

**INTO THE “BREYER” PATCH:
RELIGIOUS DIVISION AND THE ESTABLISHMENT CLAUSE
DANIEL GORDON***

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I. INTRODUCTION: VIOLENCE AND RELIGION – SOME STORIES

[1] At the end of February and beginning of March in 2002, communal rioting spread across India.¹ During this time, a train carried twenty-five hundred Hindu nationalists was returning from Ayodhya², a site in northeast India, where these Hindu devotees were planning to build a temple.³ This temple was going to be built in place of a Muslim mosque they had

* Professor of Law, St. Thomas University School of Law, Miami, FL; B.A., Haverford College; J.D., Boston College.

¹ *Three More Killed as Gujarat Limpes Back to Normalcy*, REDIFF ON THE NET, at <http://www.rediff.com/news/2002/mar/05train2.htm> (Mar. 5, 2002).

² *Muslim Mob Sets Fire to India Train, 57 Die*, MUSLIM NEWS, available at <http://www.freelists.org/archives/news/02-2002/msg00034.html> (Feb. 27, 2002).

³ *Ayodhya: India’s Religious Flashpoint*, CNN.COM, at <http://edition.cnn.com/2002/WORLD/asiapcf/south/02/27/ayodhya.background/> (Feb. 28, 2002).

demolished in 1992.⁴ The demolition resulted in nationwide religious and communal rioting and claimed approximately three thousand lives.⁵ In retaliation, a Muslim mob set this train on fire.⁶ The fire killed fifty-seven Hindus, including fourteen children.⁷

[2] As a result, riots broke out on the night of February 27, 2002.⁸ The rioting continued for five days and killed 242 people.⁹ In one specific act of carnage, a mob of five thousand people killed approximately sixty-five Muslims.¹⁰ By the beginning of March, more than 260 Muslims and Hindus had died in the religious attacks.¹¹ By May 2002, more than 850 people, mostly Muslims, had died as a result of the February attacks on the train.¹² The State of Gujarat,

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Muslim Mob Sets Fire to India Train, 57 Die, supra* note 2.

⁸ *Three More Killed as Gujarat Limp Back to Normalcy, supra* note 1.

⁹ *Id.*

¹⁰ Radha Sharma & Sanjay Pandey, *Mob Burns to Death 65 at Naroda-Patia*, THE TIMES OF INDIA, available at http://www.timesofindia.com/articleshow.asp?art_ID=2473565 (Mar. 1, 2002).

¹¹ Pradeep Mallik & Ajit Sahi, *Carnage in Gujarat, Over 260 Lives Are Lost as Sectarian Violence Rages*, NEWS INDIA-TIMES, available at <http://newsindia-times.com/2002/03/08/special-guj-top.html> (Mar. 8, 2002).

¹² *Seven Killed in New Religious Violence in India*, at <http://www.netscape.dailynews.nets.5071047000284723&dpt=international> (May 7, 2002) (on file with the author, Daniel Gordon).

where the original February train attack occurred, served as a venue for frequent religious clashes between Hindus, Muslims, and Christians.¹³

[3] In a separate incident, in the United States, Mayor Carolyn Risher of Inglis, Florida issued a proclamation banishing Satan from her town.¹⁴ On Halloween night 2001, she banished Satan with the authority of Jesus, commanding all Satanic and demonic forces to cease their activities and depart the Town of Inglis.¹⁵ The proclamation was printed, signed by the town

¹³ *Muslim Mob Sets Fire to India Train*, 57 *Die*, *supra* note 2.

¹⁴ Alex Leary, *Mayor Banishes Satan From Inglis*, ST. PETERSBURG TIMES, available at http://www.sptimes.com/News/112901/Citrus/Mayor_banishes_Satan_.shtml (Nov. 29, 2001).

¹⁵ The proclamation stated:

Be it known from this day forward that Satan, ruler of darkness, giver of evil, destroyer of what is good and just is not now, nor ever again will be, a part of this town of Inglis. Satan is hereby declared powerless, no longer ruling over, nor influencing, our citizens.

In the past, Satan has caused division, animosity, hate, confusion, ungodly acts on our youth, and discord among our friends and loved ones. NO LONGER!

