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Winnifred Fallers Sullivan

INDIFFERENTISM REDUX: REFLECTIONS ON CATHOLIC LOBBYING IN THE SUPREME COURT OF THE UNITED STATES

Winnifred Fallers Sullivan[*]

Stephen Carter's *The Culture of Disbelief*[1] was published in 1993. In subsequent years the book has attained almost iconic status. It need only be mentioned to receive a knowing nod of recognition and approbation. Carter's main point—that religious belief is scorned in American public life—is so widely accepted that its assertion is usually simply prologue to another point. All seem to assume that the only remaining question is what is to be done about it. This assertion and the assumptions that underlie it have also increasingly become a part of the discourse about religion in the Supreme Court of the United States. Chief Justice Rehnquist is probably the strongest voice on the Court for Carter's position. His dissenting opinion in *Santa Fe Independent School District v. Doe*[2] is typical. It begins with the accusation that the majority opinion invalidating the school prayer provision of a Texas school district "bristles with hostility to all things religious in public life."[3] A similar sentiment was expressed by Justice Thomas in his opinion for the plurality in *Mitchell v. Helms*.[4] "[I]t is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that

* Dean of Students and Senior Lecturer at The Divinity School, The University of Chicago, and member of the Illinois bar.

1 STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993). For a discussion of the pitfalls of using "belief" as a synonym for religion, see Winnifred Fallers Sullivan, *Diss-ing Religion: Is Religion Trivialized in American Public Discourse?*, 75 J. RELIGION 69 (1995) (reviewing CARTER, *supra*). *See also* Donald S. Lopez, Jr., *Belief, in* CRITICAL TERMS FOR RELIGIOUS STUDIES (Mark C. Taylor ed., 1998). This Essay was written before President Bush's enthusiastic endorsement of "faith-based initiatives." Interestingly, I think the President's speech and actions would not change most people's continued agreement with Carter's thesis.

2 530 U.S. 290, 318–326 (2000) (Rehnquist, C.J., dissenting).

3 *Id.* at 318.

4 120 S. Ct. 2530 (2000) (plurality).

their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children."[5] A strong line is drawn by Carter, Rehnquist, and Thomas between those whose motivations and activities are "faith-based," to use the now-fashionable adjective, and those whose motivations and activities are not.

Debate over interpretation of the First Amendment Religion Clauses,[6] like other sectors of the debate about the appropriate role of religion in American public life, has come to rest for many on the assumption that religion fights for survival in a generally unfriendly and secular public environment. It is, in fact, a curious paradox that in the world's most religious post-industrial country—far outstripping its natural peers in Europe and elsewhere in conventional measures of personal piety—many religious people across the religious and political spectrum consider religion, religious people, and their concerns to be somehow fundamentally threatened in the United States.

Where do Catholics fit into this story? For most of American history, Catholics have not been understood to occupy a central part in the history of American religion. Until quite recently in fact, as recently perhaps as the 1970s, American Catholics were a footnote to the story of American religion because "American religion" was simply assumed to mean mainstream Protestant Christianity.[7] Catholics and others were a pretext for the debate about the First Amendment, not full participants in that conversation. Indeed, Catholics today, flushed with political success and preoccupied as they are with the sea changes rocking their Church, seem to have a curious amnesia about the extent to which anti-Catholicism propelled earlier Protestant positions on the separation of church and state and many other public questions. Religion was expelled from public schools, not because of hostility to religion, but because of hostility toward Catholics and fear that Catholics would demand and be given equal time and money. The Roman Catholic school system developed in response to this Protestant attitude.[8] Catholics today seem so eager to be regarded as full Americans, or so confident of their capacity to control the debate

5 *Id.* at 2551.

6 I am somewhat reluctant to use the expression Religion "Clauses" in this Essay given Judge Noonan's known dislike of the expression, but I bow to convention. *See, e.g.*, JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 81 (1998).

7 *See* RELIGION AND AMERICAN CULTURE (David G. Hackett ed., 1995); RELIGION IN AMERICAN HISTORY: A READER (Jon Butler & Harry S. Stout eds., 1998) (attempting to survey the new historiographical landscape).

8 *See* JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE 262–93 (1985) (discussing the evolution of the Catholic parochial school system).

within the Church, that they are willing to join political forces with styles of religion they formally condemn and that have historically condemned them on behalf of a religious consensus that is peculiarly non-Catholic.

This Essay will reflect on recent lobbying accomplished through amicus filings in the United States Supreme Court by the United States Catholic Conference (USCC). The positions taken by the USCC in recent religion cases will be considered in relation to the public theology of the Church as expressed in various Vatican documents. The Essay concludes that the amicus filings of the Catholic bishops reflect a drift during the last fifty years towards a position espousing affirmative legal protection for "religion-in-general"—a position that both coincides with the "accommodationist" or "non-preferential" position on the First Amendment held by certain legal scholars and creates a tension with established Church doctrine. The promotion of "religion-in-general" indeed bears a certain resemblance to the nineteenth-century sin of indifferentism. It is a by-product, as the Catholic jeremiads of the nineteenth century predicted, of modernity and of the full integration of the American Catholic community into the larger American political and religious community. "Religion" in America now includes the Roman Catholic Church, and the Church wants to be part of it.

The USCC is the official lobbying arm of the National Conference of Catholic Bishops. Both of these organizations were formed in response to a Vatican directive after the Second Vatican Council (Vatican II) mandating the formation of national bishops' conferences.[9] In the United States they appeared as successors to the National Catholic War Council, formed during World War I, and its successor, the National Catholic Welfare Council (NCWC), formed after the war.[10] The legal office of the NCWC was formed in 1920.[11] One of its first tasks involved counseling of Mexican bishops in response to legal suppression of the Church in Mexico.[12] The United States Catholic Conference today has a full legal staff led by an experienced and

9 The Second Vatican Council was a gathering of the Roman Catholic bishops of the world held in the Vatican between 1962 and 1965. These gatherings are known as ecumenical councils and have been held periodically since the fourth century, C.E. *See* R.F. Trisco, *Vatican Council II, in* 14 NEW CATHOLIC ENCYCLOPEDIA 563–72 (The Cath. Univ. of Am. ed., 1967).

10 *See* THOMAS J. REESE, A FLOCK OF SHEPHERDS: THE NATIONAL CONFERENCE OF CATHOLIC BISHOPS 23–24 (1992).

11 *See id.*

12 *See id.* at 26.

professional General Counsel, Mark Chopko.[13] Chopko's office performs the usual tasks of in-house counsel, including advice on permissible political activity, employment, tax, and immigration law. The Office of the General Counsel also engages in legislative lobbying, participates in rule-making, and files amicus briefs in selected cases at all levels of the state and federal courts,[14] including cases directly concerning interpretation of the First Amendment. The Office occupies an interesting intersection between that most American of all its institutions, the American legal system, and that arguably most un-American of its institutions, the Roman Catholic Church.

Indifferentism. The peculiarly Catholic[15] sin of indifferentism has a slightly archaic and refined neo-scholastic ring about it. It seems out of place in the context of the post-Vatican II Church. One feels as if it would take careful effort and some education to commit such a sin. One feels that it must have vanished along with scrupulosity and other old-fashioned sins, now replaced by an entirely new model of sin and of confession—the Sacrament of Reconciliation. Some would say that sin itself has been displaced.[16] Indifferentism is, however, a very modern sin. Invented in the nineteenth century, indifferentism is a product of Roman Catholicism's response to modernity, and, like many critiques of modernity, it finds a resonance in the discourses of post-modernity. Indifferentism is the sin of erasing difference.

