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## DOES THE ESTABLISHMENT CLAUSE REQUIRE RELIGION TO BE CONFINED TO THE PRIVATE SPHERE?

Kevin Pybas\*

### I. INTRODUCTION

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

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

<sup>2</sup> 330 U.S. 1 (1947).

<sup>3</sup> *Id.* at 53.

<sup>4</sup> 403 U.S. 602 (1971).

<sup>5</sup> *Id.* at 625.

<sup>6</sup> Noting this, Justice Scalia once heatedly accused some of his colleagues of treating religion like pornography, as "some purely personal avocation that can be indulged entirely in secret . . . in the privacy of one's room." *Lee v. Weisman*, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

While the Supreme Court sought to restrict religion to the private sphere through the first four decades or so of its Establishment Clause jurisprudence, the Rehnquist Court has not followed suit, at least not in public assistance cases.<sup>7</sup> Instead, it has evinced an openness to religion in public life not present in earlier decisions. Even so, a minority of Justices on the Rehnquist Court remain firmly committed to the notion that religion should be restricted to the private sphere. In *Zelman v. Simmons-Harris*,<sup>8</sup> for example, Justice Souter fiercely objected to the Court's approval of the use of publicly funded tuition vouchers in religious schools, proclaiming not only that the Constitution relegates religion to the private sphere, but that religious freedom itself is partly premised on the notion that religion be kept "relatively private."<sup>9</sup> Justice Souter insists that the Establishment Clause banishes religion to the private sphere in order to "guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes."<sup>10</sup>

The aim of this Article is to critically examine the rationales upon which the privatization principle rests: (1) respect for rights of conscience, (2) protection of the health and vigor of religion, and (3) preservation of social peace. I will argue that the reasons given in support of the privatization claim are unpersuasive and that, indeed, the

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<sup>7</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding an Ohio law providing tuition assistance to students enrolled in religious schools); *Mitchell v. Helms*, 530 U.S. 793 (2000) (overruling parts of *Meeke v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977)) (upholding a federal law providing instructional materials, such as library books, media materials, and computers, to religious schools); *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) and *Aguilar v. Felton*, 473 U.S. 402 (1985)) (allowing state-employed teachers to offer instruction in remedial and enrichment courses in parochial schools); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 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); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (allowing a state-employed sign-language interpreter to assist a deaf student enrolled in a Roman Catholic high school); see also *Witters v. Wash. Dep't of Servs. 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); *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, private, or parochial schools).

<sup>8</sup> 536 U.S. 639 (2002).

<sup>9</sup> *Id.* at 716 (Souter, J., dissenting).

<sup>10</sup> *Mitchell*, 530 U.S. at 868 (Souter, J., dissenting).

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

This Article is largely critical. Thus, I do not explore the philosophical commitments that seem to be embedded in the privatization position.<sup>11</sup> Nor do I try either to defend the Rehnquist Court's greater acceptance of religion in the public sphere or to demarcate the appropriate boundary between religion and the state. With these caveats in mind, Part II briefly summarizes current Establishment Clause doctrine, highlighting the Rehnquist Court's different approaches to religious practices in government schools versus public aid that benefits religious schools. The aim in Part II is not to give a detailed account of the Court's Establishment Clause jurisprudence or to try to synthesize its various pronouncements on church-state issues. Rather, it briefly describes important doctrinal changes the Rehnquist

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<sup>11</sup> In a companion essay in progress, I explore the extent to which the privatization of religion interpretation of the Establishment Clause may be rooted in an understanding of the liberal political tradition that regards religion and ways of life rooted in it to be inferior to reason and the examined life. Kevin Pybas, *Two Concepts of Liberalism in Establishment Clause Jurisprudence*, 36 CUMB. L. REV. (forthcoming Mar., 2006). With a negative view of religion as the starting point, the conclusion that the Constitution restricts religion to the private sphere seems not so much the result of careful constitutional inquiry but as almost foreordained from the outset. I also consider whether the Rehnquist Court's qualified acceptance of religion in the public sphere is rooted in a different understanding of the liberal political tradition and the place of religion in it than that which strictly confines religion to the private sphere.

Court has fashioned regarding religion in the public sphere. As the Court has become more open to religion in the public sphere, those Justices committed to the privatization of religion have been moved to explain more thoroughly their views as to why religion should be confined to the private sphere. Part III closely examines these arguments, focusing on the rationales given in support of the privatization commitment. While many Justices have been committed to confining religion to the private sphere,<sup>12</sup> I primarily focus on the opinions of Justice Souter, who has more clearly argued the reasons why religion should be confined to the private sphere. Part IV summarizes and restates my criticisms of the claim that the Establishment Clause restricts religion to the private sphere.

## II. CONTEMPORARY ESTABLISHMENT CLAUSE JURISPRUDENCE

The Rehnquist Court draws a distinction between government directly supporting or endorsing religion and the expenditure of public funds in religious institutions upon the free choice of public aid recipients. In situations involving the government in the direct support of religion, the Rehnquist Court has not deviated from earlier judgments expressing the unconstitutionality of such practices.<sup>13</sup> For example, it has invalidated a state law prohibiting the teaching of evolutionary theory in public schools and universities unless creation science was also taught;<sup>14</sup> placement of an unadorned Christian nativity scene inside a

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<sup>12</sup> Myers noted in 1991 that Justices Brennan, Marshall, Blackmun, and Stevens “consistently” sought to confine religion to the private sphere. Myers, *supra* note 1, at 79. Among current Justices, Justices Souter, Ginsburg, and of course Stevens do so as well. See *supra* notes 8–10 and accompanying text. Justice Breyer’s commitment to privatizing religion seems to be context specific. For example, he joined Justice O’Connor’s concurring opinion in *Mitchell*, approving of religious schools’ use of instructional materials purchased with federal funds. 530 U.S. at 836 (O’Connor, J., concurring). However, he objected to the tuition vouchers at issue in *Zelman* because they “differ . . . in both *kind* and *degree* from aid programs upheld in the past.” *Zelman*, 536 U.S. at 726. That is, he objected because the vouchers “direct financing to a core function of the church: the teaching of religious truths to young children” and because they involve “a considerable shift of taxpayer dollars from public secular schools to private religious schools.” *Zelman*, 536 U.S. at 726–27 (Breyer, J., dissenting). See *infra* text accompanying notes 173–76.

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

<sup>14</sup> *Edwards v. Aguillard*, 482 U.S. 578 (1987).

county courthouse;<sup>15</sup> clergy-led public school graduation ceremony prayers;<sup>16</sup> and student-led prayers at public school athletic events.<sup>17</sup> While the rationales the Court gave for striking each practice included the lack of a secular purpose,<sup>18</sup> impermissible endorsement,<sup>19</sup> and governmental coercion,<sup>20</sup> the problem was that each law or practice involved the government in the direct support or sponsorship of religion, which violates the Court's interpretation that the Establishment Clause requires governmental neutrality towards religion.

"Neutrality" was established as the constitutional benchmark for church-state issues in *Everson v. Board of Education*,<sup>21</sup> where the Court declared that the Establishment Clause requires "the state to be a neutral in its relations with groups of religious believers and non-believers. . . ."<sup>22</sup> The meaning of "neutrality" is not self-evident, but in the 1971 decision of *Lemon v. Kurtzman*<sup>23</sup> the Court synthesized its post-*Everson* Establishment Clause rulings and famously declared that government acts neutrally with regard to religion when its laws have secular purposes, the primary effects of which neither promote nor hinder religion and do not lead to an "excessive entanglement" of religion and the government.<sup>24</sup> Although the *Lemon* test was given as a

<sup>15</sup> *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

<sup>16</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>17</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

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

<sup>19</sup> "[The county] has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message . . . nothing more is required to demonstrate a violation of the Establishment Clause." *County of Allegheny*, 492 U.S. at 601-02.

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

<sup>21</sup> 330 U.S. 1 (1947).

<sup>22</sup> *Id.* at 18.

<sup>23</sup> 403 U.S. 602.

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

standard for Establishment Clause issues, it is not clear that it has made much of a difference in the Court's treatment of religious practices in government institutions. For example, in the five post-*Lemon* cases the Court decided involving religion in the public schools, *Stone v. Graham*,<sup>25</sup> *Wallace v. Jaffree*,<sup>26</sup> and *Edwards v. Aguillard*<sup>27</sup> were decided on the basis of a lack of a secular purpose, indicating that a three-part test is wholly unnecessary for deciding these types of cases. The other two decisions, *Lee v. Weisman*<sup>28</sup> and *Santa Fe Independent School District v. Doe*,<sup>29</sup> were decided without resort to the *Lemon* test.<sup>30</sup> The *Lemon* test was likewise ignored in *Marsh v. Chambers*,<sup>31</sup> where the Court ruled, relying mainly on historical grounds, that state legislative chaplains do not violate the Establishment Clause.<sup>32</sup>

While the *Lemon* test appears to have had little impact in cases involving the government in the direct support of religion, it has appeared more prominently in the Court's effort to distinguish between permissible and impermissible governmental aid to religious institutions.<sup>33</sup> To be sure, as in the religion-in-government cases, the

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<sup>25</sup> 449 U.S. 39, 42-43 (1980) (forbidding schools from posting the Ten Commandments in school rooms).

<sup>26</sup> 472 U.S. 38, 61 (1985) (barring commencing the school day with a moment of silence for either meditation or voluntary prayer).

<sup>27</sup> 482 U.S. 578, 597 (1987) (invalidating a state law prohibiting the teaching of evolutionary theory in public schools and universities unless creation science was also taught).

<sup>28</sup> 505 U.S. 577 (1992).

<sup>29</sup> 530 U.S. 290 (2000).

<sup>30</sup> "Our decision in *Lee v. Weisman*, conspicuously avoided using the supposed [*Lemon*] 'test' . . ." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (citations omitted).

<sup>31</sup> 463 U.S. 783 (1983).

<sup>32</sup> *Id.* at 792.

