

Does the Establishment Clause Require
Religion to be Confined to the Private Sphere?

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Abstract

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Through the first four decades or so of the U.S. Supreme Court's church-state jurisprudence the Court generally sought to confine religion to the private sphere, on the grounds that the establishment clause requires such a result. While the Rehnquist Court has been more open to religion in the public sphere than previous Courts, the claim that the establishment clause requires religion to be restricted to the private sphere retains strong support among a minority of Supreme Court justices. Witness Justice Souter's fierce objection, in *Zelman v. Simmons-Harris* (2002), to the Court's approval of the use of publicly funded tuition vouchers in religious schools, proclaiming not only that the constitution relegates religion to the private sphere but that religious freedom itself is partly premised on the notion that religion be kept "relatively private."

The aim of this paper is to critically examine the rationales—respect for rights of conscience, to protect the health and vigor of religion, and the preservation of social peace—upon which the privatization principle rests. While these are appropriate issues to focus upon, the "privatization" justices do so abstractly and uncritically, with little attention to the lived, historical reality of religion's involvement in the public sphere. Analyzing these issues in a highly abstract fashion, I argue, leads those justices who wish to confine religion to the private sphere to ignore real issues of religious liberty. Consequently, instead of a searching inquiry into how, amidst deep religious diversity and an ever expanding regulatory state, religious liberty can be protected for all, abstract, conclusory arguments about the purported objective of the establishment clause are offered.

INTRODUCTION

A recurring theme in the U.S. Supreme Court’s establishment clause jurisprudence is the claim that the First Amendment requires religion to be confined to the private sphere.¹ In the case that launched the Supreme Court’s modern establishment clause jurisprudence—*Everson v. Board of Education*²—for example, Justice Rutledge, dissenting from the Court’s approval of the use of public funds to reimburse transportation costs to families whose children attended Catholic schools, objected on the grounds that religion and religious schooling “is exclusively a private affair.”³ Similarly, writing for the Court in *Lemon v. Kurtzman*,⁴ where it ruled that it was unconstitutional for the states of New Jersey and Pennsylvania to supplement the salaries of teachers teaching secular subjects in parochial schools, Chief Justice Burger asserted that the “[c]onstitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice.”⁵ The privatization principle, if it may be called that, thus seeks to deny religion any role in public life.⁶

While the Supreme Court through the first four decades or so of its establishment clause jurisprudence largely sought to restrict religion to the private sphere, the Rehnquist

¹ See Gerard V. Bradley, *Dogmatomachy: A “Privatization” Theory of Religion Clause Cases*, 30 St. Louis U.L.J. 275 (1986); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 Cath. U.L. Rev. 19 (1991), and Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771 (2001). Bradley, as the title of his article suggests, focuses on the way in which the First Amendment has been used by the Supreme Court to minimize the role of religion in public life. Myers, on the other hand, focuses not only on religion cases but also substantive due process cases and the extent to which the Court, or various members of it, have sought to limit the role of religious beliefs in lawmaking. Garnett argues that the limitation on political speech and activities imposed on religious institutions receiving tax exemptions wrongly communicates the message that religion is purely a private matter.

² 330 U.S. 1 (1947).

³ *Id.* at 53.

⁴ 403 U.S. 602 (1971).

⁵ *Id.* at 625.

⁶ Noting this, Justice Scalia once heatedly accused some of his colleagues of treating religion like pornography, i.e., as “some purely personal avocation that can be indulged entirely in secret . . . in the privacy of one’s room.” *Lee v. Weisman*, 505 U.S. 577, 645 (Scalia, J., dissenting).

Court has not followed suit, at least not in public assistance cases.⁷ It has instead evinced an openness to religion in public life not found in earlier years. Even so, a minority of justices on the Rehnquist Court remain firmly committed to the notion that religion should be restricted to the private sphere. In *Zelman v. Simmons-Harris*,⁸ for example, Justice Souter fiercely objected to the Court’s approval of the use of publicly funded tuition vouchers in religious schools, proclaiming not only that the constitution relegates religion to the private sphere but that religious freedom itself is partly premised on the notion that religion be kept “relatively private.”⁹ The establishment clause banishes religion to the private sphere, Justice Souter insists, in order to “guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes.”¹⁰

The aim of this essay is to critically examine the rationales—respect for rights of conscience, to protect the health and vigor of religion, and the preservation of social

⁷ See *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (allowing a state-employed sign-language interpreter to assist a deaf student enrolled in a Roman Catholic high school); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (finding that a public university does not violate the establishment clause when it makes student activity funds available to various student groups, including a student-run religious organization, on the basis of neutral criteria); *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing state-employed teachers to offer instruction in remedial and enrichment courses in parochial schools) (*overruling* *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985)); *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding a federal law providing instructional materials such as library books, media materials, and computers to religious schools) (*overruling* parts of *Meeke v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977)); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding an Ohio law providing tuition assistance to students enrolled in religious schools). See also *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding the constitutionality of a Minnesota law allowing parents to take a tax deduction for school expenses, irrespective of whether their children attended public or private schools, including parochial schools); and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (finding no constitutional violation in allowing a college student to use neutrally available state vocational rehabilitation assistance funds at a Christian college).

⁸ 536 U.S. 639 (2002).

⁹ *Id.* at 716.

¹⁰ *Mitchell*, 530 U.S. at 868 (Souter, J., dissenting).

peace—upon which the privatization principle rests. I will argue that the reasons given in support of the privatization claim are unpersuasive, indeed that the stated reasons hardly rise to the level of an argument. My argument is not that Justice Souter and other justices who wish to confine religion to the private sphere are wrong to focus on rights of conscience or the potential for religion to become corrupted or civic peace but that they do so abstractly and uncritically, with little attention to the lived, historical reality of religion’s involvement in the public sphere. Approaching the question from such a high level of abstraction, I argue, leads the “privatization” justices to gloss over real issues of religious liberty. Instead of a deep reflection on the most desirable relationship between religion and government in the contemporary context of pluralism and a far-reaching regulatory state, the privatization justices dogmatically insist that the establishment clause was intended to confine religion to the private sphere. I do not deny that there are good reasons why religion should in some circumstances be relegated to the private sphere. The facile character of the claim that the constitution always requires it, however, leaves the strong impression that the privatization position rests not so much upon a careful sifting of evidence or a thoughtful consideration of how religious liberty can be advanced for all—the religious and nonreligious alike—but upon unexamined notions about how liberal society can be made to work.

This essay is largely critical. I thus do not here explore the philosophical commitments that seem to be embedded in the privatization position.¹¹ Nor do I try

¹¹ In a companion essay in progress, tentatively titled “Two Concepts of Liberalism in Establishment Clause Jurisprudence,” I argue that the privatization of religion interpretation of the establishment clause seems to be rooted in an understanding of the liberal political tradition that regards religion and ways of life rooted in it to be inferior to reason and the examined life. With a negative view of religion as the starting point, the conclusion that the constitution restricts religion to the private sphere seems not so much the result of careful constitutional inquiry but as an outcome foreordained from the outset. I argue further that the Rehnquist Court’s qualified acceptance of religion in the public sphere seems rooted in a different

either to defend the Rehnquist Court's greater acceptance of religion in the public sphere or to demarcate the appropriate boundary between religion and the state. With these caveats in mind, Part I briefly summarizes current establishment clause doctrine, highlighting the Rehnquist Court's different approaches to religious practices in government schools versus public aid that benefits religious schools. The aim in Part I is not to give a detailed account of the Court's establishment clause jurisprudence, or to try to synthesize its various pronouncements on church-state issues, but to briefly describe important doctrinal changes the Rehnquist Court has fashioned as regards religion in the public sphere. As the Court has become more open to religion in the public sphere, those justices committed to the privatization of religion have been moved to explain more thoroughly their views as to why religion should be confined to the private sphere. Part II closely examines these arguments, focusing on the rationales given in support of the privatization commitment. While many justices have been committed to confining religion to the private sphere,¹² I primarily focus on the opinions of Justice Souter, who has more clearly explained the reasons therefore. Part III summarizes and restates my criticisms of the claim that the establishment clause restricts religion to the private sphere.

understanding of the liberal political tradition and the place of religion in it than that which informs the commitment to confine religion to the private sphere.

¹² Richard Myers noted in 1991 that Justices Brennan, Marshall, Blackmun, and Stevens "consistently" sought to confine religion to the private sphere. Myers, *supra* 1, at 79. Among current justices, Justices Souter, Ginsburg, and of course Stevens do so as well. See the dissenting opinions in *Mitchell* and *Zelman*. Justice Breyer's commitment to privatizing religion seems to be context specific. For example, he joined Justice O'Connor's concurring opinion in *Mitchell* approving of the use in religious schools of instructional materials purchased with federal funds. *Mitchell*, 530 U.S. at 836 (O'Connor, J., concurring). He objected to the tuition vouchers at issue in *Zelman*, however, because they "differ . . . in both *kind* and *degree* from aid programs upheld in the past." That is, he objected because the vouchers "direct financing to a core function of the church: the teaching of religious truths to young children" and because they involve "a considerable shift of taxpayer dollars from public secular schools to private religious schools." *Zelman*, 536 U.S. at 726-27 (Breyer, J., dissenting.) See *infra* text accompanying notes 170-73.

I. Contemporary Establishment Clause Jurisprudence

The Rehnquist Court draws a distinction between government directly supporting or endorsing religion and the expenditure of public funds in religious institutions upon the free choice of public aid recipients. In situations involving the government in the direct support of religion, the Rehnquist Court has not deviated from earlier judgments about the unconstitutionality of such practices.¹³ For example, it has invalidated a state law prohibiting the teaching of evolutionary theory in public schools and universities unless creation science was also taught,¹⁴ the practice of placing an unadorned Christian nativity scene inside a county courthouse,¹⁵ clergy-led public school graduation ceremony prayers,¹⁶ and student-led prayers at public school athletic events.¹⁷ While the rationale the Court gave for striking each practice varied from the lack of a secular purpose,¹⁸ to impermissible endorsement,¹⁹ to governmental coercion,²⁰ at bottom the problem was that each law or practice involved the government in the direct support or

¹³ *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding state-sponsored nondenominational prayer in which student participation was voluntary); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (forbidding commencing the school day with teacher-led Bible reading and recitation of the Lord's Prayer); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking a state law prohibiting the teaching of evolutionary theory in public schools and universities); *Stone v. Graham*, 449 U.S. 39 (1980) (forbidding the posting of the Ten Commandments in school rooms); and *Wallace v. Jaffree*, 472 U.S. 38 (1985) (barring commencing the school day with a moment of silence for either meditation or voluntary prayer).

¹⁴ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

¹⁵ *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

¹⁶ *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁷ *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290 (2000).

¹⁸ "In this case, appellants have identified no clear secular purpose for the [law]." *Edwards*, 482 U.S. at 585.

¹⁹ "[The county] has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message . . . nothing more is required to demonstrate a violation of the Establishment Clause." *County of Allegheny*, 492 U.S. at 601-2.

²⁰ "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment." *Lee*, 505 U.S. at 599. "Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Santa Fe Ind. School Dist.*, 530 U.S. at 312.

sponsorship of religion, which violates the Court’s interpretation of the establishment clause as requiring governmental neutrality towards religion.

As is well known, “neutrality” was established as the constitutional benchmark for church-state issues in *Everson v. Board of Education*,²¹ where the Court declared that the establishment clause requires “the state to be neutral in its relations with groups of religious believers and non-believers.”²² The meaning of “neutrality” is of course not self-evident, but in 1971 in *Lemon v. Kurtzman*²³ the Court synthesized its post-*Everson* establishment clause rulings and famously declared that government acts neutrally with regard to religion when its laws have secular purposes, the primary effects of which neither promote nor hinder religion, and which do not lead to an “excessive entanglement” of religion and the government.²⁴ Although the *Lemon* test was given as a standard for establishment clause issues, it is not clear that it has made much of a difference in the Court’s treatment of religious practices in government institutions. In the five post-*Lemon* cases the Court has decided involving religion in the public schools, for example, three were decided on the basis of a lack of a secular purpose—*Stone v. Graham*,²⁵ *Wallace v. Jaffree*,²⁶ and *Edwards v. Aguillard*,²⁷—indicating that a three-part

²¹ 330 U.S. 1 (1947).

