NOTES

A POLITICAL PROCESS THEORY OF JUDICIAL REVIEW UNDER THE RELIGION CLAUSES

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"[One] explanation for the Court's deviation from political process theory inheres in another quasi-psychological need that has manifested itself in constitutional law since at least Marbury v. Madison*: the notion that the legal system should provide remedies for all serious wrongs. The problem with this expectation in the constitutional law context is that it ignores the relative institutional competencies that should inform judicial review."*[1]

"[I]nstitutions of religion should be unfettered to make their maximum contribution to the public interest."[2]

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* Class of 2007, University of Southern California Gould School of Law; B.A. 2003, Azusa Pacific University. This note is dedicated to my parents, David and Muriel Morse, for their faithful attention to the wisdom of Proverbs 22:6. I owe sincere thanks to Professor Nomi Stolzenberg for her fine teaching, invaluable insights, and generous encouragement throughout this project. I am also indebted to Professors Danielle Keats Citron and Peter Danchin for helpful comments on earlier drafts.

1. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 824 (1991) (footnotes omitted).

2. PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 33 (1977).

I. INTRODUCTION

Few areas of constitutional law remain more captive to the subjective whims of judicial preference than the First Amendment's religion clauses.[3] This condition results in part from the Court's notorious inability to agree on a uniform standard of review under either the Free Exercise or Establishment Clauses.[4] This instability matters because, as Justice Scalia notes, "[w]hat distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle."[5] As concerns the religion clauses, a stabilizing principle may be found in political process theory, a set of ideas that, while generally familiar to constitutional theory, have yet to be comprehensively applied to either free exercise or establishment controversies.

Process theory embraces "[t]he notion that courts should exercise judicial review almost exclusively to protect democracy and guarantee the fairness of legal processes."[6] Conversely, process theory rejects the notion that courts should enforce "substantive" policy preferences that cannot be justified on these "process-oriented" grounds, as they are more properly left

3. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

4. *See* Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309, 311 (1994) (cataloguing several scholars' descriptions of current religion clause doctrine, which include "'doctrinal quagmire,'" "'inconsistent and unprincipled,'" "'schizophreni[c],'" "'a conceptual disaster area,'" and simply, "'a mess'") (footnotes omitted). Often, the Court seems to overlook constitutional analysis and simply cites its past decisions. *E.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2864 (2005) (holding that a Ten Commandments display on the grounds of the Texas State Capitol did not offend the Constitution because it was "a far more passive use of those texts than was the case in *Stone* [*v. Graham*, 449 U.S. 39 (1980)]"); Mueller v. Allen, 463 U.S. 388, 393–94 (1983) ("In this case we are asked to decide whether Minnesota's tax deduction [for expenses associated with private religious education] bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down.").

5. McCreary County v. ACLU of Kentucky, 125 S. Ct. 2722, 2751 (2005) (Scalia, J., dissenting).

6. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 433 (2000). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Ely developed the most comprehensive process theory of judicial review in his influential 1980 work *Democracy and Distrust*. The process theory discussed throughout this Note is Ely's formulation.

to the vicissitudes of the political branches. Borrowing heavily from the literature of civic republicanism, this Note argues that process theory should be broadened to account for the unique contributions of religion to the political process. This Note further argues that, using process theory, courts should interpret the First Amendment's religion clauses as process-oriented safeguards for the political contributions of religious faith and institutions. Finally, courts should reject a jurisprudence that employs the religion clauses as vehicles for the enforcement of substantive conceptions of free exercise and disestablishment.

Two recent decisions involving public displays of the Ten Commandments demonstrate why today's substantive interpretations of the religion clauses remain untenable. The first, *McCreary County v. ACLU of Kentucky*, involved a courthouse display that featured "nine framed documents of equal size, one of [which] set[] out the Ten Commandments" along with "a statement about its historical and legal significance."[7] The second, *Van Orden v. Perry*, decided on the same day, involved a six-foot statue inscribed with the Ten Commandments that sat among other monuments at the Texas State Capital.[8] In *McCreary County*, the majority applied the *Lemon* test[9] and struck down the Kentucky display for want of a secular purpose, citing the religious fervor that accompanied the display's creation.[10] But seemingly in the next breath, the *Van Orden* majority declined to apply the *Lemon* test, declaring that state "promoti[on of] a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[11] Then, upon concluding that it was "far more passive" than those in previous cases, the Court upheld the Texas display without further explanation.[12]

Besides the fact that two visually similar displays of the Ten Commandments became subject to different standards that yield arguably irreconcilable results, *McCreary County* and *Van Orden* are notable because the alleged constitutional infirmity—the presence of the Ten Commandments on public land—deprived no one of his religious liberty. Rather, the dispositive issue became whether the actions of various public

7. *McCreary County*, 125 S. Ct. at 2730–31.

8. *Van Orden*, 125 S. Ct. at 2858.

9. The three-part *Lemon* test proscribes legislation that (1) lacks a "secular legislative purpose," (2) has a "principle or primary effect" that either advances or inhibits religion, or (3) "foster[s] 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

10. *McCreary County*, 125 S. Ct. at 2740.

11. *Van Orden*, 125 S. Ct. at 2861, 2863.

12. *Id.* at 2864.

officials betrayed a sufficiently high degree of religious inspiration. Today, infringement of religious liberty is not a predicate for constitutional censure; instead, the First Amendment has become a vehicle for the enforcement of each court's own subjective tolerance for religious symbolism in the public square.

Under this regime, both the legitimate requirements of religious liberty and those of a properly functioning government—surely the First Amendment's primary concerns—remain secondary to judicial prepossessions[13] regarding the separation of church and state. The unmistakable consequence of this jurisprudence has been "the Court's tendency to press relentlessly in the direction of a more *secular* society."[14] To many, the Court's ostensible mission is "to protect democratic society from religion,"[15] while the legitimate needs of government remain secondary considerations. In the language of process theory, this is surely a "substantive" result, a jurisprudence based upon subjective policy preferences more properly left to the political branches.[16]

Of course, the substantive nature of contemporary religion clause jurisprudence is easily demonstrated. The more constructive task—and the aim of this Note—is to articulate how process theory should inform judicial review under the religion clauses, since one does not immediately associate religion with other "process-oriented" tools of self-government like the freedom of speech and the right to vote.[17] Indeed, the literature of process

13. A "prepossession" is a subjective prejudice. Justice Jackson used this now obscure but fitting noun to identify what he believed to be the bedrock of Establishment Clause jurisprudence. *See* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 237–38 (1948) (Jackson, J., concurring). Naturally, process theory challenges this view, as did Justice Douglas. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952).

14. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992) (emphasis added).

15. *Id.*

16. *See* ELY, *supra* note 6, at 44–48, 101–04.

17. *E.g.*, William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 579 (1983).

theory is virtually silent on the proper treatment of the religion clauses,[18] perhaps because religious freedom in the abstract seems "substantive" and thus beyond the scope of a "process" theory.[19] John Hart Ely himself confessed that the religion clauses may present what, to process theory, are rare examples of substantive constitutional rights that defy process-oriented interpretation.[20] Thus, as currently conceived, process theory seems an unlikely foundation for a comprehensive theory of the religion clauses.

Consider, however, that this disharmony between process and religion results not from the latter's status as a substantive constitutional right or a politically irrelevant phenomenon, but from process theory's intrinsic inability to recognize religion's contributions to the political process. As argued below, process theory's failure to embrace the religion clauses is the natural consequence of its intellectual roots in modern liberalism. Prominent in both liberal political theory and contemporary process-oriented theories of judicial review are the roles of two salient "players" in the political system, the individual and the state.[21] Notably absent from this model are other intermediate third players, like churches and civic associations, that stand between the individual and the state in the political process. Liberalism's myopic conception of the political process obscures the contributions of these "mediating institutions," a shortcoming shared by process theory.

The process-oriented qualities of mediating institutions are more easily discerned when viewed through the lens of liberalism's intellectual rival, civic republicanism. Civic republican political theory teaches that

18. A few commentators have explored the intersection of process theory and religion, but none have argued that all judicial review under the religion clauses should proceed exclusively following process-oriented theory as I do here. *E.g.*, Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1115–18 (1988) (arguing that process theory cannot account for contemporary Establishment Clause doctrine); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 703–18 (2002) (arguing that, while the endorsement test superficially conforms to the norms of process theory, it ultimately betrays them); Klarman, *supra* note 1, at 760–63 (arguing that the Court's decisions in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), were not justified on political process grounds); John P. Cronan, Note, *A Political Process Argument for the Constitutionality of Student-led, Student-initiated Prayer*, 18 YALE L. & POL'Y REV. 503, 504 (2000) ("This Case Note proposes a way to conceptualize religious jurisprudence . . . [b]y employing a political process analysis of community norms . . . [and] concludes that the Supreme Court should . . . affirm the constitutionality of student-initiated, student-led prayer.").

19. This was certainly Ely's view. *See* ELY, *supra* note 6, at 94. *See also* Laurence H. Tribe, *The Puzzling Persistence of Process-based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980) ("Plainly, the First Amendment's guarantee of religious liberty and its prohibition of religious establishment are substantive . . . .").

20. ELY, *supra* note 6, at 94.

21. *See* BERGER & NEUHAUS, *supra* note 2, at 4–5.

mediating institutions of religion should and do play profoundly important process-oriented roles as tools of self-government.[22] These contributions include facilitating the formation of personal identity, supporting the systems of morality upon which self-government depends, instilling democratic values, facilitating individual access to the apparatus of government, and influencing the activities of government by amplifying the collective political will of individual citizens.[23] Indeed, as discussed more fully below, the civic republican influence upon the American founding—and thus the Constitution itself—suggests that the First Amendment protects religion for precisely these reasons.[24]

Consequently, a viable process theory of the religion clauses would oblige this creature of liberalism to internalize certain civic republican principles related to the political functions of mediating institutions. To this end, Part II surveys Ely's process theory and critiques its exclusive emphasis on the individual and the state in the political process. Part III argues that process theory's inability to account for the political contributions of mediating institutions derives from its foundation in liberal political theory. Part IV then explores how civic republican principles make the case for a process-oriented conception of mediating institutions, including religious bodies. Building on these insights, Part V proposes a process theory of judicial review under the religion clauses. This process theory would limit judicial review to protecting the role of religious institutions as independently viable, politically relevant mediating bodies. This process theory would likewise reject the current jurisprudence of prepossessions by preventing judicial intervention into policy-oriented disputes unrelated to religion's function as a mediating institution, including many instances in which the court applies both its "substantive" *Lemon* test and its embattled "endorsement" test. As explored throughout this Note, a process theory of the religion clauses harbors the potential to substantially redefine the scope of judicial review under the religion clauses, and to provide a unifying principle to a manifestly troubled body of law.

22. *See infra* Part IV.B.
23. *See infra* Part IV.B.
24. *See infra* Part IV.B.

II. JOHN HART ELY'S PARTICIPATION-ORIENTED, REPRESENTATION-REINFORCING THEORY OF JUDICIAL REVIEW

A major debate in constitutional theory concerns the judiciary's power to review the substantive policy choices of the political branches, especially when the Constitution's text does not address the underlying issue.[25] The essence of this debate concerns what Alexander Bickel called the "countermajoritarian difficulty"—the tension inherent in a system of government that empowers politically unaccountable judges to invalidate the policy decisions of popularly elected officials.[26]

Indeed, "[v]irtually all of modern constitutional theory consists of attempts to solve . . . the countermajoritarian difficulty . . . ."[27] For decades, these attempts generally embodied one of two competing interpretive philosophies: interpretivism or noninterpretivism.[28] As a result of factious decisions like *Roe v. Wade*,[29] the height of noninterpretivist jurisprudence, constitutional scholarship soon reached an impasse as

25. ELY, *supra* note 6, at 1–9. This controversy extends at least as far back as the Court's 1905 decision in *Lochner v. New York*, 198 U.S. 45 (1905), and still endures today. *See, e.g.*, Marla Jo Fisher, *Scalia Speaks at Chapman University Law School Anniversary*, ORANGE COUNTY REG., Aug. 30, 2005. The article quotes Justice Scalia:

> "Appointed judges shouldn't be charged with the task of making moral decisions about society's rights and wrongs, because they don't know more than anyone else," Associate Supreme Court Justice Antonin Scalia told a packed house at Chapman University on Monday night. "Surely it is obvious that nothing I learned in law school qualified me to decide whether there is a fundamental right to abortion or assisted suicide," said Scalia . . . .

Id.

26. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (2d ed. 1986). As Ely said,

> [In America,] most of the important policy decisions are made by our elected representatives . . . . "[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."

ELY, *supra* note 6, at 4 (alteration in original) (quoting BICKEL, *supra*, at 19).

27. Klarman, *supra* note 1, at 768.

28. Interpretivists hold that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." ELY, *supra* note 6, at 1. Conversely, noninterpretivists believe that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." *Id.* Thus, "[w]hat distinguishes interpretivism from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution." *Id.* at 1–2. Interpretivists include those termed "originalists"; noninterpretivists include those partial to the theory of a "living constitution." Ely's criticism of the former principally concerns "clause-bound" interpretivism, which seeks to cabin constitutional interpretation within the document's original meaning. *Id.* at 11–41.

29. Roe v. Wade, 410 U.S. 113, 153 (1973) (declaring that a constitutional "right of privacy" is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

scholars felt compelled to declare allegiance to either side in this seemingly irreconcilable debate.[30]

John Hart Ely, however, proposed a fresh look at constitutional adjudication in his work, *Democracy and Distrust*.[31] Ely devoted the first half of his book to exposing the deficiencies of both interpretivism and noninterpretivism. He argued that conservative forms of interpretivism, like originalism, could not account for the Constitution's open-ended provisions such as "equal protection" and "cruel and unusual punishments," each of which seem to invite dynamic interpretations that reflect the changing needs and norms of society.[32] Of course, Ely's more enduring contribution to constitutional theory was his strong criticism of noninterpretivism and the sundry theories offered to support it.[33] To Ely, noninterpretivist constitutional adjudication amounts to nothing more than a license for unelected judges to overrule the work of the political branches in the service of the judges' subjective policy preferences.[34] That is, judicial reasoning beyond the constitutional text, proceeding as it does without fidelity to the underlying purposes of the Constitution,[35] is indeed by its very nature so unbounded that a judge's own values cannot help but become the ultimate source of his decision. Because the Constitution entrusts decisions of policy to our majoritarian institutions, Ely argued that noninterpretivist judicial review cannot be reconciled with our system of self-government.

30. *See* ELY, *supra* note 6, at vii, 2–3.

31. As of 2000, John Hart Ely was the fourth most frequently cited legal scholar of all time, and his book, *Democracy and Distrust*, was the most frequently cited legal work since 1978. University of Miami School of Law, Prof. John Hart Ely Is 4th Most Cited Legal Scholar Ever; His Book Is Most Cited Legal Work of Past 2 Decades (June 15, 2000), *at* http://www.law.miami.edu/news/92.htm. Even critics of process theory concede the immense influence of Ely's commentary upon constitutional theory. *See, e.g.*, Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 721–22 (1991) ("Few, if any, books have had the impact on constitutional theory of John Hart Ely's *Democracy and Distrust.* Ely not only effectively criticized every brand of constitutional theory favored at the time, but also promised a new type of theory that would avoid all the pitfalls of the traditional kinds. . . . [Even i]f he did not win the game, he at least forced the play onto his own court.").

32. ELY, *supra* note 6, at 11–41.

33. Ortiz, *supra* note 31, at 721–22. *See* ELY, *supra* note 6, at 43–72.

34. ELY, *supra* note 6, at 43–72. Interestingly, noninterpretivism knows no political boundaries as politicians on both the left and the right have embraced its norms. *See* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 833–35 (1991).

35. Scholars have responded forcefully and effectively to the charge that noninterpretivist adjudication abandons fidelity to the Constitution. For a recent example, see STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 17–20 (2005).

In response, *Democracy and Distrust* proposed a persuasive solution to the countermajoritarian difficulty in the form of a "process-oriented, representation-reinforcing" theory of judicial review, which would permit the Constitution to evolve through its open-ended provisions while still avoiding the "juristocratic" consequences of noninterpretivism. Ely argued that instead of identifying certain substantive rights to be enforced against the political branches, judges must focus their power on policing the process of representative government and ensuring that the process responsible for a given law remains free from irrational prejudice.[36]

Ely's preoccupation with the process/substance distinction emerged from his observation that the Constitution's overwhelming concern is not enshrining certain substantive rights that courts must define and enforce against legislative acts.[37] Rather, its provisions seek primarily to maintain a responsive and equitable political process wherein the scope of substantive rights can be debated and worked out democratically by the people.[38] As Ely explained, "the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values."[39] The same is true of the various guarantees in the Bill of Rights,[40] especially the freedom of speech, which under process theory exists not to provide a substantive right to free expression but rather to protect that vital tool of self-government from impediment by the state. As Ely explained,

> [t]he expression-related provisions of the First Amendment . . . were centrally intended to help make our governmental processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds. We can attribute other

36. ELY, *supra* note 6, at 73–104.

37. *Id.* at 90–101.

38. *Id.*

39. *Id.* at 92.