According to the *New Catholic Encyclopedia,* indifferentism is "[a] doctrinal system that exalts the attitude (internal) that all philosophical opinions, all religions, and all ethical doctrines regarding life are equally true and valuable," and it may be divided into three types: irreligious indifferentism, naturalistic indifferentism, and supernatural indifferentism.[17] Indifferentism was condemned by the Church throughout the nineteenth century by a succession of popes: Leo XII,

13 *See id.* at 216–17; *see also* Interview with Mark Chopko, General Counsel, United States Catholic Conference in Washington, D.C. (Nov. 8, 1995).

14 *See Office of General Counsel* (Mar. 3, 2000), *at* http://www.usccb.org/ogc/index.htm.

15 The difficulties surrounding the use of "Catholic" to characterize attributes of Roman Catholics are legion. As in the use of all such umbrella identities, awareness of the pluralisms within that tradition is particularly acute right now. In this Essay, I will use "Catholic" loosely to describe a religious culture defined in large part by the mainstream official teachings of the Roman Catholic Church and "the Church" to refer to that institution.

16 *See* DOLAN, *supra* note 8, at 434 (discussing the new understanding of sin in the late twentieth century).

17 T.F. McMahon, *Indifferentism, in* 7 NEW CATHOLIC ENCYCLOPEDIA, *supra* note 9, at 469.

Gregory XVI, Pius IX, and Pius XII.[18] Indifferentism in religious matters—irreligious indifferentism—was equated with atheism, with a denial of the existence of God. Indifferentism was held to lead to licentiousness, corruption of youth, and "desire of innovation," along with a host of other modern ills.[19] Indifferentism is also condemned by name in the most recent Vatican document on religious pluralism, *Dominus Iesus*,[20] albeit with a somewhat lighter touch. *Dominus Iesus* condemns indifferentism as a "mentality" produced by relativism.[21] One sees in *Dominus Iesus* a greater effort to persuade, not merely to pronounce, as in the earlier condemnations, but the dangers of religious pluralism are clearly articulated.

The sin of indifferentism—the danger of acknowledging religious pluralism—was, before Vatican II, in part to be fought through fidelity to a church-state theory that held that the state had an obligation to teach and act according to true religious doctrine and that the ideal state was one in which the Roman Catholic Church was legally established. The official teaching of the Church was embodied in the frequent observation that "error has no rights."[22] Other religions, including "separated" Christian churches, might be tolerated for practical political reasons (on the assumption that a lesser evil might be allowed to further a greater good), but theologically they had no place in the economy of salvation. Vatican II made obsolete this neo-Thomist theological discourse and inaugurated a new age of Catholic openness to modernity and to the truths of other religious traditions. In *Lumen Gentium* (the Dogmatic Constitution on the Church),[23] *Nostra Aetate* (the Declaration on the Relationship of the Church to Non-

18 *See* 1 RICHARD P. MCBRIEN, CATHOLICISM 274–75 (1980) (noting that religious indifferentism was condemned in *Ubi Primum* (1824), *Mirari Vos Arbitramur* (1832), *Qui Pluribus* (1846), *Singulari Quadam* (1854), *Quanto Conficiamur Moerore* (1863), and the *Syllabus of Errors* (1864)). Indifferentism was also condemned at the First Plenary Council of India (1950). *Id.* at 275.

19 POPE GREGORY XVI, ON LIBERALISM AND RELIGIOUS INDIFFERENTISM [*Mirari Vos Arbitramur*] No. 15, *excerpted in* J.F. MACLEAR, CHURCH AND STATE IN THE MODERN AGE 136–37 (1995).

20 POPE JOHN PAUL II, DECLARATION ON THE UNICITY AND SALVIFIC UNIVERSALITY OF JESUS CHRIST AND THE CHURCH [*Dominus Iesus*] No. 22 (Aug. 6, 2000), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20000806_dominusiesus_en.html.

21 *See id.*

22 *See, e.g.*, Derek Cross, *Tolerance as a Catholic Doctrine*, FIRST THINGS, 1992, at 38–44.

23 SECOND VATICAN ECUMENICAL COUNSEL, DOGMATIC CONSTITUTION ON THE CHURCH [*Lumen Gentium*], *in* THE DOCUMENTS OF VATICAN II, at 14 (Walter M. Abbott ed., 1966).

Christian Religions),[24] *Ad Gentes* (the Decree on the Church's Missionary Activity),[25] and *Gaudium et Spes* (the Pastoral Constitution on the Church in the Modern World),[26] Vatican II apparently completely repudiated the Church's former attitude toward religious pluralism. These documents emphasized that truth was to be found in other religious traditions and that the appropriate attitude towards other religious traditions should be one of respect and openness to dialogue. While Vatican II did not abandon the Church's teaching that salvation was accomplished only through the saving act of Jesus Christ, the actual route to heaven for any one person could be one of faithful adherence to another religious path.[27]

Church-state theory was likewise revolutionized at Vatican II in *Dignitatis Humanae* (the Declaration on Religious Freedom),[28] the document in which the Catholic Church, in effect, abandoned its claims to be a "church"—coextensive with society—in the sense of Ernst Troeltsch.[29] Based on a fundamental acknowledgment of the "dignity of the human person" and of the need for religious choices to be free from coercion, human persons were declared to have a "right" to religious freedom, not merely to religious tolerance.[30] Religious communities were declared, likewise, to have a corollary right to religious freedom, because "[r]eligious bodies are a requirement of the social nature both of man and of religion itself."[31] A hotly debated issue at Vatican II, the *Dignitatis Humanae* was the document most influenced by American Catholic thinking and experience. John Courtney Murray, an American Jesuit who had been silenced by the Church in the 1950s for his writing on church-state matters, was a *per-*

24 SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON THE RELATIONSHIP OF THE CHURCH TO NON-CHRISTIAN RELIGIONS [*Nostra Aetate*], *in* THE DOCUMENTS OF VATICAN II, *supra* note 23, at 660.

25 SECOND VATICAN ECUMENICAL COUNCIL, DECREE ON THE CHURCH'S MISSIONARY ACTIVITY [*Ad Gentes*], *in* THE DOCUMENTS OF VATICAN II, *supra* note 23, at 584.

26 SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD [*Gaudium et Spes*], *in* THE DOCUMENTS OF VATICAN II, *supra* note 23, at 199.

27 This theology is affirmed in POPE JOHN PAUL II, *supra* note 20, No. 20–22.

28 SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM [*Dignitatis Humanae*], *in* THE DOCUMENTS OF VATICAN II, *supra* note 23, at 675.

29 2 ERNST TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES 993–1013 (Olive Wyon trans., 1950).

30 SECOND VATICAN ECUMENICAL COUNCIL, *Dignitatis Humanae*, *supra* note 28.

31 *Id.* No. 4, *in* THE DOCUMENTS OF VATICAN II, *supra* note 23, at 682.

itus[32] at the Council and participated in the drafting of the Declaration.[33] Murray had long argued that American Catholics could support the First Amendment unreservedly, because the American constitutional order, unlike European constitutional orders, was founded in natural law, not in hostility to religion.[34] He labored to explain this distinction to a Vatican which was still reacting to the French Revolution.