The body of Jesus Christ, those citizens cleansed by the Blood of the Lamb, hereby join together to bind the forces of evil in the Holy Name of Jesus. We have taken our town back for the Kingdom of God. We are taking everything back that the devil ever stole from us. We will never again be deceived by satanic and demonic forces.

As blood-bought children of God, we exercise our authority over the devil in Jesus' name. By that authority, and through His Blessed Name, we command all satanic and demonic forces to cease their activities and depart the town of Inglis.

As the Mayor of Inglis, duly elected by the citizens of this town, and appointed by God to this position of leadership, I proclaim victory over Satan, freedom for our citizens, and liberty to worship our Creator and Heavenly Father, the God of Israel. I take this action in accordance with the words of our Lord and Savior, Jesus Christ.

Id.

clerk, stamped with the official town seal, encased in posts and sunk into the ground.¹⁶ The public reaction was varied, but at least some citizens found the proclamation to be negative.¹⁷ At an online petition site, people registered their approval and disapproval.¹⁸ The mayor was accused of terrorism and of using her position to overpower people.¹⁹ Some people called her an “idiot,” and her message was characterized as being biased. She was accused of pinning the problems of the world on non-Christians.²⁰ Some participants expressed deep anti-Christian feelings.²¹

[4] Finally, a week before he addressed a Joint Session of the United States Congress about the September 11, 2001 attacks on the World Trade Center and the Pentagon,²² President George W. Bush spoke at the National Cathedral in Washington, D.C., as part of a church service on the National Day of Prayer and Remembrance.²³ In his remarks, the President stated,

¹⁶ *Id.*

¹⁷ Ted Olsen, *Weblog: While You're Waiting for Jesus, How About a Nice Cola?*, CHRISTIANITY TODAY, at <http://www.christianitytoday.com/ct/2001/149/12.0.html> (Dec. 3, 2001).

¹⁸ “*Is This America?*,” THE PETITIONSITE.COM, at [http://thepetitionsite.com/takeaction.867325785?ts=1-56214697&sign\[partnerID\]=1&sign\[memberID\]=861583653&sign\[partner_userID\]=861583653](http://thepetitionsite.com/takeaction.867325785?ts=1-56214697&sign[partnerID]=1&sign[memberID]=861583653&sign[partner_userID]=861583653) (last visited June 21, 2003).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² President George W. Bush, Address to a Joint Session of Congress and the American People, available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (Sept. 20, 2001).

²³ President George W. Bush, President's Remarks at National Day of Prayer and Remembrance, available at <http://www.whitehouse.gov/news/releases/2001/09/print/20010914-2.html> (Sept. 14, 2001).

“[w]e come before God to pray for the missing and the dead, and for those who love them.”²⁴

He described the suffering and loss of not only the victims of the attack but of the American nation as a whole. However, even at this somber moment, the President rallied the United States for war. He stated to the church audience, “War has been waged against us . . . This nation is peaceful, but fierce when stirred to anger. This conflict was begun on the timing and terms of others. It will end in a way . . . of our choosing.”²⁵ The President interspersed his comments about prayer and America’s need for God’s comfort with the declaration that America had a responsibility “to answer these attacks and rid the world of evil.”²⁶ Before ending his remarks, by asking God to comfort and guide Americans, the President noted, “Our unity is a kinship of grief, and a steadfast resolve to prevail against our enemies.”²⁷

[5] The Hindu-Muslim communal strife in India, the banishment of Satan by a Florida mayor, and President Bush’s remarks at the National Cathedral share some commonalities. All three evidence passionate human divisiveness, even anger and violence, in the context of religious practice and identity. The communal strife in India reflects long-lingering religious antagonism involving religious ritual and institutions. The Mayor’s anti-Satanic, pro-Christian proclamation resulted in deeply felt antagonism on the part of those who adhered to different religious views. The President interspersed prayer with a plea for God’s mercy to abate suffering with a call to war against an enemy that he later characterized to the United States Congress and

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

American people as “a fringe movement that perverts the peaceful teachings of Islam.”²⁸ All three examples highlight the connection between religion and discord, even violence and war.

