

A PERSPECTIVE ON SUITABLE LATITUDE FOR RELIGIOUS ESTABLISHMENTS: Lessons From Contrasting the Student Educational Arena with the Adult Political Square

Laurence H. Winer and Nina J. Crimm*

I. INTRODUCTION

How should we balance claims of religious liberty against demands for maintaining separation of church and state? Are privately held secular corporations, whose owners have sincere religious beliefs regarding contraception, entitled to disregard legal requirements that they provide health care insurance coverage for their employees that includes certain contraceptives? To what extent are some religious organizations exempt from such requirements?¹ May a government official, a county clerk, assert her own religious objections as a basis for her office to refuse to issue a marriage license to a same-sex couple after *Obergefell v. Hodges*?² May a private individual in a service industry—a wedding photographer or baker, for example—refuse out of religious conviction to provide that service at a same-sex wedding?³ Falling somewhere between the private individual and the government official, may a licensed professional—a pharmacist—rely on

* Laurence H. Winer is Professor of Law and Faculty Fellow of the Center for Law, Science & Innovation at the Sandra Day O'Connor College of Law, Arizona State University. Nina J. Crimm is (now-retired) Professor of Law and the Frank H. Granito, Jr., Faculty Scholar at St. John's University School of Law in New York.

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1. *Zubik v. Burwell*, 136 S. Ct. 1557, 1562 (2016) (urging religiously-affiliated nonprofit organizations and the government to reach an accord); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (applying contraceptive mandate against private, closely-held corporation violates the Religious Freedom Restoration Act).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015); *see also* *Miller v. Davis*, 123 F. Supp. 3d 924, 944 (E.D. Ky. 2015) (requiring that marriage licenses be issued).

3. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 294–95 (Colo. App. 2015) (bakery unlawfully discriminated against gay couple by refusing to sell them a cake for their wedding reception); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013) (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners and thus violated state statute prohibiting discrimination based on sexual orientation), *cert. denied*, 134 S. Ct. 1787 (2014).

religious scruples in refusing to sell certain contraceptives to a willing customer?⁴ Finally, may a state rely on its constitutional provisions prohibiting financial aid to religious institutions to exclude a church-run day care and preschool from a state program that reimburses nonprofits for the purchase and installation of rubber playground surfaces made from recycled tires, a grant the school otherwise qualified for?⁵

Each of these scenarios, and many others, raise difficult underlying questions: Do claimed exceptions from otherwise generally applicable neutral laws, that otherwise do not favour or discriminate against religion, justify accommodations for religious liberty? Or, would such exceptions permit too much avoidance of participation in a secular, pluralistic society, adversely and unfairly impact others, and so amount to inappropriate establishments of religion? When may, or indeed must, a state differentiate between religious and secular organizations?

The point of this Essay is not to answer these types of questions in specific, proliferating examples such as those above. Rather we contrast two other contexts of religious accommodations or adverse treatment—expanding state aid for kindergarten through twelfth grade (K–12) religious education versus the prohibition on houses of worship from supporting or opposing any political candidates at risk of losing their tax-exempt status under Internal Revenue Code (I.R.C.) § 501(c)(3). In a detailed analysis of these two scenarios, each of which is highly likely to become especially prominent and contentious during the new Trump administration, we explicate the many, complex factors we believe are relevant in reaching opposite conclusions: Contrary to evolving jurisprudence by a recent five-Justice conservative majority on the Supreme Court that has emasculated the Establishment Clause and “betray[ed] [James] Madison’s vision,”⁶ government aid to religious education should be sharply curtailed; but to protect both their free exercise and free speech rights, houses of worship, unlike other secular tax-exempt entities, should be accorded a limited exception from the I.R.C. § 501(c)(3) restriction.

4. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1088 (9th Cir. 2015) (holding that state may require pharmacies to timely deliver all prescription medications, even if the pharmacy owner has a religious objection), *cert. denied*, 136 S. Ct. 2433 (2016) (Roberts, C.J., Alito, Thomas, J.J., dissenting).

5. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 789–90 (8th Cir. 2015) (upholding denial of the grant), *cert. granted*, 136 S. Ct. 891 (2016).

6. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 168 (2011) (Kagan, J., dissenting).

We therefore hope to illustrate what we believe is an important lesson in what is becoming a highly polarized and divisive social and political debate about the proper interplay between religion and the state on matters that implicate civic affairs and policy. One cannot rely simply on generalized cries of religious liberty on the one hand or separation of church and state on the other. Rather, even when touching—some would say threatening—transcendent matters of religious belief and practice, such issues require proper consideration of and reflection on the myriad, multifaceted factors involved and interests at stake if we are to achieve acceptable, if not uniformly praised, outcomes for the highly diverse and pluralistic society the United States has become. Such consideration and reflection, we believe, justifies the contrasting conclusions we reach in the two circumstances we analyze, and our approach may serve as a model for deliberating on other similarly sensitive issues like those described above.

II. TWO CONTRASTING CONTEXTS

The defining feature of Western, liberal democracies is participatory self-government.⁷ There are two basic pre-conditions for such government of and by the people through free, open, and fair elections. The first is freedom of speech and of the press. Without such freedom of expression people are unable to properly inform themselves to participate intelligently and effectively in their government.⁸ Indeed, James Madison, the “architect” of the First Amendment, argued in opposing the political censorship of the Sedition Act of 1798 that “free communication among the people” on matters of public importance is “the only effectual guardian of every other right.”⁹ Reaffirming this idea, the Supreme Court often maintains that “speech concerning public affairs is more than self-expression; it is the essence of self-government,” “indispensable to decisionmaking in a democracy.”¹⁰

But freedom of expression alone is insufficient to assure that people are able to fully and responsibly participate in the political process that produces

7. See generally James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493–98 (2011).

8. *Id.* at 493.

9. James Madison, *Virginia Resolutions* (Dec. 21, 1798), reprinted in 5 THE FOUNDERS’ CONSTITUTION 135–36 (Philip B. Kurland & Ralph Lerner eds., 1987).

10. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777, 777 n.12 (1978) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)); see also *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464–65 (2007) (plurality opinion); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251–52 (1986) (plurality opinion).

their government and guarantees their rights. A truly informed electorate presupposes that people are sufficiently educated along a broad range of subjects—from philosophy and the sciences to literature and the arts¹¹—so that they are intellectually prepared to engage in the full panoply of political activity that culminates in elections. While the United States’ founding fathers extolled the value of education, the Supreme Court has held that the U.S. Constitution, unlike the national constitutions of many other countries, does not guarantee a right to education even at the primary and secondary levels.¹² In contrast, education is an individual right enshrined in the constitutions of each of the fifty states, complemented by compulsory school attendance laws in each state. Parents, however, retain considerable liberty to direct the upbringing and education of their children including through the use of private, parochial education.¹³

Western, liberal democracies that are based on participatory and pluralistic, secular government but committed to a broad guarantee of religious freedom must grapple with the appropriate place for religion in these two constitutive spheres: what role should religious belief and practice play in the political arena, especially in electoral campaigns; and what accommodations should the state make to religious influence either in public, state funded and operated schools, or through public financial support for private, religious education? In the United States these two issues play out in the context of the magisterial clauses of the First Amendment to the Constitution—the Free Exercise and Establishment Clauses, often reinforced in this context by the freedom of speech and press.

11. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation . . . is the very foundation of good citizenship.”); see also Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256–57 (“[T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.”). Meiklejohn was the foremost 20th century American political philosopher advocating for freedom of expression. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 1–2 (1965).

12. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); see also Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997, 1004 (2010) (reporting 187 countries’ constitutions guarantee rights to education).

13. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (holding that the First and Fourteenth Amendments prevent states from compelling Amish parents to send their children to formal secondary school to age sixteen). The U.S. is bound by Article 26(3) of the United Nations (U.N.) Universal Declaration of Human Rights, which provides that parents have a choice of the “kind of education that shall be given to their children.” G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, art. 26, ¶ 3 (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 18, ¶ 4, Dec. 19, 1966, 999 U.N.T.S. 178.

Thus, for example, in recent years, many American spiritual leaders, as representatives of their respective houses of worship, increasingly promote a highly vocal and influential role for religion in electoral politics. From their pulpits (and elsewhere) they address a plethora of emotionally charged moral and political issues—including abortion, homosexuality, same-sex marriage, capital punishment, war, poverty, hunger, and the like—for which religious beliefs and commitments are central for many people. Moreover, invoking spiritual mandates, many clergy go further to identify and comment on specific political candidates' positions as to these issues, either implicitly or explicitly endorsing or opposing candidates for political office.