The declarations of Vatican II concerning religious freedom and diversity and the spirit they embody provided welcome relief to a ghettoized and defensive Catholic church, both to church members and to sympathetic onlookers—those the Council addressed as "[a]ll persons of good will."[35] They moved well beyond John Courtney Murray's practical politics. He had urged the need for religious freedom for the sake of civil peace while all the while continuing to assert that religious pluralism is against the will of God.[36] The documents of Vatican II seem to go further. They seem, rather, to find religious pluralism embedded in the human condition:

> Men look to the various religions for answers to those profound mysteries of the human condition which, today even as in olden times, deeply stir the human heart: What is a man? What is the meaning and purpose of our life? What is goodness and what is sin? What gives rise to our sorrows and to what intent? Where lies the path to true happiness? What is the truth about death, judgment, and retribution beyond the grave? What, finally, is that ultimate and unutterable mystery which engulfs our being, and whence we take our rise, and whither our journey leads us?[37]

The expansive and open tone of this paragraph is typical of the tone set by the documents of Vatican II.

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32 A *peritus* is a theologian officially appointed to advise an ecumenical council. Murray was appointed a *peritus* in the Second Session of the Council at the urging of Cardinal Spellman.

33 XAVIER RYNN, VATICAN COUNCIL II 458 (1968).

34 See the essays collected in JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960).

35 James Tunstead Burtchaell, *Religious Freedom*, *in* MODERN CATHOLICISM: VATICAN II AND AFTER 122 (Adrian Hastings ed., 1991).

36 *See generally* MURRAY, *supra* note 34. For a general introduction to Murray's thinking on religious freedom, see J. Leon Hooper, *General Introduction* to JOHN COURTNEY MURRAY, RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 11 (J. Leon Hooper ed., 1993). *See also* KEITH J. PAVLISCHEK, JOHN COURTNEY MURRAY AND THE DILEMMA OF RELIGIOUS TOLERATION (1994).

37 SECOND VATICAN ECUMENICAL COUNCIL, *Nostra Aetate*, *supra* note 24, *in* THE DOCUMENTS OF VATICAN II, *supra* note 23, at 661.

The broad and optimistic political and religious anthropology of Vatican II represents, as yet, however, more an aspiration than the fruit of a fully worked out theology and public philosophy with respect to the apparently acknowledged fact of religious pluralism. The documents of Vatican II seem to demand a singularly delicate balancing act with respect to religious diversity, one that at once both embraces religious pluralism and rejects it. The Catholic Church in the United States, as in other countries, found itself, quite abruptly, in an entirely different doctrinal relationship to politics, to the state, and to other religions.[38] No longer simply a provisional practical tolerance of the secular state and of religious diversity awaiting the arrival of a Catholic state, the Church has appeared to wholeheartedly embrace the American arrangement with respect to religion. Forty years later, it seems that it is going to take time to understand the new position and to formulate a detailed "Catholic" understanding of the new—both philosophical and theological. Unreflective appropriation of the American experience and the equation of Vatican II political theology and the American constitutional order with respect to religion can teeter on the edge of indifferentism, particularly in the context of cooperative religious lobbying with a secular government.[39]

John Courtney Murray's arguments on behalf of religious freedom, as J. Leon Hooper explains, depended on a classicist canonical cognitional theory.[40] By using an understanding of natural law as coextensive with American constitutional theory, Murray was able to support "the American proposition"—as he called it—without giving full acknowledgment to the rights of atheists and without spelling out the way in which and the extent to which saving truth resided outside the magisterium.[41] Hooper argues that *Dignitatis Humanae,* notwithstanding its affirmation of the unacceptability of political intolerance, is still supported within a Catholic theology that contains a dogmatic intolerance of other religious and non-religious truths.[42] In other words, Hooper suggests, there is some hypocrisy, or at least apparent serious internal contradiction within the Church's position—one that may in-

38 It is important to emphasize the "doctrinal." American Catholic leaders across the spectrum beginning with John Carroll in the eighteenth century have enthusiastically urged on the Vatican acceptance of the new situation of the Church in the United States with respect to disestablishment and religious liberty. *See* DOLAN, *supra* note 8, at 101–24.

39 This tendency is a concern in *Dominus Iesus.*

40 *See* Hooper, *supra* note 36, at 43.

41 *See id.*

42 *See id.* at 44.

hibit its honest participation in the public square.[43] Hooper himself proposes a project of theological reconstruction founded in the theology of Bernard Lonergan. This new theology would find a reconciliation of the two truths that the Roman Church is the one true Church and that truth exists in other religious traditions, not in a paternalistic inclusiveness of the partial revelation shared by other religions, but in a historically grounded rather than timeless theology that begins in faith in a Lord of History who reveals Himself in the "tangles of human living."[44] Whatever the theological strategy, Hooper warns of the urgent need for new theologizing on this subject.[45] He commends Murray's later work in which he had begun to confront these questions.[46]

The need for a reconstruction of the Church's relationship to the secular state and of its understanding of religious pluralism comes at a time of heightened politicization and general public rethinking of all of the issues surrounding the role of religion in a religiously plural, secular American state, a rethinking conducted in the American context in the shrill atmosphere of interest group politics. It also comes at a time of deep divisions within the Catholic community. In the thirty-odd years since the closing of the Council, public debate about the role of religion in the United States and elsewhere has become increasingly intense and increasingly polarized while internal debate about a whole range of ecclesiological questions has absorbed much energy in the Church itself. For the Catholic Church this situation means the simultaneous participation in an American public debate about the role of religion, the dominant strain of which at the present seems to be the need to protect and promote religion, and an internal debate about its own relationship to other religious communities. This bifocal gaze is not just a Catholic problem. The perceived need for the protection and promotion of "religion-in-general" causes a theological problem for all religious communities: does the embracing of religious pluralism as a fact of the human condition necessarily mean that religious truth can never be exclusive? Or that it can never be true? New theologies of church and state are being worked on or are urgently needed in other religious communities as well, and this reconstruction of the relationship of religion to the secular state is also happening around the globe.[47] The Catholic case is being used here

43 *See id.* at 40.

44 *Id.* at 44.

45 *Id.* at 40–45.

46 *Id.* at 45.

47 *See* JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD (1994) (reworking the secularization thesis to explain the emergence of public (as opposed to pri-

as an exemplar of a wider structural problem with legal protection for religious freedom in a time of radical pluralism, mobility, and globalization.

Putting aside for a moment the Church's own internal reflections, the American Catholic Church also participates in the larger American public debate about religion at a number of levels in a number of different guises. There were more than fifty million American Catholics according to the 1990 census.[48] It is impossible to generalize in any meaningful way about the politics of this group as a whole at this point in American history. The group includes people with a range of relationships to the Catholic Church as an institution and with a whole spectrum of political views of varying intensity on a huge range of topics. Catholics participate in the political process as individuals and as members of groups relating to their employment, gender, regional location, party affiliation, national origin, and of course with respect to particular political issues, such as the environment. On religious issues, Catholics are publicly represented officially through their bishops, but also increasingly through politically focused Catholic lay organizations. One way, however, Catholics are represented in the Supreme Court is through the filing of amicus briefs by the general counsel of the USCC.