40. Ely reasoned that the religion clauses of the First Amendment and the Third Amendment evinced both procedural and substantive components. *See id.* at 94–95; *infra* Part III.B.1. While the Second Amendment seems to propose a substantive right of the individual to bear arms, judicial interpretation effectively repealed that construction. ELY, *supra* note 6, at 94–95, 100. Furthermore, the Fifth through Eighth Amendments are virtually all procedural, while the Fourth Amendment is largely so. *Id.* at 95–98. Of the eleven amendments added during our second century, five extend the franchise to previously disenfranchised groups, three concern presidential eligibility and succession, and one permits the government to levy an income tax, procedural functions all. *Id.* at 99. According to Ely:

> That's it, save two, and indeed one of those two did place a substantive value beyond the reach of the political process. The amendment was the Eighteenth, and the value shielded was temperance. It was, of course, repealed fourteen years later by the Twenty-First Amendment, precisely, I suggest, because such attempts to freeze substantive values do not belong in a constitution. In 1919 temperance obviously seemed like a fundamental value; in 1933 it obviously did not.

Id.

> functions to freedom of expression, and some of them must have played a role, but the exercise has the smell of the lamp about it: the view that free expression per se, without regard to what it means to the process of government, is our preeminent right has a highly elitist cast.[41]

A similar analysis applies to the Fourteenth Amendment. Even the seemingly substantive Equal Protection Clause assumes procedural content when interpreted as a "recognition that technical access to the process may not always be sufficient to guarantee good-faith representation of all those putatively represented."[42]

In sum, the thesis of process theory is that a properly functioning democratic political process, not the judiciary, provides the most responsive and fair forum in which to debate and give effect to substantive values.[43] The courts, as referees of that process, assure that the mechanics of self-government function optimally while resisting the temptation to overrule the work of the political branches in the service of substantive norms.

How, then, does a process-oriented theory of judicial review actually function? Ely modeled his proposal on paragraphs two and three of the famous "footnote four" from *United States v. Carolene Products Co.*,[44] which proposes that judicial review is appropriate when legislation "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," or when legislation implicitly or explicitly targets "discrete and insular minorities."[45] Process theory thus embraces the two procedural goals highlighted in *Carolene Products*: *access* to the tools of self-government, and the elimination of *prejudice*.

The access prong, reflecting the concerns expressed in paragraph two of the *Carolene Products* footnote, charges judges to ensure that the tools of our political process remain open to every individual on something of an equal basis.[46] Chief among these tools are free speech, the right to vote, a free press, and free political association; each right helps ensure legislative

41. *Id.* at 93–94 (footnote omitted). *See also id.* at 99–100 (discussing the sad fate of the Constitution's other substantive provisions).

42. *Id.* at 98.

43. Ely quotes one Justice Hans A. Linde, who captures the idea: "As a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations throughout changing times." *Id.* at 101 (quoting Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 254 (1976)).

44. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

45. *Id.*

46. ELY, *supra* note 6, at 75–76.

accountability by providing the means through which ordinary citizens petition their government. Preserving these tools "keep[s] the machinery of democratic government running as it should" while leaving the identification and enforcement of substantive values in the capable hands of the political process.[47]

The prejudice prong, reflecting the concerns expressed in paragraph three of the *Carolene Products* footnote, charges judges to smoke out systematic bias against politically powerless minorities.[48] As Ely reasoned, discriminatory laws or laws motivated by palpable bias are process defects because they result from a failure of the people's representatives to fairly represent the interests of disadvantaged groups. Unlike the products of a properly functioning political process, discriminatory laws justify judicial review under the principles of process theory.[49]

Although Ely's theory focused primarily upon the Court's power to review legislation under the Free Speech Clause and the Fourteenth Amendment, it is possible, as others have done, to apply process theory to other constitutional provisions, including the religion clauses. As explored in the following part, however, process theory's exclusive focus on the roles of the individual and the state in the political process obscures the critical contributions of a third player: mediating institutions. Until process theory accounts for the political contributions of mediating institutions, it remains incomplete.

III. PROCESS THEORY AND RELIGION TODAY: A DIAGNOSIS WITHOUT A CURE

It is strange that as comprehensive an endeavor as process theory is, it has little to say about our "first liberty," religious freedom. Ely's work eschewed serious discussion of the religion clauses, especially the Establishment Clause, which it virtually ignores. Ely believed that the

47. *Id.* at 76.

48. *Id.* at 135–79.

49. Of course, readers familiar with process theory will note that Ely's attempt to articulate a nonsubstantive theory of prejudice did not persuade many critics. *E.g.*, Klarman, *supra* note 1, at 747–48. For instance, because virtually all legislation "discriminates" between groups, distinguishing between the products of a properly functioning political process and constitutionally censurable laws requires an underlying substantive theory that separates benign discrimination from invidious discrimination. *See, e.g.*, Tribe, *supra* note 19, at 1072–77. Such criticism is irrelevant to this process theory of the religion clauses, however, which treats the religion clauses as tools of self-government amenable to judicial review under process theory's "access" prong, rather than the prejudice prong. As Professor Michael Klarman observed, "the access . . . prong of political process theory has emerged relatively unscathed from the barbs of Ely's critics." Klarman, *supra* note 1, at 748.

religion clauses defied his process-oriented characterization of the Constitution. That is, the religion clauses embodied the Founders' substantive concern for religious liberty, although courts sometimes applied them in process-oriented ways.[50] For example, Ely observed that the Free Exercise Clause, in practice, protects

> what must be counted as discrete and insular minorities, such as the Amish, Seventh Day Adventists, and Jehovah's Witnesses. Whatever the original conception of the Free Exercise Clause, its function during essentially all of its effective life has been one akin to the Equal Protection Clause and thus entirely appropriate to a constitution.[51]

Nevertheless, the fact that *religious liberty* as a concept appears substantive in the abstract should not undermine the viability of a process-oriented interpretation of the religion clauses. As Ely argued, almost any constitutional provision can be construed as either a substantive or procedural right;[52] process theory simply contends that a majoritarian political process functions most efficiently under the latter construction.

Indeed, the subjective indeterminacy of contemporary religion clause jurisprudence seems to demand that courts move beyond noninterpretivism and instead treat those rights as tools of self-government to be applied in the service of process values. Since 1947, the Court's religion clause jurisprudence typifies the countermajoritarian difficulty by inviting judges to enshrine their subjective visions of religious freedom as law in a manner similar to the fundamental rights adjudication critiqued in *Democracy and Distrust*. As currently conceived, however, process theory cannot provide a remedy because its intellectual foundation, modern liberalism, obscures the process implications of religious faith and religious institutions. Discovering the process implications of religion requires reevaluation of the Founders' understanding of liberal principles and, most especially, the influence of civic republican thought on their conception of religious liberty and its political role. Once unmoored from the ideological

50. ELY, *supra* note 6, at 94. According to Ely:

> The First Amendment's religious clauses . . . are a different matter. Obviously part of the point of combining these cross-cutting commands was to make sure the church and the government gave each other breathing space: the provision thus performs a structural or separation of powers function. But we must not infer that because one account fits the data it must be the only appropriate account, and here the obvious cannot be blinked: part of the explanation of the Free Exercise Clause has to be that for the framers religion was an important substantive value they wanted to put significantly beyond the reach of at least the federal legislature.

Id. (footnote omitted).

51. *Id.* at 100.

52. *See id.* at 90 ("Even provisions that at first glance might seem primarily designed to assure or preclude certain substantive results seem on reflection to be principally concerned with process.").

constraints of modern liberalism and informed by civic republican ideals, a process theory of the religion clauses that remains faithful to Ely's normative model of judicial review becomes possible. This part considers each of these steps in turn.

A. SUFFERING JUDICIAL PREPOSSESSIONS: TODAY'S SUBSTANTIVE RELIGION CLAUSE JURISPRUDENCE

"Modern constitutional scholarship is generally characterized by a desire to take up the question . . . what politics should judges pursue, and on the basis of what conception of the good should they act?"[53] Although noninterpretivist adjudication under "unenumerated rights" threatens the most serious imposition of substantive judicial policy preferences upon the political branches of government,[54] process theory also criticizes the noninterpretivist imposition of subjective values in the service of enumerated rights if the impetus for that action is the judge's mere disagreement with the policies of the political branches. Under the religion clauses, this "jurisprudence of prepossessions" is the norm. Indeed, the Supreme Court's first major Establishment Clause case, *Everson v. Board of Education*,[55] inaugurated this approach by constitutionalizing a substantive vision of a secular society completely divorced from the legitimate needs of either the political process or religious freedom.

In *Everson*, the Court considered a New Jersey statute that authorized a local town to reimburse parents for the cost of transporting their children on public buses to both public and private schools, including parochial schools.[56] In considering the Establishment Clause challenge to this law, Justice Black's majority opinion looked to history and concluded that religious strife in England and the American colonies resulted from the ability of dominant religious groups to levy taxes in support of an established church and to coerce observance of the dominant religion.[57] Believing that this history motivated the Framers, Justice Black declared,

> The "establishment of religion" clause of the First Amendment means at least this: . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . . In the words of

53. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 644 (1990).

54. *See* ELY, *supra* note 6, at 2–4.

55. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

56. *Id.* at 3.

57. *Id.* at 8–9.

> Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[58]

Justice Black then turned to the New Jersey statute. While it did indirectly aid religious education, the absence of nefarious legislative motive seemed to threaten the propriety of the opinion's sweeping standard of establishment. Obviously, a rule prohibiting all conceivable government aid to religion creates "tension" between the Establishment Clause and its compliment, the Free Exercise Clause. Such a rule also threatened the constitutionality of *any* peripheral public benefit to religious institutions, including police and fire protection.[59]

Understandably troubled by the logical consequence of a strict separation between church and state, Justice Black resolved the case by appealing to another nebulous standard, neutrality, declaring that the Constitution "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."[60] Ultimately, Justice Black decided that New Jersey's program did not establish religion because the funds used to pay for transportation to parochial school came from a neutral state program that also funded transportation for students to secular schools.[61]

Of interest here is how Justice Black used a history concerned exclusively with defects in the political process to justify a standard of establishment that furthered his substantive vision of a secular state. Nearly every piece of history cited in the *Everson* opinion involves the intentional coercion of religious dissenters by oppressive majorities through the machinery of government.[62] That is, its unmistakable theme is coercive

58. *Id.* at 15–16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

59. *Id.* at 17–18.

60. *Id.* at 18.

61. *Id.* at 17.

62. According to the Court in *Everson*:

> A large portion of the early settlers of this country came here from Europe to escape the bondage of laws which *compelled* them to support and attend government-favored churches. 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*. . . . In efforts to *force loyalty* to whatever religious group happened to be on top and in league with the government . . . men and women had been fined, cast in jail, cruelly tortured, and killed. . . .
>
> These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown . . . authorized these individuals and companies to erect religious establishments *which all, whether believers or non-believers, would be required to support and attend*. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. . . . And all of these dissenters were *compelled* to pay *tithes* and taxes to support government-sponsored churches whose ministers preached inflammatory sermons *designed to strengthen and consolidate the established faith* by generating burning hatred against dissenters.

practices by members of dominant religions against members of minority religions for the purpose of bolstering an established church. As argued below in Part V.B.1, intentional coercion is the quintessential process violation and surely warrants judicial intervention. Justice Black's notion of establishment, however, vindicates far more than that necessary to protect religious minorities from this coercion; indeed, as he acknowledged, it effectively threatens the very survival of religious institutions themselves. Moreover, it constitutes an unjustifiable policy preference against any public contact between church and state. As *Everson* demonstrates, substantive rules of this sort run the risk of being ignored whenever their implications do not satisfy judicial prepossessions.

I posit that *Everson*'s principal and enduring infirmity is the Court's decision to extract from the Establishment Clause a substantive right against public contact between church and state, rather than a process-oriented principle informed by religion's political role. As Judge Michael W. McConnell explains, "[t]he much-discussed 'tension' between the two Religion Clauses largely arises from the Court's substitution of . . . subsidiary, instrumental values (especially the separation of church and state) in place of the central value of religious liberty."[63] Although Judge McConnell refers to both separation and religious liberty as "values," I argue here that the religious liberty privileged by the Constitution is, in the language of process theory, procedural rather than substantive. As Ely showed, reading substantive rights into the Constitution invariably reduces constitutional adjudication to a contest between the policy preferences of shifting Supreme Court majorities.

Indeed, two familiar cases decided soon after *Everson* seemed to validate this fear. In *McCollum v. Board of Education*,[64] another Black opinion, the Supreme Court considered an Illinois "released time" program under which the parents of public school children could request that students receive weekly religious instruction from a privately compensated teacher on school property.[65] The Court ruled that this program violated the Establishment Clause because it utilized "the tax-established and tax-supported public school system to aid religious groups to spread their faith."[66] Justice Black's majority opinion found two problems: (1) public

Id. at 8–10 (emphasis added) (footnotes omitted). Of course, Justice Black's arguably selective use of history here has engendered much criticism. *See, e.g.*, Feldman, *supra* note 18, at 680–84.

63. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 1–2 (1986).

64. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203 (1948).

65. *Id.* at 207–09.

66. *Id.* at 210.

buildings were being used for religious teaching, and (2) the program aids religious groups "through use of the State's compulsory public school machinery."[67] Without much analysis, Justice Black summarily declared, "[t]his is not separation of Church and State."[68]

But four years later in *Zorach v. Clauson*,[69] the Court considered a similar program under which public school children were released for a portion of the day to attend religious instruction at private religious institutions outside of school.[70] Certain taxpayers challenged the law under *McCollum*, arguing that the Establishment Clause forbids such a symbiotic relationship between church and state.[71] In *Zorach*, however, the Court applied a coercion test and ruled that, absent coercive behavior by school officials, no establishment exists.[72] Justice Douglas also reasoned that "[t]he First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State."[73] So long as the state is "neutral when it comes to competition between the sects" and does not "thrust any sect on any person," "make a religious observance compulsory," or "coerce anyone to attend church, to observe a religious holiday, or to take religious instruction,"[74] it does not violate the Constitution.

Arguably, the debate between Justice Black and Justice Douglas was not about the threats to religious liberty posed by released time programs. Rather, each opinion sought to constitutionalize the author's subjective opinion regarding a state program that put public schools and religious instruction in close conceptual proximity. Each jurist's appeals to social policy and conclusory assertions regarding the purpose of the Establishment Clause make no reference to the functional needs of either church or state. Indeed, the operative distinction between the programs in those cases boils down to the presence or absence of school buildings.

67. *Id.* at 212. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1547 (15th ed. 2004).

68. *McCollum*, 333 U.S. at 212.

69. Zorach v. Clauson, 343 U.S. 306 (1952).

70. *Id.* at 308.

71. *Id.* at 309–10. The Court summarized the taxpayers' arguments thus:

> [T]he weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this "released time" program, like the one in the *McCollum* case, would be futile and ineffective.

Id.

72. *Id.* at 311.

73. *Id.* at 312.

74. *Id.* at 314.

Under process theory, this is hardly a difference worthy of constitutional attention because it cannot be said that the liberty of any student or religious institution suffered. Of course, both cases implicate a preference that public schools should remain secular and that government should not even appear to encourage religious instruction, but these are substantive values that have no necessary claim to constitutional status and ought to remain within the legislature's purview.[75] Indeed, Justice Douglas highlighted the real issue in *Zorach*: "This [released time] program may be unwise and improvident from an educational or a community viewpoint. That appeal is made to us on a theory, previously advanced, that each case must be decided on the basis of 'our own prepossessions.' Our individual preferences, however, are not the constitutional standard."[76]

McCollum has never been overruled and, indeed, the notion that the Establishment Clause vindicates a substantive policy against any contact between church and state extends far beyond the context of released time programs, as illustrated by the brief survey of the *McCreary Co.* and *Van Orden* cases offered in the introduction. Thus, from *Everson* in the twentieth century to *McCreary County* in the twenty-first, the Court's Establishment Clause jurisprudence seems perennially captive to judicial prepossessions, sanctioning the substitution of judicial will for the legitimate decisions of elected officials.

And the courts are winning. Since *Everson*, "the Court's approach to establishment questions has forced the elimination from the nation's public life of religious elements that prior to *Everson* had not been thought by most Americans to violate the First Amendment."[77] The consequence of *Everson* and its progeny "was the Court's tendency to press relentlessly in the direction of a more secular society. . . . The Court's . . . mission was to

75. *See* ELY, *supra* note 6, at 99 ("[A]ttempts to freeze substantive values do not belong in a constitution.").

76. Zorach v. Clauson, 343 U.S. 306, 314 (1952) (quoting McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 237–38 (1948) (Jackson, J., concurring)).

77. ETHICS AND PUBLIC POLICY CENTER, RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE 4 (Terry Eastland ed., 1993). *See also* McConnell, *supra* note 63, at 3.

protect democratic society from religion."[78] As such, the Establishment Clause now limits governmental action even when no one's religious liberty is infringed.[79] Such overtly noninterpretivist jurisprudence thus seems an appropriate candidate for critique under the principles of process theory. Nevertheless, process theory has, to date, said remarkably little about it.