<sup>33</sup> See, e.g., *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (finding no *Lemon* violation in allowing a college student to use neutrally available state vocational rehabilitation assistance funds at a Christian college); *Aguilar v. Felton*, 473 U.S. 402 (1985) (forbidding, on entanglement grounds, the use of state and federal aid to employ public school teachers in parochial schools for the teaching of remedial, enrichment, and special education courses); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (also forbidding, on advancement grounds, the use of state and federal aid to employ public school teachers in parochial schools for the teaching of remedial, enrichment, and special education courses); *Mueller v. Allen*, 463 U.S. 388 (1983) (finding no *Lemon* violation in a Minnesota law allowing parents to take a tax deduction for school tuition costs, irrespective of whether their children attended public, private, or parochial schools); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (finding no *Lemon* violation in a state law providing financial reimbursement to religious schools for the costs of state-mandated testing and record keeping); *Wolman v. Walter*, 433 U.S. 229 (1977) (authorizing state-funded standardized tests and scoring services and allowing state-employed speech and

Court sometimes resolves public aid cases without invoking *Lemon*.<sup>34</sup> More significantly, the 1997 decision of *Agostini v. Felton*<sup>35</sup> explicitly modified the *Lemon* test in two significant ways regarding its application in aid-to-religion cases. First, the entanglement portion of the *Lemon* test was folded into the effects prong of the test.<sup>36</sup> The Court said of itself and the *Lemon* test:

[T]he 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).<sup>37</sup>

Thus, in aid cases, *Agostini* reduces the *Lemon* test into a two-part inquiry: whether the law has a secular purpose and whether its effect is

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hearing therapists, counselors, doctors, and nurses to examine parochial school students on school grounds, but forbidding public schools from loaning instructional materials to parochial schools, on advancement grounds and disallowing the use of public funds for field trip transportation for parochial school students, on entanglement grounds); *Meek v. Pittenger*, 421 U.S. 349 (1975) (allowing secular textbooks purchased with public funds to be loaned to religious schools, but disallowing, on advancement grounds, the use of instructional materials purchased with public money and prohibiting the provision of auxiliary services, such as counseling and speech and hearing therapy, on excessive entanglement grounds); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking a New York law on advancement grounds that provided various forms of public assistance to private schools and families with children enrolled in them, most of which were religiously affiliated); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (declaring unconstitutional, on excessive entanglement grounds, state laws that supplemented the salaries of teachers teaching secular subjects in religious schools).

<sup>34</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 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); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (no Establishment Clause violation in allowing a state-employed sign-language interpreter to assist a deaf student enrolled in a Roman Catholic high school).

<sup>35</sup> 521 U.S. 203 (1997) (partially overruling *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) and overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

<sup>36</sup> *Id.* at 232.

<sup>37</sup> *Agostini*, 521 U.S. at 232 (citations omitted).



the advancement of religion. Second, more significantly, is the way *Agostini* unambiguously altered the inquiry into whether a law advances religion. Prior to *Agostini*, advancement of religion had generally been present if the aid provided could be used to support the religious mission of the religious institution.

To this end, the Court generally drew a line between aid that it believed could be limited in its use to secular purposes only and aid that could not be so limited. Consequently, the Court permitted aid that supplied things, such as secular textbooks<sup>38</sup> and health and therapeutic services,<sup>39</sup> but not aid that was used to purchase instructional materials<sup>40</sup> or to provide remedial and enrichment courses.<sup>41</sup> However, in *Agostini*, the Court noted that its rulings in *Witters v. Washington Department of Services for the Blind*<sup>42</sup> and *Zobrest v. Catalina Foothills School District*<sup>43</sup> had called into question its project of categorizing aid either as secular or religious. The more telling inquiry, the Court reasoned, was whether the advancement of religion was attributable to the state or to individuals exercising “genuinely independent and private choices.”<sup>44</sup> Judgments about whether a law provides genuine choice between secular and religious alternatives, in turn, depend on whether “the aid is allocated on the basis of neutral, secular criteria that neither favor[s] nor disfavor[s] religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.”<sup>45</sup> In other words, laws that provide neutrally available public funds on the basis of secular criteria, such as financial need, and that provide no incentives for recipients to choose religious alternatives are nevertheless constitutional even when the funds are used to further religion. In such instances, the “advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.”<sup>46</sup> *Agostini* thus made it clear that the central inquiry in public assistance cases was not whether aid could be limited to secular purposes. Rather, the inquiry is whether funds directly further religion, which is forbidden,

<sup>38</sup> *Meek v. Pittenger*, 421 U.S. 349 (1975).

<sup>39</sup> *E.g.*, *Wolman v. Walter*, 433 U.S. 229 (1977).

<sup>40</sup> *Id.*

<sup>41</sup> *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

<sup>42</sup> 474 U.S. 481 (1986).

<sup>43</sup> 509 U.S. 1 (1993).

<sup>44</sup> *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (citing *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 487 (1986)).

<sup>45</sup> *Agostini*, 521 U.S. at 231.

<sup>46</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

or whether religion is advanced by the free and independent choices of aid recipients, which is acceptable.<sup>47</sup>

*Agostini* therefore seemed to clearly signal a certain acceptance on the Court's behalf of religion in public life that previous cases such as *Mueller v. Allen*,<sup>48</sup> *Witters*,<sup>49</sup> and *Zobrest*<sup>50</sup> had prefigured. The Court confirmed its tolerance of religion in the public sphere in *Mitchell v. Helms*,<sup>51</sup> where it reversed course to permit the use of publicly-purchased instructional materials, such as library books, media materials, and computers, in religious schools. Moreover, the Court's most recent aid case ruling, that a state law providing tuition assistance to students enrolled in religious schools does not violate the Establishment Clause, would seem to solidify its current position on religion in public life.<sup>52</sup>

What then can we say about the Rehnquist Court's approach to Establishment Clause issues? It seems its approach seeks not so much to confine religion to the private sphere but to forbid the government's direct support of it. Religious practices in government, such as the public schools, inescapably involve the government in the direct support of religion. To avoid this, a majority of the Rehnquist Court continues to insist that the Establishment Clause requires religion to be confined to the private sphere. "The design of the Constitution," Justice Kennedy wrote for the Court in 1992, "is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."<sup>53</sup> However, the support of religion present in religion-neutral assistance programs in which individual aid recipients direct public funds to secular and religious alternatives of their choosing is attributable to individual choice, not to the government. In such

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<sup>47</sup> Thus, the Court in *Agostini* ruled that there is no constitutional prohibition to applying public funds to remedial and enrichment courses in religious schools when such funds are provided to all students meeting secular eligibility requirements when there is some modest monitoring scheme in place to make sure that publicly-paid teachers do not engage in religious instruction. *Agostini*, 521 U.S. at 234-35. To this end, *Agostini* completely overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), and partially overruled *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985).

<sup>48</sup> 463 U.S. 388 (1983) (finding no Establishment Clause violation in a Minnesota law allowing parents of all school age children to take a tax deduction for school tuition costs, including parents whose children are enrolled in religious schools).

<sup>49</sup> 474 U.S. 481 (1986).

<sup>50</sup> 509 U.S. 1 (1993).

<sup>51</sup> 530 U.S. 793, 835-36 (2000) (overruling portions of *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977)).

<sup>52</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002).

<sup>53</sup> *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

circumstances, individual choice severs the link between government and the advancement of religion. Yet, with religious practices in public schools, there is no individual choice that can be exercised that would cut the impermissible tie between government and the support of religion. The support of religion present in this context thus seems unavoidably attributable to government.

Focusing on the requirement that government act neutrally towards religion helps illustrate the Court's two-track approach to these issues. If religious practices in governmental institutions necessarily involve government in the advancement of religion, government has then failed to act neutrally with regard to religion, which the Court has construed to be the command of the Establishment Clause since *Everson*.<sup>54</sup> To ensure that government acts neutrally with regard to religion in terms of its own practices, the Court has consistently insisted that religion be restricted to the private sphere. But what does the principle of neutrality require regarding neutrally available governmental assistance programs? *Lemon* and its progeny typically ruled that the government had advanced religion or acted non-neutrally towards religion when public funds were spent in a way that could be used for religious purposes.<sup>55</sup> The Court's movement away from classifying the aid in question as supporting either the secular or religious aspects of a religious institution<sup>56</sup> has led to a reconceptualization of what neutrality means vis-à-vis neutral assistance programs. As the majority opinion in *Zelman v. Simmons-Harris*<sup>57</sup> indicates, neutrality, understood as "evenhandedness" between religious and secular alternatives, now appears to be the singular standard employed by the Court for judging the constitutionality of aid programs where public funds wind up in the treasury of religious schools.<sup>58</sup> That

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<sup>54</sup> See *supra* text accompanying notes 21–22.

<sup>55</sup> See *supra* text accompanying notes 35–41.

<sup>56</sup> See *supra* text accompanying notes 41–47.

<sup>57</sup> 536 U.S. 639 (2002).

<sup>58</sup> *Id.* at 696 (Souter, J., dissenting); see also *Mitchell v. Helms*, 530 U.S. 793, 878 (2000) (Souter, J., dissenting) (describing three different meanings the Court has ascribed to the word "neutrality": "as a term to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it"). The plurality opinion in *Mitchell* treated evenhandedness as the sole constitutional measure, a conclusion criticized by Justice O'Connor in her concurring opinion and by Justice Souter in his dissent. *Id.* at 837–40 (O'Connor, J., concurring); *Id.* at 869, 900 (Souter, J., dissenting) (stating that the plurality "espouses a new conception of neutrality as a practically sufficient test of constitutionality that would, if adopted by the Court, eliminate inquiry into a law's effects," and the plurality "appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test for the establishment constitutionality of school aid"). However, Justice O'Connor now appears to agree that

is, so long as government assistance programs have a secular purpose and neither define aid recipients on the basis of religion nor attempt to steer recipients toward the religious alternatives by, for instance, providing greater assistance to recipients who choose the religious alternative, there is no violation of the neutrality requirement when recipients themselves direct the funds to religious institutions.<sup>59</sup>

Four Justices, led by Justice Souter, argue that evenhandedness alone is not an acceptable constitutional yardstick. Instead, evenhandedness “is to be considered only along with other characteristics of aid, its administration, its recipients, or its potential that have been emphasized over the years as indicators of just how religious the intent and effect of a given aid scheme really is.”<sup>60</sup> On this view, even a genuinely neutral public aid program<sup>61</sup> that ends up subsidizing the religious mission of religious schools through the free and independent choices of aid recipients is unconstitutional.<sup>62</sup> This is so, Justice Souter argues, because public aid that supports the religious mission of a religious institution violates “every objective supposed to be served by the bar against

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evenhandedness alone satisfies the First Amendment, giving it precedential value that the *Mitchell* plurality opinion could not. See *Zelman*, 536 U.S. at 669–70 (O’Connor, J., concurring); *Zelman*, 536 U.S. at 696 n.6 (Souter, J., dissenting).

<sup>59</sup> *Zelman*, 536 U.S. at 653–54.

<sup>60</sup> *Mitchell*, 530 U.S. at 884 (Souter, J., dissenting).

