious groups and corresponding social visions

As noted earlier, what one thinks of the scope of religious liberty afforded to religious groups under the First Amendment depends at least in part on the view one has of religious groups. Or as Sullivan puts it, resolution of contemporary issues of religious group liberty "will be colored by which general account of religion's role in democratic politics one finds most apt."[17] Let us then consider the four views Sullivan describes.

A. Dangerous Quasi-Governments and the Secularist Social Vision

The secularist social vision is implied in the strong establishment enforcement/weak free exercise enforcement approach. It understands religion in mostly negative terms and thus seeks to minimize the public influence of religion. On this account of religious groups, their ability, unique among private associations, "to interpret the world and express shared understandings, and to

[17] Sullivan, *The New Religion*, *supra* note 3, at 1403.

command deep allegiance, fidelity, and obedience from their adherents"[18] brings them into competition with the state for the loyalty of their adherents. Religious groups "exert a quasi-sovereign authority over their members, posing a potential rivalry with the state when religious and secular obligations conflict."[19] Unlike other voluntary associations, religious organizations can supply "a totalistic worldview that colors not only family and charitable life, but also all of an individual's social relationships, potentially dividing people along deep lines, with religious conflict etched in ancient grievances passed down across generations."[20] Consequently, religious groups "threaten to become normative enclaves outside of and apart from secular society, even quasi-governments—separatist communities with distinctive epistemic perspectives and the power to command obedience anchored in faith, posing a danger that they will become sovereign rivals to the state, or even seedbeds for terrorism, separatism, and revolt."[21] This view of religious groups, Sullivan contends, is one that can be drawn from the "intractable battle lines of Belfast, Belgrade, or Beirut."[22] What is more, "[t]his is the view of religion the Framers are conventionally thought to have been trying to prevent when they barred a national church, protected the practice of religious unorthodoxy, and forbade religious tests for office."[23] Finally, Sullivan argues that the Supreme Court's approach to religious liberty

[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*. at 1403-04.
[22] *Id*. at 1404. On this point, *see* Justice Stevens's reference to the religious conflict in "the Balkans, Northern Ireland, and the Middle East" as to why the Establishment Clause should be strongly enforced to prohibit religious schools from participating in neutral voucher program. Simmons v. Zelman-Harris, 536 U.S. 639, 686 (Stevens, J., dissenting).
[23] *Id*.

was once entirely animated by the view that religion and religious groups are threats to the state, which led it to weakly enforce free exercise and strongly enforce the no-establishment prohibition.[24] The weak approach to free exercise began in 1878 in *Reynolds v. United States*[25] and endured until the early 1960s when the Court began to apply strict scrutiny to claimed violations or religious freedom, thereby requiring government to compellingly justify the law at issue.[26] Strong enforcement of no-establishment began in the seminal case of *Everson v. Board of Education*[27] and continued through the mid-1980s when the Court began to interpret the Establishment Clause in a less restrictive manner.[28] Although the weak free exercise/strong establishment approach no longer commands the

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[24] Sullivan, *supra* note 3, at 1404-05.

[25] 98 U.S. 145 (1878) (federal territorial law prohibiting polygamy does not violate free exercise rights of Mormons).

[26] *See* Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972). *See supra* notes 6-7. In Employment Division v. Smith, 494 U.S. 872 (1990), the Court of course reestablished the *Reynolds* approach to free exercise claims.

[27] 330 U.S. 1 (1947).

[28] Salient cases in the move from strong to weak enforcement of the Establishment Clause include Mueller v. Allen, 463 U.S. 388 (1983) (affirming a Minnesota law allowing families to take a tax deduction for school tuition costs, including families whose children attended religious schools); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (no Establishment Clause violation in allowing a college student to use neutrally available state vocational rehabilitation funds to study for the ministry at a Bible college); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); (permitting state-funded sign-language interpreter to assist a deaf student attending a Roman Catholic high school); and Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (no Establishment Clause violation in an an Ohio law subsidizing the religious school tuition of students who had previously attended a failing public school). Former Chief Justice Rehnquist summarized the Court's move away from what Sullivan calls strong enforcement of the Establishment Clause to weak enforcement of it as follows:

> where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Zelman, 536 U.S. at 652.

I discuss the Court's changed approach to the Establishment Clause in Pybas, *Two Concepts of Liberalism*, *supra* note 1, and in Kevin Pybas, *Does the Establishment Clause Require Religion to be Confined to the Private Sphere?,* 40 Val. U. L. Rev. 71, 74-81 (2005) [hereinafter *Does the Establishment Clause?*].

support of a majority of justices, it is, as Sullivan notes, the view favored by Justices Stevens[29] and Ginsburg.[30]

[29] Sullivan, *Justice Scalia*, *supra* note 3, at 457; Sullivan, *The New Religion*, *supra* note 3, at 1405. On Justice Steven's interpretation of the Establishment Clause to prohibit neutral public aid from flowing to religious institutions, *see, e.g.,* Zelman, 536 U.S. at 684-86 (Stevens, J., dissenting) (objecting to public funds being used to partially pay religious school tuition costs); Wolman v. Walter, 433 U.S. 229, 264-66 (1977) (Stevens, J., concurring in part and dissenting in part) (among other things, agreeing with plurality that Establishment Clause prohibits state from loaning instructional materials to religious schools and from paying for religious school field trips and dissenting from plurality opinion permitting state to purchase secular textbooks and loan them to religious schools and allowing state to reimburse parochial schools for cost of standardized testing and scoring). With regard to free exercise, Justice Stevens joined the majority opinion in Employment Division v. Smith, 494 U.S. 872 (1990) (Free Exercise Clause does not require government to compellingly justify general laws that have the effect of burdening religion). Moreover, he was the only Justice to argue that the Religiouis Freedom Restoration Act, which would have required states to compellingly justify generally applicable laws burdening religion, passed by Congress in the wake of *Smith*, violated the Establishment Clause as well as the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Steven, J., concurring). For discussion of Justice Stevens's general approach to religious freedom, *see* Eduardo Moises Penalver, *Treating Religion as Speech: Justice Stevens's Religion Clause Jurisprudence*, 74 Fordham L. Rev. 2241 (2006) (noting that Justice Stevens "favor[s] broad judicial invalidation of [] public funding of religion" making him "as reliable a vote as any against funding of religion (*Id*. at 2243) and that he "appear[s] to be more likely to vote against religious groups than any other Justice[,]" (*Id*. at 2241) seldom finding "a free exercise claim that he like[s], no matter how trivial the cost to government." (*Id*. at 2243)) and Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 Fordham L. Rev. 2177 (2006) (arguing that Justice Stevens's religious liberty jurisprudence is animated by the principle of "equal membership").

[30] Sullivan, *Justice Scalia*, *supra* note 3, at 457; Sullivan, *The New Religion*, *supra* note 3, at 1405. Justice Ginsburg has written few opinions in which free exercise or establishment issues were raised and none specifically addressing exemptions from general laws or the participation of religious groups in general government aid programs. As Sullivan points out, however, Justice Ginsburg joined the majority in *Flores* striking the Religious Freedom Restoration Act but did not join the separate opinions of Justices O'Connor and Souter arguing that *Smith* should be revisited. Sullivan, *Justice Scalia*, *supra* note 3, at 457; Sullivan, *The New Religion*, *supra* note 3, at n.36. As regards governmental subsidization of religion via general programs, Justice Ginsburg wrote a dissenting opinion in Agostini v. Felton, 521 U.S. 203 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985) and partially overruling Grand Rapids School District v. Ball, 473 U.S. 373 (1985), but her opinion addresses procedural matters, not the substance of the Establishment Clause claim at issue. *Id.* at 255-60 (Ginsburg, J., dissenting). Although she has written no opinions concerning religion's participation in general aid programs, she consistently opposes them. *See, e.g.,*Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (joining Justice Souter's dissenting opinion opposing the use of school vouchers in religious schools); Mitchell v. Helms, 530 U.S. 793, 867 (2000) (joining Justice Souter's dissenting opinion opposing federal law providing library books and instructional equipment to religious schools). *Agostini*, 521 U.S. at 240 (joining Justice Souter's dissenting opinion opposing law permitting government employees to provide remedial educational instruction in religious schools); and Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 863 (1995) (joining Justice Souter's opinion dissenting from majority decision finding that Establishment Clause does not require public university to deny student activity funds to evangelican Christian student organization when funds are allocated on the basis of neutral criteria). Indeed, overall Justice Ginsburg takes a strict approach to establishment. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753,

For Supreme Court justices and others who believe that the social impact of religion is mainly harmful, it follows that they would advance an interpretation of the First Amendment that would seek to restrain religion's influence and potential for harm. This is accomplished by denying religion any significant public space. This secularist social vision sees religion as "merely something that people should practice in private without affirmative state support."[31] This is achieved by weakly enforcing the Free Exercise Clause and strongly enforcing the Establishment Clause. Weak enforcement of free exercise leaves religious groups in the same position as other groups in that when their religious liberty is burdened by neutral laws of general applicability they are no more entitled to constitutional relief from such laws than are non-religious groups who are similarly burdened. Denying "special" exemptions for the religious from neutral laws, it is believed, safeguards against the supposed harmful affects of religion in two ways. First, society is protected from splintering along religious lines that might ensue if the religious were entitled to relief from laws that others were obliged to obey. Moreover, granting the religious exemptions unavailable to the non-religious, it is feared, would encourage the deepening of religious loyalties and identities, thereby increasing the likelihood of the balkanization of society. Secondly, society is protected from the chaos that it is believed would result from exempting the religious from general laws. As the Court argued in *Reynolds*, exempting religiously-motivated conduct from general laws "make[s] the

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817-18 (Ginsburg, J., dissenting) (finding Establishment Clause violation in the display of a Latin cross on statehouse plaza designated as a public forum). In *Capital Square*, Justice Ginsburg endorsed Sullivan's claim that the prohibition on establishment affirmatively establishes a secular moral public order. *Id*. at 817 (citing Sullivan, *supra* note 16, at 197-214).

[31] Sullivan, *Justice Scalia*, *supra* note 3, at 459.

professed doctrines of religious belief superior to the law of the land, and in effect [] permit[s] every citizen to become a law unto himself. Government could exist only in name under such circumstances."[32] Viewing religious groups as threats to the state and to social stability thus leads to weak enforcement of free exercise rights as regards general laws, in effect treating them in an identical manner to secular groups.

On the Establishment Clause side of the religious liberty ledger, however, the same pessimistic view of religion leads not to treating it the same as non-religion but to imposing special disabilities on it; or as Sullivan puts it, to strong enforcement of the Establishment Clause. On this view, religious schools, religious social service providers and other religious associations should receive no public funding, even for the secular services they provide. Allowing religious groups to share in public funds will cause resentment in persons opposed to the subsidization of faiths not their own, which will deepen the religious divisions in this country. The uniqueness of religion therefore requires religion to be treated the same as non-religion when exemptions from general laws are sought but requires religion to be treated differently from non-religion when public funds are sought. While such an interpretation of the Free Exercise and Establishment Clauses seems akin to a coin toss where "heads I win, tails you lose," recall that this interpretive approach is in pursuit of a secularist social vision that seeks to limit religion's public influence. It begins with the view that religion is a threat to

[32] Reynolds, 98 U.S at 167. Similarly, Justice Scalia, writing for the Court in Employment Division v. Smith, 494 U.S. 872 (1990), where it rejected the claim that the Free Exercise clause exempts religiously motivated conduct from neutral laws of general applicability, argued that "[a]ny society adopting such a system would be courting anarchy," particularly in a nation as religiously diverse as ours. *Id*. at 888.

the state; hence, its public dimension must be curtailed. This is accomplished by not granting exemptions from general laws and by not allowing public funds to be used by religious organizations for any purposes. In other words, to minimize religion's harmful influence, religion can receive no assistance from government, either financially or by way of exemptions from obeying generally applicable laws.

