

Two Concepts of Liberalism in Establishment Clause Jurisprudence*

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Abstract

The political theorist William Galston argues that the liberal political tradition contains two distinct strands of philosophical thought. One emphasizes the principle of autonomy, while the other stresses the principle of diversity. These principles, according to Galston, are in tension with each other and as guiding criteria lead to quite different public policies. Autonomy-centered liberalism seeks to promote autonomy or “individual self-direction”; it reflects a “commitment to sustained rational examination of self, others, and social practices.” As such, autonomy-centered liberals are generally suspicious of religious belief and seek to confine it to the private sphere. Diversity-centered liberalism, on the other hand, seeks to maximize the public space (legally, institutionally, and culturally) in which different individuals and groups can live out their differences, limited only by the demands of liberal social unity.

Although Galston does not focus on constitutional law, his explanation of the different conceptions of the liberal political tradition and the place of religion in it raises the question of the extent to which the U.S. Supreme Court’s establishment clause jurisprudence can be explained by the autonomy-diversity dichotomy he has drawn. That is, just as autonomy-centered liberalism seeks to confine religion to the private sphere, so too has much of the Supreme Court’s establishment clause jurisprudence. The question arises then as to whether the Supreme Court’s effort to limit the public role of religion has been driven by an understanding of the liberal political tradition that emphasizes the principle of autonomy, or by something else? Similarly, one wonders if the Supreme Court’s movement over the last two decades toward greater tolerance of religion in public life is rooted in an understanding of the liberal political tradition that stresses the protection of diversity over the promotion of autonomy.

The aim of this study is to examine the Supreme Court’s establishment clause jurisprudence against the backdrop of Galston’s writings to see if we can discern in the Court’s treatment of religion any affinities with the two concepts of liberalism Galston describes. To this end, I explore the cases in which the Court has wrestled with the degree to which public funds can be used to support the education of children enrolled in religious schools and the cases in which it has used the establishment clause to remove all official religious practices and symbols from public schooling. I focus on the issue of religion and schooling because this is where the Court’s modern establishment clause jurisprudence began and, because it is the context in which a sizeable majority of establishment clause cases have been decided, it is the milieu in which the Court’s establishment clause jurisprudence has largely been fashioned. As Galston points out, moreover, the issue of education is one in which the conflict between autonomy and diversity is especially pronounced. To anticipate my conclusions, I suggest that there are affinities between autonomy-centered liberalism and the jurisprudence that seeks to secularize the public sphere, on the one hand, and between diversity-centered liberalism and the jurisprudence that seeks not to privatize religion but to ensure only that government does not directly support religion, on the other hand. The similarities in both cases are not so strong or robust, however, as to indicate a straightforward connection between liberal political philosophy and the Court’s establishment clause jurisprudence.

The political theorist William Galston argues that the liberal political tradition contains two conflicting strands of philosophical thought¹ One emphasizes the principle of autonomy, while the other stresses the principle of diversity. These principles, Galston argues, are in tension with each other and as guiding criteria lead to quite different public policies. Autonomy-centered liberalism seeks to promote autonomy or “individual self-direction”; it reflects a “commitment to sustained rational examination of self, others, and social practices.”² As such, autonomy-centered liberals are generally suspicious of religious belief and seek to confine it to the private sphere. Diversity-centered liberalism, on the other hand, seeks to maximize the public space (legally, institutionally, and culturally) in which different individuals and groups can live out their differences, limited only by the demands of liberal social unity. Many cultural/political disputes today, Galston contends, can be understood as a conflict between the principles of autonomy and diversity.

Although Galston does not focus on constitutional law, his explanation of the different conceptions of the liberal political tradition and the place of religion in it raises the question of the extent to which the U.S. Supreme Court’s establishment clause jurisprudence can be explained by the autonomy-diversity dichotomy he has drawn. That is, just as autonomy-centered liberalism seeks to confine religion to the private sphere, so too has much of the Supreme Court’s establishment clause jurisprudence.³ The question arises then as to whether the Supreme Court’s effort to limit the public role of religion

¹ William A. Galston, *Liberal Pluralism* 15-27 (2002). See also Galston, *Two Concepts of Liberalism*, *Ethics* 105: 516-534 (1995).

² Galston, *Liberal Pluralism*, *supra* note 1, at 21.

³ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971), where Chief Justice Burger, writing for the Court in a ruling declaring unconstitutional New Jersey and Pennsylvania laws supplementing the salaries of teachers teaching secular subjects in parochial schools, declared that the “[c]onstitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice.” I examine the privatization thesis at length in Kevin Pybas, *Does the Establishment Clause Require Religion to be Confined to the Private Sphere?*, *Valparaiso University Law Review* (forthcoming, Fall 2005).

has been driven by an understanding of the liberal political tradition that emphasizes the principle of autonomy, or by something else? Similarly, one wonders if the Supreme Court's movement over the last two decades toward greater tolerance of religion in public life⁴ is rooted in an understanding of the liberal political tradition that stresses the protection of diversity over the promotion of autonomy. Our curiosity about the possibility that much of the Supreme Court's establishment clause jurisprudence is itself a debate about the meaning of the liberal political tradition—whether, per Galston, it is best understood as autonomy-centered or diversity-centered—is heightened when we observe that the plain language of the establishment clause and the history of the First Amendment provide few, if any, clear-cut answers to contemporary questions of religion-state relations. Noting this, Justice Byron White once remarked that

In the end, the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choices among many alternatives. But decision has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.⁵

⁴ 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 *Meek 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).

⁵ *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting).

If neither the language of the First Amendment nor the history of its ratification makes necessary the specific conclusions the Supreme Court has reached in its many establishment clause decisions, what accounts for the ways in which the Court has resolved these cases? Perhaps it is the case that Supreme Court's articulation of what it has "deemed to be the most desirable national policy governing" religion in public life is driven by broader moral and philosophical considerations, that is, by its understanding of the liberal political tradition and the place of religion in it. Examining the Court's establishment clause cases in light of the philosophical dichotomy drawn by Galston may thus illuminate this area of the law in a way that scholarship emphasizing either historical arguments about the meaning of the First Amendment or doctrinal developments does not.

The aim of this study then is to examine the Supreme Court's establishment clause jurisprudence against the backdrop of Galston's writings to see if we can discern in the Court's treatment of religion any affinities with the two concepts of liberalism Galston describes. I shall proceed, first, in Part I, by more fully examining Galston's writings. I shall then explore in Part II the cases in which the Court has wrestled with the degree to which public funds can be used to support the education of children enrolled in religious schools and the cases in which it has used the establishment clause to remove all official religious practices and symbols from public schooling. I focus on the issue of religion and schooling because this is where the Court's modern establishment clause jurisprudence began⁶ and, because it is the context in which a sizeable majority of establishment clause cases have been decided, it is the milieu in which the Court's establishment clause jurisprudence has largely been fashioned. As Galston points out,

⁶ See *Everson v. Board of Education*, 330 U.S. 1 (1947).

moreover, the issue of education is one in which the conflict between autonomy and diversity is especially pronounced. Part III attempts to link the competing interpretations of the liberal political tradition with competing interpretations of the establishment clause as they are reflected in the religion and schooling cases. I state my conclusions in Part IV of the paper. To anticipate my conclusions, I suggest that there are affinities between autonomy-centered liberalism and the jurisprudence that seeks to secularize the public sphere, on the one hand, and between diversity-centered liberalism and the jurisprudence that seeks not to privatize religion but to ensure only that government does not directly support religion, on the other hand. The similarities in both cases are not so strong or robust, however, as to indicate a straightforward connection between liberal political philosophy and the Court's establishment clause jurisprudence.

Before proceeding, I wish to note that in examining the cases my aim is not to give an exhaustive account of the justices' arguments and counterarguments or to argue that one side or the other gets it right (or wrong) in their treatment of precedent and constitutional history. Rather my focus is on those aspects of the respective opinions that are helpful in understanding and illustrating the different philosophical assumptions—the different understandings of liberalism—that seem to underlie them. I must note, too, that a striking feature of much of the Court's establishment clause jurisprudence is the absence of any meaningful moral or philosophical reflection about the place of religion in a free society. In seeking to comprehend the Court's understanding of liberalism in these cases, then, one must attempt to draw out from cursory historical analyses and generally conclusory statements about the meaning of the establishment clause the moral and

philosophical assumptions on which the decisions seem to rest. Finally, my attitude, if you will, in this paper is speculative and suggestive rather than certain and conclusory.

I. Galston on Two Concepts of Liberalism

According to Galston, within the broad liberal political tradition the principles of autonomy and diversity are in tension with each other. By autonomy, Galston means “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. Liberal autonomy is frequently linked with the commitment to sustained rational examination of self, others, and social practices.”⁷ Diversity, on the other hand, is defined as “legitimate differences among individuals and groups over such matters as the nature of the good life, sources of moral authority, reason versus faith, and the like.”⁸ In Galston's view, many liberals, past and present, mistakenly assume that diversity and autonomy “fit together and complement one another: The exercise of autonomy yields diversity, while the fact of diversity protects and nourishes autonomy.”⁹ In practice, however, the principles rarely harmonize: “[I]n currently disputed areas such as education, rights of association, and the free exercise of religion . . . they point in quite different

⁷ Galston, *Liberal Pluralism*, *supra* note 1, at 21.

⁸ *Id.* While Galston defines diversity as “differences among individuals and groups,” his primary concern, as will become clear below, is with group diversity. If Galston were to understand diversity primarily in terms of cultivating individual difference, he would be drawn more than he intends in the direction of autonomy, but in fact he is a critic of autonomy as an ideal. We should note also that when Galston uses the words “individual” or “individualism,” he does not attach to them the Millian notion of self-development or the Kantian idea self-perfection, and he does not use the term pejoratively, in the manner of Tocqueville. Instead, individualism “corresponds [with] the liberal virtue of independence—the disposition to care for, and take responsibility for, oneself and to avoid becoming needlessly dependent on others.” William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* 222 (1991).