Amicus curiae briefs are filed, usually on appeal, by non-parties who have a particular interest in the litigation or in a point of law which is in dispute, and who serve, in effect, as *ad hoc* advisers to the court. Permission of the court is usually required for the filing of such briefs. In the United States Supreme Court, an amicus brief may be filed either if all of the parties to the case consent or if permission is granted upon motion to the Court.[49] The initial rationale for permitting such filings in American courts was that attorneys should be able to provide legal advice to courts in order to protect the courts from legal error. Today amici are understood to have a wide range of roles and may provide the Court with valuable perspectives of many different sorts on the case which may be missing from the briefs of the parties. Amici have gone from being disinterested bystanders—almost always lawyers—to interested non-parties, usually organizations

vate) religion in modern secular states); *see also* FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND THE DEMOCRATIC RESOLUTION, at ix (1995) (discussing "whether the political principles of religious freedom make sense" by examining views of religious plurality and rationales justifying plurality).

48 WILLIAM H. NEWMAN & PETER L. HALVORSEN, ATLAS OF AMERICAN RELIGION: THE DENOMINATIONAL ERA, 1776–1990, at 69–72 (2000).

49 SUP. CT. R. 37.

with a cause. Over the course of time amici have moved, as Samuel Krislov argues, "from friendship to advocacy."[50]

The filing of amicus briefs may be traced back to Roman law, but their widespread use is a comparatively recent development.[51] Since the 1960s permission is routinely granted for the filing of amicus briefs in the United States Supreme Court.[52] There has been an enormous increase in the filing of amicus briefs in the Supreme Court in the last thirty or forty years. In the ten years between 1946 and 1955 the number of amicus briefs filed was 531.[53] Between 1986 and 1995 the number was 4907, an increase of 800%.[54] This increase corresponds to a period of increased politicization of the Court's docket as well as to an increase in civil rights legislation and a growth in interest group politics. It is also the period during which the Court has been involved in interpreting the First Amendment Religion Clauses.

The First Amendment Religion Clauses, which are introduced by the phrase "Congress shall make no law,"[55] were applicable only to Congress until 1940. In 1940 the Court "incorporated" the First Amendment Religious Free Exercise Clause into the Fourteenth Amendment Due Process Clause and thereby made it applicable to the States.[56] In 1947, the Establishment Clause of the First Amendment was incorporated into the Fourteenth Amendment.[57] Because most religion cases arise as a result of state rather than federal action or legislation, interpretation of the Religion Clauses of the First Amendment by the Supreme Court is largely a phenomenon of the

50 Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963) (giving a history of the use of the amicus brief). This now somewhat dated article remains the most frequently cited authority on the subject.

51 *See* Leo Pfeffer, *Amici in Church-State Litigation*, 44 LAW & CONTEMP. PROBS. 83, 83 (1981).

52 *Id.* at 85.

53 Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 752 (2000).

54 *Id.*

55 U.S. CONST. amend. I.

56 This "incorporation" was accomplished by using the enumerated rights of the Bill of Rights to supply the detail for the general assertion of rights in the Fourteenth Amendment. Incorporation of the Free Exercise Clause of the First Amendment was accomplished in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *Cantwell*, a Connecticut law prohibiting door-to-door solicitation was declared unconstitutional, because it violated the free exercise rights of Jehovah's Witnesses. *Id.* at 307.

57 *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947). In *Everson*, the Court, while announcing a very high standard of church-state separation, held constitutional a New Jersey statute reimbursing parents for the cost of busing their children to parochial school, on the ground that children, not religion, benefited from the expenditure of public funds. *Id.* at 17–18.

second half of the twentieth century, unlike that of other parts of the Constitution.[58] Amicus participation in this process has been intense.

Both religious and secular organizations have participated as amicus curiae in Supreme Court religion cases since 1940 but their participation has greatly increased over the years and their number has proliferated.[59] The participation of amici who make regular filings can have influence over time as particular amici, such as the Solicitor General of the United States, develop a reputation for good and reliable advice. Amicus briefs can also, at times, be seen to have made a discernible difference in the opinions of the Justices in particular cases.[60] The influence of amici, according to commentators, depends, in part, on the strength of the parties' briefs—whether the amici add a significantly different point of view or whether they simply serve to say "me, too." However, as Krislov notes, amicus briefs may serve other functions, apart from influencing the Justices, within their own organizations.[61] Amicus briefs may serve as a location for the construction and display of identity, whether or not the Supreme Court is listening. Indeed many amicus briefs may be written primarily for an audience other than the Court.

After having only occasionally filed amicus briefs beginning with *Pierce v. Society of Sisters*[62] and having decided not to file in *Everson v. Board of Education*,[63] the USCC has, since *Everson*, regularly filed amicus briefs in First Amendment cases. It is, however, selective about the cases in which it files and files less frequently than either mainstream Jewish and Protestant organizations or the American Civil Liberties Union.[64] Still, patterns can be discerned in the USCC's First Amendment filings. It is clear that care is taken in the selection of cases in

58 For a subtle historical exploration of the effect that this delayed incorporation has had on First Amendment jurisprudence, see generally MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965).

59 For a description of the principal amici organizations filing briefs in religion cases, see Pfeffer, *supra* note 51, at 86–94. *See generally* PAUL J. WEBER & W. LANDIS JONES, U.S. RELIGIOUS INTEREST GROUPS: INSTITUTIONAL PROFILES (1994) (discussing 120 religious interest groups).

60 *See, e.g.*, McCollum v. Bd. of Educ., 333 U.S. 203, 229 n.19 (1948) (Frankfurter, J., concurring).

61 *See* Krislov, *supra* note 50, at 720–21.

62 268 U.S. 510 (1925). The Court held in *Pierce* that parents had a right to send their children to private (in this case, Catholic) schools rather than public ones, provided they met state education standards. *Id.* at 534–35. *Pierce* was not a First Amendment case.

63 See *supra* note 51 for a description of *Everson*.

64 *See* Pfeffer, *supra* note 51, at 93.

which to make amicus filings and that an overall philosophy of the First Amendment and of the position of the Roman Catholic Church in relation to the First Amendment informs those filings.[65]

As a general matter, the USCC files amicus briefs in two kinds of cases, both of which raise what the USCC understands to be "Catholic" issues.[66] As one voice in the public square seeking to influence American public policy, it files briefs on a range of issues which correspond to the bishops' social agenda as outlined by the USCC both in its mission statement and in periodic statements of legislative goals and objectives.[67] Such "social justice" cases include those touching on euthanasia, abortion, immigration, obscenity laws, school prayer, and poverty. Briefs are also filed in cases that may affect the Church's legal and constitutional status as an institution. Thus, the USCC has filed briefs in cases concerning the political rights of religious groups, the taxation of religious institutions, a variety of employment issues, and aid to parochial schools, among others.[68]

Cutting across the specific legal and constitutional questions at issue in each of these two kinds of cases is the larger question of the overall historical and jurisprudential interpretation of the Religion Clauses of the First Amendment, a highly contested area of constitutional interpretation. In the last twenty to thirty years scholars have engaged in an intense debate over the historical evidence surrounding the adoption of the First Amendment. These scholars fall roughly into two groups: "separationists" see the First Amendment *primarily* as effecting a structural separation of religion and government and a corresponding prohibition of government aid to religion; "accommodationists" see the First Amendment *primarily* as effecting an affirmative mandate in favor of freedom of religion and to require, therefore, certain forms of government aid to religion, including exemption from neutral laws of general application, which incidentally prohibit religious activity as well as equal participation in federal funding programs. There are variations on both of these positions.

