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ON CONDUITS AND VOICES

*Thomas Morawetz**

I. INTRODUCTION

Kathleen Sullivan commends the distinction between government speech and government-created conduits for private speech as a crucial step in adjudicating and resolving conflicts at the intersection of the speech and religion clauses of the First Amendment.¹ She writes that “[i]n the context of government speech, government need not be neutral toward religious ideas as a matter of free speech, and *must not* as a matter of establishment.”² Sullivan explains that “the Establishment Clause has been held to prohibit government endorsement of a religious viewpoint, whether one that favors Episcopalians over Baptists or religion over irreligion as a whole.”³ By contrast, when providing conduits for private speech, government must eschew censorship and must fully respect the First Amendment speech rights of such private parties.⁴

This criterion for severing the Gordian knot binding the speech and religion clauses is truly Solomonic. Just as Solomon sought to resolve a

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1. Kathleen Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243-44 (1996).

2. *Id.* at 248 (emphasis added). Sullivan explains what she means by neutrality in saying that “[w]hen government speaks, or speech will be attributed to it, government must be *non-neutral* toward religion in an important sense: it must avoid official endorsement of religion.” *Id.* at 257 (emphasis in original).

3. *Id.* at 251.

4. Sullivan adds an additional layer of complexity and interest by pointing out that, in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court held “that a private entity may function either as a speaker or a conduit . . . and that only when it functions as a speaker may it object to providing space for the speech of others whose messages it does not like.” *Id.* at 249.

custody dispute without reference to ends, most significantly the well-being of the infant,⁵ Sullivan seeks to resolve First Amendment conflicts without reference to the ends that speech and religion are, disputably, said to play in public life. In mimicking Solomonic wisdom, she may indeed achieve Solomonic success. But her resolution is not likely to satisfy many of the ideological disputants who seek to define a place for religion in public life.

In the following brief remarks, I shall reconstruct the ideological poles of debate, showing, in Part II, why Sullivan's response will be seen as evading rather than addressing these ideological issues, and pointing out, in Part III, some additional difficulties in understanding and applying her suggested criterion.

II. RELIGION RECONSIDERED

Stephen Carter⁶ and William Bennett⁷ are only the most visible members of an army of scholars and pundits who have criticized the "trivialization" of religion in American life. Their claim is that religion is central to the "quest for meaning" and the "search for sense and value" in many persons' lives.⁸ Thus, it is much more than one ingredient in the mix of cultural, political, and ideational discourse; for many persons, religion is the focal point from which all ideas and values are organized and given meaning.

At the same time, according to Carter, religion is paradoxically disfavored by the Constitution as interpreted by the modern Court.⁹ Religious expression, unlike all other forms of expression, is disfavored in some contexts and prohibited in others. The argument of these scholars, accordingly, is that the Establishment Clause only forbids the incorporation and advocacy of a particular sectarian position by the government, the identification of the government with one or another religion. It should not, on this view, stand in the way of government encouragement and endorsement of the value of religion in general.¹⁰

5. 1 Kings 3:16.

6. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

7. WILLIAM J. BENNETT, *THE BOOK OF VIRTUES* (1993).

8. CARTER, *supra* note 6, at 273.

9. *Id.*

10. *Id.* at 124-35, 213-32.

Sullivan explicitly rejects this view, emphasizing that when the government speaks in its own voice it is uniquely and specifically disqualified from endorsing either a particular religious viewpoint or religion in general.¹¹ No comparable Constitutional bar stands explicitly in the way of endorsing other aspects of cultural, political, or social involvement. But Sullivan sidesteps the ideological question of why this should be so. What explains the Constitutional bar? Does religion inherently foster a kind of dogmatism that is inimical to a liberal and democratic society? Is it impossible in practice to distinguish the endorsement of religion from the endorsement of a particular religious view? Is the Constitution intended to protect irreligion equally with religion? Obviously, how Sullivan would answer these questions matters, because only certain answers are compatible with the second dimension of her analysis, her analysis of conduits for private speech.