⁹ Galston, *Liberal Pluralism*, *supra* note 1, at 21.

directions."¹⁰ Disputes in education and with regard to religion as well as in other areas are thus best understood "as a conflict between these two principles." Many cultural and political conflicts derive from "the decision to throw state power behind the promotion of individual autonomy," and this "can 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."¹¹ The promotion of autonomy, moreover, often leads liberal societies to act "in ways that reduce diversity."¹²

Liberal societies need not promote autonomy, however, to retain their liberal character. Indeed,

properly understood, liberalism is about the protection of legitimate diversity. A liberal state need not and should not take sides on such issues as purity versus mixture [of cultures] or reason versus tradition. To place an ideal of autonomous choice . . . at the core of liberalism is in fact to narrow the range of possibilities available within liberal societies. In the guise of protecting the capacity for diversity, the autonomy principle in fact represents a kind of uniformity that exerts pressure on ways of life that do not embrace autonomy. . . . [T]he Kantian and Millian conceptions of liberalism (which rest on autonomy and individuality as specifications of the good life) are not adequate solutions to the political problems of reasonable disagreements about the good life. They have themselves simply become another part of the problem.¹³

The unspoken premise here, I believe, is that diversity arises out of different communities and is not reducible to individual differences. In contrast to Mill's critique of custom and tradition and the power they hold over individual choice, to say nothing of his argument that individuals are not truly free unless they have freely chosen their way of life, Galston suggests that individuality makes sense only in the context of community. Before

¹⁰ Galston, *Liberal Pluralism*, *supra* note 1, at 21.

¹¹ Galston, *Liberal Pluralism*, *supra* note 1, at 21.

¹² Galston, *Two Concepts of Liberalism*, *supra* note 1, at 522.

¹³ Galston, *Liberal Pluralism*, *supra* note 1, at 23 (quoting Charles Larmore, *Political Liberalism*, *Political Theory* 18: 345 (1990)).

individuals are adults capable of choosing a way of life for themselves, they are children in need of nurturing and development. Done well, rearing children requires vibrant, supportive communities, including "families, neighborhoods, schools, voluntary associations, and religious institutions."¹⁴ Public policies promoting self-development or self-perfection undermine diversity by making more difficult the existence of subcommunities not organized around those principles. The push to make individuality or autonomy the organizing principle of all of society thus undermines in the long run the conditions that prepare children to make meaningful choices as adults.

Galston maintains that while the conflict between autonomy and diversity is exacerbated by the rise of the modern welfare state, its roots are centuries old. On the one hand, autonomy-centered liberalism is

linked to an historical impulse often associated with 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.¹⁵

On the other hand, diversity-centered liberalism is connected to what Galston calls the "post-Reformation Project—that is, to the effort to deal with the political consequences of religious differences in the wake of divisions within Christendom." The effort to deal with the fractionation of Christendom gave rise, in turn, to various political strategies. The strategy that finally carried the day, the one that

proved most decisive for the development of liberalism, was that of accepting and managing diversity through mutual toleration. Within a framework of civic unity, a plurality of religions could be allowed to

¹⁴ Galston, *A Public Philosophy for the 21st Century*, *The Responsive Community* 8 (1998): 18, 21.

¹⁵ Galston, *Liberal Pluralism*, *supra* note 1, at 24. By and large, this is what Tocqueville describes as "the precepts of Descartes." Alexis de Tocqueville, *Democracy in America* 429-33 (J.P. Mayer ed. & George Lawrence trans., HarperPerennial 1966) (1840).

coexist. It was in fact that religious diversity that undergirds, and eventually sets in motion the development of, our wider conception of individual and cultural difference. And thus, any reasonable understanding of diversity will have to include (though in modern circumstances cannot be restricted to) religious commitments.¹⁶

The problem then with invoking autonomy as the polestar of public life in a diverse society is that doing so 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.”¹⁷

Rightly understood, liberalism is concerned with diversity, not autonomy or individuality. This is not to say that autonomy has no place in liberalism. Galston acknowledge that it does, but insists that it is only a feature of liberalism and not the whole. Diversity-centered liberalism provides space for many ways of life, including Millian and Kantian ways of life. But autonomy-centered liberalism, as Galston points out, leaves little room for diversity, especially as regards ways of life based on faith or tradition. Autonomy advocates, in his view, unnecessarily provoke and marginalize many citizens of good will, especially the religious and traditionalists who, for reasons of conscience, reject the Enlightenment impulse. In so doing, autonomy-centered liberalism fails to take diversity, understood to encompass our deepest differences, especially our religious differences, seriously. Galston writes: "the state-supported commitment to autonomy tugs against specific kinds of lives that differ fundamentally, not just

¹⁶ Galston, *Liberal Pluralism*, *supra* note 1, at 25.

¹⁷ Galston, *Liberal Pluralism*, *supra* note 1, at 25-26.

superficially, from many others and whose disappearance would reduce social diversity."¹⁸ Only diversity-centered liberalism "gives diversity its due."

For Galston, diversity-centered liberalism finds practical expression in "the 'Diversity State'—that is, in public principles, institutions, and practices that afford maximum feasible space for the enactment of individual and group differences, constrained only by the requirements of liberal social unity."¹⁹ Galston's claim is not that the liberal state must be neutral. There are, he acknowledges, "compelling state interests that warrant public interference with group practices."²⁰ These state interests fall into four general categories: "first, solving coordination problems among legitimate activities and adjudicating unavoidable conflicts among them; second, deterring and when necessary punishing transgressions individuals may commit against one another; third, safeguarding the boundaries separating legitimate from illegitimate variations among ways of life; and finally, securing the conditions—including the cultural and civic conditions—needed to sustain liberal pluralist institutions."²¹ The ways in which

¹⁸ Galston, *Two Concepts of Liberalism*, *supra* note 1, at 521. According to Galston, the failure to take diversity seriously is a failing not only of self-professed autonomy liberals, but also of John Rawls, who purports, in *Political Liberalism*, to take as his starting point the fact that people disagree deeply and permanently about their moral, philosophic, and religious beliefs. On Galston's account, Rawls fails to take our differences seriously enough, especially as regards religious belief. *Id.* at 518-521. *See also* Galston, *Pluralism and Social Unity*, *Ethics* 99: 711-726 (1989) and *Liberal Purposes*, *supra* note 8, Chapter 7.

¹⁹ Galston, *Two Concepts of Liberalism*, *supra* note 1, at 524.

²⁰ Galston, *Liberal Pluralism*, *supra* note 1, at 23.

²¹ Galston, *Liberal Pluralism*, *supra* note 1, at 125. Among the civic conditions necessary to sustain the Diversity State, or what Galston also calls the liberal pluralist regime, is a tolerant citizenry and a scheme of civic education that teaches tolerance along with other liberal virtues. As regards tolerance, Galston expressly rejects the argument made by autonomy liberals that genuine toleration requires intense critical reflection on all ways of life, especially as regards inherited beliefs. The Diversity State must "evince[] a strong system of tolerance." What Galston means here is not a relativistic "wishy-washiness" on moral issues, but "the principled refusal to use coercive state instruments to impose one's views on others, and therefore a commitment to moral competition through recruitment and persuasion alone." *Id.* at 126. Moreover, he does not regard unreflective commitment to one's way of life as necessarily inconsistent with tolerance. As he writes, "[c]ivic tolerance of deep differences is perfectly compatible with unswerving belief in the correctness of one's own way of life." Galston, *Liberal Purposes*, *supra* note 8, at 253. In short, the toleration a liberal polity requires is not skepticism about the correctness of one's way of life, but a commitment not to use state power to impose one's way of life on another.

individuals and groups may be restricted represent the demands of social unity. Claims of unimpeded liberty to live out differences must give way to the public institutions that secure the “space within which individuals and groups may lead their lives in accordance with their diverse understandings of what gives life meaning and value.”²²

The picture Galston draws of the conflict between autonomy-centered liberalism and diversity-centered liberalism can be brought into greater relief by examining two concrete examples of the conflict. As Galston argues, the conflict between the principles of autonomy and diversity is especially pronounced in the areas of “education, rights of association, and the free exercise of religion.”²³ Examples of educational disputes that Galston notes, which also escalated into free exercise of religion claims, include those litigated in *Wisconsin v. Yoder*²⁴ and *Mozert v. Hawkins County Board of Education*.²⁵ The issue in *Yoder* was whether Old Order Amish fourteen- and fifteen year-old children should be exempt, on free exercise grounds, from a compulsory education law requiring children to attend school until the age of sixteen. The Amish parents did not object to their children attending school until the age of fourteen but resisted the law on grounds that no additional formal education was necessary to prepare their children for participation in the Amish way of life and that high school would expose Amish children to “worldly influences”²⁶ that threatened to undermine not only the religious beliefs of Amish teenagers but the Amish religious community itself. In ruling in favor of the Amish, the Court accepted the State of Wisconsin’s claim that the compulsory education law was animated by the state’s valid interest in preparing students both for effective

²² Galston, *Liberal Pluralism*, *supra* note 1, at 125.

²³ Galston, *Liberal Pluralism*, *supra* note 1, at 21.

²⁴ 406 U.S. 205 (1972).

²⁵ 827 F.2d 1058 (6th Cir. 1987).

²⁶ *Yoder*, 406 U.S. at 218.

participation in the nation's civic life and for economic self-sufficiency as adults.²⁷ The Court concluded, however, that the Amish system of informal, technical post-elementary education, with its focus on developing manual labor skills, more than adequately prepared Amish children to become productive members of Amish society and even of the wider society itself, should they choose to leave the Amish faith.²⁸ As for the civic education of the Amish, the Court noted the fact that the Amish had "survived and prospered" in this country for over 200 years "as a separate, sharply identifiable and highly self-sufficient community[,]" which indicated "that they are capable of fulfilling the social and political responsibilities of citizenship" without benefit of a formal high school education.²⁹

The issue in *Mozert* was whether elementary school children had a free exercise right to opt out of a reading program that the children's parents found to be offensive to the families' religious beliefs. The reading program was intended to build not only reading skills but also to teach tolerance by exposing children to diverse viewpoints and ways of life so that the students might learn tolerance of others, but some parents objected that some of the stories involved denigrated their faith.³⁰ The parents asked not that the offending reading program be dropped but only that their children be allowed to pursue an alternative reading curriculum.³¹ Some students were initially provided with alternative readings that were satisfactory to the parents. Ultimately, however, the county school board made the objectionable reading series mandatory for all students and

²⁷ *Yoder*, 406 U.S. at 221.

²⁸ *Yoder*, 406 U.S. at 222-225.

²⁹ *Yoder*, 406 U.S. at 225.

³⁰ Objections to the reading program included claims that it promoted "evolution and 'secular humanism[,]' . . . 'futuristic supernaturalism,' pacifism, magic and false views of death[,]" all in violation of the families' religious beliefs. *Mozert*, 827 F.2d at 1062.