The byword of the revisionist project of the second group, the "accommodationists," has become the assertion that the First Amend-

65 These larger conclusions are based on a reading of all of the amicus filings of the USCC in the United States Supreme Court. This Essay focuses rather on the most recent ones which will be cited to individually.

66 *See, e.g.*, Abortion Rights Mobilization v. U.S. Catholic Conference, 885 F.2d 1020 (2d Cir. 1989).

67 The 1981 Mission Statement and the NCCB/USCC Goals and Objectives, 1991–96 are reproduced in REESE, *supra* note 10, at app. A–B. *See also* USCC website, http://www.usccb.org/chronological.htm.

68 *See supra* note 65.

ment was originally intended to protect religion from the state rather than the state from religion.[69] Rarely is this statement qualified either with an admission that the legislative history of the First Amendment will not support the assertion of such clarity of intent one way or the other or that "original intent" is a highly compromised method of constitutional interpretation. "Proof" that the First Amendment Religion Clauses have such an overarching intention affirmatively to protect religion is attempted by selectively expanding the relevant historical materials beyond the writings of Madison and Jefferson commonly referred to by the Court to include those of the many eighteenth-century "religious" advocates of separation of church and state, such as Isaac Backus, and by careful selective reading of the historical record on the nature of colonial establishments.[70] This strategy is intended to show that Jefferson and Madison were actually in the minority and that the Supreme Court has erred in using the Virginia experience, beginning with the campaign for the Virginia Statute for Religious Freedom, as *the* privileged historical antecedent for understanding the First Amendment.[71] The most enthusiastic spokesperson on the Court for this interpretation of the First Amendment has been Chief Justice Rehnquist.[72] In the course of this effort a very close relationship has developed between the academic legal community and the growing activist legal community committed to the promotion of religious liberty.[73] Academic legal scholars either write or advise on many of the amicus briefs filed by religious groups in the Supreme Court.

The USCC has been actively involved in this apologetic reinvention of First Amendment colonial legislative history. The USCC

69 *See, e.g.*, Brief Amicus Curiae of the United States Catholic Conference in Support of Petitioners at 6–7, Mitchell v. Helms, 530 U.S. 793 (1999) (No. 98-1648); Mark E. Chopko, *Intentional Values and the Public Interest—A Plea for Consistency in Church/State Relations*, 39 DEPAUL L. REV. 1143, 1144 (1990). The term "accommodationists" is quoted from ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 556 (1950).

70 *See, e.g.*, JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2000).

71 See Brief of the United States Catholic Conference as Amici Curiae in Support of the Respondent at 8–12, Boerne v. Flores, 521 U.S. 507 (1996) (No. 95-2074), written by Michael McConnell, Professor of Law at the University of Utah. This is a large and growing body of literature. Scholarly contributions to this effort include ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); WITTE, *supra* note 70; and Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

72 *See* Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

73 *See* Mark Curriden, *Defenders of the Faith*, A.B.A., Dec. 1994, at 86, 89.

funded a major work of revisionist history entitled *Freedom from Federal Establishment*,[74] a publication of the Institute for Church-State Law of the Georgetown University Law Center. A lay Catholic publication entitled *First Things* has also been founded to address the interpretation of the First Amendment.[75] Amicus Briefs of the USCC rehearse the "accommodationist" position.[76] For example, in its brief in *Bender v. Williamsport Area School District*, the USCC argued, "The Establishment and Free Exercise Clauses were intended by the framers to be complementary and provide comprehensive protection for religious liberty."[77] Following this statement is the quote from Anson Stokes to the effect that the First Amendment Religion Clauses "were adopted not as a protection *from* religion, but rather as a protection *for* religion."[78] USCC briefs are full of repeated appeals for the need for the government to affirmatively aid "religion-in-general" through support of the autonomy of religious institutions.[79]

In all this debate about the intentions of the founders, however, beyond a rejection by almost everyone except Justice Scalia of the opinion/act dichotomy,[80] there has been very little discussion of what this "religion" is that is either being protected or being kept apart, from either a theological perspective within religious communities or

74 CHESTER JAMES ANTIEAU, ARTHUR T. DOWNEY & EDWARD C. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964).

75 FIRST THINGS: A JOURNAL OF RELIGION AND PUBLIC LIFE, is published in New York. The first issue was published in 1990.

76 *See, e.g.*, Brief of the United States Catholic Conference as Amicus Curiae in Support of Neither Party at 4–6, Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (No. 91-948); Brief of the United States Catholic Conference as Amicus Curiae in Support of Petitioners at 17–19, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014); Brief of the United States Catholic Conference as Amicus Curiae in Support of Appellant at 7–12, Bowen v. Kendrick, 487 U.S. 589 (1988) (No. 87-253); Brief of the United States Catholic Conference as Amicus Curiae in Support of Appellants at 7–10, Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (No. 86-179); Brief of the United States Catholic Conference as Amicus Curiae in Support of Petitioners at 7–16, Sch. Dist. v. Ball, 473 U.S. 373 (1985) (No. 83-990); Brief of the United States Catholic Conference as Amicus Curiae in Support of Respondents at 7–13, Mueller v. Allen, 463 U.S. 388 (1983) (No. 82-195); Brief of the United States Catholic Conference as Amicus Curiae in Support of Respondents at 3–5, Widmar v. Vincent, 454 U.S. 263 (1981) (No. 80-689).

77 Brief of the United States Catholic Conference as Amicus Curiae in Support of Petitioners at 9, Bender v. Williamsport Area Sch. Dist., 475 U. S. 534 (1986) (No. 84-773).

78 *Id.*

79 *See, e.g.*, Brief of the United States Catholic Conference as Amicus Curiae in Support of Appellant at 2, *Bowen* (No. 87-253).

80 *See* Employment Div. v. Smith, 494 U.S. 872, 876–78 (1990).

from a religious studies perspective from outside religious communities.[81] What exactly is it that is entitled to accommodation? The supposed threat to "religion," or "faith," or "belief," which is a staple of a certain contemporary political rhetoric, depends, I would argue, on having the word "religion" remain a placeholder in the sentence to be supplied by each hearing believer. Each religious actor may then fight for his or her own religious vision while making common cause with those with radically different understandings of the meaning and structure of the world.

Is this studied ambiguity necessary to First Amendment jurisprudence? Is it constitutional? Is it Catholic? Does interpretation of the First Amendment require having a referent for the word "religion"? Historians would agree that "religion" has had a chamelion-like quality over the course of American history, but it has never been more unstable than it is at present. It is, perhaps, both inevitable and desirable that a category like "religion"—as it is used in legal documents—is constantly changing its colors as circumstances change. While attention to this process is valuable in any event, the dangers of ambiguity are more acute, I would argue, when "religion" is actually being promoted. The content becomes more urgent when religion is intended to be the beneficiary of an affirmative government effort, rather than being one of two partners in an evolving structural separation of spheres. For reasons that John Courtney Murray understood, policing the borders between religion and the state is troublesome for those who do it, but it does not raise the same thorny theological and philosophical problems as does affirmative promotion—or even accommodation—of religion by the state. This dynamic can be seen to be at work in the litigation under the Religious Freedom Restoration Act[82] and its state counterparts.[83]

The intensity of the recent debate over the Religion Clauses arguably begins with the Court's decision in *Employment Division v.*

81 These two efforts are related because religion scholars must depend on theologians to articulate the theology of their communities and theologians must depend on scholars of religion to describe and analyze the plurality of human religious experience. Both are needed in constructing a public conversation about the meaning of the First Amendment. For two recent descriptions of these difficulties, see CRITICAL TERMS FOR RELIGIOUS STUDIES (Mark C. Taylor ed., 1998); Robert Orsi, *Everyday Miracles: The Study of Lived Religion, in* LIVED RELIGION IN AMERICA 3, 5–6 (David D. Hall ed., 1997).