B. Valuable Private Associations and the Separationist Social Vision

Enforcing both free exercise and establishment strongly implies that religious groups as like other valuable private associations but with an important distinction. They are similar to other voluntary associations in that they "occupy an intermediate ground between individuals and government, and serve valuable social and political functions by fostering normative pluralism and epistemic diversity, in turn ensuring healthy social mobility or helping to check the potentially homogenizing tyranny of the state."[33] Religious groups, however, are unlike other voluntary associations in that "religion operates as a more powerful force in people's lives than does membership in a Kiwanis Club, a fraternity, or a cheerleading organization."[34] Thus, similar to the quasi-government approach, the valuable private associations view also understands religious groups to possess "unique power to interpret the world and express shared understandings, and [] to command allegiance and obedience."[35] They are "normative enclaves

[33] Sullivan, *The New Religion*, *supra* note 3, at 1406; Sullivan, *Justice Scalia*, *supra* note 3, at 453-54.
[34] Sullivan, *Justice Scalia*, *supra* note 3, at 454.
[35] *Id*.

outside of and apart from secular society."[36] In contrast to secular groups, religious associations "exert a kind of sovereign authority over their members."[37] The separationist view of religion is thus mixed. On the one hand, it sees religion as a potentially divisive social force: "religion is not a garden-variety interest group, and the danger of civil fissure is too great if it is treated as one."[38] But it also sees religious groups as playing an important role in society as intermediaries between individuals and the state.

The scheme of religious liberty that follows from this understanding of religion entails both strong establishment and free exercise enforcement. It is the framework of religious liberty advanced by pairing *Everson v. Board of Education*[39] with *Sherbert v. Verner*[40] and *Wisconsin v. Yoder*.[41] Among current justices, Sullivan notes that Justice Souter is the most consistent advocate of the separationist social vision.[42]

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[36] *Id*.
[37] *Id*.
[38] *Id*. at 454-55.
[39] 330 U.S. 1 (1947). *See supra* note 23
[40] 374 U.S. 398 (1963). *See supra* note 6.
[41] 406 U.S. 205 (1972). *See supra* note 7.
[42] Sullivan, *Justice Scalia*, *supra* note 3, at 456; Sullivan, *The New Religion*, *supra* note 3, at 1406. On Justice Souter's strong establishment views, *see, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (objecting to majority decision upholding an Ohio law providing tuition assistance to students enrolled in religious schools) (Souter, J. dissenting); Mitchell v. Helms, 530 U.S. 793, 867 (2000) (objecting to majority decision upholding a federal law providing instructional materials such as library books, media materials, and computers to religious schools) (*overruling* parts of Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U. S. 229 (1977)) (Souter, J., dissenting); Agostini v. Felton, 521 U.S. 203, 240 (1997) (objecting to majority decision allowing state-employed teachers to offer instruction in remedial and enrichment courses in parochial schools) (*overruling* Aguilar v. Felton, 473 U.S. 402 (1985) and *partially overruling* Grand Rapids School District v. Ball, 473 U.S. 373 (1985) (Souter, J., dissenting); and Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 863 (1995) (objecting to majority decision finding that a public university does not violate the Establishment Clause when it makes student activity funds available to various student groups, including a student-run religious organization, on the basis of neutral criteria) (Souter, J., dissenting). On his strong free exercise approach, *see* City of Boerne v. Flores, 521 U.S. 507, 565 (1997) (arguing that writ of certiorari should not have been granted and suggesting that Employment Division v. Smith , 494

For separationists the uniqueness of religion and its potential for social divisiveness means that the state must refrain from associating itself with religion. This, Sullivan says, is the lesson separationists draw from *Everson*,[43] where the Supreme Court in dicta interpreted the Establishment Clause to mean that "[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"[44] The Establishment Clause thus bars "state involvement in or aid to religion."[45] In Sullivan's words, "religious associations express distinctive viewpoints that government must refrain from speaking or having attributed to it, either in its own capacity or as the mouthpiece of citizens who believe in other faiths or none."[46] This prohibition takes two forms. Government can neither endorse the messages of religious groups nor provide financial assistance to them. On this view, strong enforcement of the Establishment Clause is required to protect the rights of dissenting citizens by preventing the government from using their tax contributions to support religion, either by endorsing a religious message or by providing financial assistance to religious organizations. In other words, strong establishment enforcement safeguards the associational rights of dissenters by preventing them

U.S. 872 (1990), was wrongly decided) (Souter, J., dissenting); and Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 564-577 (1993) (concurring in part and concurring in judgment) (arguing that *Smith* should be reexamined).

[43] 330 U.S. 1 (1947) (permitting public money to be used to reimburse bus transportation costs for children attending Catholic schools).

[44] Kathleen M. Sullivan, *God as a Lobby*, 61 U. Chi. L. Rev. 1655, 1665 (1994) (reviewing Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion (1993) and quoting *Everson*).

[45] *Id*.

[46] Sullivan, *The New Religion*, *supra* note 3, at 1407.

from being coerced "through taxation" into supporting religion.[47] So while government may endorse the messages of and provide financial assistance to any number of non-religious privates associations, say, for example, Mothers Against Drunk Driving, the Establishment Clause prevents it from aligning itself with religious groups.

Although the separationist approach to the Establishment Clause is virtually identical to secularist approach—both barring government from supporting religion—the separationist understanding of free exercise is more favorable to religion than that of the secularists. The secularists interpret the powerful sway religion can have in the lives of individuals as mostly a bad thing, at least in terms of its likely social or civic influence. However, while being wary or religion in the public sphere, separationists nevertheless see some social benefit to religion—in the intermediary role religious groups play. And so as to protect religious groups in their intermediary roles, separationists seek to protect the ability of religious groups to define their own identities and missions. This means that general laws that burden religion must give way unless they can be compellingly justified. Thus, for example, "the Roman Catholic Church must be free to exclude women from the priesthood, and Old Order Amish parents to reclaim their teenage members from indoctrination by local public high schools that would undermine the cultural cohesion of their religious communities."[48] In a regulatory state such as ours, with innumerable laws impacting everyday life in countless ways, lawmakers may be insensitive to the ways in which laws affect

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[47] *Id*. at 1405.
[48] *Id*. at 1407.

religious groups, particularly non-traditional religious groups. The Free Exercise Clause should be therefore strongly enforced. This prevents the state from undermining the "collective self-expression"[49] of religious groups. This, in turn, safeguards the ability of religious groups to stand between individuals and the state: "[f]ree exercise exemptions operate as allocations of alternative jurisdiction to religious entities that help keep the values promoted by the central government from becoming too monolithic."[50]

What is more, because of the unique power of religion free exercise exemptions from general laws "are ultimately a safety valve for the civil order."[51] When an individual's civic and religious obligations conflict, general law exemptions reduce the tension. Exemptions "allow people who do not think they can conscientiously comply with general laws to have, at least on selected matters, a kind of normative enclave of their own."[52] Exemptions are thus safeguards for the state, to protect it from religious citizens who otherwise might rebel against it "when the commands of God and Caesar conflict."[53]

That the separationist vision of religious liberty requires strong establishment enforcement suggests yet another rationale for why free exercise should also be strongly enforced: strong enforcement of free exercise compensates for strong establishment enforcement. Exempting religiously-motivated conduct from general laws counterbalances "the political disability religious organizations suffer because strong establishment entails that religious

[49] *Id.*
[50] Sullivan, *Justice Scalia*, *supra* note 3, at 454.
[51] *Id.* Sullivan, *The New Religion*, *supra* note 3, at n.37.
[52] Sullivan, *Justice Scalia*, *supra* note 3, at 454.
[53] *Id.*

points of view may not decisively drive political outcomes and that religion may not enjoy the full distribution of public bounties."[54] What Sullivan means is that the separationist view, which is her own,[55] understands the Establishment Clause to deny government the ability "to put its imprimatur of approval on religion through any official action."[56] This means that government cannot fund, promote or acknowledge (through its speech and symbols), or base its laws, on religion. In Sullivan's separationist vision the Establishment Clause "banish[es] religion from the public square"[57] or the "civil public order."[58] As compensation for the exclusion of religion from public life, however, "religious communities must be afforded significant leeway for an exit from secular law's commands."[59] In this theory, then, strong enforcement of free exercise—exempting religion from laws of general applicability—is intended to counterbalance strong establishment enforcement.[60]

To recap the separationist social vision, it shares with the secularist approach the belief that religion is a uniquely powerful force in people's lives, an ever-present threat to social peace. Consequently, both positions hold that the Establishment Clause forbids all symbolic and financial governmental support of religion. Despite similar attitudes about the distinctiveness of religion, however, separationists differ with secularists on the appropriate approach to free exercise.

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[54] Sullivan, *The New Religion*, *supra* note 3, at n.37.
[55] *See infra* notes 124-37 and accompanying text.
[56] Sullivan, *supra* note 16, at 205.
[57] *Id.* at 222.
[58] Sullivan, *supra* note 44, at 1665.
[59] *Id.* at 1666.
[60] As Sullivan notes, a similar approach to religious liberty is advocated by Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L.J. 1611, 1614-33 (1993). Sullivan, *supra* note 44, at n.32.

Three different instrumental theories are offered in support of the separationists' strong free exercise enforcement. The first holds that like other voluntary associations, religious groups perform an important social function, serving as valuable intermediaries between individuals and the state. So as to protect the ability of religious groups to act in this capacity, then, government must compellingly justify general laws that burden religion. Also supporting strong enforcement of free exercise is the notion that because of the fierce loyalty religion can command from its followers, exemptions act as a safety valve to minimize the tension between religion and the state when the obligations each places on individuals conflict. Finally, Sullivan's own view is that strong free exercise enforcement is necessary as compensation for strong establishment enforcement. Strong establishment enforcement prevents the state from supporting religion, either symbolically or financially, even for the secular services religious groups provide. To offset the perceived harshness of this, requiring government to compellingly justify burdensome general laws makes it easier for religious individuals and groups to live according to their own best lights without undue interference from an expansive regulatory state.

C. Discrete and Insular Minorities and the Accomodationist Social Vision

Sullivan describes the third approach to religious liberty found in the Supreme Court's jurisprudence as one that conceptualizes religion as a "discrete and insular minority"[61] in need of special protection. That is, weak establishment enforcement paired with strong free exercise enforcement implies an

[61] Sullivan, *The New Religion*, *supra* note 3, at 1408; Sullivan, *Justice Scalia*, *supra* note 3, at 460.

"accomodationist social vision" that seeks "not only equal rights for religion, but 'affirmative action' for religion.[62] This approach "sees religious associations as less like traditional voluntary associations than like ascriptive groups such as those based on race and gender."[63] As a result, religious groups "are entitled not only to protection from unequal treatment, but also to preferential treatment in order to offset historical and structural disadvantages."[64] What Sullivan means by "historical and structural disadvantages" is the belief that the expansive and ever-growing welfare state threatens the health and well-being of religion and religious groups. The notion is that as the state continuously expands and assumes responsibility for activities once carried out by religious entities, like education, health care and charity, religious groups are left with less and less space in which to function. The growth of government and with it the concomitant secularization of the public sphere "lead religious practices to be undervalued and threaten[s] to distort religious choices."[65] In this state of affairs "religious flourishing depends not only on the autonomy of religious institutions and their negative freedom from government interference, but also upon their affirmative freedom to participate in the expanded public sphere, which now encompasses a great range of activities once provided by religious institutions."[66]

The goal of accomodationism is "to minimize government distortion of prepolitical religious choices"[67] The accomodationist seeks to as much as is

[62] Sullivan, *Justice Scalia*, *supra* note 3, at 460.
[63] Sullivan, *The New Religion*, *supra* note 3, at 1408.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] Sullivan, *Justice Scalia*, *supra* note 3, at 460.

feasible to respond to religion as though we lived in a prepolitical condition, to as much as possible give it the space it would have but for the presence of the sprawling bureaucratic state.[68] The religious liberty regime corresponding to this social vision is strong free exercise enforcement and weak establishment enforcement. Religious group participation in general government programs and broad religious exemptions from general laws minimizes the impact of the welfare state on religion. An accommodationist thus believes that "courts should broadly exempt religious normative enclaves from secular commands but also ensure that religions can compete fairly with secular substitutes under the welfare state's expanding umbrella."[69] Religious groups should be permitted "to partake of the spoils of the modern welfare state on par with their secular substitutes."[70] The pairing of strong free exercise with weak establishment is of course the most favorable combination possible for religion. Sullivan characterizes this reading of religious group liberty as a type of "affirmative action"[71] for religion and identifies Justice O'Connor as the justice who most consistently took this approach.[72]