[6] The examples also provide a broader backdrop to a debate about the nature of religion that has occurred during the last few years on the United States Supreme Court. That debate can be found in recent Establishment Clause cases, *Zelman v. Simmons-Harris*,²⁹ *Mitchell v. Helms*,³⁰ *Good News Club v. Milford Central School*,³¹ and *Santa Fe Independent School District v. Doe*.³² That debate focused on whether religion is, by its very nature, divisive and whether the Establishment Clause doctrine should be molded to protect against divisiveness. The debate remained a subtle, almost implicit one until Justice Breyer, in his dissent in *Zelman*, brought the issue of the social divisiveness of religion into the open.³³ This article will examine the Supreme Court debate by examining insights about origins of the violent nature of religion and the historical context of the Establishment Clause in reference to the divisive and violent nature of religion and suggesting how the Supreme Court should analyze Establishment Clause cases taking into consideration the relationship between religion and passionate human divisiveness.

II. THE SUBTLE AND IMPLICIT AND SOMETIMES NOT SO SUBTLE AND EXPLICIT, DEBATE ON THE SUPREME COURT

²⁸ President George W. Bush, *supra* note 22.

²⁹ 536 U.S. 639 (2002).

³⁰ 530 U.S. 793 (2000).

³¹ 533 U.S. 98 (2001).

³² 530 U.S. 290 (2000).

³³ *Zelman v. Simmons-Harris*, 536 U.S. 639, 719 (2002) (Breyer, J., dissenting).

[7] Four cases evidence the debate in the United States Supreme Court about whether religion is socially divisive and whether the impact, or lack of impact, of that divisiveness on American society should shape Establishment Clause doctrine.³⁴ All four cases have been decided since 2000, and all four cases involved religion in the context of public or parochial education. The divisiveness debate constituted a subtext in all of the cases, even a minor subtext in some of the cases. However, in 2002 the debate surfaced as a major subtext potentially critical to future Establishment Clause doctrinal analysis.

A. The Four Cases: Issues and Doctrines

[8] *Mitchell v. Helms*³⁵ involved the application of a federal school aid program known as “Chapter 2,”³⁶ in which the Federal Government allocates funds to state and local governments that use the funds to purchase educational materials and equipment to be loaned to private and public schools within state and local jurisdictions.³⁷ Individuals challenged the application of Chapter 2 in Jefferson Parish, Louisiana by bringing an action in the United States District Court for the Eastern District of Louisiana.³⁸ This action challenged the Jefferson Parish, Chapter 2 lending program as a violation of the Establishment Clause.³⁹ Jefferson Parish lent, “library

³⁴ U.S. CONST. amend I. The First Amendment provides in pertinent part, that “Congress shall make no law respecting an establishment of religion” *Id.*

³⁵ 530 U.S. 793 (2000).

³⁶ The Education Consolidation and Improvement Act of 1981, (codified as amended at 20 U.S.C. §§ 7301-7373 (2002)).

³⁷ *Id.*

³⁸ *Mitchell v. Helms*, 530 U.S. 793, 803-4 (2000).

³⁹ *Id.*

books, computers, . . . computer software, . . . slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, film strips, slides and cassette recordings" to forty-six private schools of which forty-one were religiously affiliated, mostly Catholic, schools.⁴⁰

[9] The District Court upheld the lending program to the religious schools, holding that it did not violate the Establishment Clause.⁴¹ The Fifth Circuit Court of Appeals reversed.⁴² The United States Supreme Court, in turn, reversed the Court of Appeals.⁴³ Justice Thomas, writing for the Court, held that Chapter 2 was "not a 'law respecting the establishment of religion'",⁴⁴ finding that Chapter 2 did not result in governmental religious indoctrination, because Chapter 2 "determine[d] eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content."⁴⁵ Justice Thomas relied heavily on *Agostini v. Felton*⁴⁶ to find that the Jefferson Parish program made aid available to a broad array of schools disregarding religious affiliation or the lack thereof.⁴⁷ In

⁴⁰ *Id.* at 803. In 1990, Chief Judge Heebe of the District Court did grant summary judgment to the respondents. After Judge Heebe's retirement, however, Judge Livandais received the case and reversed the decision of the former Chief Justice. *Id.*

⁴¹ *Id.* at 804.