82 42 U.S.C. §§ 2000bb to bb-4 (1994).

83 *See, e.g.*, Florida Religious Freedom Restoration Act, FLA. STAT. ANN. § 761.03 (West 2000). Other state Religious Freedom Restoration Acts are cited in Brief of Appellants, Warner v. City of Boca Raton, 64 F. Supp. 2d 1272 (S.D. Fla. 1999) (No. 99-13730-EE).

Smith.[84] In *Smith* the Court held that two members of the Native American Church, fired from their jobs as substance abuse counselors, were not entitled to unemployment compensation because they had been constitutionally fired for cause because of their sacramental use of peyote, a regulated narcotic.[85] The Court rejected a First Amendment claim that the two had a right under the Free Exercise Clause to the use of peyote as a sacrament.[86]

Certain First Amendment cases have been perceived by the activist community as having the specific potential to threaten religion, all religion, "religion-in-general." Supreme Court cases which raise the issue of the appropriate governmental relationship to "religion-in-general" provoke amicus filings from a range of religious interest groups, including Catholic groups. The *Smith* decision is one such example. Major religious organizations across the political and theological spectrum have banded together, particularly and more strenuously since the decision in *Smith*, to rescue the First Amendment and the country from secularizing tendencies.[87] The political activities on behalf of this effort, which resulted in passage of the Religious Freedom Restoration Act (RFRA),[88] have also resulted in an expansion of religious lobbying of the Supreme Court and in the creation of new alliances across formerly hostile denominational divides. "We have people who cannot agree on how to get to heaven, but we are together on this one issue—all our religious freedoms are decaying."[89]

The USCC, in its restrained Catholic way, has entered the fray. While General Counsel Mark Chopko says that he is attempting a careful balance between allegiance with other groups on behalf of "religion-in-general" and an attention only to Catholic issues in the narrowest sense,[90] the public persona of the USCC in the Supreme Court is one which has gradually shifted, I would argue, towards an activist promotion of governmental protection of religion. Chopko notes, for example, that the USCC did not join in the coalition to lobby for RFRA because of its concern about the effect of RFRA on the abortion

84 494 U.S. 872 (1990).

85 *Id.* at 890.

86 *Id.* at 882.

87 Arguably the roots of this situation go back to Justice Black's equation of religion and non-religion in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

88 42 U.S.C. §§ 2000bb to bb-4 (1994). RFRA was subsequently held to be an unconstitutional congressional usurpation of power in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

89 Curriden, *supra* note 73, at 86, 87 (quoting Alan Sears, President of the Alliance Defense Fund).

90 Interview with Mark Chopko, General Counsel, United States Catholic Conference, in Washington, D.C. (June 4, 1996).

debate, does not belong to the Coalition for the Free Exercise of Religion, and will not join other religious lobbying groups in behalf of satanic cults in prisons.[91] On the other hand, the USCC continues to lobby for school vouchers although similar dangers of losing Catholic specificity and of having the content of "religion" be determined by governmental interests are present there, and USCC briefs reflect the accommodationist project.

Chopko says that the USCC is sometimes suspected by other religion lobbyists of being typically Catholic: of acting ecumenical when it suits them—cooperating in "religion-in-general" lobbying, for example—while their fingers are crossed behind their backs.[92] They are willing to lobby the government only for those things that affect Catholic religious objectives, narrowly understood, and they continue, these critics argue, to use Catholic theological standards for judging the salvation of people of other faiths. In spite of the generosity of the words of Vatican II, the Church in its legal persona is still relying on Murray's assertion that the United States is founded in natural law. Mark Chopko speaks publicly of the pro-religion stance of the Constitution and of the threat of secularism, but there remains a gap between this balancing act on the part of the Office of the General Counsel and what has often been perhaps an overly expansive reading of the documents of Vatican II.

The USCC's most recent amicus filings in First Amendment cases have been in two school cases, *Agostini v. Felton*[93] and *Mitchell v. Helms*.[94] *Agostini* concerned the constitutionality of the provision of remedial education by public school teachers in private schools under Title I of the Elementary and Secondary Education Act,[95] Title I had been declared unconstitutional in *Aguilar v. Felton*.[96] *Mitchell* concerned the constitutionality of Chapter 2 of the Education Consolidation and Improvement Act of 1981,[97] a federal law providing educational materials to private schools. Together, *Agostini* and *Mitchell* have created considerable conflict over First Amendment jurispru-

91 *Id.*

92 *Id.*

93 Brief Amicus Curiae of the United States Catholic Conference in Support of Petitioners, Agostini v. Felton, 521 U.S. 203 (1997) (No. 96-552).

94 Brief Amicus Curiae of the United States Catholic Conference in Support of Petitioners, Mitchell v. Helms, 530 U.S. 793 (2000) (No. 98-1648).

95 20 U.S.C.A. §§ 6301–6514 (West 2000 & Supp. 2000).

96 473 U.S. 402, 414 (1985).

97 Pub. L. No. 97-35, 95 Stat. 357, 463–82 (codified as amended at 20 U.S.C. §§ 7301–7373 (1994 & Supp. IV 1998)).

dence with respect to the constitutionality of various forms of government aid to religious schools.

In its Brief in Support of Petitioners in *Agostini*, one of eight filed in the case, the USCC reviewed Establishment Clause jurisprudence and argued strenuously for an overturning of both *Lemon*[98] and *Aguilar*.[99] In the course of its brief, the USCC repeatedly stressed that the religious freedom protected by the First Amendment has two aspects: personal religious liberty and institutional autonomy.[100] Any test under the Establishment Clause, it asserted,

> must provide for absolute impartiality of treatment for religion, and among religions. In order to do so, two interests must both be served, rather than spuriously seeming to be weighed against each other. Personal religious liberty must at all times be protected from encroachment by the state, and the institutional autonomy of both governmental and religious institutions must not be impinged upon. Neither must be permitted to intrude into the institutional prerogatives of the other.[101]

The USCC also insisted that the state has an "affirmative obligation to accommodate religion," arguing that religious schools can keep secular and religious instruction separate and to assume otherwise is to demonstrate "hostil[ity] to religious belief itself."[102]

Aguilar was indeed overturned by *Agostini*. The 5-4 majority held that to offer remedial instruction by public school teachers in parochial schools in New York was not an unconstitutional establishment of religion, because the act did not (1) have the effect of inculcating religion, (2) use religious criteria to select recipients, or (3) result in excessive entanglement between government and religion.[103] While *Agostini* was a victory of sorts for advocates of greater aid to parochial schools, the Court fell far short of the sweeping statements about the rights of religion urged by amici. The Court seems more comfortable with something like neutrality in Philip Kurland's famous formulation: law should not use religion as a category either for the disadvantage or for the advantage of religion.[104] Law should rather go about

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98 Lemon v. Kurtzman, 403 U.S. 602 (1971).

99 *See* Brief Amicus Curiae of the United States Catholic Conference in Support of Petitioners at 3, 25–28, Agostini v. Felton, 521 U.S. 203 (1997) (No. 96-552).