The difficulty, however, arises because virtually all houses of worship qualify as nonprofit organizations under I.R.C. § 509(a)(1) and 501(c)(3). But the I.R.C. conditions substantial financial benefits for a § 501(c)(3) nonprofit organization (tax-exempt status) and its donors (tax deductibility of contributions under I.R.C. § 170) on the absolute relinquishment of the entity's right to engage in political campaign speech supporting or opposing a candidate. This statutory "gag rule" restriction is based on the theory that taxpayers should not be required to subsidize partisan political activity. Whatever the merits of this rationale, the Supreme Court's highly controversial 2010 decision in *Citizens United v. Federal Election Commission*¹⁴ creates a strikingly anomalous situation: federal campaign finance restrictions on for-profit and nonprofit corporations' expenditures for political campaign speech are unconstitutional while federal tax law, I.R.C. § 501(c)(3), still absolutely precludes political campaign speech (at the federal, state and local levels) by many nonprofit entities. This is starkly problematic for houses of worship and their clergy, and arguably goes too far in restricting both their freedom of speech and their free exercise of religion.

Under an ingrained notion of the primacy of separation of church and state,¹⁵ one can doubt the wisdom, and even more the propriety, of houses of worship becoming directly involved in electoral politics. On the other hand, the Supreme Court often extends the greatest protection to political speech. So, surely as a constitutional matter, one might think that political campaign speech from any source, including spiritual leaders in their capacity as representatives of houses of worship, especially if religiously compelled or motivated, at least must be tolerated if not always welcomed. But the threat of losing the substantial benefits of I.R.C. § 501(c)(3) status induces houses

14. *Citizens United*, 558 U.S. at 371–72.

15. The phrase "separation of church and state" does not appear anywhere in the U.S. Constitution; it is merely a metaphorical, symbolic phrase, popularized in the 1800s and is most commonly credited to Thomas Jefferson. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 1 (1965).

of worship to relinquish their dual, core constitutional rights of freedom of religious exercise and speech and succumb to a quasi prior restraint. And an unfortunate statutory procedural quirk effectively prevents them from proactively seeking judicial review of this application of I.R.C. § 501(c)(3).¹⁶ We contend, therefore, that Congress should accord houses of worship a modest accommodation from the ban on political campaign speech, which, although not extended to all I.R.C. § 501(c)(3) nonprofits, would not constitute an impermissible establishment of religion.

In contrast, the urgent need to improve the quality of K–12 education cannot justify violating the Constitution, especially the First Amendment’s Establishment Clause, or similar state constitution provisions. Yet, in recent years state legislatures in the United States aggressively have enacted innovative, targeted government programs under the rubric of “school choice” that use various tax mechanisms—exemptions, exclusions, deductions, and credits—to subsidize private, K–12 tuition and other education expenses.¹⁷ These initiatives overwhelmingly aid private, parochial elementary and secondary schools and other religiously-affiliated education providers.¹⁸ This use of taxpayer money to support religious education in the extraordinarily sensitive context of K–12 education is, historically and constitutionally, a quintessential form of government establishment of religion that should be forbidden.

Too often proponents of school choice inappropriately devalue the Establishment Clause and seek to maneuver around it by legislative tax schemes designed to avoid more “direct,” and therefore prohibited, public funding of religious education. Through sharply-contested decisions, the recent five conservative Supreme Court Justices have abetted such approaches by indulging and expanding several judicially-created legal fictions to circumvent Establishment Clause restrictions in various circumstances: State programs that primarily aid parochial education are nonetheless “neutral” as to religion; programs created, administered, and funded by the state are insulated from constitutional difficulty if they ostensibly invoke private, independent choice of schools by parents; and money owed to the state through tax liability but directed by taxpayers

16. NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 285–86 (2011) (discussing IRC § 7428(a)(1)(A), (b)(2)).

17. LAURENCE H. WINER & NINA J. CRIMM, GOD, SCHOOLS, AND GOVERNMENT FUNDING: FIRST AMENDMENT CONUNDRUMS 26–32 (2015).

18. *Vast Majority of Schools Receiving Vouchers are Religious Schools*, PEOPLE FOR AM. WAY 1, 10–13 (2005), <http://files.pfaw.org/uploads/2017/01/flawsandfailings.pdf>.

claiming a tax credit to fund private, secular or sectarian education is not really state money if it remains untouched by government hands.¹⁹

Most recently, these Justices even have departed from settled precedent to deny taxpayers standing²⁰ to challenge in federal court the extensive and unabashed public funding of religious education, thus turning their backs on the once-revered canon of American constitutional principle represented by James Madison's celebrated *Memorial and Remonstrance Against Religious Assessments*: Citizens shall not be forced to contribute even "three pence" to support religion.²¹ Our critique asserts that the Supreme Court's current ideological position, and its abdication of its essential role in constitutional adjudication to preserve individual liberties, should not endure.

Thus, we argue the student educational arena and the adult political square require vastly different considerations and decidedly different outcomes with respect to separation of church and state. This Essay assesses the fragile and somewhat inconsistent compromises that exist in these areas. It argues that the current situation does violence to what should be inviolable constitutional principles about establishments of religion and creates an unjust restriction on freedom of speech. We oppose the burgeoning taxpayer-funded subsidies for parochial education in many states but urge a (limited) accommodation to allow houses of worship to freely participate in electoral campaigns without endangering their tax-exempt status.

We first describe how the current American approaches regarding political campaign speech by houses of worship and public funding of parochial K–12 education have evolved. We then explain and justify our very different constitutional positions in these areas. We conclude, perhaps unremarkably, that reaching an appropriate balance between church and state cannot depend on general, slogan-based positions about separationism or establishments but requires careful, context-sensitive, nuanced reasoning, as in the examples we discuss. This is an important lesson in an era of increasing contentiousness, exacerbated by such developments as the advent of the Affordable Care Act ("Obamacare") and the Supreme Court's ruling on same-sex marriage, between private claims for accommodations in the name of religious liberty versus concerns that federal, state, and local government establishments are encroaching on the freedoms of others.

19. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652, 662 (2002); *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion); *Mueller v. Allen* 463 U.S. 388, 399 (1983); see also WINER & CRIMM, *supra* note 17, at 108–46 (discussing history of Establishment Clause challenges to government aid to parochial schools).

20. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011).

21. James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 9, at 82.

III. THE ADULT POLITICAL SQUARE AND POLITICAL CAMPAIGN SPEECH

On a Sunday in October, 2014, Jim Garlow, the conservative pastor of a church in a rural area east of San Diego, California, endorsed the re-election of the Democratic incumbent of the state's 52nd congressional district and exhorted the nearly 2,000 members of his congregation to oppose the openly gay, and activist, Republican challenger. This was not a purely political act but one based in deep religious conviction: "I want babies protected in the womb. I want marriage defined as one man one woman. You can't have the advancing of the radical homosexual agenda and religious liberty at the same time," explained Pastor Garlow.²² But this part of the sermon also was a blatant violation of federal tax law that threatened the tax-exempt status of Pastor Garlow's church.

Pastor Garlow is hardly alone. Each election season, hundreds of clergy openly defy the absolute ban on political campaign speech by any nonprofit organization that enjoys tax-exempt status under I.R.C. § 501(c)(3).²³ They go beyond educating their congregants about biblically related issues of the day and urging them to act accordingly. Rather, as religious "watchmen"²⁴ they feel duty bound to theologically evaluate political candidates' positions on the issues and either explicitly support or oppose candidates, or do so in implicit exhortations unmistakable to any informed listener.²⁵ They are organized and supported in this regard by the Alliance Defending Freedom, a conservative, Christian organization that each election season promotes "Pulpit Freedom Sunday," a day on which many spiritual leaders agree to preach in open defiance of the ban and in affirmation of what they sincerely believe to be their religious freedom.²⁶ They give full notice of their activities to the Internal Revenue Service (I.R.S.), sometimes even sending the agency a videotape of the offending sermon.²⁷ The goal is to provoke the I.R.S. into revoking the house of worship's tax-exempt status. Revocation would enable

22. Tamara Audi, *Preaching Politics, Pastors Defy Ban*, WALL ST. J., Oct. 6, 2014, at A6.

23. See Simon Brown, *The Persistence of Pulpit Politicking: Will the IRS Finally Crack Down on Unlawful Church Electioneering?*, AM. UNITED FOR SEPARATION OF CHURCH & ST. (June 2016), <https://www.au.org/church-state/june-2016-church-state/featured/the-persistence-of-pulpit-politicking>.

24. See *Ezekiel 33:2-7* (King James).

25. For additional examples from earlier campaigns see CRIMM & WINER, *supra* note 16, at 1-4.

26. Eugene Scott, *Pastors Take to Pulpit to Protest IRS Limits on Political Endorsements*, CNN (Oct. 1, 2016, 4:00 PM), <http://www.cnn.com/2016/10/01/politics/pulpit-freedom-sunday-johnson-amendment/>.