<sup>61</sup> It should be noted that Justice Souter denies that the voucher program at issue in *Zelman* is neutral. In his view, the voucher program provides recipients with a financial incentive to select religious schooling. *Zelman*, 536 U.S. at 697–98 (Souter, J., dissenting). The *Zelman* majority, on the other hand, concluded that the program provides financial incentives for public schooling. *Id.* at 653–54 (majority opinion). The dispute as to whether the voucher program provided incentives or disincentives for religious schooling is beyond my interest here, but it is worth noting that the disagreement seems to turn on how to count the amount of state funding available to students choosing to remain in public school. Justice Souter focuses on the fact that the state of Ohio offers up to \$2,250 tuition assistance for students who opt out of the Cleveland public schools but only up to \$324 in tutoring assistance for the students choosing to remain in the Cleveland public schools, which seemingly provides a financial incentive to opt out of public schooling. *Id.* at 697–98 (Souter, J., dissenting). However, the majority focuses on the fact that the amount of state money going to Cleveland public schools, including community and magnet schools, is two to three times more than can be paid to a religious school. *Id.* at 654 (majority opinion). The majority also emphasizes that children choosing to remain in public school have no co-pay obligation but that families choosing private schooling are obligated to pay a portion of the private school tuition, which creates an additional disincentive to choose religious schooling. *Id.*

<sup>62</sup> “[T]he basic principle of establishment scrutiny of aid remains the principle . . . that there may be no public aid to religion or support for the religious mission of any institution.” *Mitchell*, 530 U.S. at 884 (Souter, J., dissenting). “[E]ven a genuine choice criterion is [not] up to the task of the Establishment Clause when substantial state funds go to religious [schooling]. . . .” *Zelman*, 536 U.S. at 703 (Souter, J., dissenting).

establishment.”<sup>63</sup> These objectives include “respect for freedom of conscience . . . , sav[ing] religion from its own corruption,”<sup>64</sup> and “protecting the Nation’s social fabric from religious conflict. . . .”<sup>65</sup> I now wish to turn to an examination of each of these rationales underpinning the privatization thesis.

### III. THE PRIVATIZATION RATIONALES

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

#### A. Freedom of Conscience

Justice Souter opposes the expenditure of neutrally available public funds in religious schools on the grounds that Thomas Jefferson’s *Virginia Act for Establishing Religious Freedom* and James Madison’s *Memorial and Remonstrance against Religious Assessments* “establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it.”<sup>66</sup> Specifically, Justice Souter cites Jefferson for the proposition that neutrally available funds spent in religious schools violate rights of conscience by infringing upon the principles that “no one ‘shall be compelled to . . . support any religious worship, place, or ministry whatsoever’”<sup>67</sup> and that:

[C]ompelling a man to furnish contributions of money for propagation of opinions which he disbelieves, is sinful and tyrannical; . . . even the forcing him to support this or that teacher of his own religious persuasion, is

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<sup>63</sup> *Zelman*, 536 U.S. at 708 (Souter, J., dissenting).

<sup>64</sup> *Id.* at 711 (Souter, J., dissenting); see also *Mitchell*, 530 U.S. at 870-72 (Souter, J., dissenting) (arguing that public support of religion “violates the fundamental principle of freedom of conscience,” “corrupts religion,” and “is inextricably linked with conflict”).

<sup>65</sup> *Zelman*, 536 U.S. at 717 (Breyer, J., dissenting).

<sup>66</sup> *Mitchell*, 530 U.S. at 870 (Souter, J., dissenting) (citations omitted).

<sup>67</sup> *Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (citing *A Bill for Establishing Religious Freedom*, in 5 THE FOUNDERS’ CONSTITUTION 84 (Phillip B. Kurland & Ralph Lerner eds., 1987)). The title of the document Justice Souter purports to be citing does not match the page number he gives. Jefferson’s *A Bill for Establishing Religious Freedom* is reprinted in the Kurland and Lerner volume at page seventy-seven. On page eighty-four is the *Virginia Act for Establishing Religious Freedom*. However, it makes no difference which document Justice Souter intended to cite because the passages he relies on are in both documents.

depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.<sup>68</sup>

Madison is cited for the belief that freedom of conscience is violated “by any ‘authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment.’”<sup>69</sup> Taken together, Jefferson’s *Act* and Madison’s *Memorial and Remonstrance* establish that “[a]ny tax to establish religion is antithetical to the command that the minds of men always be wholly free.”<sup>70</sup>

There are several possible objections to Justice Souter’s claim that Jefferson and Madison authoritatively established that the use of neutrally available public funds in religious schools amounts to despotism over the mind. One objection I will note but not pursue is Justice Souter’s belief that the outcome of the debate in Virginia in the 1780s over religious freedom, in which Madison and Jefferson played such prominent roles, has constitutional status. This, of course, is not a new claim<sup>71</sup> and many objections have been raised against it.<sup>72</sup> Suffice it to say, given the “widespread and deep division[s]”<sup>73</sup> over the meaning

<sup>68</sup> *Mitchell*, 530 U.S. at 871 (Souter, J., dissenting) (citing *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 13 (1947)).

<sup>69</sup> *Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (citing *Memorial and Remonstrance* ¶ 3, reprinted in *Everson*, 330 U.S. at 65–66).

<sup>70</sup> *Id.* (citation omitted).

<sup>71</sup> In *Everson v. Board of Education*, the Supreme Court declared that “the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the [Virginia Bill for Religious Liberty],” originally written by Jefferson. 330 U.S. at 13. More recently, Justice Souter has declared that Madison’s “authority on questions about the meaning of the Establishment Clause is well settled.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 868 (Souter, J., dissenting).

<sup>72</sup> See, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995). In commenting upon the claim in the majority opinion of *Everson* that the Establishment Clause has the same meaning as Jefferson’s Statute for Religious Freedom, Smith notes that “the Court took no notice of the obvious objection to imposing the Virginia policy on a constitutional provision that had an entirely different wording and that was adopted by a different, and very differently composed, body.” *Id.* at 46.

<sup>73</sup> Daniel O. Conkle, *Legal Theory: Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1133 (1988). Given the profound disagreement over the meaning of religious freedom in the late eighteenth century, Conkle asks:

[H]ow could Congress and the ratifying state legislatures have reached agreement on the [E]stablishment [C]lause? It was supported, after all, both by separationists and by those who were committed to programs of state-sponsored religion. These various political actors simply could

of religious liberty in the late eighteenth century, it is exceedingly unlikely that the men in Congress and the state legislatures that ratified

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not have agreed on a general principle governing the relationship of religion and government, whether it be the principle endorsed in *Everson* or any other. If the [E]stablishment [C]lause had embraced such a principle, it would not have been enacted.

*Id.* (citation omitted). Conkle goes on to argue that the Establishment Clause is simply a jurisdictional statement making it clear that in denying Congress the authority to pass any "law respecting the establishment of religion," the Constitution had not withdrawn legislative authority over religion from the states. *Id.* Similar arguments are made by several scholars. Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293 (2002). Carter insists that:

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

*Id.* at 299; Charles Fried, *The Supreme Court, 1994 Term: Foreword: Revolutions?*, 109 HARV. L. REV. 13, 52-53 (1995) ("There is little doubt that the Establishment Clause, (quite apart from its opening words 'Congress shall make no law[s]'), was specifically intended to preserve a freedom of action to the states while denying it to the national government."); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 307 (1989) ("The language of the [Establishment] [C]lause was directed against congressional creation of a national church or favoritism of one ecclesiastical sect over another. Thus, its predominant intent was to protect state religious establishments from national displacement."). Smith notes that there was widespread support in America in the late eighteenth century for the notion that religion was necessary for good republican government, but there was sharp disagreement over whether government itself should promote religion or whether religion should be left to private, voluntary initiatives. Smith, *supra* note 72, at 19-22. Given this disagreement, Smith, like the authors noted above, argues that the Establishment Clause is simply a jurisdictional statement but also insists that the Free Exercise Clause is as well. *Id.* at 35-43. "Given the controversies that in fact existed in the new nation over 'Free Exercise' issues, it seems most plausible to understand the Free Exercise Clause, like the Establishment Clause, as expressing a jurisdictional decision to leave substantive issues [of religious freedom] to be resolved by the states." *Id.* at 42. However, Douglas Laycock argues that the federalism interpretation of the religion clause is mistaken and that the Establishment Clause does in fact protect individual rights. See Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 241-43 (2004); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 885-94 (1986).

The claim that the Establishment Clause is simply a federalism provision intended to prohibit Congress from interfering with state establishments raises a host of questions I have not the space to address. For example, it calls into question the coherence of "incorporating" the Establishment Clause against the states. See *Zelman*, 536 U.S. at 677-80 (Thomas, J., concurring). Another question raised by the federalism claim is the extent to which Congress could have moved against state establishments under some expressly enumerated power in Article I.

the First Amendment believed that they were writing into the Constitution the views of Jefferson and Madison to the exclusion of all others.

For the sake of argument, let us assume that the Establishment Clause is simply a restatement of Jefferson's and Madison's views. The question then is: Do their views unmistakably establish that governmental programs of the type at issue in *Mitchell* and *Zelman* represent a tyranny over the mind? In other words, is "the command 'that the minds of men always be wholly free'"<sup>74</sup> violated when government aid is spent in religious schools "only as a result of the genuinely independent and private choices of individuals"<sup>75</sup>? The first difficulty one encounters in trying to answer this question involves the not insignificant challenge of applying Jefferson's and Madison's principles of religious liberty to a world quite different from the one in which they were articulated. To give but one example—if an example is needed—consider that the expenditures of the federal government for the period 1789–1791 were \$4,269,000,<sup>76</sup> but by 2002 they had grown to exceed \$2 trillion.<sup>77</sup> This says nothing of the growth of state and local governments over this period<sup>78</sup> nor of the exponentially increased reach of all levels of government into the lives of citizens today. Because of the great difficulty of computing the relative value of a dollar, it is difficult to conclude, with any precision, just how much larger the federal government is today as compared to 1791. The point, though, is that given that Jefferson's and Madison's views on religious liberty were part of a set of beliefs that also included belief in limited government, does it make sense to invoke the former when we have rejected the latter?<sup>79</sup>

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<sup>74</sup> *Zelman*, 536 U.S. at 711 (Souter, J., dissenting) (citation omitted); *Mitchell v. Helms*, 530 U.S. 793, 871 (2000) (Souter, J., dissenting) (citing *Everson*, 330 U.S. at 12).

<sup>75</sup> *Mitchell*, 530 U.S. at 810 (quoting *Agostini v. Felton*, 521 U.S. 203, 226 (1997)).

<sup>76</sup> U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, PART 2 1115 (1976) (containing a table entitled "Outlays of the Federal Government: 1789–1970").

<sup>77</sup> ECONOMIC REPORT OF THE PRESIDENT, H. DOC. 108–45, at tbl. B-82 (2004), available at [http://www.gpoaccess.gov/usbudget/fy05/pdf/2004\\_erp.pdf](http://www.gpoaccess.gov/usbudget/fy05/pdf/2004_erp.pdf).

<sup>78</sup> Total state and local government spending in 2002 was about \$1.4 trillion. *Id.*

<sup>79</sup> Smith writes that:

[F]ollowing Locke, Jefferson's views about religious freedom [] rested heavily on a minimalist conception of the proper functions of the state. That minimalist conception hardly commands a consensus today. Hence, it is unclear why current judges or legal scholars should feel entitled to invoke Locke's or Jefferson's *conclusions* about religious freedom when they reject the *premises* from which those conclusions were derived.