B. THE IDEOLOGICAL LIMITATIONS OF PROCESS THEORY

1. What Process Theory Has Said About Religion

Process theory limits the power of judicial review to defending tools of self-government and to remedying defects in the democratic process. As currently conceived, however, process theory leaves little room for an argument that religion is a tool of self-government because religion is not a direct input to democracy.[80] Indeed, the reigning free exercise precedent rejects the position that religious conduct deserves the level of judicial protection afforded traditional process-oriented rights like the freedom of speech.[81] Of course, process theory justifies certain narrow features of

78. McConnell, *supra* note 14, at 120. Judge Michael McConnell's work exploring the secularizing influence of modern liberalism seems to further support the argument that a jurisprudence of prepossessions governs interpretation of the religion clauses. Judge McConnell argues that the classical liberalism of the Founders was a "political" liberalism that prescribed rules for government, namely "neutrality, tolerance, and the guarantee of equality before the law," without necessarily demanding them of its citizens or private institutions. Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, *in* CHRISTIAN PERSP. ON LEGAL THOUGHT 5, 18 (Michael W. McConnell et al. eds., 2001) [hereinafter McConnell, *Old Liberalism*]. Modern notions of liberalism, however, demand neutrality, tolerance, and equality from not only the government but also individuals *and* their private associations. Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1259 (2000) [hereinafter McConnell, *First Freedom*]. Consequently, when the sectarian nature of religion conflicts with the functions of government, the classical liberal mandate of neutrality today requires "secularism," resulting in the systematic censorship of religious points of view in public discourse, all of which merely furthers a noninterpretivist policy preference for the complete elimination of religious influence from self-government. *See* McConnell, *Old Liberalism*, *supra* at 21; McConnell, *First Freedom*, *supra* at 1262.

79. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 936 (1986).

80. *See* Marshall, *supra* note 17, at 579.

81. *See* Employment Div. v. Smith, 494 U.S. 872, 885–86 (1990). According to the Court:

> The "compelling government interest" requirement [of strict scrutiny] seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it [in the Free Exercise context]. What it produces in those other fields . . . are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.

Id. (internal citations omitted).

current free exercise law, namely those prohibiting intentional discrimination against religious minorities.[82]

De jure discrimination against religious minorities, however, is extremely rare.[83] Restricting judicial review to those situations leaves other common and weighty church-and-state disputes without a hearing. For instance, demands for legislative accommodation from neutral laws of general application, by either dominant *or* minority religions, should be ignored because neutral laws by definition lack the prejudicial genesis that justifies process-oriented judicial review. This result conforms to current free exercise doctrine, which minimally scrutinizes a legislature's failure to accommodate citizens' religious beliefs absent discriminatory intent or the concomitant infringement of another constitutional right.[84] Also, process theory would disappoint those challenging any form of state aid to religious institutions because they constitute policy decisions properly entrusted to the political branches.[85] Indeed, it seems that process theory would even justify intentional discrimination against members of nonminority religions, if the legislature so desired. That is, if the protestant members of the 109th U.S. Congress, who constitute a majority of that body,[86] decided to exempt protestant groups from an otherwise neutral funding program,[87] process theory would permit this instance of a "majority" discriminating against "itself" because protestants are adequately represented.[88]

82. *See* ELY, *supra* note 6, at 100. *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524–25 (1993) (striking down Hialeah's city-wide ban on animal sacrifices after finding that the law intentionally discriminated against members of the Santeria religion in violation of the Free Exercise Clause). The Court also entertains claims of intentional discrimination against religious minorities under the Establishment Clause. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 230–31, 253–55 (1982) (striking down Minnesota's Charitable Solicitations Act on Establishment Clause grounds for evincing legislative disdain for members of the Reverend Moon's Unification Church).

83. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 214 (1992).

84. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532–34; *Smith*, 494 U.S. at 876–77, 881–82.

85. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 647, 662–63 (2002) (rejecting an Establishment Clause challenge to Cleveland's school vouchers program, under which ninety-six percent of the participants used the vouchers to attend religious private schools).

86. In 2006, 52.8% of the 109th Congress identified themselves as Baptist, Methodist, Presbyterian, Episcopalian, Lutheran, Congregationalist, or "Protestant." Religious Affiliation of U.S. Congress, *at* http://www.adherents.com/adh_congress.html (last visited Apr. 6, 2007). Additional protestant denominations are also represented in the Congress.

87. *Cf.* McDaniel v. Paty, 435 U.S. 618, 627–29 (1978) (plurality opinion) (striking down, under the Free Exercise Clause, a Tennessee law that disqualified professional clergy from serving as state legislators or as delegates to the constitutional convention).

88. Ely used this line of reasoning to justify affirmative action:

> "Reverse discrimination" in favor of racial or other minorities poses a vexing ethical issue. . . . But a difficult moral question does not necessarily generate a difficult constitutional question . . . . There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect.

In short, today's Free Exercise and Establishment Clause disputes lack the prerequisites for traditional process-oriented judicial review—a compromised tool of self-government or intentional discrimination against a discrete and insular minority—thus preventing process theory from adequately addressing the thorny questions posed by the uneasy co-existence of church and state. As argued above in Part III.A, however, process theory speaks directly to the problems of subjectivity pervading current religion clause jurisprudence. Since process theory specifically targets this problem, and proposes solutions in other contexts, logic dictates that process theory should do the same for our religion clauses.

Remedying the impasse between process theory and religion depends upon the willingness of process theory to recognize and protect religion not as a substantive freedom, but rather as a tool of self-government akin to the freedom of speech.[89] This task first warrants inquiry into why process theory dismisses the religion clauses in the first place. As argued below, the likely reason is process theory's intellectual birthplace, namely, the ideological milieu of modern liberalism. Liberalism's view of the political process focuses on the political interactions between the individual and the state, ignoring other intermediate players in the political process—especially religious institutions. Process theory's inability to account for the religion clauses thus manifests the ideological constraints imposed by liberalism.

2. Process Theory: Bootstrapped by Modern Liberalism

a. Defining Liberalism

"[L]iberalism is the dominant ideology in the modern Western world, an ideology that pervades our views of human nature and of social life."[90] While liberalism is a relatively fluid concept, enjoying varying degrees of influence throughout our history,[91] this brief survey aims to encapsulate the essence, and consequences, of liberal theory's influence upon Western society.

ELY, *supra* note 6, at 170.

89. *See infra* Part V. This Note does not propose, as some scholars have, that religious freedom should receive only those protections afforded the freedom of speech. *E.g.*, Marshall, *supra* note 17, at 578–79. Rather, a process theory of the religion clauses would define the scope of the freedoms protected by the Free Exercise Clause and Establishment Clause by reference to the contributions that religious faith and institutions make to self-government, which are quite distinct from those made by speech.

90. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1074 (1980).

91. *See* Richard H. Fallon, Jr., Commentary, *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1695–97, 1704–05 (1989).

At base, liberalism offers a theory of human nature and a normative conception of politics in democratic society analogous to that of a free market.[92] The foundation of liberal theory is the belief that people derive political motivation from "possessive individualism," namely the desire to "maximize their material well-being."[93] Liberal theory embraces the idea that individual persons have interests separate from that of any group,[94] and considers human beings, individually, to be "ultimate subjects of moral value."[95] Indeed, liberalism considers "individual self-interest [to be] the only legitimate animating force in society."[96] Liberalism thus stands at odds with communitarian philosophies because of the former's "deep mistrust of people's capacities to communicate persuasively to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly, interpretations of the world."[97]

Liberal politics, then, "consists of a struggle among interests groups for scarce social resources. . . . Various groups in society compete for loyalty and support from citizens. Once they are organized and aligned, they exert pressure on political representatives, who respond, in a market-like manner, to the pressures thus exerted."[98] Consequently, political participation serves utilitarian ends and does not have independent significance, for instance, as a component of one's psychosocial development.[99] As Professor Frank Michelman explains:

> It follows that in a pure pluralist [i.e., liberal] vision, good politics does not essentially involve the direction of reason and argument towards any common, ideal, or self-transcendent end. For true pluralists, good politics can only be a market-like medium through which variously interested and motivated individuals and groups seek to maximize their own particular preferences.[100]

92. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988).

93. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 8 (1988).

94. *See* Frug, *supra* note 90, at 1087–88.

95. Fallon, *supra* note 91, at 1697. *See also* Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1832 (1987).

96. Horwitz, *supra* note 95, at 1832 ("Liberalism has stood for a subjective theory of value, a conception of individual self-interest as the only legitimate animating force in society, . . . and denial of any conception of an autonomous public interest independent of the sum of individual interests."). *See also* TUSHNET, *supra* note 93, at 6 ("The liberal tradition stresses the self-interested motivations of individuals and treats the collective good as the aggregation of what individuals choose . . . .").

97. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507 (1988) (emphasis omitted).

98. Sunstein, *supra* note 92, at 1542.

99. *See id.* at 1543. *Cf.* Horwitz, *supra* note 95, at 1832 (arguing that, for liberalism, the public interest is merely the sum of individual self-interests).

100. Michelman, *supra* note 97, at 1507–08.

In short, liberalism encourages and expects individuals participating in politics to vote their self-interest and sees a "common good" only in the mere aggregate of individual choices.[101]

Because liberalism places great emphasis on the role of individual participation in the political process, liberal theories tend to discount the political role played by mediating institutions such as religion. As Professors Berger and Neuhaus argue, modern liberalism "has tended to be blind to the political (as distinct from private) functions of mediating [institutions]."[102] This myopic consequence results from liberal theory's tendency to view society in terms of a duality comprised exclusively of the sphere of the individual actor and the separate sphere of the state.[103] Indeed, liberal theory seeks "to allocate all aspects of social life to one of the poles of its dualities, in this case either to the sphere of the state or to that of the free interaction of individuals within civil society."[104]

Professor Gerald Frug's account of liberalism's influence upon the sociopolitical status of cities and towns (both quintessential intermediate institutions) is illustrative:

> [Originally, t]he medieval town was not an artificial entity separate from its inhabitants; it was a group of [merchants] seeking protection against outsiders for the interests of the group as a whole. . . .
>
> Thus city autonomy meant the autonomy of the merchant class as a group with distinct privileges within society. Yet, it should be emphasized that the medieval town established the rights of a group *that could not be distinguished from the rights of the individuals within the group*. The status of the individual merchant was defined by the rights of the group to which he belonged, namely the medieval town.[105]

The rise of liberal theory radically altered this arrangement by recognizing the autonomous moral worth of individuals as against mediating institutions and the state. Specifically, the ascension of liberal theory in Western thought meant that society's power centers, once intermediate institutions like towns and churches, were displaced by the individual or the state. "The dissolution of the medieval town as an organic association and the accompanying increase in the power of the King over

101. TUSHNET, *supra* note 93, at 6.
102. BERGER & NEUHAUS, *supra* note 2, at 4.
103. Frug, *supra* note 90, at 1075–76.
104. *Id.* at 1076.
105. *Id.* at 1083–84 (emphasis added) (footnotes omitted).

the town were part of the general liberal undermining of medieval society itself."[106] As Professor Frug explains,

> [L]iberalism separated out from each aspect of life an individual interest as contrasted with a group interest and, at the same time, consolidated all elements of social cohesion into the idea of the nation-state. With the development of liberalism, "[the] Sovereignty of the State and the Sovereignty of the Individual were steadily on their way towards becoming the two central axioms from which all theories of social structure would proceed, and whose relationship to each other would be the focus of all theoretical controversy."
>
> The evolution of liberalism thus can be understood as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state. The unity of the church . . . and the medieval town dissolved into entities separate from, and opposed to, the interests of their members, and each of them established separate relationships with the emerging nation-state.[107]

Of course, liberalism did not *eliminate* the town and other mediating institutions from society. Rather, these intermediate entities, which once defined individual identity, began to assume an identity distinct from those of its members and, consequently, to assume distinct positions in the political process. In many societies, churches and other mediating institutions remain powerful forces while still subordinate to the autonomy and moral superiority of the individual that liberalism secured. The point is that, in light of liberalism's promotion of individual rights, liberal societies throughout history pursued the relegation of all intermediate social institutions to the "poles of its dualities"—either the state or the individual—with varying degrees of vigor, often with negative consequences for mediating institutions like religion.

Our modern liberalism, into which process theory was born, does not tolerate a prominent role for mediating institutions of religion.[108] One reason is surely the decline of limited government and the rise of our modern welfare state. This development exacerbates conflict between religious institutions and the state because of big government's pervasive involvement in education, welfare, and dissemination of culture—duties traditionally performed by mediating institutions like religion when the

106. *Id.* at 1087–88.

107. *Id.* at 1088 (quoting OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES 87 (F.W. Maitland trans., Beacon Press 1958) (1900)).

108. *See generally* McConnell, *Old Liberalism*, *supra* note 78.

First Amendment was adopted.[109] While modern liberalism vigorously defends the *private* religious rights of *individuals*, it holds fast to the Enlightenment view that public institutions standing between the individual and the state are "viewed as irrelevant, or even a[s] obstacle[s], to the rational ordering of society. What lies in between is dismissed, to the extent it can be, as superstition, bigotry, or (more recently) cultural lag."[110] Indeed, the rights of individuals are often defended *against* the rights of religious institutions.[111] Consequently, liberal political theories, including process theory, reflect liberalism's ambivalence—and perhaps hostility—toward the role of entities standing between the individual and the state in the political process.

b. Liberalism's Influence on Process Theory

As the paradigm of Western society, liberalism's pervasive presence inevitably influences the development of legal doctrine, as law principally serves to order society.[112] Ely believed that the Constitution embraced a liberal political order.[113] As a result, process theory serves the Constitution's liberal mandate by perfecting the process of individual political participation and representation. Ely's focus on protecting the tools through which individuals access their governments (like speech and the vote), and ensuring that government does not target politically powerless groups for discrimination, conforms nicely to a view of politics that considers individual interests its foundation.

Liberalism also accounts for process theory's ignorance of the role of mediating institutions, particularly when viewed in light of Ely's desire to defend the liberal jurisprudence of the Warren Court.[114] Professor John

109. *Id.* at 21.

110. BERGER & NEUHAUS, *supra* note 2, at 5.

111. *Id. See, e.g.*, EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458, 459–60 (9th Cir. 1993) (holding that a private religious school could not avail itself of the Title VII exception from employment discrimination suits because the school was not sufficiently affiliated with any religious group). *But see* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644–45 (2000) (concluding that the freedom of association guaranteed by the First Amendment insulated the BSA from a discrimination lawsuit brought by a former scoutmaster who was dismissed because of his sexual orientation).

112. *See* Frug, *supra* note 90, at 1079–80 ("The combined process of accommodation of ideas to experience and assimilation of experience to ideas means that, to some extent, the world is made to conform to our ideas and, to some extent, our ideas are made to conform to the world.").

113. ELY, *supra* note 6, at 80 ("The original Constitution's more pervasive strategy . . . can be loosely styled a strategy of pluralism, one of structuring the government, and to a limited extent society generally, so that a variety of voices would be guaranteed their say and no majority coalition could dominate.").

114. *See id.* at 73–75. *See also* TUSHNET, *supra* note 93, at 2 ("Ely and others explicitly desire to protect the legacy of the Warren Court at a time when its liberalism has become a beleaguered minority position on the Supreme Court as elsewhere in American society.").

McGinnis argues that the Warren Court's preference for centralized democracy and individual political participation accelerated the displacement of mediating institutions in the political process.[115] Under the Warren Court's view, a vast welfare state cannot operate efficiently while competing with intermediate authorities. The Court viewed mediating institutions as superfluous or perhaps threatening because of their potential to cultivate values opposed to the state's social objectives.[116] Without the checking functions provided by mediating institutions, political accountability therefore had to come from individuals who enjoyed broad access to the democratic inputs like speech and the franchise.[117] Thus, by obscuring the independent status of mediating institutions, the Warren Court's jurisprudence further advanced liberalism's desire to allocate religion to the private sphere.

Process theory's fidelity to these liberal principles explains why Ely considered the religion clauses to be exceptions to his premise that the Constitution's overwhelming concern is protecting procedural rather than substantive rights. If religion's institutional role is ignored, then religious faith lacks any overt political dimensions and can be dismissed as a mere personal liberty that is both properly allocated to the private sphere and properly excluded from a process theory of the Constitution.

If process theory can be broadened to account for the political role of mediating institutions of religion, however, it is possible to rectify process theory's misconception of the religion clauses as substantive and to instead articulate a process theory of the religion clauses that vindicates the requirements of a properly functioning political process. Unmooring process theory from the constraints of modern liberalism can facilitate the integration of religion's process-oriented qualities, thus producing a more comprehensive, and consequently more powerful, theory of judicial review that remains faithful to the normative commitments of Ely's work. Process

115. *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 499–501 (2002). According to McGinnis:

> With the dissolution of federalism and other checks on the power of the federal government, advocates of social reform had to look elsewhere for restraint: the Warren Court found such a mode for restraint on the federal government in the reasoned deliberations of citizens in the democratic process. Under this new paradigm, the citizens' ability to engage in sustained social criticism and vote their rulers out would prevent a powerful state from becoming a tyrannical one. If the ability of citizens to criticize and ultimately replace the government contained the power of the state, the First Amendment inevitably focused on "open political dialogue and process." Free speech became the fuel of the engine of social reform by encouraging the widest possible dissemination of social ideas and political programs.

Id. (footnotes omitted) (quoting ELY, *supra* note 6, at 112).

116. *Id.* at 499–500.

117. *Id.* at 501–02.

theory must therefore look beyond a purely liberal conception of the political process and embrace liberalism's intellectual competitor, civic republicanism.