⁴² *Id.* at 807.

⁴³ *Mitchell v. Helms*, 530 U.S. 793, 836 (2000).

⁴⁴ *Id.* at 808.

⁴⁵ *Id.* at 829.

⁴⁶ 521 U.S. 203 (1997).

⁴⁷ *Mitchell*, 530 U.S. at 830.

addition, parents, through their choice of school, determined who received aid under a per capita allocation scheme.⁴⁸ The neutrality of the Jefferson Parish program was a critical factor for Justice Thomas who wrote, “[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”⁴⁹

[10] Two years after deciding *Mitchell*, the United States Supreme Court in *Zelman v. Simmons-Harris*⁵⁰ found that a Cleveland, Ohio voucher program that allowed parents to pay for parochial schools did not violate the Establishment Clause.⁵¹ At issue in *Zelman* was Ohio’s enactment of a pilot project scholarship system⁵² that provided financial assistance to families in specified school districts demonstrating high levels of educational failure.⁵³ The scholarship program provided tuition aid to parents who wished to send their children to participating schools outside of the school district.⁵⁴ For parents who chose a private school, public funds checks were made payable to the parents who endorsed the checks to the chosen school.⁵⁵ Individuals challenged the program in Federal Court as a violation of the Establishment Clause,⁵⁶

⁴⁸ *Id.*

⁴⁹ *Id.* at 809.

⁵⁰ 536 U.S. 639 (2002).

⁵¹ *Id.* at 644.

⁵² OHIO REV. CODE ANN. §§ 3313.974-.979 (Anderson 1999 & Supp. 2000).

⁵³ *Id.*

⁵⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002).

⁵⁵ *Id.* at 646.

⁵⁶ *Id.* at 648.

as 82% of the participating private schools in 1999-2000 had religious affiliations and 96% of students utilizing the vouchers enrolled in religiously affiliated schools.⁵⁷ The District Court enjoined the voucher program and the Circuit Court of Appeals affirmed.⁵⁸ The Supreme Court reversed,⁵⁹ holding in an opinion written by Chief Justice Rehnquist, that the voucher program did not offend the Establishment Clause.⁶⁰ Chief Justice Rehnquist found that the voucher program was one of “true private choice.”⁶¹ In *Zelman*, Rehnquist took a tack similar to the one taken by Justice Thomas in *Helms*, focusing on the neutrality of the governmental program.⁶² Rehnquist noted that: “[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government.”⁶³ Rehnquist observed that the Ohio program did not give financial incentives for parents to choose religious schools, because private schools received only half the government assistance given to governmentally sponsored community schools.⁶⁴ The voucher program was narrowly tailored to assist poor children and not to assist religious schools.⁶⁵ The

⁵⁷ *Id.* at 647.

⁵⁸ *Id.* at 648.

⁵⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 663 (2002).

⁶⁰ *Id.* at 643.

⁶¹ *Id.* at 653.

⁶² *Id.* at 652.

⁶³ *Id.*

⁶⁴ *Id.* at 654.

⁶⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

fact that most parents chose religious schools remained irrelevant to an Establishment Clause analysis because the aid program was itself neutral.⁶⁶

[11] In *Good News Club v. Milford Central School*,⁶⁷ the Supreme Court considered whether a school district could exclude a religious club from using school district property.⁶⁸ A New York statute had allowed school boards to open their schools for public use,⁶⁹ including educational and social purposes.⁷⁰ The Milford School District promulgated a school-community-use-policy that prohibited use of schools by individuals or organizations for religious purposes. The Good News Club, a Christian children's organization, was denied permission to use a school cafeteria for after school meetings involving Bible lessons.⁷¹ The Good News Club brought an action in Federal Court alleging violation of free speech and equal protection rights.⁷² The District Court found for the school district and the Second Circuit Court of Appeals affirmed.⁷³ The Supreme Court reversed.⁷⁴ Justice Thomas, writing for the Court, held that the exclusion of the Good News Club by the school district constituted viewpoint discrimination.⁷⁵

⁶⁶ *Id.* at 657.