³¹ *Mozert*, 827 F.2d at 1060.

suspended from school those children who refused these readings.³² At this point the Mozerts and other families filed suit, claim that the mandatory policy violated their free exercise rights. The Court of Appeals denied the families' free exercise claim, ruling that the reading program did not compel or coerce the children into violating their religious beliefs. The court reasoned instead that the readers simply exposed the children to ideas, ideas that, to be sure, their parents objected to on religious grounds. But, the court concluded, exposure to objectionable ideas does not burden religion in a way against which the First Amendment protects.³³

These cases are expressions of the conflict between autonomy-centered liberalism and diversity-centered liberalism in that the disputes were largely about whether the state or public schools should be permitted to develop autonomy or critical reasoning skills in the children at issue over the religious objections of their parents. Galston does not of course claim that the legal arguments and the decisions themselves framed the issues in such philosophical terms. Essentially, however, both cases involved state authorities promoting a principle—autonomy—that in the abstract is unobjectionable but which in each case conflicted with deeply held religious beliefs. Galston argues that the state's objective in each case—in *Yoder* to prepare teenagers to become independent, self-sufficient adults and to participate in the nation's civic life, and in *Mozert* to developing a tolerant citizenry—could be achieved without infringing upon the religious beliefs of the objecting families. In other words, giving diversity its due means insofar as is feasible accommodating the religious beliefs of citizens. And since the accommodation sought by

³² *Id.*

³³ For a compelling account of the *Mozert* case itself and the larger political struggle of which it was a part, see Stephen Bates, *Battleground: One Mother's Crusade, the Religious Right, and the Struggle for Control of Our Classrooms* (1993). I question the *Mozert* ruling in Kevin Pybas, *Liberalism and Civic Education: Unitary versus Pluralist Alternatives*, *Perspectives on Political Science* 33: 18, 25-26 (2004).

the religious parents in both cases could have been granted without jeopardizing the otherwise legitimate aims of public schooling, Galston thus defends the *Yoder* decision and questions the outcome of *Mozert*.³⁴

In summary, autonomy-centered liberalism aims to make autonomy the guiding principle of public life. It is thus often antagonistic toward ways of life that give priority to values other than autonomy, such as those based on faith or tradition. Diversity-centered liberalism, on the other hand, focuses on pluralism or diversity and seeks to maximum the space available for individuals and groups to live according to their own best lights, constrained only by the demands of social unity. Having briefly outlined Galston's arguments, let us now examine various establishment clause/schooling cases to see if they might betray any similarities to the moral and philosophical commitments of autonomy-centered liberalism or diversity-centered liberalism.

II. Schooling and Establishment Clause Jurisprudence

From the American founding until about the middle of the last century, religion was an integral part of the educational experience of the vast majority of children in America. Religion was generally thought to be indispensable to civic or moral instruction, and this instruction was regarded as a primary responsibility of the schools. This was true even after compulsory public schools began to be established in the mid-nineteenth century. For the first hundred years or so of American public schooling, the moral component of the curriculum was heavily infused with Protestant Christianity, the religion of the majority of the population.³⁵ Protestantism remained dominant, even as

³⁴ Galston, *Liberal Pluralism*, supra note 1, Chapters 8 and 9. Also, the arguments of Galston's *Two Concepts of Liberalism*, supra note 1, are mainly framed around the issues raised in *Yoder*.

³⁵ See, e.g., Charles L. Glenn, Jr., *The Myth of the Common School* (1987).

the nation was growing more religiously diverse, because of the long-standing practice in America of regarding education as properly a matter of local concern. In most localities, the Protestant majority was able to impose its moral ideas on various religious minorities, most notably, Roman Catholics, as well as on the irreligious. Rather than acquiescing in moral instruction contrary to their own beliefs, Catholics, after the mid nineteenth century, began to establish parochial schools so that their principles could be passed on to their children.

Despite the Protestant character of public schooling, the issue that launched the Court's modern establishment clause jurisprudence was one involving public aid to parents of children enrolled in Catholic schools. In 1947, in *Everson v. Board of Education of Ewing Township*,³⁶ the Supreme Court ruled that the establishment clause of the First Amendment was incorporated through the due process clause of the Fourteenth Amendment and thereby made applicable to the states.³⁷ In *Everson*, the Court, speaking through Justice Hugo Black, cited Thomas Jefferson's 1802 letter to the Danbury Connecticut Baptist Association for its contention that the First Amendment was intended to erect "a wall of separation between church and state."³⁸ The Court interpreted Jefferson's metaphor to mean that neither the federal government nor the states "can pass laws which aid one religion, aid all religions, or prefer one religion over another."³⁹

³⁶ 330 U.S. 1.

³⁷ In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court indicated that the religion clause of the First Amendment is binding on the states, but *Cantwell* involved only a free-exercise claim. Left unclear by *Cantwell* was whether the establishment clause was also binding on the states.

³⁸ *Everson*, 330 U.S. at 16. For perhaps the best account available of Jefferson and his letter to the Danbury, Connecticut, Baptist Association, from which the "wall of separation" metaphor is taken, see Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* (2002). For an argument against the notion that the First Amendment simply restates Jefferson's (and Madison's) views on church and state, see Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995).

³⁹ *Everson*, 330 U.S. at 15.

Ironically, after interpreting the establishment clause to mean that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions,”⁴⁰ the Court affirmed the constitutionality of a law reimbursing parents for the costs of transporting their children to and from Catholic schools. The reimbursement program, the Court concluded, was intended to ensure that children had safe transportation to school and back. As such, it was analogous to the provision of general governmental services, such as fire and police protection, and to the maintenance of public highways and sidewalks. The establishment clause does not preclude the state from providing ordinary service such as these; therefore, neither does it prohibit legislation providing “a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”⁴¹ The establishment clause “requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.”⁴² By interpreting the establishment clause to require “a wall of separation between church and state” prohibiting all state aid to religion beyond the provision of ordinary governmental services, the Court thus opened the door for subsequent challenges to laws providing public funding to religious schools and to the Protestant moral instruction that was common in the public schools.

A. Public Aid to Religious Schools

Everson set the Court on what has proven to be a meandering course distinguishing between constitutional and unconstitutional public assistance to religious

⁴⁰ *Everson*, 330 U.S. at 16.

⁴¹ *Everson*, 330 U.S. at 18.

⁴² *Everson*, 330 U.S. at 18.

schools. The cases include those: affirming a New York state law requiring local school districts to lend textbooks without charge to students, including those attending religious schools;⁴³ prohibiting governmental support for teachers teaching secular subjects in parochial schools;⁴⁴ striking a New York law providing various forms of public assistance to private schools in the state, most of which were religiously affiliated, and to parents of children enrolled in private schools;⁴⁵ allowing the loaning to religious schools of secular textbooks purchased with public funds but disallowing the use of instructional materials purchased with public money and also prohibiting the provision of auxiliary services, such as counseling and speech and hearing therapy;⁴⁶ forbidding public schools from loaning instructional materials to parochial schools and disallowing the use of public funds for field trip transportation for parochial school students but 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 schools students on school grounds;⁴⁷ allowing state aid to religious schools to cover the costs of state-mandated testing and record keeping;⁴⁸ upholding the constitutionality of 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;⁴⁹ prohibiting the use of state and federal aid to employ public school teachers in parochial schools for the teaching of remedial, enrichment, and special

⁴³ Board of Education v. Allen, 392 U.S. 236 (1968).

⁴⁴ Lemon v. Kurtzman, 403 U.S. 602 (1971).

⁴⁵ Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 757 (1973).

⁴⁶ Meek v. Pittenger, 421 U.S. 349 (1975).

⁴⁷ Wolman v. Walter, 433 U. S. 229 (1977).

⁴⁸ Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980).

⁴⁹ Mueller v. Allen, 463 U.S. 388 (1983).

education courses;⁵⁰ finding no constitutional violation in allowing a college student to use neutrally available state vocational rehabilitation assistance funds to study for the ministry at a bible college;⁵¹ allowing a state-employed sign-language interpreter to assist a deaf student enrolled in a Roman Catholic high school;⁵² 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;⁵³ allowing state-employed teachers to offer instruction in remedial and enrichment courses in parochial schools;⁵⁴ upholding a federal law providing instructional materials such as library books, media materials, and computers to religious schools;⁵⁵ and, upholding a state law providing tuition assistance to low-income students enrolled in religious schools.⁵⁶

While there is no virtually no philosophical discussion about the liberal political tradition and the place of religion in it in any of these cases, one sees in these cases a shift in the political principles emphasized, or at least a change in the way the Court understands them. This alteration signals as well, it seems, an adjustment regarding the philosophical assumptions upon which the decisions rest. From *Everson* until roughly the mid-1980s, the Court emphasized the principle of “neutrality” (as between believers and non-believers) and the notion that religion is purely a “private matter for the

⁵⁰ *Grand Rapids School District v. Ball*, 473 U.S. 373, and *Aguilar v. Felton*, 473 U.S. 402 (1985).

⁵¹ *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).

⁵² *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

⁵³ *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995).

⁵⁴ *Agostini v. Felton*, 521 U.S. 203 (1997), overruling *Ball* (1985) and *Aguilar* (1985).

⁵⁵ *Mitchell v. Helms*, 530 U.S. 793 (2000), overruling portions of *Meek* (1975) and *Wolman* (1977).

⁵⁶ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

individual, for the family, and the institutions of private choice.”⁵⁷ The main test employed by the Court for evaluating a law’s neutrality was the so-called *Lemon* test; that is, whether the law has a secular purpose, the primary effect of which is neither to promote nor hinder religion, and which does not lead to an “excessive entanglement” of religion and the state.⁵⁸ Because in the religious schooling cases the Court normally accepts that the laws at issue have a valid secular purpose, which generally is to assist the secular education activities within such schools, the constitutionality of a given law generally turned on whether it advanced or inhibited religion or whether it led to an excessive entanglement between church and state. The Court’s understanding of neutrality, moreover, was controlled by its commitment to restricting religion to the private sphere. Consequently, it saw no violation of the neutrality principle in a compulsory, value-shaping, government-run educational system in which it was, as we will see in the next line of cases below, systematically removing all official religious aspects from. The Court’s belief that religion has no proper public dimension thus led it to establish a baseline for neutrality that was skewed away from religion from the outset.

In other words, the existence of a secular, governmental school system that all taxpayer are required to support makes it hard to understand exactly how the state is acting neutrally with regard to religion. For many parents the ability to transmit their religious beliefs to their children is an important feature of liberty, and religious schooling is an important means for doing so. Yet while such families are compelled to support the public schools, the Court struck down as a violation of neutrality any effort

⁵⁷ *Lemon*, 403 U.S. at 625. See Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 Cath. U.L. Rev. 19 (1991).; and Gerard V. Bradley, *Dogmatomachy: A “Privatization” Theory of Religion Clause Cases*, 30 St. Louis U.L.J. 275 (1986).

⁵⁸ *Lemon*, 403 U.S. at 613.

by the state to aid religious schools that went beyond assistance that could be categorized as the provision of basic governmental services.⁵⁹ Other types of aid were viewed as either advancing the religious mission of the school or requiring an excessive entanglement of church and state to ensure that the aid was not used for religious purposes. The assumption that religion is a private matter to be confined to the private sphere thus blinded a majority of justices in these cases to the decidedly non-neutral aspect of public schooling and led them to view most legislative efforts to provide public assistance to religious schools as violating the neutrality principle.