I am not sure how to begin to answer the question. However, it seems to me that some explanation is in order if someone wishes to claim, as Justice Souter does, that Jefferson's and Madison's principles of religious liberty unequivocally establish that the use of public funds in religious schools by means of religiously neutral criteria and the individual choices of aid recipients constitutes despotism over the mind. Some explanation that would, at a minimum, attempt to explain why in circumstances of an expansive bureaucratic state the indirect support of religion—as in *Mitchell* and *Zelman*—is anymore “antithetical to the command ‘that the minds of men always be wholly free’” than other public expenditures to which people object.<sup>80</sup> Perhaps Justice Souter is right, that even in the modern regulatory state wherein government spends few of the trillions of dollars it spends each year in a way that fails to offend any number of people, indirect public support of religion nevertheless represents a tyranny over the mind. Yet it behooves him to explain how this is true. Unfortunately, Justice Souter and other Justices committed to the privatization of religion convey not a hint of believing that there is any complexity to the issue. The sprawling growth of the government over the last two centuries and the enormous extension of its reach into the lives of citizens is something that Justice Souter simply does not note. For him and the other privatization Justices, the use of neutrally available public funds in religious institutions amounts straightforwardly to an establishment of religion that tyrannizes the minds of citizens.

Having raised the question of whether the demise of limited government undermines Justice Souter's application of Jefferson's and Madison's principles to invalidate the expenditure of neutrally available public funds in religious schools, let us return to the substantive issue of whether Jefferson's *Act* and Madison's *Memorial and Remonstrance* clearly establish that the use of such funds in this way actually amounts to the establishment of religion and, hence, to a tyranny over the mind.<sup>81</sup>

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Smith, *supra* note 72, at 148–49 n.24.

<sup>80</sup> *Mitchell*, 530 U.S. at 871.

<sup>81</sup> Recall that in support of his claim that the expenditure of neutrally available public funds in religious schools violates rights of conscience, Justice Souter invokes Jefferson for the principle that “no one ‘shall be compelled to . . . support any religious worship, place, or ministry whatsoever’” and for the contention that:

[C]ompel[ling] a man to furnish contributions of money for propagation of opinions which he disbelieves, is sinful and tyrannical . . . even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.

Recent scholarship suggests that Justice Souter is wrong on this score, at least regarding Madison and the *Memorial and Remonstrance*.

Vincent Phillip Muñoz argues that Madison's central teaching of religious liberty is that the state may not take "cognizance" of religion.<sup>82</sup> In the *Memorial and Remonstrance*, after first arguing that religion is an inalienable natural right, Madison writes that "therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."<sup>83</sup> What the "noncognizance" of religion requirement means, writes Muñoz, is that the state:

[L]acks jurisdiction over religion. It may not take authoritative notice of or perceive religion or the religious affiliation of its citizens. A government noncognizant of religion, in other words, must be blind to religion. It cannot use religion or religious preferences as a basis for classifying citizens. This is the doctrinal teaching of the "Memorial and Remonstrance." The state, which is a product of the social compact between men originally born in the state of nature, must remain noncognizant of religion because religion is not part of the social compact. Religion cannot be part of the social compact because of the inalienable character of man's right to direct his religion according to conviction and conscience.<sup>84</sup>

Under the noncognizance principle, government "must remain blind to religion as such. It can neither privilege religion nor punish citizens on account of their religion."<sup>85</sup> If Madison is the authoritative guide to the Establishment Clause, as Justice Souter claims,<sup>86</sup> a "Madisonian approach to the First Amendment would utilize the straightforward rule that the state must remain noncognizant of religion. No state actor or

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*See supra* text accompanying notes 67–70. Madison is cited for the idea that freedom of conscience is violated "by any 'authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment.'" *See supra* note 69 and accompanying text.

<sup>82</sup> Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 22–23 (2003).

<sup>83</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 THE FOUNDERS' CONST. 82 (1987).

<sup>84</sup> Muñoz, *supra* note 82, at 23.

<sup>85</sup> *Id.* at 29.

<sup>86</sup> *See supra* note 71.

government policy could classify, punish, distribute, or withhold benefits from individual citizens or organizations on account of religion or religious affiliation.”<sup>87</sup> In other words, the Constitution must be “religion-blind.”<sup>88</sup>

Muñoz’s interpretation of Madison’s claim that religion is “wholly exempt” from the state’s “cognizance” is supported by Vincent Blasi. Like Muñoz, Blasi argues that Madison’s principle of noncognizance of religion means that the state has no “jurisdiction” over religion or “responsibility” for it.<sup>89</sup> As Blasi explains, the noncognizance principle means that the state “has no authority to attempt to influence, facilitate, or promote . . . [religious] beliefs and practices. That responsibility belongs exclusively to the individual believer and the voluntary associations he forms.”<sup>90</sup> Moreover, for Madison, the state’s failure to respect the noncognizance principle meant that it had established religion. Blasi contends that a “religious establishment,” according to Madison, was “any instance of government taking ‘cognizance’ of, that is responsibility for, religion.”<sup>91</sup> Blasi argues, in other words, that Madison’s notion of the separation of church and state did not seek to confine religion to the private sphere. Rather, Madison believed it was necessary to deny government any authority over the religious beliefs of citizens. As Madison wrote in the *Memorial and Remonstrance*, “[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate . . . . It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.”<sup>92</sup> Separation of church and state for Madison then requires “a separation

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<sup>87</sup> Muñoz, *supra* note 82, at 29. Muñoz claims only that the noncognizance approach to religion represents Madison’s view, not that it also represents the intent of the men who ratified the First Amendment. *Id.* at 29 n.38.

<sup>88</sup> *Id.* at 29. In the Free Exercise Clause context, Muñoz argues that the principle of noncognizance “prohibits the government from making laws that single out a religion or religion generally for unfavorable treatment. It would also deny the government the authority to make laws or exemptions singling out a religion or religion generally for favorable treatment under the law.” *Id.* at 31. Muñoz thus concludes that the Supreme Court’s decision in *Employment Division v. Smith*, 485 U.S. 660 (1990), declaring that the Free Exercise Clause does not exempt religious individuals and groups from laws of general applicability that incidentally burden religion, is consistent with Madison’s noncognizance principle. Muñoz, *supra* note 82, at 31.

<sup>89</sup> Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 789 (2002).

<sup>90</sup> *Id.* at 790.

<sup>91</sup> *Id.* at 791.

<sup>92</sup> Madison, *supra* note 83, at 82.

of functions and purposes, not some quixotic attempt to achieve a hermetically sealed spatial separation."<sup>93</sup>

Applying the noncognizance principle to issues that the Supreme Court has decided helps illustrate the Madisonian approach. For example, Muñoz persuasively makes the case that the Court violated Madison's principle in *Marsh v. Chambers*,<sup>94</sup> upholding the constitutionality of publicly-funded legislative chaplains, and in *Walz v. Tax Commissioners of New York City*,<sup>95</sup> finding no constitutional violation in granting property tax exemptions to religious organizations for property used solely for religious worship. Both conclusions violate the noncognizance principle in that government took "authoritative notice of religion." *Marsh* violated the noncognizance principle in that the hiring of a chaplain involves a hiring based on religion and the chaplain's prayers promote a religious exercise. The same is true in *Walz* because the Court conferred a benefit on the basis of religion.<sup>96</sup> By the same token, Muñoz argues that the decisions removing official religious practices from the public schools are consistent with the principle of noncognizance in that government, quite obviously, takes note of religion when it promotes religious activities.<sup>97</sup>

Moreover, Muñoz convincingly contends that "[t]he principle of 'noncognizance' . . . forbids the state from using religious affiliation to exclude individuals or organizations from generally available benefits."<sup>98</sup> To this end, Muñoz argues that the Court's decisions in *Mueller v. Allen*<sup>99</sup> and *Rosenberger v. Rector and Visitors of University of Virginia*<sup>100</sup> were consistent with the Madisonian approach. The law at issue in *Mueller* entitled all families with children enrolled in elementary and secondary schools to take a tax deduction for education expenses, which benefited families enrolled in religious schools. However, because the tax exemption was available to all families with school-age children, the law "did not inquire into the religious character of the child's school," which meant that "the state remained noncognizant of religion."<sup>101</sup> However, in *Rosenberger*, the University of Virginia did take cognizance of religion

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<sup>93</sup> Blasi, *supra* note 89, at 791.

<sup>94</sup> 463 U.S. 783 (1983).

<sup>95</sup> 397 U.S. 664 (1970).

<sup>96</sup> Muñoz, *supra* note 82, at 29.

<sup>97</sup> *Id.* at 30.

<sup>98</sup> *Id.*

<sup>99</sup> 463 U.S. 388 (1983).

<sup>100</sup> 515 U.S. 819 (1995).

<sup>101</sup> Muñoz, *supra* note 82, at 30.

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

A Madisonian interpretation of the First Amendment would have reached the same result on the grounds that to deny a student newspaper generally available newspaper funds because their paper contains religious content subjects religious students to a particular disability. The university became unconstitutionally cognizant of religion by singling out religious activities for exclusion from generally available funds.<sup>102</sup>

In other words, once the university chose to fund student newspapers, in order to remain “blind to religion,” it could not inquire into the religious character of the newspapers. Regarding the issue of public funds going to religious schools, Muñoz argues that:

[T]he Madisonian approach would adjudicate the issue like any other policy of governmental funding. The government may not use religious affiliation as a classification or criterion for either privilege or penalty. The government may not fund schools because they are religious, but it also may not fund schools only because they have a religious affiliation. If the government chooses to adopt a general policy to fund educational programs in public and private schools, it may not adopt standards that take religion into account.<sup>103</sup>

The “religion-blind” requirement, as Muñoz notes,<sup>104</sup> supports the Supreme Court’s recent decisions in the religious schooling context, permitting the use of a publicly-funded sign-language interpreter by a student enrolled in a Catholic school,<sup>105</sup> publicly-funded teachers teaching enrichment and remedial courses in religious schools,<sup>106</sup> loaning instructional materials purchased with public money to religious

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 30–31.

<sup>104</sup> *Id.* at 31.

<sup>105</sup> *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993).

<sup>106</sup> *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997).

schools,<sup>107</sup> and religious schools' participation in a publicly-funded voucher program.<sup>108</sup> If religious interests had been denied the ability to participate in general funding programs, as Justice Souter would have done in pursuit of the privatization of religion,<sup>109</sup> the Court would have imposed a particular burden on religion, which the noncognizance principle forbids.