⁶⁷ 533 U.S. 98 (2001).

⁶⁸ *Id.*

⁶⁹ N.Y. EDUC. LAW §414 (McKinney 2000).

⁷⁰ *Good News Club v. Milford Sch. Dist.*, 533 U.S. 98, 102 (2001).

⁷¹ *Id.* at 103.

⁷² *Id.* at 104.

⁷³ *Id.* at 104-5.

⁷⁴ *Id.* at 120.

⁷⁵ *Id.* at 107.

Justice Thomas characterized religious teachings of the club as the teaching of morals and character from a specific vantage point. He noted, “[w]hat matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism.”⁷⁶ Justice Thomas proceeded to dismiss the school district’s Establishment Clause defense.⁷⁷ Like in *Mitchell* and later in *Zelman*, the Court in *Good News Club* focused on neutrality.⁷⁸ Thomas wrote, “The Good News Club seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups.”⁷⁹ Also, like in *Mitchell* and in *Zelman*, the Court focused on who chose the religious message distinguishing between governmental and private choices.⁸⁰ Justice Thomas observed that since parents chose whether children attended club meetings and since no child could attend without parental consent,⁸¹ no one coerced children into participating.⁸² No endorsement of religion existed just because the club used the school facilities after hours, and little danger existed that children attending club meetings at the school would misperceive an endorsement of religion by the school district.⁸³

⁷⁶ *Good News Club. v. Milford Sch. Dist.*, 533 U.S. 98, 111 (2001).

⁷⁷ *Id.* at 113.

⁷⁸ *Id.* at 114.

⁷⁹ *Id.*

⁸⁰ *Id.* at 115.

⁸¹ *Id.*

⁸² *Good News Club, Milford Sch. Dist.*, 533 U.S. 98, 115 (2001).

⁸³ *Id.* at 118.

[12] *Santa Fe Independent School District v. Doe*⁸⁴ serves as the exception to the four Supreme Court cases. The Santa Fe Independent School District enacted a policy, “Prayer at Football Games,” which authorized two student elections to determine whether invocations should be delivered at football games and then next to select a student spokesperson to deliver the invocations.⁸⁵ Parents and students brought an action in Federal Court to challenge the football game prayer policy and other policies as violations of the Establishment Clause.⁸⁶ The District Court enjoined a number of school district prayer policies but allowed some to stand.⁸⁷ The Court of Appeals struck down all of the policies including the football prayer policy.⁸⁸ The United States Supreme Court affirmed, finding that the football prayer policy was invalid on its face because the policy established an improper election on religion, which created the perception of the school district encouraging the delivery of prayer at important school events.⁸⁹ The Court held that the school district’s decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violated the Establishment Clause.⁹⁰ Justice Stevens, writing for the Court, found that though attendance at football games was voluntary, delivery of a pre-game prayer coerced attendees to participate in an act of

⁸⁴ 530 U.S. 290 (2000).

⁸⁵ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 297-98 (2000).

⁸⁶ *Id.* at 294-95.

⁸⁷ *Id.* at 294.

⁸⁸ *Id.* at 299.

⁸⁹ *Id.* at 317.

⁹⁰ *Id.* at 317.

religious worship.⁹¹ The price of attending a school event, the Court noted, should not be religious conformity.⁹²

[13] All four cases contour Establishment Clause doctrine in the educational context. Vouchers and equipment loans paid by governmental funds remain acceptable so long as program criteria remain neutral, thereby allowing parent's private autonomy to choose religious education over public education. School property must remain open after school to everyone, including those with a religious message, when a school district decides to open its property to some. Again, parental control matters. So long as children are not coerced into attending religious events, the Establishment Clause is not violated. However, once religious coercion by school officials occurs, the Establishment Clause is violated. Forcing students to choose between attending a school sponsored activity and praying constitutes such coercion. While the Court, in the four cases, focused on neutrality, autonomy, and coercion, another subtext ran throughout the court's decisions: religion not only could be coercive for nonbelievers but could also be divisive and disruptive in American society.