²² *Id.* at 18.

²³ 403 U.S. 602.

²⁴ *Id.* at 612-13. The secular purpose test was drawn from *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), where the Court declared unconstitutional laws requiring Bible reading, without comment, in the public schools at the beginning of each school day. The primary effect test was first announced in *Bd. of Education v. Allen*, 392 U.S. 236 (1968), where the Court affirmed a state law requiring local school districts to lend textbooks without charge to parochial school students. The excessive entanglement prong was first articulated in *Walz v. Tax Commission*, 397 U.S. 664 (1970), where the Court ruled that tax exemptions for property owned by religious organizations that is used exclusively for religious purposes do not violate the establishment clause.

²⁵ 449 U.S. 39 (1980) (forbidding the posting of the Ten Commandments in school rooms).

²⁶ 472 U.S. 38 (1985) (barring commencing the school day with a moment of silence for either meditation or voluntary prayer).

²⁷ 482 U.S. 578 (1987) (invalidating a state law prohibiting the teaching of evolutionary theory in public schools and universities unless creation science was also taught).

test is wholly unnecessary for deciding these types of cases. And the other two—*Lee v. Weisman*,²⁸ and *Santa Fe Independent School District v. Doe*²⁹—were decided without resort to the *Lemon* test.³⁰ The *Lemon* test was likewise ignored in *Marsh v. Chambers*,³¹ where the Court ruled, mainly on historical grounds, that state legislative chaplains do not violate the establishment clause.

While the *Lemon* test appears to have had little impact in cases involving the government in the direct support of religion, it has featured more prominently in the Court’s effort to distinguish permissible versus impermissible governmental aid to religious institutions.³² To be sure, as in the religion-in-government cases, the Court

²⁸ 505 U.S. 577 (1992).

²⁹ 530 U.S. 290 (2000).

³⁰ “Our decision in *Lee v. Weisman*[] conspicuously avoided using the supposed [*Lemon*] test” *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (Scalia, J., concurring) (citation omitted).

³¹ 463 U.S. 783 (1983).

³² *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971) (declaring unconstitutional on excessive entanglement grounds state laws that supplemented the salaries of teachers teaching secular subjects in religious schools); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 757 (1973) (striking a New York law that provided various forms of public assistance to private schools (and families with children enrolled in them) in the state, most of which were religiously affiliated, for advancing religion); *Meek v. Pittenger*, 421 U.S. 349 (1975) (allowing secular textbooks purchased with public funds to be loaned to religious schools but disallowing the use of instructional materials purchased with public money (on advancement grounds) and also prohibiting the provision of auxiliary services, such as counseling and speech and hearing therapy (on excessive entanglement grounds)); *Wolman v. Walter*, 433 U.S. 229 (1977) (allowing the use of state-funded standardized tests and scoring services and allowing state-employed speech and hearing therapists, counselors, doctors, and nurses to examine parochial school students on school grounds but forbidding public schools from loaning instructional materials to parochial schools (on advancement grounds) and disallowing the use of public funds for field trip transportation for parochial school students (on entanglement grounds)); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (no *Lemon* violation in a state law providing financial reimbursement to religious schools for the costs of state-mandated testing and record keeping); *Mueller v. Allen*, 463 U.S. 388 (1983) (no *Lemon* violation in a Minnesota law allowing parents to take a tax deduction for school tuition costs, irrespective of whether their children attended public or private schools, including parochial schools); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985) (forbidding on advancement grounds (*Ball*) and excessive entanglement grounds (*Aguilar*) the use of state and federal aid to employ public school teachers in parochial schools for the teaching of remedial, enrichment, and special education courses); and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (no *Lemon* violation in allowing a college student to use neutrally available state vocational rehabilitation assistance funds at a Christian college).

sometimes resolves public aid cases without invoking *Lemon*.³³ More significantly, in 1997 in *Agostini v. Felton*³⁴ the *Lemon* test was explicitly modified in two significant ways as regards its application in aid-to-religion cases. First, the entanglement portion of the *Lemon* test was folded into the effects prong of the test. As the Court said of itself and the *Lemon* test,

the factors we use to assess whether an entanglement is ‘excessive’ are similar to the factors we use to examine ‘effect.’ That is, to assess entanglement, we have looked to ‘the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.’ Similarly, we have assessed a law’s ‘effect’ by examining the character of the institutions benefited (e.g., whether the religious institutions were ‘predominantly religious’) and the nature of the aid that the State provided (e.g., whether it was neutral and nonideological).³⁵

Agostini thus reduces the *Lemon* test to a two-part inquiry: whether the law has a secular purpose and whether its effect is the advancement of religion. Second and more significantly is the way *Agostini* unambiguously alters the inquiry into whether a law advances religion. Prior to *Agostini* advancement of religion had generally been found if the aid provided could be used to support the religious mission of the religious institution. To this end, a line was generally drawn between aid that the Court believed could be limited in its use to secular purposes only and aid that could not be so limited.

Consequently, aid that supplied such things as secular textbooks³⁶ and health and

³³ See *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (no establishment clause violation in allowing a state-employed sign-language interpreter to assist a deaf student enrolled in a Roman Catholic high school); and *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (finding that a public university does not violate the establishment clause when it makes student activity funds available to various student groups, including a student-run religious organization, on the basis of neutral criteria.)

³⁴ 521 U.S. 203 (1997) (partially overruling *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and overruling *Aguilar v. Felton*, 473 U.S. 402 (1985).

³⁵ *Agostini*, 521 U.S. at 232 (citations omitted).

³⁶ *Meek v. Pittenger*, 421 U.S. 349 (1975).

therapeutic services³⁷ was permitted but instructional materials³⁸ and the provision of remedial and enrichment courses were not.³⁹ In *Agostini*, however, the Court noted that its rulings in *Witters*⁴⁰ and *Zobrest*⁴¹ had called into question its project of categorizing aid either as secular or religious. The more telling inquiry, the Court reasoned, was whether the advancement of religion was attributable to the state or to individuals exercising “genuinely independent and private choices.”⁴² Judgments about whether a law provides genuine choice between secular and religious alternatives, in turn, depends on whether “the aid is allocated on the basis of neutral, secular criteria that neither favors nor disfavors religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.”⁴³ In other words, laws that provide neutrally available public funds on the basis of secular criteria, e.g., financial need, and which provide no incentives for recipients to choose religious alternatives are nevertheless constitutional even when the funds are used to further religion. In such instances the “advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.”⁴⁴ *Agostini* thus made clear that the central inquiry in public assistance cases was not whether aid could be limited to secular purposes but whether the

³⁷ *E.g.*, *Wolman v. Walter*, 433 U. S. 229 (1977).

³⁸ *Id.*

³⁹ *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) and *Aguilar v. Felton*, 473 U.S. 402 (1985).

⁴⁰ 474 U.S. 481 (1986).

⁴¹ 509 U.S. 1 (1993).

⁴² *Agostini*, 521 U.S. at 226 (citing *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487 (1986)).

⁴³ *Agostini*, 521 U.S. at 231.

⁴⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

funds that ultimately furthered religion did so directly, which is forbidden, or by the free and independent choices of aid recipients, which is acceptable.⁴⁵

Agostini therefore seemed to clearly signal a certain acceptance on the Court's behalf of religion in public life that previous cases such as *Mueller v. Allen*,⁴⁶ *Witters*,⁴⁷ and *Zobrest*⁴⁸ had prefigured. The Court's tolerance of religion in the public sphere was confirmed in *Mitchell v. Helms*,⁴⁹ where the Court reversed course to permit the use of publicly-purchased instructional materials such as library books, media materials, and computers in religious schools. The Court's most recent establishment clause pronouncement, moreover, finding no establishment clause violation in a state law providing tuition assistance to students enrolled in religious schools would seem to solidify beyond question its (current) position on religion in public life.⁵⁰

What then can we say about the Rehnquist Court's approach to establishment clause issues? It seems its approach seeks not so much to confine religion to the private sphere but to forbid the government's direct support of it. Religious practices in government, that is, the public schools, inescapably involve the government in the direct support of religion. To avoid this, a majority of the Rehnquist Court continues to insist that the establishment clause requires religion to be confined to the private sphere. "The

⁴⁵ The Court in *Agostini* thus ruled that there is no constitutional prohibition to using public funds to provide remedial and enrichment courses in religious schools when such funds are provided to all students meeting secular eligibility requirements when there is some modest monitoring scheme in place to make sure that publicly-paid teachers do not engage in religious instruction. *Agostini*, 521 U.S. at 234-5. To this end, *Agostini* completely overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), and partially overruled *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985).

⁴⁶ 463 U.S. 388 (1983) (no establishment clause violation in a Minnesota law allowing parents of all school age children to take a tax deduction for school tuition costs, including parents whose children are enrolled in religious schools).

⁴⁷ 474 U.S. 481 (1986).

⁴⁸ 509 U.S. 1 (1993).

⁴⁹ 530 U.S. 793 (2000) (overruling portions of *Meeke v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977)).

⁵⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

design of the constitution[,]” Justice Kennedy wrote for the Court in 1992, “is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.”⁵¹ However, the support of religion present in religion-neutral assistance programs in which individual aid recipients direct public funds to secular and religious alternatives of their choosing is attributable to individual choice, not to the government. In such circumstances individual choice severs the link between government and the advancement of religion. With religious practices in public schools, however, there is no individual choice that can be exercised that would cut the impermissible tie between government and the support of religion. The support of religion present in this context thus seems unavoidably attributable to government.

Focusing on the requirement that government act neutrally towards religion helps to illustrate the Court’s two-track approach to these issues. If religious practices in governmental institutions necessarily involve government in the advancement of religion, government has then of course failed to act neutrally with regard to religion, which since *Everson* the Court has construed to be the command of the establishment clause.⁵² To ensure that government acts neutrally with regard to religion in terms of its own practices, the Court has consistently insisted that religion be restricted to the private sphere. But what does the principle of neutrality require as regards neutrally available governmental assistance programs? *Lemon* and its progeny typically found that government had advanced religion, or acted non-neutrally towards religion, when public

⁵¹ *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

⁵² *See supra* text accompanying notes 21-22.

funds were used in a way that could be used for religious purposes.⁵³ The Court’s movement away from classifying the aid in question as supporting either the secular or religious aspects of a religious institution⁵⁴ has led to a reconceptualization of what neutrality means vis-à-vis neutral assistance programs. As the majority opinion in *Zelman v. Simmons-Harris*⁵⁵ indicates, neutrality understood as “evenhandedness” between religious and secular alternatives now appears to be the singular standard employed by the Court for judging the constitutionality of aid programs in which public funds wind up in the treasury of religious schools.⁵⁶ That is, so long as government assistance programs have a secular purpose and do not define recipients of aid on the basis of religion nor attempt to steer recipients toward the religious alternatives by, say, providing greater assistance to recipients who choose the religious alternative, there is no violation of the neutrality requirement when recipients themselves direct the funds to religious institutions.⁵⁷ Four justices, led by Justice Souter, argue that evenhandedness alone is not an acceptable constitutional yardstick. Instead, evenhandedness “is to be considered only along with other characteristics of aid, its administration, its recipients,

⁵³ See *supra* text accompanying notes 37-40.

⁵⁴ See *supra* text accompanying notes 41-46.

⁵⁵ 536 U.S. 639 (2002).