27. Stephanie Strom, *The Political Pulpit*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/business/flouting-the-law-pastors-will-take-on-politics.html>.

the house of worship to challenge that act in federal court by asserting that the gag rule is unconstitutional, a claim that is otherwise frustratingly difficult to get before the courts.²⁸ The legal arm of the Alliance Defending Freedom pledges free legal support for this endeavor.²⁹ So far, allegedly for political reasons, the I.R.S. has been very reluctant to take the triggering action. But as the result of a 2014 lawsuit filed by a counter, non-theist organization, the Freedom From Religion Foundation, the I.R.S. has agreed to investigate purported political campaign activity of houses of worship.³⁰ The 2016 presidential campaign produced prominent, renewed conflict.³¹

The relevant text of I.R.C. § 501(c)(3) is straightforward and comprehensive, covering all federal, state, and local elections. The current eight categories of sectarian and non-sectarian nonprofit organizations listed there are entitled to tax-exempt status provided they do not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”³² Houses of worship are among the original three types of organizations—charitable, religious, or educational—that Congress exempted from federal taxation as early as the 1890s, even prior to ratification of the Sixteenth Amendment in 1913 that finally provided a firm constitutional basis for income taxation of entities and individuals. The exemption for religious organizations was grounded in economic policy and regard for their presumed charitable activities; it was never concerned with their religious nature *per se* or the Religion Clauses of the First Amendment.³³ Today, houses of worship not only share the § 501(c)(3) income tax

28. See CRIMM & WINER, *supra* note 16, at 285–86, 285 n.83 (explaining a possible approach for a house of worship to proactively challenge the ban).

29. See Erik Eckholm, *Legal Alliance Gains Host of Court Victories for Conservative Christian Movement*, N.Y. TIMES (May 11, 2014), https://www.nytimes.com/2014/05/12/us/legal-alliance-gains-host-of-court-victories-for-conservative-christian-movement.html?_r=0.

30. Freedom From Religion Found., Inc. v. Koskinen, No. 12-C-0818, 2014 WL 3811050, (W.D. Wisc. 2014); Kimberly Winston, *IRS Agrees to Monitor Churches for Electioneering*, WASH. POST (July 21, 2014), https://www.washingtonpost.com/national/religion/irs-agrees-to-monitor-churches-for-electioneering/2014/07/21/99815d32-1118-11e4-ac56-773e54a65906_story.html?utm_term=.b5181d1512f8.

31. Indeed, recently the front page of the *New York Times* reported: “On Sunday, Pastor Bradley Cranston stood at his pulpit in Burlington, Iowa, and, citing Exodus 18:21 (“select out of all people able men who fear God . . . as leaders”), endorsed Senator Ted Cruz of Texas, urging his parishioners to also consider voting for him.” Trip Gabriel, *Ted Cruz’s Diligent Courting of Evangelicals Pays Off in Iowa*, N.Y. TIMES (Jan. 10, 2016), http://www.nytimes.com/2016/01/11/us/politics/ted-cruz-rises-in-iowa-on-tide-of-evangelical-support.html?_r=0.

32. I.R.C. § 501(c)(3) (2015).

33. See CRIMM & WINER, *supra* note 16, at 97–102.

exemption with a plethora of other sectarian and non-sectarian entities, but under I.R.C. § 170 a donor to any of these entities may take a corresponding deduction on its federal income tax return, a considerable benefit and inducement for giving depending on the donor's marginal tax rate. Many states mirror these income tax advantages in their own tax systems, even also applying an exemption to property and sales taxes. In addition, houses of worship uniquely enjoy a number of additional federal tax benefits, all of which makes their § 501(c)(3) status of considerable importance, and this in turn gives power to the gag rule.³⁴

Thus, while some aspects of the highly beneficial tax treatment of houses of worship may be debateable on establishment grounds, they generally are long-standing and well accepted. The genesis of the gag rule provision, however, is not auspicious, and rationales for it perhaps are not compelling. The gag rule was added to I.R.C. § 501(c)(3) in 1954 when Lyndon B. Johnson, then a senator from Texas, was running for re-election. Although he eventually won re-election handily, Johnson was concerned about campaign opposition from certain tax-exempt organizations.³⁵ As "Master of the Senate," Johnson pushed through the first version of the amendment to I.R.C. § 501(c)(3), the gag rule language that now is known as the Johnson Amendment.³⁶ Its enactment therefore was the result of pure political opportunism; no concern was raised as to First Amendment implications, in general or with respect to houses of worship in particular.³⁷

Still, a number of rationales are advanced to support the gag rule. First is the idea that partisan political campaign speech is incompatible with the purposes for which tax benefits are provided to nonprofit entities such as charities and educational organizations; such organizations should be politically neutral and not promote self-serving, private political agendas.³⁸ This assertion ignores that numerous spiritual leaders of houses of worship, who view part of their essential religious responsibility to serve as watchmen for their congregations, vigorously dispute this neutrality premise as applicable to them. Indeed, historically houses of worship, as a core part of

34. *Id.* at 44–55.

35. CRIMM & WINER, *supra* note 16, at 110–14.

36. For a fuller version of the enactment, see *id.* at 110–16. Twenty years earlier, Congress had added language to § 501(c)(3) prohibiting "substantial" lobbying by any covered entity. This provision was upheld against a constitutional challenge in *Regan v. Taxation with Representation of Washington* interpreted as lending some support to the constitutionality of the gag rule as well. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550–51 (1983).

37. See CRIMM & WINER, *supra* note 16, at 113–16.

38. See *id.* at 116–17.

their missions, have been in the forefront of many moral, social, and political movements.³⁹

Second, despite the inherent consequence of any government taxation system that taxpayers are forced to support many programs and activities they may strenuously oppose—for example, war—there is an argument related to the first assertion: Taxpayers should not have to indirectly and involuntarily support *political* messages regarding candidates which they may consider misguided, distasteful, or otherwise objectionable, especially if such statements are based on religious dogma taxpayers may reject.⁴⁰

Moreover, some who back the gag rule fear that relaxing it for houses of worship might induce powerful politicians to seek overt endorsements by intimidating or favouring certain religious leaders, leading to some “preferred” houses of worship exercising undue political influence or being perceived as doing so.⁴¹ Finally, there is the more general concern that fostering explicit political campaign speech by houses of worship could further erode the beneficial separation between church and state that is so healthy for an increasingly religiously diverse and pluralistic American society.⁴²

On the other hand, the § 501(c)(3) gag rule restricts pure political speech, which deserves and receives the greatest degree of constitutional protection.⁴³ Indeed, “the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”⁴⁴ Regulation of political speech therefore demands strict judicial scrutiny, with the government rarely able to meet its burden of demonstrating a compelling government interest for its regulation that could not be achieved by any less speech restrictive alternative means.⁴⁵ Especially given the less than principled basis for the 1954 Johnson Amendment, it is far from clear that any compelling government interest supports it.

Yet, while the gag rule is an impediment to free political speech by houses of worship it hardly is an absolute ban on their participation in the political process. Absent explicit (or perhaps implicit) endorsement or opposition of political candidates, spiritual leaders are free to address in unqualified

39. *See id.* at 118–19.

40. *See id.* at 119–20.

41. *See id.* at 121.

42. *See id.* at 122–23.

43. *See id.* at 197–99.

44. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). As Justice Antonin Scalia has stated, “It is perhaps our [the Court’s] most important constitutional task to ensure freedom of political speech.” *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 503 (2007) (Scalia, J., concurring).

45. *CRIMM & WINER*, *supra* note 16, at 198–99.

religious terms any moral, social, or political issues of the day.⁴⁶ Moreover, if they believe their theological mandate is so weighty as to require actually endorsing or opposing candidates, they may do so if they are willing for the house of worship they represent to forego the secular, material financial and nonfinancial benefits of § 501(c)(3) tax-exempt status and its attendant advantages. In other words, I.R.C. § 501(c)(3) acts simply as a government subsidy, regardless of its magnitude, that any entity is free to decline, and perhaps the government is able to condition such a subsidy on compliance with the gag rule. Yet, this tact leads to the virtually intractable argument of whether the gag rule amounts to an “unconstitutional condition,” a “troubled area of our [the Court’s] jurisprudence.”⁴⁷

Many of these arguments about the wisdom and constitutional viability of the § 501(c)(3) gag rule as a restriction of freedom of political speech apply not just to houses of worship but also to the far more numerous secular nonprofit entities that come within that section’s purview.⁴⁸ Houses of worship, however, have a distinct, and powerful, additional argument: The gag rule improperly infringes their religious freedom. Following, perhaps, in the roles of the Old Testament prophets, some modern religious leaders see themselves as “speaking truth to power” with their unique spiritual authority. The American experience is rich with such examples across a number of great moral and social movements.⁴⁹ And if, as many may believe, “God is raging in the prophet’s words,”⁵⁰ should this speech be afforded particular protection under the First Amendment as the free exercise of religion? In particular, the Religious Freedom Restoration Act subjecting any government regulation that “substantially burdens” a person’s “exercise of religion . . . [under] the First Amendment” to a strict scrutiny test adds statutory authority to a house of worship’s challenge to the gag rule.⁵¹ Or, would any such accommodation relaxing the ban of I.R.C. § 501(c)(3) solely for houses of worship amount to an inappropriate establishment of religion? Avoiding an Establishment Clause violation is certainly a compelling government interest.⁵² This

46. *Id.* at 199.