Blasi focuses only on the issue of religious school vouchers, and he too concludes that they do not violate Madison's principle of noncognizance. That is, vouchers do not "place the state in the position of taking responsibility for the religious beliefs of its citizens."<sup>110</sup> Blasi writes:

There are secular educational objectives served by a voucher system that are not bound up with the religious beliefs of its participants. Even when those secular educational benefits are delivered by religious authority figures, acting out of religious motives and functioning in a "pervasively sectarian" environment, the state has not adopted an educational strategy that gives it a stake in the religious beliefs of its citizens.<sup>111</sup>

In the cases Muñoz analyzes, the Supreme Court did not claim to be following Madison's principle of noncognizance. However, it seems that its analysis in aid cases is now essentially a "noncognizance" inquiry. That is, *Zelman* makes clear that public assistance laws pass Establishment Clause scrutiny so long as they have a secular purpose and neither define recipients on the basis of religion nor attempt to direct recipients to religious alternatives, even when significant amounts of public money end up in religious schools.<sup>112</sup> The secular purpose requirement and the requirement to distribute aid on the basis of nonreligious criteria are investigations, under the modified *Lemon* test, into whether the government has acted neutrally with regard to

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<sup>107</sup> *Mitchell v. Helms*, 530 U.S. 793, 835-36 (2000).

<sup>108</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002).

<sup>109</sup> See *Zelman*, 536 U.S. at 686 (Souter, J., dissenting); *Mitchell*, 530 U.S. at 867 (Souter, J., dissenting); *Agostini*, 521 U.S. at 240 (Souter, J., dissenting); *Zobrest*, 509 U.S. at 14 (Blackmun, J., dissenting, joined by Justice Souter).

<sup>110</sup> Blasi, *supra* note 89, at 790. However, Blasi notes that Madison raises other issues in *Memorial and Remonstrance* that may lead one to reject religious school vouchers. *Id.* at 787-88.

<sup>111</sup> Blasi, *supra* note 89, at 790.

<sup>112</sup> See *supra* text accompanying notes 57-59.

religion.<sup>113</sup> Asking whether a law is neutral or evenhanded<sup>114</sup> is also to ask whether the state has taken cognizance of religion. Nonneutrality indicates cognizance of religion, which denotes an establishment of religion in Madisonian terms and is prohibited. In the public assistance cases, then, the Court now seems to perform basically a Madisonian noncognizance inquiry. If Muñoz's interpretation of Madison is correct, there is more than a little irony in Justice Souter's dogged insistence that the Court has betrayed Madison in its recent public assistance pronouncements. Instead, it is his use of religious affiliation as a classification for penalizing citizens that contravenes Madison's principle of religious liberty.

In addition to questioning Justice Souter's rather simplistic understanding of Madison and Jefferson, let us consider more directly the concept of "freedom of conscience." Irrespective of the best reading of Jefferson's and Madison's principles, it seems strange to claim that my rights of conscience are violated when others are permitted to share in a governmental resource that they also have contributed to and from which I already have drawn. For example, my family resided in the State of Ohio earlier this decade when the Cleveland voucher program was in place and when the Court decided *Zelman*. In the year following the *Zelman* decision, the 2002–2003 academic year, my children and over 1.8 million other children were enrolled in Ohio elementary and secondary public schools.<sup>115</sup> By contrast, at that time about 4,200 students in the Cleveland district were using their education vouchers in religious schools.<sup>116</sup> Justice Souter claims that such expenditures violate the rights of conscience of all citizens of Ohio. But in what sense were my rights or the rights of anyone violated by the use of vouchers in religious schools? The vouchers support education,<sup>117</sup> not a minister, missionary, or the like. No one's taxes were increased in order to channel money to religious schools. The state's claim on me, such as my tax obligation, was the same whether religious schools participated in the voucher program or not. Furthermore, the use of voucher funds in religious schools did not interfere with my family's—nor would I argue

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<sup>113</sup> See *supra* text accompanying notes 36–47.

<sup>114</sup> See *supra* text accompanying notes 57–59.

<sup>115</sup> Ohio Department of Education 2004–2005 Fact Sheet, at <http://www.ode.state.oh.us/faq/> (last visited Oct. 5, 2005).

<sup>116</sup> Amy Hanauer, *Cleveland School Vouchers: Where the Students Go* (2002), at <http://www.policymattersohio.org/pdf/WhereStudentsGo.pdf>.

<sup>117</sup> "There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

with anyone else's—ability to live by our own best lights, that is, according to the beliefs and values that give meaning and purpose to our lives, that which makes our lives our own.

In other words, it seems to me that to find a genuine infringement of rights of conscience there must be some real interference with what the political philosopher William Galston calls “expressive liberty.” Galston defines this concept as “[t]he ability of individuals and groups to live in ways consistent with their understanding of what gives meaning and purpose to life. . . .”<sup>118</sup> Governmental interference with rights of conscience denies individuals and groups the right to define how they would live. It is to compel others to live in a way they would not live but for the governmental compulsion.<sup>119</sup>

What Galston's discussion of freedom of conscience suggests is that there has been no violation of rights of conscience and expressive liberty unless government meddles into the lives of citizens in a way that interferes with their ability to live according to their own best lights. To this end, Galston argues that compulsory flag salute and Pledge of Allegiance laws that require some citizens to violate their religious beliefs are forbidden infringements upon conscience.<sup>120</sup> Such laws interfered, without a compelling governmental interest, with the ability of Jehovah's Witnesses to live and raise their children according to the dictates of their consciences. It is precisely this element of interference with one's way of life that is missing from Justice Souter's claim that the use of neutrally available public funds in religious schools violates rights of conscience. As I stated, the expenditure of public funds in religious schools by means of neutral governmental programs involves absolutely no interference with the ability of citizens to live according to their own best lights. One may believe that funding programs such as those at

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<sup>118</sup> William A. Galston, *Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience*, 48 AM. J. JURIS. 149, 177 (2003).

<sup>119</sup> Galston does not claim that the right of expressive liberty is an unlimited right, for as he adds “[i]t may rightly be limited, but only to the extent necessary to secure the institutional conditions for its exercise.” *Id.* While freedom of conscience and expressive liberty may at times be legitimately curtailed, they “enjoy[] a rebuttable presumption to prevail in the face of public law.” *Id.* at 176. That is, “governmental infringements upon . . . conscientious claims would be sustainable in court only if it were shown that they were necessary for compelling governmental interests.” *Id.*

<sup>120</sup> *Id.* Galston focuses on *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), where the Supreme Court affirmed the right of public schools to expel Jehovah's Witness students who refused to say the pledge and salute the flag on religious grounds. *Minersville* was overruled on free speech grounds in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).



issue in *Zobrest*, *Agostini*, *Mitchell*, and *Zelman* are unwise, even foolish, but they in no way impair one's ability to believe and live as one sees fit. One is free to continue believing or not believing whatever one does about God and to continue worshiping or not worshiping God in the same way as before the institution of the programs. Likewise, one is free to continue raising children as before, to pursue what one values, and to set and follow one's life plan. In short, it is difficult to understand how, per Justice Souter, rights of conscience are violated when neutrally available public assistance is routed to religious schools by the independent choices of aid recipients.

A critic might object that Justice Souter is merely relying on the authority of Madison for his claim about rights of conscience and that my real quarrel is with Madison. However, as the discussion of Muñoz's and Blasi's interpretations of the *Memorial and Remonstrance* suggests, religion-neutral government programs are not instances of government taking cognizance of, or responsibility for, religion.<sup>121</sup> If this is the case, it would then follow that such programs do not impair rights of conscience. Considering the *Memorial and Remonstrance* in the light of Galston's concept of expressive liberty buttresses this conclusion. Recall that Madison wrote the *Memorial and Remonstrance* in response to Patrick Henry's *A Bill Establishing a Provision for Teacher's of the Christian Religion*. As the title of the bill suggests, Henry was proposing a property tax to explicitly fund the teaching of Christianity.<sup>122</sup> Had Henry's bill become law, it would have violated Madison's injunction against government taking cognizance of religion and clearly hindered the "ability of individuals and groups to live in ways consistent with their understanding of what gives meaning and purpose to life. . . ."<sup>123</sup> We need not speculate on just how much Henry's bill would have interfered with the liberty of various Christian groups or denominations, for it plainly would have violated the expressive liberty of non-Christians, who would have been taxed for the support of a faith not their own. Requiring non-Christians to support Christianity undeniably interferes with their ability to live in a way that reflects their judgments about what gives value and meaning to their lives. Henry's bill was thus unlike contemporary government assistance programs in which individuals are not taxed for the support of religion but for the provision of legitimate

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<sup>121</sup> See *supra* text accompanying notes 82-114.

<sup>122</sup> Muñoz, *supra* note 82, at 21.

<sup>123</sup> Galston, *supra* note 118, at 177.

governmental services such as educational and disability services.<sup>124</sup> In Madisonian terms, government has not taken cognizance of religion.

Justice Souter claims, mantra-like, that the outlay of neutral public funds to religious schools violates freedom of conscience. He makes this assertion as though the claim alone were a trump. Even if we assume, with Justice Souter, that the First Amendment embodies Jefferson's and Madison's views to the exclusion of all others, he fails to explain why we should accept their views on the *relationship* between church and state when we have rejected their views on the proper *scope* of the latter.<sup>125</sup> Furthermore, Muñoz's and Blasi's writings on the *Memorial and Remonstrance* provide strong reason to doubt that Justice Souter has correctly understood Madison's principles of religious liberty.<sup>126</sup> Finally, I have suggested that in order to establish an actual violation of rights of conscience, there must be some denial of what Galston calls expressive liberty, which is absent in the neutral funding cases.<sup>127</sup>

#### B. *Saving Religion from Its Own Corruption*

The second reason Justice Souter gives in support of the claim that the Constitution confines religion to the private sphere is that the First Amendment aims also to protect the purity of religion from corruption. Like his claim about freedom of conscience, Justice Souter's argument about protecting religion from corruption rests upon Madison's *Memorial and Remonstrance*. One of the reasons Madison opposed Henry's bill was his belief that "ecclesiastical establishments" corrupted "the purity and efficacy of Religion" by producing "pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution."<sup>128</sup> Justice Souter does not claim that the threat today to the purity of religion is quite the same as in Madison's day. Instead, he argues that the integrity of religion is threatened by "corrosive secularism" that jeopardizes the ability of religious schools "to educate the children of the faithful according to the unaltered precepts of their faith."<sup>129</sup> His concern is that government regulations accompanying public funds will undermine the particular identity of religious schools that receive public funds. That is, the corruption of religion that Justice

<sup>124</sup> See *supra* note 7 and accompanying text.

<sup>125</sup> See *supra* text accompanying notes 74–80 (emphasis added).

<sup>126</sup> See *supra* text accompanying notes 82–114.

<sup>127</sup> See *supra* text accompanying notes 115–24.

<sup>128</sup> Madison, *supra* note 83, at 83. Justice Souter quotes a portion of Article 7 of *Memorial and Remonstrance* in *Zelman*. 536 U.S. 639, 712 (2002).

<sup>129</sup> *Zelman*, 536 U.S. at 712.

Souter believes the Establishment Clause protects against constitutes the compromises the faithful might make with their own beliefs in order to qualify for public funds. He cites the voucher program at issue in *Zelman*, which prohibits religious discrimination and prevents participating religious schools from favoring students of the school's faith in the admissions process.<sup>130</sup> Justice Souter speculates that the prospect of additional state funding may ultimately lead religious schools to exchange their relative independence and particular identities for increased public money.<sup>131</sup>

That religious beliefs and identities might be undermined by the acceptance of public funds is certainly a valid concern, and it is a topic that deserves more attention than I can devote here. However, several points are worth noting. First, one doubts that Justice Souter and other adherents of the privatization thesis truly grasp the problem that an expansive regulatory state presents to religious believers who wish to safeguard the integrity of their faith. For example, does not the state's monopoly on education funds exert substantial pressure on the religious to compromise their beliefs? As Eugene Volokh has observed:

[M]any religious parents object on religious grounds to many aspects of the curriculum and environment in government-run public schools. The offer of a free education in government-run school[s] puts these parents to the choice of (1) taking this government subsidy and compromising their religious objections to the curriculum or environment or (2) sticking by their beliefs but losing the subsidy. . . .<sup>132</sup>

The prevalence of religious schools in this country indicates that many families are unwilling to compromise their religious beliefs. However, the inability to afford religious schooling undoubtedly leads many religious parents to accept the subsidy and compromise their beliefs.<sup>133</sup>

If the Establishment Clause is intended to prevent states from placing individuals in a situation in which they will be tempted to

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 715.

<sup>132</sup> Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 364 (1999).

<sup>133</sup> On a related point, Justice Stevens has gone so far as to suggest that public schooling should be an instrument for educating children away from inherited religious beliefs. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 711 (1994) (Stevens, J., concurring).

compromise their religious beliefs, as Justice Souter maintains, then it would seem that public schooling itself violates the Establishment Clause. If the threat of secularism to religious belief is the concern, how much more of a threat must this be in the context of public schooling, given its pervasively secular character? Thus, denying parents the option of spending neutrally available education funds in religious schools would hardly begin to remedy the problem the secular state presents to the integrity of religious belief. In short, concern that governmental policies may lead individuals to compromise their religious beliefs must also concede that the existing structure of schooling already leads to just this result.

While Justice Souter ignores the more widespread threat to religious belief that secular public schooling presents, the possibility nevertheless exists that legislatures will permit families to direct neutral educational funds only to religious schools willing to bend their religious beliefs. As Justice Souter points out, for example, religious schools participating in the Cleveland voucher program cannot favor students of the schools' faith in the admissions process.<sup>134</sup> Although this relatively mild qualification does not interfere with religious instruction in the schools, one wonders if the Supreme Court itself is not mainly responsible for restrictions of this type and for more onerous ones like the Milwaukee voucher program, where religious schools are forbidden from requiring voucher students to participate in religious activities.<sup>135</sup> That is, the Court's many Establishment Clause pronouncements have not provided clear guidance for legislatures. And until its decision in *Zelman*, the constitutional fate of vouchers was unsettled.

Perhaps the limitation on religious schools in Cleveland and Milwaukee were simply good faith efforts by policymakers, given the state of law at the time, to structure the scholarship programs in a way most likely to ensure that they passed the inevitable constitutional scrutiny. In other words, it is not clear that legislatures will inevitably seek to undermine the religious identity of religious schools.<sup>136</sup> This is

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<sup>134</sup> See *supra* text accompanying note 130.

<sup>135</sup> *Jackson v. Benson*, 578 N.W.2d 602, 609 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

<sup>136</sup> One might argue, in fact, that some legislatures have been far more sensitive to religious identity and diversity than the Supreme Court. For example, the Supreme Court has rejected legislative attempts to accommodate the needs of religious children. *Grumet*, 512 U.S. 687 (striking a New York law creating a school district for the public education of handicapped children of the Satmar Hasidic sect); *Aguilar v. Felton*, 473 U.S. 402 (1985) (forbidding the use of state and federal aid to employ public school teachers in religious schools for teaching remedial, enrichment, and special education courses); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (also forbidding the use of state and federal aid to

especially so given that the *Zelman* decision itself does not appear to require religious schools to be so hamstrung as a condition for participating in neutral public programs. *Zelman* clarifies that when recipients of neutral public aid direct that aid to religious schools, the promotion of religion is attributable to the free and independent choices of the recipients, not to the state.<sup>137</sup> Thus, there appears to be no Establishment Clause requirement that religious schools trim their principles in order to participate in neutral funding programs.<sup>138</sup>

Finally, one must note the off-putting paternalism present in Justice Souter's claim that the Establishment Clause prohibits the participation of religious schools in neutral public programs to protect the integrity of religion. An expansive regulatory state presents a real danger to the vitality of religious belief, but, as I have suggested, prohibiting religious

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employ public school teachers in religious schools for teaching remedial, enrichment, and special education courses); *Wolman v. Walter*, 433 U.S. 229 (1977) (forbidding public schools from loaning instructional materials to religious schools, and prohibiting religious schools from using public funds to cover field trip transportation costs); *Meek v. Pittenger*, 421 U.S. 349 (1975) (forbidding government-owned instructional materials to be loaned to religious schools, and prohibiting the provision of state-funded auxiliary services, such as counseling and speech and hearing therapy); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 757 (1973) (striking a New York law that provided various forms of public assistance to secular and religious private schools); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (invalidating state laws that supplemented the salaries of teachers teaching secular subjects in religious schools); *see also Mitchell v. Helms*, 530 U.S. 793 (2000) (objecting to religious schools using instructional equipment and materials purchased with government funds); *Agostini v. Felton*, 521 U.S. 203 (1997) (objecting to publicly-funded remedial, enrichment, and special education in religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14-21 (1993) (Blackmun, O'Connor, JJ., dissenting) (objecting to a state-employed sign-language interpreter assisting a deaf student enrolled in a Roman Catholic high school). This is not to deny that legislatures may sometimes act oppressively against religion. However, such treatment of religion could not be justified by claiming that the Establishment Clause requires it.

<sup>137</sup> *See supra* text accompanying notes 57-59.

<sup>138</sup> While Establishment Clause concerns do not seem to be a valid basis for requiring religious schools to alter their principles as a condition for participating in neutral public programs, there nevertheless may be valid public policy concerns justifying the exclusion of a religious school from neutral public programs because of the school's religious principles. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (affirming the Internal Revenue Service's interpretation of the Internal Revenue Code to deny tax-exempt status to religious colleges and secondary and elementary schools that practice racial discrimination). It is beyond the scope of this Article to address the question of whether public policy concerns may entitle the state to deny religious schools the ability to participate in neutral public programs. Consequently, I do not address the extent to which the state may burden religion by means of religiously neutral laws. *See Employment Div. v. Smith*, 494 U.S. 872 (1990) (finding no Free Exercise Clause violation in a neutrally-applicable state criminal law that burdened the religious practices of the Native American Church).

schools from participating in neutral public programs hardly begins to address the issue.<sup>139</sup> More fundamentally, Justice Souter's position appears to presume that the faithful cannot be trusted to preserve their religion and that Supreme Court Justices care more for the faith of the religious than do the religious themselves. I do not doubt the genuineness of Justice Souter's concern over the threat that "corrosive secularism" poses for religious belief. However, I do question the presumption that the faithful cannot be trusted to safeguard their faith and thus that it is the responsibility of political elites to guard it for them. Putting aside the reasonableness or constitutionality of legislatures requiring religious schools to relax their religious principles in order to participate in neutral public programs, if religious communities are willing to abide by the terms legislators have established for such programs, should not their decision be respected? Are not the faithful themselves in a much better position to judge the threat, or lack of threat, to their religion that accompanies participation in government programs? A religious community might, of course, misjudge and find that participation does jeopardize its beliefs and integrity, but Justice Souter might also misjudge and see a threat where one does not exist. Upon recognizing that participation does tug too sharply towards secularism, a religious school or community would, presumably, be free to withdraw from the program. However, how is the error corrected when religious schools are denied the opportunity to participate in neutral public programs on the mistaken belief that the exclusion is necessary to safeguard the purity of religion?

A critic might concede that the Supreme Court's paternalism will at times be mistaken and that it will "protect" religion when no protection is required, but nevertheless respond that the stakes are too high for the Court to avoid paternalism. In other words, protecting the purity of religion, or religious pluralism,<sup>140</sup> outweighs the interest that religious communities have in deciding whether to accept the terms being offered. It is better to have a blanket prohibition to safeguard all religion, one might argue, even if the protection is unnecessary in some cases. However well-meaning this position is, we still must ask whether heavy-handed paternalism is warranted. I believe it is not. I see no basis for the presumption that religious communities cannot protect themselves. Participation, individually and institutionally, in neutral governmental programs such as the Cleveland voucher program, is voluntary. It is not

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<sup>139</sup> See *supra* text accompanying notes 132-33.

<sup>140</sup> See Blasi, *supra* note 89, at 796 (discussing Madison's belief in "the value of religious pluralism").

a case of the state commandeering the religious schools and forcing their participation.

In the absence of evidence to the contrary, should we not assume that these schools agreed to participate, fully aware of the terms of the program, on conditions that they presumably found acceptable? How religious schools in Milwaukee responded to the opportunity to participate in that city's voucher program is instructive. The Milwaukee program prohibits religious schools from requiring voucher students to participate in religious activity.<sup>141</sup> Many religious schools declined to become voucher schools on the grounds that the restriction would interfere with their religious mission.<sup>142</sup> However, other schools concluded that the constraint poses no threat to their religious mission and thus accept voucher students.<sup>143</sup> As long as religious institutions are not obligated to participate in public programs, which would likely violate the Free Exercise Clause, and as long as they are free to withdraw from such programs, I see no reason why the judgment of Supreme Court Justices should prevail over the judgments of the religious themselves. In any case, the experience of religious schools eligible to participate in Milwaukee's voucher program seems to confirm that religious officials are capable of judging for themselves the threat that participation in government programs poses for their religion and institutions.

A related reason for rejecting Justice Souter's paternalism is that he is doing the very thing the Supreme Court has forbidden in other contexts. That is, in arguing that the religious schools participating in Cleveland's voucher program have compromised their beliefs by accepting the preference restriction,<sup>144</sup> Justice Souter is making judgments about whether a religious community's beliefs are consistent with particular religious doctrines. However, the decision in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*<sup>145</sup> prohibits judicial excursions into theology, as the Court declared that it was

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<sup>141</sup> See *supra* note 135 and accompanying text.

<sup>142</sup> Joe Loconte, *Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?*, 93 POL'Y REV. 30 (1999). The principal of one Lutheran school explained that his school's unwillingness to participate in the voucher program was due to the restriction, which school authorities believed "would compromise [the school's] mission as a Christian school." *Id.* at 31. Loconte notes that a nationwide survey of private schools conducted in 1998 by the U.S. Department of Education "found that few sectarian schools would join voucher programs that allowed exemptions from religious instruction or activities." *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 712 (2002) (Souter, J., dissenting).