⁵⁶ *Id.* at 696 (Souter, J., dissenting). See also *Mitchell*, 530 U.S. at 878-884 (Souter, J., dissenting) (describing three different meanings the Court has ascribed to the word “neutrality”: “as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it.” *Id.* at 878. The plurality opinion in *Mitchell* treated evenhandedness as the sole constitutional measure, a conclusion criticized by Justice O’Connor in her concurring opinion (*Mitchell*, 530 U.S. at 837-40) and by Justice Souter in his dissent. The plurality “espouses a new conception of neutrality as a practically sufficient test of constitutionality that would, if adopted by the Court, eliminate enquiry into a law’s effects” and the plurality “appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test establishment constitutionality of school aid.” *Mitchell*, 530 U.S. at 869, 900 (Souter, J., dissenting). Justice O’Connor now appears to agree, however, that evenhandedness alone satisfies the First Amendment, giving it precedential value that the *Mitchell* plurality opinion could not. See *Zelman*, 536 U.S. at 669-70 (O’Connor, J., concurring) and *Zelman*, 536 U.S. at 696 n.6 (Souter, J., dissenting).

⁵⁷ *Zelman*, 536 U.S. at 653-54.

or its potential that have been emphasized over the years as indicators of just how religious the intent and effect of a given aid scheme really is.”⁵⁸ On this view, even a genuinely neutral public aid program⁵⁹ that ends up subsidizing the religious mission of religious schools through the free and independent choices of aid recipients is unconstitutional.⁶⁰ This is so, Justice Souter argues, because public aid that supports the religious mission of a religious institution violates “every objective supposed to be served by the bar against establishment.”⁶¹ These objectives include “respect for freedom of conscience . . . , sav[ing] religion from its own corruption”⁶² and “protecting the Nation’s social fabric from religious conflict.”⁶³ It is to an examination of each of these rationales underpinning the privatization thesis that I now wish to turn.

⁵⁸ *Mitchell*, 530 U.S. at 884 (Souter, J., dissenting).

⁵⁹ It should be noted that Justice Souter denies that the voucher program at issue in *Zelman* is neutral. In his view, the voucher program provides recipients with a financial incentive to select religious schooling. *Zelman*, 536 U.S. at 697-98 (Souter, J., dissenting). The *Zelman* majority, on the other hand, concluded that the program provides financial incentives for public schooling. *Zelman*, 536 U.S. at 653-54. The dispute as to whether the voucher program provided incentives or disincentives for religious schooling is beyond my interest here but it is worth noting that the disagreement seems to turn on how to count the amount of state funding available to students choosing to remain in public school. Justice Souter focuses on the fact that the state of Ohio offers up to \$2,250 tuition assistance for students who opt out of the Cleveland public schools but only up to \$324 in tutoring assistance for the students choosing to remain in the Cleveland public schools, thereby seemingly providing a financial incentive to opt out of public schooling. *Zelman*, 536 U.S. at 697-98 (Souter, J., dissenting). The majority, however, focuses on the fact that the amount of state money going to Cleveland public schools, including community and magnet schools, is two to three times more than can be paid to a religious school. *Zelman*, 536 U.S. at 654. The majority also emphasizes that children choosing to remain in public school have no co-pay obligation but that families choosing private schooling are obligated to pay a portion of the private school tuition, thereby creating an additional disincentive to choose religious schooling. *Id.*

⁶⁰ “[T]he basic principle of establishment scrutiny of aid remains the principle . . . that there may be no public aid to religion or support for the religious mission of any institution.” *Mitchell*, 530 U.S. at 884 (Souter, J., dissenting). “[E]ven a genuine choice criterion is [not] up to the task of the Establishment Clause when substantial state funds go to religious schooling.” *Zelman*, 536 U.S. at 703 (Souter, J., dissenting).

⁶¹ *Zelman*, 536 U.S. at 708 (Souter, J., dissenting).

⁶² *Zelman*, 536 U.S. at 711 (Souter, J., dissenting). *See also Mitchell*, 530 U.S. at 870-72 (Souter, J., dissenting) (arguing that public support of religion “violates the fundamental principle of freedom of conscience,” that it “corrupts religion,” and that it “is inextricably linked with conflict”).

⁶³ *Zelman*, 536 U.S. at 717 (Breyer, J., dissenting).

II. The Privatization Rationales

As I noted at the outset, rights of conscience, the potential for government to harm religion, and social peace are not inappropriate objects of concern. The burden of this part of the paper, however, is to illustrate the superficial character of the scrutiny Justice Souter and other adherents of the privatization thesis give to these issues.

A. Freedom of Conscience

Justice Souter opposes the expenditure of neutrally available public funds in religious schools on the grounds that Thomas Jefferson's *Virginia Act for Establishing Religious Freedom* and James Madison's *Memorial and Remonstrance against Religious Assessments* "establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it."⁶⁴ Specifically, Justice Souter cites Jefferson for the proposition that neutrally available funds spent in religious schools violate rights of conscience by infringing upon the principles that "no one 'shall be compelled to . . . support any religious worship, place, or ministry whatsoever'"⁶⁵ and that "'compel[ling] a man to furnish contributions of money for propagation of opinions which he disbelieves, is sinful and tyrannical; . . . even the forcing him to support this or that teacher of his own persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose

⁶⁴ *Mitchell*, 530 U.S. at 870 (Souter, J., dissenting) (citations omitted).

⁶⁵ *Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (citing A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution 84 (P. Kurland & R. Lerner, eds. 1987)). The title of the document Justice Souter purports to be citing does not match the page number he gives. Jefferson's *A Bill for Establishing Religious Freedom* is reprinted in the Kurland and Lerner volume at page 77. On page 84 is the *Virginia Act for Establishing Religious Freedom*. It makes no difference which document Justice Souter intended to cite, however, for the passages he relies on are in both documents.

morals he would make his pattern.’’⁶⁶ Madison is cited for the belief that freedom of conscience is violated “by any ‘authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment’”⁶⁷ Taken together, Jefferson’s *Act* and Madison’s *Memorial and Remonstrance* establish that “[a]ny tax to establish religion is antithetical to the command that the minds of men always be wholly free.’’⁶⁸

There are several possible objections to Justice Souter’s claim that Jefferson and Madison authoritatively establish that the use of neutrally available public funds in religious schools amounts to a despotism over the mind. One objection I will note but not pursue is Justice Souter’s belief that the outcome of the debate in Virginia in the 1780s over religious freedom, in which Madison and Jefferson played such prominent roles, has constitutional status. This of course is not a new claim,⁶⁹ and many objections have been raised against it.⁷⁰ Suffice it to say that given the “widespread and deep division[s]”⁷¹ over the meaning of religious liberty in the late eighteenth century, it is

⁶⁶ *Mitchell*, 530 U.S. at 871 (Souter, J., dissenting) (alteration in original) (citing *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13).

⁶⁷ *Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (citing the *Memorial and Remonstrance* ¶ 3, reprinted in *Everson*, 330 U.S. at 65-66).

⁶⁸ *Id.* (citation omitted).

⁶⁹ In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Supreme Court declared that “the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protections against governmental intrusion on religious liberty as the [Virginia Bill for Religious Liberty],” originally written by Jefferson. *Id.* at 13. More recently, Justice Souter has declared that Madison’s “authority on questions about the meaning of the Establishment Clause is well settled.” *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 868 (Souter, J., dissenting).

⁷⁰ See, e.g., Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995). In commenting upon the claim in the majority opinion in *Everson* that the establishment clause has the same meaning as Jefferson’s Statute for Religious Freedom, Smith notes that “the Court took no notice of the obvious objection to imposing the Virginia policy on a constitutional provision that had an entirely different wording and that was adopted by a different, and very differently composed, body.” *Id.* at 46.

⁷¹ Daniel O. Conkle, “Legal Theory: Toward a General Theory of the Establishment Clause,” 82 *Nw. U. L. Rev.* 1115, 1133 (1988). Given the profound disagreement over the meaning of religious freedom in the late eighteenth century, Conkle asks

exceedingly unlikely that the men in Congress and in the state legislatures that ratified the First Amendment believed that they were writing into the constitution the views of Jefferson and Madison to the exclusion of all others.

how could Congress and the ratifying state legislatures have reached agreement on the establishment clause? It was supported, after all, both by separationists and by those who were committed to programs of state-sponsored religion. These various political actors simply could not have agreed on a general principle governing the relationship of religion and government, whether it be the principle endorsed in *Everson* or any other. If the establishment clause had embraced such a principle, it would not have been enacted.

Id. Conkle goes on to argue that the establishment clause is simply a jurisdictional statement making it clear that in denying Congress the authority pass any “law respecting the establishment of religion” the constitution had not withdrawn legislative authority over religion from the states. *Id.* Similar arguments are made by, among others, Stanley Ingber, “Religion or Ideology: A Needed Clarification of the Religion Clauses,” 41 *Stan. L. Rev.* 233, 307 (1989) (arguing that “[t]he language of the [establishment] clause was directed against congressional creation of a national church or favoritism of one ecclesiastical sect over another. Thus, its predominant intent was to protect state religious establishments from national displacement.”); Charles Fried, “The Supreme Court, 1994 Term: Foreword: Revolutions?,” 109 *Harvard L. Rev.* 13, 52-53 (1995) (contending that “[t]here is little doubt that the Establishment Clause (quite apart from its opening words ‘Congress shall make no laws’) was specifically intended to preserve a freedom of action to the states while denying it to the national government.”); and Stephen L. Carter, “Reflections on the Separation of Church and State,” 44 *Ariz. L. Rev.* 293 (2002), insisting that

[s]urely the [establishment] clause means what it says, and no more than that. At the moment of the founding, the majority of states had official, state-supported, established churches, and all but two required religious tests for public office. The states were not giving these powers away. On the contrary, they wanted to protect their own established churches from interference by the new national government, and also wanted to prevent the national government from establishing a church of its own.

Id. at 299. Smith, *supra* note 70, at 19-22, notes that there was widespread support in America in the late eighteenth century for the notion that religion was necessary for good republican government, but that there was sharp disagreement over whether government itself should promote religion or whether religion should be left to private, voluntary initiatives. Given this disagreement, Smith, like the authors noted above, argues that the establishment clause is simply a jurisdictional statement but also insists that the free exercise clause is as well. *Id.* at 35-43. “Given the controversies that in fact existed in the new nation over ‘free exercise’ issues, it seems most plausible to understand the free exercise clause, like the establishment clause, as expressing a jurisdictional decision to leave substantive issues [of religious freedom] to be resolved by the states.” *Id.* at 42.

Douglas Laycock argues, however, that the federalism interpretation of the religion clause is mistaken and that the establishment clause does in fact protect individual rights. See Douglas Laycock, “Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty,” 118 *Harvard Law Review* 155, 241-43 (2004); “‘Nonpreferential’ Aid to Religion: A False Claim About Original Intent,” 27 *Wm. and Mary L. Rev.* 875, 885-94 (1986).

For the sake of argument, however, let us assume that the establishment clause is simply a restatement of Jefferson's and Madison's views. The question then is: do their views unmistakably establish that governmental programs of the type at issue in *Mitchell* and *Zelman* represent a tyranny over the mind? In other words, is "the command 'that the minds of men always be wholly free'"⁷² violated when government aid is spent in religious schools "only as a result of the genuinely independent and private choices of individuals"?"⁷³ The first difficulty one encounters in trying to answer this question involves the not insignificant challenge of applying Jefferson's and Madison's principles of religious liberty to a world quite different from the one in which they were articulated. To give but one example—if an example is needed—consider that the expenditures of the federal government for the period 1789-1791 were \$4,269,000⁷⁴ but by 2002 had grown to exceed \$2 trillion.⁷⁵ And this says nothing of the growth of state and local governments over this period,⁷⁶ nor of the exponentially increased reach of all levels of governments into the lives of citizens today. Because of the great difficulty of computing the relative value of a dollar, it is hard to say with any precision just how many times larger the federal government is today as compared to 1791. The point, though, is that given that Jefferson's and Madison's views on religious liberty were part of a set of

⁷² *Mitchell*, 530 U.S. at 871 (Souter, J., dissenting) (citing *Everson v. Board of Ed.*, 330 U.S. at 12); *Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (citation omitted).