47. *Rust v. Sullivan*, 500 U.S. 173, 205 (1991) (Blackmun, J., dissenting). The title of one article by a noted legal scholar says it well: Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 989 (1995). For a discussion of the unconstitutional conditions doctrine and how it might relate to the § 501(c)(3) gag rule, see WINER & CRIMM, *supra* note 17, at 266–82, 291.

48. See CRIMM & WINER, *supra* note 16, at 101.

49. See *infra* note 75.

50. ABRAHAM J. HESCHEL, *THE PROPHETS* 5 (1962).

51. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

52. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995).

conundrum is a prime example of being caught in the “channel between the Scylla [of what the Free Exercise Clause demands] and Charybdis [of what the Establishment Clause forbids].”⁵³

We would resolve this dilemma by allowing houses of worship a limited accommodation—a highly circumscribed exception from the harsh prohibition of I.R.C. § 501(c)(3) on their political campaign speech. The I.R.S. is charged with enforcing the statute but has no province or expertise in First Amendment issues dealing either with speech or religion. And it is unseemly, at best, for any government agency to be monitoring the internal affairs of a house of worship such as a sermon to assess whether the words cross an amorphous line from explicating a religious principle into constituting support or opposition of a particular political candidate. Congress therefore should enact a revised gag rule that a house of worship could elect to follow if it wishes to maintain its tax-exempt status. In essence, such legislation should provide that a religious leader or other spiritual representative may freely engage in political campaign speech without jeopardizing the entity’s tax-exempt status so long as the speech remains *within* the house of worship, solely among current congregants. Thus, a sermon from the pulpit would not raise any issue, regardless of its content, as long as it remains within the congregation, including even a mega-church with thousands of members. But the house of worship could not broadcast such a sermon or similar statement more widely in any medium generally available to members of the public. Nor could the house of worship place newspapers ads containing political campaign speech or otherwise broadly communicate such messages.⁵⁴

53. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 42 (1989) (Scalia, J., dissenting) (quoting *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting)). The Court often resolves this conflict in an ad hoc manner by finding “room for play in the joints” between the clauses. *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970); *see also* *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *Locke v. Davey*, 540 U.S. 712, 718 (2004).

54. For the details of this proposal, and other broader suggestions, as well as discussion of their feasibility, *see* Winer & Crimm, *supra* note 17, at ch. 6.

Long after our above cited book was published and well after this Essay was presented at an international conference, Representative Steve Scalise (R-LA) introduced on September 28, 2016, in the House of Representatives H.R. 6195, a bill, “The Free Speech Fairness Act,” to amend I.R.C. §§ 501(c)(3), 170(c)(2), and other relevant provisions. This bill would permit any § 501(c)(3) organization to engage in political speech if the “content of any [such] statement . . . (A) is made in the ordinary course of the organization’s regular and customary activities in carrying out its exempt purpose, and (B) results in the organization incurring not more than de minimis incremental expenses.” This bill recognizes the importance of political speech, that spiritual representatives of houses of worship may consider such speech to be a core component of their obligations to their congregations, and that *de minimis* expenditures to carry out that perceived duty should not be harmful to separation of church and state or the political process. The bill goes

The virtues of this approach are that, first, removing restraints on internal house of worship speech eliminates all intrusive government monitoring and any need to engage in the often intractable task of evaluating the content of speech for compliance with a necessarily vague standard. The distinction between essentially private, internal speech and more public, external dialogue by an institution's representatives is relatively straightforward and objective. Moreover, limiting the audience to the house of worship's own congregants aligns with the purported theological mandate that impels a spiritual leader's message. That is, one's own congregation is the audience most important to reach with a religious message and is the audience presumably most receptive to such guidance. At the same time this correspondingly is the audience most nonmembers would consider it most appropriate for a spiritual leader to address from a particular doctrinal perspective, which perhaps renders less objectionable allowing more leeway for such communications.

Finally, and relatedly, this accommodation for houses of worship respects their autonomy as to internal affairs and the sacerdotal "watchman" function of religious figures while according them only a minor benefit over other secular § 501(c)(3) organizations still bound by the gag rule as to all political campaign speech. Houses of worship can politically proselytize only to current members, a confined, largely homogeneous group who already may be pre-disposed to favour or oppose certain candidates. This gives such houses of worship only a very contained and modest advantage without competing inequitably in the far broader, more contentious, and high decibel public political square.

The limited accommodation for houses of worship we propose promotes First Amendment freedoms for the type of speech commanding constitutional protection of the very highest order: political speech intimately connected with religious beliefs and practices within a community of believers. For all the reasons discussed above we believe our narrow, circumscribed accommodation for houses of worship would be socially and politically palatable and would not amount to an inappropriate or unconstitutional establishment of religion. As will become apparent, this position is in marked contrast to fundamental principles of separation of church being undermined by burgeoning forms and quantities of public financial aid channeled into

further than we suggested in our book by including all § 501(c)(3) organizations, thus avoiding Establishment Clause problems. We note, however, that terms in the bill's language are vague and therefore would be subject to problematic interpretation by the I.R.S. and to potential abuse by organizations' leaders.

private, parochial K–12 education in many of the U.S. states. This is the second topic to which we now turn.

IV. THE K–12 STUDENT EDUCATIONAL ARENA

In 1784, Patrick Henry, famed orator and politician of the revolutionary era, proposed to the Virginia General Assembly *A Bill Establishing a Provision for Teachers of the Christian Religion*.⁵⁵ Henry's Bill would have imposed a property surtax payable via taxpayer designation to the "society of Christians"; the recipients were to use the funds for a "Minister or Teacher of the Gospel" or to provide for places of worship.⁵⁶ If any taxpayer would choose not to make such an assignment, his collected taxes would be used "for the encouragement of seminaries of learning," among which apparently numbered nonsectarian schools.⁵⁷ Thus Henry's Bill had all the elements of modern schemes used in many U.S. states for funding parochial schools. It proposed not a direct legislative grant from general taxpayer funds to sectarian institutions but a special tax mechanism that relied on the individual, private choices of taxpayers to direct money to a religious school. And, although the great majority of tax funds so raised might in fact have gone to (Christian) sectarian schools, the nonsectarian opt-out provision allowed an objecting taxpayer to avoid use of his money to support religious education.

Henry's proposed assessment provoked immediate and vigorous opposition, including James Madison's famous encomium to religious liberty, his *Memorial and Remonstrance Against Religious Assessments*.⁵⁸ In fifteen numbered paragraphs Madison advanced compelling reasons why the tax assessment was an affront to religious freedom and violated the liberty of conscience. "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"⁵⁹ Madison's arguments expanded on Thomas Jefferson's earlier drafted *Virginia Bill for Establishing Religious Freedom*, which pronounced that "to compel a man to furnish contributions of money

55. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 36 (1947). The text of Henry's Bill is attached as a Supplemental Appendix to Justice Wiley B. Rutledge's dissenting opinion. *Id.* at 72–74 (Rutledge, J., dissenting).

56. See Donald O. Dewey, *Virginia Statute for Religious Freedom*, in JAMES MADISON AND THE AMERICAN NATION 1751–1836: AN ENCYCLOPEDIA 428–29 (Lance Banning et al. eds. 1994).

57. See WINER & CRIMM, *supra* note 17, at 91.

58. See Madison, *supra* note 21, at 82–84.

59. See *id.* at 82.

for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical: [t]hat even the forcing him to support this or that teacher of his own religious persuasion” improperly compromises one’s religious liberty.⁶⁰ Madison adroitly was able to substitute Jefferson’s Bill for Henry’s, and the Virginia legislature enacted the essence of Jefferson’s proposal, declaring “the rights hereby asserted are of the natural rights of mankind.”⁶¹

After election to the First Congress following ratification of the Constitution, Madison fulfilled a campaign pledge by sponsoring a federal Bill of Rights and introducing an initial draft of what became the First Amendment, including protections for religious liberty in both the Free Exercise and Establishment Clauses.⁶² Thus the renowned defeat of Henry’s proposed Virginia Tax Assessment, with crucial support by Madison and Jefferson, is a principal, edifying episode in the constitutional history of the United States and provides an explicit and powerful argument that public financing of religious schools, through even a small tax, is not consistent with the later prohibitions of the Establishment Clause.⁶³ Indeed, at one time the Supreme Court acknowledged that “the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”⁶⁴

Beginning in the mid-twentieth century, however, cases began reaching the Supreme Court regarding both religious influences in public schools, especially prayer and religious observances, and government financial

60. Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 9, at 77.