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[68] Sullivan rejects this approach to religious liberty. For her the prepolitical is not the correct baseline for thinking about religious liberty. "The correct baseline," she writes, "is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order." Sullivan, *supra* note 16, at 198. Sullivan's views are discussed more fully below. *See infra* text accompanying notes 124-37.
[69] Sullivan, *Justice Scalia*, *supra* note 3, at 460.
[70] Sullivan, *The New Religion*, *supra* note 3, at 1409.
[71] *Id*.
[72] *Id*. Sullivan, *Justice Scalia*, *supra* note 3, at 458-59. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (O'Connor, J., concurring) (no Establishment Clause violation in state law providing tuition assistance to children attending religious schools); Mitchell v. Helms, 530 U.S. 793, 836 (2000) (O'Connor, J., concurring) (agreeing with plurality that Establishment Clause was not violated by federal law providing instructional materials such as library books, media materials, and computers to religious schools); City of Boerne v. Flores, 521 U.S. 507, 544 (1997) (*Smith* was wrongly decided and should be reconsidered) (O'Connor, J., dissenting); Agostini v. Felton, 521 U.S. 203 (1997) (no Establishment Clause violation in federally funded program

D. Ordinary Interest Groups and the Assimilationist Social Vision

The final view of religious groups Sullivan describes is drawn from weak enforcement of both free exercise and establishment. This approach implies that religious groups are best understood as ordinary interest groups largely indistinguishable from non-religious groups. From this perspective, religious groups "are neither epistemically special, distinctively expressive, especially oppressed or disadvantaged, nor uniquely normatively valuable to the political order."[73] Religious and non-religious groups alike are involved in "presiding over useful family rituals, organizing choirs, feeding the hungry, manufacturing jam or wine, distributing twelve-step-program pamphlets, counseling wayward youth and providing useful outlets for civic and charitable energies."[74] On this view, there is no way to draw "principled distinctions between Saturday sabbatarians and soccer moms, Quaker pacifists and antiwar activists, Rastafarians and regulars at the Cannabis Club."[75] Consequently, exempting religiously-motivated conduct from the operation of general laws treats religion more favorably than non-religion. Such a result, moreover, provides an incentive for more and more behavior to be claimed as religiously inspired, so as fall within the ambit of exemption

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providing supplemental, remedial instruction to disadvantaged children on a neutral basis) (overruling Aguilar v. Felton, 473 U.S. 402 (1985) and partially overruling Grand Rapids School District v. Ball, 473 U.S. 373 (1985); and Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 846 (1995) (no Establishment Clause violation in public university program making student activity funds available to various student groups, including a student-run religious organization, on the basis of neutral criteria); and Employment Div. v. Smith, 494 U.S. 872, 891 (arguing that constitutionality of general law burdening religion should be judged by compelling interest test, which was satisfied in present case) (O'Connor, J., concurring).

[73] Sullivan, *The New Religion*, *supra* note 3, at 1409. *See* Sullivan, *Justice Scalia*, *supra* note 3, at 461.

[74] Sullivan, *The New Religion*, *supra* note 3,at 1409-10.

[75] *Id*. at 1410. See Sullivan, *Justice Scalia*, *supra* note 3, at 461.

entitlement. Treating religious groups differently than secular groups thus "may well act as a breeding ground for deviance from general norms, with the potential to bring about widespread copycat anarchy."[76] To avoid all of this, religious groups are to be treated no differently than secular groups as regards the operation of general laws.

By the same token, however, if religious groups are practically the same as secular groups, if they are ordinary interest groups by another name, there is no need to treat them as special cases prohibited by the Establishment Clause from participating in politics. "[I]f religious associations are not so different from other garden-variety interest groups," Sullivan writes, "then they might as well be allowed to participate openly and freely in politics and to bring home their fair share of the spoils."[77] If they from time to time come out on top in the interest group process, "if religious groups succeed in procuring benefits alongside other groups that drink at the public trough, then they should face no judicial impediment to keeping those benefits."[78]

The religious liberty regime accompanying this view of religious groups is weak enforcement of both free exercise and establishment. As is obvious, this approach is exceptionally deferential to democratic processes. If religious groups are essentially indistinguishable from secular groups, there is no reason to treat them differently as regards the operation of general laws or neutral government aid programs. While this would seem to leave religious groups particularly

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[76] Sullivan, *The New Religion*, supra note 3, at 1410. See Sullivan, *Justice Scalia*, *supra* note 3, at 461.
[77] Sullivan, *The New Religion*, supra note 3, at 1410. See Sullivan, *Justice Scalia*, *supra* note 3, at 461.
[78] Sullivan, *The New Religion*, supra note 3, at 1410.

vulnerable, especially small, non-mainstream religious groups, one must appreciate that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[79] In other words, however politically impotent any one group may be, "cross-religious alliances are possible, and the political lobbying power of religious interests in the aggregate makes up for any sect's weakness operating alone."[80] The point to emphasize is that viewing religious associations as part and parcel of the interest group process is to see religion as no serious threat to civic life and at the same time to encourage the further assimilation of religious groups into our common political life by inviting them to participate in politics on the same terms as secular groups. As Sullivan points out, this is the Supreme Court's approach today, where *Smith*[81] controls exemptions from general laws and *Zelman*[82] controls neutral aid to religion. And she sees Justice Scalia's attitude toward establishment and free exercise as embodying the assimilationist view.[83]

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[79] Smith, 494 U.S. at 890.
[80] Sullivan, *The New Religion*, *supra* note 3, at 1411. As Sullivan reminds us, for example, after *Smith* the state of Oregon rewrote its drug law to exempt the religiously-motivated use of peyote and Congress passed the Religious Freedom Restoration Act (RFRA), which sought to require the Court to employ the compelling interest test in evaluating laws that burden religion, even if only indirectly. RFRA was declared unconstitutional on Fourteenth Amendment grounds as applied against the states in City of Boerne v. Flores, 521 U.S. 507 (1997).
[81] *See supra* note 7.
[82] *See supra* note 5.
[83] Sullivan, *Justice Scalia*, *supra* note 3, at 461. On Justice Scalia's approach to free exercise, *see* the majority opinion he authored in Employment Div. v. Smith, 494 U.S. 872 (1990) (Free Exercise clause does not exempt religiously-motivated conduct from obligations of general laws) and his concurring opinion defending *Smith* in City of Boerne v. Flores, 521 U.S. 507, 537-44 (1997) (Religious Freedom Restoration Act declared unconstitutional on Fourteenth Amendment grounds and rejecting notion that *Smith* was wrongly decided) (Scalia, J., concurring). Justice Scalia has authored no opinions involving neutral aid programs and religion but has joined majority opinions upholding religious school vouchers in Zelman v. Simmons-Harris, 536 U.S. 639 (2002), upholding federal law providing instructional materials to religious schools in Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion), upholding federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis in Agostini v. Felton, 521 U.S. 203 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985) and

III. Evaluating Sullivan's Taxonomy

As we have seen, both secularists and separationists believe in strong establishment enforcement while both accomodationsists and assimilationists believe in weak establishment enforcement. And both secularists and assimilationists believe in weak free exercise enforcement while both separationists and accommodationists believe in strong free exercise enforcement.[84] Having explained Sullivan's classification of religious groups, arguments, I now wish to critically examine it. In doing so, I will also address Sullivan's own views about the proper understanding of establishment and free exercise. I begin by considering the two different approaches to the Establishment Clause.

A. Strong Establishment Enforcement

1. *Everson v. Board of Education* and Strong Establishment Enforcement

On Sullivan's telling, the Court strongly enforced the Establishment Clause for about forty years, beginning in 1947 in *Everson v. Board of Education*[85] and continuing through the mid-1980s. In *Everson* the Court,

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partially overruling Grand Rapids School District v. Ball, 473 U.S. 373 (1985)), finding that Establishment Clause does not prohibit distribution of public university student activity funds to student religion group when done pursuant to neutral criteria in Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995), finding no Establishment Clause violation in publicly-funded sign-language interpreter assisting deaf student in religious school in Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). Justice Scalia's weak reading of the Establishment Clause is not limited to aid cases. As Sullivan notes, as a Supreme Court justice he has neither authored no joined an opinion finding an Establishment Clause violation to a challenged law. Sullivan, *The New Religion*, *supra* note 3, at n. 51 (collecting cases).

[84] *See* Figure 1.

[85] 330 U.S. 1 (1947).

through Justice Black, ruled that the Establishment Clause was incorporated into the Due Process Clause of the Fourteenth Amendment and is therefore a limitation on the states as well as the national government.[86] Quoting from Thomas Jefferson's letter to the Danbury, Connecticut, Baptist Association, the Court further ruled that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"[87] According to the Court, the wall of separation meant, among other things, that neither the federal nor state governments "can pass laws which aid one religion, aid all religion, or prefer one religion over another" and that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions,"[88] Despite interpreting the Establishment Clause in this way, the Court nevertheless found no constitutional violation in a law reimbursing parents for transportation costs incurred in getting their children to and from Catholic schools. This was so, the Court reasoned, because such costs were analogous to provision of general governmental services like fire and police protection and the provision and maintenance of sidewalks.[89] That the Court found no Establishment Clause violation in the reimbursement plan would seem to suggest weak, instead of strong, enforcement of the no-establishment principle. However, in characterizing the ruling as an instance of strong establishment enforcement,

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[86] *Id*. at 8.
[87] *Id*. at 16 (quoting Reynolds v. United States, 98 U.S 145, 164). For a comprehensive, engaging account of Jefferson's letter and the occasion of its writing, *see* Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* (2002). Jefferson's Danbury letter can be found in Dreisbach. Numerous commentators have persuasively challenged the Court's claim in Everson that the provisions in the First Amendment on religion are simply a restatement of Jefferson's (and James Madison's) views on religious liberty. *See infra* note 107.
[88] *Everson*, 330 U.S. at 15-16.
[89] *Id*. at 16-18.

Sullivan focuses not on the outcome but on the view of religion articulated by Justice Black, who argued that:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions generated in large part by established sects determined to maintain their absolute political and religious supremacy. . . .Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects . . . and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.[90]

It is thus the Court's understanding of religion as harmful to the peace and stability of society that leads Sullivan to see *Everson* as an example of strong establishment enforcement.

I think Sullivan is correct to see *Everson* as an instance of strong establishment enforcement. Indeed, the suspicion of religion evident in Justice Black's opinion is so pronounced that the outcome of the case remains surprising all these years later.[91] We should note, however, that Justice Black nevertheless rejected the notion that the Establishment Clause "require[s] the state to be [the] adversary"[92] of religion and religious schools. In general terms, then, it is perhaps

[90] Sullivan, *supra* note 3, at 1404 (quoting Everson, 330 U.S. at 8-9).
[91] Recall Justice Jackson's dissenting opinion in *Everson*, where he noted that

> the undertones of the [majority] opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent,'—consented."

Everson, 330 U.S. at 19 (Jackson, J., dissenting).
[92] *Everson*, 330 U.S. at 18.

more accurate to say that the principle established in *Everson*, and enlarged in later cases, sometimes leads to strong establishment enforcement but sometimes not. It seems that what *Everson* sought to foreclose is not all governmental assistance to religion but only that which is seen as directly furthering a religious mission. On the other hand, aid of the type at issue in *Everson* that is "so separate and so indisputably marked off from the religious function"[93] is permissible. Government benefit cases after *Everson* bear this out.

Although the incorporation of the Establishment Clause in *Everson* embroiled the Court in more and more religion and state disputes, it was not until 1968 that it dealt with another government benefit case. In *Board of Education v. Allen*[94] the Court upheld a New York law requiring local public school districts to lend textbooks without charge to students in grades 7-12, including those attending religious schools. The Court emphasized that the textbooks were for secular subjects and, relying on *Everson* and subsequent non-benefit cases, concluded that the law had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[95] Taken together, *Everson* and *Allen* indicate that the Court's approach to the nascent category of government benefit cases was whether the aid was limited to secular purposes, like transportation or secular textbooks. If so, then whatever furtherance of religion was made possible by the benefit was considered incidental rather than direct or primary and therefore constitutionally permissible. But what if the Court could not be certain that the aid would in fact be limited to secular purposes? This was the concern in

[93] *Id*.
[94] 392 U.S. 236 (1968).
[95] *Id*. at 243 (citations omitted).