In cases involving public aid to religious schools the last twenty years, however, the Court has moved away from its privatization of religion commitment, which has led to a new understanding of neutrality. In these cases—*Mueller, Witters* (involving a religious college), *Zobrest, Agostini, Mitchell*, and *Zelman*—the Court seeks not to confine religion to the private sphere but to ensure that the state does not directly promote religion. That the state should not directly promote religion of course was an objective of the earlier decisions too, but the privatization commitment of the majority of justices in those cases led them to view almost all public assistance to religious schools as a violation of the neutrality principle, as they understood it. The rejection of the privatization commitment, on the other hand, has led to a modification of the *Lemon* test and to an understanding of neutrality that does not regard the fact that public assistance reaches a religious school as necessarily indicating that the state has aided religion. The

⁵⁹ For example, aid that supplied such things as secular textbooks (*E.g.*, *Meek v. Pittenger*, 421 U.S. 349 (1975)) and health and therapeutic services (*E.g.*, *Wolman v. Walter*, 433 U. S. 229 (1977)) was permitted but instructional materials (*E.g.*, *Wolman v. Walter*, 433 U.S. 229 (1977)) and *Meek v. Pittenger*, 421 U.S. 349 (1975)) and the provision of remedial and enrichment courses (*E.g.*, *Grand Rapids School District v. Ball*, 473 U.S. 373, and *Aguilar v. Felton*, 473 U.S. 402 (1985)) were not.

Lemon test was explicitly modified in *Agostini v. Felton*.⁶⁰ A law's neutrality is now judged by whether the challenged legislation has a secular purpose that neither advances nor inhibits religion. Because it is, again, rare in the religious schooling context for a law to be struck on the grounds that it lacks a secular purpose, the question of neutrality turns mainly on whether a law advances or inhibits religion. The answer to this question no longer depends, however, as it did earlier, on whether the aid secures to the school a basic governmental service (previously permissible) or goes beyond this (previously impermissible, on the grounds that it either promoted religion or led to an excessive entanglement between church and state). Instead neutrality is now judged by whether the challenged legislation is a government program providing benefits to a broad spectrum of individuals who are defined without reference to religion and in which government aid reaches religious schools only as a result of the independent choices of the recipients.⁶¹

⁶⁰ 521 U.S. 203 (1997). Specifically, the entanglement portion of *Lemon* was collapsed into the effects portion of the inquiry. As the Court said of itself and *Lemon*:

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).

Agostini, 521 U.S. at 232 (O'Connor, J., citations omitted).

⁶¹ The Court in *Zelman* appears to have adopted neutrality as the sole constitutional test for judging aid-to-religion cases. The four-justice plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), had argued that neutrality alone is the appropriate test. As Justice O'Connor pointed out in her concurring opinion in *Mitchell*, however, the Court had never viewed neutrality as the sole criteria for judging the constitutionality of a government-aid program. Other factors such as the divertibility of the aid to religious purposes and whether the aid was for a program that would not otherwise exist but for the aid were also important considerations. *Mitchell*, 530 U.S. at 838-39 (O'Connor, J., concurring). See also Justice Souter's *Mitchell* dissent, 530 U.S. at 878-889. As Justice Souter points out in his *Zelman* dissent, Justice O'Connor now appears to agree that neutrality is the sole criteria for judging government-aid cases, giving the test precedential value that the *Mitchell* opinion could not. *Zelman*, 536 U.S. at 696 n. 6 (Souter, J., dissenting).

As Chief Justice Rehnquist, writing for the Court in *Zelman* in 2002 in the most recent schooling case, stated:

where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause⁶²

Under this new understanding of neutrality, a law passes constitutional scrutiny if it provides aid on the basis of some non-religious criteria and does not attempt to steer recipients toward religion. For example, the Ohio law at issue in *Zelman* was found not to violate the establishment clause because 1) the eligibility criteria for the voucher program was poverty and geography; that is, all financially needy students living within the boundaries of the Cleveland school district are eligible to receive tuition assistance; and, 2) the money can be used at public schools in adjacent districts and at private schools, religious and non-religious, within the Cleveland district.⁶³ The law thus does not define recipients on the basis of religion and it provides them with meaningful choice as between religious and secular alternatives.

As is evident, under this newer meaning of neutrality the Court does not object to the fact that public assistance promotes the religious mission of a school. On the Court's

⁶² *Zelman*, 536 U.S. at 652.

⁶³ It must be noted that the public schools in the adjacent districts refuse to participate in the voucher program. It is a point of contention between the majority and the dissenting justices in *Zelman* as to whether the tuition payments public schools in the adjacent districts would receive for participating in the voucher program provides incentives or disincentives for participation. The majority contends that these schools have a financial incentive to participate. *Zelman*, 536 U.S. at 653-54. While the dissenters say that it would be a financial burden for them to accept voucher students. *Zelman*, 536 U.S. at 697-98 (Souter, J., dissenting). This dispute turns on how one counts the public funds available to public schools participating in the voucher program. The *Zelman* majority argues that all state funds available to the public schools have to be considered, including those monies not explicitly part of the voucher program. The dissenting justices argue that only those funds appropriated through the voucher program should be counted in determining the program's incentives and disincentives for school participation.

reasoning, such promotion is not attributable to the state, as the private choice of individual recipients is the reason public aid gets directed to a religious school. As the majority opinion in *Zelman* noted, the “incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributed to the individual recipient, not to the government, whose role ends with the disbursement of benefits.”⁶⁴ On this understanding of neutrality there is no effort to restrict religion to the private sphere. Neutrality requires only that the state neither define recipients of aid on the basis of religion nor attempt to steer individuals toward the religious alternative. That some individuals go on to use neutrally available public assistance in a way that promotes religion means only that the individuals themselves, not the state, have favored religion.

B. Religion in the Public Schools

Before *Everson* the Supreme Court had been largely silent as to the operation of the public schools.⁶⁵ Following *Everson* the Court used the establishment clause to invalidate a variety of state and local educational practices that it judged as promoting religion in the public schools. These practices included "release time" programs whereby teachers from all religious groups choosing to participate, and who were paid by the groups they represented, were permitted to offer religious instruction in the public schools one hour per week;⁶⁶ state-sponsored nondenominational prayer in which student

⁶⁴ 536 U.S. at 652.

⁶⁵ Notable exceptions, of course, are *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), holding that it was not unconstitutional to expel from school a student who refused to salute the American flag on the grounds that it violated the student's religious beliefs. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), reversed *Gobitis* on free speech grounds.

⁶⁶ *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948). Release-time programs where religious instruction is offered off campus were held to be constitutional in *Zorach v. Clauson*, 343 U.S. 306 (1952).

participation was voluntary;⁶⁷ commencing the school day with Bible reading and recitation of the Lord's Prayer;⁶⁸ a state law prohibiting the teaching of evolutionary theory in public schools and universities;⁶⁹ posting of the Ten Commandments in school rooms⁷⁰ commencing the school day with a moment of silence for either meditation or voluntary prayer;⁷¹ a state law prohibiting the teaching of evolutionary theory in public schools and universities unless creation science was also taught;⁷² clergy-led prayers at graduation ceremonies;⁷³ and, student-led prayers at school sporting events.⁷⁴

Unlike the public assistance cases, one does not find in the public school cases any change over time in the Court's approach to them. The principle that the state must remain neutral with respect to religion is of course the benchmark employed for judging the constitutionality of the programs at issue in the various cases. And the Court understands neutrality in the older sense of the term, as in the public aid cases through about the mid-1980s, and this understanding has remained constant over the years. It make sense of course that that the understanding has remained unchanged, for the context—internal activities of government institutions—does not lend itself to the “circuit-breaker” analysis now employed in the aid cases. That is, religious activities in the public schools inescapably involve the state in the promotion of religion. There is no free and independent choice of parents, as is possible in the aid context, to sever the link between the state and the promotion of religion. The rationale that thus runs through these cases is that each of the practices at issue lacks a secular purpose and involves the

⁶⁷ Engel v. Vitale, 370 U.S. 421 (1962).

⁶⁸ Abington School District v. Schempp, 374 U.S. 203 (1963).

⁶⁹ Epperson v. Arkansas, 393 U.S.97 (1968).

⁷⁰ Stone v. Graham, 449 U.S. 39 (1980).

⁷¹ Wallace v. Jaffree, 472 U.S. 38 (1985).

⁷² Edwards v. Aguillard, 482 U.S. 578 (1987).

⁷³ Lee v. Weisman, 505 U.S. 577 (1992).

⁷⁴ Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

state, through the public schools, in the promotion of religion in violation of the neutrality principle and, hence, the establishment clause.⁷⁵

Having briefly summarized the Court's establishment clause jurisprudence in the schooling context, let us now examine more closely the reasoning in these cases to see if we can discern any particular understanding of the liberal political tradition.

III. The Understanding of Liberalism in the Schooling Cases

As I noted earlier, one does not find in any of the church-state cases much of a discussion about the meaning of the liberal political tradition and the place of religion in it. What one does find, however, is an intermittent commitment, especially in the Court's establishment clause jurisprudence through the 1960s and 1970s, to the secularization of the public sphere. This is a well-chronicled phenomenon,⁷⁶ and as George Dent explains somewhat hyperbolically, is one in which the "Court believed religious people are irrational, try to suppress the truth, and need to be enlightened with secular truth"; thus "secular justices . . . sought to banish religion from public life and exile it to the private

⁷⁵ As I argued earlier, in the schooling context the existence of a public, secular school system skews the neutrality baseline away from religion from the beginning. *See supra* text accompanying notes 58-59. Even so, and without getting into specific cases, the Court's conclusion that the practices in these cases promoted religion seems for the most part generally right. In other words, I tend to think that most of these cases were rightly decided, not because I believe the practices at issue had to be excluded to uphold governmental neutrality towards religion, for the establishment of a state-owned, secular school system undermines at the outset the claim that the state is acting neutrally concerning religion. I believe instead that respect for diversity requires that the state not promote religion in the public schools.