61. Act for Establishing Religious Freedom, 1785 Va. Acts ch. 34, *reprinted in* 5 THE FOUNDERS’ CONSTITUTION, *supra* note 9, at 84–85; Dewey, *supra* note 56.

62. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184 (2012) (referring to Madison as the “leading architect of the religion clauses of the First Amendment” (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 140 (2011))).

63. See Ralph Ketcham, *James Madison, Thomas Jefferson, and the Meaning of “Establishment of Religion” in Eighteenth-Century Virginia*, in *NO ESTABLISHMENT OF RELIGION: AMERICA’S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY* 158, 170 (T. Jeremy Gunn & John Witte, Jr. eds., 2012).

64. *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). The Court was unanimous on the significance of the Virginia assessment controversy, as the four dissenters agreed that “[a]ll the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition . . .” *Id.* at 39 (Frankfurter, Rutledge, Jackson, Burton, JJ., dissenting); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 871–72 (1995) (Stevens, Souter, Ginsburg, Breyer, JJ., dissenting) (citing scholarly support); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 770 n.28 (1973) (terming the Virginia experience “one of the greatest chapters in the history of this country’s adoption of the essentially revolutionary notion of separation between Church and State”).

support for parochial schools.⁶⁵ While curtailing explicit religious practices, on the latter issue the Court started down a sixty-five-year path of confusing, controversial, and often inconsistent decisions—some with only plurality opinions and some with later majorities overruling earlier decisions over vigorous dissents—that seem to depend more on the changing composition of the Court than on any coherent theory of the First Amendment and its Religion Clauses.⁶⁶ The process began in 1947 when a bare majority, after stating a grand and expansive view of the Establishment Clause,⁶⁷ incongruously allowed a state to reimburse parents for the costs of bus transportation of their children to private, religious schools.⁶⁸ This start to what would prove a slippery slope perhaps seemed innocuous enough at the time, though the dissent presciently warned of growing competition among religious denominations for ever larger shares of public money for parochial education.⁶⁹

In the decades following this inauspicious beginning the Court reviewed, usually with split decisions, a variety of measures enacted by states that aided K–12 religious education to a greater or lesser extent. Communities, for example, were allowed to carve out time from the regular public school day for willing students to attend religious classes, but only if the students left the public school grounds for instruction elsewhere.⁷⁰ States could provide textbooks free of charge to students in all schools, including private secular and parochial schools, even though books impact actual teaching, so long as the books ostensibly were secular and not religious in nature.⁷¹ A majority of the Court thus assumed that the religious and secular components of education in a parochial school, and the textbooks used for each, could be distinguished adequately.⁷² In contrast, teachers are more problematic than textbooks because, even if instructing solely in the secular curriculum of a parochial school, teachers necessarily would have great difficulty in completely separating their secular and religious educational functions and

65. See WINER & CRIMM, *supra* note 17, at 4.

66. For a full discussion of this evolution, see WINER & CRIMM, *supra* note 17.

67. The Religion Clauses preclude government from financial or other meddling in religion, whether the intervention encumbers or “aid[s] one religion, aid[s] all religions, or prefer[s] one religion over another.” *Everson*, 330 U.S. at 15.

68. *Id.* at 17.

69. *Id.* at 53 (Frankfurter, Jackson, Rutledge, Burton, JJ., dissenting).

70. Compare *McCullum v. Bd. of Educ.*, 333 U.S. 203, 211–12 (1948), with *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

71. *Bd. of Educ. v. Allen*, 392 U.S. 236, 244 (1968).

72. *Id.* at 245. Justice William O. Douglas’s dissent took strong exception to this Panglossian view. *Id.* at 258–60 (Douglas, J., dissenting).

remaining religiously neutral.⁷³ State subsidy for these teachers' salaries, therefore according to the Court, ran too great a risk of state support for a school's religious mission.⁷⁴ Instructional services, materials, and assistance other than textbooks fell somewhere between books themselves and teachers.⁷⁵ Early tax schemes that provided some modest financial assistance to parents who sent their children to parochial schools met varied fates.⁷⁶

All of these cases presented a discordant and incongruous approach, as was well-recognized.⁷⁷ Justice Thurgood Marshall once suggested imposing some coherence by distinguishing between general welfare programs—such as assistance for speech, hearing and psychological diagnosis and therapy for students—that serve children in private, parochial schools because the schools happen to be a convenient place to reach them and programs that assist the actual educational function such as providing textbooks and other instructional materials and equipment.⁷⁸ In Justice Marshall's view only the former comport with the Establishment Clause because, as such general welfare programs are divorced from the educational function, they do not impermissibly advance the religious mission of a school and so also do not generate political divisiveness along religious lines.⁷⁹ This sensible, if not perfect, compromise approach however gained no traction.

Instead, the Court's jurisprudence in the school aid cases began to shift dramatically with changes in its membership indicating, for better or worse, the profound effect that Justices' personal views can have on the development of constitutional law. First, a new majority of the Court used two narrow cases

73. *Lemon v. Kurtzman*, 403 U.S. 602, 618–19 (1971).

74. *See id.* at 613–14; *see also* *Aguilar v. Felton*, 473 U.S. 402, 413–14 (1985), *overruled* by *Agostini v. Felton*, 521 U.S. 203 (1997); *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 396–97 (1985), *overruled in part* by *Agostini*, 521 U.S. 203.

75. *Compare* *Meek v. Pittenger*, 421 U.S. 349, 362–73 (1975), *overruled* by *Mitchell v. Helms*, 530 U.S. 793 (2000), *with* *Wolman v. Walter*, 433 U.S. 229, 255 (1977), *overruled* by *Mitchell*, 530 U.S. at 793.

76. *Compare* *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973) (invalidating a “hybrid” tax benefit), *with* *Mueller v. Allen*, 463 U.S. 388, 393–94 (1983) (upholding an authentic tax deduction approach).

77. *See* *Edwards v. Aguillard*, 482 U.S. 578, 639 n.7 (1987) (Scalia, J., dissenting) (quoting Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680–81 (1980)); *Wallace v. Jaffrey*, 472 U.S. 38, 110–11 (1985) (Rehnquist, J., dissenting) (“For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class.”).

78. *Wolman*, 433 U.S. at 259–60 & n.5 (Marshall, J., concurring in part and dissenting in part), *overruled* by *Mitchell*, 530 U.S. at 793.

79. *Id.* (Marshall, J., concurring in part and dissenting in part) (“The distinction is between programs that help the school educate a student and welfare programs that may have the effect of making a student more receptive to being educated.”).

involving aid to individual, handicapped students—one case that unnecessarily reached a constitutional issue⁸⁰ and the other about a blind college student⁸¹—to disingenuously claim a much broader “shift . . . in our Establishment Clause law” for aid to K–12 parochial schools.⁸² Then, over a strong dissent, the conservative Justices overruled a thirteen-year-old precedent and allowed public school teachers to provide secular, remedial educational services for disadvantaged students inside parochial schools.⁸³ The Court no longer was willing to assume that the mere presence of public employees in parochial schools necessarily would lead to state sponsored inculcation of religion or a symbolic union of church and state.

Just a few years later, a plurality opinion by Justice Clarence Thomas confirmed the dramatic shift on the Supreme Court and, when joined by two Justices concurring in the judgment, formed a majority overruling two other precedents.⁸⁴ Supplemental federal funds made available for educational assistance now were free to flow to both private and public schools based upon student enrollment even if most of the private school recipients were religiously-affiliated and predominantly Catholic. Formal government neutrality in distribution—the aid was theoretically available to all schools without regard to religion—was enough to avoid constitutional difficulty regardless of the large, actual amount of subsidization of religious education. This neutrality, in turn, was assured in the minds of some Justices simply because the aid flowed to parochial schools “only as a result of genuinely independent and private choices of individuals,” namely the parents who choose the school their children attend.⁸⁵ But it is far from clear why merely a particular payment mechanism through which large amounts of government funds—in both absolute and proportionate terms—reach parochial schools should insulate government from what almost certainly would be an unconstitutional establishment of religion if accomplished more directly.