Lemon v. Kurtzman[96] where at issue were laws from Rhode Island and Pennsylvania that in different ways subsidized the salaries of teachers in religious schools teaching secular subjects. Without deciding whether the subsidization directly or indirectly advanced religion, the Court reasoned that comprehensive monitoring was required to make sure that the teachers being subsidized did not introduce religion into the secular subject they were teaching. This requirement, however, would lead to an "excessive entanglement" between church and state, which the Court concluded is prohibited by the Establishment Clause.[97] Following *Lemon*, then, it was not enough that the governmental benefit was intended for secular purposes, the Court had to be certain that the aid would not be put to religious purposes. To be sure, the line between the permissible and prohibited was not always clear.[98] I will not go into the pertinent cases here, for I have done so elsewhere,[99] but the Court followed this approach—allowing aid that it saw as secular in character but disallowing aid that might further religion—in benefit cases for another decade and a half or so.

[96] 403 U.S. 602 (1971).
[97] *Lemon* thus gave rise to the famous (or infamous) *Lemon* test for evaluating whether the Establishment Clause has been breached: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, … finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (citations omitted).
[98] *Compare* Meek v. Pittinger, 421 U.S. 349, 352-55 (1975) (permitting secular text books purchased with public funds to be loaned to religious schools but not instructional materials, such as maps, photos, and lab equipment and disallowing state funded on-site counseling and speech and hearing therapy) *with* Wolman v. Walter, 433 U.S. 229, 237-55 (1977) (among other things, disallowing public funds to be used to pay for parochial school field trips but allowing state-funded health-care workers to perform diagnostic evaluations of religious school students on-site). The portions of both cases striking the aid in question were overruled in Mitchell v. Helms, 530 U.S. 793 (2000) (upholding federal law providing library books and educational equipment to primary and secondary schools, including religious schools).
[99] Pybas, *supra* note 1, at pp. 217-20.

Despite the fact that in this period the Court allowed aid to religious schools for their secular functions, I do not question that the Court in this period appeared to have a disapproving view of religion, particularly Roman Catholicism. Recall, for example, Justice Black's complaint against Catholics in his dissent in *Board of Education v. Allen*:[100] "[t]he same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion."[101] Recall also Justice Douglas's concurring opinion in *Lemon v. Kurtzman*[102] approvingly quoting an anti-Catholic tract claiming that

> [i]n the parochial schools Roman Catholic indoctrination is included in every subject. History, Literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.[103]

As Thomas Berg argues, statements such as these from Justices Black and Douglas, along with other evidence he marshals, indicate that they as well as other justices "shared the negative views of Catholicism found widely" among political elites at the time.[104] Douglas Laycock notes, too, that in "the middle of

[100] 392 U.S. 236 (1968).
[101] *Id*. at 251.
[102] 403 U.S. 602 (1971)
[103] *Id*. at 635 n.20.
[104] Thomas Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. U. Chi. L.J. 121, 129 (2001). *See also* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297-318 (2001) (describing the influence of anti-

the twentieth century, there was a wave of open and respectable anti-Catholicism among the American intellectual elite" and that the Court was not beyond this influence.[105] Sullivan is thus correct in noting the Court's disapproving view of religion, particularly of Catholicism, during this period. I wonder, though, if something more is present in these cases, something that Sullivan fails to note.

That something more, I think, is indifference to religion and religious liberty. This indifference is manifest in at least two ways in *Everson*. First, the Court took no notice of the extraordinary growth in government initiated by the New Deal. Of course no federal law was at issue in *Everson*, but the rapid expansion of government underway at the time suggested at least a hint of difficulty in the approach the Court took. Citing earlier cases, the Court asserted that the *Virginia Bill for Religious Liberty* authored by Thomas Jefferson and James Madison's *Memorial and Remonstrance Against Religious Assessments* and Jefferson's letter to the Danbury Baptists provided the authoritative meaning of the First Amendment's religion clauses.[106] Putting aside the implausible claim that the Establishment and Free Exercise Clauses are simply restatements of Jefferson's and Madison's views on religious liberty,[107] the Court's reliance on

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Catholicism on the development of Establishment Clause jurisprudence in the middle of the twentieth century; and Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DePaul L. Rev. 263, 279-93 (1992) (describing hostility to Roman Catholics in America in the nineteenth and twentieth centuries); and Philip Hamburger, Separation of Church and State (2002) (describing same, especially in chapter eight).

[105] Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 B.Y.U. L. Rev. 275.

[106] *Everson*, 330 U.S. at 11-16 (citations omitted). The *Memorial and Remonstrance* is attached as an appendix to Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 63 (Rutledge, J., dissenting). The Virginia Bill for Religious Liberty can be found in numerous places, including 5 The Founders' Constitution 77 (P. Kurland & R. Lerner, eds. 1987).

[107] As I have written elsewhere,

the “wall of separation” metaphor raises the following concern. Jefferson’s wall metaphor stems from a set of beliefs that that also included belief in limited government. When government was limited the wall metaphor may have served as a helpful guide to considerations of religious liberty.[108] But once limited government was rejected in the New Deal era, mechanical reliance on the wall metaphor leads to a diminution of religious liberty. As the state grows and assumes more and more responsibilities that formerly were carried out by

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> “given the ‘widespread and deep division[s]’ over the meaning of religious liberty in the late eighteenth century, it is exceedingly unlikely that the men in Congress and the state legislatures that ratified the First Amendment believed they were writing into the Constitution the views of Jefferson and Madison to the exclusion of all others.”

Pybas, *Does the Establishment Clause?*, supra note 28, at 83-84 (citing Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1115, 1133). Conkle and others argue that the First Amendent is best understood as simply a jurisdictional statement making clear that the new national government had no authority over religion. He writes that

> At the time of the first amendment's adoption, the newly created American states reflected divergent views concerning the appropriate relationship between religion and government. Virginia had recently expressed a separationist philosophy in its Bill for Religious Liberty, and six other states also embraced anti-establishment policies. The remaining six states, however, continued to maintain or authorize established religions. In these latter states, at least, the prevailing political philosophy thus permitted the use of public for the support and furtherance of religion.
>
> Given this widespread and deep division, how could Congress and the ratifying state legislatures have reached agreement on the establishment clause? It was supported, after all, both by separationists and by those who were committed to programs of state-sponsored religion. These various political actors simply could not have agreed on a general principle governing the relationship of religion and government, whether it be the principle endorsed in Everson or any other. If the establishment clause had embraced such a principle, it would not have been enacted. What united the representatives of all the states, both in Congress and in the ratifying legislatures, was a much more narrow purpose: to make it plain that Congress was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states.

Id. at 1132-33. See also Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (1995) and *The Jurisdictional Establishment Clause: A Reappraisal*, 81 Notre Dame L. Rev. 1843 (2006).

[108] Actually, given how little Establishment Clause case law there is from the era of limited government, it is not clear to me just how useful a guide the wall metaphor was even then.

voluntary associations, the metaphorical wall moves with it, leaving religion with less public space within which to operate. Jefferson and Madison understood their political principles, including their notions about religious liberty, to be in the service of expanding the sphere of human liberty over against governmental interference. If we take the wall metaphor as a summary statement of their principles, as the *Everson* Court did, invoking it in the context of an expanding welfare state tends to establish the presumption that when government grows religious liberty must recede.[109] The rote incantation of a principle articulated initially as part of a set of beliefs about limited government but now asserted in a context of expansive government without the least consideration of whether in this different environment it could still promote liberty suggests a stark indifference to religious liberty.

Instead of a careful reflection on the New Deal and what its rejection of limited government might mean for religious liberty, *Everson* gives us stock references to the religious conflicts of 16th and 17th century England, colonial America, and the founding era[110] intending to illustrate the divisive nature of religion. Religion can of course be divisive, especially when joined with political

[109] That the bus transportation reimbursement to families was upheld in *Everson* does not, I believe, undermine my point. The reimbursement was upheld on the theory that transportation costs are analogous to the provision of general governmental services like "police and fire protection, connections for sewage disposal, public highways and sidewalks" to religious schools, which are "so separate and so indisputably marked off from the religious function [of the schools]." *Everson*, 330 U.S. at 17-18. But consider the wall metaphor and the broader issue of public aid to religious schools. All citizens are taxed for the benefit of education, but under the "high and impregnable" wall described in *Everson*, religious schools are denied any meaningful public support. This permits government to monopolize educational tax proceeds, which results in a reduction of liberty for families who wish for their children an education that cannot be provided by government schools. True, such families have the liberty to send their children to religious schools, *see* Pierce v. Society of Sisters, 268 U.S. 510 (1925), but they are denied the opportunity to share in the educational fund to which they have contributed.
[110] *Everson*, 330 U.S. at 8-14.

power, as in the references cited in *Everson*. It is far from clear, however, just how much those conflicts should inform debates about the ability of religious groups to participate in government benefit programs in the welfare state. The religious conflicts referenced in *Everson* involved the government placing its power behind some notion of religious truth. Justice Black notes this in his indictment of religion, writing that "[i]n efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed."[111] But the Court either failed to note or did not see a meaningful distinction between using the coercive powers of government to promote religious truth and aid of the type at issue in *Everson* and subsequent cases. In the aid cases government has not sought to establish an official religious truth that all citizens must bend to. Instead, these disputes have concerned issues of schooling and educational authority and the propriety in the welfare state of government's monopolization of education funds.[112] Whatever the merit of providing public assistance to religious schools, analogizing such assistance to the standard references in which the state had placed its power behind some contested version of religious truth seems far-fetched.

The point is that while Sullivan is correct in noting that the strong establishment approach does see religion and religious groups as a threat to the state, this understanding is born more out of indifference to religion and religious liberty than it is a meaningful inquiry into religion and its place in a free society.

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[111] *Everson*, 330 U.S. at 9.

[112] I discuss this point more fully at Pybas, *Does the Establishment Clause?*, *supra* note 28, at 108-09.

Certainly the Court in *Everson* asked no hard questions about what the abandonment of limited government meant for the wall metaphor and for religious liberty. *Everson* gives the appearance of having taken religion seriously and then concluding, after having conducted a searching inquiry, that strong establishment enforcement is necessary to preserve civic peace. But this conclusion about the danger of religion is cheaply achieved. Events are cited as though they speak for themselves. No effort is made to explain why events of a dissimilar character that occurred hundreds of years earlier in different cultural, political, and religious milieus should compel the Court's approach to establishment issues in the welfare state. The hurried conclusion that religion is a threat to the state, moreover, permitted the Court to restrain religion while at the same time denying any hostility to it.[113] But is not indifference to religion or, more specifically, indifference to the consequences of a growing, expansive government to religion not itself a form of hostility? As Edward McGlynn Gaffney, Jr., writes, "[t]hough less dramatic than overt hostility, complete indifference to religion on the part of government is just as lethal to religious freedom, especially in the affirmative welfare state."[114] As government's power expands and its control over individuals and the associations they form grows, indifference to religion inexorably results in less religious freedom. So while indifference to religion may appear innocuous, even neutral towards religion,[115] in

[113] *Everson*, 330 U.S at 18: The First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."
[114] Gaffney, *supra* note 104, at 293.
[115] Sullivan notes that the secularist social vision, which urges strong establishment enforcement and weak free exercise enforcement, understands "neutrality as government indifference" to religion. Sullivan, *Justice Scalia*, supra note 3, at 458. My point, though, is that in the welfare

the welfare state its consequences to religious liberty can be as harmful as explicit targeting of religion.[116]

The second way in which the *Everson* decision manifests indifference to religion and religious liberty is the nonchalant, superficial treatment of the incorporation issue. While it is not my intent to enter the debate over whether the Establishment Clause is best understood as a federalism provision protecting state authority over religion[117] or as protecting individual rights,[118] the Court in *Everson* did little more than state as a conclusion that the Fourteenth Amendment made the Establishment Clause binding on the states. The Court's entire treatment of incorporation encompassed one sentence: "The First Amendment, as made applicable to the states by the Fourteenth Amendment, *Murdock v. Pennsylvania*, 319 U.S. 105, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'"[119] That is it. No discussion of the complexity of applying against the states a provision that initially was understood, at least in part if not wholly, as leaving to

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state, strong establishment enforcement, whether as part of either the secularist or separatist social visions, amounts to indifference to religion.

[116] *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

[117] *See* Justice Thomas's argument that the Establishment Clause "is a federalism provision, which, for this reason, resists incorporation." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in judgment); Zelman v. Simmons-Harris, 536 U.S. 639, 677-80 (2002) (Thomas, J., concurring); Van Orden v. Perry, 545 U.S. 677, 693 (2005). A non-exhaustive list of legal scholars who take the federalism position is noted at Pybas, *Does the Establishment Clause?*, *supra* note 28, at n. 73. *See also* Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. Pa. J.Const. L. 585 (2006),

[118] *See* Steven G. Gey, *Vestiges of the Establishment Clause*, 5 First Amdt. L. Rev. 1, 1-12 (2006); Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 241-43 (2004); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim about Original Intent*, 27 Wm. & Mary L. Rev. 875, 885-94 (1986); and Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contem, Legal Issues 313, 324 (1996).

[119] Everson, 330 U.S. at 8.

the states a sphere of action concerning religion.[120] No discussion of the easily foreseeable ramifications to long-standing state and local practices that now would be held to the federal standard. A standard, moreover, simultaneously announced as requiring a wall of separation between church and state, but now understood as between church and all levels of government. In short, it is difficult not to see the Court's one-sentence conclusory statement about incorporation as anything but a manifestation of great indifference to religion and religious liberty.

The Court's citation to *Murdock v. Pennsylvania*[121] contributes to this conclusion. No Establishment Clause issue was raised in *Murdock*, which involved the constitutionality of a city ordinance requiring individuals to first obtain a license before soliciting the purchase of goods of any kind within the city. The Court ruled that the ordinance violated the free exercise rights of Jehovah's Witnesses who went door to door soliciting people to buy religious pamphlets. The Court in *Murdock*, moreover, said next to nothing about incorporation, writing only that "[t]he First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .'"[122] That the Court in *Murdock* said little about incorporation is unsurprising, however, given that the issue there was free exercise and the Free Exercise clause had been incorporated

[120] *See* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 481 (1991) (noting that "[a]s a matter of judicial craftsmanship, it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long served to protect the states against the federal government.")
[121] 319 U.S. 105 (1943).
[122] *Id*. at 108.

three years prior in *Cantwell v. Connecticut*.[123] In any event, the perfunctory reference to *Murdock* adds no explanatory power to *Everson's* one-sentence treatment of incorporation.

In summary, Sullivan is right to note that the strong establishment enforcement approach, promoted by both secularists and separationists, draws on the portrait of religion painted in *Everson* as something dangerous and divisive that government must restrain. However, she overlooks the fact that this bleak, unbalanced view of religion seems born of a stubborn indifference to religious liberty and to the unique difficulties the welfare state presents to it.

2. Sullivan's "secular public moral order" thesis

As for Sullivan's own views, she embraces the separationist social vision and thus also argues for strong establishment enforcement.[124] And although she largely agrees with the view of religion expressed in *Everson*, she comes to the strong enforcement position by a different route. She argues that the First Amendment is intended to promote a "secular public moral order" which "forbids government to put its imprimatur of approval on religion through any official action."[125] The conclusion that Religion Clauses are intended to establish a secular public moral order follows naturally, Sullivan argues, once we note that the Free Exercise and Establishment Clause each contain "an unstated

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[123] 310 U.S. 296 (1940).
[124] *See* Sullivan, *The New Religion*, supra note 3, at 1421; Sullivan, *supra* note 16, at 222; and Kathleen M. Sullivan, *Parades, Public Squares, and Voucher Payments: Problems of Government Neutrality*, 28 Conn. L. Rev. 243 (1996) [hereinafter *Parades, Public Squares*].
[125] Sullivan, *supra* note 16, at 198 and 205.

corollary."[126] The unstated corollary of free exercise is that the right to free exercise "implies the right to free exercise of non-religion."[127] The unbeliever's right to observe no religion is as inviolable as the believer's right to practice whatever religion she will. Similarly, the "negative bar against establishment of religion implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes."[128] In other words, there must be a moral framework for our shared public life, for pursuing common political ends and for settling public moral disagreements. The prohibition against established religion denies this role to religion and thus affirmatively establishes the "culture of liberal democracy"[129] as our shared moral framework. Sullivan stresses that the culture of liberal democracy does not rest upon a comprehensive set of philosophical commitments or moral beliefs but rather is political in nature. Though her treatment of the issue is brief, what she has in mind here is something very similar to John Rawls's notion of political liberalism.[130] For Rawls, political liberalism neither rests upon nor presupposes any comprehensive philosophical commitments, and it refrains from taking sides in controversies over such commitments. It aims instead to establish rules of justice and political arrangements that are independent of or neutral with respect to ultimate philosophical principles. Political liberalism is grounded in an "overlapping consensus" that requires individuals to set aside their comprehensive moral, religious, and philosophical commitments and establish or

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[126] *Id*. at 197.
[127] *Id*.
[128] *Id*.
[129] *Id*. at 198.
[130] John Rawls, Political Liberalism (1993). Sullivan references Rawls but not the book Political Liberalism, which was published after her article. Sullivan, *supra* note 16, at 200.

endorse liberal political arrangements on the basis shared political values.[131] For Sullivan, then, the Establishment Clause requires the establishment of the secular public moral order.

Sullivan argues further that in light of the Free Exercise Clause, any reading of the Establishment Clause other than as requiring a secular public moral order renders it "mere surplusage."[132] "If the Free Exercise Clause standing alone guarantees free exercise of non-religion," she writes, "the Establishment Clause must do more than bar coercion of non-believers. . . . If the Establishment Clause is to have independent meaning, it must bar something other than coercion of private citizens into confessions of official faith."[133] The Establishment Clause means, then, that government can neither place its "stamp of approval" upon religion nor provide financial support for it. Of the former, Sullivan writes that the

> official agnosticism mandated by the Establishment Clause requires not only even-handed government treatment of private religious groups, but also a standing gag order on government's own speech and symbolism; it prohibits official partiality toward religion. On this reading, the Establishment Clause does more than bar 'coercion'; it bars 'endorsement' and 'acknowledgment' of religion as well.[134]

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[131] Stephen Macedo explains political liberalism as follows:

> People who disagree about their highest ideals and their conceptions of the whole truth might nevertheless agree that public aims such as peace, prosperity, and equal liberty are very important. That is political liberalism's virtue: it focuses our attention on shared political values without requiring or expecting agreement on ultimate ends or a comprehensive set of moral values governing all of our lives.

Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 Ethics 468, 474 (1995).

[132] *Id*. at 205.

[133] *Id*.

[134] *Id*. at 206.

The Establishment Clause thus prohibits government "endorsement" and "acknowledgment" of religion. And it "protects individuals from compulsory financial support of other people's religion through the tax system—not because such support will coerce conversion, but because it will cause profound divisiveness and offense."[135] Thus, "no tax subsidy, large or small, may go to religious use."[136] According to Sullivan, government is funding religion even when public funds are channeled to religious organizations through individuals, e.g., as tuition payments. This is true even when there are religious and secular options and when the choice of the religious option is made by the taxpayer, free of governmental interference. The channeling of public funds by independent choice for Sullivan still constitutes government subsidization of religion, indicating "official partiality toward religion."[137] It remains unclear, however, and Sullivan does not explain, just how government's treatment of religion on an equal basis with non-religion amounts to partiality toward religion.

A critic might argue, moreover, that Sullivan's view of the Establishment Clause advantages secular liberalism over religion. In fact, she acknowledges this but insists that it "does so no more than the baseline set by the Religion Clause requires."[138] Sullivan concedes, too, that the exclusion of religious organizations from general government programs is a form of discrimination, but she insists that it is not "invidious" discrimination.[139] Rather, "it is simply the entailment of the establishment of the secular public order."[140] One might ask, though, "invidious" to whom? In other words, is it not possible that the discrimination Sullivan advocates

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[135] *Id*. at 209-210. Sullivan does not appear to consider the possibility that the discrimination she advocates against religion is likewise divisive and offensive to religionists, among others, who are taxed to support government programs, which, according to her, must be entirely secular.
[136] Sullivan, *Parades, Public Squares*, *supra* note 124, at 244.
[137] Sullivan, *supra* note 16, at 206.
[138] *Id*. at 213.
[139] *Id*. at 208.
[140] *Id*.

against religion may be perceived by religionists to be divisive and offensive? I noted just above that Sullivan argues against any government financial support, directly or indirectly, of religion, contending that the Establishment Clause "protects individuals from compulsory financial support of other people's religion through the tax system—not because such support will coerce conversion, but because it will cause profound divisiveness and offense."[141] But if offensiveness and divisiveness are proper concerns of the Establishment Clause, what about the offensive and divisive nature of taxing all citizens for social services like education but at the same time insisting that these tax proceeds can be used only for the government's secular provision of these programs? Sullivan's response is that because her approach to the Establishment Clause does not involve invidious discrimination, prohibiting religion's participation in general government programs does not penalize families who, say, prefer a religious education for their children. Rather,

> [a]ll religions gain from the settlement of the war of all sects against all reflected in the establishment of the civil order. Religionists gain from the provision of universal public education even if they withdraw their children to private schools—just as the elderly or childless gain from the education of their fellow citizenry even in the absence of personal family gain. . . . Just as religionists must pay for the secular army that engineers the truce among them, they must pay for the other common goods of the civil public order.[142]

One response to this rationale is to note that people who oppose governmental support of religious education also gain from it in that religious schooling also generally contains an extensive secular component. The cases permitting aid to religious schools for the secular functions they provide underscore this point.[143]

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[141] *Id*. at 209-210.
[142] *Id*. at 222-223.
[143] *See supra* notes 100-06 and accompanying text. An additional point to make about the contribution to the public good that religious schools make is to note that there is ample evidence indicating that religious schools do as well as, if not better than, public schools at promoting civic education. *See, e.g.,* Patrick J. Wolf, Jay P. Greene, Brett Kleitz, and Kristina Thalhammer, *Private Schooling and Political Tolerance*, in Charters, Vouchers and Public Education 268 (Paul E. Peterson and David E. Campbell, eds., 2001) and Jay P. Greene, *Civic Values in Public and Private Schools*, in

That religious schools contribute to the common good would seem to somewhat blunt Sullivan's position, which in part is predicated on the notion that religionists benefit from public schooling but that religious schooling benefits no one except those partaking of it. Since this is not the case, it is an oversimplification to say that whenever government funds end up being spent in religious institutions, directly or indirectly, taxpayers have been compelled to support "other people's religion."[144]

Although Sullivan generally eschews reliance on historical arguments about what the Religion Clauses may have meant to the Founding generation,[145] she implies, curiously, that hers is really an original intent argument. "Agreement on such a secular mechanism," she insists, "was the price of ending the war of all sects against all. Establishment of a civil public order was the social contract produced by religious truce."[146] And "[s]ecular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all."[147] It is not clear what this can mean. On the one hand, she may be saying nothing more than that the Religion Clauses should be understood in the context of the broader liberal political tradition as it emerged from thinkers like John Locke, who emphasized religious tolerance and the removal of sectarian religious differences from politics. Yet on the other hand she implies more than this, stating

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Learning from School Choice 83 (Paul E. Peterson and Bryan C. Hassel, eds., 1998). These studies do not distinguish between private religious schooling and private non-religious schooling. However, because most private schooling in this country is religious schooling, to speak of private schooling is to speak essentially of religious schooling. For example, the National Center for Educational Statistics reports that in 2005-06 school year, the most recent time period for which data is available, there were 28,996 private schools in the United States. Of these, 22,080 were religious schools. Thus, 76% of private schools in America are religious in character. *See* Private School Universe Survey Table 1, "Number and percentage distribution of private schools, students, and full-time equivalent (FTE) teachers, by selected characteristics: United States, 2005–06" *available at* http://nces.ed.gov/surveys/pss/tables/table_2006_01.asp?referrer=report (last visited July 15, 2008).

[144] Sullivan, *supra* note 16, at 209-210.

[145] Recall her point that one's understanding of religious liberty "will be colored by which general account of religion's role in democratic politics one finds most apt." *See supra* text accompanying note 17.

[146] Sullivan, *supra* note 16, at 197.