Scholars at the opposite pole of debate from Carter and Bennett take these questions very seriously. In their recent book, *The Godless Constitution*, Isaac Kramnick and Laurence Moore oppose what they call "religious correctness."¹² They suggest that any and every religion traditionally has been seen as claiming a univocal voice with regard to morality and social value, and that the Constitution and the American ideology are committed to the coexistence of many voices, many conflicting and diverse sources of inspiration about what is right and what is good. In this sense, religion inevitably stands in tension with the secular bases of the Constitution.¹³ This is true not only of particular religions, but of the very idea of religion. At the same time, Kramnick and Moore do not deny either that religious persons have played important public roles or that religion plays a central part in the private lives of vast numbers of Americans.¹⁴

It is hardly clear whether Sullivan generally shares this view of religion. It is possible to read her account of government-supported conduits for private speech in two ways. On one reading, she might hold views similar to Kramnick and Moore, yet concede that private speech rights under the First Amendment make such reservations about the effects of religious speech legally irrelevant and Constitutionally moot. On a different reading, she might take no position on these ques-

11. Sullivan, *supra* note 3.

12. ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996).

13. *Id.* at 23-43, 137-57.

14. *Id.* at 1-22.

tions and merely recommend a formal distinction for resolving Constitutional conflicts, a distinction that is not intended to respond to the underlying quandary. Is she simply "splitting the difference" or taking a position on the role of religion in American life?

This quandary is typically called "the paradox of liberalism," often glibly put as the question of how much the liberal can tolerate the intolerant.¹⁵ While it is unfair and inaccurate to equate religion and intolerance,¹⁶ what underlies the quandary is the imputation that every religion aspires to represent an authoritative criterion for truth and value. Allegiance to religion on this view competes with the kind of open-mindedness about truth and value (or at least some truths and values) which is said to be a prerequisite of participation in a marketplace of ideas.

The quandary raises both conceptual and practical questions. Relevant conceptual questions are whether liberalism does indeed mandate not only a public stance of neutrality toward systems of value but also a private attitude of openness or agnosticism toward epistemological claims about the knowability of truth and value. Does liberalism go beyond openness and agnosticism to require the rejection of dogmatism and of claims grounded on non-secular criteria? The practical questions involve the extent to which liberal systems of government can survive the promulgation of nonliberal or dogmatic points of view.¹⁷

As Nomi Stolzenberg points out in a recent article,¹⁸ both the conceptual and practical questions are intractable, whether seen from the standpoint of liberals or of religious dogmatists and fundamentalists. Just as liberals are threatened by dogmatism, fundamentalists are threatened by liberal attitudes in public education which "implicitly teach children that beliefs are matters of individual opinion; that values are the stuff of subjective thought; that religions are cultural systems which reflect the human hand of history; and that their doctrines are therefore open to debate."¹⁹ To all of these problems, neither of the two views canvassed by Sullivan begins to offer a solution—not "abstinence,"

15. See, for example, Henry Richardson, *The Problem of Liberalism and the Good*, and Brian Barry, *How Not to Defend Liberal Institutions*, in *LIBERALISM AND THE GOOD* (R. Bruce Douglass et al. eds. 1990).

16. It goes without saying that toleration and generosity are cardinal virtues in the teachings of many religions.

17. Barry, *supra* note 15.

18. Nomi M. Stolzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 *HARV. L. REV.* 581 (1993).

19. *Id.* at 659.

which merely excludes religion from public forums, nor "assimilationism," which integrates religion, but only by undercutting its role and importance.²⁰ From the standpoint of the dogmatic or fundamentalist believer, both positions demean religion by distorting its centrality to experience. From the standpoint of the liberal, both positions are unsatisfactory compromises with a point of view that is antithetical to the epistemological²¹ underpinnings of liberalism itself.²²

It is not farfetched to suggest that the tension between forms of liberalism and dogmatism can cripple legislative bodies.²³ Flexibility and willingness to compromise historically have made agreement on the content of legislation possible. Liberalism, which recognizes a plurality of legitimate positions on policy and value, presupposes that legislators will refrain from holding any one position dogmatically. If, however, legislators understand their task differently and adhere to certain policies mandated by a system of values that stands outside and above meaningful debate, the machinery of compromise is all the more likely to freeze and legislative institutions are likely to suffer gridlock.²⁴