This is especially so considering the even more drastic move made by some Justices. Previously, government aid to parochial schools had to be used solely for secular educational purposes even though that aid might free up other resources of the school that could be devoted to its religious mission. For example, textbooks loaned to private schools had to be secular, not

80. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

81. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986).

82. *Agostini v. Felton*, 521 U.S. 203, 225 (1997).

83. *Id.* at 208–09.

84. *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion); *id.* at 837 (O’Connor, Breyer, JJ., concurring in the judgment) (overruling *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977)).

85. *Id.* at 810 (plurality opinion) (quoting *Agostini*, 521 U.S. at 226).

religious in nature. Now, however, that concern about the “non-divertability” of government aid disappeared. The plurality strikingly proclaimed: “the *use* of governmental aid to further religious indoctrination [is not] synonymous with religious indoctrination *by* the government”⁸⁶ The two concurring Justices vehemently disagreed, keeping this *volte face* from becoming a majority position for the time being: the plurality’s new “rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school aid programs . . . does not accurately describe our recent Establishment Clause jurisprudence.”⁸⁷

Still, it now was inevitable that the constitutionality of subsequent tax-supported voucher initiatives and tax-related tuition breaks for parents who send their children to private schools, including predominately parochial schools, would garner majority support on the Court, especially if a sympathetic case led the way. And because tuition subsidies enable students to attend the school itself, such public funds help expose those students to all aspects of the school’s educational program, including any religious instruction, indoctrination, or mission. So any issue of diverting state aid to religious purposes is totally elided. The push for such assistance was fueled by the growing perception and reality of woefully inadequate public schools and the desperate desire of parents for alternatives.

In particular, “[f]or more than a generation” the public schools in Cleveland, Ohio, were “among the worst performing public schools in the Nation.”⁸⁸ To partially alleviate this problem Ohio created a state government tuition voucher plan for private schools that overwhelmingly supported parochial schools. But, the voucher program approved in *Zelman v. Simmons-Harris* was very narrow and financially limited, designed to aid only educationally and economically disadvantaged students facing the truly dire failure of Cleveland’s inner city school system.⁸⁹ Notably, private schools participating in the program could not discriminate in admissions or teach hatred on the basis of race, religion, or ethnicity.⁹⁰ Still, forty-six of the fifty-six participating private schools (82%) were religiously affiliated, and the remaining ten had limited seats available.⁹¹ This fact combined with parental choice meant that the parochial schools enrolled over 96% of the 3,700 students in the scholarship program.⁹² So, as Justice David Souter

86. *Id.* at 821.

87. *Id.* at 837, 839 (O’Connor, Breyer, JJ., concurring in the judgment).

88. *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

89. *Id.* at 644–46.

90. *Id.* at 645.

91. *Id.* at 647.

92. *Id.*

summarized the financial effects of the program in his dissent: “[S]ubstantial amounts of tax money are . . . systematically underwriting religious practice and indoctrination.”⁹³ The Court, however, relying somewhat disingenuously on a contorted and formalistic view of neutrality and private choice upheld the tuition voucher program by a 5–4 vote.⁹⁴ The main dissent therefore asserted that the current Court majority has “largely silenced” the Establishment Clause in school aid cases, which have reached “doctrinal bankruptcy.”⁹⁵

Since *Zelman*, numerous state legislatures (and courts) in the United States have interpreted the majority decision as substantially lessening constitutional constraints on government aid to private, secular and parochial schools, at least if such aid can be deemed “indirect”—funneled through parents—rather than through direct government grants. Many states aggressively have enacted innovative, targeted government programs that use various tax mechanisms—exemptions, deductions, credits, and even education savings accounts providing tax exclusions⁹⁶—to subsidize private, K–12 tuition and other education expenses and that overwhelmingly aid private, parochial elementary and secondary schools and other religiously-affiliated education providers. Increasingly, these initiatives are financially much more expansive and unrestricted than the modest *Zelman* voucher program, encompassing now not only educationally and economically disadvantaged students but also those across the socio-economic spectrum, and frequently not prohibiting beneficiary schools from discriminating in admissions on the basis of religion.⁹⁷ Allowing such discrimination may limit

93. *Id.* at 711 (Souter, J., dissenting).

94. In a single paragraph of his dissent, Justice Breyer strikingly undermined the Court’s ubiquitous invocation of “private choice” as a panacea to resolve Establishment Clause problems with government aid to religious schools: “Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division [described earlier]. Consequently, the fact that the parent may choose which school can cash the government’s voucher check does not alleviate the Establishment Clause concerns associated with voucher programs.” *Id.* at 728 (Breyer, J., dissenting).

95. *Id.* at 688, 717 (Souter, J., dissenting).

96. For a more comprehensive description and analysis of these various tax mechanisms, see WINER & CRIMM, *supra* note 17, at 151–74.

97. For example, Douglas County, Colorado, a largely affluent area, enacted a choice scholarship pilot program that permits children to use government vouchers at private, secular

for many students the choices of alternative educational opportunities, the fostering of which ostensibly is the secular purpose of these programs. Moreover, all of these tax concessions are economically and functionally equivalent to outright entitlement spending or grant provisions, “meet objectives that the government considers to require financial assistance,”⁹⁸ and constitute governmental discretionary and rewarding or incentivizing subsidies.⁹⁹ Importantly, like outright monetary grants, such tax dispensations substantially reduce a government’s immediate net revenues and resources available for public schools.¹⁰⁰

Recently, the State of Arizona, a leader in these innovations, instituted a tax credit program whereby any taxpayer could donate money to a nonprofit Student Tuition Organization (STO) that then would award scholarships to students to attend eligible private schools.¹⁰¹ This donation cost the taxpayer nothing, however, since he could claim a dollar-for-dollar credit (up to a set limit, initially of about \$500) against his tax liability on his state income tax return.¹⁰² The state thus bore the full expense of this tuition subsidy. Most STOs explicitly restricted their scholarship grants to students attending parochial schools, and by the time an Establishment Clause challenge reached the Supreme Court hundreds of millions of dollars in state tax revenues had been diverted to private, parochial education.¹⁰³

and parochial schools, without statutorily limiting discriminatory admissions of students. Indeed, the Colorado Supreme Court noted that over sixty percent of the private schools accepting the vouchers discriminate in admissions or enrollment on the basis of children’s religious beliefs or practices. Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015), *petition for cert. filed*, 84 U.S.L.W. 3261 (2015) (No. 15-557). The Colorado court held the initiative unconstitutional under the state’s constitution Article IX, § 7, a Blaine Amendment-type provision prohibiting the state from using public money to fund religious schools. *Id.* at 475. For discussion of proposals for including in school choice legislation clauses specifying means-testing, limiting financial incentives, and requiring non-discrimination, see WINER & CRIMM, *supra* note 17, at 244–65.

98. STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 99 (1985).

99. For budgetary purposes, these targeted subsidies are considered “tax expenditures.”

100. There may be some off-setting, eventual savings for the government in having some students partially subsidized by the state educated in a private institution rather than a public school. But this in no way diminishes the constitutional problem with the state helping substantially to finance the religious education of large numbers of students.

101. See WINER & CRIMM, *supra* note 17, at 212–13.

102. See *id.*

103. *Id.* at 213. Arizona and other jurisdictions have expanded these programs and even have instituted Education Savings Accounts (ESA) whereby the state deposits an amount, perhaps up to ninety percent of the cost of a student’s public school education, into an account upon which a parent can draw to pay for qualified education expenses, including private, parochial school tuition or religiously affiliated education provider fees. The funds deposited are excluded from the parent’s gross income, totally eluding state income taxation (and perhaps federal taxation as well). When used to support religious education, ESAs may present the greatest potential affront

The Court, however, abdicated its responsibility in *Arizona Christian School Tuition Organization v. Winn* to review the significant merits of the constitutional challenge.¹⁰⁴ Instead, the conservative five-Justice majority ignored its own considerable precedents (including an earlier iteration of the very same case) to now decide that the plaintiffs lacked standing to bring the action.¹⁰⁵ Most incredibly, the majority maintained that the tax credit a taxpayer claimed was his own money, never within government hands, and not the state's, even though it reduced, dollar-for-dollar, the taxpayer's liability, and thus the amount ultimately paid in state income taxes.¹⁰⁶ Justice Elena Kagan's powerful dissent exposed the many fallacies in the majority opinion. In particular, as she noted, the money at stake had to belong to the state and not to the taxpayer because the taxpayer with a state tax liability has only one choice: Whether to write a check to the Arizona Department of Revenue or to an STO; he cannot keep the funds for himself.¹⁰⁷ And whether or not it physically flows through the state treasury, this state money reaches students and parochial schools through operation of state programs specially designed for that specific purpose, and the economic and constitutional consequences of government aid to religious education are identical.¹⁰⁸ But after the Court's deplorable opinion, as Justice Kagan concluded, "the majority betrays Madison's vision. . . . [h]owever blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts."¹⁰⁹ So, judicial review of state aid to private K–12 education now rests with state courts, with varied and uncertain results under the different states' own constitutional obligations.¹¹⁰

Notwithstanding the egregious tact taken in recent years by a bare majority of the Supreme Court, it is easy to sympathize with proponents of school choice who advocate for increased alternative educational opportunities, especially for students from lower socio-economic backgrounds who often must endure poor or failing traditional public schools. Many, and perhaps most, parochial schools do a fine job of providing a solid secular education as well as inculcating moral and spiritual values that greatly enrich the lives of their students in the best spirit of American pluralism. Students are the

to the Establishment Clause and the greatest threat of de-funding public schools. See WINER & CRIMM, *supra* note 17, at 64–67, 159–60 for a full discussion.