[147] *Id*. at 199.

that the Establishment Clause ended “the war of all sects against all.” Possibly she means that the prohibition barring Congress from making laws “respecting the establishment of religion” averted religious conflict in the new national government. But she provides no arguments or evidence in support of this reading. Moreover, the Establishment Clause did little to dampen religious disagreement and conflict in the states, seeing that it restrained only Congress until it was incorporated against the states in 1947 in *Everson*. Her point, though, is that the overarching purpose of the Establishment and Free Exercise Clauses is the establishment of a secular public moral order and it is against this purpose that establishment and free exercise issues must be judged. Put otherwise, the Religion Clauses do not promote "unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of a secular public moral order."[148]

There are multiple objections that can be raised against Sullivan’s novel understanding of what the founding generation was trying to accomplish with the Establishment Clause. However, it is beyond the scope of my objective here to offer a detailed rebuttal. It suffices to point out that Sullivan cites not one thinker, publication, or argument from the founding era in support of her thesis. As Douglas Laycock has succinctly noted, the First Amendment emphatically does not “establish a ‘secular public moral order.’”[149]

To summarize Sullivan’s views, she contends that the Establishment Clause guarantees a secular public moral order which forbids government to fund, endorse, or acknowledge religion. Among other things, this means that no public funds may be used, for example, for religious education, even if such money reaches religious schools only upon the independent decisions of families. While this arrangement

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[148] Sullivan, *supra* note 16, at 198.
[149] Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contem. Legal Issues 313, 313, (1996) (quoting Sullivan, *supra* note 16, at 198).

may favor secular liberalism over religion, such is the price religionists must pay, Sullivan maintains, for the truce that ends the war of all sects against all.

B. Weak Establishment Enforcement

Sullivan's explanation of weak establishment enforcement, the approach taken by both accommodationists and assimilationists, is inferred mainly from the approach itself rather than from what the Court has said about religion in its turn from strong to weak establishment enforcement. Before getting into Sullivan's understanding of weak establishment enforcement, though, let us review the relevant cases. The shift from strong to weak establishment enforcement began in *Mueller v. Allen*[150] where the Court upheld the constitutionality of a Minnesota law entitling all families of school-age children, including those attending religious schools, to a tax deduction for school costs. In sustaining the law, Justice Rehnquist, writing for the Court, emphasized the fact that the tax deduction was "available only as a result of numerous private choices of individual parents of school-age children."[151] Consequently, the law did not place the "imprimatur of state approval" on religion in violation of the Establishment Clause.[152] Moreover, the Court distanced itself from the view expressed in *Everson* that religion is ever on the brink of causing great social conflict. To be sure, the *Mueller* Court agreed that the purpose of the Establishment Clause was to "'prevent[] that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political

[150] 463 U.S. 388 (1983).
[151] *Id*. at 399.
[152] *Id*. (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

system to the breaking point.'"[153] At the same time, however, the Court insisted that

> [a]t this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights . . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote[.][154]

The Court thus seemingly took note of both the well-developed welfare state and the nation's imperfect but relatively laudatory history of religious tolerance to draw a distinction between "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from [] neutrally available [government aid]"[155] and direct support of religion.

Having largely rejected the strong misgivings about religion expressed in *Everson*, *Mueller* sketched a new framework for evaluating pubic aid cases that now prevails.[156] As I have noted, the crucial inquiry in *Everson* and its progeny

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[153] *Id*. at 399-400 (citations omitted).
[154] *Id*. at 400 (citations omitted).
[155] *Id*.
[156] To be sure, this was possible in no small part because legislative efforts to assist religious education began to take the form of payments to families instead of directly to schools.*See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding an Ohio law providing tuition assistance to students enrolled in religious schools); Agostini v. Felton, 521 U.S. 203 (1997) (allowing state-employed teachers to offer instruction in remedial and enrichment courses in parochial schools) (*partially overruling* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985), and *overruling* Aguilar v. Felton, 473 U.S. 402 (1985)); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (allowing a state-employed sign-language interpreter to assist a deaf student enrolled in a Roman Catholic high school); and Witters v. Wash. Dep't. Servs. for the Blind, 474 U.S. 481 (1986) (finding no constitutional violation in allowing a college student to use neutrally available state vocational rehabilitation assistance funds at a Christian college to prepare for ministry). *See also* Mitchell v. Helms, 530 U.S. 793 (2000) (upholding a federal law providing instructional materials such as library books, media materials, and computers to religious schools) (*overruling* parts of Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U. S. 229 (1977)). Because the aid at issue in *Mitchell* is not filtered through families, that is, it involves direct aid to religious schools, the case fits uneasily into the *Mueller* line of cases. There is no majority opinion in

was whether the aid at issue could be limited to secular purposes.[157] But under the line of inquiry initiated by *Mueller*, the main issue has become whether the aid, and the promotion of religion following from it, is attributable to the state or to individuals exercising "genuinely independent and private choices."[158] Whether individual choice is truly "independent and private" depends, in turn, on whether "the aid is allocated on the basis of neutral, secular criteria that neither favors nor disfavors religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[159] In other words, laws that provide public funds on the basis of non-religion criteria and that do not seek to steer recipients toward religious alternatives now pass constitutional scrutiny even if the funds are used to further religion. When this happens, the "advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[160]

Mitchell, and Justice O'Connor's concurring opinion, which rests on a narrower rationale than that of the plurality opinion, states the controlling law. To wit: when the law provides direct aid to religious schools, it must also establish minimal safeguards to prevent diversion of the aid to explicitly religious purposes and any significant diversion would be unconstitutional. *Mitchell*, 530 U.S. at 836-67 (O'Connor, J., concurring). Still, I believe it appropriate to see *Mitchell* as fitting generally into the *Mueller* weak establishment paradigm. *See also* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (finding that a public university does not violate the Establishment Clause when it makes student activity funds available to various student groups, including a student-run religious organization, on the basis of neutral criteria).

[157] *See supra* text accompanying notes 94-100.

[158] Agostini v. Felton, 521 U.S. 203, 226 (1997) (citing Witters v. Wash. Dep't. Servs. for the Blind, 474 U.S. 481, 487 (1986)).

[159] *Agostini*, 521 U.S. at 231.

[160] *Zelman*, 536 U.S. at 652. For criticism of the independent and private choice approach, *see, e.g.,* Steven K. Green, *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, 38 Willamette L. Rev. 549 (2002) and Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 Ind. L.J. 167 (2000).

As is clear from discussion of Sullivan's argument that the Establishment Clause requires a secular public moral order,[161] she opposes weak establishment enforcement. For her, the main problem with weak establishment enforcement is that it presumes that "religious associations are no longer a fearsome force to be kept at bay."[162] This lack of concern for religion's harmful potential leads those who hold to weak establishment enforcement to err as regards the meaning of government's neutrality towards religion. Sullivan contends, again, that the Establishment Clause requires the establishment of a secular public moral order, and this secular moral order is the proper baseline for evaluating religious liberty issues. In other words, Sullivan understands the social contract itself as establishing the benchmark of government neutrality. In her view, no matter how large government grows, no matter how much it displaces religion from responsibilities it once undertook, government acts neutrally with respect to religion by neither hindering it nor assisting it. On this view, religious liberty means simply "negative freedom from government interference."[163]

The weak establishment enforcement approach, however, seeks to mitigate the ways in which the welfare state distorts religious preferences. As Sullivan explains, the weak establishment perspective focuses on how "the rise of the welfare state has led to a wide range of public substitutes for formerly private and religious provision of education, health care, and charity. As secular social service programs increasingly displace religious activity, religious association

[161] *See supra* notes 124-37 and accompanying text.
[162] Sullivan, *The New Religion*, *supra* note 3, at 1411.
[163] *Id*. at 1408.

attenuates in a shrinking private sphere."[164] Consequently, "religious flourishing depends not only upon the autonomy of religious institutions and their negative freedom from government interference, but also upon their affirmative freedom to participate in the extended pubic sphere, which now encompasses a great range of activities once provided by religious institutions."[165] On this view, the better way of thinking about religious liberty is through the lens of what Douglas Laycock calls "substantive neutrality."[166] Substantive neutrality differs from formal neutrality in that the latter focuses on categories and the former on incentives. That is, "[a] law is formally neutral if it does not use religion as a category—if religious and secular examples of the same phenomenon are treated exactly the same."[167] By the same token, "[a] law is substantively neutral if it neither 'encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.'"[168] The advantage of substantive neutrality is that

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[164] *Id*. at 1408.
[165] *Id*.
[166] Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51 (2007); and Laycock, *supra* note 116.
[167] Douglas Laycock, *Substantive Neutrality Revisited*, *supra* note 155, at 54.

[168] *Id*. (quoting Laycock, *supra* note 116, at 1001.) Laycock describes the difference between formal neutrality and substantive neutrality by way of an example:

> forbidding children to take communion wine is formally neutral. Children cannot consume alcoholic beverages in any amount for any purpose. Religion is not a category in the formulation or application of this rule; alcohol is forbidden to children whether for religious purposes or secular purposes.
>
> But an exception that permits children to take communion wine is substantively neutral. Exempting communion wine from the ban on under-age consumption of alcohol is extraordinarily unlikely to induce anyone to become a Christian, to join a denomination that uses real wine in its communion service, or to attend communion services more often -- unless that person already desired to do these things but had been deterred by the threat of government-imposed penalties. Consuming communion wine is a desirable activity only to those who already believe in the religious teaching that gives meaning to the act. Forbidding children to take communion wine, or criminally punishing their parents and the

it "insists on minimizing government influence on religion. Minimizing government influence leaves religion maximally subject to private choice, thus maximizing religious liberty."[169] For example, in the welfare state where government has ousted religion from various roles it once carried out, religious liberty is thus enhanced by giving recipients of general government benefits the choice of religious and secular alternatives. Consider the issue of schooling. All citizens are taxed for the support of education yet the state generally monopolizes these resources for its own schools. Families who wish for their children a religious education must either accept the subsidized secular education or finance the religious education on their own, after paying their taxes for government's schools. The subsidy for secular schools but not for religious schools thus provides an incentive to choose secularism over religion. Permitting religious schools to participate in general education programs, then, as in the voucher program at issue in *Zelman v. Simmons-Harris*,[170] helps minimize government's influence over religion, thereby enhancing religious liberty.

Sullivan's answer to weak establishment is that the inclusion of religion in public programs violates "the settlement by the Establishment Clause of the war of all sects against all."[171] The welfare state and its distortions of religious choice are of no weight to her in the calculation of religious liberty. The problem with

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> priest who gives them the sacrament, powerfully discourages an act of worship. But exemption does not encourage any child to take communion, or any parent to take his child to a communion service, who is not already religiously motivated do so. An exemption does not change anyone's religious incentives; criminalization changes those incentives profoundly.

Id. at 55.

[169] *Id*. at 65.

[170] 536 U.S. 639 (2002).

[171] Sullivan, *supra* note 16, at 199.

this view is similar to my criticism of the wall of separation approach of *Everson*.[172] Whereas the *Everson* Court believed Jefferson's wall metaphor forever defined the scope of religious liberty, for Sullivan it is the social settlement purportedly achieved by the Establishment Clause. Both approaches combine the virtue of consistency—applying their respective principles always and everywhere the same, no matter how much context changes—with the vice of indifference to whether application in a changed context promotes liberty or not. No matter how expansive the state grows, religion must ever recede in its path. Whatever the merits of Sullivan's position, there is more than a little irony in interpreting the constitution—once thought to protect liberty by limiting government—in such a way as to create the default position that when government expands religious liberty must necessarily contract.

C. Free Exercise Enforcement

Whereas attitudes about religion's propensity to foster social harm are predictive of the different approaches to establishment enforcement, this is not necessarily the case with the different approaches to free exercise. Both secularists and separationists are suspicious of religion and thus both would prohibit religion's participation in general government programs. And both accomodationists and assimilationists believe that in contemporary circumstances religion's threat to social peace is exaggerated, hence both allow religion's participation in general government programs. Yet separationists favor exemptions for religiously-motivated conduct from the operation of general laws

[172] *See supra* text accompanying notes 106-15.

absent a compelling governmental interest but assimilationists do not. Contrastingly, the approach to free exercise taken by both secularists and accommodationists track with their attitudes about religion's harmful potential. Secularists believe it is great and reject exemptions; accomodationists believe it is small and favor exemptions. Discussion of free exercise enforcement therefore requires more particularity than did the analysis of establishment enforcement.

1. Weak Free Exercise Enforcement

Weak free exercise enforcement began in *Reynolds v. United States*,[173] where the Court rejected the argument of a Mormon polygamist that the Free Exercise clause relieved him from the obligation to comply with the federal territorial prohibition on polygamy, and continued for almost a century. Sullivan maintains that the Court's refusal in *Reynolds* to grant exemptions from general law for religiously-motivated conduct is rooted in the belief that religion is a threat to the state. Her argument relies on Chief Justice Waite's conclusion that to grant the exemption "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[174] Polygamy, the Court stated, was an "odious" practice, an "offence against society" that leads to "despotism."[175] *Reynolds* thus does seem to regard at least polygamy as a threat to the state.