⁷³ *Mitchell*, 530 U.S. at 810 (quoting *Agostini v. Felton*, 521 U.S. 203, 226 (1997)).

⁷⁴ Historical Statistics of the United States: Colonial Times to 1970, Part 2, 1115 (1976) Table entitled "Outlays of the Federal Government: 1789-1970."

⁷⁵ Economic Report of the President 381 (2004) Table B-82 "Federal and state and local government current receipts and expenditures, national income and product accounts (NIPA), 1959-2003."

⁷⁶ Total state and local government spending in 2002 was about \$1.4 trillion. *Ibid.*

beliefs that also included belief in limited government, does it make any sense to invoke the former when we have rejected the latter?⁷⁷

I am not sure how to begin to answer the question. It seems to me, however, that some explanation is in order if someone wishes to claim, as Justice Souter does, that Jefferson's and Madison's principles of religious liberty unequivocally establish that the use of public funds in religious schools by means of religiously neutral criteria and the individual choices of aid recipients amounts to a despotism over the mind. Some explanation that would at a minimum attempt to explain why in circumstances of an expansive bureaucratic state the indirect support of religion—as in *Mitchell* and *Zelman*—is anymore “antithetical to the command that the minds of men always be wholly free” than other public expenditures to which people object. Perhaps Justice Souter is right, that even in the modern regulatory state wherein government spends few of the trillions of dollars it spends each year in a way that fails to offend any number of people, indirect public support of religion nevertheless represents a tyranny over the mind. Yet it behooves him, it seems to me, to explain how this is true. Unfortunately, Justice Souter and other justices committed to the privatization of religion betray not a hint of believing that there is any complexity to the issue. The sprawling growth in the size of government over the last two centuries and with it the enormous extension of its reach into the lives of citizens is something that Justice Souter simply does not note. For him and the other privatization justices, the use of neutrally available public funds in

⁷⁷ Smith, *supra* note 70, at 148-9 n. 24, writes that “following Locke, Jefferson's views about religious freedom [] rested heavily on a minimalist conception of the proper functions of the state. That minimalist conception hardly commands a consensus today. Hence, it is unclear why current judges or legal scholars should feel entitled to invoke Locke's or Jefferson's *conclusions* about religious freedom when they reject the *premises* from which those conclusions were derived.”

religious institutions amounts straightforwardly to an establishment of religion that tyrannizes the minds of citizens.

Having raised the question of whether the demise of limited government undermines Justice Souter's application of Jefferson's and Madison's principles to invalidate the expenditure of neutrally available public funds in religious schools, let us return to the substantive issue of whether the *Act for Establishing Religious Freedom* and the *Memorial and Remonstrance against Religious Assessments* clearly establish that the use of such funds in this way actually amounts to the establishment of religion and, hence, to a tyranny over the mind.⁷⁸ Recent scholarship suggests that Justice Souter is wrong on this score, at least as regards Madison and the *Memorial and Remonstrance*.

Vincent Phillip Muñoz argues that Madison's central teaching of religious liberty is that the state may not take "cognizance" of religion.⁷⁹ That is, after first arguing in the *Memorial and Remonstrance* that religion is an inalienable natural right, Madison writes that "therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."⁸⁰

What the "noncognizance" of religion requirement means, writes Muñoz, is that the state lacks jurisdiction over religion. It may not take authoritative notice of or perceive religion or the religious affiliation of its citizens. A government

⁷⁸ Recall that in support of his claim that the expenditure of neutrally available public funds in religious schools violates rights of conscience, Justice Souter invokes Jefferson for the principle that "no one 'shall be compelled to . . . support any religious worship, place, or ministry whatsoever'" and for the contention that "'compel[ling] a man to furnish contributions of money for propagation of opinions which he disbelieves, is sinful and tyrannical; . . . even the forcing him to support this or that teacher of his own persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.'" See *supra* text accompanying notes 65-69. Madison is cited for the idea that freedom of conscience is violated "by any 'authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment.'" See *supra* note 68 and accompanying text.

⁷⁹ Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 *American Political Science Review* 17, 22-23 (2003).

⁸⁰ James Madison, *Memorial and Remonstrance Against Religious Assessments*, Article 1, in 5 *The Founders' Constitution* 82 (P. Kurland & R. Lerner, eds. 1987).

noncognizant of religion, in other words, must be blind to religion. It cannot use religion or religious preferences as a basis for classifying citizens. This is the doctrinal teaching of the “Memorial and Remonstrance.” The state, which is a product of the social compact between men originally born in the state of nature, must remain noncognizant of religion because religion is not part of the social compact. Religion cannot be part of the social compact because of the inalienable character of man’s right to direct his religion according to conviction and conscience.⁸¹

The noncognizance principle means that government “must remain blind to religion as such. It can neither privilege religion nor punish citizens on account of their religion.”⁸²

If Madison is the authoritative guide to the establishment clause, as Justice Souter claims,⁸³ a “Madisonian approach to the First Amendment would utilize the straightforward rule that the state must remain noncognizant of religion. No state actor or government policy could classify, punish, distribute, or withhold benefits from individual citizens or organizations on account of religion or religious affiliation.”⁸⁴ In other words, the constitution must be “religion-blind.”⁸⁵

Muñoz’s interpretation of Madison’s claim that religion is “wholly exempt” from the state’s “cognizance” is supported by Vincent Blasi. Like Muñoz, Blasi argues that Madison’s principle of noncognizance of religion means that the state has no

⁸¹ Muñoz, *supra* note 79, at 23.

⁸² Muñoz, *supra* note 79, at 29.

⁸³ *See supra* note 69.

⁸⁴ Muñoz, *supra* note 79, at 29. Muñoz claims only that the noncognizance approach to religion represents Madison’s view, not that it also represents the intent of the men who ratified the First Amendment. Muñoz, *supra* note 80, at 29 n. 38.

⁸⁵ Muñoz, *supra* note 79, at 29. In the free exercise context, Muñoz argues that the principle of noncognizance “prohibits the government from making laws that single out a religion or religion generally for unfavorable treatment. It would also deny the government the authority to make laws or exemptions singling out a religion or religion generally for favorable treatment under the law.” *Id.* at 31. Muñoz thus concludes that the Supreme Court’s decision in *Employment Division v. Smith*, 485 U.S. 660 (1990), declaring that the free exercise clause does not exempt religious individuals and groups from laws of general applicability that have the effect of incidentally burdening religion, is consistent with Madison’s noncognizance principle. *Id.*

“jurisdiction” over religion or “responsibility” for it.⁸⁶ As Blasi explains, the noncognizance principle means that the state “has no authority to attempt to influence, facilitate, or promote . . . [religious] beliefs and practices. That responsibility belongs exclusively to the individual believer and the voluntary associations he forms.”⁸⁷ For Madison, moreover, the state’s failure to respect the noncognizance principle meant that it had established religion. That is, according to Blasi a “religious establishment” was for Madison “any instance of government taking ‘cognizance’ of, that is responsibility for, religion.”⁸⁸ Blasi argues, in other words, that Madison’s notion of separation of church and state did not seek to confine religion to the private sphere, but to deny government any authority over the religious beliefs of citizens. As Madison wrote in the *Memorial and Remonstrance*, “[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.”⁸⁹ Separation of church and state for Madison then requires “a separation of functions and purposes, not some quixotic attempt to achieve a hermetically sealed spatial separation.”⁹⁰

Applying the noncognizance principle to issues that the Supreme Court has decided helps to illustrate the Madisonian approach. Muñoz persuasively makes the case, for example, that Madison’s principle was violated by the Court in *Marsh v. Chambers*,⁹¹ where it upheld the constitutionality of publicly-funded legislative chaplains, and in *Walz*

⁸⁶ Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 Cornell L. Rev. 783, 789 (2002).

⁸⁷ Blasi, *supra* note 86, at 790.

⁸⁸ Blasi, *supra* note 86, at 791.

⁸⁹ Madison, *supra* note 80, at 82.

⁹⁰ Blasi, *supra* note 86, at 791.

⁹¹ 463 U.S. 783 (1983).

v. Tax Commissioners of New York City,⁹² where it found no constitutional violation in the granting of property tax exemptions to religious organizations for property used solely for religious worship. Both conclusions violate the noncognizance principle in that government took “authoritative notice of religion”—in *Marsh* both by hiring on the basis of religion, i.e., hiring a minister, and promoting a religious exercise (prayer); and in *Walz* by conferring a benefit on the basis of religion.⁹³ By the same token, Muñoz argues that the decisions removing official religious practices from the public schools are consistent with the principle of noncognizance in that government quite obviously (and improperly) takes note of religion when it promotes religious activities.⁹⁴

Muñoz convincingly contends, moreover, that “[t]he principle of ‘noncognizance’ . . . forbids the state from using religious affiliation to exclude individuals or organizations from generally available benefits.”⁹⁵ To this end, Muñoz contends that the Court’s decisions in *Mueller v. Allen*⁹⁶ and *Rosenberger v. Rector and Visitors of University of Virginia*⁹⁷ were consistent with the Madisonian approach. The law at issue in *Mueller* entitled all families with children enrolled in elementary and secondary schools to take a tax deduction for education expenses, which of course benefited families enrolled in religious schools. However, because the tax exemption was available to all families with school-age children, the law “did not inquire into the religious character of the child’s school[.]” which meant that “the state remained noncognizant of religion.”⁹⁸ In *Rosenberger*, however, the University of Virginia did take cognizance of

⁹² 397 U.S. 664 (1970).

⁹³ Muñoz, *supra* note 79, at 29.

⁹⁴ Muñoz, *supra* note 79, at 30.

⁹⁵ Muñoz, *supra* note 79, at 30.

⁹⁶ 463 U.S. 388 (1983).

⁹⁷ 515 U.S. 819 (1995).

⁹⁸ Muñoz, *supra* note 79, at 30.

religion by inquiring into the religious character of student groups that applied for student-activity funds that were made available on the basis of nonreligious criteria. The Supreme Court declared the policy unconstitutional because it violated the free speech rights of a Christian student organization, but as Muñoz argues,

[a] Madisonian interpretation of the First Amendment would have reached the same result on the grounds that to deny a student newspaper generally available newspaper funds because their paper contains religious content subjects religious students to a particular disability. The university became unconstitutionally cognizant of religion by singling out religious activities for exclusion from generally available funds.⁹⁹

In other words, once the university chose to fund student newspapers, in order to have remained “blind to religion,” it could not inquire into the religious character of the newspapers.

As regards the issue of public funds going to religious schools, Muñoz argues that the Madisonian approach would adjudicate the issue like any other policy of governmental funding. The government may not use religious affiliation as a classification or criterion for either privilege or penalty. The government may not fund schools because they are religious, but it also may not fund schools only because they have a religious affiliation. If the government chooses to adopt a general policy to fund educational programs in public and private schools, it may not adopt standards that take religion into account.¹⁰⁰

The “religion-blind” requirement, as Muñoz notes,¹⁰¹ supports the Supreme Court’s recent decisions in the religious schooling context permitting the use of a publicly-funded sign-language interpreter by a student enrolled in a Catholic school,¹⁰² publicly-funded

⁹⁹ Muñoz, *supra* note 79, at 30.

¹⁰⁰ Muñoz, *supra* note 79, at 30-31.

¹⁰¹ Muñoz, *supra* note 79, at 31.

¹⁰² *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

teachers teaching enrichment and remedial courses in religious schools,¹⁰³ the loaning to religious schools of instructional materials purchased with public money,¹⁰⁴ and the participation of religious schools in a publicly-funded voucher program.¹⁰⁵ To have denied the religious interests the ability to participate in general funding programs—as Justice Souter, in pursuit of the privatization of religion, would have done,¹⁰⁶—would have imposed a particular burden on religion, which the noncognizance principle forbids.