100 *Id.* at 3, 16–17, 21–25.

101 *Id.* at 3.

102 *Id.* at 4.

103 Agostini v. Felton, 521 U.S. 203, 230, 232, 234–35 (1997).

104 *See* PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 112 (1961).

its business—here of ensuring equal access to education—and let the chips fall where they may.

The USCC sometimes argues in favor of neutrality and sometimes in favor of a special status for religion.[105] Neutrality, it seems to say, should be the rule when government benefits are being handed out.[106] Special treatment, on the other hand, should be the rule when religion wishes to exempt itself from regulation.[107] Sometimes it makes both arguments in the same brief.[108] In its brief in *Mitchell* supporting the constitutionality of Chapter 2, the USCC first argues that the constitutionality of aid to parochial schools can be judged on the basis of whether it is religion or religious activity that is at issue.[109] "Religion qua religion"—for example, worship, proselytizing, liturgy, doctrine, and selection and supervision of clergy and the tasks that support them—cannot, according to the USCC's brief, receive government aid.[110] Religiously motivated action can. While the distinction between "religion qua religion" and religion not qua religion is not transparent, several pages later the brief quotes the Court to the effect that "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose."[111] This would seem to be a reference to government aid for "religion qua religion." This kind of neutrality would seem to be exquisitely designed, as Justice Brennan noted in his dissent in *Lynch v. Donnelly*,[112] "to offend believers and non-believers alike."[113] The majority had succeeded in keeping Christ in Christmas by declaring the crèche to be "devoid of any inherent meaning."[114] Likewise current lobbyists for religion, including the USCC, seem to be trying to raise the public

105 *See* Brief of the United States Catholic Conference as Amicus Curiae in Support of the Respondents at 8–12, Boerne v. Flores, 521 U.S. 507 (1996) (No. 95-2074); Brief Amicus Curiae of the United States Catholic Conference in Support of the Petitioners at 14–25, *Agostini* (No. 96-552).

106 *See* Brief Amicus Curiae of the United States Catholic Conference in Support of Petitioners at 14–25, *Agostini* (No. 96-552).

107 *See* Brief of the United States Catholic Conference as Amicus Curiae in Support of the Respondents at 8–12, *Boerne* (No. 95-2074).

108 *See* Brief Amicus Curiae of the United States Catholic Conference in Support of the Petitioners at 14–25, *Agostini* (No. 96-552).

109 *See* Brief Amicus Curiae of the United States Catholic Conference in Support of Petitioners at 16–17, Mitchell v. Helms, 530 U.S. 793 (2000) (No. 98-1648).

110 *Id.* at 6–12.

111 *Id.* at 18.

112 465 U.S. 668 (1984).

113 *Id.* at 712 (Brennan, J., dissenting).

114 *Id.* at 727 (Blackmun, J., dissenting).

profile of religion at the expense of rendering it entirely without distinction or importance.

Justice Thomas's opinion for the plurality in *Mitchell*[115] proposed a radically streamlined approach to Establishment Clause cases. The *Lemon*[116] test is restated as having two, rather than three, parts: Does the law in question have either the purpose or the effect of advancing religion?[117] In testing effect, the Court is to be guided by a principle of neutrality.

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.[118]

Like the USCC, Thomas seems to argue that neutrality means that religion is entitled to government benefits on the same basis as any other institution. Religion should not make a difference.

The effect of the plurality's restatement of the Establishment Clause case law is, as Justice Souter says in dissent, to overturn the principle enunciated in *Everson*,[119] but amply testified to by the Founders, that government may not support religious instruction. "To the plurality there is nothing wrong with aiding a school's religious mission; the only question is whether religious teaching obtains its tax support under a formally evenhanded criterion of distribution. The principle of no aid to religious teaching has no independent significance."[120] In footnotes Souter challenges the assertion of the USCC and the plurality that there is no danger in funding "religion qua religion" because religious and secular instruction can be easily separated.[121] Indeed, the Justice quotes official Catholic teaching that they should not. In fact, religious education in Roman Catholic schools is defined as part of required religious practice; aiding it is thus akin to aiding a church service.[122] Justice Souter also points out

115 *See* Mitchell v. Helms, 120 S. Ct. at 2530, 2536–56 (2000) (plurality opinion).

116 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

117 *See id.*

118 *Mitchell*, 120 S. Ct. 2541.

119 Everson v. Bd. of Educ., 380 U.S. 1, 14–17 (1947).

120 *Mitchell*, 120 S. Ct. at 2541 (Souter, J., dissenting).

121 *See id.* at 2588–89, n.17; 2591, n.19; 2596, n.28.

122 *Id.* at 2582–83; *see* 1983 CODE c.798 (directing parents to entrust children to Roman Catholic schools or otherwise provide for Roman Catholic education), c.800,

that, far from being irreligious, the principle of no aid has strong religious support. "[The plurality] equates a refusal to aid religious schools with hostility to religion (as if aid to religious teaching were not opposed in this very case by at least one religious respondent and numerous religious amici curiae in a tradition claiming descent from Roger Williams)."[123] Amici curiae to which he refers include the Baptist Joint Committee on Public Affairs, The Interfaith Religious Liberty Foundation, and the National Committee for Public Education.[124]

In its brief in *Agostini*, in a section entitled "A New Approach to the Interpretation of the Establishment Clause Must be Undertaken Here," the USCC begins with several assertions about the circumstances surrounding the promulgation of the First Amendment that are almost universally acknowledged by historians. First, that the founding generation, for the most part, believed religion to be essential to the maintenance of public order and the promotion of public virtue.[125] Second, that the First Amendment, to the extent that such an intent can be discerned, was intended simply to confirm the incapacity of Congress to establish a national church, a jurisdictional rather than an ideological claim.[126] Finally, that at the time of passage of the First Amendment there was great diversity among the States with respect to the legal regulation of religion.[127] It is very difficult to find any consensus beyond these points. The rest of this section of the USCC's brief in *Agostini*, however, moves from this generally accepted but rather bare bones history to grand attribution of ideological motive to the founding generation.[128] There are no more citations to the Founders but rather extensive attribution of intention to "history" and the use of the passive voice.

> History indicates that the Establishment Clause *was intended* to prohibit the preference of one religion over another .... Benevolence toward religion *was not perceived* as an evil. Rather, support and encouragement of religion *was perceived* to be in the public good. . . .

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§ 2 (requiring the faithful to support establishment and maintenance of Roman Catholic schools), cc.802, 804 (requiring diocesan bishop to establish and regulate schools "imparting an education imbued with the Christian spirit"), *reprinted in* THE CODE OF CANON LAW: A TEXT AND COMMENTARY 566–68 (James A. Coriden, Thomas J. Green, & Donald E. Heintschel eds., 1985).

123 *Mitchell*, 120 S. Ct. at 2597 (Souter, J., dissenting) (footnotes omitted).

124 *See id.* at n.31 (Souter, J., dissenting).

125 *See* Brief Amicus Curiae of the United States Catholic Conference in Support of Petitioners at 14–25, Agostini v. Felton, 521 U.S. 203 (1997) (No. 96-552).

126 *See id.* at 14–17.

127 *See id.* at 15.

128 *See id.* at 21–25.

> The Establishment Clause *was not meant* to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty.[129]

By whom? Where? When? These are our issues, not theirs.