IV. RETHINKING PROCESS THEORY: LESSONS FROM THE CIVIC REPUBLICAN REVIVAL

A. LIBERALISM'S COMPETITOR: CIVIC REPUBLICANISM

Republicanism offers an alternative to liberalism's normative model of the democratic political process and the nature of constitutionalism.[118] Unlike the individualism at the heart of liberal theory, the republican vision of politics emphasizes the communal nature of individuals, "insist[ing] that people are social beings who draw their understandings of themselves and the meaning of their lives from their participation with others in a social world that they actively and jointly create."[119] Republicans harbor a collectivist view of politics that believes "human nature has a uniform purpose or telos that can be fulfilled only through participation in political activity, that there exists an objective public good apart from individual goods, and that this objective good can be discovered through virtuous political debate."[120]

Thus, the foundation of republican politics is "civic virtue," not individual self-interest.[121] Civic virtue is a transcendent public good determined through deliberation between political actors willing to suspend individual interest and instead derive their motivation from, and legislate according to, a consensus view of the public good.[122] Republicans fear that self-interested politics encourages the corrupt use of public office for private gain and argue that interest group liberalism simply does not facilitate needed discussions of the common good.[123] Consequently, republicans seek to replace liberal notions of self-interest "with a notion of civic virtue" as defined through deliberation.[124]

118. Sunstein, *supra* note 92, at 1540.

119. TUSHNET, *supra* note 93, at 10.

120. Fallon, *supra* note 91, at 1698 (footnotes omitted) (citing J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 74–75, 114 (1975)). *See* Horwitz, *supra* note 95, at 1832.

121. Sunstein, *supra* note 92, at 1547–51.

122. *Id.*

123. TUSHNET, *supra* note 93, at 11; Timothy L. Fort, The First Man *and the* Company Man*: The Common Good, Transcendence, and Mediating Institutions*, 36 AM. BUS. L.J. 391, 396 (1999); Sunstein, *supra* note 92, at 1547–48.

124. Fort, *supra* note 123, at 396.

B. LESSONS FROM THE CIVIC REPUBLICAN REVIVAL

Many scholars argue that liberalism's dominance in Western thought was not absolute, even at the time of the American founding. Recent historical scholarship reveals the contributions of civic republican thought in the days surrounding the ratification of our Constitution.[125] Scholars explored new insights suggesting that the "tradition of classical liberalism and individual rights was not the only conception of politics to have shaped the ideas and actions of American political actors and lawmakers" during the Founding.[126] Indeed, many historians acknowledge that "the republican influence [may have] far outweighed that of . . . liberalism."[127] This thesis sparked a wide-spread "republican revival" in American legal scholarship wherein prominent scholars explored the implications of the Founders' civic republicanism for today's liberal legal order.[128]

The products of the republican revival constitute valuable intellectual resources when studying the political implications of religion because, as explored below, the religion clauses were arguably intended to embody civic republican ideals.[129] As Professor Kathryn Abrams noted in reference to the republican revival, however, "[i]t is one thing to seize upon an appealing idea; it is another to know what to do with it."[130] Revivalists offered competing visions of how republican principles might present a coherent and attractive alternative to liberal theory, many of which Ely found objectionable.

Professor Frank Michelman's well-known proposal, for instance, used republicanism to justify a reign of judicial prepossessions.[131] Michelman's test case is the Supreme Court's now-overruled decision in *Bowers v.*

125. Sunstein, *supra* note 92, at 1540. *See also* Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-government*, 100 HARV. L. REV. 4, 16 (1986). Professors J.G.A. Pocock and Gordon Wood were the first to see civic republicanism as a coherent alternative to liberalism in American thought. *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787 (1969). Other important texts include BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967), and THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988). Unfortunately, legal scholars have built little upon the insights of the "republican revival" since the late 1980s. This Note endeavors to, in a sense, revive the revival, as civic republicanism remains a valuable intellectual resource.

126. Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025, 1025 (1998) (book review).

127. Fallon, *supra* note 91, at 1696.

128. *See, e.g.*, Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

129. *See* TUSHNET, *supra* note 93, at 273–74.

130. Kathryn Abrams, Comment, *Law's Republicanism*, 97 YALE L.J. 1591, 1591 (1988).

131. Michelman, *supra* note 97, at 1494–95. *See also* Abrams, *supra* note 130, at 1593 (criticizing Michelman's proposal).

Hardwick,[132] which upheld Georgia's anti-sodomy law as applied to two consenting adults who engaged in the proscribed activity within the defendant's home. Paraphrasing the *Bowers* opinion, Michelman unashamedly endorses a noninterpretivism highly offensive to process theory:

> Justice White's opinion for the Court in *Bowers* wears its positivistic constitutional theory on its sleeve: It is not for the Court to "impose" its members' "own choice of values" on the people by "'announc[ing] . . . a fundamental right to engage in homosexual sodomy'" . . . .
>
> . . . .
>
> Dare one ask: Why *ought* the Supreme Court not be an organ of politics, if that is what it takes to secure liberty and justice for Hardwick and those for whom he stands? . . .
>
> While the Court's opinion does not directly speak to this question, we already know the answer. It is, of course, democracy. But that answer without more is both lazy and presumptuous. . . .
>
> I believe that a close consideration of certain implications of historical republican constitutional thought can point us toward . . . the opposite result in *Bowers* . . . . This is the republicanism I advocate.[133]

Specifically, Michelman's republicanism would empower judges to enforce their subjective perceptions of a republican "common good" against the "popular-authoritarian excesses and perversions" of the majoritarian political process like the law at issue in *Bowers*.[134]

Michelman's proposal engendered substantial criticism for several reasons, which are of interest in discerning how civic republican principles should influence process theory. First, Professor Abrams argues that Michelman's "judicial republicanism" suffers from the legal community's residual commitment to judicial activism in the context of individual rights.[135] Michelman thus gives short shrift to the centrality of individual participation in democratic government by favoring a powerful judiciary.[136] The republican ideal envisions individuals pursuing notions of the common good through democratic dialogue, not forced assimilation of a common good as defined by judicial fiat.

132. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

133. Michelman, *supra* note 97, at 1497–99.

134. *See id.* at 1524–26 (footnote omitted).

135. *See* Abrams, *supra* note 130, at 1592.

136. *See*, *e.g.*, *id.* at 1594–95; Fort, *supra* note 123, at 399.

Perhaps it was similarly juristocratic applications of republican theory that caused Ely to look askance upon certain elements of the republican revival.[137] Ely reasoned:

> [A]nything resembling a full-scale attempt to impose a "republican" political mentality seems badly out of place under contemporary conditions, and would in addition be unwarranted as a matter of constitutional interpretation, as no coherent account of the document supports it. . . .
>
> Presented as a first order theory of judicial review . . . it constitutes only another version of the reductionist view that judges should do what, based on their experience, seems right to them.[138]

Ely did not, however, reject republican theory outright, saying "[t]he theory of judicial review articulated in *Democracy and Distrust* was intended to be as compatible with 'republican' legislative and community behavior as with a 'pluralist' model."[139] This sentiment surely reflects the fact that other manifestations of republican theory confirm the centrality of popular participation in government and envision a limited judicial role. A republican theory that permits the people, through their representatives, to make society's policy decisions, and charges the judiciary with policing this process rather than declaring and applying naked judicial will against perceived "popular-authoritarian excesses and perversions," would remain faithful to the tenets of process theory.

However, any republican process theory differs from Ely's pluralist/liberal process theory in one key respect. Traditional process theory, true to its liberal roots, assumes that individual self-interest is prepolitical and focuses on the tools—like speech and the franchise—that enable individuals to interact with their government *as* individuals, once self-interest is determined. Republican theory, on the other hand, assumes that self-interest is not prepolitical. Rather, individuals define their self-interest, and align it with the common good, while in dialogue with others. A republican conception of the political process thus includes within its scope those interest-defining activities that liberal theory deems prepolitical. In other words, republican conceptions of the political process

137. *See* Ely, *supra* note 34, at 840 n.15. Indeed, Michelman's republicanism was motivated in part by the alleged normative thinness of process theory. *See* Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2124 n.48 (2003).

138. Ely, *supra* note 34, at 840 n.15.

139. *Id.*

include not only how individuals relate with the state but also how voters make political decisions and define the self-interest they bring to the polls.

Because this "how" necessarily implicates the "where," a significant concern of a republican focus yet absent from liberal theory is the identity of the various forums in which dialogue takes place, namely mediating institutions.[140] In republican theory, mediating institutions constitute tools of self-government like speech and the vote in that mediating institutions facilitate the republican dialogue necessary for the political process to function optimally. A republican process theory, then, would count mediating institutions among the compendium of tools of self-government protected by the "access prong" articulated in *Democracy and Distrust*. A republican process theory would also tailor judicial review of the religion clauses to protecting the political contributions of mediating institutions of religion while resisting the jurisprudence of prepossessions that pervades contemporary religion clause doctrine. The contours of such a theory, of course, must necessarily consider the nature and specific needs of mediating institutions, which are explored next.

1. The Undervalued Contributions of Mediating Institutions

As explored above, "[m]ediating institutions are relatively small communities which socialize individuals"[141] and "stand[] between the individual in his private life and the large institutions of public life" like the state.[142] They include neighborhoods, families, voluntary associations, corporations, and most notably in American life, churches.[143] Professors Berger and Neuhaus explain the importance of mediating institutions in modern society:

> Modernization brings about an historically unprecedented dichotomy between public and private life. The most important large institution in the ordering of modern society is the modern state itself. In addition, there are the ["megastructures:"] large economic conglomerates of capitalist enterprise, big labor, and the growing bureaucracies that administer wide sectors of the society, such as in education and the organized professions. . . .

140. *See* Michelman, *supra* note 125, at 19 (noting that "[p]roponents of republicanism believed that their aims were linked closely with the size and composition of the political community"—deliberative politics and true liberty require decentralized government).

141. Fort, *supra* note 123, at 395.

142. BERGER & NEUHAUS, *supra* note 2, at 2 (emphasis omitted).

143. *See id.* at 3, 26; McConnell, *supra* note 63, at 18.

> Then there is that modern phenomenon called private life. It is a curious kind of preserve left over by the large institutions and in which individuals carry on a bewildering variety of activities with only fragile institutional support.
>
> For the individual in modern society, life is an ongoing migration between these two spheres, public and private. The megastructures are typically alienating, that is, they are not helpful in providing meaning and identity for individual existence. Meaning, fulfillment, and personal identity are to be realized in the private sphere. While the two spheres interact in many ways, in private life the individual is left very much to his own devices, and thus is uncertain and anxious. . . .
>
> The dichotomy poses a double crisis. . . . Many who handle it more successfully than most have access to institutions that *mediate* between the two spheres. Such institutions have a private face, giving private life a measure of stability, and they have a public face, transferring meaning and value to the megastructures.[144]

2. Mediating Institutions and the Civic Republican Ideal

The essential function of mediating institutions in democracies is an old theme,[145] and their function as mediators between one's private life and the large megastructures of society still endures, even in today's large welfare states. In a civic republican conception of government, mediating institutions help form and sustain those interest-defining relationships and activities that individuals bring to the political process.[146] As explored above, the republican ideal envisions individuals dialoguing in pursuit of the common good, rather than individual self-interest. Thus, the success of the republican enterprise depends upon voters' willingness and ability to at

144. BERGER & NEUHAUS, *supra* note 2, at 2–3.

145. J. Philip Wogaman, *The Church as Mediating Institution: Theological and Philosophical Perspective*, *in* DEMOCRACY AND MEDIATING STRUCTURES 69, 69 (Michael Novak ed., 1980) ("The role of mediating institutions in a democracy is not altogether a new theme, of course. It has antecedents in political thought going back at least to Aristotle's criticisms of Plato's *Republic* . . . .").

146. BERGER & NEUHAUS, *supra* note 2, at 3–4, 6.

> Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is "delegitimated." When that happens, the political order must be secured by coercion rather than by consent. And when that happens, democracy disappears.
>
> . . . .
>
> Democracy is "handicapped" by being more vulnerable to the erosion of meaning in its institutions. Cynicism threatens it; wholesale cynicism can destroy it. That is why mediation is so crucial to democracy. Such mediation cannot be sporadic and occasional; it must be institutionalized in structures. The [institutions] we have chosen to study have demonstrated a great capacity of adapting and innovating under changing conditions. Most important, they exist where people are, and that is where sound public policy should always begin.

Id. at 3–4, 6 (italics omitted).

times temper and perhaps abandon their self-interest when participating in the political process.[147]

Professor Timothy Fort argues that such an unnatural sacrifice cannot occur through the deliberative politics of a liberal regime because the transformation of human nature requires a substantive moral vision that deliberation, being amoral, cannot provide.[148] Dialogue generates a conception of the common good only if the participants concede the supremacy of certain common moral principles. He explains: "Civic virtue only becomes desirable if one understands the personal benefit of promoting such virtue. That is a moral task, not a political one."[149] Fort argues that republicanism's "moral task" of broadening myopic self-interest to consider the common good can occur only when individuals belong to institutions or groups that bind their fate with that of others: "A commitment to the common good is likely only made if individuals first see the connection of a common good—that of their mediating institution—to individual self-interest. Without this formative process, republicans . . . have little likelihood of transforming self-interest on a larger scale."[150] In other words, individual self-interest is too strong an influence to abandon in favor of a sacrificial politics based upon the common good unless individuals are morally compelled to do it. Mediating institutions best cultivate this moral motivation because they permit individuals, through experiences of community, to witness the potentially detrimental effects of self-interested behavior upon others.[151]

147. Fort, *supra* note 123, at 406–07.

148. *See id. See also* McConnell, *supra* note 63, at 16 ("[T]he liberal state itself cannot ultimately be the source (though it can be the reflection) of the people's values. Liberalism is foremost a regime of fair procedures. It leaves to the citizens the right and responsibility for determining their own interests and values.").

149. Fort, *supra* note 123, at 406.

150. *Id.* at 429. Using the example of political oppression of minorities, Fort argues the following:

> Without a transcendent sense of moral belief in the wrongness of discrimination, deliberative politics is not sufficient to extend the identification of the self to solidarity with the poor, oppressed, or simply different. It requires a moral transformation of the self that only can be done in conjunction with interdependence with others learned through mediating institutions that allow that self to be concretely broadened.

Id. at 406–07 (footnote omitted) (citing Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1610–12 (1988)).

151. As Fort again explains,

> Mediating institutions teach that we cannot simply have things our own way, nor can we "get away" with misfeasance. In voluntary associations, individuals learn to compromise, persuade, and sublimate narrow self-interest for the greater good of the group. In other words, mediating institutions teach that one's welfare is tied to the welfare of one's community. Without such training, the impetus will be for individuals to pursue self-interest without regard to others. This theory is consistent with that of the republican revivalists [who discount the role of mediating institutions] . . . , but it makes smaller organizations the focus of the expansion of self-interest [to include the common good].

Thus, mediating institutions are the primary forum for the civic republican dialogue that orients individuals toward legislating for the common good. Specifically, mediating institutions perform at least five key functions essential to securing optimal interaction between the individual and the state in the political process.

a. Mediating Institutions Link Individuals with Others and Facilitate the Creation of Personal Identity

Many social theories advance the notion that human experience is foundationally either individual (as did Locke) or communal (as did Rousseau and Marx).[152] However, the pervasive importance of mediating institutions in the lives of individuals reflects the reality that human nature is both individual and social.[153] Professor J. Philip Wogaman explains:

> [T]he individual and social aspects of human nature are such that we cannot have one without the other. . . .
>
> Furthermore, both individualism and collectivism ultimately reduce humanity to abstraction. . . . [But] the fully personal and fully social character of human life cannot be realized abstractly. They must find realization where we can know others and be known by them as we engage in social interactions.[154]

This can best occur on the level of the mediating institution because mediating institutions develop community.[155] The reciprocity of community constitutes what sociologists call "social capital: the glue that binds society together through a group of interlocking networks."[156]

These experiences in community also provide the essential catalyst for the formation of identity through the process of "socialization."[157] "Socialization signifies the process whereby persons who are raised in a particular culture come to assimilate and identify with the standards and expectations of that culture."[158] As George Herbert Mead wrote:

> What goes to make up the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the

Id. at 428 (footnote omitted) (citing Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623 (1988)).

152. Wogaman, *supra* note 145, at 70.

153. *Id.* at 71.

154. *Id.*

155. *Id. See* Fort, *supra* note 123, at 402; McGinnis, *supra* note 115, at 491.

156. McGinnis, *supra* note 115, at 491.

157. *See* Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 475 (1997).

158. *Id.*

> institutions of that community into his own conduct. . . . Such, in a certain sense, is the structure of a man's personality. . . . The structure, then, on which the self is built is this response which is common to all, for one has to be a member of a community to be a self.[159]

Mediating institutions, then, maintain society's most important relationships and the community necessary for the formation of personal, and thus political, identity.[160]

b. Mediating Institutions Link Individuals with Values, Sources of Meaning, and Moral Authority

"Human fulfillment in small associations is not enough, and a sense of historical accomplishment is not enough, if people cannot believe that their lives have enduring purpose and that the values by which they live have some ontological status."[161] In a democratic society, mediating structures must serve as the "value-generating and value-maintaining" agents.[162] Otherwise, the definition of values "becomes another function of the megastructures," that is, of government—"a hallmark of totalitarianism."[163]

Mediating institutions serve this end because individuals form moral identity through participation in these institutions. Professor Robert C. Post explains how communities facilitate the formation of one's norms:

> "[N]orms" . . . refer to the group attitudes that we all carry around in us all the time and that form the foundation and possibility of our very selves. . . . [N]orms are not merely subjective; they are instead "intersubjective," because they refer to attitudes and standards that persons have a right to expect from others.[164]

And as Professor Fort explains,

> It is not the case, of course, that a mediating institution magically transforms one's self-interested behavior. Rather, what occurs is that the [mediating institution] provides a framework in which one has no choice but to negotiate with others in the organization so as to understand one's identity within the context of the demands and aspirations of the

159. GEORGE HERBERT MEAD, MIND, SELF AND SOCIETY 162 (Charles W. Morris ed., 1962).

160. *Cf.* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 (2006) (arguing for increased attention to the role of families and their centrality in cultivating the psychological capacity for fruitful democratic citizenship).