104. 131 S. Ct. 1436 (2011).

105. *Id.* at 1440.

106. *See id.* at 1448.

107. *Id.* at 1456 (Kagan, J., dissenting).

108. *Id.* at 1457 (Kagan, J., dissenting).

109. *Id.* at 1462 (Kagan, J., dissenting).

110. *See* WINER & CRIMM, *supra* note 17, at 221–24, 230–42.

most direct beneficiaries of such an education. But parents who wish a parochial school education for their children, while having to support public schools through their taxes, also benefit when they are relieved of paying that portion of their children's private school tuition supported by a state's voucher, tax deduction or credit mechanisms, or education savings accounts. And parochial schools themselves profit both intangibly and financially by being more available to wider groups of students. Those schools have the opportunity to further their religious missions by inculcating in the hearts and minds of children specific religious doctrines, beliefs, and values, thereby encouraging youths to form lifetime habits of worshiping and engaging in other religious practices, thus promoting individuals' long-term relationships with particular denominations and religious institutions.

Yet, too often proponents of school choice inappropriately view the Establishment Clause not as a vital guarantee of individual liberty of conscience but merely as an inconvenient technical impediment to be maneuvered around by whatever legerdemain is necessary. Some elements of the school choice movement in the United States also are motivated by having lost the culture wars over religion in public schools. Organized prayer has been banned; evolution is taught; "secular humanism" prevails. But now, with state legislatures using various tax schemes to channel increasingly huge amounts of public money into private parochial schools, the secularization of public schools and its intended democratizing effects become irrelevant. Private school education can be centered around religion and the public made to help pay for it. And some private school education may be inadequate or pernicious. Parochial schools may be discriminatory by their very religious nature; this discrimination may extend well beyond religion, which itself may be problematic, to sexual orientation, ethnicity, or race.¹¹¹ Some also may promote an a-scientific, totally faith-based view of the world that will ill-equip their students for life in the twenty-first century, with adverse societal consequences.¹¹² An overly insular, narrow-minded school environment may

111. See, e.g., *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 479 (Colo. 2015) (Marquez, J., concurring in judgment), *petition for cert. filed*, 84 U.S.L.W. 3261 (2015) (No. 15-557); S. EDUC. FOUND., *GEORGIA'S TAX DOLLARS HELP FINANCE PRIVATE SCHOOLS WITH SEVERE ANTI-GAY POLICIES, PRACTICES, & TEACHINGS* (2013), <http://www.southerneducation.org/Our-Strategies/Research-and-Publications/Publications/Georgia%E2%80%99s-Tax-Dollars-Help-Finance-Private-Schools.aspx> (asserting Georgia's "program of educational tax credits is providing public financing to a large number of private schools in Georgia that have draconian anti-gay policies and practices").

112. See, e.g., Jennifer Miller, *A Yeshiva Graduate Fights for Secular Studies in Hasidic Education*, N.Y. TIMES, Nov. 23, 2014, at B1 (A young man raised in an ultra-Orthodox Jewish family in New York was educated in a Hasidic yeshiva supported by government funds that supposedly was required by state law to teach a curriculum "substantially equivalent" to what

nurture students who reject assimilation and withdraw from the pluralistic, secular, democratic society that comprises America's strength. At the extremes, some parochial schools could instill in their students intolerance, chauvinism, or xenophobia and undermine cohesive civil society.

There are many ideological and cultural battles over school curriculum and related issues, both religious and secular in nature. But, inculcation of religion is different, and it is the one area the Constitution puts off-limits for government funding. The four dissenting Justices in *Zelman* well illustrated the constitutional problem:

Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention.¹¹³

Whether parochial schools are enlightened or not, government subsidies, direct or indirect, should not support them. This position presents no impediment for parents who want a religious education for their children because parents are always free to provide, at their own expense and on their own initiative, moral and religious training for their children either in the home or through more formal, private instruction that either supplants or supplements public schooling. In particular, parents can present alternative views on matters to which their children have been exposed in public school, through the media, or otherwise, and which they consider objectionable. The

public schools offer. In this man's school, however, "he said, English, math and science were considered 'profane.'" It wasn't until he defied tradition and enrolled in a local college that he first heard the word "molecule"); Stephanie Simon, *Taxpayers Fund Creationism in the Classroom*, POLITICO (Mar. 24, 2014), <http://www.politico.com/story/2014/03/educationcreationism-104934.html>. A class action lawsuit against the state and some New York schools sought to assure that students receive a "sound basic education." *Parent Doe 1 v. New York*, No. 7:2015-CV-09130 (S.D.N.Y. Nov. 20, 2015).

113. *Zelman v. Simmons-Harris*, 536 U.S. 639, 715–16 (2002) (Souter, J., dissenting) (internal citations omitted).

Constitution gives parents this basic choice regarding their children but also should be recognized as precluding taxpayer funding for the sectarian choice.

Thus, the issue is not one of the free exercise of religion but of a state establishment of religion. Allowing a state's skillfully camouflaged method of "indirectly" funneling money to private, parochial schools through an inventive tax mechanism or tax-supported voucher or ESA blatantly exalts form over substance in a way that is inconsistent with modern notions of the Establishment Clause and the cardinal principle of separation of church and state it embodies.

V. RECONCILING THE TWO APPROACHES

What justifies our very different approaches to the establishment issues raised by the § 501(c)(3) gag rule as applied to houses of worship compared to state subsidization of K–12 religious education? First, history and tradition often play an important and appropriate role in resolving modern First Amendment issues, especially those involving religion.¹¹⁴ For well over a century under federal tax laws, including more than sixty years under unamended I.R.C. § 501(c)(3), houses of worship, along with many other religious and secular entities, were recognized as nonprofit entities entitled to enjoy various and considerable tax benefits without statutory restriction on their participation in political campaigns. Their political engagements were left to the judgment of their congregations and spiritual leaders with no discernible adverse effects. The Johnson Amendment gag rule was imposed only in 1954 due to political opportunism without consideration of its First Amendment implications. But from biblical times, religious leaders have been in the forefront of great, progressive moral and social reforms, and this certainly has been true throughout U.S. history.¹¹⁵ And freedom of political speech, especially campaign speech, from all individual and organizational sources, always has been the most prized and protected form of expression in

114. See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014).

115. "From the revivalists of the Great Awakening who helped pave the way for the American Revolution, to the God-drenched abolitionist movements that sparked the Civil War; from the priests, ministers, and rabbis who appealed to the nation's better angels during the Civil Rights movement, to the priests, ministers, and rabbis who today urge a rejection of the Culture of Death; from the presidential bids of Reverends Jackson and Robertson to the 'God talk' that was a staple of the campaigns of Senator Joseph Lieberman and now-President George W. Bush—our history, traditions and interminable public debates on the social issues are and have always been awash in religious expression, argument, and activism." Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 779–80 (2001) (citations omitted).

the United States.¹¹⁶ Combining this free speech interest, benefiting the public audience as well, with the more singular free exercise of religion right of houses of worship, compels a limited accommodation for houses of worship that relieves them of the harsh reach of the § 501(c)(3) gag rule without constituting an inappropriate establishment of religion.

The history and tradition regarding public financing of religious education in the United States is very different. Disparate episodes such as Thanksgiving or prayer proclamations initiated by early presidents—or even the appointment of congressional chaplains and the practice of legislative prayers—may inform other Establishment Clause issues. But firm opposition to taxation to support religious education predates the Constitution and is reflected in Madison’s authority in framing the First Amendment. Since 1947 the Supreme Court began recognizing, though somewhat inconsistently, a very limited role for targeted government aid to private K–12 education if such funding could subsidize only secular aspects of parochial schools.¹¹⁷ It is only recently that, in this context, a conservative five-Justice majority on the Court has turned its back entirely on Madison’s *Memorial and Remonstrance*, a once revered canon of American constitutional principle, through poorly reasoned, result driven opinions. Large tax-financed tuition subsidies for parochial school students constitute a long-recognized, classic establishment of religion that should not endure.