⁷⁶ *See, e.g.*, Michael W. McConnell, *Believers as Equal Citizens*, in *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* 90 (Nancy L. Rosenbaum, ed., 2001); George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 B.Y.U.L. Rev. 1; and Frederick Mark Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (1995). For arguments that the First Amendment requires the establishment of a secular public order, *see* Kathleen M. Sullivan, *Religion and Liberal Democracy* 195, in *The Bill of Rights in the Modern State* (Geoffrey R. Stone, Richard Epstein, and Cass Sunstein, eds., 1992); and Stephen G. Gey, *Why is Religion Special? Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U. Pitt. L. Rev. 75 (1990).

sphere.”⁷⁷ And Michael McConnell describes “two models of religious citizenship” in our public philosophies, including the Supreme Court’s religion jurisprudence.⁷⁸ On the one hand, the Court has sought to establish a secular public sphere in which “laws are based on secular premises, government programs and activities are strictly secular in nature, and religion is deemed to be irrelevant to determination of the citizens’ civil obligations[,]” the effect of which is to require “all citizens to put aside their sectarian loyalties and convictions in their capacities as citizen, but to allow everyone complete freedom to practice religion in private.”⁷⁹ Yet on the other hand the Court has sometimes evinced a commitment to “religious pluralism” that allows “people of all religious persuasions to be citizens of the commonwealth with the least possible violence to their religious convictions.”⁸⁰

Having said this, one finds at least hints of the two concepts of liberalism in the Court’s religion and schooling establishment clause jurisprudence. The existence of intimations, however, does not establish either that the privatization of religion thesis is rooted in autonomy-centered liberalism or that the friendlier view of religion that has emerged in the neutral aid cases over the last two decades stems from diversity-centered liberalism. As unreflective philosophically as the Court is, it is possible that both the privatization of religion commitment and the more open view of religion derive from nothing more rich or comprehensive than either simple skepticism concerning, or support for, religion. The aim of this portion of the essay is thus to see if we might draw out of

⁷⁷ Dent, *supra* note 76, at 55-56.

⁷⁸ McConnell, *supra* note 76, at 100-101.

⁷⁹ McConnell, *supra* note 76, at 101.

⁸⁰ McConnell, *supra* note 76, at 100, 103 (quotation is on page 103).

the religion and schooling cases something more philosophically robust than first meets the eye.

A. Public Aid to Religious Schools

The belief that religion is purely a private matter to be confined to the private sphere, which was once the majority position on the Court but is no longer so,⁸¹ has obvious parallels to autonomy-centered liberalism. According to Galston, autonomy-centered liberals regard ways of life based on religion or tradition as inferior to a life of autonomy or individuality. One sees a similar negative view towards religion, or at least towards religion in the public sphere, in the reasons various justices have given for the assertion that the establishment clause requires religion to be restricted to the private sphere. In easily the most extended discussion of the privatization commitment in any church-state case, the dissenting justices in *Zelman*, for example, regard the use of public funds in religious schools as tyrannizing the minds of citizens,⁸² believe that religion must be kept private in order to save it from its own corruption,⁸³ and believe that religion is hopelessly divisive and threatening to social stability.⁸⁴

⁸¹ See *supra* text accompanying notes 57-60.

⁸² *Zelman*, 536 U.S. at 711 (Souter, J., dissenting). See also *Mitchell v. Helms*, 530 U.S. 793, 870 (Souter, J., dissenting) (“compelling an individual to support religion violates the fundamental principle of freedom of conscience”). Justice Souter’s interpretation of the religion clause is based on his claim, which was initially articulated by the Court in *Everson v. Board of Education*, 330 U.S. 1, 13 (1947), that the First Amendment enshrines into the constitution the views on religious liberty of Thomas Jefferson and James Madison as they were articulated in the 1780s in the debate in Virginia over religious freedom. I collect criticisms of this claim at Pybas, *Does the Establishment Clause?*, *supra* note 3, at notes 70-71. I also argue that Justice Souter misconstrues Madison’s principles of religious liberty. *Id.* at (text accompanying notes 78-111).

⁸³ *Zelman*, 536 U.S. at 711-12 (Souter, J., dissenting). See also *Mitchell*, 530 U.S. at 871 (Souter, J., dissenting) (“government aid corrupts religion”).

⁸⁴ *Zelman*, 536 U.S. at 715 (Souter, J., dissenting); *Zelman*, 536 U.S. at 717-729 (Breyer, J., dissenting). See also *Mitchell*, 530 U.S. at 872 (Souter, J., dissenting) (“government establishment of religion (by which Justice Souter means any public aid to religion) is inextricably linked with conflict”).

The belief that religion should be confined to the private sphere purports to be true to the original intent of the establishment clause, i.e., it is a claim that the establishment clause was intended by the men who drafted and ratified it to bar religion from the public sphere to protect rights of conscience, to protect the purity of religion, and to protect the public sphere from religiously-motivated civic strife.⁸⁵ These are not inappropriate objects of concern but the claim that the establishment clause was intended to restrict religion to the private sphere is patently false. One need only recall that when ratified the First Amendment, as with all of the Bill of Rights, limited only Congress in its actions, not state governments. And the states of course provided public support for religion in a variety of ways, including established churches, religious tests for office, and blasphemy laws.⁸⁶ Whatever the original intent of the establishment clause, it clearly was not to confine religion to the private sphere as it left unmolested all the ways in which the states supported religion.⁸⁷ Having noted this, I do not wish engage in a debate about the original meaning of the establishment clause. Rather, my aim is to draw out the negative view of religion that is suggested or implied in the three rationales of the privatization claim.

⁸⁵ See, e.g., *Zelman*, 536 U.S. at 711-13 (Souter, J., dissenting); *Mitchell*, 530 U.S. at 870-72 (Souter, J., dissenting).

⁸⁶ See, e.g., Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. and Mary L. Rev. 2105 (2003); Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*, Chapter 2 (1986).

⁸⁷ For an argument that the original intent of the establishment clause was largely a jurisdictional statement making clear that the new constitution gave Congress no authority to interfere with the states' authority over religion, see Smith, *Foreordained Failure*, *supra* note 38. But cf. 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) (rejecting federalism interpretation of the establishment clause and arguing that it does in fact protect individual rights).

I have written at length on this previously⁸⁸ and will not rehearse here the full extent of my arguments, though several brief remarks are in order. First, it is difficult to understand how rights of conscience are tyrannized by aid programs of the type that the Court has routinely affirmed over the last two decades wherein individual aid recipients channel money to schools of their choice, religious or secular.⁸⁹ In other words, in the context of an expansive regulatory state wherein government spends trillions of dollars annually⁹⁰ and intrudes into the lives of citizens in ways unimaginable to the founding generation it is hard to see why we should view neutral aid funds that wind up in the coffers of religious institutions as a result of the free and independent choices of aid recipients as any more offensive to rights of conscience than any other governmental spending to which citizens object. Neutral aid programs coerce no belief or action and leave citizens to live according to their own best lights, believing or not believing what they will about God, living according to the dictates of their consciences. The claim that such programs violate rights of conscience then seems little more than a knee -jerk reaction, a mantra duly recited, devoid of any meaningful analysis. In fact, the easy equating of neutral aid programs of today with Patrick Henry's *A Bill Establishing a Provision for Teachers of the Christian Religion* indicates almost a profound lack of curiosity about religious liberty. That is, as I noted above,⁹¹ Jefferson and Madison are regarded by the privatization justices as authoritative on the meaning of the establishment clause, and their writings from which the purported meaning of it is drawn are Jefferson's

⁸⁸ Pybas, *Does the Establishment Clause?*, *supra* note 3.

⁸⁹ *E.g.*, *Mueller*, *Zobrest*, *Agostini*, *Mitchell*, and *Zelman*.

⁹⁰ According to the Economic Report of the President 307 (2005) Table B-82 "Federal and state and local government current receipts and expenditures, national income and product accounts (NIPA), 1959-2003," the federal government was projected to spend over \$2.3 trillion dollars in fiscal year 2004, while state and local governments were projected to spend around \$1.5 trillion dollars during the same period.

⁹¹ *See supra* note 82.

A Bill for Establishing Religious Freedom and James Madison's *Memorial and Remonstrance against Religious Assessments*.⁹² The *Memorial and Remonstrance* of course was written in opposition to Henry's *Bill*, which would have created a property tax to fund the teaching of Christianity. The controversy over Henry's bill, which Madison is credited with defeating, gave impetus to the passage into law of Jefferson's *Bill*, which had been drafted and proposed several years prior to the Henry controversy.⁹³ However much Henry's proposal to explicitly benefit the Christian religion would have violated the rights of conscience of citizens of Virginia, which it undoubtedly did, such a proposal is miles apart from the neutral aid programs that permit—*permit*, not require—aid recipients to direct their benefits to religious schools. Jefferson and Madison understood their principles of religious liberty as enlarging the sphere of human liberty. But in the context of a far-reaching regulatory state that “touch[es] the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own,”⁹⁴ the reflexive cry that religion must be confined to the private sphere in order to protect rights of conscience demeans religion as an activity not worthy of serious inquiry.

Secondly, the claim that religion must be confined to the private sphere in order to protect it from its own corruption, that is, to protect it from secularizing influences that competition for public dollars inevitably brings, is deeply and unnecessarily paternalistic. That religious institutions might relax their principles in order to qualify for public funds is a real concern, and were I a member of a religious community contemplating applying for public funds, I would be extremely wary of such an undertaking. But I see no reason

⁹² *Mitchell*, 530 U.S. at 870-71 (Souter, J., dissenting) (citations omitted); *Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (citations omitted).

⁹³ See Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787* (1977).

⁹⁴ *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 657-58 (1989) (Kennedy, J., concurring in part, dissenting in part).

why the religious themselves should not be permitted to judge for themselves the risks and merits of participation in a neutral aid program, and if they are willing to accept the terms and conditions of participation, why that decision should not be respected. What evidence exists indicating that the faithful are incapable of safeguarding their faith? It seems to me that the anti-corruption argument is premised on the notion that Supreme Court justices care more about the integrity of the faith of religious believers and communities than do the faithful themselves—a proposition that seems highly unlikely. Equally troubling is that the anti-corruption rationale seems also to presuppose that Supreme Court justices possess the theological and constitutional authority to tell the faithful how to understand their own faith. Whatever else we may say about the First Amendment, surely it should deny governmental officials any such right.⁹⁵

As for the third rationale of the privatization claim—that religion must be confined to the private sphere in order to protect civic peace and stability—we may

⁹⁵ In *Does the Establishment Clause?*, supra note 3, I argue further that the anti-corruption rationale requires the Court to engage in theological evaluations, an undertaking the Court has declared unconstitutional in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). The anti-corruption worry is that the lure of public funds will lead religious entities to be unfaithful to their religious principles and identities. But how is the Court to evaluate when a group has been unfaithful to its religious beliefs? To make such a determination, the Court would have to be well versed in theology so that it could decide whether a religious group's willingness to abide by the terms and conditions of participation of an aid program truly amounts to a compromise of belief. The Court would have to make a judgment about whether a religious community's beliefs remained consistent with particular religious doctrines. Theological judgments, however, are prohibited by *Presbyterian Church*, where the Supreme Court declared that it was unconstitutional for "civil courts to engage in the forbidden process of interpreting and weighing church doctrine." *Id.* at 451. Ownership of local church property was at issue in *Presbyterian Church*, the outcome of which turned on whether certain actions of the national denomination "departed substantially" from church doctrine and, if so, whether the departure was significant or not. In other words, the dispute required the judiciary "to determine matters at the very core of religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion." *Id.*, at 450. "Plainly," the Court declared, "the First Amendment forbids civil courts from playing such a role." *Id.* It seems to me that in seeking to be the guardian of religious belief, the Court has to engage in something like what *Presbyterian Church* forbids. To relegate religion to the private sphere in order to prevent its corruption is to worry that the religious will depart from their principles and beliefs if permitted to participate in neutral aid programs. But to worry about a loosening of beliefs and principles involves the Court in second-guessing the understanding believers have of their faith, which *Presbyterian Church* forbids.

reasonably wonder just how socially and politically disruptive religion's involvement in the public sphere is. Those justices who argue that establishment clause requires religion to be confined to the private sphere expend great energy worrying about the divisive potential of religion while failing to notice religion's long involvement in the public sphere in this country, a connection that has produced no lasting social strife. In her concurring opinion in *Zelman*, for example, Justice O'Connor points out that many billions of public dollars annually wind up in the coffers of religious institutions through state and federal tax policies, public health programs, childcare programs, and student loan and subsidy programs.⁹⁶ Most of the programs Justice O'Connor notes came into existence during the New Deal and afterwards, yet one is hard-pressed to point to any enduring religiously-motivated social disruptions caused by the participation of religion in these various programs. This of course is not meant to deny that much evil has taken place in name of religion throughout human history, including American history.⁹⁷ I do mean to question, however, how instructive such atrocities are for evaluating the divisive potential of neutral aid programs. It seems to me that the real issue concerning the participation of religious entities in neutral aid programs has been fundamentally misunderstood by those justices who seek and have sought to confine religion to the private sphere. Take Justice Souter, for example, who would deny religious schools the right to participate in aid programs of the type at issue in *Mitchell* and *Zelman* because, among other reasons, of the concern about religiously motivated political strife. The

⁹⁶ *Zelman*, 536 U.S. at 665-668 (O'Connor, J., concurring). Justice O'Connor uses the information cited to make a different point that I am making, namely, that the amount of public funds going to religious schools participating in the voucher program at issue in *Zelman* paled in comparison to the amount of public dollar already constitutionally permitted to flow to religious institutions.

⁹⁷ See, e.g., Philip Hamburger, *Separation of Church and State* 191-478 (2002) (recounting fierce anti-Catholicism surrounding schooling and other public policy debates from the mid nineteenth century into the twentieth century); and John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297-318 (2001) (same focusing largely on the issue of schooling).

problem with this view is that the debate over the inclusion of religious institutions in such program is not a religious debate; it is a political one. The debate is not about religion or establishing religious truth or government taking sides in a religious debate. Instead, it is a debate about political principles as regards the structure and financing of the education of children in a free society.⁹⁸ Only political values are implicated in the debate over public aid to religious schools. It is a political debate carried on by ordinary political means. The establishment of religious truth or religious orthodoxy is not part of the debate. What is sought is not the establishment of religious orthodoxy but an end to the government's monopolization of 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 assert, without a scintilla of evidence, the contrary."⁹⁹ This of course does not deny that religion is in the background of the debate, 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?

One should not misconstrue me as advocating any particular boundary between religion and the state, or of encouraging an uncritical, unqualified, or unlimited involvement of religion in the public square, or as denying the possibility that religion could come to jeopardize civic stability. As I noted above, human history, including American history, to say nothing of the current decade, undeniably teaches otherwise.

⁹⁸ See, e.g., Pybas, *Liberalism and Civic Education*, *supra* note 33; Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (2000); Amy Gutmann, *Democratic Education* (1987).

⁹⁹ Gerard V. Bradley, *Dogmatomachy: A "Privatization" Theory of Religion Clause Cases*, 30 St. Louis U.L.J. 275, 304 (1986).

My point rather is to note that in the American context religion has always had some involvement in the public sphere and yet on the whole our experience has been one without enduring religious conflict. And this is especially true post-New Deal where, as I noted above,¹⁰⁰ billions of dollars have been routed through religious institutions without generating worrisome social strife. Despite the fretfulness expressed by Justice Souter and others who seek to confine religion to the private sphere, it is telling that they fail to cite any examples of lasting religious conflict in this country beyond referencing the divisiveness of the founding era state-supported churches and 17th century Europe.¹⁰¹ We should note, too, that Justice Stevens cites religious conflict in “the Balkans, Northern Ireland, and the Middle East” as evidence as to why religion must be confined to the private sphere in this country.¹⁰² In other words, I take my point that America has been largely free of enduring religiously-motivated political strife, especially as regards neutral aid programs, to be conceded by the privatization justices’ failure to point to any meaningful examples of it.

The belief that religion must be confined to the private sphere does not necessarily indicate hostility to religion, though in the past some justices’ privatization commitments were infused with views that bordered on, if not crossed the line into, anti-Catholicism.¹⁰³ It does suggest, however, that the privatization commitment prevents

¹⁰⁰ See *supra* text accompanying note 92.

¹⁰¹ See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 8 (1947); and *Zelman*, 536 U.S. at 718 (Breyer, J., dissenting).

¹⁰² *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

¹⁰³ See Justices Black and Douglas’ dissenting opinions in *Board of Education v. Allen*, 392 U.S. 236 (1968) and Douglas’ concurring opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, for example, Justice Douglas approvingly quotes an anti-Catholic tract claiming that in

the parochial schools Roman Catholic indoctrination is included in every subject. History, Literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very

individuals who adhere to it from thinking about religion in the public sphere in any but negative terms. That is, while the reasons given in support of the claim that the establishment clause requires religion to be confined to the private sphere—to protect rights of conscience, to safeguard religion from its own corruption, and to protect the civic peace—are not inappropriate objects of concern, they are explored in such a shallow, dogmatic way by the justices committed to the privatization of religion that this conclusion seems foreordained from the outset, as an *a priori* negative judgment about religion, rather than as the result of a careful, searching inquiry into how religious liberty can be protected and promoted in the modern administrative state.

Another similarity between the privatization of religion jurisprudence and autonomy-centered liberalism is that both give insufficient attention to the nation's religious diversity. Recall that Galston argues that autonomy centered liberalism fails to take diversity seriously,¹⁰⁴ and that public policies promoting autonomy are harmful to “individuals and groups who cannot conscientiously embrace the Enlightenment impulse.”¹⁰⁵ Hints of this same failure to seriously reflect upon the nation's rich religious diversity are present in the claim that the establishment clause requires religion to be confined to the private sphere. Despite the nation's religious diversity, the privatization thesis insists that the only education worthy of public support is secular education. The privatization of religion thus fails to take diversity seriously in two respects. First, as

purpose of such schools, the very reason for going to all the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.

Lemon, 403 U.S. at 635 n. 20 (Douglas, J., concurring).

¹⁰⁴ See *supra* text accompanying notes 17-18.

¹⁰⁵ Galston, *Liberal Pluralism*, *supra* note 1, at 25-26.

between religion and secularism, it places the state on the side of secularism. What is more, it discriminates against families who desire a religiously-oriented education for their children by taxing them for education purposes but denying them any share of the proceeds. Families who desire a religious education are thus compelled to pay for the education of other children while at the same time paying twice, as it were, for a religious education.

A critic might object that attention to diversity is precisely what motivates the privatization of religion stance. That is, one might argue that the justices who hold to the privatization view do so out of concern that to do otherwise would be to put the state's imprimatur of approval upon mainly one religion—Christianity—the religion of the overwhelming majority of religious schools in America.¹⁰⁶ The privatization of religion, one might therefore argue, is an expression of respect for our nation's religious diversity in that no one religion receives favored treatment. In other words, the privatization of religion treats all religions equally; it insists that none can receive public assistance. On its face this is not an implausible argument. However, I am unaware of any justice making this argument in a public assistance case. If this is the actual motivating force behind the privatization view, moreover, what is one to make of the negative assessment

¹⁰⁶ The National Center for Education Statistics reports, for example, that there were approximately 29,000 private schools in existence during the 2001-02 school year, and 22,595 of these had a religious orientation. Because of the existence of an "other" category, it is not possible to state with exact precision the precise religious orientation of the religious schools. However, it appears that of the 22,595 private religious schools, 188 were Islamic, 730 Jewish, and 602 other. Assuming that none of the schools in the "other" category were Christian, there were 1,520 non-Christian (Islamic, Jewish, and other) religious schools and 21,075 Christian schools during 2001-02. The Christian schools represent more than twenty different Christian theological outlooks. During the same year, about 4.4 million students (out of approximately 5.3 million children attending private schools) attended religious schools. Islamic schools enrolled about 23,000 students, Jewish schools about 199,000 students, and "other" schools about 57,000 students. Approximately 4.1 million students thus attended Christian schools of one type or another. See Tables 6 and 7, *Characteristics of Private Schools in the United States: Results from the 2001-2002 Private School Universe Survey*, available at <http://nces.ed.gov/pubs2005/2005305.pdf> (last visited Aug. 11, 2005).

of religion that generally accompanies the privatization commitment?¹⁰⁷ Were respect for religious diversity the motivation for the privatization of religion, surely that could be articulated without the off-putting critique of religion that runs through the privatization opinions.

Whereas a minority of justices continues to insist that religion be confined to the private realm, the majority view that has emerged over the last two decades aims not to limit religion but to ensure simply that the state does not directly promote religion.¹⁰⁸ This position is obviously friendlier to religion than is the privatization stance. But these opinions are no more philosophically reflective than are the privatization opinions. Still, one sees in them a hint of a philosophical understanding that is akin to Galston's diversity-centered liberalism.

Specifically, it is the shift the majority effects with regard to the meaning of neutrality that points to an understanding of liberalism that is more diversity oriented. The *Zelman* decision makes clear, for example, that a law is neutral, and therefore constitutional, as long as it neither defines aid recipients on the basis of religion nor attempts to channel them toward religious alternatives. This is so even if a great majority of beneficiaries actually choose the religious option. As Chief Justice Rehnquist wrote in *Zelman*, “[t]he constitutionality of a neutral education aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.”¹⁰⁹ On this view, religious schooling is an unexceptional alternative in a pluralistic society; the choice for religious schooling is no more noteworthy than the

¹⁰⁷ See *supra* text accompanying notes 81-103

¹⁰⁸ See *supra* text accompanying notes 57-64.

¹⁰⁹ *Zelman*, 536 U.S. at 658.

choice for secular education. The justices holding this position are unmoved by the fact that in a neutrally available program some or even many families will choose the religious alternative. They seek neither to confine religion nor marginalize religious belief, only to ensure that the state does not directly promote religion. From this perspective, the Court's proper oversight of religion is simply to ensure that public policy does not favor religion, that it does not define recipients on the basis of religion or attempt to channel them toward the religious alternative.

This comports with diversity-centered liberalism in the sense that it recognizes the religiously diverse character of the United States and leaves families free to choose the religious alternative or not, according to the dictates of their own beliefs. It recognizes, too, that religious believers are citizens and taxpayers who have contributed to the government's education fund. Consequently, the diversity approach, if it may be called that, does not regard the fact that public funds are used in religious schools as an instance of the state favoring religion. Instead, it treats such programs as allowing the families of religious school students simply to share in the pool of resources that they helped establish. Public funding of religious schools serves the interest of diversity by expanding the educational opportunities available to a diverse population. There is then for these justices no meaningful objection to including religious schools in the publicly funded alternatives parents and children have so long as religion is not favored.

The majority's insistence that religion not be favored further suggests an understanding of liberalism analogous to diversity centered liberalism. Were a public program to favor religion, it would fail to take diversity seriously in that it would fail to acknowledge that many Americans do not profess any religious beliefs at all, or they

profess religious beliefs different from those found in many religious schools. In other words, the majority seems to recognize that while any reasonable conception of diversity has to include religion, it cannot be limited to religion.

B. Religion in the Public Schools

The understanding of liberalism that seems to underlie the judgments in the public school cases is less clear than it is in the public aid cases. One reason for this, I think, is that unlike the jurisprudence in the aid cases, there has been no shift in the understanding of neutrality in the public school cases. That is, in these cases the Court has been consistent in insisting that religion be restricted to the private sphere. As Justice Kennedy wrote for the Court in *Lee v. Weisman*, declaring unconstitutional clergy-led graduation ceremony prayers, “[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.”¹¹⁰ That the jurisprudence of the public school cases has not followed that of the aid cases is not surprising. For the context—the activities of the public schools—of necessity does not allow for a reconceptualization of neutrality, at least not along the lines of the public aid cases. Public schooling is not a neutrally available public assistance program that leaves it to families to choose between secular and religious alternatives. There is no intervening independent choice of families, as in the public aid cases, that breaks the circuit, as it were, between the state and religion.¹¹¹ Religious activities in the public schools inescapably involve the state in the promotion of religion. Consequently, in this context the only alternative to the state’s promotion of

¹¹⁰ *Lee*, 505 U.S. at 589.

¹¹¹ See *supra* text accompanying notes 74-75.

religion is to insist that religion be limited to the private sphere.¹¹² Perhaps the starkness of alternatives in this context helps explain why in this line of cases one sees nothing of the negative view of religion in the Court's opinions as is found in the public aid cases. That is, the simplicity of the choice before the Court in the public schooling cases—either permit the state to promote religion or not—leads the Court to engage in little analysis beyond stating the purported historical meaning of the establishment clause. In short, the fact that the Court generally does not view the public school cases as difficult decisions leads it to say little at all about religion. This contrasts with the aid cases, where in the context of the modern regulatory state one might view the programs at issue as rather unremarkable. This was of course Justice O'Connor's point in her concurring opinion in *Zelman*,¹¹³ where she cataloged the variety of ways that religion and the state mix in the modern bureaucratic state, all without violating the establishment clause.¹¹⁴ In other words, in the age of trillion dollar government budgets,¹¹⁵ the fact that a few education spending programs permit families to choose religious alternatives is not particularly momentous, especially in light of the fact that to the extent that public monies end up in religious institutions it is because of recipient choice rather than governmental direction. Because neutral aid programs permitting religious choice are rather unexceptional features of our administrative state, those justices who wish to restrict religion to the private sphere are compelled to argue not simply that neutral aid programs are

¹¹² In this regard, note that Justices Kennedy and O'Connor adhere to the privatization thesis in the public school cases but not the aid cases. *See, e.g.,* *Lee v. Weisman*, 505 U.S. 577 (1992) and *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000), where they were part of the Court majority declaring unconstitutional public school graduation ceremony prayers and athletic event prayers, respectively. But they reject the privatization thesis in the aid cases. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), where they were part of the five-justice majority approving of the inclusion of religious schools in a publicly-funded voucher program.

¹¹³ *Zelman*, 536 U.S. at 665-668 (O'Connor, J., concurring).

¹¹⁴ *See supra* text accompanying note 96.

¹¹⁵ *See supra* note 90.

unconstitutional, but also that they are unwise policies—that religion threatens the rights of others and is itself endangered by the secular state when it seeks to move beyond the private sphere. In the aid cases the privatization justices thus articulate lengthy, substantive-like critiques of religion—policy judgments cloaked in legal arguments—while saying nothing of substance about religion in the public school cases.

We might look to the dissenting opinions in the public school cases for some hint as to the understanding of liberalism that informs the Court’s decisions in this line of cases. Unfortunately, however, the opinions of the dissenting justices in these cases are unhelpful in trying to draw out the philosophical assumptions of either the position for excluding or for permitting official religious activities in the public schools. These justices—among the current Court, Chief Justice Rehnquist and Justices Scalia and Thomas, who would allow, for example, official prayers at graduation ceremonies and at school sporting events—generally rest their arguments on history rather than any implicit philosophical arguments.¹¹⁶

Further clouding the issue of just what understanding of liberalism animates the public school cases is the fact that the cases excluding religion from the public schools can be justified on the basis of diversity-centered liberalism, or at least a version of it. That is, the state fails to take diversity seriously, to respect the beliefs of all citizens, religious and nonreligious alike, when it places its weight behind one (usually) religion—namely, Christianity. Respect for religious diversity, then, requires the state to abstain from inculcating religious beliefs, even through the relatively mild measures that have been declared unconstitutional. While the exclusion of religion from the public schools

¹¹⁶ See, e.g., Justice Scalia’s dissenting opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), and Chief Justice (then Associate Justice) Rehnquist’s dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

can be justified by a thin account of the diversity principle, none of the public school cases appear to rest on this rationale. To be sure, there is the occasional mention of diversity, as in Justice Brennan’s concurring opinion in *Abington School District v. Schempp*, where he notes how much more religiously diverse the nation is now than at its founding.¹¹⁷ Instead the main rationale for these cases is simply that the establishment clause forbids the government’s involvement in religious activities. In any event, attempting to justify the decisions on the basis of any robust notion of diversity would be problematic in light of the compulsory, secular nature of the public schools.

Leaving aside the important question of whether public schooling itself rests upon an understanding of liberalism that is autonomy-centered,¹¹⁸ to the extent that one sees any notion of the Court’s understanding of liberalism in the public school cases, it is in its claims about the purportedly different functions of public schooling and private schooling and the dissimilar principles that are said to animate each. Justice Brennan states this view well in his concurring opinion in *Abington School District v. Schempp*, where he writes that “public schools serve a uniquely *public* function: the training of American citizens in a atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.”¹¹⁹ The *Schempp* decision prohibits public schools from beginning

¹¹⁷ *Abington School District*, 374 U.S. at 240 (Brennan, J., concurring).

¹¹⁸ Charles Glenn, for example, traces the origin of the common school movement to eighteenth century France, where it emerged as part of the Enlightenment agenda. The cultural elite of late eighteenth and early nineteenth century France advocated state-controlled schools as a means by which children could be educated toward Enlightenment values and away from religion or, as the elite saw it, away from “superstition.” Glenn argues further that Horace Mann and other leaders of the common school movement in America in the mid-nineteenth century regarded state-controlled schools primarily as a means by which Enlightenment values could be inculcated in rising generations of children. Simply stated, fashioning loyalties and a shared national identity were as important, if not more so, to Mann and his followers as teaching basic academic skills. Charles L. Glenn, Jr., *The Myth of the Common School* (1987).

¹¹⁹ *Abington School District*, 374 U.S. at 241-42 (Brennan, J. concurring) (emphasis in original).

school days with Bible reading and a recitation of the Lord's Prayer, and Justice Brennan's point, in the quotation above, is that official religious exercises introduce divisiveness into the schools that would otherwise be absent. This is not the place for a comprehensive critique of Justice's Brennan's claim, but his insinuation that but for religion public schooling would be free of "divisive influences" is not one that accords with the history of public schooling. Stephen Arons, for example, in criticizing government-run schooling, documents a wide array of contemporary disputes over the moral and civic instruction in the public schools.¹²⁰ Let us not forget too that the public schools are a critical staging ground for what James Davison Hunter and others have referred to as "culture wars."¹²¹ Witness the ever more common conflicts over sex education and multicultural and diversity education in the public schools.¹²² To be sure, in a nation as religiously and morally diverse as ours, official religious exercises in the public schools are indeed divisive, but it is not the case that the removal of such practices has ended our divisions over public schooling.

Justice Brennan's larger point, however, is that public schools are animated by "democratic values" and "serve a uniquely *public* function"¹²³ while "sectarian education . . . offers values of its own."¹²⁴ That public function, of course, is to turn children from diverse backgrounds into democratic or liberal citizens, or as Justice Brennan puts it, to be the instrument of assimilation for "all American groups and religions."¹²⁵ Or as Justice Brennan wrote for the Court elsewhere, "[p]ublic schools are "vitaly important

¹²⁰ Stephen Arons, *Short Route to Chaos: Conscience, Community, and the Re-Constitution of American Schooling* (1997), and *Compelling Belief: The Culture of American Schooling* (1983).

¹²¹ James Davison Hunter, *Culture Wars: The Struggle to Define America* (1991).

¹²² See, e.g., Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, New York Times, June 9, 2005, at A18.

¹²³ *Abington School District*, 374 U.S. at 241-42 (Brennan, J. concurring) (emphasis in original).

¹²⁴ *Abington School District*, 374 U.S. at 242 (Brennan, J. concurring).

¹²⁵ *Abington School District*, 374 U.S. at 242 (Brennan, J. concurring).

‘in the preparation of individuals for participation as citizens,’ and as vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’”¹²⁶ Justice Brennan of course is not making a novel claim about the democratizing role of the public schools,¹²⁷ so I want to focus here not on his claim about the public schools but on his understanding of private schooling. In contrast to the democratic values promoted in the public schools, religious schools, Justice Brennan argues, “offer[] values of [their] own.”¹²⁸ Undoubtedly religious schools do offer values, i.e., religious values, not found in the public schools. Presumably this is the very reason for their existence. But is it the case that simply because religion is part of the experience of religious schooling that such schools serve no public function, that they do not also inculcate “liberal” or “democratic” values such as tolerance and respect for the rights of others and a willingness to participate in the nation’s political processes and civil society more generally? Justice Brennan seems to presume that this is the case, as do many liberal and democratic theorists who are critical of religious schooling.¹²⁹ Indeed the very labels used to distinguish government schools from and nongovernmental schools—“public” vs. “private”—signifies this presumption. It is perhaps telling that advocates of this claim do not so much argue that religious schools serve no public function as assert it, as the example of Justice Brennan shows. To state the matter another way, it is presumed that as between schooling options, only government schools impart to rising generations the civic values necessary to sustain democracy.¹³⁰ Religious schools, on the

¹²⁶ *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (citation omitted).

¹²⁷ *See, e.g.*, Horace Mann, *The Republic and the School* (Lawrence A. Cremin, ed., 1957 [1837]); and John Dewey, *Democracy and Education* (1963 [1916]).

¹²⁸ *Abington School District*, 374 U.S. at 242 (Brennan, J. concurring).

¹²⁹ *See, e.g.*, Macedo, *supra* note 98; and Gutmann, *supra* note 98.

¹³⁰ *See, e.g.*, Gutmann, *supra* note 98, and Benjamin Barber, *An Aristocracy of Everyone* (1992).

other hand, are presumed simply to inculcate narrow, sectarian dogmas that contribute little to the preservation of our democratic way of life. We might ask, however: what evidence exists to demonstrate that children who attend religious schools do not grow up to become tolerant, responsible, law-abiding citizens, who are respectful of the rights of others, with the capacity for thinking critically about politics and other matters, who are capable of providing for themselves, and who are burdensome neither to their families nor to society at large—who do not, in other words, become good democratic citizens? The question of the degree to which religious schools actually instill important civic values in young people is a question that has only recently attracted the attention of researchers. Because it is a question that needs to be studied over a long period of time, no ultimate conclusion has yet been reached. However, the extant research runs against the long-held presumption that public schools outperform religious schools in inculcating civic values.¹³¹ In other words, evidence is mounting that religious schools are no less effective, and perhaps even are better at, teaching civic values such as tolerance and civic-mindedness than are the public schools. Justice Brennan and others are thus correct to note that religious schools have values of their own, i.e., religious values, but are wrong to presume that that is all they have, that they do not contribute to the health and maintenance of civil society.

One might argue, too, that religious schools, indeed all private schools, serve an additional public function in easing the enrollment burden on the public school system.

¹³¹ See Patrick J. Wolf, Jay P. Greene, Brett Kleitz, and Kristina Thalhammer, *Private Schooling and Political Tolerance*, in *Charters, Vouchers and Public Education* 268 (Paul E. Peterson and David E. Campbell, eds., 2001) and Jay P. Greene, *Civic Values in Public and Private Schools*, in *Learning from School Choice* 83 (Paul E. Peterson and Bryan C. Hassel, eds., 1998). These studies do not distinguish between private religious schooling and private non-religious schooling. However, because most private schooling in this country is religious in character, to speak of private schooling is to speak essentially of religious schooling. See *supra* note 106.

Take the 2000-2001 academic year as an example. The U.S. Department of Education’s National Center for Education Statistics estimates that over five million students were educated in private schools during 2000-2001.¹³² While the precise amount is difficult to quantify, private schooling undoubtedly saves government—local, state, and national—millions of dollars annually by lessening the need for additional tax monies that would otherwise be needed for the public system to educate millions of more students.¹³³ In this regard, recall that one of the legislative motivations for the tuition reimbursement and tax credit plans declared unconstitutional in *Committee for Public Education & Religious Liberty v Nyquist*¹³⁴ was the fear that “any ‘precipitous decline in the number of non-public school pupils would cause a massive increase in public school enrollment and costs,’ an increase that would ‘aggravate an already serious fiscal crisis in public education [in New York state]’ and would ‘seriously jeopardize quality education for all children.’”¹³⁵ Quite apart from the civic education function of private schools, then, such schools would seem also to serve the public good by the benefit they provide by alleviating public school enrollment burdens, and correspondent financial obligations. This fact, along with the civic education accomplishments of private schools, thus call into question the presumption that “private” schooling serves only narrow, sectarian interests.

What then can be said about the understanding of liberalism underlying the public school cases? For different reasons, the belief that the state should not promote religion

¹³² See *supra* note 106.

¹³³ See Michael W. McConnell and Richard Posner, *An Economic Approach to Issues of Religious Freedom*, University of Chicago Law Review 56: 1, 23-25 (1989).

¹³⁴ 413 U.S. 756 (1973). *Nyquist* also struck down public grants to religious schools for the maintenance and repair of facilities and equipment. *Id.* at 774-777.

¹³⁵ *Nyquist*, 413 U.S. at 765 (citation omitted).

is consistent with both autonomy-centered liberalism and diversity-centered liberalism. Unlike the opinions in the public assistance cases, however, which appear to bear a closer resemblance to Galston's two concepts of liberalism, the similarities, if any, in the public school cases are less apparent. As I suggested, perhaps the strongest similarity to Galston's taxonomy is the public school cases is the notion that public schooling rests upon and serves broad, near-universal principles while religious schooling serves only narrow, sectarian interests. Although this view appears to have a low regard for diversity—the *liberty interests of parents in raising and educating their children as they generally see fit requires the state, per Pierce v. Society of Sisters,*¹³⁶ *to tolerate religious schooling, even as these schools serve only narrow religious interests*—it does not necessarily point in the direction of autonomy-centered liberalism. To be sure, autonomy-centered liberals argue that that public schooling should be a vehicle for educating children away from inherited religious beliefs toward notions of autonomous self-direction,¹³⁷ but the Supreme Court itself has not gone this far. This is not to ignore the fact that Justice Stevens suggests that public schooling should be an instrument for educating children away from inherited religious beliefs,¹³⁸ but among Supreme Court justices, he appears to be alone in this view.

¹³⁶ 268 U.S. 510 (1925).

¹³⁷ See Gutmann, *supra* note 98.

¹³⁸ *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 711 (1994) (Stevens, J., concurring) (In *Kiryas Joel* the Court declared unconstitutional on establishment clause grounds the establishment of a public school district that coincided with the boundaries of Kiryas Joel, a village in Orange County, New York, populated entirely by Satmar Hasidic Jews.)

IV. Conclusion

The conflict within the liberal political tradition between the principles of autonomy and diversity that Galston describes seems present, if sometimes only faintly, in the Supreme Court's judgments about the place of religion in public life as regards the education of children. The main challenge of discerning just what understanding of liberalism, if any, animates the Court's establishment clause jurisprudence lies in the fact that Supreme Court justices simply are not very reflective or philosophical in their opinion-writing. Neither those justices who have sought and seek to secularize the public sphere nor those justices who have resisted this goal betray much philosophical insight. Even so, there seems to be more than a passing resemblance between autonomy-centered liberalism and the opinions of those justices who believe religion should be restricted to the private sphere. The similarity is most apparent in the public assistance cases, where the privatization commitment is paired with a negative appraisal of religion. One finds indications that autonomy-centered liberalism also underlies the public school decisions, but the evidence here—the assumption that religious schooling serves no public function or does not contribute to the public good—is less distinct than in the public assistance cases.

That the contexts are different helps explain why autonomy-centered liberalism is more evident in the public assistance cases than in the public schooling cases. As I noted, the practices that have been declared unconstitutional in the public schooling cases unavoidably involved the state in the promotion of religion. Consequently, little in the way of explanation is given, or perhaps even needed, to conclude that the state should not promote religion. This contrasts with the public assistance cases where neutrally

available programs leave beneficiaries free to choose between secular and religious alternatives, thereby severing the link between the state and religion. Still another possibility as to why autonomy-centered liberalism is more pronounced in the public assistance cases, even if not all that robust, is that the Court is sharply divided in these cases, especially recently. As the privatization of religion position has become the minority view, justices writing in this vein have been moved to write lengthy dissents explaining just why religion should be limited to the private realm. In doing so, the affinity to autonomy-centered liberalism has become more apparent.

Diversity-centered liberalism, on the other hand, is reflected—not perfectly or fully but is suggested—in the conception of neutrality that now commands the support of a slim majority of justices in the public assistance cases. A law is now considered neutral if it neither defines recipients on the basis of religion nor attempts to channel them toward the religious alternative. Under such a program, public money that ends up supporting religion does so not because the government has acted to advance religion, but because individual recipients prefer the religious alternative over the secular one. This understanding of government neutrality evinces far more respect for our nation’s religious diversity than does the belief that religion is to be confined to the private sphere. It seems to me, moreover, that it is a better, more accurate understanding of neutrality. The older understanding, associated with a commitment to secularizing the public sphere, inexplicably holds, or even fails to recognize, that the establishment of a government-owned, compulsory, secular educational system means that the state is anything but neutral with respect to religion. Though the newer understanding of neutrality seems to be genuinely neutral as between religion and non-religion, its application is limited to the

public assistance cases. Public schooling simply is not a neutrally available public program that leaves parents to choose between secular and religious alternatives.

A way to summarize the Court's religion and schooling establishment clause jurisprudence would be to note that from the beginning of the Court's religion clause jurisprudence in the middle of the twentieth century until roughly about the time of the ascendancy of William Rehnquist to the chief justice position, the Court generally sought to confine religion to the private sphere, or to secularize the public sphere. In these opinions, autonomy-centered liberalism, or at least hints of it, is evident. As the makeup of the Court has changed in recent decades, a jurisprudence more akin to diversity centered liberalism has emerged, as least as measured by the neutral aid cases. Evidence suggestive of this is the fact that the aim in recent aid cases is not to restrict religion to the private sphere but to ensure simply that the state does not directly promote religion.

The differing views on religion's place in society, and the appropriate posture of the state vis-à-vis religion, that are found in the Court's establishment clause jurisprudence thus contains tensions similar, if sometimes only faintly, to those found in the conflict between autonomy-centered liberalism and diversity-centered liberalism. In other words, just as the conflict between autonomy-centered liberalism and diversity-centered liberalism is a debate about the meaning of the liberal political tradition and the place of religion, so too is the constitutional debate over the meaning of the establishment clause fundamentally a debate over the nature of the liberal political tradition itself.

Writing for the Court in *Lemon v. Kurtzman*, Chief Justice Burger observed that the Court "could only dimly perceive the lines of demarcation" drawn by the establishment

clause.¹³⁹ However dim the Court's perception of the just boundary between religion and the state may be, its marking of the boundary, circuitous and winding as it has been, parallels at least in outline form the conflict between autonomy-centered liberalism and diversity-centered liberalism. The conflicts within the Supreme Court's establishment clause jurisprudence then seem also to be largely about the meaning of the liberal political tradition and the place of religion in it.

¹³⁹ *Lemon*, 403 U.S. at 612.