The Catholic Church, as it has "come of age" and taken its place with other American "denominations," has tended to move away from concern with issues that touch primarily on "Catholic" issues to participation in a more general lobbying of the Court on the meaning of the First Amendment and in defense of "religion-in-general." For example, it has changed its position on school prayer. The Catholic position on prayer in public schools until 1948 was that it should be abolished, because it was Protestant.[130] Now, prayer in schools is seen as important, because it is one of the frontiers of defending religion, of putting religious values back into public life.[131] The American Catholic Church is now one religious group among many banding together to lobby, like a trade association does, for legislation and court decisions that will favor its product. What was once regarded as a dangerous Protestant *de facto* establishment is now regarded as an acceptable "Judaeo-Christian" *de facto* establishment—which includes Catholics.[132] Mark Chopko is a member of an association of general counsels for churches and other religious organizations that meet regularly, like the counsels of other trade associations, to discuss common legal issues.[133]

The USCC is arguing in its briefs today that neutrality means that religion should be treated the same as other recipients of government benefits. This is the argument that was made and accepted by the Court in *Rosenberger v. Rector*.[134] "Neutrality," as a First Amendment value, can be traced directly to *Everson*.[135] Mark de Wolfe Howe in *The Garden and the Wilderness*[136] argues persuasively that neutrality in the sense that religion and non-religion ought to be treated alike is the result of incorporation of the First Amendment into the Four-

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129 *Id.* at 15–16 (citations omitted).

130 *See* Pfeffer, *supra* note 51, at 96.

131 *See* RICHARD J. GELM, POLITICS AND RELIGIOUS AUTHORITY: AMERICAN CATHOLICS SINCE THE SECOND VATICAN COUNCIL 84 (1994).

132 The new *de facto* establishment was first described by Will Herberg in his classic PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 247–69 (1955).

133 Interview with Mark Chopko, General Counsel, United States Catholic Conference in Washington, D.C. (Nov. 8, 1995).

134 515 U.S. 819, 839 (1995).

135 *See* Everson v. Bd. of Educ., 380 U.S. 1, 14–17 (1947).

136 HOWE, *supra* note 58.

teenth Amendment at a time when the Court was preoccupied with issues of racial equality.[137] Equality, Howe argues, was the preoccupation of the middle of the twentieth century, not of the end of the eighteenth.[138] A concern for equality, he suggests, led the Court to abandon a special role for religion.[139] Others too have argued that it is equality that is the dominant value of American political life.[140]

In his dissent in *Mitchell*, Justice Souter complains that three different kinds of neutrality have been conflated into one by the majority. "'Neutrality' has been employed as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it."[141] This has been a progressive movement by the Court, as Souter describes it, from the use of the term to denote the general stance of government vis á vis religion to a measure of the constitutionality of a particular program in its evenhanded distribution of benefits as between religious and non-religious institutions. In this movement the Court has gone from a requirement of what Souter calls universal neutrality, characterized by such programs as fire and police protection, to a neutrality that is limited to a particular government benefit, a benefit that in itself is not universal.[142] The danger, as Souter sees it, is far greater in this latter use of neutrality that religion will be directly funded by government in a way clearly feared by at least some leaders among the founding generation.

> [I]f we looked no further than evenhandedness, and failed to ask what activities the aid might support, or in fact did support, religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money.[143]

Taking their cue from Scalia, religious lobbyists in the *Rosenberger* case urged the Court to treat religious groups the same as other non-religious student groups. In the brief for the *Rosenberger* plaintiffs, a student religious organization, written by Michael McConnell, a law professor at the University of Utah, plaintiffs equated Wide Awake's Christian viewpoint to "a gay rights, racialist, or antiwar point of

137 *See id.* at 71–73, 101–08.
138 *See id.* at 136–37.
139 *See id.* at 149–51.
140 *See, e.g.*, J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY (2d ed. 1993).
141 Mitchell v. Helms, 120 S. Ct. at 2530, 2578 (2000) (Souter, J., dissenting).
142 *See id.* at 2581–82.
143 *Id.*

view"[144] in terms of its constitutional significance and urged that they be given the same First Amendment Free Speech rights as gay rights groups, et cetera, because religion was simply another point of view.[145]

Dominus Iesus and the Catholic doctrine with respect to indifferentism suggest that the position now taken by the USCC on the First Amendment—namely, that religion should be treated equally when receiving benefits but differently when being exempt from government regulation—denies the particularity and claim to exclusiveness of the Roman Catholic Church. Furthermore, the generic demand for protection of "religion-in-general" distorts the historical evidence, makes understanding of the nature of human religion more difficult, and suppresses the development of theologies of pluralism within all religious communities. While certainly there were "Founders" who wished to protect churches from state interference, and even Jefferson and Madison, the bogeymen of this debate, explicitly stated their wish to maximize religious freedom, those wishes were necessarily set in the eighteenth-century political debate over federalism and the best kind of government, as well as in the context of competition for membership among Protestant churches.[146] "Religion" does not mean the same thing today. "Religion" today is a rapidly expanding category. It includes Santeria and the Taliban, as well as the Roman Catholic Church. The invention of American "religion-in-general" can be seen in part to be the result of nineteenth-century evangelizing following the Second Great Awakening—an effort that Sidney Mead has argued at length created an ahistorical, emotional, and anti-intellectual voluntaristic new kind of Christianity: the denomination.[147] Today these are non-Christian denominations, too.

Combining the ahistoricity of the "defenders of the faith" with the egalitarian impulse of the incorporation doctrine creates a category of "religion" which has no meaning. That situation is clearly useful for many who wish to advance their own agenda. The specificity and power of religious reality is lost when all religions are homogenized. Furthermore, when the argument is made that the First Amendment was and is intended to affirmatively "protect" religion from government, "religion" is necessarily reified and defined by government. It loses its prophetic value. Interpreting the First Amend-

144 Brief for Rosenberger at 17, Rosenberger v. Univ. of Va., 515 U.S. 819 (1994) (No. 94-329).

145 *See id.* at 15–22.

146 *See* SYDNEY AHLSHOM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 360–84 (1972).

147 SIDNEY MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 103–87 (1963).

ment to mean affirmative protection for "religion-in-general" distorts both the constitutional tradition and, insofar as it is promoted by Catholics, betrays the particularity of the Catholic Church's understanding of its historical identity. It conceals the theological assumptions inherent in the category, and it distracts both the Church and the country from the real work of articulating how pluralism can work.

It may seem strange that I urge an exploration of Catholic theology in the context of the debate about the First Amendment. It may seem that such a combination of efforts is an improper mixing of discourses. But the mixing seems unavoidable if the present confusion in the public conversation about the role of religion in American public life is to be cleared up. Furthermore, as José Casanova[148] and others have noted, the price Catholics must pay for a desire to be engaged in the debate about the "good life" in the United States is that they must now have their own community and its theology subject to public debate as well. It will no longer be possible to keep internal church politics private. The same is true of other "public" religions.

The problem of acknowledging the universal while retaining the particular is one that is familiar to scholars of religion. Religious pluralism is not a problem only for Catholics and other religious communities engaged in public theologies; it is also a problem for scholars of religion, both at the level of religion in relation to other social realities and at the level of particular religious traditions. Religion scholars right now tend to resist defining religion, in part because of a fear of theologizing, but the presence of the word in the First Amendment makes it necessary that Americans think about what this word means and lends scholarship a political urgency.

148 *See* CASANOVA, *supra* note 47, at 167–207.