Blasi focuses only on the issue of religious school vouchers and he too concludes that they do not violate Madison’s principle of noncognizance. That is, vouchers do not “place the state in the position of taking responsibility for the religious beliefs of its citizens.”¹⁰⁷ “There are secular educational objectives served by a voucher system,”

Blais writes,

that are not bound up with the religious beliefs of its participants. Even when those secular educational benefits are delivered by religious authority figures, acting out of religious motives and functioning in a ‘pervasively sectarian’ environment, the state has not adopted an educational strategy that gives it a stake in the religious beliefs of its citizens.¹⁰⁸

The Supreme Court did not of course in any of the cases Muñoz analyzes claim to be following Madison’s principle of noncognizance. It seems, however, that its analysis in aid cases is now essentially a “noncognizance” inquiry. That is, *Zelman* makes clear that public assistance laws pass establishment clause scrutiny so long as they have a

¹⁰³ *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁰⁴ *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁰⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁰⁶ That is, Justice Souter dissented from the Court’s holding in each of these cases. *See Zobrest*, 509 U.S. at 14 (Blackmun, J., dissenting, joined by Justice Souter); *Agostini*, 521 U.S. at 240 (Souter, J., dissenting); *Mitchell*, 530 U.S. at 867 (Souter, J., dissenting) and *Zelman*, 536 U.S. at 686 (Souter, J., dissenting).

¹⁰⁷ Blasi, *supra* note 86, at 790. Blasi notes, however, that Madison raises other issues in the *Memorial and Remonstrance* that might (or might not) lead one to reject religious school vouchers. Blasi, *supra* note 86, at 787-88.

¹⁰⁸ Blasi, *supra* note 86, at 790.

secular purpose and do not define recipients on the basis of religion nor attempt to direct recipients to religious alternatives, even when significant amounts of public money end up in religious schools.¹⁰⁹ The secular purpose requirement and the requirement that aid be distributed on the basis of nonreligious criteria are investigations, under the modified *Lemon test*, into whether the government has acted neutrally with regard to religion.¹¹⁰ Asking whether a law is neutral (understood as evenhandedness)¹¹¹ is also to ask whether the state has taken cognizance of religion. Nonneutrality indicates cognizance of religion, which in Madisonian terms denotes an establishment of religion, which is prohibited. In the public assistance cases, then, the Court now seems to perform basically a Madisonian noncognizance inquiry. If Muñoz’s interpretation of Madison is correct, there is more than a little irony in Justice Souter’s dogged insistence that the Court has betrayed Madison in its recent public assistance pronouncements. Instead, it is his use of religious affiliation as a classification for penalizing citizens that contravenes Madison’s principle of religious liberty.

In addition to questioning Justice Souter’s rather simplistic understanding of Madison and Jefferson, let us consider more directly the concept of “freedom of conscience” and what it means. Irrespective of what the best reading of Jefferson’s and Madison’s principles is, it seems strange to claim that my rights of conscience are violated when others are permitted to share in a governmental resource they too have contributed to and in which I already have drawn from. For example, my family resided in the state of Ohio earlier this decade when the Cleveland voucher program was in place and when *Zelman* was decided. In the year following the *Zelman* decision—the 2002-03

¹⁰⁹ See *supra* text accompanying notes 55-57.

¹¹⁰ See *supra* text accompanying notes 34-45.

¹¹¹ See *supra* text accompanying notes 55-57.

academic year—my children and over 1.8 million other children were enrolled in Ohio elementary and secondary public schools.¹¹² By contrast, about 4,200 students in the Cleveland district were then using their education vouchers in religious schools.¹¹³ Justice Souter claims that such expenditures violate the rights of conscience of all citizens of Ohio. But in what sense were my rights or the rights of anyone violated by the use of vouchers in religious schools? The vouchers support education,¹¹⁴ not a minister or missionary or the like. No one's taxes were increased in order to channel money to religious schools. The state's claim on me, i.e., my tax obligation, was the same whether religious schools participated in the voucher program or not. The use of voucher funds in religious schools, moreover, did not interfere with my family's—nor I would argue with anyone else's—ability to live by our own best lights, that is, according to the beliefs and values that give meaning and purpose to our lives, that make our lives our own.

In other words, it seems to me that to find a genuine infringement of rights of conscience there must be some real interference with what the political philosopher William Galston calls “expressive liberty.” That is, an important feature of liberty is expressive liberty, which Galston defines as “[t]he ability of individuals and groups to live in ways consistent with their understanding of what gives meaning and purpose to life.”¹¹⁵ Governmental interference with rights of conscience denies individuals and

¹¹² Ohio Department of Education Fact Sheet – 2004, <http://www.ode.state.oh.us/faq/>. The fact sheet was last viewed on July 13, 2004.

¹¹³ Amy Hanauer, Cleveland School Vouchers: Where the Students Go 2 (2002), <http://www.policymattersohio.org/pdf/WhereStudentsGo.pdf>. This publication was last viewed on July 13, 2004.

¹¹⁴ “There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.” *Zelman*, 536 U.S. at 649.

¹¹⁵ William A. Galston, *Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience*, 48 Am. J. Juris. 149, 177 (2003).

groups the right to define for themselves how they would live. It is to compel others to live in a way they would not but for the governmental compulsion.¹¹⁶

What Galston's discussion of freedom of conscience suggests is that there has been no violation of rights of conscience (and expressive liberty) unless government meddles into the lives of citizens in a way that interferes with their ability to live according to their own best lights. To this end, Galston argues that compulsory flag salute and Pledge of Allegiance laws that require some citizens to violate their religious beliefs are forbidden infringements upon conscience.¹¹⁷ Such laws interfered, without a compelling governmental interest, with the ability of Jehovah's Witnesses to live and to raise their children according to the dictates of their consciences. It is precisely this element of interference with one's way of life that is missing from Justice Souter's claim that the use of neutrally available public funds in religious schools violates rights of conscience. As I stated in the preceding paragraph, the expenditure of public funds in religious schools by means of neutral governmental programs involves absolutely no interference with the ability of citizens to live according to their own best lights. One may believe that funding programs such as those at issue in *Zobrest*, *Agostini*, *Mitchell*, and *Zelman* are unwise, even foolish, but they in no way impair one's ability to believe and live as one sees fit. One is free to continue believing or not believing whatever one does about God, to continue worshiping or not worshiping God in the same way as before

¹¹⁶ Galston does not claim that the right of expressive liberty is an unlimited right, for as he adds "[i]t may rightly be limited, but only to the extent necessary to secure the institutional conditions for its exercise." Galston, *supra* note 115, at 177. While freedom of conscience and expressive liberty may at times be legitimately curtailed, they "enjoy[] a rebuttable presumption to prevail in the face of public law." *Id.* at 176. That is, "governmental infringements upon . . . conscientious claims would be sustainable in court only if it were shown that they were necessary for compelling governmental interests." *Id.*

¹¹⁷ Galston, *supra* note 115, at 176. Galston focuses on the case of *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), where the Supreme Court affirmed the right of public schools to expel Jehovah's Witness students who refused, on religious grounds, to say the pledge and salute the flag. *Minersville* was of course overruled on free speech grounds in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

the institution of the programs. One is likewise free to continue raising children as before, to pursue what one values, to set and follow one's own life plan. In short, it is difficult to understand how, per Justice Souter, rights of conscience are violated when neutrally available public assistance is routed to religious schools by the independent choices of aid recipients.

A critic might object that Justice Souter is merely relying on the authority of Madison for his claim about rights of conscience and that my real quarrel is with him. As the discussion of Muñoz's and Blasi's interpretations of the *Memorial and Remonstrance* suggests, however, religion-neutral government programs are not instances of government taking cognizance of, or responsibility for, religion.¹¹⁸ If this is the case, it would then seem to follow that neither do such programs impair rights of conscience. This conclusion is buttressed by considering the *Memorial and Remonstrance* in the light of Galston's concept of expressive liberty. Recall that Madison wrote the *Memorial and Remonstrance* in response to Patrick Henry's *A Bill Establishing a Provision for Teacher's of the Christian Religion*. As the title of the bill suggests, Henry was proposing a property tax to explicitly fund the teaching of Christianity.¹¹⁹ Had Henry's bill become law, it not only would have violated Madison's injunction against government taking cognizance of religion but would have also clearly hindered the "ability of individuals and groups to live in ways consistent with their understanding of what gives meaning and purpose to life."¹²⁰ We need not speculate on just how much Henry's bill would have interfered with the liberty of various Christian groups or denominations, for it plainly would have violated the expressive liberty of non-

¹¹⁸ See *supra* text accompanying notes 79-108.

¹¹⁹ Muñoz, *supra* note 79, at 21.

¹²⁰ Galston, *supra* note 115, at 177.

Christians, who would have been taxed for the support of a faith not their own. Requiring non-Christians to support Christianity undeniably interferes with their ability to live in a way that reflects their judgments about what gives value and meaning to their lives. Henry's bill was thus unlike contemporary government assistance programs in which individuals are not taxed for the support of religion—in Madisonian terms, government has not taken cognizance of religion—but for the provision of legitimate governmental services, e.g., educational and disability services.¹²¹

Justice Souter claims, mantra-like, that the outlay of neutral public funds to religious schools violates freedom of conscience. He makes this assertion as though the claim alone were a trump. Even if we assume with Justice Souter that the First Amendment embodies Jefferson's and Madison's views to the exclusion of all others, he fails to explain why we should accept their views on the *relationship* between church and state when we have rejected their views on the proper *scope* of the latter.¹²² What is more, Muñoz's and Blasi's writings on the *Memorial and Remonstrance* give us strong reason to doubt that Justice Souter has correctly understood Madison's principles of religious liberty.¹²³ Finally, I have suggested that in order to establish an actual violation of rights of conscience there must be some denial of what Galston calls expressive liberty, which is absent in the neutral funding cases.¹²⁴

B. Saving Religion from its Own Corruption

The second reason Justice Souter gives in support of the claim that the constitution confines religion to the private sphere is that the First Amendment aims also to protect the purity

¹²¹ See cases cited *supra* note 7.

¹²² See *supra* text accompanying notes 72-78.

¹²³ See *supra* text accompanying notes 78-108.

¹²⁴ See *supra* text accompanying notes 112-121.

of religion from corruption. Like his claim about freedom of conscience, Justice Souter's argument about protecting religion from corruption rests upon Madison's *Memorial and Remonstrance*. One of the reasons Madison opposed Henry's bill was his belief that "ecclesiastical establishments" corrupted "the purity and efficacy of Religion" by producing "pride and indolence in the Clergy; ignorance and servility in the laity, in both, superstition, bigotry, and persecution."¹²⁵ Justice Souter does not claim that the threat today to the purity of religion is quite the same as in Madison's day. He argues instead that the integrity of religion is threatened by "corrosive secularism" that jeopardizes the ability of religious schools "to educate the children of the faithful according to the unaltered precepts of their faith."¹²⁶ His concern is that government regulations accompanying public funds will undermine the particular identity of religious schools in which public funds are expended. That is, the corruption of religion that Justice Souter believes the establishment clause protects against is the compromises the faithful might make with their own beliefs in order to qualify for public funds. He cites as an example the fact that the voucher program at issue in *Zelman* prohibits religious discrimination, which prevents participating religious schools from favoring in the admissions process students of the school's faith,¹²⁷ and he speculates that the prospect of additional state funding may ultimately lead religious schools to exchange their relative independence and particular identities for increased public money.¹²⁸

That religious beliefs and identities might be undermined by the acceptance of public funds is certainly a valid concern, and is a topic that deserves more attention than I can devote here. Several points are worth noting, however. First, one doubts that Justice

¹²⁵ Madison, Article 7, *supra* note 80, at 83. Justice Souter quotes a portion of Article 7 of the *Memorial and Remonstrance* in *Zelman*, 536 U.S. at 712.

¹²⁶ *Zelman*, 536 U.S. at 712.

¹²⁷ *Zelman*, 536 U.S. at 712.

¹²⁸ *Zelman*, 536 U.S. at 715.