Even more important than history and tradition, however, are the modern realities contrasting the adult, public political arena from the more cloistered environment of minors enrolled in K–12 education. Only adults participate through voting in elections, and adults must be presumed able to process adequately the barrage of political messages—indeed propaganda—that surround elections from all sources however financed, secular and religious, trustworthy and specious, rational and emotional. Lamentedly or not, such is the state of U.S. politics. Allowing leaders of houses of worship to impart just to their congregants their unique religious perspectives hardly risks

116. See CRIMM & WINER, *supra* note 16, at 292; Ellada Gamreklidze, *Political Speech Protection and the Supreme Court of the United States*, NAT’L COMM. ASS’N. (Oct. 1, 2015), <https://www.natcom.org/communication-currents/political-speech-protection-and-supreme-court-united-states>.

117. Virtually all private schools, secular and religious, can qualify as § 501(c)(3) nonprofits merely as educational entities. *Section 501(c)(3) Organizations*, IRS, https://www.irs.gov/publications/p557/ch03.html#en_US_201602_publink1000200076 (last visited Mar. 20, 2017) (describing requirements for 501(c)(3) eligibility). As such they enjoy many, well-accepted federal and state tax benefits common to all nonprofits which are of considerable economic benefit to them. The constitutional issue is what, if any, *additional* public financial support, especially including tuition subsidies through various tax mechanisms, parochial schools may receive that unequivocally advance their religious missions.

corrupting the larger political system and may exert moderating influence on this cauldron.

The situation of children within primary and secondary schools is very different. As the Supreme Court has noted repeatedly in prohibiting public school sponsored or directed daily prayers, or prayers at school events such as graduations or sporting contests, children inherently are impressionable and susceptible to peer pressure, prone to coercion to conform, and generally less mature than adults in myriad other ways.¹¹⁸ Their vulnerability may be especially acute with regard to religious matters. When the state puts any aspect of its power, prestige, or influence behind support for religious education the message is not lost on children or their parents, either those who avail themselves of a government-funded religious education or those who do not for whatever reason.

From the child's perspective, if the state pays for her religious schooling it must mean that such education is considered a good thing officially, and not just by her parents. The state in effect is endorsing the religious content and truth of what she is being taught. The subtle fact that parents may direct the flow of government money, including some to secular schools, well may not be understood by their children. Regardless, the child's obvious perception is that a government program, if not totally enabling her and her classmates to receive otherwise unobtainable private, parochial schooling, facilitates it through the allocation of funds that government otherwise could spend on public education. And if the vast majority of state money for private schools supports one denomination, or just Christian denominations generally, as is often the case, then this can only reinforce in the eyes of many school children the official "specialness" of their religion and the "outsider" status of others. The symbolic union of church and state fostered by government subsidization of tuition for primary and secondary parochial schools creates a highly noticeable, divisive distinction between favored religious status and inclusion on the one hand and minority standing and exclusion on the other.

These unmistakable messages are identified precisely as constitutionally inappropriate—namely they constitute "government endorsement or

118. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000); *Lee v. Weisman*, 505 U.S. 577, 592 (1991); *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring). The same solicitude for the special nature of children leads the Court to analyze First Amendment speech issues carefully "in light of the special characteristics of the school environment." *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988), then quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

disapproval of religion,” which is a “direct infringement” of the Establishment Clause. This is because “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”¹¹⁹

In short, there is something crucially distinctive about the confluence of religion, children, and schools that requires great sensitivity by government. This is why the Court has prohibited public school prayer while allowing legislative prayers and even largely sectarian prayers at the opening of town board meetings before adults.¹²⁰ Similarly, the Court has approved the display of a Ten Commandments monument on the grounds of a state capitol (though not in county courthouses) while previously prohibiting such displays in public schools. Indeed, Justice Stephen Breyer, who provided the crucial fifth vote for the state capitol display, specifically distinguished the public school environment “where, given the impressionability of the young, government must exercise particular care in separating church and state.”¹²¹

By comparison, whatever belated rationale may be asserted for applying the § 501(c)(3) gag rule to houses of worship, it is remarkably weak compared to the historically compelling reasons for government not to subsidize parochial education. Adults are used to dealing with all sorts of political messages, perhaps especially in the heat and fog of electoral campaigns. They can discount political propaganda and indoctrination, even if it comes from their own religious leaders couched in theological terms. Religious leaders, as representatives of their houses of worship, certainly are free to preach from the pulpit on moral and social issues of the day; indeed this is their core function, which should not be monitored and sanctioned by the state if some amorphous boundary between such issues and campaigning is encroached. So there is little risk that also allowing, for example, an explicit political endorsement by a spiritual leader from the pulpit to a relatively homogenous, like-minded congregation will be perceived as government endorsement of a religious position simply because the house of worship enjoys tax-exempt

119. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). Although controversial with some Justices, a majority of the Court has adopted Justice O’Connor’s Establishment Clause endorsement test. *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592–93 (1989), *abrogated by, Town of Greece*, 134 S. Ct. 1811.

120. *See also Town of Greece*, 134 S. Ct. at 1824–25, 1838, 1851. *Compare Lee*, 505 U.S. at 592 (“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”) and *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311–12, with *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (legislators are adults “not readily susceptible to ‘religious indoctrination’ . . . or peer pressure”).

121. *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring in judgment).

status. While such status may be financially important overall to the house of worship (and its donors), it certainly provides negligible support for a sermon or other purely internal communication that entails little expense (as opposed, say, to a newspaper ad or public broadcast that still would be precluded under our approach). In other words, the slight amount of government subsidization for this sort of political speech by spiritual leaders is inconsequential, even accounting for the potential impact on other § 501(c)(3) organizations still bound by the gag rule.

In contrast, forcing all taxpayers to help fund the religious education of vulnerable children to any degree, even “three pence,” is considerably more harmful. Religion is different from other political or philosophical views. Religious traditions, doctrines, and beliefs, after all, operate at the most intimate, transcendent level of individual conscience. An adult is free and competent to make his own decisions about religion (or politics); he is not subject to the same influences and pressures with which children attending school must deal. It is easy, then, to understand why an adult may viscerally object to helping pay for his neighbor’s child to be indoctrinated into a “false” religion, or perhaps any religion at all for that matter. Invoking the power of the state to compel support for the religious education of other people’s children can be a tremendous affront to conscience, regardless of how enlightened and tolerant the school may be. This grievance arises because parochial education well may include indoctrination and proselytizing of impressionable and susceptible children before they are mature enough to make their own reasoned decisions. The government should not subsidize this education, but instead leave it to parents who always are free to provide, at their own initiative and expense, whatever moral and religious training for their children they desire.

Finally, there is the important concern about avoiding religious divisiveness. As George Washington once warned, “[r]eligious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause.”¹²² No issue likely has greater potential for generating religious divisiveness than government support for religion in schools. This is why Justice Breyer’s dissent in the voucher case *Zelman*, joined by Justices John Paul Stevens and Souter, was prompted by his unease over the “religiously based social conflict” inherent when “government becomes involved in religious education,” even a “well-intentioned school voucher program.” Justice Breyer therefore concluded that the Establishment

122. George Washington, *From George Washington to Edward Newenham, 22 June 1772*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-10-02-0324> (last visited Mar. 19, 2017).

Clause required separation of church and state, not an “equal opportunity” approach to government aid, “at least where the heartland of religious belief, such as primary religious education, is at issue.”¹²³

VI. CONCLUSION

These two examples illustrate the heavy irony of the increasing acceptability in the United States of offensively forcing any taxpayer to provide financial support, however crafted or veiled, for the religious education of another’s children while silencing the voices of houses of worship in political campaigns ostensibly to avoid even the appearance of indirect, public subsidization of such speech. This paradoxical situation undoubtedly contributes to the growing emotionally charged atmosphere about the role of religion in education and in the public sphere more generally. This increasing discord is manifesting itself currently, and more broadly, in heated argument about matters such as those described in the Introduction.

The message of the two examples we have analysed is that one can appropriately deal with such conundrums, not with reflexive notions of religious liberty or separation of church and state, but only through careful, nuanced balancing of the compelling interests at stake on all sides. Though modest, this message sometimes seems in danger of being disregarded at our collective peril. As Justice Sandra Day O’Connor once wisely cautioned in a case invalidating courthouse display of the Ten Commandments: “At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. Why would we trade a system that has served us so well for one that has served others so poorly?”¹²⁴

123. *Zelman v. Simmons-Harris*, 536 U.S. 639, 722–23 (2002) (Breyer, Souter, Stevens, JJ., dissenting).

124. *McCreary Cty. v. ACLU*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring).