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## Zelman v. Simmons-Harris and the Private Choice Doctrine

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*ZELMAN v. SIMMONS-HARRIS* AND THE PRIVATE CHOICE  
DOCTRINE

LAURA T. RAHE<sup>1</sup>

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I. INTRODUCTION

The Supreme Court’s June, 2002 decision in *Zelman v. Simmons-Harris*<sup>2</sup> follows a pattern of cases that allow religion equal footing in the public sphere with secular institutions and expression, so long as religion enters the arena as a result of a private choice. This Article will refer to the principle found in these cases as the “private choice doctrine.”<sup>3</sup> As one commentator put it with regard to *Zelman*,

the Supreme Court played a calming role in the culture wars by declaring that the era of strict separation between church and state is over. . . . The Supreme Court’s vision of neutrality—which holds that a government program enacted for a valid secular purpose is not unconstitutional if that program incidentally benefits religious organizations—represents a moderate and appealing vision for addressing church-state issues, one that can accommodate the concerns of liberals and conservatives.<sup>4</sup>

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<sup>1</sup>This article began as a series of papers for Russell Hittinger’s class, *Wall of Separation: Church-State Doctrines*, taught at the University of Tulsa in the Spring of 2002. I am deeply indebted to Prof. Hittinger for the ideas presented in that course, and for his input into this article. I also wish to extend my thanks, as always, to my husband, Paul Rahe.

<sup>2</sup>*Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

<sup>3</sup>This term has also been used in Cynthia Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 CAL. W. L. REV. 193, 217, 224 (1995).

<sup>4</sup>Jeffrey Rosen, *The Refining of Religious Neutrality*, THE NEW YORK TIMES ON THE WEB (June 28, 2002) at <<http://www.nytimes.com/2002/06/28/opinion/28ROSE.html>>.

In *Zelman*, the Court examined the constitutionality of an Ohio pilot program that took effect in the Cleveland City School District.<sup>5</sup> One of the program's provisions permitted parents to use a tuition voucher for their children to attend public or private schools, including religious schools.<sup>6</sup> The statute authorizing the program ensured that participating private schools remained affordable for the most disadvantaged children,<sup>7</sup> and required that the schools refrain from "advocat[ing] or foster[ing] unlawful behavior or teach[ing] hatred of any person or group on the basis of race, ethnicity, national origin or religion."<sup>8</sup>

The Cleveland program exemplifies one attempt, informed by the reality of religious pluralism, at a political solution to the perceived failure of the public school system. The recent decision happily ends the divisive legacy of extreme separation, and in this respect, promises to play "a calming role in the culture wars . . ."<sup>9</sup> Furthermore, the private choice doctrine affords much needed space for religious speakers. The culture wars, however, will continue. Since the late 1940's, the Supreme Court has produced a cacophonous composition by its divergent interpretations of the Establishment Clause. The disharmony besetting church-state jurisprudence is the subject of this Article. It examines, in particular, the legal and political theories that have tended to promote secular establishment in the United States.

Part II discusses a series of precedents that support the private choice doctrine, while Part III explores another influence in the doctrine's development: the deep lack of consensus among scholars and the judiciary with regard to certain aspects of religion clause jurisprudence. Part IV attempts to situate the private choice doctrine in its political context, which itself is in part the product of court decisions. Part V addresses some risks associated with the private choice doctrine.

## II. ZELMAN AND ITS HERITAGE

The crux of the majority opinion upholding the Cleveland program was the element of parental choice. "Where tuition aid is spent[.]" the Chief Justice observed, "depends solely upon where parents who receive tuition aid choose to enroll their child."<sup>10</sup> The program satisfied the Establishment Clause at least in part

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<sup>5</sup>*Zelman*, 122 S. Ct. at 2462.

<sup>6</sup>*Id.* at 2463.

<sup>7</sup>*Id.* at 2464 ("Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to \$2,250. §§ 3313.978(A) and (C)(1). For these lowest-income families, participating private schools may not charge a parental co-payment greater than \$250. § 3313.976(A)(8). For all other families, the program pays 75% of tuition costs, up to \$1,875, with no co-payment cap. §§ 3313.976(A)(8), 3313.978(A). These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate." (footnote omitted)).

<sup>8</sup>*Id.* at 2463 (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (Anderson 1999 and Supp. 2000)).

<sup>9</sup>THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 17<sup>th</sup> ed. 2000).

<sup>10</sup>*Id.* at 2464.

on account of its neutrality; as the Court explained, “any parent” could use the vouchers, and “all schools within the district, religious or nonreligious” could accept them.<sup>11</sup> No “financial incentive” existed benefiting religious schools,<sup>12</sup> and the Court found, based on the record, no evidence that parents lacked the option of secular schools.<sup>13</sup> This last factor, according to the majority, ought not be interpreted broadly: “The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.”<sup>14</sup> In short, “neutral” programs like the one available to Cleveland parents do not “carr[y] with [them] the *imprimatur* of government endorsement.”<sup>15</sup>

*Zelman* is only the latest in a series of cases that forbid state disfavor of religion.<sup>16</sup> The private choice doctrine as articulated in these cases has provided a

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<sup>11</sup>*Zelman*, 122 S. Ct. at 2468 (emphasis in original).

<sup>12</sup>*Id.* (quoting *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 487-88 (1986)).

<sup>13</sup>*Id.* at 2469.

<sup>14</sup>*Id.* at 2470. It is worth noting that Justice O’Connor’s concurring opinion places strong emphasis on the issue of available secular choices. *Id.* at 2473-80 (O’Connor, J., concurring). Early in the opinion, she proposes to “elaborat[e] on the Court’s conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents.” *Id.* at 2473. In her analysis of the second prong of the *Lemon* test as applied to “indirect aid cases[.]” she concludes, “[c]ourts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion . . . second, *and more importantly*, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is ‘no,’ the program should be struck down under the Establishment Clause.” *Id.* at 2476 (emphasis added). The portion of the majority opinion she cites addresses Justice Souter’s dissent. *See id.* at 2469-71. Earlier in the majority opinion, however, Chief Justice Rehnquist wrote, “where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.” *Zelman*, 122 S. Ct. at 2467. In contrast with the second prong of Justice O’Connor’s test, *see id.*, the Chief Justice in his concluding paragraph mentions the ability of “individuals to exercise genuine choice among options public and private, secular and religious,” *id.* at 2473. One may conclude, then, that according to Chief Justice Rehnquist’s understanding of what the Establishment Clause demands, there must be “genuine choice[.]” but “most private schools” participating in a given voucher program need not be secular. *Id.* at 2472. Although Justice O’Connor joined the majority, her concurring opinion points in the direction of a more fact-specific inquiry, placing an emphasis on the availability of secular alternatives in programs of private choice. *Id.* at 2473.

<sup>15</sup>*Id.* at 2468 (citations omitted) (emphasis in original).

<sup>16</sup>For discussions of the voucher issue, *see* Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997 (2002); Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37 (1993); Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167 (2000); Michael A. Vaccari, *Public Purpose and the Public Funding of Sectarian Educational Institutions: A More Rational Approach after*

more or less consistent façade for religion clause jurisprudence. As discussed in Part III, however, the legal theories underlying these decisions can fairly be described as incoherent.

*Widmar v. Vincent*<sup>17</sup> involved the University of Missouri at Kansas City's decision to deny a registered student organization access to its facilities for religious meetings.<sup>18</sup> The University had a policy of allowing recognized student organizations to meet in its facilities.<sup>19</sup> The Court determined that when the University engaged in "discriminatory exclusion from a public forum based on the religious content of a group's intended speech," it perpetrated a "content-based exclusion[.]" and strict scrutiny applied.<sup>20</sup> The Establishment Clause did not help the University meet the requirements of strict scrutiny.<sup>21</sup> Applying the test established in *Lemon v. Kurtzman*,<sup>22</sup> the Court found that allowing the group to meet on its facilities easily passed the first and third prongs,<sup>23</sup> and as to the second, provision of a meeting place would result in only "incidental" benefits to religion, rather than "primary advancement."<sup>24</sup> In reaching this conclusion, the Court relied on two points: "First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. . . . Second, the forum is available to a broad class of nonreligious as well as religious speakers."<sup>25</sup>

For the sake of clarity, it is worth exploring the Court's understanding of public fora. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,<sup>26</sup> the Court laid out a classification scheme covering three types of public property, and discussed the First Amendment rights of the public in each type.<sup>27</sup> First, in "traditional public forum . . . places which by long tradition or by government fiat have been devoted to

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*Rosenberger and Agostini*, 82 MARQ. L. REV. 1 (1998); Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 WM. & MARY L. REV. 685 (1995). On religion in the public arena more generally, see Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991).

<sup>17</sup>*Widmar v. Vincent*, 454 U.S. 263 (1981).

<sup>18</sup>*Id.* at 265.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at 269-70. The University "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 270. For another case involving religious speech on state property, see *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

<sup>21</sup>See *Widmar*, 454 U.S. at 270-75.

<sup>22</sup>403 U.S. 602 (1971). The test reads as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted).

<sup>23</sup>See *Widmar*, 454 U.S. at 271-72.

<sup>24</sup>*Id.* at 273-74 (citations omitted).

<sup>25</sup>*Id.* at 274.

<sup>26</sup>*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

<sup>27</sup>*Id.*

assembly and debate,” the state faces strict scrutiny in attempts to limit content-based discrimination, but may enforce “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>28</sup> Second, although the government need not maintain forever as a public forum property it “has opened for use by the public as a place for expressive activity[,]” so long as that property does remain open, the same restrictions apply to the government as in the first category.<sup>29</sup> As a subset of the second type of forum, the Court explained that the state might open property “for a limited purpose such as use by certain groups”; the university facilities in *Widmar* fall into this category.<sup>30</sup> Finally, in the case of “[p]ublic property which is not by tradition or designation a forum for public communication[,]” the state may enforce the restrictions applicable to the first two types of forum, as well as additional limits on expression.<sup>31</sup>

In *Board of Education v. Mergens*,<sup>32</sup> the Court applied the Equal Access Act<sup>33</sup> to a situation involving a high school student who sought official school recognition for her Christian club.<sup>34</sup> The Equal Access Act requires public high schools to refrain from discrimination against student organizations “on the basis of the religious, political, philosophical, or other content of the speech” at their meetings, if the school offers a limited open forum.<sup>35</sup> According to the Act, a “limited open forum” occurs “whenever [a high] school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.”<sup>36</sup> Justice O’Connor, writing for the Court in two parts of her opinion, determined that the school offered a “limited open forum[,]” and that it had denied the student’s Christian club “equal access” as required by the Act.<sup>37</sup>

In concluding that this application of the Equal Access Act did not result in a violation of the Establishment Clause,<sup>38</sup> Justice O’Connor, joined in this portion of the opinion by three other justices, applied the *Lemon* test, and determined that the Act satisfied the first prong, because “Congress’ avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular.”<sup>39</sup> As for the second prong, the Act enabled only “*private* speech endorsing religion,”

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<sup>28</sup>*Id.* at 45-46 (citations omitted).

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

<sup>30</sup>*Id.* at 45 n.7.

<sup>31</sup>*Id.* at 46.

<sup>32</sup>*Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

<sup>33</sup>20 U.S.C. § 4071 et seq. (1994).

<sup>34</sup>*Mergens*, 496 U.S. at 226.

<sup>35</sup>§ 4071(a).

<sup>36</sup>§ 4071(b).

<sup>37</sup>*Mergens*, 496 U.S. at 246-47.

<sup>38</sup>*Id.* at 247-53.

<sup>39</sup>*Id.* at 249 (citation omitted).

not speech by the government.<sup>40</sup> Justice O'Connor found neither state endorsement of religion nor excessive entanglement with it.<sup>41</sup> Justice Kennedy, in whose opinion Justice Scalia joined, also found that the Act did not violate the Establishment Clause, but reached this conclusion without the help of the *Lemon* test.<sup>42</sup>

As they pertain to future equal access cases, two principles from *Mergens* are particularly important. First, in the plurality portion of the opinion, Justice O'Connor took a giant step away from the radical separation established by the Warren Court: "[t]he proposition that schools do not endorse everything they fail to censor is not complicated."<sup>43</sup> According to this reasoning, the state can no longer necessarily justify invasive restrictions on private speech on the grounds that the speech somehow invokes governmental authority and brings an established church in through the back door. Second, the Court decided *Mergens* based upon the Equal Access Act, and explicitly did not determine whether the First Amendment required the Act's protection against discrimination.<sup>44</sup>

The Court in *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>45</sup> directly addressed the question of what the First Amendment requires with regard to religious speech in a limited public forum.<sup>46</sup> The case involved a University of Virginia policy under which the University paid printers for the costs of producing student publications.<sup>47</sup> A student paper, its publisher, and several of its staff members sued when the University refused to pay their printing costs on account of the paper's religious perspective.<sup>48</sup> The Court determined that the University's decision violated the students' free speech rights<sup>49</sup> and that the Establishment Clause did not mandate this deprivation.<sup>50</sup>

The Student Activities Fund, through which the University paid the printing costs, constituted a limited forum.<sup>51</sup> In reaching its conclusion with regard to free speech, the Court distinguished between "content discrimination, which may be permissible if it preserves the purposes of that limited forum," and "viewpoint discrimination,"<sup>52</sup> "an egregious form of content discrimination."<sup>53</sup> The government

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<sup>40</sup>*Id.* at 250 (emphasis in original).

<sup>41</sup>*Id.* at 252-53.

<sup>42</sup>*Mergens*, 496 U.S. at 260-62. Justice Marshall filed a concurring opinion in which Justice Brennan joined, *id.* at 262-270; and Justice Stevens filed a dissenting opinion, *id.* at 270-91.

<sup>43</sup>*Id.* at 250.

<sup>44</sup>*Id.* at 247.

<sup>45</sup>*Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* at 822, 844.

<sup>48</sup>*Id.* at 825-27.

<sup>49</sup>*Id.* at 837.

<sup>50</sup>*Id.* at 845.

<sup>51</sup>*Rosenberger*, 515 U.S. at 829-30.

<sup>52</sup>*Id.* at 830.

engages in viewpoint discrimination when it censors speech on the basis of “the specific motivating ideology or the opinion or perspective of the speaker.”<sup>54</sup> “[V]iewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations[,]”<sup>55</sup> is precisely what the University of Virginia had done.<sup>56</sup>

The *Rosenberger* decision foreshadows *Zelman* on two points. First, Justice Kennedy, writing for the Court, distinguished between a situation in which the government is the speaker (“when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”)<sup>57</sup> and private speech in a limited forum provided by the government.<sup>58</sup> In the latter case, such as “when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers[,]” the government may not engage in viewpoint discrimination.<sup>59</sup> Second, in her concurring opinion, Justice O’Connor relied on three sets of circumstances in reaching the conclusion that the University was not “endorsing the magazine’s religious perspective.”<sup>60</sup> One of these circumstances was the fact that the University did not control the student publications.<sup>61</sup> Although Justice Kennedy discussed the distinction between government and private speech in the context of the free speech issue,<sup>62</sup> both his point and Justice O’Connor’s illustrate the importance, for at least some members of the Court, of the fact that the case involved a private entity making a choice. For Justice Kennedy, this circumstance meant that the private speaker deserved free speech protection; Justice O’Connor determined that government endorsement of religion had not occurred in part because of the independence of the private publication. In *Rosenberger*, this distinction served to protect a diversity of viewpoints among campus publications; if the Court were to read the Establishment Clause in such a way as to limit free speech, Justice Kennedy concluded, the ideas exchanged in the University’s forum “would be both incomplete and chilled . . . .”<sup>63</sup>

Chief Justice Rehnquist’s majority opinion in *Zelman* devoted significant space to three cases that reflect the principles of *Widmar*, *Rosenberger* and *Mergens*, but more closely resemble *Zelman* in their facts.<sup>64</sup> In *Mueller v. Allen*,<sup>65</sup> the Court

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<sup>53</sup>*Id.* at 829.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 830.

<sup>56</sup>*Rosenberger*, 515 U.S. at 832.

<sup>57</sup>*Id.* at 833 (citation omitted).

<sup>58</sup>*See id.* at 834.

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 849.

<sup>61</sup>*Rosenberger*, 515 U.S. at 849.

<sup>62</sup>*Id.* at 833-35.

<sup>63</sup>*Id.* at 844.

<sup>64</sup>*Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2465-67 (2002).

upheld a Minnesota law permitting tax deductions for certain educational expenses, including tuition to religious schools, under the Establishment Clause.<sup>66</sup> *Witters v. Washington Dept. of Services for the Blind*<sup>67</sup> determined that a state scholarship award to a student attending a religious school in order to become a pastor passed Establishment Clause muster.<sup>68</sup> The Court ruled in *Zobrest v. Catalina Foothills School District*<sup>69</sup> that the Establishment Clause permitted deaf children to receive help from federally funded sign-language interpreters while attending religious schools.<sup>70</sup> All three cases developed the private choice doctrine before *Zelman*; the taxpayers in *Mueller* and the students in *Witters* and *Zobrest* all spent government money, or money from which the government would receive a portion, by their own choosing, without implicating the state in their decision. “The incidental advancement of a religious mission,” Chief Justice Rehnquist concluded from these cases, “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>71</sup>

The *Zelman* Court itself made explicit reference to the history of the private choice doctrine. Chief Justice Rehnquist explained, “our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.”<sup>72</sup> He cited *Rosenberger* as authority for the former category.<sup>73</sup> The private choice doctrine, however, has a foundation broader than simply vouchers or even schools. The principle appears analogously in cases pertaining to speech in public fora. *Widmar*, *Rosenberger*, *Mergens* and related cases address the thorny problem of how, or whether, to regulate private choices in a government controlled setting.

These cases are readily distinguishable from several relatively recent decisions striking down government policies on Establishment Clause grounds, where the Court perceived the state actor as lending its authority to a religious speaker. *Lee v. Weisman*,<sup>74</sup> for example, involved a school district policy of allowing members of the clergy to pray at graduations.<sup>75</sup> The litigation that eventually reached the Supreme Court began with a middle school graduation ceremony during which students stood to say the pledge of allegiance and remained standing while a rabbi

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<sup>65</sup>*Mueller v. Allen*, 463 U.S. 388 (1983).

<sup>66</sup>*Id.*; see *Zelman*, 122 S. Ct. at 2466.

<sup>67</sup>*Witters v. Washington Dep’t Servs. for the Blind*, 474 U.S. 481 (1996).

<sup>68</sup>*Id.* See *Zelman* 122 S. Ct. at 2466-67.

<sup>69</sup>*Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

<sup>70</sup>*Id.*; see *Zelman*, 122 S. Ct. at 2467.

<sup>71</sup>*Zelman*, 122 S. Ct. at 2467.

<sup>72</sup>*Id.* at 2465 (citations omitted).

<sup>73</sup>*Id.*

<sup>74</sup>*Lee v. Weisman*, 505 U.S. 577, 581 (1992).

<sup>75</sup>*Id.*

said a prayer.<sup>76</sup> Justice Kennedy began his analysis by explaining that among the “dominant facts” that “mark and control the confines of [the Court’s] decision” was the fact that “[s]tate officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools.”<sup>77</sup> Later he observed, “[t]he degree of school involvement here made it clear that the graduation prayers bore the imprint of the State.”<sup>78</sup> Running through the policy arguments concerning divisiveness<sup>79</sup> and the discomfort of students who did not wish to pray<sup>80</sup> was the fact that in some sense the state itself purveyed the religious message. Thus, nothing like a private choice situation existed because the rabbi in effect prayed on behalf of the school district, rather than on his own behest.

The Court reached a similar conclusion in *Santa Fe Independent School District v. Doe*.<sup>81</sup> In this case, a school district permitted an elected student to deliver a “brief invocation and/or message” before high school football games.<sup>82</sup> Justice Stevens, writing for the Court, was “not persuaded that the pregame invocations should be regarded as ‘private speech.’”<sup>83</sup> Quoting *Lee*, the *Santa Fe* Court concluded that given the “degree of school involvement[,]” the district’s policy bore “the imprint of the State.”<sup>84</sup> Central to this determination was the fact that rather than allowing any student to deliver an address before football games, it permitted only one to do so for the season.<sup>85</sup> Hence, the choice was not private.

It is important to note that, controversial as the concept of religious schools receiving public funds through vouchers may be, the private choice doctrine finds latent support even within the radical separationist tradition that began in the 1940’s. In *Everson v. Board of Education*,<sup>86</sup> the case that announced “a wall between church and state” which “must be kept high and impregnable[,]”<sup>87</sup> the Court concluded that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”<sup>88</sup> The second prong of the test established in *Lemon* requires that a law’s “principal or primary effect must be one that neither advances *nor inhibits*

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<sup>76</sup>*Id.* at 583.

<sup>77</sup>*Id.* at 586.

<sup>78</sup>*Id.* at 590.

<sup>79</sup>*See id.* at 587-88.

<sup>80</sup>*Lee*, 505 U.S. at 592-93.

<sup>81</sup>530 U.S. 290 (2000).

<sup>82</sup>*Id.* at 294, 298.

<sup>83</sup>*Id.* at 302.

<sup>84</sup>*Id.* at 305 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

<sup>85</sup>*Id.* at 303.

<sup>86</sup>330 U.S. 1 (1947).

<sup>87</sup>*Id.* at 18.

<sup>88</sup>*Id.*

religion.”<sup>89</sup> The principle of private choice for religion, then, is nothing new. The novelty of *Zelman* and several of its predecessors lies in the application of that principle. One might argue, probably rightly, that Justices Black and Frankfurter, and perhaps Justice Burger as well, would not have looked favorably upon vouchers for religious schools; moreover, the earlier cases differ from *Zelman* in significant ways, as discussed below. It is nevertheless difficult to believe, if a system made available state money for children to attend any school, public or private in a city, and then rigorously screened the recipient schools for any hint of religion in their curricula, denying parents the voucher money to send their children to schools testing positive, that such a system would not “handicap” or “inhibit” religion.

Consistent support for the private choice doctrine, from language in *Everson* to the *Zelman* decision itself, and the doctrine’s common sense approach to the problem of religion in the public forum, however, obscure profound disagreements among legal scholars and members of the Court as to how to apply those provisions of the Constitution that concern religion.

### III. CONTEXT

The private choice doctrine has developed in a climate of intense controversy on two subjects: the scope of the Establishment Clause and the meaning of religion.<sup>90</sup>

#### A. Establishment Clause Battles

To do justice to the debates concerning the Establishment Clause, pertaining to both the Framers’ original intent and to the Clause’s incorporation, requires far more space than one part of one article. The classification below is not an attempt to evaluate the arguments on their merits, but rather to illustrate the broad range of proposed interpretations of the Establishment Clause, and consequently, the deep divisions among theorists with regard to these interpretations. These differences persist despite the few consistencies that appear in Establishment Clause jurisprudence since *Everson*.

#### 1. The Radical Separationist Substantive Interpretation

The first theory is the radical separationist substantive interpretation. This reading of the Establishment Clause began with *Everson*, and continues to appear<sup>91</sup> despite decisions like *Zelman* that moderate it. *Everson* articulated a substantive reading of the Establishment Clause by providing a laundry list of applications as follows:

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<sup>89</sup>*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (emphasis added).

<sup>90</sup>For several scholarly views on religion and the Constitution, see GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987); JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* (1995); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 314-16 (Regnery Gateway 1986) (1840); JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* (2000).

<sup>91</sup>See e.g. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.<sup>92</sup>

The language of the concluding paragraph evidences the extreme separationist character of the opinion: “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”<sup>93</sup> Although the Court noted that government need not play the role of “adversary” towards religion,<sup>94</sup> its clear preoccupation lay with the possibility that the state would befriend the church. The Court found constitutional a program under which a New Jersey board of education reimbursed parents for the public bus fares spent in transporting their children to schools, including parochial schools,<sup>95</sup> but it did so in order that it might not “inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.”<sup>96</sup> The state spent money “as a part of a general program under which it pa[id] the fares of pupils attending public and other schools.”<sup>97</sup> The decision, thus, articulated a doctrine of strict separation, justifying the inevitable entanglement of government and religious institutions only in cases involving general public welfare provisions such as sidewalks, crossing guards, fire protection and reimbursement of bus fares.<sup>98</sup>

The *Everson* Court adopted as authority for its interpretation James Madison’s *A Memorial and Remonstrance Against Religious Assessments*, the Virginia Bill for Religious Liberty, and its preamble written by Thomas Jefferson.<sup>99</sup> The First Amendment’s provisions, Justice Black wrote, “had the same objective and were intended to provide the same protection against governmental intrusion on religious

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<sup>92</sup>*Everson*, 330 U.S. at 15-16.

<sup>93</sup>*Id.* at 18.

<sup>94</sup>*Id.*

<sup>95</sup>*See id.* at 3, 18.

<sup>96</sup>*Id.* at 16.

<sup>97</sup>*Everson*, 330 U.S. at 17.

<sup>98</sup>*Id.* at 17-18.

<sup>99</sup>*Id.* at 11-13.

liberty as the Virginia statute.”<sup>100</sup> Attached as an appendix to the *Everson* decision was *Memorial and Remonstrance*.<sup>101</sup>

Although *Memorial and Remonstrance* contains ambiguities that lend themselves to the separationist cause, it is by no means certain Madison intended by the document to pioneer for Virginia the type of radical separation the *Everson* Court introduced. *Memorial and Remonstrance* contains both principled arguments and arguments of practical policy. In the passages based upon principle, Madison maintains first, that there is a right to freedom of conscience in religious matters, for “[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. This right is in its nature an unalienable right.”<sup>102</sup> Second, he adds that because man’s first obligation is to God, civil and legislative authority cannot compel him with regard to religion, religious duty being “precedent, both in order of time and degree of obligation, to the claims of Civil Society.”<sup>103</sup> His third principled argument is that all sects deserve equal religious freedom.<sup>104</sup>

On the second point, with regard to the primacy of man’s duty towards God, he concludes, “that in matters of religion no man’s right is abridged by the institution of Civil Society, and that religion is wholly exempt from its cognizance.”<sup>105</sup> The second clause requires interpretation. Three explanations are readily conceivable: first, the State must not intervene in Church matters; second, the State may not look to the Church in determining questions of law; or third, the State should base its law upon a general theism, and not look to revealed religions in civil matters. The problem with the third interpretation of “wholly exempt from its cognizance” is that it contradicts other arguments made in *Memorial and Remonstrance*; for example, further on Madison claims that a religious establishment “at once discourages those who are strangers to the light of [revelation] from coming into the region of it.”<sup>106</sup> In this passage, he makes the case for a policy of religious freedom aimed at fostering a presumably Trinitarian teaching. The purpose of effective proselytization is inconsistent with a theistic government that takes no cognizance of religion. The inconsistency, however, does not necessarily mean Madison does not adopt the theistic position: desiring a government based upon theistic principles, from whose cognizance revealed “Religion is wholly exempt[.]” he might nonetheless have made practical arguments intended to appeal to those who confessed a Trinitarian or other revealed religion. But if one assumes Madison meant what he said, the other two interpretations are more plausible.

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<sup>100</sup>*Id.* at 13 (citations omitted).

<sup>101</sup>*See id.* at 63-72.

<sup>102</sup>1 CHARLES S. HYNEMAN & DONALD S. LUTZ, *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805* 632 (Liberty Press 1983).

<sup>103</sup>*Id.*

<sup>104</sup>*Id.* at 633-34. As a consequence of their “natural rights[,]” men “are . . . to be considered as retaining an ‘equal title to the free exercise of religion according to the dictates of conscience.’” *Id.* at 633.

<sup>105</sup>*Id.* at 632.

<sup>106</sup>*Id.* at 636 (bracketed text in HYNEMAN & LUTZ).

The second interpretation, that is, that Madison intended to say that civil society must not consider religious teaching in determining questions of law, is problematic as well. Society must define the terms used in its laws, and in many cases, terms are difficult to define without reference to religion. A state's family law may provide that alimony awards favor the non-adulterous over the adulterous, not necessarily in order to encourage human perfection, but because the legislature may believe that encouraging marital fidelity will lead to a stable society, and thus promote prosperity. But one man's polygamous marriage and another man's remarriage are a third man's adultery. In order to apply the law, therefore, the legislature must take cognizance of religion, because many people believe that marriage falls at least in part under the authority of the Church.

Despite the ambiguities in *Memorial and Remonstrance*, *Everson* and its progeny have stretched the document's legacy beyond its writer's intent. *McCullum v. Board of Education*<sup>107</sup> ruled unconstitutional a program allowing religious teachers to provide instruction in public schools because of the use of "tax-supported public school buildings" for "dissemination of religious doctrines[.]" and because the program "affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery."<sup>108</sup> Following *Everson*, the Court required "a wall of separation between Church and State."<sup>109</sup>

The "wall" erected by *McCullum* distances civil society from religion far more radically than do the principles articulated in *Memorial and Remonstrance*. Madison wrote his document in opposition to a proposal to use tax money in support of the Episcopal Church.<sup>110</sup> The program at issue in *McCullum* differed from the Virginia bill in three ways. First, the Virginia plan involved a tax in direct support of religious education.<sup>111</sup> Although Justice Black threw out the program in Champaign, Illinois, in part, because the religious instruction took place in "tax-supported public school buildings[.]"<sup>112</sup> this portion of his argument has the least credibility of any in the opinion. As Justice Black acknowledged in *Everson*, tax money already allowed parochial schools "ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."<sup>113</sup> Furthermore, the presence of religious teachers did not cost Champaign taxpayers more money than they would otherwise have spent to provide the school with heat and electricity during school hours. Second, the Virginia plan provided state funding for a particular sect.<sup>114</sup> In Champaign, on the other hand, teachers offered instruction in the Protestant, Catholic

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<sup>107</sup>McCullum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* at 211 (citation omitted).

<sup>110</sup>HYNEMAN & LUTZ, *supra* note 102, at 631.

<sup>111</sup>*Id.*

<sup>112</sup>McCullum, 333 U.S. at 212.

<sup>113</sup>Everson v. Bd. of Educ., 330 U.S. 1, 17-18 (1947).

<sup>114</sup>HYNEMAN & LUTZ, *supra* note 102, at 631.

and Jewish religions,<sup>115</sup> and the opinion gave no indication that practitioners of other faiths would be excluded should they choose to participate. Finally, the Virginia bill allowed only Quakers and Mennonites an exemption from the tax.<sup>116</sup> Under the Illinois program, parents signed cards requesting that their children receive religious education, and those children whose parents did not sign a card pursued “secular studies” elsewhere in the building.<sup>117</sup>

“We are all agreed[,]” Justice Frankfurter wrote in his concurring opinion, “that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an ‘established church.’”<sup>118</sup> Many a legal scholar, however, has disagreed. *Memorial and Remonstrance*, relied upon by the *Everson* Court to welcome in this radical interpretation, advocates nothing more than that Virginia refrain from promoting religious orthodoxy.

More fundamentally, what makes the attempt to root an interpretation of the Establishment Clause in *Memorial and Remonstrance* unjustifiable lies in the fact that Madison’s document pertained to a question of policy in Virginia, while the First Amendment addressed the power of Congress. Furthermore, Madison’s proposed version of an amendment concerning religious freedom,<sup>119</sup> which could have restrained state legislatures as well as Congress, was rejected.<sup>120</sup> Even had Congress enthusiastically adopted Madison’s language, the Virginia document would still fail to serve as a model for extreme separationism; references to “the duty which we owe to our Creator”<sup>121</sup> and “the light of Christianity”<sup>122</sup> belie neutrality between “religious believers and non-believers.”<sup>123</sup> *Memorial and Remonstrance* provided the *Everson* Court with no foundation for its extreme separationist interpretation of the Establishment Clause.<sup>124</sup>

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<sup>115</sup>*McCullum*, 333 U.S. at 208-09.

<sup>116</sup>HYNEMAN & LUTZ, *supra* note 102, at 633-34.

<sup>117</sup>*McCullum*, 333 U.S. at 208-09.

<sup>118</sup>*Id.* at 213.

<sup>119</sup>“The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or any pretext infringed.” HAMBURGER, *supra* note 82, at 105.

<sup>120</sup>See PAUL A. RAHE, *REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION* 750 (1992).

<sup>121</sup>HYNEMAN & LUTZ, *supra* note 102, at 632.

<sup>122</sup>*Id.* at 636. George Washington’s farewell address is further evidence of support for religion among the founders. According to Washington, “‘religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and cherish them.’” RAHE, *supra* note 113, at 755.

<sup>123</sup>*Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

<sup>124</sup>On incorporation of the First Amendment, see SMITH, *supra* note 94, at 49-54.

## 2. The Moderate Substantive Interpretation

The moderate substantive interpretation holds that the Establishment Clause has substantive meaning, which may apply to the states through incorporation of the Fourteenth Amendment, but it does not advocate enforcement of the strict level of separation envisaged by those who adopt the extreme separationist substantive interpretation.

Justice Reed's dissenting opinion in *McCullum* adopts the moderate substantive approach. "The history of American education is against" the proposition, he wrote, "that religious instruction of public school children during school hours is prohibited."<sup>125</sup> His substantive understanding of the Establishment Clause was that it "may have been intended by Congress to be aimed only at a state church."<sup>126</sup> He concurred with his more separation-minded colleagues that the government should not "aid all or any religions or prefer one 'over another[.]'" but he did not conclude from these premises that the Champaign, Illinois program was unconstitutional.<sup>127</sup>

Perhaps the most clearly articulated expression of the moderate substantive interpretation is Justice Rehnquist's dissent in *Wallace v. Jaffree*.<sup>128</sup> Here, the dissenting Justice distinguished his interpretation of the Establishment Clause from the extreme separationist substantive interpretation.

Like the proponents of the more rigid theory, Justice Rehnquist considered the Establishment Clause to have substantive meaning, although he disagreed with them as to its content:

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires the government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.<sup>129</sup>

Justice Rehnquist also took exception to the authority Justice Black relied upon in shaping his interpretation of the Establishment Clause in *Everson*. In the 1947 decision, the Court concluded that "Madison and Jefferson" had "played such leading roles" in the First Amendment's "drafting and adoption."<sup>130</sup> As Justice

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<sup>125</sup>*McCullum v. Bd. of Educ.*, 333 U.S. 203, 241 (1948).

<sup>126</sup>*Id.* at 244.

<sup>127</sup>*Id.* at 248.

<sup>128</sup>472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

<sup>129</sup>*Id.* at 113.

<sup>130</sup>*Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). The Court quoted Jefferson's "wall of separation" language from *Reynolds v. United States*, 98 U.S. 145 (1878), see *Everson*, 330

Rehnquist observed, however, “Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress.”<sup>131</sup> The dissenting Justice in *Wallace* also appeared to disagree with the use of *Memorial and Remonstrance* and the Virginia statute as indicators of the Framers’ intent with regard to the Establishment Clause.<sup>132</sup>

In his concurring opinion in *Zelman*,<sup>133</sup> Justice Thomas offered an interpretation of the Establishment Clause that also falls into the moderate substantive category:

[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. “States, while bound to observe strict neutrality, should be freer to experiment with involvment [in religion]—on a neutral basis—than the Federal Government.” . . . Thus, while the Federal Government may “make no law respecting an establishment of religion,” the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of the States on the other.<sup>134</sup>

Although Justice Thomas’ position has much in common with the jurisdictional interpretation discussed below, he gave substantive effect to the Establishment Clause by eliciting a “strict neutrality” requirement against the states, as well as the condition that no state law may impinge upon what he interprets to be Free Exercise principles. The thrust of his interpretation, however, clearly lay in an attempt to limit the effect of incorporation through the Fourteenth Amendment.

Justice Thomas articulated a consequence of his interpretation in his concurring opinion in *Rosenberger*.<sup>135</sup> There he pointed out a lack of “evidence that the Framers intended to disable religious entities from participating on neutral terms in

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U.S. at 16, which in turn quoted a letter from Jefferson to the Danbury Baptist Association, *Wallace*, 472 U.S. at 92.

<sup>131</sup>*Wallace*, 472 U.S. at 92.

<sup>132</sup>*See id.* at 98-99. In *Schempp*, he wrote, “the Court made the truly remarkable statement that ‘the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States’ (footnote omitted). On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history.” *Id.* at 99.

<sup>133</sup>*See Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2480-84 (2002) (Thomas, J., concurring).

<sup>134</sup>*Id.* at 2481 (citation and footnote omitted).

<sup>135</sup>*See Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 852-63 (1995) (Thomas, J., concurring).

evenhanded government programs. The evidence that does exist points in the opposite direction and provides ample support for today's decision."<sup>136</sup>

What the moderate substantive approaches have in common is that they do not embrace the requirement adopted by the extreme separationists in *Everson* that government "be a neutral in its relations with groups of religious believers and non-believers."<sup>137</sup> They tend instead to discern the meaning of the Establishment Clause as forbidding discrimination "between sects."<sup>138</sup> It is worth noting that a proponent of a moderate substantive interpretation authored the *Zelman* decision.

### 3. The Jurisdictional Interpretation

Steven D. Smith raises this alternative in his book, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*. This interpretation is clearly distinguishable from the substantive interpretations because Smith argues that according to their "original meaning[,] . . . the religion clauses . . . did not adopt any substantive right or principle of religious freedom."<sup>139</sup> He reads both religion clauses as preventing the imposition by Congress against the states of federal laws concerning religion.<sup>140</sup> Accordingly, incorporation through the Fourteenth Amendment resulted in a nullity; because not even the states could address the substantive question of how government ought to treat religion, the Supreme Court took up the job, and *Everson* and its progeny resulted.<sup>141</sup> Smith bases his interpretation on the diversity of opinion at the founding as to the proper relationship between government and religion,<sup>142</sup> and the relative lack of controversy surrounding the ratification of the clauses.<sup>143</sup> As to Congress' regulation of religion in the territories, Smith argues that this fact only underscores the clauses' jurisdictional nature in limiting federal power over the states.<sup>144</sup>

#### B. "Religion" Defined

The history of Supreme Court jurisprudence on "religion" has yielded no consensus as to the term's meaning. In *Reynolds v. United States*, a case that upheld the constitutionality of a law forbidding polygamy,<sup>145</sup> the Court observed that "[t]he word 'religion' is not defined in the Constitution[,]" and proposed "to go elsewhere . . . to ascertain its meaning, and nowhere more appropriately . . . than to the history of the times in the midst of which the provision was adopted."<sup>146</sup> In reaching its

<sup>136</sup>*Id.* at 863.

<sup>137</sup>*Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

<sup>138</sup>*Wallace v. Jaffree*, 472 U.S. 38, 113 (1985).

<sup>139</sup>SMITH, *supra* note 82, at 17.

<sup>140</sup>*Id.* 21.

<sup>141</sup>*Id.* at 49.

<sup>142</sup>*Id.* at 19-22, 26.

<sup>143</sup>*Id.* at 26-27.

<sup>144</sup>SMITH, *supra* note 82, at 27-30.

<sup>145</sup>*Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>146</sup>*Id.* at 162.

conclusion that by the Free Exercise Clause, the framers took from congress “all legislative power over mere opinion,” but left it “free to reach actions which were in violation of social duties or subversive of good order[.]”<sup>147</sup> the Court touched on the definition of “religion” appearing in *Memorial and Remonstrance*; i.e., “the duty we owe the Creator . . . .”<sup>148</sup>

If one were to place the *Reynolds* definition on the narrow end of a spectrum reflecting what religion has been taken to mean, Justice Kennedy’s explication in *Lee* would occupy that spectrum’s opposite end. He wrote there that “we acknowledge the profound belief of adherents to many faiths that there must be a place in the student’s life for *precepts of a morality higher even than the law we today enforce.*”<sup>149</sup> The complication of this latter definition is that it includes within the ambit of religion sets of opinions not generally considered religious, such as Aristotelian natural right theory and Kantian moral philosophy.

Two draft cases also evince disparate attempts to settle upon a meaning of religion. Chief Justice Hughes, dissenting in *United States v. Macintosh*,<sup>150</sup> described “[t]he essence of religion” as “belief in a relation to God involving duties superior to those arising from any human relation.”<sup>151</sup> A later case reached a more expansive definition. In construing an Act of Congress that described who might be classified as a conscientious objector, the Court in *United States v. Seeger*<sup>152</sup> construed “religious training and belief” in the statute to include “all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.”<sup>153</sup>

The trajectory of definitions over time might suggest that the Court has developed a broader reading of the term “religion” in more recent decades; *Wisconsin v. Yoder*,<sup>154</sup> however, belies this notion. *Yoder* overturned on Free Exercise grounds the conviction of three families for failing to send their children to school.<sup>155</sup> The families, two Old Order Amish and one Conservative Amish Mennonite, chose not to comply with Wisconsin’s compulsory education law because it violated their religious beliefs to send their children to high school.<sup>156</sup> Chief Justice Burger, writing for the majority, reasoned that “if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary

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<sup>147</sup>*Id.* at 164.

<sup>148</sup>*Id.* at 163.

<sup>149</sup>*Lee v. Weisman*, 505 U.S. 577, 598 (1992) (emphasis added).

<sup>150</sup>*United States v. Macintosh*, 283 U.S. 605 (1931).

<sup>151</sup>*Id.* at 633-34.

<sup>152</sup>*United States v. Seeger*, 380 U.S. 163 (1965).

<sup>153</sup>*Id.* at 176.

<sup>154</sup>406 U.S. 205 (1972).

<sup>155</sup>*Id.* at 207-08.

<sup>156</sup>*Id.* at 207-09.

secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious."<sup>157</sup>

When the Court moves away from defining religion as man's duties towards God, the concept of religious freedom becomes very extensive. In *West Virginia State Board of Education v. Barnette*,<sup>158</sup> Justice Jackson, writing for the Court, enjoined the enforcement of a State policy of requiring the pledge of allegiance in public schools.<sup>159</sup> The parties requesting injunctive relief against the policy did so on the grounds that the flag salute violated their religious beliefs.<sup>160</sup> "If there is any fixed star in our constitutional constellation," the Court stated, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."<sup>161</sup> This sweeping language prefigures that found in *Griswold v. Connecticut*<sup>162</sup> ("specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance")<sup>163</sup> and *Planned Parenthood v. Casey*<sup>164</sup> ("[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life").<sup>165</sup>

The expansive understanding of religious freedom that results when religion is broadly defined, however, presents a problem for advocates of the extreme separationist interpretation: if the Court enforces strict separation between church and state, and just about anything qualifies as a church, then the teaching power of the state is severely restricted. Public schools would have to set aside much of their curriculum if presenting "precepts of a morality higher even than the law"<sup>166</sup> constitutes teaching religion.

One resolution to the quandry of how to define religion is to emphasize free speech rather than religious freedom, as the Court did in *Widmar* and *Rosenberger*. Protecting religious speech, however, will often require the private choice doctrine.

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<sup>157</sup>*Id.* at 216.

<sup>158</sup>*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>159</sup>*Id.*

<sup>160</sup>*Id.* at 629.

<sup>161</sup>*Id.* at 642.

<sup>162</sup>*Griswold v. Conn.*, 381 U.S. 479 (1965).

<sup>163</sup>*Id.* at 484.

<sup>164</sup>*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>165</sup>*Id.* at 851.

<sup>166</sup>*Lee v. Weisman*, 505 U.S. 577, 598 (1992).

## IV. THE PRUDENCE OF THE PRIVATE CHOICE DOCTRINE

As discussed above, substantial theoretical differences on several grounds surround the development of the private choice doctrine applied in *Zelman*. In his dissent in *Board of Education v. Mergens*,<sup>167</sup> Justice Stevens criticized the doctrine.<sup>168</sup> He concluded that the Court's decision applying a federal statute that limited discrimination against student-run religious organizations with regard to use of public high school property,

leads to a sweeping intrusion by the Federal Government into the operation of our public schools, and does so despite the absence of any indication that Congress intended to divest local school districts of their power to shape the educational environment. If a high school administration continues to believe that it is sound policy to exclude controversial groups, such as political clubs, the Ku Klux Klan, and perhaps gay rights advocacy groups, from its facilities, it now must also close its doors to traditional extracurricular activities that are noncontroversial but not directly related to any course being offered at the school.<sup>169</sup>

Although Justice Stevens addressed the application of an Act of Congress, his reasoning easily applies to the private choice doctrine as a whole. The Court's application of the Establishment Clause to the facts of *Zelman*, by analogy, could be construed, given another set of facts,<sup>170</sup> as a broad grant of federal authority to monitor discrimination against religious schools, and a denial of local autonomy.

The irony of Justice Stevens' *Mergens* dissent is that it is precisely the "sweeping intrusion" of the Supreme Court in cases like *McCullum* that "divest[s] local school districts of their power to shape the educational environment." In *McCullum*, the Court invalidated on Establishment Clause grounds a voluntary, nondiscriminatory program under which students received religious education on public school property during school hours.<sup>171</sup> A cynic might argue that the local autonomy principle serves no other purpose than to attack positions that the person raising it does not like.

Justice Stevens himself wrote a dissenting opinion in *County of Allegheny v. ACLU*<sup>172</sup> arguing that the Court should divest a city-county of its power to display a Christmas tree and Chanukah menorah in front of a public building<sup>173</sup> because "[t]he overall display thus manifests governmental approval of the Jewish and Christian

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<sup>167</sup>*Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

<sup>168</sup>*Id.* at 270-91 (Stevens, J., dissenting).

<sup>169</sup>*Id.* at 290.

<sup>170</sup>For example, Congress might pass a law that proscribes discrimination against religious schools in voucher programs. An interesting question arises as to what the court would find absent such a statute, were a school district to adopt vouchers, but limit their use to secular schools.

<sup>171</sup>*Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

<sup>172</sup>492 U.S. 573 (1989).

<sup>173</sup>*Id.* at 646-55.

religions.”<sup>174</sup> More significantly, he wrote the Court’s opinion in *Santa Fe*, which concluded, against the interests of local autonomy, that a school policy of allowing an elected student officer to deliver an invocation before football games violated the Establishment Clause.<sup>175</sup> Justice Stevens’ view appears to be that the Court ought to defend local autonomy when officials want to exclude religion from the public forum, and abrogate it when they attempt to give religion space. The Justice would probably reply that “a strong presumption against the public use of religious symbols . . . will prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular”;<sup>176</sup> and that the nature of the Establishment Clause at times requires the extreme separation he has advocated. Other interpreters of the Establishment Clause, however, have not arrived at the conclusion that the Framers intended to discourage religion in this way. The question remains, whether a position adopting either the moderate substantive or jurisdictional interpretation of the Establishment Clause, while at the same time offering affirmative protection to speech, including religious speech, in the public fora, falls prey to the same inconsistency.

Some discussion of the environment in which these court decisions have taken place may be of help in exploring the issue of affirmative protection for religious speech. Compulsory schooling means that the state is a very substantial influence in the American household through its role in the upbringing of young people. It is worthwhile examining how religion came to figure in relation to this influence. As the Establishment Clause jurisprudence following *Everson* demonstrates, that influence proved to be anything but neutral towards religion. No decision better illustrates this fact than *McCollum*.

In his most radical argument in *McCollum*, Justice Black opposed the provision of “an invaluable aid” to religious education,<sup>177</sup> and it is on this reasoning that Justice Frankfurter elaborated in his concurring opinion. “The Champaign arrangement[,]” the latter argued, “presents powerful elements of inherent pressure by the school system in the interest of religious sects.”<sup>178</sup> Justice Frankfurter, thus, characterized public policy favoring religion over non-religion as a threat. Here, *McCollum* differs even from *Memorial and Remonstrance*, which refers to religion as “the duty which we owe to our Creator.”<sup>179</sup> Although Justice Frankfurter cited the “preservation . . . of religion from censorship and coercion however subtly exercised”<sup>180</sup> as a good derivative from the strict separation he promoted, much of his opinion focused upon what he perceived as the dangers of sectarianism.

Justice Frankfurter argued that religious education in public schools has the potential to undercut what he describes as the purpose of the public school system. “Designed to serve as perhaps the most powerful agency for promoting cohesion

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<sup>174</sup>*Id.* at 654 (citation omitted).

<sup>175</sup>*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>176</sup>*Allegheny*, 492 U.S. at 652 (footnote omitted).

<sup>177</sup>*Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

<sup>178</sup>*Id.* at 227.

<sup>179</sup>HYNEMAN & LUTZ, *supra* note 102, at 632.

<sup>180</sup>*McCollum*, 333 U.S. at 217.

among a heterogeneous democratic people,” the public school system, he reasoned, “must keep scrupulously free from entanglement in the strife of sects.”<sup>181</sup> Religious education, accordingly, must take place “in the individual’s church and home.”<sup>182</sup> He handed the ambitious project of serving on the front lines of the effort to assimilate diverse groups into American culture to public schools, which had developed relatively recently in the United States.<sup>183</sup> He also discussed the challenges parents faced in providing their children with religious instruction,<sup>184</sup> but after the *Everson* and *McColum* decisions, he could not reasonably have expected this task to become easier. While insisting that religious education remain out of the picture, Justice Frankfurter’s opinion welcomed the expansion of a state influence, the public school, which had a purpose broader than academic instruction. He claimed that “[t]he secular public school did not imply indifference to the basic role of religion in the life of the people,”<sup>185</sup> but the manner in which the Warren Court applied the Establishment Clause to public schools has since helped to crowd religion out of public discourse.

Justice Frankfurter’s concurring opinion in *McColum* in effect advocated banishing religion from American public life. “Separation[,]” he explained, “is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally.”<sup>186</sup> He decried the “obvious pressure upon children to attend”<sup>187</sup> the religious instruction offered by the Champaign program, although the Supreme Court has not in other contexts seen fit to address peer pressure among children. Justice Frankfurter sought to enlist the Court in preventing the possibility that “feeling[s] of separatism”<sup>188</sup> will arise in the context of religious differences among students. He argued that “[t]he claims of religion were not minimized by refusing to make the public schools agencies for their assertion[.]”<sup>189</sup> but he did not examine the teaching power of such a radical separation between church and state, and its potential to exert a secularizing influence on American society.

One of two assumptions must underlie the position Justice Frankfurter took: that the teaching power of the law through public education is ineffective, or that it is effective. If the former is the case, it is futile to hope that public schools will “serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people.”<sup>190</sup> On the other hand, if one assumes the latter, the policy of

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<sup>181</sup>*Id.* at 216-17.

<sup>182</sup>*Id.* at 217.

<sup>183</sup>*Id.* at 218.

<sup>184</sup>*Id.* at 220-25.

<sup>185</sup>*McColum*, 333 U.S. at 216.

<sup>186</sup>*Id.* at 227.

<sup>187</sup>*Id.*

<sup>188</sup>*Id.*

<sup>189</sup>*Id.* at 216.

<sup>190</sup>*McColum*, 333 U.S. at 216.

relegating religious education to “the individual’s church and home”<sup>191</sup> at best teaches that religion is of little importance, and at worst promotes the establishment of irreligion. By confining religion to the private sphere, and thus, attempting to render it a mere “personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room[,]”<sup>192</sup> the Court places religion and pornography on a par by implying that the decency of the public square depends upon the exclusion of both. The Congress that framed the First Amendment eschewed this conclusion when it established chaplaincies and proclaimed a day of Thanksgiving.<sup>193</sup>

It is worth noting that Justice Frankfurter’s plans for the public school sprang from intense personal conviction. “As one who has no ties with any formal religion,” he once explained,

perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship. . . . American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution.<sup>194</sup>

Justice Frankfurter was not alone in his apparent desire to establish irreligion. John Dewey’s influence on American public schools also suggests such an establishment. In his book, *A Common Faith*, Dewey openly attacks revealed religion.

He begins by implying that all such religions are false. He starts with a discussion of the variety of deities, devotions and moral teachings existing throughout the world.<sup>195</sup> Many religious beliefs and practices, he adds, are harmful;<sup>196</sup> “historic religions have been relative to the conditions of social culture in which peoples lived.”<sup>197</sup> He also contends that reason and choice are incompatible with accepting revelation. “[W]hen we begin to select, to choose, and say that some present ways of thinking about the unseen powers are better than others[,]” he claims, “. . . we have entered upon a road that has not yet come to an end.”<sup>198</sup>

In another closely related argument, Dewey maintains that acceptance of religious authority is intellectually dishonest. “What we ardently desire to have thus

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<sup>191</sup>*Id.* at 217.

<sup>192</sup>*Lee v. Weisman*, 505 U.S. 577, 645 (1992).

<sup>193</sup>BRADLEY, *supra* note 90, at 97.

<sup>194</sup>LIVA BAKER, FELIX FRANKFURTER 290 (1969).

<sup>195</sup>JOHN DEWEY, *A COMMON FAITH*, 4-5 (1934). He explores these beliefs and practices in order to support the conclusion that defining “religion” as pertaining to a supernatural power leaves the term with “little meaning.” *Id.* at 3-4.

<sup>196</sup>*Id.* at 5-6.

<sup>197</sup>*Id.* at 6.

<sup>198</sup>*Id.* at 7. He fails to explore the possibility that someone might choose a revealed religion on the grounds that its authority accords with reason, and accept additional doctrines on account of that authority.

and so, we tend to believe is already so.”<sup>199</sup> Moreover, he ascribes religious experience to an imaginative process involving “a thoroughgoing and deep-seated harmonizing of the self with the Universe.”<sup>200</sup> What the faithful imagine or idealize they convert into an invisible reality, and they seek to conform their conduct to the dictates of their belief.<sup>201</sup>

Dewey treats the decision to adhere to the teachings of a revealed religion rather than to pursue inventive progress as a kind of moral weakness. “Belief in the supernatural as a necessary power for apprehension of the ideal and for practical attachment to it has for its counterpart a pessimistic belief in the corruption and impotency of natural means.”<sup>202</sup> Faith in divine intervention is not only ineffectual, it “is too easy a way out of difficulties.”<sup>203</sup>

If we leave aside for the moment Dewey’s almost unmitigated optimism concerning the adequacy of human reason unguided by authority or tradition,<sup>204</sup> his depiction of revealed religion as false and of its adherents as intellectually dishonest and morally weak provides some grounding for his conclusion that “[i]nterest in the supernatural therefore reinforces other vested interests to prolong the social reign of accident.”<sup>205</sup> Although Dewey does not propose it, a political project to destroy religion logically follows. Should the truth of revelation remain a possibility, he might present his progressivism as one among many theories for philosophers to explore, and it would lose its urgency as a political project. The efficacy of Dewey’s teaching thus depends upon a thoroughgoing rejection of revealed religion, and even upon a public policy aimed at its destruction.

It is worth noting that Smith argues in *Foreordained Failure* against the possibility of government neutrality towards religion. He maintains that “any account of religious freedom will necessarily depend on—and hence will stand or fall along with—more basic background beliefs concerning matters of religion and theology, the proper role of government, and ‘human nature.’”<sup>206</sup> What is more, “[i]n adopting a theory of religious freedom that is consistent with some background beliefs but not with others, therefore, government (or the judge or the legal scholar) must adopt, or privilege, one of the competing secular or religious positions[,]” a result that “is precisely what modern theories of religious freedom seek to avoid.”<sup>207</sup>

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<sup>199</sup>*Id.* at 22.

<sup>200</sup>DEWEY, *supra* note 195, at 19.

<sup>201</sup>*See id.* at 19-21.

<sup>202</sup>*Id.* at 46.

<sup>203</sup>*Id.* at 47.

<sup>204</sup>*See e.g., id.* at 46 (“emphasis on exercising our own powers for good . . . makes no assumption beyond that of the need and responsibility for human endeavor, and beyond the conviction that, if human desire and endeavor were enlisted in behalf of natural ends, conditions would be bettered. It involves no expectation of a millenium of good.” The “conviction” casts some doubt upon the denial of the “expectation.”)

<sup>205</sup>*Id.* at 78.

<sup>206</sup>SMITH, *supra* note 90, at 63.

<sup>207</sup>*Id.* at 68.

The supposition, for example, that the government can remain neutral by adopting a secular position falls prey to this problem because it involves an imposition of secularism over various religious traditions.<sup>208</sup> Adopting secularism as an attempt at finding common ground among conflicting traditions similarly fails because from the perspective of many religious believers, secularism does not provide common ground.<sup>209</sup>

The issue of “divisiveness” in the Court’s Establishment Clause jurisprudence is a persuasive argument for Smith’s theory regarding neutrality. In *McCullum*, Justice Frankfurter bit his nails over religion’s potential to divide people. “Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people,” he wrote,

[T]he public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual’s church and home, indoctrination in the faith of his choice.<sup>210</sup>

Justice Kennedy sounded a calmer note in *Lee*, but worried nonetheless:

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State’s attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.<sup>211</sup>

Justice Breyer’s dissenting opinion in *Zelman*, moreover, raised the perceived “risk that publicly financed voucher programs pose in terms of religiously based social conflict.”<sup>212</sup> None of these discussions of divisiveness appear to contemplate the divisive effect of extreme separation mandated by the judiciary. If anything, the stream of Establishment Clause cases that has wound its way toward the Supreme Court over the past nearly sixty years demonstrates that the attempt to erect a “high and impregnable” “wall between church and state”<sup>213</sup> has, if anything, exacerbated conflict pertaining to religion in American public life. To use Smith’s paradigm, the Court, in seeking to eliminate divisiveness, does so on the presumption that the ordinary divisiveness that occurs between sects is intolerable, but not the

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<sup>208</sup>*Id.* at 81-84.

<sup>209</sup>*See id.* at 88-90.

<sup>210</sup>*McCullum v. Bd. of Educ.*, 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring).

<sup>211</sup>*Lee v. Weisman*, 505 U.S. 577, 587-88 (1992).

<sup>212</sup>*Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2502 (2002) (Breyer, J., dissenting).

<sup>213</sup>*Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

divisiveness fostered by extreme separationist jurisprudence between members of the various sects and those who propose to ban religion from the public square.

Expansive Court protection of free speech is not uncomplicated, even in public fora. Government may have compelling reasons to limit speech, as Justice Stevens wrote with regard to student organizations in public schools,<sup>214</sup> and in the case of a democracy, those reasons may be even more compelling, if not less problematic than they are in other regimes. A thorough examination of this aspect of First Amendment jurisprudence, however, requires placing it in the context of what the public forum has come to mean, and the role it plays in the lives of Americans. Such an examination may not justify the Court's active defense of free speech against state and local governments in the eyes of those who do not believe that the Court should have incorporated the First Amendment in the first place; as Justice Souter put it in his dissenting opinion in *Zelman*, "[c]onstitutional limitations are placed on government to preserve constitutional values in hard cases."<sup>215</sup> Political libertarians and many others, however, may well applaud the private choice doctrine as an expansion of individual liberty at the expense of State monopoly; and when the doctrine is applied against the federal government, even those opposed to incorporation will be inclined to support it.

#### V. THE PROBLEMS OF CHURCH AND STATE

As mentioned above, the voucher money at issue in *Zelman* came with strings attached. One string required that any participating school must not "discriminate on the basis of race, religion, or ethnic background. . . ."<sup>216</sup> Another proscribed the promotion of "unlawful behavior" or "hatred of any person or group on the basis of race, ethnicity, national origin, or religion."<sup>217</sup> Schools were also required to meet state academic standards.<sup>218</sup>

The requirements may seem innocuous enough, but Justice Souter saw them as cause for concern. In his dissenting opinion, he reflected upon the threat posed by programs like the one in Cleveland "to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith."<sup>219</sup> The prohibition against discrimination on the basis of religion, he noted, prevented religious schools from giving admission preferences to children in their own congregation or parish.<sup>220</sup> The provision concerning "hatred . . . 'on the basis of' . . . 'religion,'" he added, "could be understood (or subsequently broadened) to prohibit" any teachings concerning "the error, sinfulness, or ignorance of others, if they want government money for their schools."<sup>221</sup>

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<sup>214</sup>See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 290 (1990) (Stevens, J., dissenting).

<sup>215</sup>*Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2485 (2002) (Souter, J., dissenting).

<sup>216</sup>*Id.* at 2463.

<sup>217</sup>*Id.* (citing OHIO REV. CODE ANN. § 3313.976(A)(6) (Anderson 1999 and Supp. 2000)).

<sup>218</sup>*Id.* (citing OHIO REV. CODE ANN. § 313.976(A)(3) (Anderson 1999 and Supp. 2000)).

<sup>219</sup>*Id.* at 2499.

<sup>220</sup>*Id.*

<sup>221</sup>*Id.* at 2500 (footnote and citation omitted).

Justice Souter's critique, when extended, applies even to state academic standards. A fundamentalist Christian school, for example, might offer classes on creation theory and abjure any reference to evolution. Should the state mandate evolution as a portion of its biology standards, the school would fail to meet the standards.

A case in point of a school changing its policies when the government withheld a monetary incentive is *Bob Jones University v. United States*.<sup>222</sup> In *Bob Jones*, the Court upheld the revocation of the University's tax-exempt status.<sup>223</sup> The decision does not present especially novel legal theory, except perhaps in its interpretation of a portion of the Internal Revenue Code,<sup>224</sup> but it is historical evidence of the power, and perhaps the propensity, of government to induce dissenting institutions to conform to majoritarian practices.

Although the racists of Bob Jones University deserve scant sympathy, their story illustrates the manner in which hard cases make bad law. A state might enact a statute prohibiting institutions that discriminate on the basis of sex from receiving voucher money.<sup>225</sup> Schools operated by Orthodox Jews or the Roman Catholic Church would easily fall on the wrong side of this law because women cannot become Orthodox rabbis or Catholic priests. Another law might withhold voucher money from schools that practice discrimination based on sexual practices. The myriad religious communities that condemn sodomy would then be forced to choose between state money and applying the tenets of their faith to hiring decisions. One might argue that no harm will be done, because most religious institutions will stick to their guns and pass on the voucher money; nevertheless, there is something deeply troubling about the state offering carrots to the church on the condition that it violate its teachings.

Legislatures may or may not defend minority religious beliefs. Whether they do so depends upon the time and place and political climate in which laws are made. The Free Exercise Clause, moreover, will probably not provide a buffer against legislatures. In *Employment Division v. Smith*,<sup>226</sup> the Court determined that religious beliefs do not provide an exemption "from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."<sup>227</sup> Although the case involved

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<sup>222</sup>*Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>223</sup>*Id.*

<sup>224</sup>*Id.* at 578 n.1 (emphasis in *Bob Jones*). Section 501(c)(3) of the Internal Revenue Code listed as tax exempt under § 501(a) "[c]orporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes." The Court concluded that according to "[h]istory" and "logic,]" "to warrant exemption under § 501(c)(3), an institution must . . . demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." *Id.* at 591-92 (footnote omitted). Even the task of statutory interpretation carries with it the potential for judicial divination of "common community conscience." *Id.* at 592.

<sup>225</sup>See Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 485 (1992).

<sup>226</sup>*Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>227</sup>*Id.* at 878-79.

a criminal prohibition (and a government denial of unemployment benefits as a consequence of violating that prohibition),<sup>228</sup> nothing in the opinion indicates that its application will be limited to the criminal context.<sup>229</sup> The Court acknowledged precedents “bar[ring] application of a neutral, generally applicable law to religiously motivated action” on Free Exercise grounds, but explained that these cases also involved “other constitutional protections” as well.<sup>230</sup> It is not readily apparent how a party seeking Free Exercise protection in a case involving a voucher program could summon the help of any other constitutional provisions. *Smith* may seem unduly severe towards unpopular religious practices, but a more active legal standard is not without its difficulties.

Cases prior to *Smith* bear out the difficulty of court-imposed concepts of neutrality with regard to religion. For example, in his dissent in *Zorach v. Clauson*, Justice Black opined that

[u]nder our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells.<sup>231</sup>

In articulating a theory of “religious freedom,” he does so on the basis of a viewpoint that acknowledges only those religious traditions under which adherents do not worship “because they fear[] the law”; many Americans, however, believe and practice precisely on account of their fear of God’s law.<sup>232</sup>

In Free Exercise Jurisprudence as well, the Court has weighed in heavily. Chief Justice Burger in *Yoder* relied on his own finding that “the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion” in order to grant Amish parents a religious exemption from a state mandatory attendance law.<sup>233</sup> The Amish were fortunate in that the Court found that they had been able “to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society.”<sup>234</sup>

<sup>228</sup>*Id.* at 874.

<sup>229</sup>Indeed, the Court distinguishes a case based on unemployment compensation. *See id.* at 882-84.

<sup>230</sup>*Id.* at 881. In 1993, Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4 (1994), which the Court declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The RFRA specifically referred to *Smith*, 42 U.S.C. § 2000bb(a)(4). In response to *City of Boerne* (*see Johnson v. Martin*, 223 F. Supp.2d 820, 22 n.1 (W.D. Mich. S. Div. 2002)), Congress passed the Religious Land Use and Institutional Persons Act, 42 U.S.C. § 2000cc-2000cc-s (2000). Both laws, contrary to *Smith*, sought affirmative protection for religion. *See* 42 U.S.C. § 2000bb-1(b) (1994); 42 U.S.C. § 2000cc(a)(1) (2000).

<sup>231</sup>*Zorach v. Clauson*, 343 U.S. 306, 319 (1952) (Black, J., dissenting).

<sup>232</sup>*See e.g.*, Job 28:28 (“Behold, the fear of the Lord, that is wisdom”).

<sup>233</sup>*Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972).

<sup>234</sup>*Id.* at 225.

In short, decisions like *Zorach* and *Yoder* place the Court in the position of actively favoring certain religious beliefs and practices and discouraging others. The judiciary therefore becomes the vehicle for preferring one tradition over another, and in so doing creating what might be called an establishment. Although one may argue the meaning of Madison's statement in *Memorial and Remonstrance*, "religion is wholly exempt from [Civil Society's] cognizance[.]"<sup>235</sup> the Court, beginning with *Everson* and until *Smith*, clearly took scrutinizing cognizance of religious doctrine. Justice Black's reliance on religious politics in eighteenth century Virginia is thus ironic as well as erroneous.<sup>236</sup>

The Court's hands-off approach taken in *Smith*, on the other hand, may leave minorities with little protection against the power of the state. Compelling children to salute the flag<sup>237</sup> and regulating the shape of families<sup>238</sup> could conceivably fall under the "unavoidable consequence of democratic government[.]"<sup>239</sup> the tyranny of the majority.

The difficulty is that courts are often jealous of their jurisdiction, and thus have an interest in resolving questions of faith when these problems intersect with legal and political issues. Needless to say, courts do not have the same stake in doctrinal purity that religious practitioners have. When the court tries like Constantine to arbitrate in religious matters, it is inevitable that an Establishment Clause problem crops up. Ironically, once the state becomes involved in enforcing this type of court decision, a Free Exercise Clause problem enters the picture as well. Harsh as *Smith* may seem, it leaves the members of religious minorities having to confront only the legislature (while the Court reserves under constitutional authority the right to curb the worst abuses of the lawmaking body<sup>240</sup>), rather than the legislature and an enthusiastic lawmaking court as well.

Religious schools, then, face a two-fold threat to their autonomy posed by legislatures and courts. The threat from legislatures, exemplified by the Cleveland provisions, can be fought in the traditional way, by speaking and voting.

The threat posed by courts is that schools receiving state money could be determined to be state actors, and face forced compliance with the Equal Protection and Due Process requirements of the Fourteenth Amendment, not to mention civil rights liability should they fail to do so.<sup>241</sup> The *Civil Rights Cases* decided in the 19<sup>th</sup> Century determined that the Fourteenth Amendment could only govern state action,

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<sup>235</sup>HYNEMAN & LUTZ, supra note 102, at 632.

<sup>236</sup>See *Wallace v. Jaffree*, 472 U.S. 38, 92-99 (1985) (Rehnquist, J., dissenting).

<sup>237</sup>See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>238</sup>See *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>239</sup>*Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>240</sup>See *id.* at 877-78.

<sup>241</sup>For a discussion of the state action doctrine and civil rights liability in another context, see Laura T. Rahe, *The Right to Exclude: Preserving the Autonomy of the Homeowners' Association*, 34 URB. LAW. 521 (2002).

not private conduct.<sup>242</sup> For years, the Court has wrestled with the question of what constitutes state action.<sup>243</sup>

It may seem extremely unlikely that the Court will find that a school accepting voucher money is a state actor. In discussing the Establishment Clause implications of the Cleveland program, the majority wrote in *Zelman*, “[t]he incidental 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>244</sup> The Court emphasized that the vouchers were “a program of true private choice.”<sup>245</sup> Furthermore, in *Rendell-Baker v. Kohn*,<sup>246</sup> the Supreme Court held in 1982 that a high school receiving at least 90% of its funding from the government was not a state actor.<sup>247</sup> On the other hand, the Court decided in *Brentwood v. Tennessee Secondary School Athletic Ass’n*<sup>248</sup> in 2001 that an athletic association comprised of both public and private high schools was a state actor.<sup>249</sup> Although it is improbable, then, that receiving a voucher will somehow translate into state action should the issue come up in a later case, it is by no means impossible. If courts should reach such a conclusion, no amount of speaking or voting will make any difference.

## VI. CONCLUSION

Any nation in which the state plays as expansive a role in the lives of its citizens as ours has in the wake of *Everson* will not fail to pose a threat to religion in one of two ways: through its own teaching power by means of its own institutions, or through its reach into otherwise autonomous institutions. In the first instance, a threat arises when the government requires universal education, and ensures a near monopoly of its free provision through secular public schools. A threat arises in the second instance when the state contracts out the project of educating its citizens by means of, say, vouchers, and attaches strings to the voucher money that restrict the freedom of the recipient institutions.

If the Supreme Court adopts a moderate substantive interpretation or a jurisdictional interpretation of the First Amendment Establishment Clause (and it seems to have done the former in the *Zelman* case), the first problem will no longer rear its ugly head. When the Court abandons the radical separationist interpretation, it no longer mandates anything resembling an establishment of irreligion in the public schools. Confronting the second problem, however, will require a reconsideration of jurisprudence in other areas as well.

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<sup>242</sup>Civil Rights Cases, 109 U.S. 3 (1883).

<sup>243</sup>*See e.g.*, *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>244</sup>*Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2467 (2002).

<sup>245</sup>*Id.*

<sup>246</sup>*Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

<sup>247</sup>*Id.*

<sup>248</sup>*Brentwood v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001).

<sup>249</sup>*Id.*

In the fight against state usurpation and control, a better friend for religion than favorable court decisions is popular demand and legislative prudence. At this point, Congress and state legislatures, informed by a public interested in the autonomy of the church, can do the most for religious institutions by scaling back the reach of government.