Souter and other adherents of the privatization thesis truly grasp the problem that an expansive regulatory state presents to religious believers who wish to safeguard the integrity of their faith. For example, does not the state's monopoly on education funds exert substantial pressure on the religious to compromise their beliefs? That is, as Eugene Volokh has observed,

many religious parents object on religious grounds to many aspects of the curriculum and environment in government-run public schools. The offer of a free education in government-run schools puts these parents to the choice of (1) taking this government subsidy and compromising their religious objections to the curriculum or environment or (2) sticking by their beliefs but losing the subsidy.¹²⁹

The prevalence of religious schools in this country indicates that many families are unwilling to compromise their religious beliefs. The inability to afford religious schooling, however, undoubtedly leads many religious parents to accept the subsidy and compromise their beliefs.¹³⁰ If the establishment clause is intended to prevent the state from placing individuals in a situation in which they will be tempted to compromise their religious beliefs, as Justice Souter maintains, then it would seem that public schooling itself violates the establishment clause. If the threat of secularism to religious belief is the concern, how much more of a threat this must be in the context of public schooling, given its pervasively secular character. Denying parents the option of spending neutrally available education funds in religious schools thus would hardly begin to remedy the problem the secular state presents to the integrity of religious belief. In short, concern that governmental policies may lead individuals to compromise their religious beliefs must

¹²⁹ Eugene Volokh, *Equal Treatment is not Establishment*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 341, 364 (1999).

¹³⁰ On a related point, Justice Stevens has gone so far as to suggest that public schooling should be an instrument for educating children away from inherited religious beliefs. *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 711 (1994) (Stevens, J., concurring).

also include attention to the fact that the existing structure of schooling already leads to just this result.

While Justice Souter ignores the more widespread threat to religious belief that secular public schooling presents, the possibility nevertheless exists that legislatures will permit families to direct neutral educational funds only to religious schools willing to bend their religious beliefs. As Justice Souter points out, for example, religious schools participating in the Cleveland voucher program cannot in the admissions process favor students of the schools' faith.¹³¹ Although this relatively mild qualification does not interfere with religious instruction in the schools, one wonders if the Supreme Court itself is not mainly responsible for restrictions of this type, and for more onerous ones like the one in the Milwaukee voucher program, where religious schools are forbidden from requiring voucher students to participate in religious activities.¹³² That is, the Court's many establishment clause pronouncements have not provided the clearest guidance for legislatures. And until its decision in *Zelman*, the constitutional fate of vouchers was very much up in the air. Perhaps the limitation on religious schools in Cleveland and Milwaukee were simply good faith efforts by policymakers to structure the scholarship programs—given the state of law at the time—in a way most likely to ensure that they passed the constitutional scrutiny that was certain to follow. The education of poor children trapped in failing public schools was at stake, after all. In other words, it is not clear that legislatures will inevitably seek to undermine the religious identity of religious schools.¹³³ This is especially so given that the *Zelman* decision itself does not appear to

¹³¹ See *supra* text accompanying note 127.

¹³² *Jackson v. Benson*, 578 N.W.2d 602, 609 (Wis. 1998), *cert. denied* 119 S.Ct. 466 (1998).

¹³³ One might argue, in fact, that some legislatures have been far more sensitive to religious identity and diversity than has the Supreme Court. Think, for example, of the Supreme Court's rejection of legislative

require religious schools to be so hamstrung as a condition for participating in neutral public programs. *Zelman* makes clear, in other words, that when recipients of neutral public aid direct that aid to religious schools, the promotion of religion is attributable to the free and independent choices of the recipients, not to the state.¹³⁴ There thus appears to be no establishment clause requirement that religious schools trim their principles in order to participate in neutral funding programs.¹³⁵

Finally, note the off-putting paternalism present in Justice Souter's claim that the establishment clause prohibits the participation of religious schools in neutral public programs so as to protect the integrity of religion. To be sure, an expansive regulatory

attempts to accommodate the needs of religious children in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (invalidating state laws that supplemented the salaries of teachers teaching secular subjects in religious schools); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 757 (1973) (striking a New York law that provided various forms of public assistance to private (secular and religious) schools; *Meek v. Pittenger*, 421 U.S. 349 (1975) (forbidding government-owned instructional materials to be loaned to religious schools, and prohibiting the provision of state-funded auxiliary services, such as counseling and speech and hearing therapy); *Wolman v. Walter*, 433 U.S. 229 (1977) (forbidding public schools from loaning instructional materials to religious schools and prohibiting religious schools from using public funds to cover field trip transportation costs); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985) (forbidding the use of state and federal aid to employ public school teachers in religious schools for the teaching of remedial, enrichment, and special education courses); and *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) (striking a New York law creating a school district for the public education of handicapped children of the Satmar Hasidic sect). *See also* the dissenting opinions in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (objecting to a state-employed sign-language interpreter assisting a deaf student enrolled in a Roman Catholic high school); *Agostini v. Felton*, 521 U.S. 203 (1997) (objecting to publicly-funded remedial, enrichment, and special education in religious schools); and *Mitchell v. Helms*, 530 U.S. 793 (2000) (objecting to religious schools using instructional equipment and materials purchased with government funds). This is not to deny that legislatures may sometimes act oppressively against religion. It is to say, however, that such treatment of religion could not be justified by claiming that the establishment clause requires it.

¹³⁴ *See supra* text accompanying notes 55-57.

¹³⁵ While establishment clause concerns do not seem to be a valid basis for requiring religious schools to alter their principles as a condition for participating in neutral public programs, there nevertheless may be valid public policy concerns justifying the exclusion of a religious school from neutral public programs because of the school's religious principles. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574 (1983) (affirming the Internal Revenue Service's interpretation of the Internal Revenue Code to deny tax-exempt status to religious colleges and secondary and elementary schools that practice racial discrimination). It is beyond the scope of this essay to address the question of whether public policy concerns may entitle the state to deny religious schools the ability to participate in neutral public programs. Consequently, I do not address the important question regarding the extent to which the state may burden religion by means of religiously neutral laws. *See Employment Division v. Smith*, 494 U.S. 872 (1990) (finding no free exercise violation in a neutrally-applicable state criminal law that burdened the religious practices of the Native American Church).

state presents a real danger to the vitality of religious belief. But as I have suggested, prohibiting religious schools from participating in neutral public programs hardly begins to address the issue.¹³⁶ More fundamentally, Justice Souter's position appears to presume that the faithful cannot be trusted to preserve their religion, that Supreme Court justices care more for the faith of the religious than do the religious themselves. I do not doubt the genuineness of Justice Souter's concern over the threat "corrosive secularism" poses for religious belief. I do question, however, the presumption that the faithful cannot be trusted to safeguard their faith, and thus that it is the responsibility of political elites to guard it for them. What I mean is this: putting aside the reasonableness or constitutionality of legislatures requiring religious schools to relax their religious principles in order to participate in neutral public programs, if religious communities are willing to abide by the terms legislators have established for such programs, should not their decision be respected? Are not the faithful themselves in a much better position to judge the threat to their religion, or lack thereof, accompanying participation in government programs? A religious community might of course misjudge and find that participation does jeopardize its beliefs and integrity, but so might Justice Souter misjudge and see a threat where one does not exist. Upon recognizing that participation does tug too sharply towards secularism, a religious school or community would, presumably, be free to withdraw from the program. How is the error corrected, however, when religious schools are denied the opportunity to participate in neutral public programs on the mistaken belief that the exclusion is necessary to safeguard the purity of religion?

¹³⁶ See *supra* text accompanying note 129-30.

A critic might concede that the Supreme Court’s paternalism will at times be mistaken, that it will “protect” religion when no protection is required, but nevertheless respond that the stakes are too high for things to be otherwise. In other words, protecting the purity of religion—protecting religious pluralism, really¹³⁷—is of such value as to outweigh the interest religious communities, who too may misjudge threats, have in deciding themselves whether to accept the terms being offered. Better a blanket prohibition to safeguard all religion, one might argue, even if the protection is unnecessary in some cases. However well-meaning this position is, we still must ask whether the heavy-handed paternalism is warranted. I believe it is not. First, I see no basis for the presumption that religious communities cannot protect themselves. Participation, both individually and institutionally, in neutral governmental programs, like the Cleveland voucher program, is voluntary. It is not a case of the state commandeering the religious schools and forcing their participation. In the absence of evidence to the contrary then, should we not thus assume that these schools agreed to participate, fully aware of the terms of the program, conditions that they—again, absent evidence suggesting otherwise—presumably found acceptable? How religious schools in Milwaukee responded to the opportunity to participate in that city’s voucher program is instructive. The Milwaukee program prohibits religious schools from requiring voucher students to participate in religious activity.¹³⁸ Many religious schools declined to become voucher schools on the grounds that the restriction would interfere with their religious mission.¹³⁹ Other schools, however, concluded that the constraint poses no threat to their

¹³⁷ See Blasi, *supra* note 86, at 796, discussing Madison’s belief in “the value of religious pluralism.”

¹³⁸ See *supra* note 132 and accompanying text.

¹³⁹ Joe Loconte, “Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?,” 93 *Policy Review* 30 (1999). The principal of one Lutheran school explained that his school’s unwillingness to

religious mission and thus accept voucher students.¹⁴⁰ As long as religious institutions are not obligated to participate in public programs—something that would likely violate the free exercise clause—and as long as they are free to withdraw from programs they have participated in, I see no reason why the judgment of Supreme Court justices about what constitutes a threat to religion should prevail over the judgments of the religious themselves. In any case, the experience of religious schools eligible to participate in Milwaukee’s voucher program seems to confirm what I have suggested—that religious officials are capable of judging for themselves the threat participation in government programs poses for their religion (and institutions).

A related reason for rejecting Justice Souter’s paternalism is that he is here doing the very thing the Supreme Court has forbidden in other contexts. That is, in arguing that the religious schools participating in Cleveland’s voucher program have compromised their beliefs by accepting the restriction that prevents them from preferring in the admissions process students of the schools’ faith,¹⁴¹ Justice Souter is making judgments about whether a religious community’s beliefs are consistent with particular religious doctrines. But judicial excursions into theology are prohibited by *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, where the Court declared that it was unconstitutional for “civil courts to engage in the forbidden process of interpreting and weighing church doctrine.”¹⁴² *Presbyterian Church* involved a dispute over church property between two local churches and the national denomination that turned on

participate in the voucher program was due to the restriction, which school authorities believed “would compromise [the school’s] mission as a Christian school.” *Id.* at 31. Loconte also notes that a nationwide survey of private schools conducted in 1998 by the U.S. Department of Education “found that few sectarian schools would join voucher programs that allowed exemptions from religious instruction or activities.” *Id.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Zelman*, 536 U.S. at 712 (Souter, J., dissenting).

¹⁴² 393 U.S. 440, 451 (1969).

whether certain actions of the latter “departed substantially” from church doctrine. If such a departure was found, a second determination had to be made regarding how significant the issue(s) on which the departure occurred were to church doctrine. In other words, the judiciary was asked “to determine matters at the very core of religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion.”¹⁴³ “Plainly,” the Court declared, “the First Amendment forbids civil courts from playing such a role.”¹⁴⁴

But isn’t this precisely the role Justice Souter is playing when he claims that participation in the voucher program has compromised the beliefs of the religious schools? Such a claim, after all, is a claim that the schools have departed from church doctrine. To illustrate the point, let us focus on Catholicism and the fact that at the time of the *Zelman* litigation 35 of the 46 religious schools (out of a total of 56 participating private schools) enrolling voucher students were Catholic schools.¹⁴⁵ To conclude that the Catholic schools had compromised their religion, Justice Souter has to compare the schools’ willingness to abide by the terms of the program against the teachings of the Catholic Church. He is required, in short, to engage in theology, to interpret and weigh Catholic teachings, as well as the religious traditions and doctrines of the other religions operating schools that accept voucher students. As *Presbyterian Church* makes clear, however, the free exercise clause prevents courts from becoming embroiled in theological matters, from attempting to tell the faithful how to understand their own faith.