[173] 98 U.S. 145 (1878).
[174] Sullivan, *The New Religion*, supra note 3, at 1404 (quoting *Reynolds*, 98 U.S. at 167).
[175] *Reynolds*, 98 U.S. at 164-66.

It is not clear, though, that the Court's concern with Mormonism and polygamy can be fairly read as a blanket worry about religion more broadly in the manner Sullivan indicates. In fact, it seems more likely that the minority status of Mormons goes further in explaining *Reynolds* than does concern with generic religion. From its founding in the early nineteenth century, Mormonism was seen as an alien and exotic religion that by the middle of the century had been driven from the United States into Utah, then part of Mexico.[176] As a result of the Mexican-American War, Utah became federal territory and the U.S. government soon set about to suppress the practice of polygamy.[177] Instead of *Reynolds* indicating that the Court understood religious groups to be "sovereign rivals to the state",[178] it is possible to read the denial of an exemption from the anti-polygamy law in *Reynolds* as instance of the Protestant majority suppressing a politically powerless religious minority.

I am not suggesting that hostility to Mormonism explains all there is to *Reynolds*. Consider that the Court's claim that polygamy is an "offence against society" for which no exemption is due hearkens back to John Locke's *A Letter*

[176] *See* Leonard J. Arrington & Davis Bitton, The Mormon Experience: A History of the Latter-Day Saints (1992)
[177] From *Reynolds* in 1878 to *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (upholding federal law requiring forfeiture of Mormon Church charter and confiscation of church property), the U.S. Supreme Court decided a dozen cases concerning the Mormon practice of polygamy. The Mormon Church officially renounced the practice of polygamy in 1890. For an account of the U.S. Government's efforts in the 19th century to end the practice, *see* Edwin Brown Firmage & Richard Collin Mangrum, Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-Day Saints, 1830-1900 (1988). For contemporary attitudes on Mormonism, particularly as regards the presidential candidacy of Mitt Romney, *see Public Views of Presidential Politics and Mormon Faith* (opinion polling in February 2007 indicates "strong public misgivings" about Mormonism and about the possibility of a Mormon president). http://pewforum.org/docs/?DocID=213. (Last visited July 17, 2008.)
[178] Sullivan, *supra* note 3, at 1404.

Concerning Toleration.[179] In arguing that the magistrate has neither the power to require nor to prohibit "the use of any Rites and Ceremonies in any Church",[180] Locke adds an important caveat. Religious motivation does not make lawful "things that are not lawful in the ordinary course of life."[181] This means that in "the Interest of the Commonwealth" the state may prohibit to churches and religious believers conduct that is prohibited to citizens in general, such as human sacrifice.[182] When this is done, "the Law is not made about a Religious, but a Political matter."[183] In other words, laws aimed at the public as a whole that happen to interfere with religious practices do not violate Locke's principles of religious liberty. Thus, despite the strong anti-Mormonism of the period, the Court's ruling in *Reynolds* on the operation of general laws has a philosophical pedigree running at least back to Locke. I am therefore skeptical of Sullivan's contention that the case stands for the broad principle that all religion is a threat to the state.

Unsurprisingly, the few exemption cases subsequent to *Reynolds* and before *Sherbert v. Verner*,[184] where the Court first required burdensome general laws to be compellingly justified, largely track the *Reynolds* analysis. Instead of expressing suspicions about the supposed dangers of religion and religious groups, they mainly articulate pragmatic concerns over granting the exemption. Consider *Minersville Sch. Dist. v. Gobitis*,[185] where the Court ruled that the

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[179] John Locke, A Letter Concerning Toleration, ed. James H. Tully [1689] (1983).
[180] *Id*. at 41.
[181] *Id*. at 42.
[182] *Id*. at 41-42.
[183] *Id*. at 42.
[184] 374 U.S. 398 (1963).
[185] 310 U.S. 586 (1940), *rev'd* West Va. Bd. Of Educ. v. Barnette, 319 U.S. 624 (1943).

constitution did not exempt Jehovah's Witnesses school children who objected on religious grounds to the daily obligation to salute and pledge allegiance to the American flag. After rejecting the notion that as originally understood the First Amendment required such an exemption,[186] the Court declared that "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[187] Exemptions from general laws are unavailable, the Court reasoned, because general laws are "manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."[188] Instead of being animated by anxiety over real or imagined dangers posed by religion, the refusal to grant an exemption to the general law seems to be mainly pragmatic in nature, as an

[186] The Court cites both Jefferson and Madison in support of its original understanding argument. *Gobitis*, 310 U.S. at 594 n.3. The debate over whether the original meaning of the Free Exercise Clause recognized religious exemptions from general laws is unresolved. *Compare* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) (arguing that the weight of the evidence supports the idea that the original understanding of the Free Exercise Clause provides an exemption from general laws) *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992) (arguing opposite). *See also* Vincent Phillip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 Harv. J.L. & Pub. Pol'y 1083 (2008). Munoz examines evidence from the First Congress involving the drafting of what became the Second Amendment. This evidence indicates that Congress considered and rejected a constitutional right to a religiously-motivated exemption from militia service. According to Munoz, this strongly suggests that the original meaning of the Free Exercise Clause did not include religious exemptions from general laws.

[187] *Gobitis*, 310 U.S. at 594. In support of this claim, the Court cites, in addition to *Reynolds*, Davis v. Beason, 133 U.S. 333 ((1890) (upholding conviction who took an oath falsely claim that he was not a member of a polygamous association (not a Mormon)); *Arver v. United States* [also known as *The Selective Service Draft Law Cases*], 245 U.S. 366 (1918) (upholding selective service law and non-combat exemptions for clergy members, theology students, and individuals belonging to pacifist sects); and Hamilton v. Regents of Univ. of California, 293 U.S. 245 (1934) (state university students have no constitutional due process right to exempt out of required course in military science). It should be noted that in none of these cases does the Court vex about the threats to the state posed by religion and religious groups.

[188] *Id*. at 595.

unwillingness to begin carving exceptions to the ordinary exercise of legislative authority. This is not to deny that the Court's deference to the West Virginia legislature's overestimation of the requirements of an "orderly" society seems an instance of hostile indifference to religious liberty. The point, though, is that the decision does not express much worry about the danger religion itself, in a substantive sense, might cause for society.

Similarly, consider *Braunfeld v. Brown*,[189] the last exemption case decided before *Sherbert*. In a plurality opinion, the Court rejected the claim that Orthodox Jews who observed their Sabbath from sundown Friday to sundown Saturday were entitled to an exemption from a law prohibiting retailing on Sunday. The Court acknowledged that the Sunday closing law indirectly burdened non-Sunday Sabbath observers economically, since they were closed on their Sabbath day and also were required to close on Sunday. Still, the law was within the legislature's general authority "to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility - a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created[.]"[190] Given the vast religious diversity of the nation, the Court explained, "it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."[191] Granting an exemption, moreover, the Court added, could well undermine the state's objective of promoting a day of rest and would raise practical concerns about

[189] 366 U.S. 599 (1961).
[190] *Id*. at 607.
[191] *Id*. at 606.

enforcement—the state would be required to police two days of closings. What is more, conceding an exemption could tempt others who wish "to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day[,]"[192] thereby creating a host of additional problems interfering with the state's goal of encouraging a one-day a week respite from commercial activity.

Consider also the Court's return to weak free exercise enforcement in *Employment Division v. Smith*.[193] In denying that the Free Exercise Clause exempted the sacramental use of peyote in a Native American religious service from the operation of the state of Oregon's criminal laws, the Court expressed no worries about any dangers intrinsic to religion. Instead, as in *Reynolds*, *Gobitis*, and *Braunfeld*, the focus was on the rule of law and the purported danger to it should the exemption be granted. The Court in fact relied on both *Reynolds* and *Gobitis* for its conclusion. Writing for the Court, Justice Scalia relied on *Gobitis* for the proposition that

> '[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.'[194]

Reynolds was cited for notion that

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[192] *Id*. at 608-09.
[193] 494 U.S. 872 (1990).
[194] *Smith*, 494 U.S. at 879 (*quoting* Gobitis, 310 U.S. at 594-95).

> [l]aws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.[195]

Reynolds and its progeny thus seem not so much about confining religion lest it break out and cause harm but with the purported harm that might ensue to the rule of law if exceptions to the laws in question were made. No doubt the Court misjudged the fragility of the republic. Still, it seems doubtful that these cases understand religion in quite the threatening way Sullivan contends.

Although the Court's focus in the foregoing cases in which it weakly enforced free exercise was on the rule of law, one should not overlook the fact that the exemption-seekers in these cases all belonged to minority religions. As I noted, *Reynolds* was part of a larger effort to suppress the Mormon practice of polygamy.[196] *Gobitis* was one of a number of cases during the World War II era in which Jehovah's Witnesses suffered real persecution.[197] And the minority religious groups represented in *Braunfeld* and in *Smith* were Orthodox Jews and Native Americans, respectively. How intentionally complicit the Court was in the persecution of Mormons and Jehovah's Witnesses is not clear, but the results in the cases certainly compounded the difficulties of the two groups. As did the

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[195] *Id*. (citing *Reynolds*, 98 U.S. at 167). For criticism of *Smith*, *see, e.g.,* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990); and Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1. For arguments supporting *Smith*, *see, e.g.*, William P. Marshall, *Correspondence : In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991); and Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591 (1990).
[196] *See supra* text accompanying notes 176-78.
[197] *See* Shawn Francis Peters, Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution (2002).

rulings in *Braunfeld* and *Smith*.[198] Probably none of these rulings themselves involve overt hostility to minority religious groups.[199] They are instead more likely instances of the indifference to religious liberty I noted earlier.[200] The absence of explicit hostility, however, is likely of little comfort to practitioners of the minority religions at issue, whose liberty is restricted just the same.

Recall that both secularists and assimilationists favor weak free exercise enforcement. Sullivan contends that secularists take this approach because of *Reynolds* and the belief that its refusal to grant an exemption from the generally applicable anti-polygamy law is rooted in the notion that religious groups

> threaten to become normative enclaves outside of and apart from secular society, even quasi-governments—separate communities with distinctive epistemic perspectives and the power to command obedience anchored in faith, posing a constant danger that they will become sovereign rivals to the state, or even seedbeds for terrorism, separatism, and revolt.[201]

As I have argued, however, it is a stretch to read *Reynolds* as expressing a substantive worry about religion. This is not to deny that contemporary secularists view religion this way. For example, Justice Stevens states that his understanding of religious liberty is

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[198] Some commentators have thus argued the Court's reluctance to grant exemptions from general laws has as much to do with the minority group status of the exemption-seekers as anything else. For a review of the literature and an argument that in the federal courts as a whole members of minority religions are no less successful than exemption-seekers from mainstream Christian denominations, *see* Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence From Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021 (2005).

[199] Justice Frankfurter wrote the Court's opinion in *Gobitis*. Recall his dissenting opinion in West Virginia State Bd. of Educ., 319 U.S. 624 (1943) (overruling *Gobitis* on free speech grounds) arguing that because he "belongs to the most vilified and persecuted minority in history [he was] not likely to be insensible to the freedoms guaranteed by our Constitution." *Barnette*, 319 U.S. at 646 (Frankfurter, J., dissenting).

[200] *See supra* text accompanying notes 106-116.

[201] Sullivan, *The New Religion*, *supra* note 3, at 1403-04.

> influenced by [his] understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.[202]

Be that as it may, this is a view of religion *qua* religion not found in *Reynolds*. It is instead the assimilationists who are closer to *Reynolds*, at least if we take Justice Scalia to be the model assimilationist, as Sullivan does.[203] Sullivan's attributes the assimilationists' weak free exercise enforcement to epistemology, to the belief that "religion is not epistemically distinct from other associational activities."[204] Consequently, religious groups and their activities are not unique; they are simply part and parcel of the interest group process. They therefore should no more be exempt from general laws than non-religious groups. But as I noted, Justice Scalia's opinion for the Court in *Smith* relies not on epistemology but on *Reynolds* and *Gobitis* (which itself had cited *Reynolds*[205]) and focuses on the purported difficulty in maintaining the rule of law if religiously-motivated conduct was exempt from general laws.[206] Contrary to Sullivan, then, it is the assimilationists, not the secularists, whose understanding of free exercise is traceable to *Reynolds*.

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[202] *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).
[203] Sullivan, *The New Religion*, *supra* note 3, at 1410-11; Sullivan, *Justice Scalia*, *supra* note 3, at 461-62.
[204] Sullivan, *Justice Scalia*, *supra* note 3, at 461.
[205] *Gobitis*, 310 U.S. at 595.
[206] *See supra* text accompanying notes 193-95.

2. Strong Free Exercise Enforcement

Both separationists and accomodationists favor strong free exercise enforcement but for different reasons. Before getting to those reasons, let us note that in practice the strength of strong free exercise enforcement was more rhetorical than substantive. In the period in which the compelling interest test prevailed—from *Sherbert*[207] to *Smith*[208]—the Court rejected most requests for exemptions. The only exemptions granted involved unemployment compensation issues like those in *Sherbert*[209] and the education of the Amish in *Yoder*.[210] In all other exemption cases, the Court found either that the compelling interest test was inappropriate for the context,[211] or that religion had not been burdened[212] or if it had, that government's interest was compelling.[213] This is not to deny of course that strong free exercise enforcement could be wielded in a more forceful way so as to better safeguard free exercise. But in practice it has protected free exercise only slightly better than weak free exercise enforcement.

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[207] 374 U.S. 398 (1963).
[208] 494 U.S. 872 (1990).
[209] *See* Frazee v. Illinois Dep't of Employment Security, 486 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); and Thomas v. Review Board, 450 U.S. 707 (1981).
[210] 406 U.S. 205 (1972).
[211] *See, e.g.,* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (prison regulation limiting but not prohibiting free exercise satisfies more deferential rational basis test); and Goldman v. Weinberger, 475 U.S. 503 (1986) (military due great deference concerning regulation of military attire).
[212] *See, e.g.,* Jimmy Swaggert Ministries v. Bd. of Equalization, 493 U.S. 378 (1990) (obligation to pay tax on sales of Bibles and religious literature did not burden religion); and Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (because government's construction of road on federal land interfering with Native Americans' ability to worship at sacred site did not cause religionists to act against beliefs, no cognizable burden).
[213] *See, e.g.,*Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (because government has compelling interest in not supporting racial discrimination in education, no free exercise violation in removal of tax exempt status of racially discriminatory private educational institutions); and United States v. Lee, 455 U.S. 252 (1982) (because of compelling governmental interest in preserving social security system, no free exercise violation in compelling Amish business-owners to pay social security taxes over their objection).

A. Separationism and Strong Free Exercise Enforcement

Like secularists, separationists believe religion to be threat to social stability, hence their strong establishment enforcement.[214] But whereas the belief in the danger of religion leads secularists to weakly enforce free exercise, separationist favor strong free exercise enforcement. This is because the separationist social vision takes an instrumental approach to free exercise in which three different rationales are offered as to why, despite its guarded view of religion, strong enforcement is appropriate. The first sees all voluntary associations, including religious groups, as performing an important social role in standing between individuals and the state. Strong free exercise enforcement thus helps to promote the valuable mediating function of religious groups.[215] The second holds that because of the great force religion is in the lives of many citizens, exemptions from general laws act as a safety valve to minimize conflict between religion and the state.[216] Finally, Sullivan's own view is that strong free exercise enforcement functions as compensation for strong establishment enforcement. Strong free exercise enforcement is a type of grace for the prohibition on religion's participation in general government programs.[217] More specifically, the establishment of the secular moral order that Sullivan believes is required by the Establishment Clause banishes religion from the public sphere.[218] As compensation for the expulsion of religion from the public sphere, strong free

[214] *See supra* text accompanying notes 33-47
[215] *See supra* text accompanying notes 48-50.
[216] *See supra* text accompanying notes 51-53.
[217] *See supra* text accompanying notes 54-60
[218] *See supra* text accompanying notes 124-37.

exercise enforcement permits religious groups to avoid public regulation to the extent that the exemption is consistent with the secular public moral order.[219]

As I said, the three separationist rationales supporting strong free exercise enforcement are all instrumental in character. None appear to value religious liberty for its own sake. In each justification free exercise is the byproduct of the pursuit of a perceived greater goal. The first rationale stresses the importance of preserving mediating institutions in democratic society. The second justification emphasizes the necessity of a control device so as to vent strong religious passions that might otherwise threaten civic stability. The third rationale is based on the belief that religion requires a payment or reward for separationist treatment under the Establishment Clause. Underlying each rationale is the belief that religion is a dangerous force that must be restrained. Strong free exercise enforcement is thus derivative of the primary aim of minimizing the threat posed by religion. In other words, in the separationist social vision strong free exercise enforcement depends simply on instrumental calculations. This means that were the calculations different—say, being persuaded that democratic society's need for mediating institutions was adequately met by secular groups, or that largely ceremonial public expressions of religion, like the phrase "In God We Trust" on money, adequately vented religion's dangerous enthusiasms, or that the same was sufficient recompense for strong establishment enforcement—then presumably there would be no need for strong free exercise enforcement. Whatever the merits of an instrumental approach to free exercise, it is a peculiar, to say nothing of a cramped, way to think about the constitution's guarantee of religious liberty. I am

[219] Sullivan, *supra* note 16, at 222; Sullivan, *supra* note 44, at 1655.

not suggesting that the constitution guarantees an unlimited free exercise right, only that it values free exercise as intrinsically good. Not as the separationists have it as simply the offshoot of a non-establishment strategy.

B. Accomodationism and Strong Free Exercise Enforcement

According to Sullivan, the pairing of weak establishment enforcement with strong free exercise enforcement—the accommodationist social vision—amounts to treating religion groups as "discrete and insular minorit[ies]"[220] needing "not only equal rights"[221] but also "preferential treatment"[222] or "affirmative action."[223] From Sullivan's perspective, the accomodationists err in not fully appreciating the danger religion presents to social stability. This leads them to not understand the true basis for strong free exercise enforcement, which as I noted above, is instrumental in nature. Moreover, the reason Sullivan sees accommodationism as bestowing special treatment on religion is that with establishment it leaves religion to fend for itself in the political process, and if it succeeds in securing a place in general government programs the courts will not invalidate this success. With free exercise, however, courts are to take a more interventionist approach. If religion succeeds politically, i.e., if it secures legislative exemptions from general laws, fine. But if it fails politically, courts are to intervene to require government to compellingly justify burdensome laws. For Sullivan, then, intervention of the courts in religion's political failures

[220] Sullivan, *The New Religion*, *supra* note 3, at 1408; Sullivan, *Justice Scalia*, *supra* note 3, at 460.
[221] Sullivan, *Justice Scalia*, *supra* note 3, at 460.
[222] Sullivan, *The New Religion*, *supra* note 3, at 1408.
[223] *Id*. at 1409; Sullivan, *Justice Scalia*, *supra* note 3, at 460.

concerning exemptions but not in its political victories achieving inclusion in general government programs constitutes preferential treatment of religion.

One response to Sullivan's contention that the accommodationist social vision gives religion special treatment is to note that this is how it should be, given that the constitution singles out religion for special treatment. Specifically, it singles out religious liberty for special protection. The constitution guarantees "liberty with respect to religious choices and commitments."[224] Among the various spheres of human activity, the constitution specially protects religious liberty. And among the four possible combinations of free exercise and establishment, the accomodationist approach provides the most religious liberty. Sullivan regards this as unfair preference for religion, however, because she sees religion as a threatening force that must be guarded against. She does not oppose religious liberty, but supports it only "insofar as it is consistent with the establishment of a secular public moral order.[225] And establishment of the secular public moral order requires strong enforcement of both establishment and free exercise. The accomodationists' willingness to intervene in free exercise on behalf of religion but unwillingness to intervene to prevent religion from participating in general programs thus amounts to unfair favoritism toward religion. For Sullivan, if courts are going to intervene in religious matters on the free exercise side, they must also intervene on the establishment side. Intervention on the establishment side, however, involves only prohibiting religion from participating in general programs. Although there is symmetry to

[224] Laycock, *supra* note 149, at 313.
[225] Sullivan, *supra* note 18, at 198.

Sullivan's position, it is divorced from the underlying constitutional guarantee of religious liberty. She focuses simply on the act of intervening without considering whether or not the intervention promotes religious liberty. This is unsurprising since religious liberty is not the animating principle of her approach to free exercise and establishment. Her guiding principle is the establishment of the secular public moral order, which requires significant restraint of religion.

IV. Conclusion

While I have questioned some of Sullivan's analysis, as a descriptive matter her taxonomy of the different views of religious groups helps to illuminate the Court's religion jurisprudence. More than anything, her taxonomy as well as her own approach to establishment and free exercise indicate that she and in many instances the Court believe that the First Amendment guarantees social stability instead of religious freedom. Strong establishment enforcement, weak free exercise enforcement, most of the arguments favoring strong free exercise enforcement, and Sullivan's secular public moral order thesis are based on the avoidance of social instability. Civic stability is of course necessary to the security and enjoyment of all liberties but what is required to maintain it is unclear. Neither the justices who favor strong establishment enforcement nor Sullivan explore this question but they are nevertheless certain that a lax approach to religion will surely wreck if not destroy whatever it is that ensures or contributes to social stability. What is more, social stability is something that admits of degrees, which means that the extent of its presence or absence almost always lies in the eyes of the beholder. Sullivan and other strong establishment

enforcers, for example, tend to see religion as ever on the cusp of causing great civic harm. While the justices who support weak establishment enforcement see religion more benignly. Both cannot be right. The abstract and idiosyncratic focus on social stability by those who wish to limit religion, including their failure to truly wrestle with the issue and to explain both the many factors that must surely combine to create stability and how religion threatens these causes, thus converts the First Amendment guarantee of religious liberty into a weapon to use against religion.

The abstract and idiosyncratic approach to social stability of Sullivan and the justices who seek to restrain religion is seen they way they think about religion and religious groups. In their thinking British religious conflicts in the early modern era and international contemporary religious strife are more instructive for thinking about "which general account of religion's role in democratic politics [is] most apt"[226] than is the fact that our nation has largely been free of any deep or enduring religious trouble. To be sure, minority religious groups such as Catholics, Mormons, and Jehovah's Witnesses have suffered real persecution in America. Fortunately, these episodes have not been enduring and have not greatly convulsed society. This willful blindness to America's history of relatively laudable religious tolerance and civic peace is especially pronounced in light of the fact that the self-image of those suspicious or religion tends to be that of the clear-eyed realist grounded in empirical fact concerning religion and the threat it poses. But the facts that count for them our not ours but are those drawn from other nations and ages.

[226] Sullivan, *The New Religion*, *supra* note 3, at 1403.

Though not animated by a negative view of religion, weak free exercise enforcement nevertheless suffers from the same error concerning social stability. Its worry about the rule of law and the anarchy that would ensue were religiously-motivated conduct exempt from general laws displays the same unsubstantiated certainty about the requirements of civic stability as do Sullivan and the justices who favor strong establishment enforcement. The constitution does not of course guarantee an unlimited right to any liberty, including religious liberty. But casual assumptions about what is necessary to maintain social stability elevated to constitutional law tend to mock the First Amendment guarantee of religious liberty. Should not the burden then be on justices opposed to exemptions to do more than merely assert that their abstract worries about social instability must necessarily trump religious liberty?

As I have noted, the problem with the majority of the approaches to religion and religious groups discussed in this essay is that liberty has been made secondary to other concerns. But as Randy Barnett has rightly argued, "[t]he Constitution that was actually enacted and formally amended creates islands of government power in a sea of liberty."[227] The approaches to religion I have criticized here, however, "create[] islands of liberty rights in a sea of governmental power."[228] In this latter understanding, governmental power is the norm against which individuals and groups must ever justify the use of their liberty. But even this is not really the case. For even were it appropriate for citizens to have to justify their religious choices and commitments to government,

[227] Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004) 1.
[228] *Id*.

this is a dead end given the easy assumptions Sullivan and so many justices make about the demands of social stability. In their theories government is relieved of the need to marshal arguments backed with relevant evidence—the simple assertion suffices—explaining just how it is that the religious liberty being denied will harm society. Easy then is the way that a sea of liberty is transformed into a sea of governmental power.