161. Wogaman, *supra* note 145, at 73.

162. *See* BERGER & NEUHAUS, *supra* note 2, at 6.

163. *Id.*

164. Post, *supra* note 157, at 475.

> members of the organization. One learns interdependence and moral values.[165]

c. Mediating Institutions Help Define Social Norms and Orient Those Norms Toward the Common Good Through Competition in the Marketplace of Ideas

Judge Michael W. McConnell observes that "the liberal state itself cannot ultimately be the source (though it can be the reflection) of the people's values. Liberalism is foremost a regime of fair procedures. It leaves to the citizens the right and responsibility for determining their own interests and values."[166] Individuals best accomplish this though participation in mediating institutions.

Contemporary political theory skeptically views centralized government's ability to effect beneficial social reform.[167] Professor John O. McGinnis explains that "[i]n particular, public choice theory has shown that cohesive groups, called special interests, may be able to exercise political power out of proportion to their numbers to obtain resources and status for themselves."[168] As reflected by the generally low interest in political participation, average citizens today can feel powerless to challenge special interests.[169] McGinnis argues that "[i]f centralized democracy is not a sure engine of social reform, more decentralized democracy could offer a way to discover better social regimes through experimentation with a wider range of social arrangements that would suit diverse preferences."[170] The objective is the creation of an "encompassing interest" (or common good) that governs political decision making.[171] Mediating institutions contribute to the achievement of the common good by "generat[ing] potentially beneficial norms for society through their competition. The norms that survive this market-test have some claim to being beneficial."[172] "Preserving the autonomy of these [mediating institutions] helps sustain the subtleties and complexities of this

165. Fort, *supra* note 123, at 430.

166. McConnell, *supra* note 63, at 16.

167. McGinnis, *supra* note 115, at 502.

168. *Id.* at 503.

169. *See id.* at 504.

170. *Id.* at 504–05.

171. *Id.* at 505 ("Such an encompassing interest (the diffuse majority or supermajority of citizens) is more likely to choose norms that advance the public interest because, unlike special interests, a diffuse majority is not primarily focused on using the government to obtain resources and status for itself at the expense of others.").

172. *Id.*

spontaneous order, which in turn improves the behavior and character of individuals without the intervention of the centralized state."[173]

The Founders recognized that successful democratic government demands a decentralized system for the formation and transmission of social values. Self-rule entails many risks, including the possibility that minorities may suffer at the hands of immoral majorities. In a democratic system, morality is not self-generating. "Rather [democracy] depends crucially, more than other forms of government, on habits and restraints that are not entirely natural to the human condition . . . ."[174] Liberal government cannot coerce civil order; it is a regime of self-rule, not despotism. As such, it requires "internalized constraints and natural sentiments of justice . . . . As the Founders understood it, the republic was peculiarly dependent on public virtue to maintain the mutual respect and harmony on which republican liberty rests."[175] For "[i]f the people are corrupt, how can a republican government—in which sovereignty resides in the people—be just?"[176] Because the public's freedom to make choices necessarily includes the freedom to make normatively bad choices, successful democratic government requires some source of public virtue outside the state.[177]

For the Founders, this source was the mediating institution, and, quintessentially, the church. Indeed, substantial evidence exists that the Founders considered mediating institutions to be essential for healthy self-government.[178] Their "classical" liberalism envisioned quite substantial roles for mediating institutions because these associations facilitated the transmission of values, including democratic values, and fostered the morality and justice that ensure successful self-rule.[179] The Founders recognized that a majoritarian government, even one committed to individual rights and constrained by internal checks and balances, might still sanction a tyranny of the majority. It was a notion of a common good and the morality of political actors that would directly combat such tyranny.[180]

173. *Id.* at 529.
174. *Id.* at 542.
175. McConnell, *supra* note 63, at 16, 19 & n.68.
176. *Id.* at 16–17.
177. *Id.* at 17.
178. Fort, *supra* note 123, at 415–21.
179. *Id.* at 415–16. *See also* McConnell, *supra* note 63, at 18.
180. *See* Fort, *supra* note 123, at 418.

Naturally, religion occupied the preeminent position in this scheme. Professor Fort explains:

> By constitutionally underwriting liberal individualism, the founders saw religion as the only remaining social force that prevented self-interest from being completely divorced from the common good. The conflation of republicanism and liberalism depended upon religion's restraint of self-interest. Such a restraint was not simply a matter of private virtue, but also public morality. In a governmental structure separating church from state, only a non-established cultural morality could protect individual liberties within a context of the common good. . . . [Religion] was viewed as the key bulwark against excessive individualism.[181]

Thus, under this view, the Founders' vision of democratic government combines liberalism's concern for individual rights with a civic republican desire for a common good achieved through mediating institutions of religion. Indeed, while the Founders vigorously debated the propriety of an established national church, each side conceded democracy's dependence upon religion.[182] Proponents of the religion clauses, which of course forbid such an establishment, contended that a national religion was both harmful and unnecessary for religion to flourish, whereas proponents of a federal establishment argued the opposite.[183] Obviously, the campaign for a federally established religion was defeated, reflecting the Founders' consensus that "voluntary religious societies—not the state—are the best and only legitimate institutions for the transmission of religious faith and, with it, virtue."[184] The religion clauses thus welcomed, in Benjamin Franklin's words, a "publick religion" of considerable political importance.[185]

d. Mediating Institutions Link Individuals with Democratic Power Centers

"Links between or among individuals cannot assuage the alienation that comes from being subjected to power one cannot affect."[186] The ubiquitous presence of impersonal megastructures in modern society can deny individuals the security of knowing they control their destinies. "One

181. *Id.* (footnote omitted).

182. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1441–43 (1990).

183. *Id.* at 1441–42.

184. *Id.* at 1443.

185. Fort, *supra* note 123, at 416–18. Of course, the church is but one of many mediating institutions capable of instilling virtue, including the family and other civic associations, but it is the only such institution explicitly mentioned in the Constitution.

186. Wogaman, *supra* note 145, at 71.

of the most debilitating results of modernization is a feeling of powerlessness in the face of institutions controlled by those whom we do not know and whose values we often do not share."[187] Mediating institutions remedy this in two ways.

First, mediating institutions can reflect and amplify the needs and values of their members to the megastructures, in essence permitting individuals to realize strength in numbers.[188] By exercising one's potential control over the policies of a group, one might by extension affect the policies of democratic megastructures.[189]

Second, mediating institutions are democratic training grounds, providing forums in which individuals practice meaningful political participation, in many cases before one can legally vote. The processes of deliberation, reaching compromise, and working with others toward common goals are all democratic values, first learned and practiced in mediating institutions.

The Boy Scouts of America ("BSA") superbly exemplifies these characteristics. BSA programs not only instill appreciation for American values and institutions but also emphasize the responsibilities that attend self-government.[190] Moreover, the BSA prepares scouts to fulfill these responsibilities in practical ways. For instance, scouting maintains a decentralized organizational structure in which good citizenship is learned and practiced. Members of a given troop operate in smaller "patrols" of around ten scouts.[191] Patrol members learn interdependence when they undertake responsibilities that affect the group, such as preparing the patrol's meal during a campout or coordinating transportation of the patrol's camping supplies. Patrols are lead by executive members, a reality that emphasizes to younger scouts both the need to respect authority and how to deal with authority figures constructively in the face of conflict.[192]

187. BERGER & NEUHAUS, *supra* note 2, at 7.

188. *See id.* at 7–8; MARTIN E. MARTY & JONATHAN MOORE, POLITICS, RELIGION, AND THE COMMON GOOD 94–95 (2000).

189. Wogaman, *supra* note 145, at 72.

190. *See* BOY SCOUTS OF AMERICA, BOY SCOUT HANDBOOK 10, 457–59, 550 (10th ed. 1990).

191. *Id.* at 535.

192. *See id.* at 539–40. The Boy Scout Handbook states:

> All of you in a patrol will want to support your patrol leader through thick and thin. At times you may not want to go along with patrol plans. . . . But remember that Scouting is based on cheerful cooperation. Sometimes you may need to put aside your own comforts if it will benefit the patrol.

Id. at 540.

A scout cannot advance without putting other democratic values into practice. From as young as eleven years old, a scout must participate in civic activities such as public flag ceremonies,[193] fill a variety of leadership positions,[194] and familiarize himself with the rights and responsibilities of American citizenship.[195] These experiences inevitably influence a scout's development into a healthy member of American society, fulfilling functions unique to mediating institutions.

e. Mediating Institutions Perform Essential Checking Functions Against the State's Normative Authority

Mediating institutions provide essential "counterweight to the authority of the state."[196] Professor Stephen Carter describes this effect in the context of mediating institutions of religion, which is easily analogized to other secular mediating institutions:

> Religions are in effect independent centers of power, with bona fide claims on the allegiance of their members, claims that exist alongside, are not identical to, and will sometimes trump the claims to obedience that the state makes. . . .
>
> Democracy needs its nose-thumbers, and to speak of the religions as intermediaries is to insist that they play important roles in the proper function of the republic.[197]

Carter argues that, as a mediating institution, religion performs two functions: providing the moral ingredients of democratic society, and imparting that morality on the megastructures through its normative authority.[198] "As autonomous intermediate institutions, the religions can work against the state," challenging its decisions in the same way we expect and require individual voters to challenge them.[199] Thus,

> [a] religion, in this picture, is not simply a means for understanding one's self, or even of contemplating the nature of the universe, or existence, or of anything else. A religion is, at its heart, a way of denying the authority of the rest of the world . . . . This is a radically destabilizing proposition, central not only to the civil resistance of Martin Luther King, Jr., and

193. *Id.* at 15 (stating the requirements for advancement to the rank of Second Class).

194. *Id.* at 594–96 (stating the requirements for all upper ranks).

195. *Id.* at 610–11 (stating that merit badges required for the rank of Eagle Scout include "Citizenship in the Community," "Citizenship in the Nation," and "Citizenship in the World").

196. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 35 (1993).

197. *Id.*

198. *See id.* at 36–37, 39.

199. *See id.* at 39.

> Mohandas Gandhi, but also to [smaller groups like] Operation Rescue . . . .[200]

Mediating institutions, then, are central to effecting political change and thus constitute necessary third players, along with the individual and the state, in our political process.

3. The Church as the Quintessential Mediating Institution

The church is the quintessential mediating institution. As "by far the largest network of voluntary associations in American society," churches are "singularly important to the way people order their lives and values."[201] Moreover, churches are unique in that they perform each of the five functions entrusted to mediating institutions discussed above.[202]

The church is by definition a community of individuals united in common purpose and ontological identity.[203] Moreover, religion makes the pursuit of community, albeit of a certain kind, a primary objective.[204] For instance, in Christian theology, community is a biblical mandate.[205]

Furthermore, churches are uniquely concerned with discerning moral truth and articulating the values by which people should live.[206] "Religious groups are by definition the bearers of human tradition concerning ultimate meaning and value . . . ."[207] According to psychologist Gordon W. Allport, religion is "'[t]he search for a value underlying all things.'"[208] That is, religion focuses believers' attention on their "ultimate concern" by confronting them with weighty questions about the purpose of life and the

200. *Id.* at 41.

201. BERGER & NEUHAUS, *supra* note 2, at 26.

202. While exceptions may exist, common sense seems to support the notion that churches, unlike other mediating institutions, serve all five functions at once. For instance, families certainly transmit values, but they do not connect individuals with democratic power centers and they also cannot check the power of the state (certain political families of course defy convention, such as the Kennedy and Bush clans). While political subdivisions like neighborhoods and political associations generally link individuals to a certain degree, they merely reflect, rather than generate and transmit, moral values.

203. Wogaman, *supra* note 145, at 77.

204. MARTY & MOORE, *supra* note 188, at 11.

205. *See* WILLIAM BARCLAY, THE NEW DAILY STUDY BIBLE: THE GOSPEL OF MARK 84 (2001) ("[T]he whole essence of Christianity was that it bound men and women to their fellows, and presented them with the task of living with each other and for each other.").

206. *Cf.* Wogaman, *supra* note 145, at 77 ("It should be clear . . . that the church . . . is the quintessential mediating structure in society. Religious groups are by definition the bearers of human tradition concerning ultimate meaning and value . . . . But the opportunity is clearly present for the church to function in that [second] linkage [with political power structures].").

207. *Id.*

208. MARTY & MOORE, *supra* note 188, at 9 (quoting DICTIONARY OF QUOTABLE DEFINITIONS 485–90 (Eugene E. Brussell ed., 1970)).

ultimate propriety of one's values and priorities.[209] Because most Americans regard their values as religiously inspired, our public moral discourse naturally has a religious pedigree.[210]

Many churches also seek to translate religious values into social values that serve the common good. As Professor McGinnis explains:

> [R]eligions offer a useful framework through personal attachment and restraints on self-interest that help certain norms flourish. For instance, sexual restraint may be a positive norm for society, or at least in the long-term interest of some people in society, but at any particular moment sexual restraint is obviously fighting against immediate human impulses. Accordingly, a religious structure may be necessary to provide this norm the strength to compete against others in a society in which individuals freely choose among competing norms.[211]

Finally, history demonstrates that churches wield remarkable political influence by mediating between the individual and the state for the purpose of social change.[212] Religious faith and institutions not only motivate our individual political leaders but also provide forums through which most religious lay people can contribute to such change, particularly those who shun traditional politics.[213] Individual congregations increasingly inject themselves in local politics by campaigning for certain causes, like prolife legislation or abolition of the death penalty, and by providing social services to a degree that government cannot, including educational programs, homeless shelters, intradenominational and general welfare programs, or aid to the poor.[214]

209. *Id.* at 10.

210. BERGER & NEUHAUS, *supra* note 2, at 30; CARTER, *supra* note 196, at 119 ("The data suggest that although Americans are less likely than in the past to respond rigidly to hierarchical commands of religious authority, their religious beliefs tend to be deep and, on many moral issues, seem to be controlling.").

211. McGinnis, *supra* note 115, at 506 (footnote omitted).

212. Wogaman, *supra* note 145, at 77.

213. *See* MARTY & MOORE, *supra* note 188, at 55–71, 76. The Mormon Church's welfare program, for example, constitutes one of the most expansive and successful charitable organizations in existence. *See* RICHARD N. OSTLING & JOAN K. OSTLING, MORMON AMERICA 126–29 (1999). According to the authors:

> One of the guiding principles of Mormonism is self-reliance, and nowhere is this more apparent than in the church's remarkable welfare system. The church teaches that if a person encounters hard times, his first duty is to solve the problem himself. If he cannot solve the problem, he is directed to look to his extended family for help. If he still cannot solve his problem, he is to ask his bishop for the church's help. By church precept, only as a last resort is he to go to the federal government, understood as a sometimes necessary evil.

Id. at 126.

214. MARTY & MOORE, *supra* note 188, at 80–87.

The political influence of churches increases noticeably at the denomination level and higher. For instance, the conservative Moral Majority and its sister organizations were serious political forces during the presidential elections of the past two decades.[215] More recently, Reverend Jim Wallis and other American ministers opposed to the current conflict in Iraq secured audiences with several U.S. lawmakers and the British Prime Minister to present their "Six-Point Plan" as an alternative to war.[216] In decades past, religious institutions fueled the civil rights movement and made important contributions to the American decision to withdraw from the Vietnam War.[217]

Religious institutions, then, can truly be a voice for the voiceless in political affairs and thus provide the essential mediating function that facilitates greater popular control over democratic megastructures. In other words, along with the individual and the state, they are true third players in the political process, and the proper subjects of process theory.

V. APPLYING PROCESS THEORY TO THE RELIGION CLAUSES

Civic republican principles are the key to a process theory of judicial review under the religion clauses. Civic republicanism seeks to orient politics toward a common good through deliberation and cooperation in the mediating institutions familiar to American life. Process theory seeks to make representative democracy as responsive to the interests of individuals as possible. All the better if individuals imbue their self-interest with civic virtue and a responsibility to the common good. Although the liberalism underlying process theory rejects the ultimate possibility of government

215. CAL THOMAS & ED DOBSON, BLINDED BY MIGHT: CAN THE RELIGIOUS RIGHT SAVE AMERICA?, 15–17, 23–27 (1999).

216. JIM WALLIS, GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT 43–44 (2005).

217. J. Philip Wogaman, *The Church as Mediating Institution: Contemporary American Challenge*, *in* DEMOCRACY AND MEDIATING STRUCTURES, *supra* note 145, at 85, 85–86. According to Wogaman:

> [T]he churches' participation in the civil rights movement was a great success story. The churches had done their theological homework, in the main, and that was an important reason for the ultimate success of the movement. . . . The churches contributed some of the outstanding leaders and a good deal of the institutional clout that undergirded that effort. They also deserve great credit for keeping it so largely nonviolent. That, I think, is an achievement of our period that will still be respected five hundred or a thousand years from now . . . .
>
> The churches' other great political involvement during the 1960s was in the reaction to the Vietnam war. The churches made important contributions to the American decision to withdraw from the war.

Id.

based upon the common good,[218] the two ideas are certainly not incompatible.[219]

Moreover, while a revised process theory would retain liberalism's concern for the individual and the state, providing a civic republican gloss on process theory's conception of the political process creates doctrinal room for the contribution of a third player, the mediating institution. By expanding its scope to include the role of mediating institutions as the values-generating and values-sustaining entities that they are, process theory would help ensure the integrity of those processes through which individuals define the self-interest they advance through democratic inputs.[220]

As with other constitutional provisions, judicial review under the religion clauses would consist exclusively of protecting the religious freedom of individuals and the autonomy of religious institutions *to the degree necessary to ensure religion's public role as an essential tool of self-government*. Conversely, judicial review would not vindicate a substantive vision of the proper relationship between church and state that cannot be justified on these process-oriented grounds. Both the scope of religious freedom for individuals and institutions under the Free Exercise Clause, and the restrictions placed upon government by the Establishment Clause, would reflect the needs of religion as a mediating institution with public responsibilities. Moreover, as process theory advocates judicial deference to the political branches absent a defect in the political process, legislation that does not interfere with the role of religion as a mediating institution must stand, regardless of its substantive merits.

A. PROCESS-ORIENTED FREE EXERCISE RIGHTS

Early drafts of the First Amendment included the term "rights of conscience" in place of "free exercise of religion."[221] Both constructions clearly protect the freedom of religious belief. Thus, the most basic free exercise infringement takes the form of religious tests for public office[222]

218. *See* Sunstein, *supra* note 92, at 1554 ("Under pluralist assumptions, the notion of a common good is alternatively mystical or tyrannical.").

219. Ely, *supra* note 34, at 840 n.15.

220. *See* Post, *supra* note 157, at 475–76 (arguing that one defines his identity through interaction in community).

221. McConnell, *supra* note 182, at 1488.

222. *See* Torasco v. Watkins, 367 U.S. 488, 489, 495–96 (1961) (striking down a provision of Maryland's Constitution that required an individual appointed to the office of Notary Public to declare his belief in God before receiving his commission).

or intentional discrimination against a particular faith.[223] "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."[224] The process rationales against de jure religious discrimination are clear: representative government certainly malfunctions when the legislature maliciously targets a particular group for negative treatment based upon the content of its beliefs. However, the "free exercise of religion," as opposed to the "freedom of conscience," implies substantially more than the mere protection of religious belief from censure. It implies the freedom of religious conduct against direct and indirect governmental interference and, more importantly for process theory, the freedom of religion *as an institution*.[225]

Judge Michael McConnell explains that "[t]he main components of religious liberty are the autonomy of religious institutions, individual choice in matters of religion, and the freedom to put a chosen faith (if any) into practice."[226] Despite earlier rulings to the contrary,[227] constitutional law now recognizes the freedom of some religious conduct[228] and the needs of religious institutions as such.[229] Because de jure religious discrimination is rare, the most likely threats to religious liberty naturally come from facially neutral laws.

Of course, the United States enjoys a long history of avoiding these conflicts through the use of legislative accommodation. Legislative accommodation is

> a practice undertaken specifically for the purpose of facilitating the free exercise of religion, usually by "exempt[ing], where possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or [by

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

224. McDaniel v. Paty, 435 U.S. 618, 626 (1978) (citing Sherbert v. Verner, 374 U.S. 398, 402 (1963)). *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

225. McConnell, *supra* note 182, at 1489–90.

226. McConnell, *supra* note 63, at 1 (footnote omitted).

227. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166–67 (1878). According to the Court:

> Laws 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 [from conformity with the law] 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. Government could exist only in name under such circumstances.

Id.

228. *Smith*, 494 U.S. at 877–78; Wisconsin v. Yoder, 406 U.S. 205, 213–15, 234–36 (1972).

229. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987) (upholding, without dissent, Title VII's exemption of religious institutions from that Act's proscription of religious discrimination in hiring).

> creating] without state involvement an atmosphere in which voluntary religious exercise may flourish."[230]

While the next section considers the alleged conflict between the practice of legislative accommodation and the Establishment Clause, this section considers the degree to which a process-oriented interpretation of the Free Exercise Clause mandates accommodation from generally applicable laws that interfere with religious conduct.

Until 1990, the Free Exercise Clause ostensibly required government to surmount strict scrutiny whenever neutral laws conflicted with one's religious duties.[231] But the controversial ruling in *Employment Division v. Smith* changed that rule.[232] In *Smith*, the Court considered a free exercise challenge to Oregon's general criminal prohibition on the ingestion of peyote, a hallucinogenic drug used by some Native American religious groups for sacramental purposes.[233] Two Native Americans had been fired from their jobs after so using peyote, and were consequently denied unemployment benefits.[234] The Court declined to apply strict scrutiny to the law[235] and ruled that the free exercise of religion does not exempt religiously motivated conduct from the ambit of "a 'valid and neutral law of general applicability.'"[236] Justice Scalia reasoned that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public

230. McConnell, *supra* note 63, at 3–4 (quoting McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring)).

231. In reality, this standard provided little protection for religious conduct, as the Court routinely denied free exercise outside of the employment compensation context. *See* GUNTHER & SULLIVAN, *supra* note 67, at 1526–33. The Court's decision in *Yoder*, 406 U.S. at 234–36, is virtually the lone exception. *See also Smith*, 494 U.S. at 882–83 (noting the same).

232. *Smith*, 494 U.S. at 888–90. Judge Michael McConnell argues that, while "*Smith* purported to base its decision on precedent[,] . . . its use of precedent is troubling, bordering on the shocking." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990). For instance, Justice Scalia, in delivering the opinion of the Court, declared that "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878–79. But as Judge McConnell observes, "The Court reiterated the compelling interest test no fewer than three times in the year preceding *Smith*, including two unanimous opinions." McConnell, *supra*, at 1120–21 (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384–85 (1990); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989)).

233. *Smith*, 494 U.S. at 874.

234. *Id.*

235. *Id.* at 888–89.

236. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[237]

Interestingly, the Court was not persuaded by comparisons between free exercise and other express constitutional guarantees, such as free speech and equal protection, which can warrant strict scrutiny when infringed:

> What [strict scrutiny] produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly. . . . Any society adopting such a system would be courting anarchy . . . .[238]

Consequently, the Court was content to leave religious accommodation to the political process, dismissing the objection that such deference will disadvantage less popular religions.[239] "[T]hat unavoidable consequence of democratic government," the Court reasoned, "must be preferred to a system in which each conscience is a law unto itself."[240]

As a threshold matter, there are important constitutional distinctions between an accommodation *permitted* under the Establishment Clause, and one *mandated* by the Free Exercise Clause. As discussed more fully in the next subpart, current doctrine seems to affirm the constitutionality of legislative accommodation.[241] Judicially mandated accommodation, however, presents a thornier issue for process theory as a challenged law that fails to accommodate religion implicitly reflects a legislative decision against accommodation.[242] Thus, as Judge McConnell observes, the propriety of judicially mandated accommodation "requires consideration of such factors as the nature of the religious claim, the openness of the political system to the claims of minority religions, and—most importantly—a general view of the proper relation between elected governments and the courts."[243] Under a process theory of the religion clauses, which internalizes these factors, the Court's willingness to leave

237. *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

238. *Id.* at 885–86, 888.

239. *Id.* at 890.

240. *Id.*

241. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) (stating that the Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause.").

242. *See Smith*, 494 U.S. at 890 (leaving religious accommodation to the legislative process).

243. McConnell, *supra* note 63, at 5.

religious accommodation to the political process inadequately protects both individual religious freedom and the viability of religious institutions. Because generally applicable laws and laws that purposefully stifle religious observance can equally impede the political work of mediating institutions, strict scrutiny must be the norm.

Of course, process theory recognizes the potential for judicially mandated accommodation to be extended beyond the degree required to vindicate a properly functioning political process, thus facilitating the imposition of judicial prepossessions that favor liberal free exercise rights in the face of contrary state interests. Consequently, process theory would also limit the application of strict scrutiny to instances in which the neutral law materially impedes religion's ability to perform its public duties as a mediating institution and, conversely, counsel judicial restraint when the neutral law merely inconveniences religious observance.

1. Process Theory's Preference for Strong Free Exercise Protections

Traditionally recognized democratic inputs, like speech and free exercise, are equally impeded whether the state action is intentional or not. Justice Scalia correctly acknowledges in *Smith* that our government remains solicitous of religious freedom. However, this view merely establishes that our political process by and large functions correctly, that is, by respecting religious freedom; it should not justify the virtually nonexistent constitutional protection afforded by *Smith* should the state's character change.

Justice Scalia's comparison between free exercise and free speech is curious in this respect. As process theory recognizes, strict scrutiny for laws targeting speech is a "constitutional norm" because such laws thwart the vital contributions of free speech to self-government. Of course, the freedom of speech receives lesser protection from neutral laws and from those otherwise not directed toward content or viewpoint;[244] process theory at least partly justifies this discrepancy in light of the reality that content and viewpoint discrimination is more inimical to a fair and open political process than incidental restrictions on speech, such as time, place, and manner restrictions. That is, incidental restrictions on speech from neutral laws do not necessarily prevent that speech from enjoying expression though alternative means or in other forums. A neutral law that impedes a religious practice, however, may indeed leave the religious observer no

244. *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647–49 (1981).

such alternatives, as in the *Smith* case. Moreover, because intentional discrimination against religious minorities remains virtually nonexistent,[245] limiting constitutional free exercise protection to that scenario essentially saps the clause of meaning. When it is conceded that neutral laws have the capacity to "virtually destroy" a religion,[246] why are free exercise rights left to fend for themselves without meaningful constitutional protection? Both rights are essential to the political process and deserve at least comparable enforcement.

What is more, religiously motivated conduct seems doubly deserving of accommodation because of the potential conflict between civic authority and divine commands, and because of religion's unique role as a values-defining agency that performs a checking function against the state. Religion is unique in that its claims upon the believer are not optional but issue from an external authority.[247] For the religious observer, accommodations "relieve the believer—where it is possible to do so without sacrificing significant civic or social interests—from the conflicting claims of religion and society."[248] Accommodation preserves the freedom of that believer's conscience and thus her ability to participate in her mediating institution. Religious mediating institutions, however, are only as strong as their constituencies; consequently, accommodation of both individual belief *and* institutional needs remain necessary for religious institutions to realize full membership in the political process. Religious institutions can hardly contribute to the social conversation about society's values when the state silences their voices, forces them to act contrary to those values, or "virtually destroys" them. Without accommodation, the political process suffers from the absence of those intermediate bodies responsible for linking individuals to democratic government and checking the oppressive potential of state power.

Another powerful justification for judicial accommodation is the special vulnerability of religious minorities.[249] Several scholars note that these groups are most likely to suffer religious oppression from neutral laws of general application because of their potential inability to command the attention or sympathy of elected officials. As Professor Kathleen Sullivan observes, "not a single religious exemption claim has ever reached

245. *See* Sullivan, *supra* note 83, at 214.

246. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 467 (1988) (Brennan, J., dissenting).

247. McConnell, *supra* note 63, at 26.

248. *Id.*

249. Judge McConnell persuasively argues this point. *See* McConnell, *supra* note 232, at 1129, 1152–53.

the Supreme Court from a mainstream Christian religious practitioner. Mainstream Christianity does not need judicial help; the legislature is likely already to be obliging."[250] The inability of minority groups, either racial or religious, to command the attention of their representatives is a principal concern of process theory. Courts honor, rather than impede, the democratic process when they ensure that mediating institutions remain open to minority participation.

Because of religion's essential contribution to the political process, and the special threats to minority religions posed by representative government, state action that interferes with religious observance should endure the most exacting judicial scrutiny. A process-oriented theory of judicial review is most aggressive in the face of state action that inhibits rights, like free exercise, that constitute bona fide tools of self-government. Where those rights are concerned, *Smith*'s implicit norm—"If you lose in politics, you lose."[251]—remains inapposite.

2. Distinguishing Impediments to Religious Duty from Other Inconveniences

The most credible objection to a regime of strong free exercise rights is the animating concern of the *Smith* decision, namely, that constitutionally compelled accommodation is tantamount to "a private right to ignore generally applicable laws" and "would be courting anarchy."[252] Of course, the hallmarks of process theory are judicial restraint and legislative supremacy so, at first blush, one might expect that *Smith*'s deference to political compromise reflects process norms: a process theory that pushed the political process to the point of anarchy would hardly serve its own principles. Judicial restraint has a far more limited application in the context of religious accommodation, however, because of religion's contributions to a healthy political process. Thus, a process-oriented theory of judicial review, which focuses primarily on religion's needs as a mediating institution, would avoid *Smith*'s doomsday scenario by limiting judicially mandated accommodation to those instances in which neutral laws keep religious institutions from functioning as such, or actually prevent (rather than merely discourage) individuals from participation in that institution.

250. Sullivan, *supra* note 83, at 216.

251. Stephen L. Carter, Comment, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 121 (1993).

252. Employment Div. v. Smith, 494 U.S. 872, 886, 888 (1990).

From a process perspective, the degree of interference with one's religion is of paramount importance to the accommodation claim and provides a potential screen against both excessively numerous claims and the use of accommodation to effect judicial prepossessions.[253] Of particular relevance is whether the claimant is prevented from performing a religious *duty*, that is, something required by or central to the claimant's religion, or merely denied some preferred form of observance or an accommodation that would simply make the observer's life easier.[254] The familiar cases of *Smith*,[255] *Sherbert v. Verner*,[256] and *Wisconsin v. Yoder*[257] illustrate the distinction between burdens on religious duties, which deserve accommodation, and mere frustrations to religious observance, which in most cases should not.

Sherbert involved a sabbatarian's free exercise challenge to the state's decision to deny her unemployment compensation after she was fired for refusing to work on Saturdays.[258] The South Carolina Supreme Court held that the plaintiff's ineligibility for employment compensation "infringed no constitutional liberties because such a construction of the statute 'places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.'"[259] Applying strict scrutiny, the U.S. Supreme Court reversed, reasoning that a denial of welfare benefits, while not a regulation of the plaintiff's religious beliefs as such, restricted her free exercise rights sufficiently to offend the Constitution. Specifically, the Court reasoned that a denial of unemployment benefits that forced the plaintiff to choose between the dictates of her employer and the dictates of her religion was tantamount to imposing a fine upon the plaintiff for her beliefs.[260]

These contrasting rulings illustrate the distinction between a process-oriented and a substantive free exercise jurisprudence. Free exercise of religion means autonomy for mediating institutions and the freedom of individuals to participate in them to the degree necessary for religious institutions to perform their work in the political process. To the South Carolina court, the denial of welfare benefits was simply irrelevant to the

253. *See* McConnell, *supra* note 63, at 26–27.
254. *See id.* at 27.
255. *Smith*, 494 U.S. at 872.
256. Sherbert v. Verner, 374 U.S. 398 (1963).
257. Wisconsin v. Yoder, 406 U.S. 205 (1972).
258. *Sherbert*, 374 U.S. at 399–401.
259. *Id.* at 401 (quoting Sherbert v. Verner, 125 S.E.2d 737, 746 (S.C. 1962)).
260. *Id.* at 404.

plaintiff's ability to practice her religion as she saw fit. The U.S. Supreme Court, on the other hand, considered indirect coercion to act against one's religion convictions sufficient to infringe the First Amendment.

From a process perspective, the Supreme Court's ruling is erroneous. The denial of welfare benefits to a worshiper does not infringe upon the Seventh-day Adventist church's work as a traditional mediating institution. The law also does not ultimately deprive the plaintiff of her ability to participate fully in her church and to take advantage of the benefits thereof. Her injury—the law's tendency to disincentivize individual religious participation—remains peripheral to the primary function of the mediating institution of religion.

A civic republican view of the political process values religion for its contribution to the public discourse *as an independent mediating institution*, not as one of many personal liberties with substantive content extending beyond what is necessary to protect the requirements of the political process. A law denying welfare payments to those refusing to work on religious grounds may penalize individual religious choices, but it does not implicate the process-oriented contributions of religion as an institution. The legislature should enjoy the freedom to make policy determinations of this sort, provided those determinations do not "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and are not "directed at particular religious . . . minorities."[261] Consequently, a process-oriented theory of judicial review would leave the resolution of the accommodation demanded in *Sherbert* to the political process.

The facts of *Employment Division v. Smith*, however, present the opposite scenario: a neutral law that truly does infringe upon the process-oriented functions of a religious institution. As discussed above, the law in *Smith* criminalized the use of peyote, a central feature of petitioners' religion. From a process perspective, the harm is twofold. First, criminalizing peyote obstructs a vital component of that church's identity and function as a mediating institution. Second, the law prevents individuals from participating fully in the ceremonies central to sustaining their religion. While the notion that the ingestion of peyote constitutes a necessary prerequisite to political participation seems mistaken in the abstract, the essential fact remains that the petitioners, and many others, derive meaning and fulfillment from observance of their religion,

261. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (internal citations omitted).

indicating that these institutions have a role to play as values-defining agents in the political process.

The law at issue in *Smith*, then, involves the constitutionally meaningful infringement of religious liberty missing from *Sherbert*. In the former, the state significantly impeded the freedom of a certain religion to function as a mediating institution by criminalizing a religious duty; in the latter, while individual participation was made more difficult, the viability of that religion's contribution to the political process remained unharmed.

Closer cases involve laws that do not implicate religious duties per se, but still inhibit the ability of a religious body to function as an autonomous institution. In *Yoder*, two Amish parents were convicted for refusing to send their children, ages fourteen and fifteen, to public school because Wisconsin law required attendance until age sixteen.[262] The Amish claimed,

> in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.[263]

The Court ruled that compelled attendance past the eighth grade interfered with Amish religious beliefs, reasoning that an extra two years of schooling beyond the eighth grade would do little to serve the state's interest, not least because "the Amish community has been a highly successful social unit within our society, even if apart from the conventional 'mainstream.'"[264]

The *Yoder* case presents an instance wherein a neutral law does not contravene religious commandments or duties, as in *Smith*, but surely presents a more material infringement of religious liberty than the mere nuisance present in *Sherbert*. As such, from a process perspective, the result in *Yoder* is correct because of the law's potential to completely compromise the Amish Christian faith as a viable mediating institution. As the Court observed,

262. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
263. *Id.* at 209.
264. *Id.* at 214, 217, 222.

> Old order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. . . .
>
> . . . .
>
> . . . They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life . . . . The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.[265]

Indeed, an expert on the Amish "testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States."[266]

Clearly, then the law at issue in *Yoder* threatened the Amish church's ability to mediate between Amish individuals and the megastructures of the state. Mainstream public education threatens the definition and transmission of Amish values, the discovery of a common good through mutual participation in community, and even the Amish understanding of the meaning of existence. These are precisely the tasks that define the political role of mediating institutions; thus, process theory sanctions the just result in that case.

B. A PROCESS-ORIENTED THEORY OF "ESTABLISHMENT OF RELIGION"

The Supreme Court acknowledges our society's preference for religious accommodation: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[267] Nevertheless, the practice of accommodation like that implicated in *Smith*, *Sherbert*, and *Yoder* presents a quandary for current Establishment Clause doctrine, which cautions that "accommodation is not a principle without

265. *Id.* at 210–11.
266. *Id.* at 212.
267. Zorach v. Clauson, 343 U.S. 306, 313–14 (1952).

limits."[268] The principal danger is the potential for accommodation to facilitate "rank religious favoritism" on the part of the government[269] or, similarly distasteful from a process perspective, the enforcement of judicial prepossessions. Thus, "[t]he challenge posed by [accommodation] . . . is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion."[270]

Obviously, the Establishment Clause guarantees some type of neutrality on the part of the government.[271] As argued in Part III.A, however, this nebulous standard all too often facilitates the constitutionalization of substantive, policy-oriented visions of the relationship between church and state that have little to do with the requirements of a properly functioning political process. A process-oriented theory, however, would reserve judicial review to instances when religion's contribution to the political process is actually threatened, regardless of how offensive the symbolic contact between church and state.

In pursuit of this standard, a process-oriented enforcement of the Establishment Clause would work exclusively to ensure an optimal political environment for religious institutions to flourish. In policing the three seminal players in the political process—the individual, the state, and the mediating institution—the Court must target those procedural infirmities that tend to obstruct the work of mediating institutions or otherwise threaten their role as independent entities standing between the individual and the state. As argued below, these infirmities comprise: (1) coercion of the individual believer or religious institution; (2) fusion between the roles of government and the religious institution; or (3) governmental favoritism that materially impedes the process functions of the religious institution. Likewise, neither state action that merely evinces a purpose or primary effect of advancing religion, as proscribed by the *Lemon* test, nor state action that merely models an "endorsement" of religion, constitute procedural infirmities. By preventing bona fide process defects, the courts ensure that government observes the neutrality necessary for mediating institutions to flourish, without succumbing to judicial prepossessions.

268. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 706 (1994).

269. McConnell, *supra* note 63, at 4.

270. Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring).

271. As the Court has said, "'[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion.'" *Kiryas Joel*, 512 U.S. at 696 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792–93 (1973)).

1. Preventing Coercion of the Individual Believer or Religious Institution

During the debates in the First Congress concerning the construction of the religion clauses, James Madison said that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any matter contrary to their conscience."[272] Madison also "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[273] Thus, "[i]f Madison's explanations to the First Congress are any guide, compulsion . . . is the essence of an establishment."[274]

Indeed, coercion has long been considered a quintessential Establishment Clause violation, figuring prominently in the Court's early cases.[275] From a process perspective, coercion clearly compromises the effectiveness of mediating institutions by offending the liberty of conscience essential to full participation in the personality- and values-defining functions unique thereto. Moreover, coercion of religious institutions themselves by state actors compromises their ability to generate competitive social norms and their freedom to challenge the state's moral authority.

Naturally, opinions differ as to what constitutes an actionable instance of coercion; however, process theory lends some stability to this inquiry by requiring that the coercion materially influence the political functions of mediating institutions of religion. A useful case study comes from *Lee v. Weisman*,[276] wherein the Court ruled that school districts may not invite religious leaders to offer prayers and benedictions at public school graduation ceremonies because of the intrinsically coercive nature of that

272. 1 ANNALS OF CONG. 758 (J. Gales ed., 1834).

273. *Id.*

274. McConnell, *supra* note 79, at 937.

275. *Id.* at 934–35. According to McConnell:

> In *Cantwell v. Connecticut*, the Court had paraphrased the Establishment Clause as "forestal[ling] compulsion by law of the acceptance of any creed or the practice of any form of worship," and the presence or lack of compulsion, respectively, had been central to the Court's decisions in *McCollum v. Board of Education* and *Zorach v. Clauson*, which concerned release time programs in the public schools.

Id. (footnotes omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)) (citing McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952)). Nevertheless, the Court has never considered coercion a necessary predicate to an Establishment Clause violation. *See* Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion . . . .").

276. Lee v. Weisman, 505 U.S. 577 (1992).

venue. Although no student was forced to attend the ceremony, the majority held that psychological coercion offends the Establishment Clause: "[T]he school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction."[277] Justice Scalia's dissent, on the other hand, demands a greater degree of coercion: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[278]

From a process perspective, the degree of coercion sufficient to constitute an Establishment Clause violation may often be a close question. Surely context and the age of the participants plays a role,[279] as does the quality of the force employed by the state. The situation in *Weisman* poses an interesting paradox because, while children as a group display more susceptibility to coercion, the context in which that coercion took place—a public school—is not a true mediating institution because of its strong connections to the state. On the one hand, the ability to coerce children, and the political powerlessness of children, suggest that process theory place increased scrutiny on the actions of school officials. On the other hand, because a school is not a mediating institution of religion, process theory would counsel restraint concerning legislative decisionmaking in that context, so long as students' participation in their own religious institutions remained unimpeded.

In any event, while it could be argued that the functions of mediating institutions are compromised because children may hear messages from school officials that touch on religion or with which they disagree, this

277. *Id.* at 592–94.

278. *Id.* at 640 (Scalia, J., dissenting). *See also id.* at 642. According to Justice Scalia:

> Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise," . . . I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernable to those of us who have made a career of reading the disciples of Blackstone rather than of Freud."

Id. (quoting *id.* at 587 (majority opinion)).

279. For instance, while the Court has found voluntary prayers coercive at high school activities, it has not done so in contexts populated by adults. *E.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310–12 (2000) (high school football game); *Weisman*, 505 U.S. at 597–98 (high school graduation); Marsh v. Chambers, 463 U.S. 783 (1983) (legislative chamber). The *Weisman* Court distinguished *Marsh* thus: "The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend." *Weisman*, 505 U.S. at 597.

possibility seems at most a de minimis infraction that does no genuine injury to a student's religious freedom.[280] That is, although the line between de minimis invocations of religion and genuine proselytizing by school officials may be hazy, even the most offensive instances of religious endorsements probably will not rise to the level of a process-oriented constitutional violation unless students are actually forced to engage in bona fide religious exercises. America's diverse religious institutions flourished even before the Supreme Court outlawed obviously unconstitutional practices such as mandatory Bible reading in public schools. Of course, Bible reading is certainly coercive to the extent it is required. All school assignments, however, are coercive; what makes Bible reading offensive from a process perspective is the fact that it constitutes a religious exercise. But surely there are instances in which mandatory bible reading is not a religious exercise, such as when students study the bible as literature or examine the Bible's influence upon other subjects such as history or politics.

Thus, the constitutional inquiry cannot encompass coercion in any context that touches religion; what matters is coercion to participate in a genuine religious exercise. Anything less likely does not implicate religion's process-oriented role and offends only a subjective policy preference that public schools remain completely sanitized from religious influence. While today's increasingly pluralistic religious population may

280. *Weisman*, 505 U.S. at 637–39 (Scalia, J., dissenting). As an academic matter, the concept of a de minimis Establishment Clause violation certainly has a place in process theory, which values judicial restraint. If what superficially affronts the political process does not actually do so, the very justification for process-oriented judicial review would seem to evaporate. Consider the words of Justice Goldberg:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring). In practice, older cases reject the concept of a de minimis Establishment Clause violation under a slippery slope rationale, but more recent cases express some willingness to entertain that defense. *Compare id.* at 225 (stating that with respect to collective recitation of Bible verses by Pennsylvania public school children, "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent"), *with* Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (examining a display that included Santa's house, reindeer pulling a sleigh, a Christmas tree, an elephant, a teddy bear, and—the offending item at issue in the case—a crèche, and stating, "The dissent asserts some observers may perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, *arguendo*, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. . . . Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental . . . .").

render a school official's religious speech especially improvident, the fact remains that, absent a material impediment to a student's religious practice, there is no process defect: endorsement is not coercion, even when students like those in the *Weisman* case are for all intents and purposes coerced into attending and must hear messages that implicate religion.[281] The Constitution should not be contorted in an effort to find remedies for all conceivable wrongs. It can, however, be used to maintain those political processes that make possible the redress of such wrongs, such as the ability of aggrieved parents to petition the school board for a change of policy.

Ultimately, the Establishment Clause's coercion standard must be developed through serious, case-by-case consideration of exactly what sort of state action is present, and how materially it impedes the ability of individuals to participate in their mediating institutions of religion. Thus framed, the notion that a nondenominational prayer like that offered in *Weisman* impedes the political contributions of mediating institutions seems quite untenable. As with other components of Establishment Clause jurisprudence, the danger with crediting injury from "psychological coercion" is the Court's ability to use that standard as a pretext for the enforcement of substantive visions of the proper relationship between church and state. Indeed, such a result seems the logical consequence of sentiments like that found in a concurring *Weisman* opinion: "'The [First] Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.'"[282] Clearly this standard exceeds the requirements of a properly functioning political process, and as *Everson* confessed, proposes the impossible.[283]

Thus, if coercion were the only issue presented by the facts of *Weisman*, the ruling might appear to substantiate the oft-repeated charge that the Court aimed to "shov[e] God out of the Classroom,"[284] a policy

281. Moreover, finding actionable coercion whenever school officials mutter words that directly or indirectly implicate topics of importance to religion would create ridiculous results. The state could hardly run a school because schools constantly send messages that offend particular religious groups, such as when they teach the theory of evolution or science lessons that touch on issues related to human reproduction.

282. *Weisman*, 505 U.S. at 601 (Blackmun, J., concurring) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 31–32 (1947) (Rutledge, J., dissenting)). *See also id.* at 589 (majority opinion) ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . . .").

283. *See Everson*, 330 U.S. at 16–18.

284. *See* CARTER, *supra* note 196, at 188.

decision that courts have no business enforcing unless the ability of students to participate in mediating institutions becomes impeded. Nevertheless, the facts of *Weisman* implicate another serious process violation that is not so easily ignored: the fusion of religious and civic authority.[285]

2. Preventing the Fusion of Religion and Government

Among the most necessary components of a vibrant community of mediating institutions is the assurance that each institution remains autonomous and distinct from the state. Mediating institutions of religion hardly enjoy the requisite independence as intermediate bodies when either a religious group or state actor cedes its respective duties to the other. This unwholesome conflation threatens the sovereignty needed to sustain their process-oriented functions. From a process perspective, however, the concept of fusion can be parsed into both constitutionally legitimate and illegitimate injuries. One notion of fusion is "functional"—it concerns activity that actually threatens the process-oriented roles of the church and the state. The second is a substantive notion of fusion that, while concerned with functional fusion, also embraces instances in which church and state merely appear to be united in purpose, integrated, or otherwise *conceptually* close but are nevertheless not fused in ways that threaten the functional mechanics of self-government. In other words, the fusion prevented by the Establishment Clause can embrace either a process-oriented or a substantive set of boundaries between church and state; naturally a process-oriented theory of the religion clauses would sanction judicial review only in the former instance.

A comparison between the curious cases of *Larkin v. Grendel's Den, Inc.*[286] and *Board of Education of Kiryas Joel Village School District v. Grumet*[287] aptly illustrates the distinction between these two conceptions of fusion. In *Grendel's Den*, the Court considered a Massachusetts law that bequeathed to churches and schools the power to veto the licensure of retail establishments selling liquor within five hundred feet of that church or

285. *Weisman*, 505 U.S. at 586 ("These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools.").

286. Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

287. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

school.[288] Massachusetts argued that the law constituted a valid exercise of the state's zoning power because it sought to "'protec[t] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets.'"[289] The state commission refused to grant a license to Grendel's Den, citing only the objection of its neighbor, Holy Cross Church.[290] The church expressed concern over "having so many licenses so near" to itself.[291]

The Court conceded that a zoning law prohibiting liquor sales within the vicinity of churches and schools is a proper exercise of the state's authority, but distinguished the Massachusetts law because it "delegates to private, nongovernmental entities power to veto certain liquor license applications," which "is a power ordinarily vested in agencies of government."[292] According to the Court, "delegating a governmental power to religious institutions[] inescapably implicates the Establishment Clause."[293] The Court observed that:

> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. . . .
>
> . . . This statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause; "[t]he objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other."[294]

Thus, because "the core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions,'" the Court struck down the Massachusetts law.[295]

Some years later, the Court relied heavily upon *Grendel's Den* in considering the "unique problem" presented by Kiryas Joel Village in New

288. *Grendel's Den, Inc.*, 459 U.S. at 117. The Massachusetts law provided: "'Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto.'" *Id.* (quoting MASS. GEN. LAWS ch. 138, § 16C (1974), *invalidated by Grendel's Den, Inc.*, 459 U.S. 116). In a similar case, the Massachusetts Supreme Court characterized the law as an extension of "veto power" to churches and schools. *See* Arno v. Alcoholic Beverages Control Comm'n, 384 N.E.2d 1223, 1227 (Mass. 1979).

289. *Grendel's Den, Inc.*, 459 U.S. at 120, 123 (quoting Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 766 (1980)).

290. *Id.* at 118.

291. *Id.* (emphasis omitted).

292. *Id.* at 121–24.

293. *Id.* at 123.

294. *Id.* at 125–26 (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

295. *Id.* at 126–27 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)).

York state.[296] The residents of Kiryas Joel, all members of the ultra-orthodox and exclusive Satmar Hasidic Jewish sect, are notable for their strict religious observance, Yiddish speech, and strident efforts to avoid assimilating into the modern world.[297] The group had already successfully petitioned the town of Monroe, New York, to incorporate their own village that was to be composed almost entirely of Satmars.[298]

The litigation in question, however, concerned not the creation of the town but rather the state's efforts to accommodate the educational needs of handicapped Satmar children. Because handicapped Satmar children did not attend private religious schools like the other children, Kiryas Joel's parents initially sent them to public schools, populated primarily by non-Satmars.[299] Predictably, Satmar parents found this arrangement unsuitable, citing "'the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different.'"[300] In response, the sympathetic New York legislature passed another accommodation providing a separate public school district in Kiryas Joel, thus empowering a locally elected school board to open schools, hire teachers, and fund the school through taxation.[301] The Kiryas Joel school district operated only a secular school for handicapped children, however, as the nonhandicapped children remained in their private schools and relied upon the district only for transportation and other ancillary services.[302]

Before the new school district began operation, the New York State School Boards Association along with two individuals challenged the constitutionality of the Kiryas Joel school district.[303] Applying the *Lemon* test, the New York Court of Appeals affirmed the lower court rulings against the creation of the school district.[304] In applying the "principlal or primary effect" prong of *Lemon*, the New York Court of Appeals "conclud[ed] that because both the district's public-school population and its school board would be exclusively Hasidic, the statute created a 'symbolic union of church and State' that was 'likely to be perceived by the

296. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 693, 696–97 (1994) (internal citation omitted).

297. *Id.* at 691.

298. *Id.*

299. *See id.* at 692.

300. *Id.* (quoting Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 527 N.E.2d 767, 770 (1988)).

301. *Id.* at 693.

302. *Id.* at 693–94.

303. *Id.* at 694.

304. *See* Grumet v. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist., 618 N.E.2d 94, 98–99, 101–02 (N.Y. 1993).

Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval' of their own. As a result, said the majority, the statute's primary effect was an impermissible advancement of religious belief."[305]

On appeal, the U.S. Supreme Court affirmed, although ostensibly under a slightly different rationale. Writing for the majority, Justice Souter held that the creation of the Kiryas Joel school district violated the neutrality commanded by the Establishment and Free Exercise Clauses by (1) "delegating the State's discretionary authority over public schools to a group defined by its character as a religious community," (2) "in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally."[306] The first prong is of importance here; the second prong will be dealt with in the next subpart.

In ruling against the creation of the Kiryas Joel school district, the Supreme Court relied upon *Grendel's Den*, noting that the Act in that case "brought about a 'fusion of governmental and religious functions' by delegating 'important, discretionary governmental powers' to religious bodies, thus impermissibly entangling government and religion" and lacked any guarantee that the power would serve secular purposes.[307] "[T]his, along with the 'significant symbolic benefit to religion' associated with 'the mere appearance of a joint exercise of legislative authority by Church and State,'" doomed the law at issue in *Grendel's Den*.[308] The Court then compared that law to the "more subtle" issue raised by the *Kiryas Joel* litigation, which involved the delegation of civic authority not to a religious institution as such, but "to a group chosen according to a religious criterion."[309] The Court found no constitutionally significant distinction between the cases,[310] reasoning that the common constitutional infirmity was not the functional fusion of church and state but rather the delegation of government authority *on criteria not neutral to religion*: "Where 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."[311] Thus, because

305. *Kiryas Joel*, 512 U.S. at 695 (internal citation omitted) (quoting *Grumet*, 618 N.E.2d at 100).
306. *Id.* at 696.
307. *Id.* at 696–97 (internal quotations omitted) (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126–27 (1982)).
308. *Id.* at 697 (quoting *Grendel's Den, Inc.*, 459 U.S. at 125–26).
309. *Id.* at 698.
310. *Id.*
311. *Id.* at 699.

New York formed the school district and effectively, though not explicitly, "identifie[d] these recipients of governmental authority by reference to doctrinal adherence"[312] and "defin[ed] a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions,'"[313] the formation of the Kiryas Joel school district violated the Establishment Clause.

For the purpose of developing a process theory of the religion clauses, the results in *Grendel's Den* and *Kiryas Joel* distinguish a process-oriented Establishment Clause jurisprudence from a substantive one. In *Grendel's Den*, the legislature granted churches veto power over the state's authority to issue liquor licenses, "a power ordinarily vested in agencies of government."[314] From a process perspective, this delegation obliterates the distinction between the church *as a mediating institution*, and the megastructure of state government. The church cannot effectively mediate between individuals and the state while acting as the state; "[a]s autonomous intermediate institutions, the religions can work against the state; as partners with the state, they cannot."[315]

Judge Michael McConnell explains that, properly functioning, "the liberal state itself cannot ultimately be the source (though it can be the reflection) of the people's values. Liberalism is foremost a regime of fair procedures. It leaves to the citizens the right and responsibility for determining their own interests and values."[316] Under the law at issue in *Grendel's Den*, however, the state of Massachusetts did not merely *reflect* the values of people as defined by participation in the mediating institution of the church; it permitted the church to become the source of those values. This distinction matters because the autonomy of religious institutions is fundamental to their role in the political process; autonomy ensures the survival of the various voices in our proverbial "marketplace of ideas" and facilitates a republican dialogue regarding the common good by subjecting these competing values to comparison and evaluation. In *Grendel's Den*, however, virtually every church could circumvent this process by giving its values the force of law, without the political accountability that accompanies state action.

312. *Id.*
313. *Id.* at 702 (quoting *Grendel's Den, Inc.*, 459 U.S. at 126).
314. *Grendel's Den, Inc.*, 459 U.S. at 122.
315. CARTER, *supra* note 196, at 39.
316. McConnell, *supra* note 63, at 16.

Moreover, the loss of autonomy threatens the effectiveness of religion's checking function against the state. "Sören Kierkegaard, looking at the established churches of Europe, said that when Christianity becomes part of the state, it ceases to be Christianity, a proposition readily generalized beyond the Christian churches."[317] The political consequence, as Stephen Carter argues, is that religion loses its ability to resist the state when it "rush[es] to become part of the very [thing] against which the religions should ideally serve as a bulwark."[318] If the church has veto power over the actions of government, it controls society's values in much the same way that a government might control the content of political speech, a quintessential process violation.

The legislation at issue in *Kiryas Joel*, on the other hand, presents an entirely different notion of fusion that finds offense whenever the church and state simply appear too close. As Justice Scalia aptly noted in dissent, *Grendel's Den* involved the delegation of civic authority *to a church*, not, as in *Kiryas Joel*, "'to a group chosen according to a religious criterion.'"[319] To Justice Scalia, "steamrolling"[320] over this difference is quite significant:

> [It] boils down to the quite novel proposition that any group of citizens (say, the residents of Kiryas Joel) can be invested with political power, but not if they all belong to the same religion. . . . "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."[321]

Of central importance here is that the legislation in *Kiryas Joel* did not threaten the viability of Satmar Hasidism as a mediating institution. In fact, the opposite is true: creating a school district to serve handicapped

317. CARTER, *supra* note 196, at 81.

318. *Id.* at 82. According to Carter:

> The inquisition only became possible when church and state merged their authorities, and neither was available to stand against the other. The church, by becoming the state, surrendered the possibility of acting as an intermediary. It yielded its essential role as the protector of the people of God; it ceased to be able to preach resistance. One might even say in its grasping for power, the institutional church gave up the right to die for its beliefs in exchange for the right to kill for its beliefs.

Id.

319. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 734 (1994) (Scalia, J., dissenting) (emphasis omitted) (quoting *id.* at 698). According to Justice Scalia: "The uniqueness of [*Grendel's Den*] stemmed from the grant of governmental power directly to a religious institution, and the Court's opinion focused on that fact, remarking that the transfer of authority was to 'churches' (10 times), the 'governing body of churches' (twice), 'religious institutions' (twice), and 'religious bodies' (once)." *Id.* at 735.

320. *Id.*

321. *Id.* at 736–37 (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring)).

schoolchildren is totally inapposite to Satmar Hasidism's ability to perform the traditional roles of a mediating institution. Satmar Hasidism "fuses" with the state only in the abstract sense that the state has done something to help it. The school board, however, while invariably composed entirely of devout Satmars, will occupy its time tending to the needs of its *secular* public schools. Unlike the law in *Grendel's Den*, the arrangement does not grant Satmar Hasidism itself the authority to act as the state, and the state did not invite the Satmars to use their political authority to give effect to the values of Satmar Hasidism.

Finally, the arrangement in *Kiryas Joel* hardly implicates religion's role as a values-defining agent. In an ideal political system, mediating institutions enjoy the freedom to orchestrate public debate about the values that society should adopt. Yet while individuals, independent mediating institutions, and the state all contribute to these debates, it remains the duty of the political branches to make decisions among the competing visions of the good. In *Grendel's Den*, the state ceded that responsibility to religious institutions. A school board full of Satmars, on the other hand, still functions independently of Satmar Hasidism, leaving both this arm of the state and the institution of Satmar Hasidism free to perform their respective functions in the political process. This figurative fusion is palpably different from the functional fusion at issue in *Grendel's Den*, regardless of the fact that Kiryas Joel's boundaries were drawn with the needs of Satmar children in mind.

The Court's objection, then, appears to be a substantive one, concerned not with the actual procedural consequences of the fusion of civic and ecclesiastical authority, but with the state's willingness to benefit religious groups and the mere appearance of a union between church and state. The New York Court of Appeals explicitly relied upon these policy-oriented rationales when it objected to the law's attendant "'symbolic union of church and State.'"[322] Although the U.S. Supreme Court relied upon the "no fusion" rule of *Grendel's Den* rather than the *Lemon* test, the highly abstract interpretation of *Grendel's Den* needed to accommodate the dissimilar fusion at issue in *Kiryas Joel* reveals that the majority's objection was fundamentally substantive. As Justice Souter said, "[w]here 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion."[323] In other words, the

322. *Id.* at 695 (quoting Grumet v. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist., 618 N.E.2d 94, 100 (N.Y. 1993)).

323. *Id.* at 699.

constitutional offense became not the *actual* degree of civic authority exercised by religious institutions, but the *motivation* of the state in distributing certain benefits, and the resultant *appearance* of fusion, regardless of how functionally separate the religious institution and the state remain.

From a process perspective, this jurisprudence offends the principle that society's value choices should be left to elected representatives absent actual injury to the political process. The New York legislature, for whatever reason, but by all accounts a noble one, thought the state's interest served by sparing the Yiddish-speaking, handicapped children of Kiryas Joel the added burden of navigating the mores of a foreign culture. As this values judgment does not implicate the autonomy of religious institutions, process theory would find no establishment here.

3. Remedying Religious Favoritism on the Part of the Government

The *Kiryas Joel* opinion also invites consideration of the constitutional implications of religious favoritism on the part of the government. Indeed, the Court's "fusion" analysis, which focused on the motivation of the legislature rather than the functional consequences of the law, could be read simply as an application of the purported constitutional requisite that "government should not prefer one religion to another, or religion to irreligion."[324] Nevertheless, the Court addressed this concern separately, inquiring "whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups."[325] Although there was no evidence that any group besides the Satmars sought creation of a separate school district, the Court ruled that the nature of the legislation bespoke the risk that New York would not *in the future* exercise its authority with the requisite degree of religious neutrality.[326]

From a process perspective, this ruling is indeed a serious charge. Mediating institutions cannot flourish when the government needlessly silences their voices, or disadvantages them through inequitable distribution of benefits based on reasons inarticulable in secular terms. As the *Kiryas Joel* majority noted, "we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals

324. *Id.* at 703.
325. *Id.* at 702.
326. *Id.*

in turning aside Establishment Clause challenges."[327] Current doctrine provides that "a [governmental] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."[328] For instance, in *Zelman v. Simmons-Harris*, the Court held that school vouchers programs, which reimburse parents for the cost of private education, even at parochial schools, were likely constitutional when "neutral with respect to religion, and [where they] provide[] 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."[329]

These sensible rulings reflect the reality that any abstract contact between public dollars and religious institutions, to some an odious "symbolic" union between church and state, does not compromise the ability of mediating institutions to perform their political functions, provided that each mediating institution has the chance to compete for or benefit from the funds. Thus, the constitutional concern must be favoritism that implicates religion's process-oriented role, even in cases such as *Kiryas Joel* wherein the government distributes its largess to some religious groups and not others. Process theory, however, rejects the notion that legislative policy choices cannot consider religious difference or the special needs of religious groups, provided that choice does not implicate the process-oriented role of religious institutions generally or discriminate against religious groups as such.

The notion that a legislative accommodation like that at issue in *Kiryas Joel* must be available to all religious groups or none at all is yet another manifestation of the belief that the Establishment Clause embodies a substantive vision of strict separation between church and state. That is, the fact that Kiryas Joel Village alone received a special school district offends only a policy preference for the complete irrelevance of religious criteria in legislative decisionmaking. This vision of neutrality does little to further the needs of a properly functioning political process. As Justice O'Connor noted, *Kiryas Joel* "is a close question, because the Satmars may be the only group who currently need this particular accommodation."[330] Under a process-oriented theory of establishment, which seeks to maintain the optimal political environment for mediating institutions of religion to flourish, this fact controls the case. If the Satmars are the only group who

327. *Id.* at 704.
328. Mueller v. Allen, 463 U.S. 388, 398–99 (1983).
329. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).
330. *Kiryas Joel*, 512 U.S. at 716 (O'Connor, J., concurring).

want, or would significantly benefit from, a special school district, then giving them one poses no threat to other mediating institutions. Under such a law, the community of Satmars is better off, and no group is worse off; there is no process defect here. Indeed, considering the deference paid by the New York legislature to such a small minority of its citizens, the political process appears to be functioning rather well.

Of course, discrimination between religious sects may present a process violation when the legislature acts without a convincing secular justification. For example, a school vouchers program that denied funds to certain parochial schools should not stand unless the legislature's decision remained "neutral" as to the religious identity of the schools by basing its distinctions upon secular criteria, such as the educational standards of those schools. From a process perspective, religiously motivated discrimination against religious sects in the distribution of benefits harms mediating institutions as such, discourages their participation in the political process, and can empower the voices of some over others. Religiously neutral distinctions, on the other hand, while perhaps threatening the latter result, neither harm mediating institutions as such nor discourage them from performing their vital political functions because the process responsible for the law remains fair. As Ely argued, "[t]he constitutionality of most distributions . . . cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question."[331] If the community of religious mediating institutions retains its full authority as a third player in the political process, as in *Kiryas Joel*, then process theory would not readily find an establishment.

4. Religious Symbolism in the Public Square

Perhaps the most material consequence of applying process theory to the religion clauses would concern today's most controversial Establishment Clause issue, religious symbolism in the public square. As argued above in the context of the *McCreary County* and *Van Orden* cases, here the Court's jurisprudence of prepossessions reigns, especially as enforced through the embattled "endorsement test." Among its many manifestations, the endorsement test "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the

331. ELY, *supra* note 6, at 136.

political community.'"[332] As Justice O'Connor explains, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[333]

Notably absent from this list of evils is any injury to a properly functioning community of mediating institutions. Religious symbolism in the public square, while highly offensive to some, simply does not implicate the ability of mediating institutions of religion to contribute to the political life of the nation. Moreover, individuals who infer messages denigrating their status as members of the political community are still free to participate in their own mediating institutions, and through them perhaps convince elected leaders that a secular public square better serves the public interest. Virtually any law that concerns public policy communicates potentially offensive messages from which one might infer that those who embrace values contrary to the state's are not full members of the political community. Process theory offers no justification for a rule that government must observe a categorical ban on messages that implicate religion but remains otherwise free to communicate potentially offensive secular ideas. As Berger and Neuhaus argue, "[n]obody has a [constitutional] right not to encounter religious symbols in public places and thus to impose his aversion to such symbols on the community that cherishes them."[334] In short, the political process is hardly implicated by the presence or absence of, for instance, the Ten Commandments on the courthouse wall. The propriety of religious symbols on public property is a policy decision best left to those in whom the Constitution entrusts policy decisions: elected officials.

Ultimately, the dissatisfactory indeterminacy compelled by the Court's approach to these issues encourages a jurisprudence "on which [judges] can find no law but [their] own prepossessions."[335] As is common with noninterpretivist adjudication, asking policy-oriented questions about the proper degree of contact between church and state often becomes a contest of competing wills, none of which should enjoy constitutional status without some process-oriented justification. The Court has used the

332. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). For other manifestations of the endorsement test, see *id.* at 592–94.

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

334. BERGER & NEUHAUS, *supra* note 2, at 32–33 (emphasis omitted).

335. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

endorsement test to strike down a crèche at the county courthouse but to uphold a display that included a menorah, a forty-five foot Christmas tree, and a sign entitled "Salute to Liberty."[336] In that case, certain Justices thought the crèche's "religious meaning [was] unmistakably clear"[337] while others thought the crèche a "purely passive symbol[] of [a] religious holiday[]."[338] As for the menorah, Justice Blackmun thought it "a religious symbol," though "not exclusively religious," being "the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions."[339] Other Justices disagreed, declaring that a "menorah is indisputably a religious symbol, used ritually in a celebration that has deep religious significance."[340] In a recent case, certain Justices decided that "[t]he phrase 'under God' is in no sense . . . an endorsement of any religion, but a simple recognition . . . [that] '[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.'"[341] Similarly, certain Justices think that the practice of legislative prayer "is simply a tolerable acknowledgement of beliefs widely held among the people of this country,"[342] while others think that "[l]egislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause."[343]

Is a crèche a meaningful expression of faith or a "purely passive symbol?" Should a menorah's "religious [or] secular dimensions" control the constitutional inquiry? Does legislative prayer defy the requirements of neutrality or is it "tolerable?" Objective answers to these questions do not exist; they are policy questions worthy of democratic debate, not judicial usurpation. For this reason, process theory counsels that courts should leave subjective inquires into the propriety of religious or secular public squares to the capable mechanics of the political process, and reserve constitutional sanction for state action that materially impedes the political contributions of mediating institutions.

336. *See ACLU Greater Pittsburgh Chapter*, 492 U.S. at 578–79, 582.

337. *Id.* at 598.

338. *Id.* at 664 (Kennedy, J., concurring in part and dissenting in part).

339. *Id.* at 613–14 (opinion of the Court).

340. *Id.* at 643 (Brennan, J., concurring in part and dissenting in part).

341. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring) (quoting H.R. REP. NO. 83-1693, at 2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340).

342. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

343. *Id.* at 808 (Brennan, J., dissenting).

VI. CONCLUSION

John Hart Ely's process theory sought to answer the perennially difficult question of how best to secure liberty under a Constitution that juxtaposes a fundamentally majoritarian government with the antimajoritarian institution of judicial review.[344] He proposed a solution under which courts leave society's policy decisions to politically accountable branches of government, and instead assume the vital task of securing a responsive and equitable political process.[345] In that same spirit, this process theory of the religion clauses seeks to provide a coherent theory of Free Exercise and Establishment Clause adjudication that preserves a healthy political process while enabling "institutions of religion . . . to make their maximum contribution to the public interest."[346] The hope is that a vibrant community of mediating institutions might further effect Ely's commitment to the maintenance of a just and fair society.

344. *See* ELY, *supra* note 6, at 73, 100.
345. *See id.* at 101–04.
346. BERGER & NEUHAUS, *supra* note 2, at 33.