Beyond this structural restraint denying the Supreme Court (and all civil courts) that authority to act as theologians, we may also question whether justices and judges

¹⁴³ *Presbyterian Church*, 393 U.S. at 450.

¹⁴⁴ *Presbyterian Church*, 393 U.S. at 450.

¹⁴⁵ *Zelman*, 536 U.S. at 681 (Thomas, J., concurring).

possess, in the first instance, the knowledge and insight requisite for theological undertakings. In other words, how does Justice Souter know when a particular religious community has compromised its principles? Is he or the Court generally so well versed in the theologies of the various religious traditions in this country that he or it is in a position to say to a religious community that it has violated its own principles? Justice Souter believes that the religious voucher schools in Cleveland have compromised their principles in order to qualify for the program; undoubtedly he would say the same of religious schools in Milwaukee, who must abide the more serious limitation that permits voucher students to opt out of religious instruction and activities. But such a conclusion contradicts the self-understanding of at least the Catholic schools in Milwaukee, most of which are participating in the voucher program.¹⁴⁶ As the principal of one Milwaukee Catholic high school put it, the opt-out provision did not interfere with the school's ability to "maintain [its] independence and [its] mission."¹⁴⁷ What may thus appear to an outsider like Justice Souter to be a case of a religious community compromising its beliefs in order to qualify for public funds may instead be to the community itself nothing of the sort. Justice Souter thus aptly demonstrates that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular [believers'] interpretation of [their] creeds."¹⁴⁸

One may of course reasonably doubt that Justice Souter actually practices theology, that he does the interpreting and evaluating of religious principles that would be necessary to conclude that religious voucher schools have compromised their beliefs. That is, there is no evidence in his *Zelman* opinion that he actually made any theological

¹⁴⁶ Loconte, *supra* note 139, at 31.

¹⁴⁷ Loconte, *supra* note 139, at 31, quoting the principal.

¹⁴⁸ *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

determinations, which is just as well since he is not a theologian. Instead, the “compromise” claim is a bald assertion that the faithful have been unfaithful, that they have violated their religious beliefs. It is an accusation that the religious have been unfaithful to their God and to what their God requires of them. It is a very serious charge.¹⁴⁹ But what leads Justice Souter (and the other justices who joined his dissent) to make such a serious charge, especially when no evidence is offered to indicate that voucher schools have compromised their faith? Justice Souter indicates that the schools’ willingness to accept the restriction preventing them from preferring same-faith students represents a compromise of belief. But as I have noted, he cannot know this without weighing and evaluating the doctrines of the religions at issue, which he does not do, and which in any event he is forbidden to do. Consequently, he cannot know whether any of the schools have compromised their beliefs by accepting the same-faith preference restriction. Why then the cavalier assertion that they have? It seems to me that the claim is simply a form of moral badgering intended to shame and condemn religious believers who would permit their institutions to participate in neutral public programs. His aim seems to be to discourage such participation, to instill in the public consciousness the notion that religious institutions necessarily betray their religion when they participate in

¹⁴⁹ Lest the reader think that I have exaggerated Justice Souter’s claim that the religious have compromised their religious beliefs, reproduced below is the pertinent passage from *Zelman*. In the founding era, Justice Souter writes, the corruption of religion was manifest in

‘pride and indolence in the Clergy; ignorance and servility in the laity[,], in both superstition, bigotry and persecution’; in the 21st century, the risk is one of ‘corrosive secularism’ to religious schools, and the specific threat is to the primacy of the schools’ mission to educate the children of the faithful according to the unaltered precepts of their faith. Even ‘[t]he favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largess brings government regulation.’ *The risk is already being realized . . . [in the Cleveland program].*

Zelman, 536 U.S. at 712 (Souter, J., dissenting) (citations omitted) (emphasis added).

neutral public programs. In the end, Justice Souter’s motivations for the severe allegation he makes are unclear. However, if the constitution denies courts the authority to “interpret[] and weigh[] church doctrine,”¹⁵⁰ surely Supreme Court justices should thus refrain from accusing the religious of having betrayed their God.

As I noted above, that policymakers may seek to secularize religious institutions as a prerequisite to their participating in neutral programs is a legitimate concern. I have argued, however, that by ignoring the threat the state’s monopoly on education funds presents to religious belief, Justice Souter indicates that he does not truly understand the secularization problem. Instead of chastising individuals and groups who would seek to secularize religious schools, Justice Souter adopts a deeply paternalistic stance that seeks to deny religious schools the opportunity to participate in neutral educational programs. Such paternalism is unwarranted, I have argued, because religiousbelievers appear quite capable of judging for themselves the threat participation presents to their religious beliefs. In addition to his paternalism, Justice Souter’s concern about religious purity involves him in a theological enterprise—something thatthe Court in other contexts, has acknowledged that it is ill-equipped for, and which in any event is forbidden by the First Amendment.

C. Prevention of Social Conflict

The third pillarsupporting the privatization commitment is the claim that the establishment clause confines religion to the private sphere because of “its inextricable link with social conflict.”¹⁵¹ To be sure, this is a position “that once occupied the Court

¹⁵⁰ *Presbyterian Church*, 393 U.S. at 451 (1969).

¹⁵¹ *Zelman*, 536 U.S. at 715 (Souter, J., dissenting). *See also Mitchell*, 530 U.S. at 872 (Souter, J., dissenting) (briefly recounting cases in which the Court has invoked the religious strife rationale); and

but” which now has been “rightly disregarded.”¹⁵² Nevertheless, those justices committed to the privatization of religion cling to it, arguing that religion in the public sphere will lead to social conflict as religious groups vie for public funds to support their institutions and as “taxpayers who take their liberty of conscience seriously” mobilize to prevent such expenditures.¹⁵³ As with the concern over rights of conscience and the potential for religion to become corrupted, social peace is certainly an important matter. The problem, however, is that the historical and social analysis offered in support of the claim is wholly unpersuasive. In fact, it is perhaps an overstatement to describe the social conflict claim as resting on any meaningful analysis at all.

Although it is claimed that the prevention of religiously-motivated social conflict is one of the aims of the establishment clause, it is revealing that one finds no references by any of the justices espousing this position to any original sources. Justice Souter, for example, cites only other Supreme Court opinions, which themselves fail to marshal any founding era arguments.¹⁵⁴ As Edward McGlynn Gaffney, Jr., argues, moreover, this particular claim about the establishment clause is of recent vintage.¹⁵⁵ Gaffney documents that it was first hinted at by Justice Harlan in his concurring opinion in *Walz v. Tax Commission*¹⁵⁶ in 1970 and the next year, in *Lemon v. Kurtzman*,¹⁵⁷ a majority of the Court claimed it as one of the motivations behind the adoption of the First

Zelman, 536 U.S. at 718-22 (Breyer, J., dissenting) (same with specific attention to cases involving religion and education).

¹⁵² *Mitchell*, 530 U.S. at 825 (Thomas, J., plurality opinion).

¹⁵³ *Zelman*, 536 U.S. at 715 (Souter, J., dissenting).

¹⁵⁴ *See Zelman*, 536 U.S. at 715 (Souter, J., dissenting); and *Mitchell*, 530 U.S. at 872 (Souter, J., dissenting).

¹⁵⁵ Edward McGlynn Gaffney, Jr., “Political Divisiveness along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy,” 24 *Saint Louis University Law Journal* 205 (1980).

¹⁵⁶ 397 U.S. 664 (1970).

¹⁵⁷ 403 U.S. 602 (1971).

Amendment.¹⁵⁸ Writing for the Court in *Lemon* Chief Justice Burger argued that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”¹⁵⁹ As Gaffney notes, neither Justice Harlan nor Chief Justice Burger reference any founding era arguments or sources in support of their assertion about the intent of the establishment clause.¹⁶⁰ Both rely instead on a 1969 Harvard Law Review article, which itself is “unadorned with any reference to primary sources.”¹⁶¹ After reviewing congressional debates over the First Amendment and the writings of Jefferson and Madison, Gaffney argues that the historical record cannot bear the weight of the social conflict claim. The historical record, Gaffney writes, is devoid of evidence indicating that “the founding fathers perceived political divisions along religious lines as an evil and that they intended to avoid such conflicts by enacting the first amendment.”¹⁶² Given that the establishment clause seems largely to be a jurisdictional statement explicitly affirming that the new constitution did not withdraw from the states the authority they then exercised over religion,¹⁶³ it is not surprising that Gaffney would reach this conclusion.

Not only does the alleged prevention-of-social-conflict motivation for the establishment clause lack a credible historical foundation, as social policy it is a solution

¹⁵⁸ Gaffney, *supra* note 155, at 209-212.

¹⁵⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

¹⁶⁰ Gaffney, *supra* note 155, at 210, 214.

¹⁶¹ Gaffney, *supra* note 155, at 214. The article is Paul A. Freund, “Public Aid to Parochial Schools,” 82 *Harvard Law Review* 1680 (1969).

¹⁶² Gaffney, *supra* note 155, at 223. Gaffney goes on to add that not only can Madison not be put into service for the political divisiveness rationale, but that Madison actually encouraged, both theoretically and practically, religiously-motivated political divisions. In support of this argument, Gaffney cites Madison’s argument in *Federalist No. 10* that civil and religious liberty would be safeguarded by competition among different “interests” and “sects.” And Gaffney notes that in his battle to defeat Patrick Henry’s bill to support the teaching of Christianity, Madison “explicitly appealed to a wide coalition of religious dissidents in Virginia, principally Baptists and Presbyterians, to oppose the views of the established Episcopalian Church.” *Id.* at 222.

¹⁶³ See sources cited *supra* note 71.

in search of a problem. That is, religion has had a place in the public sphere throughout our nation's history and it has engendered no deep or enduring social conflict. Consider for example only the post-New Deal American political culture. As Justice O'Connor points out in her *Zelman* concurrence, substantial public funds have long been channeled to religious institutions "through public health programs such as Medicare . . . and Medicaid . . . through educational programs such as the Pell Grant program . . . and the G.I. Bill of Rights . . . and through childcare programs such as the Child Care and Development Block Grant Program."¹⁶⁴ Religious institutions have additionally long benefited, albeit indirectly, from tax policies permitting tax deductions for contributions made to qualified religious organizations and from education policies establishing tax credits for educational expenses, including those incurred at religious schools, and of course property owned by religious institutions is generally exempt from state property taxes.¹⁶⁵ The annual value of the foregoing benefits is well into the billions of dollars,¹⁶⁶ and yet one is hard pressed to identify any divisive political conflict provoked by these examples of religion in the public sphere.¹⁶⁷

Consequently, just as the claim that the founders intended the establishment clause to be a safeguard against religiously motivated political divisiveness is free of any founding era references or arguments, the arguments about the divisiveness of religion in the public sphere are likewise free of any meaningful American examples of religiously-

¹⁶⁴ *Zelman*, 536 U.S. at 666-68 (O'Connor, J., concurring).

¹⁶⁵ *Zelman*, 536 U.S. at 665-66 (O'Connor, J., concurring).

¹⁶⁶ See *Zelman*, 536 U.S. at 665-68 (O'Connor, J., concurring).