<sup>145</sup> 393 U.S. 440, 451 (1969).

unconstitutional for “civil courts to engage in the forbidden process of interpreting and weighing church doctrine.”<sup>146</sup> *Presbyterian Church* involved a dispute over church property between two local churches and the national denomination that turned on whether certain actions of the latter “depart[ed] substantially” from church doctrine.<sup>147</sup> If such a departure was found, a second determination had to be made regarding how significant the departures were to church doctrine. In other words, the judiciary was asked “to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion.”<sup>148</sup> “Plainly,” the Court declared, “the First Amendment forbids civil courts from playing such a role.”<sup>149</sup>

But is this not precisely the role Justice Souter is playing when he claims that participation in the voucher program has compromised the beliefs of the religious schools? Such a claim, after all, is a claim that the schools have departed from church doctrine. To illustrate the point, let us focus on Catholicism and the fact that at the time of the *Zelman* litigation, thirty-five of the forty-six religious schools, out of a total of fifty-six participating private schools enrolling voucher students, were Catholic schools.<sup>150</sup> To conclude that the Catholic schools had compromised their religion, Justice Souter must compare the schools’ willingness to abide by the terms of the program against the teachings of the Catholic Church. He must engage in theology to interpret and weigh Catholic teachings, and he must do the same with religious traditions and doctrines of other religious schools that accept voucher students. However, as *Presbyterian Church* makes clear, the Free Exercise Clause prevents courts from becoming embroiled in theological matters and from attempting to tell the faithful how to understand their own faith.

Beyond this structural restraint denying the Supreme Court and all civil courts the authority to act as theologians, we may also question whether Justices and judges possess the knowledge and insight requisite for theological undertakings. In other words, how does Justice Souter know when a particular religious community has compromised its principles? Is he or the Court generally so well-versed in the theologies of the various religious traditions in this country that he or it is in a position to say to a religious community that it has violated its own

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<sup>146</sup> *Id.* at 451.

<sup>147</sup> *Id.* at 450.

<sup>148</sup> *Presbyterian Church*, 393 U.S. at 450.

<sup>149</sup> *Id.*

<sup>150</sup> *Zelman*, 536 U.S. at 681 (Thomas, J., concurring).



principles? Justice Souter believes that the religious voucher schools in Cleveland have compromised their principles in order to qualify for the program. Undoubtedly, he would say the same of religious schools in Milwaukee, which must abide by the more serious limitation that permits voucher students to opt out of religious instruction and activities. Such a conclusion contradicts the self-understanding of at least the Catholic schools in Milwaukee, most of which are participating in the voucher program.<sup>151</sup> As the principal of one Milwaukee Catholic high school stated, the opt-out provision did not interfere with the school's ability to "maintain [its] independence and [its] mission."<sup>152</sup> Thus, what may appear to an outsider, such as Justice Souter, to be a case of a religious community compromising its beliefs in order to qualify for public funds, may instead be nothing of the sort to the community. Justice Souter aptly demonstrates that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of [a] particular [believers'] interpretation[] of [their] creeds."<sup>153</sup>

One may reasonably doubt that Justice Souter actually practices theology and that he does not interpret and evaluate religious principles that would be necessary to conclude that religious voucher schools have compromised their beliefs. That is, there is no evidence in his *Zelman* opinion that he actually made any theological determinations, which is just as well because he is not a theologian. Instead, the "compromise" claim is a bald assertion that the faithful have been unfaithful and that they have violated their religious beliefs. It is an accusation that the religious have been unfaithful to their God and to what their God requires of them. It is a very serious charge.<sup>154</sup> But what leads Justice

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<sup>151</sup> Loconte, *supra* note 142, at 31.

<sup>152</sup> *Id.* (quoting the principal).

<sup>153</sup> *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

<sup>154</sup> Lest the reader think that I have exaggerated Justice Souter's claim that the religious have compromised their religious beliefs, reproduced below is the pertinent passage from *Zelman*. In the founding era, Justice Souter writes, the corruption of religion was manifest in:

'[P]ride and indolence in the Clergy; ignorance and servility in the laity[,] in both superstition, bigotry and persecution'; in the 21st century, the risk is one of 'corrosive secularism' to religious schools, and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. Even 'the favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation.' *The risk is already being realized . . . [in the Cleveland program].*

Souter and the other Justices who joined his dissent to make such a serious charge, especially when no evidence is offered to indicate that voucher schools have compromised their faith? Justice Souter indicates that the schools' willingness to accept the restriction preventing them from preferring same-faith students represents a compromise of belief. However, as I have noted, he cannot know this without weighing and evaluating the doctrines of the religion at issue, which he does not do and he is forbidden to do. Consequently, he cannot know whether any of the schools have compromised their beliefs by accepting the same-faith preference restriction. Why then the cavalier assertion that they have? It seems to me that the claim is simply a form of moral badgering intended to shame and condemn religious believers who would permit their institutions to participate in neutral public programs. His aim seems to be to discourage such participation and to instill in the public consciousness the notion that religious institutions necessarily betray their religion when they participate in neutral public programs. In the end, Justice Souter's motivations for the severe allegation he makes are unclear. However, if the Constitution denies courts the authority to "interpret[] and weigh[] church doctrine,"<sup>155</sup> surely the Supreme Court Justices should thus refrain from accusing the religious of betraying their God.

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

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

<sup>155</sup> *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969).

C. *Prevention of Social Conflict*

The third pillar supporting the privatization commitment is the claim that the Establishment Clause confines religion to the private sphere because of “its inextricable link with social conflict.”<sup>156</sup> To be sure, this is a position “that once occupied the Court” but has now been “rightly disregarded.”<sup>157</sup> Nevertheless, those Justices committed to the privatization of religion cling to it, arguing that religion in the public sphere will lead to social conflict as religious groups vie for public funds to support their institutions and as “taxpayers who take their liberty of conscience seriously” mobilize to prevent such expenditures.<sup>158</sup> As with the concern over rights of conscience and the potential for religion to become corrupted, social peace is certainly an important matter. However, the problem is that the historical and social analysis offered in support of the claim is wholly unpersuasive. In fact, it is perhaps an overstatement to argue that the social conflict claim rests on any meaningful analysis at all.

Although it is claimed that the prevention of religiously-motivated social conflict is one of the aims of the Establishment Clause, it is revealing that one finds no reference by any of the Justices espousing this position to any original source. For example, Justice Souter cites only other Supreme Court opinions, which fail to marshal any founding era arguments.<sup>159</sup> Moreover, as Edward McGlynn Gaffney, Jr., argues, this particular claim about the Establishment Clause is of recent vintage.<sup>160</sup> Gaffney documents that it was first hinted at by Justice Harlan in his concurring opinion in *Walz v. Tax Commission*<sup>161</sup> in 1970. The next year, in *Lemon v. Kurtzman*,<sup>162</sup> a majority of the Court claimed it as one of the motivations behind the adoption of the First Amendment.<sup>163</sup> Writing for the Court in *Lemon*, Chief Justice Burger argued that “political division

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<sup>156</sup> *Zelman*, 536 U.S. at 715 (Souter, J., dissenting); see also *Zelman*, 536 U.S. at 718–22 (Breyer, J., dissenting) (presenting the same argument as Justice Souter with specific attention to cases involving religion and education); *Mitchell v. Helms*, 530 U.S. 793, 872 (2000) (Souter, J., dissenting) (briefly recounting cases in which the Court has invoked the religious strife rationale).

<sup>157</sup> *Mitchell*, 530 U.S. at 825 (Thomas, J., plurality opinion).

<sup>158</sup> *Zelman*, 536 U.S. at 715 (Souter, J., dissenting).

<sup>159</sup> See *Zelman*, 536 U.S. at 715 (Souter, J., dissenting); *Mitchell*, 530 U.S. at 872 (Souter, J., dissenting).

<sup>160</sup> Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980).

<sup>161</sup> 397 U.S. 664 (1970).

<sup>162</sup> 403 U.S. 602 (1971).

<sup>163</sup> Gaffney, *supra* note 160, at 209–12.

along religious lines was one of the principal evils against which the First Amendment was intended to protect.”<sup>164</sup> As Gaffney notes, neither Justice Harlan nor Chief Justice Burger reference any founding era arguments or sources in support of their assertion about the intent of the Establishment Clause.<sup>165</sup> Instead, both rely on a 1969 Harvard Law Review article, which itself is “unadorned with any reference to primary sources.”<sup>166</sup> After reviewing congressional debates over the First Amendment and the writings of Jefferson and Madison, Gaffney argues that the historical record cannot bear the weight of the social conflict claim. The historical record, Gaffney writes, is devoid of evidence indicating that “the founding fathers perceived political divisions along religious lines as an evil and that they intended to avoid such conflicts by enacting the First Amendment.”<sup>167</sup> Given that the Establishment Clause appears to be a jurisdictional statement explicitly affirming that the new Constitution did not withdraw from the states’ authority over religion,<sup>168</sup> it is not surprising that Gaffney would reach this conclusion.

Not only does the alleged prevention-of-social-conflict motivation for the Establishment Clause lack a credible historical foundation, as social policy it is a solution in search of a problem. That is, religion has had a place in the public sphere throughout our nation’s history, and it has engendered no deep or enduring social conflict. Consider only the post-New Deal American political culture. As Justice O’Connor points out in her *Zelman* concurrence, substantial public funds have long been channeled to religious institutions “through public health programs such as Medicare . . . and Medicaid . . . through educational programs such as the Pell Grant program . . . and the G.I. Bill of Rights . . . and through childcare programs such as the Child Care and Development Block Grant Program.”<sup>169</sup> Religious institutions have additionally long

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<sup>164</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

<sup>165</sup> Gaffney, *supra* note 160, at 210, 214.

<sup>166</sup> *Id.* at 214. (referring to Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969)).

<sup>167</sup> *Id.* at 223. Gaffney adds that not only can Madison not be put into service for the political divisiveness rationale, but that Madison actually encouraged, both theoretically and practically, religiously-motivated political divisions. In support of this argument, Gaffney cites Madison’s argument in *Federalist No. 10* that civil and religious liberty would be safeguarded by competition among different “interests” and “sects.” Further, Gaffney notes that in his battle to defeat Patrick Henry’s bill to support the teaching of Christianity, Madison “explicitly appealed to a wide coalition of religious dissidents in Virginia, principally Baptists and Presbyterians, to oppose the views of the established Episcopalian Church. . . .” *Id.* at 222.

<sup>168</sup> *See supra* note 73.

<sup>169</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 666–68 (2002) (O’Connor, J., concurring).

benefited, albeit indirectly, from tax policies permitting tax deductions for contributions made to qualified religious organizations, education policies establishing tax credits for educational expenses, including those incurred at religious schools, and exemptions from state property taxes for property owned by religious institutions.<sup>170</sup> The annual value of the foregoing benefits is well into the billions of dollars,<sup>171</sup> but one is hard pressed to identify any divisive political conflict provoked by these examples of religion in the public sphere.<sup>172</sup>

Consequently, just as the claim that the founders intended the Establishment Clause to be a safeguard against religiously-motivated political divisiveness is free of any founding era references or arguments, the arguments about the divisiveness of religion in the public sphere are likewise free of any meaningful American examples of religiously-motivated political divisions. Rather, there are the standard references to seventeenth century European religious conflicts and the established churches in colonial America that persisted into the nineteenth century.<sup>173</sup> The state-established churches in the late 1700s and early 1800s were politically divisive, but these conflicts are inapposite to the evaluation of the divisiveness of religious institutions participating in religiously-neutral public programs within the context of an expansive regulatory state. If religiously-motivated social conflict were truly a problem requiring the privatization of religion, one would expect to find examples of it accompanying the public programs noted in the preceding paragraph wherein billions of public dollars have directly and indirectly aided religion.

The lack of meaningful American examples of religious conflict explains why Justice Souter and other privatization Justices do not reference any, and this perhaps helps us to understand why Justice Stevens now also looks to contemporary international conflicts to

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<sup>170</sup> *Id.* at 665–66 (O'Connor, J., concurring).

<sup>171</sup> *See id.* at 665–68.

<sup>172</sup> Noting this, Bradley wrote—in 1986, when the divisiveness rationale commanded the support of a majority of Justices—that the:

Court is clearly engaged in an entirely prophylactic effort, one that has constitutionalized the relationship of church to state without *any empirical* confirmation of the “evil” that assertedly justifies it. Requiring just a “clear and present danger” of sectarian strife, for instance, would eliminate the “divisiveness” rationale from every case that ever employed it.

Bradley, *supra* note 1, at 303.

<sup>173</sup> *See, e.g., Zelman*, 536 U.S. at 718 (Breyer, J., dissenting); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

support his claim that religion must be confined to the private sphere. That is, Justice Stevens's opposition to religion in the public sphere is based not only on his "understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent" but also on "the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another."<sup>174</sup> One wonders which is the more curious, Justice Stevens's reduction of complex political, ethnic, and religious differences to simply religious disputes or his belief that the political strife in the Balkans, Northern Ireland, and the Middle East is somehow instructive for gauging the constitutionality of neutral, public, *American* programs.

My comments here should not be understood as an uncritical, unqualified endorsement of religion in the public square or as a denial that religion holds any potential for social harm. Clearly it does. Human history is replete with instances of great evil committed in the name of religion.<sup>175</sup> My contention is simply that religion has always had some involvement in the public sphere in this country and yet the American experience has been one largely free of serious, lasting religious conflict. This claim is reinforced, I believe, by the failure of the privatization Justices to identify any consequential American examples of such divisiveness.

One might concede my point about the American history of many religions and of no religion living together more or less peacefully but argue that religious school vouchers, as in *Zelman*, are different. For instance, one could claim that the lack of any serious social conflict over neutral tax, higher education, healthcare, and childcare policies is uninformative for evaluating the potential political divisiveness of school choice programs. This is essentially Justice Breyer's position, who concedes that the "consequence [of religion in the public sphere] has not been great turmoil" but argues that "[s]chool voucher programs differ . . . in both *kind* and *degree* from" other types of neutral aid programs.<sup>176</sup> Vouchers differ in kind because they "direct financing to a core function of the church: the teaching of religious truths to young children," which is "far more contentious than providing funding for

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<sup>174</sup> *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

<sup>175</sup> See, e.g., John C. Jeffries, Jr., & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297-318 (2001) (focusing largely on the issue of schooling). See generally 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).

<sup>176</sup> *Zelman*, 536 U.S. at 726 (Breyer, J., dissenting).

secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university.”<sup>177</sup> He also contends, without referencing any historical examples, that “history also shows that government involvement in religious primary education is far more divisive” than any tax or healthcare programs that happen to benefit religion.<sup>178</sup> Vouchers differ in degree from other aid programs the Court has endorsed in that other programs provided only “limited amounts of aid,” whereas vouchers involve “a considerable shift of taxpayer dollars from public secular schools to private religious schools.”<sup>179</sup>

While Justice Breyer is correct about how vouchers differ from other types of public aid, it is unclear that vouchers will generate any more political division—that is to say, *any* political division—than have the more limited aid programs the Court has approved of in recent years.<sup>180</sup> This of course is not to say that vouchers are uncontroversial or that some segments of American society do not ardently resist them, but that the divisiveness reasoning is fundamentally flawed and has been since it was first articulated in 1970. It is flawed because the public debate over public aid to religious schools is not about religion or religious truths. Instead, it is a debate about political principles—chiefly, what justice and equality require regarding schooling in a free society.<sup>181</sup> Essentially, the disagreement over public aid to religious schools implicates no religious values, only political values. It is a political dispute carried on by ordinary political means. What advocates of school vouchers and other aid programs seek is not the establishment of a religious truth or some religious orthodoxy, but an end to the state’s monopoly over education funds. As Gerard Bradley argues, the issue of public aid to religious schools “has never been agitated in a way distinguishable from political conflict generally, and the Court has done nothing except assert, without a scintilla of evidence, the contrary.”<sup>182</sup> To be sure, religion is in the background, but in a religious society such as ours, religion is in the background of virtually every political issue. Yet, does not the American experience confirm that individuals and groups of different religions and

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<sup>177</sup> *Id.* at 726–27.

<sup>178</sup> *Id.* at 727.

<sup>179</sup> *Id.*

<sup>180</sup> See *supra* note 7 and accompanying text (emphasis added).

<sup>181</sup> See, e.g., AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); Kevin Pybas, *Liberalism and Civic Education: Unitary Versus Pluralist Alternatives*, 33 *PERSP. ON POL. SCI.* 18 (2004).

<sup>182</sup> Bradley, *supra* note 1, at 304.

of no religion are capable of living together more or less peacefully? This point seems conceded by the failure of the privatization Justices to point to any meaningful American examples of religiously-motivated political strife and by Justice Breyer's acknowledgement that no previous aid program has generated any such conflict.

#### IV. CONCLUSION

Justice Souter and other Justices stubbornly insist that the aim of the Establishment Clause is to restrict religion to the private sphere. The arguments in support of this conclusion, respecting the rights of conscience, preventing the corruption of religion, and preserving social peace, are unpersuasive. It is my contention that analysis of these issues by the privatization Justices is largely perfunctory and that no real examination of the issues takes place. Instead of a meaningful analysis of religious liberty, the privatization thesis rests upon the following: (1) conclusory statements about rights of conscience, including a misreading of Madison's *Memorial and Remonstrance*;<sup>183</sup> (2) a misguided paternalism requiring the Court to weigh and evaluate religious doctrines, which ignores the threat that the state's monopolization of public education funds presents to religion and wrongly assumes that religious institutions participating in neutral government programs are incapable of safeguarding their faith;<sup>184</sup> and (3) seeks to protect the nation from a religiously-inspired social conflict, which is largely an imaginary problem.<sup>185</sup>

To further illustrate the thinness of the claim that the Establishment Clause banishes religion to the private sphere, consider the treatment of "public sphere" and "private sphere" by the privatization Justices. Interpreting the Establishment Clause to require that religion be restricted to the private sphere follows this syllogism:

The Establishment Clause embodies Jefferson's *A Bill for Establishing Religious Freedom* and Madison's *Memorial and Remonstrance Against Religious Assessments*. These texts reflect the belief that religion should be confined to the private sphere. No public funds may therefore be used for religious purposes, even when such funds reach religious institutions only as a result of the free and independent choices of aid recipients.

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<sup>183</sup> See *supra* Part III.A.

<sup>184</sup> See *supra* Part III.B.

<sup>185</sup> See *supra* Part III.C.



The problem with this syllogism is: The easy assumption of the minor premise that the term “private sphere” has the same meaning today as it did for Jefferson and Madison. Insofar as I can determine, the Supreme Court has never explicitly defined what it means by the use of “private sphere” and “public sphere.” However, it seems that the Court equates government and its activities with the public sphere and that the private sphere consists of those areas of life that government has not wholly regulated. In essence, the private sphere consists of the aspects of life where we are relatively unconstrained to live according to our own best lights.

If we understand “public sphere” to mean nothing more than whatever government does, as the Supreme Court seems to interpret it, then it is axiomatic that the public sphere has come to dwarf the private sphere. The privatization Justices thus trivialize religion by refusing to confront this fact. Jefferson and Madison understood their principles as expanding the sphere of human liberty. In contrast, crudely insisting that religion must be limited to the private sphere in contemporary circumstances of an expansive managerial state reduces the sphere of human liberty. Consider only the example of public aid to religious schools, which comprises much of the Court’s Establishment Clause jurisprudence. All citizens are taxed for the benefit of education, but under the privatization of religion interpretation of the Establishment Clause, religious schools are denied any meaningful public support. Government schools alone are entitled to the educational tax proceeds. Such a scheme clearly results in a reduction of liberty for families who wish to provide their children an education unavailable in state schools. To be sure, such families have the liberty to send their children to religious schools,<sup>186</sup> but the privatization principle denies them the opportunity to draw on the educational fund to which they have contributed.

It is thus rather formalistic and crude to reflexively demand that religion be confined to the private sphere without contextually considering whether liberty will be promoted or impeded.<sup>187</sup> The unwillingness to wrestle with such a crucial issue is emblematic of the refusal of those Justices who seek to confine religion to the private sphere to seriously engage difficult issues of religious liberty. The

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<sup>186</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

<sup>187</sup> I am not suggesting that the restraint of liberty is always illegitimate. Human liberty is restrained in various ways in liberal society, generally in the service of some broader social good.

casualness with which these Justices claim that the Constitution requires religion to be restricted to the private sphere suggests almost an eagerness to constrain religion. Instead of the result of a careful constitutional inquiry, the conclusion that religion must be confined to the private sphere seems indicative of an *a priori* negative judgment about religion—as something unimportant, possibly dangerous, and requiring no serious analysis.<sup>188</sup> Particularly underscoring this point is the fact that privatization Justices seem incapable of drawing any favorable conclusions from religion's long involvement in the public sphere, an association without lasting social conflict.<sup>189</sup> Refusing to notice this, they dogmatically insist that religion must be confined to the private sphere to avoid a largely nonexistent problem.

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

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<sup>188</sup> In a manuscript in progress, I suggest that the belief that religion must be confined to the private sphere is part of a comprehensive philosophical commitment about religion, individual, and social flourishing that is rooted in an understanding of the liberal political tradition that William Galston calls "autonomy-centered." See *supra* note 11. Autonomy-centered liberalism, Galston argues, promotes "individual self-direction in at least one of many senses explored by John Locke, Immanuel Kant, John Stuart Mill, and Americans writing in an Emersonian vein [and] is frequently linked with the commitment to sustained rational examination of self, others, and social practices." GALSTON, *LIBERAL PLURALISM* 21 (Cambridge Univ. Press 2002). Autonomy-centered liberalism is:

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

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

<sup>189</sup> See *supra* notes 169–74 and accompanying text.

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