My main claim is that legal issues at the intersection of the speech and religion clauses seem to demand consideration of the nature of religion and the alleged paradox of liberalism. Professor Sullivan's response conspicuously sidesteps these intractable questions and does not address the impact of her proposal. In doing so, she tacitly takes a position not only on the First Amendment but also on the methodology of decision making. According to one attitude toward decision making, it is essential to consider the impact of one's decision on affected parties and its meaning for them. This attitude seems to characterize the most controversial and influential Supreme Court opinions of the last fifty years. *Brown v. Board of Education*²⁵ and *Roe v. Wade*²⁶ are only the most obvious examples.²⁷ According to a different attitude,

20. Sullivan, *supra* note 1, at 245.

21. I am assuming that the difference between secular liberalism and dogmatic religions can be expressed as a difference in epistemology, that is, a difference in conceptions of how (at least some important kinds of) knowledge is gained and justified.

22. In other words, liberalism precludes the forms of justification that are used to validate some value judgments that are held as certain by religious fundamentalists. See Barry, *supra* note 15, at 56.

23. Nor is it farfetched to suggest that this may explain some of the turmoil in the current legislative session in Congress.

24. Whether this is a good or bad consequence depends, of course, on the point of view of the observer.

25. 347 U.S. 483 (1954).

26. 410 U.S. 113 (1973).

27. Indeed it is hard to think of a decision of the Warren Court that does not discuss im-

wisdom lies in deciding cases by appeal to a clear and coherent distinction whether or not it is responsive to the parties' deeper concerns. This attitude arises directly out of a sense that ideological conflicts are unresolvable, that for example the paradox of liberalism must remain a paradox. Philosophically, it is prompted by a kind of paralysis in the face of many available points of view, many narratives about the role of law, each telling a different story about the nature of religion, the mandates of liberalism, and their impact on each other. The label "pragmatism" (or "neopragmatism")²⁸ fits this disposition to decide cases non-ideologically. Sullivan's ingenious solution seems, in this sense, to exemplify neopragmatism.²⁹

III. SPEECH AND CONDUITS OF SPEECH

Professor Sullivan admits that the distinction between speech and conduits of speech will "[not] always be easy to discern."³⁰ Nonetheless, she maintains that "the reasonable observer" usually will be able to make the distinction. The following examples suggest ways in which the distinction may be less clear than Sullivan claims or, even where it is clear, gives results that may be intuitively unsatisfactory.

a. Sullivan defends her conclusion that the Court justifiably may find religious educational vouchers impermissible on the ground that in public education the government speaks in its own voice and does not merely act as a conduit for ideas and beliefs. This claim needs clarification. Would "the reasonable observer" conclude that what is taught in public schools reflects the voice of the government, as opposed to the voice of the school board, or of particular teachers, or of some neutral, nonideological source of pure knowledge? If schools *are* the voice of government, why are we troubled when teachers act as mouthpieces for political positions, controversial or not? Why do we continue to expect that they will teach methods of thought and analysis, indeed methods of thinking for oneself, rather than ideological conclusions consistent with government policies? Insofar as schools are the voice of government,

pact and consequences in a way that seems to make them crucial to the decision.

28. Several important articles on legal pragmatism are brought together in *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

29. Indeed, Stanford Law School, Professor Sullivan's home institution, is also home to other leading legal pragmatists including Thomas Grey and Margaret Jane Radin, both contributors to the Southern California symposium, *supra* note 28.

30. Sullivan, *supra* note 1, at 259.

should teachers express views that reflect government policies but not views that are inconsistent with such policies?³¹

Legislative acts and judicial opinions are clearly forms of government speech. They are texts that emanate from government. If the communicative acts of teachers in public schools are also government speech, rather than government providing a context in which non-governmental speakers can carry out a circumscribed task, that characterization must be clarified and defended.

b. The airwaves seem as clear an example of a conduit of private speech as can be imagined. Is it obvious, as Sullivan's analysis seems to imply, that government can do nothing to affect and control private religious speech over the airwaves? Suppose all of the major television networks were acquired by fundamentalist religious groups, groups that already controlled newspapers, magazines, and other media. Would this raise any First Amendment concerns? Would the government *have* to disregard the dispositions of these groups in allocating a scarce resource? Sullivan's implicit answers to these questions invite further speculation and discussion.

31. Some of these questions grew out of a conversation with Professor Robert Bard.