¹⁶⁷ Noting this, Bradley wrote—in 1986, when the divisiveness rationale commanded the support of a majority of justices—that the “Court is clearly engaged in an entirely prophylactic effort, one that has constitutionalized the relationship of church and state without *any empirical* confirmation of the ‘evil’ that assertedly justifies it. Requiring just a ‘clear and present danger’ of sectarian strife, for instance, would eliminate the ‘divisiveness’ rationale from every case that ever employed it.” Bradley, *supra* note 1, at 303 (emphasis in original).

motivated political divisions. There are instead the standard references to 17th century European religious conflicts and to the established churches in colonial America that persisted into the 19th century.¹⁶⁸ The state-established churches in the late 1700s and early 1800s were of course politically divisive, but these conflicts are inapposite, I believe, to the evaluation of the divisiveness of religious institutions participating in religiously-neutral public programs within the context of an expansive regulatory state. If religiously-motivated social conflict were truly a problem requiring the privatization of religion, one would expect to find examples of it accompanying the public programs noted in the preceding paragraph wherein billions of public dollars have directly and indirectly helped religion. That no meaningful American examples of religious conflict exist explains why Justice Souter and other privatization justices do not reference any, and this perhaps helps us to understand why Justice Stevens now also looks to contemporary international conflicts to support his claim that religion must be confined to the private sphere. That is, Justice Stevens' opposition to religion in the public sphere is based not only on his "understanding of the impact of religious strife on the decision of our forbears to migrate to this continent" but also on "the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another."¹⁶⁹ One wonders which is the more curious, Justice Stevens' reduction of complex political, ethnic, and religious differences to simply religious disputes or his belief that the political strife in the Balkans, Northern Ireland, and the Middle East is somehow instructive for gauging the constitutionality of neutral, public *American* programs.

¹⁶⁸ See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 8 (1947); and *Zelman*, 536 U.S. at 718 (Breyer, J., dissenting).

¹⁶⁹ *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

My comments here should not be understood as an uncritical, unqualified endorsement of religion in the public square, or a denial that religion holds any potential for social harm. Clearly it does. Human history is replete with instances of great evil committed in the name of religion. My contention simply is that religion has always had some involvement in the public sphere in this country and yet the American experience has been one largely free of serious, lasting religious conflict. This claim is reinforced, I believe, by the failure of the privatization justices to identify any consequential American examples of such divisiveness.

One might concede my point about the history of Americans of many religions and of no religion living together more or less peacefully but argue that religious school vouchers (as in *Zelman*) are different, that the lack of any serious social conflict over neutral tax, higher education, healthcare, and childcare policies is uninformative for evaluating the potential political divisiveness of school choice programs. This essentially is Justice Breyer's position, who concedes that the "consequence [of religion in the public sphere] has not been great turmoil" but argues that "[s]chool voucher programs differ . . . in both *kind* and *degree* from" other types of neutral aid programs.¹⁷⁰ Vouchers differ in kind in that they "direct financing to a core function of the church: the teaching of religious truths to young children," which is "far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university."¹⁷¹ He also contends, without referencing any historical examples, that "history shows that government involvement in religious primary education is far more divisive than" any tax or

¹⁷⁰ *Zelman*, 536 U.S. at 726 (Breyer, J., dissenting) (emphasis in original).

¹⁷¹ *Zelman*, 536 U.S. at 726-27 (Breyer, J., dissenting).

healthcare programs that happen to benefit religion.¹⁷² Vouchers differ in degree from other aid programs the Court has endorsed in that those provided only “limited amounts of aid” whereas vouchers involve “a considerable shift of taxpayer dollars from public secular schools to private religious schools.”¹⁷³

While Justice Breyer is correct about how vouchers differ from other types of public aid, it is not clear to me that vouchers will generate any more political division—that is to say, *any* political division—than have the more limited aid programs the Court has approved of in recent years.¹⁷⁴ This of course is not to say that vouchers are uncontroversial, or that some segments of American society do not ardently resist them. It is to say, however, that the divisiveness reasoning is fundamentally flawed and has been since it was first articulated in 1970. It is flawed because the public debate over public aid to religious schools is not about religion or religious truths. It is instead a debate about political principles—chiefly what justice and equality require as regards schooling in a free society.¹⁷⁵ In other words, the disagreement over public aid to religious schools implicates no religious values, only political values; it is a political dispute carried on by ordinary political means. What advocates of school vouchers and other aid programs seek is not the establishment of a religious truth or some religious orthodoxy but an end to the state’s monopoly over education funds. As Gerard Bradley argues, the issue of public aid to religious schools “has never been agitated in a way distinguishable from political conflict generally, and the Court has done nothing except

¹⁷² *Zelman*, 536 U.S. at 727 (Breyer, J., dissenting).

¹⁷³ *Zelman*, 536 U.S. at 727 (Breyer, J., dissenting).

¹⁷⁴ See cases cited *supra* note 7.

¹⁷⁵ See, e.g., Kevin Pybas, “Liberalism and Civic Education: Unitary versus Pluralist Alternatives,” 33 *Perspectives on Political Science* 18 (2004); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (2000); Amy Gutmann, *Democratic Education* (1987).

assert, without a scintilla of evidence, the contrary.”¹⁷⁶ To be sure, religion is in the background, but in a religious society such as ours religion is in the background of virtually every political issue. And yet does not the American experience confirm that individuals and groups of different religions and of no religion are capable of living together more or less peacefully? This point seems conceded not only by the failure of the privatization justices to point to any meaningful American examples of religiously motivated political strife but also by Justice Breyer’s acknowledgement that no previous aid program has generated any such conflict.

III. Conclusion

Justice Souter and other justices stubbornly insist that the aim of the establishment clause is to restrict religion to the private sphere. I have argued that the arguments in support of this conclusion—respect for rights of conscience, preventing the corruption of religion, and preserving social peace—are unpersuasive. It is my contention, moreover, that analysis of these issues by the privatization justices is largely perfunctory, that no real examination of the issues takes place. Instead of a meaningful analysis of religious liberty, the privatization thesis rests upon conclusory statements about rights of conscience, including a misreading of Madison’s *Memorial and Remonstrance*;¹⁷⁷ a misguided paternalism—requiring the Court to weigh and evaluate religious doctrines, a project for which it is ill-equipped—that ignores the threat the state’s monopolization of public education funds presents to religion and at the same time wrongly assumes that religious institutions participating in neutral government programs are incapable of

¹⁷⁶ Bradley, *supra* note 1, at 304.

¹⁷⁷ See discussion *supra* part II.A.

safeguarding their faith;¹⁷⁸ and, finally, seeks to protect the nation from a problem—religiously-inspired social conflict—that is largely imaginary.¹⁷⁹

To further illustrate the thinness of the claim that the establishment clause banishes religion to the private sphere, consider the treatment of “public sphere” and “private sphere” by the privatization justices. Interpreting the establishment clause to require that religion be restricted to the private sphere follows a syllogism that goes like this: “The establishment clause embodies Jefferson’s *A Bill for Establishing Religious Freedom* and Madison’s *Memorial and Remonstrance against Religious Assessments*. These texts reflect the belief that religion should be confined to the private sphere. No public funds may therefore be used for religious purposes, even when such funds reach religious institutions only as a result of the free and independent choices of aid recipients.” The problem with this syllogism is something that I noted earlier—the easy assumption of the minor premise that the term “private sphere” has the same meaning today as it did for Jefferson and Madison. Insofar as I can determine, the Supreme Court has never explicitly defined what it means by the use of “private sphere” and “public sphere.” However, it seems that the Court equates government and its activities with the public sphere and that the private sphere consists of those areas of life which government has not wholly regulated, i.e., those aspects of our lives in which we are relatively unconstrained to live according to our own best lights.

If we understand “public sphere” to mean nothing more than whatever government does, as the Supreme Court seems to, then it is axiomatic that the public sphere has come to dwarf the private sphere. The privatization justices thus trivialize

¹⁷⁸ See discussion *supra* part II.B.

¹⁷⁹ See discussion *supra* part II.C.

religion by refusing to confront this fact. Jefferson and Madison understood their principles as expanding the sphere of human liberty. In contrast, crudely insisting that religion must be limited to the private sphere in contemporary circumstances of an expansive managerial state reduces the sphere of human liberty. Consider only the example of public aid to religious schools, the issue around which much of the Court's establishment clause jurisprudence has been fashioned. All citizens are taxed for the benefit of education, but under the privatization of religion interpretation of the establishment clause religious schools are denied any meaningful public support. Government schools alone are entitled to the educational tax proceeds. Such a scheme clearly results in a reduction of liberty for families who wish for their children an education that cannot be provided by state schools. To be sure, such families have the liberty to send their children to religious schools,¹⁸⁰ but the privatization principle denies them the opportunity to draw on the educational fund to which they have contributed. It is thus rather formalistic and crude to reflexively demand that religion be confined to the private sphere without considering whether in the specific context liberty will be promoted or impeded.¹⁸¹ The unwillingness to wrestle with such a crucial issue is emblematic of the refusal of those justices who seek to confine religion to the private sphere to seriously engage difficult issues of religious liberty. The casualness with which these justices claim that the constitution requires religion to be restricted to the private sphere suggests almost an eagerness to constrain religion. So much so that the conclusion that religion must be confined to the private sphere seems more indicative of

¹⁸⁰ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹⁸¹ I am not suggesting that the restraint of liberty is always illegitimate. Human liberty is of course restrained in various ways in liberal society, generally in the service of some broader social good.

an *a priori* negative judgment about religion—as something unimportant, if not outright dangerous, requiring no serious analysis—than it does of careful constitutional inquiry.¹⁸²

Particularly underscoring this point is the fact that privatization justices seem incapable of drawing any favorable conclusions from religion’s long involvement in the public sphere, an association that has fostered no lasting social conflict.¹⁸³ Refusing to notice this, they dogmatically insist that religion must be confined to the private sphere so as to avoid a problem that is largely nonexistent.

In criticizing the privatization claim I should not be understood as advocating any particular boundary between religion and the state. That I believe and hope to have shown that the privatization thesis is remarkably unpersuasive, that it has little to do with either founding era arguments that brought the establishment clause into existence or with

¹⁸² In a manuscript in progress, see *supra* note 11, I argue that the belief that religion must be confined to the private sphere is part of a comprehensive philosophical commitment about religion and individual and social flourishing that is rooted in an understanding of the liberal political tradition that William Galston calls “autonomy-centered.” Autonomy-centered liberalism, Galston argues, promotes “individual self-direction in at least one of many senses explored by John Locke, Immanuel Kant, John Stuart Mill, and Americans writing in an Emersonian vein [and] is frequently linked with the commitment to sustained rational examination of self, others, and social practices.” Galston, *Liberal Pluralism* (2002) 21. It is

linked to an historical impulse often associated with the Enlightenment—namely, liberation through reason from externally imposed authority. Within this context, reason is understood as the prime source of authority; the examined life is understood as superior to reliance on tradition or faith; preference is to be given to self-direction over external determination; and appropriate relationships to conceptions of good or of value, and especially conceptions that constitute groups, are held to originate only through acts of conscious individual reflection on and commitment to such conceptions.

Ibid. at 24. Galston argues further that a number of cultural and political conflicts today are the result of “the decision to throw state power behind the promotion of individual autonomy,” which tends to “undermine individuals and groups that do not and cannot organize their affairs in accordance with that principle without undermining the deepest sources of their identity.” *Ibid.* The promotion of autonomy places the coercive powers of the state behind a partisan conception of the good life; the state “takes sides in the ongoing struggle between reason and faith, reflection and tradition. Autonomy-based arguments are bound to marginalize those individuals and groups who cannot conscientiously embrace the Enlightenment impulse.” *Ibid.* at 25-26. Autonomy-centered liberalism thus fails to take diversity seriously, and it often leads liberal societies to act “in ways that reduce diversity.” Galston, “Two Concepts of Liberalism.” 105 *Ethics* 516 (1995) 522.

¹⁸³ See *supra* notes 164-69 and accompanying text.

an informed awareness that religion has been for the most part peacefully involved in the public sphere since the nation's founding (and before) does not mean that the state should promote religion by, say, official prayers and scripture readings in the public schools. The point rather is that an uncritical commitment to confining religion to the private sphere leads Justice Souter and other justices to hurry past, if not ignore, complex issues of religious liberty. Instead of a searching inquiry into how, amidst deep religious diversity and an ever expanding regulatory state, religious liberty can be protected for all, we get abstract, conclusory arguments about the purported meaning of the establishment clause. Wherever the just boundary between religion and state may lie, neither our confidence in the Supreme Court's ability to mark it nor the cause of religious liberty itself is furthered by dogmatic assertions that the constitution requires religion to be confined to the private sphere.