B. Moving Into the Breyer Patch: Debating Divisiveness

[14] During 2000 and 2001, the Supreme Court implicitly and subtly debated whether religion was divisive to American politics and society, and also whether any such divisiveness is relevant to Establishment Clause doctrine. Justices Stevens and Souter expressed concern about the divisive nature of religion, while Justices Thomas and Scalia showed less sensitivity to the impact of religion as a social antagonist on American society. Justice Stevens focused narrowly on the impact of religion in the public schools. In *Santa Fe*, Justice Stevens noted that prayer at

⁹¹ *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000).

⁹² *Id.* at 312.

a public school event and a mechanism utilized by a public school to facilitate prayer at a school “encourages divisiveness along religious lines in a public school setting.”⁹³ Religious recruiting at public school, according to Justice Stevens, would separate children into cliques and undermine the public school’s mission.⁹⁴ Justice Stevens seemed to imply that public schools functioned to homogenize children socially and that social peace remained essential to the educational mission of public schools. However, Justice Stevens also worried that division along religious lines at public schools could lead to coercion.⁹⁵

[15] Justice Souter focused on two aspects of religious divisiveness. First, religion threatened the political unity of society when less favored religions became implicitly excluded, and the public support for religious causes created antagonism and controversy.⁹⁶ Souter clearly noted that “government establishment of religion is inextricably linked with [political and social] conflict.”⁹⁷ Souter suggested that the political divisiveness of government-supported religion may not be an analytical consideration in Establishment Clause cases, but he also felt that concern about religious divisiveness remained a motivating concern underlying the Establishment Clause as the Framers of the Constitution were influenced by sectarian conflict.⁹⁸

⁹³ *Id.* at 311.

⁹⁴ *Good News Club v. Milford Sch. Dist.*, 533 U.S. 98, 131-32 (2001) (Stevens, J., dissenting).

⁹⁵ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317.

⁹⁶ *Mitchell v. Helms*, 530 U.S. 793, 868 (2000) (Souter, J., dissenting).

⁹⁷ *Id.* at 872 (Souter, J., dissenting).

⁹⁸ *Id.* at 872, n.2 (Souter, J., dissenting).

[16] Souter pointed to past Supreme Court decisions that were sensitive to religious divisiveness,⁹⁹ including *Everson v. Board of Education*,¹⁰⁰ *McCullum v. Board of Education*,¹⁰¹ and *Engel v. Vitale*.¹⁰² Those cases outlined a general sense of history about religious antagonism. The *Everson* Court implied that America's early settlers remained sensitive to and aware of "turmoil, civil strife, and persecutions, generated in large part by established sects."¹⁰³ In early America, the government-supported Catholics persecuted Protestants, who in turn persecuted Catholics, while different Protestant sects persecuted each other. Everyone persecuted the Jews.¹⁰⁴ Justice Frankfurter's opinion in *McCullum* expressed concern that the preservation of a community from divisive conflicts required that public school instruction be limited to non-religious topics.¹⁰⁵ Frankfurter believed that the preservation of social peace required that indoctrination in faith remain at home or at church,¹⁰⁶ since public schools were powerful public agencies "promoting cohesion among a heterogeneous democratic people."¹⁰⁷ Those public schools needed to avoid entanglement with "the strife of sects."¹⁰⁸ The *Engel*

⁹⁹ *Id.* (Souter, J., dissenting).

¹⁰⁰ 330 U.S. 1 (1947).

¹⁰¹ 333 U.S. 203 (1948).

¹⁰² 370 U.S. 421 (1962).

¹⁰³ *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring).

¹⁰⁶ *Id.* at 216-17 (Frankfurter, J., concurring).

¹⁰⁷ *Id.* at 216 (Frankfurter, J., concurring).

¹⁰⁸ *Id.* at 217 (Frankfurter, J., concurring).

Court asserted that Americans at the time of the adoption of the Constitution “knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government’s stamp of approval from each King, Queen, or Protector that came to temporary power.”¹⁰⁹ Souter seemed to imply by his citations to *Everson*, *McCullum* and *Engel* that religion and strife were wedded to each other, and that early American society reflected a generalized concern about the natural relationship between religion and sectarian strife.

[17] Justices Scalia and Thomas evidenced much less concern about the impact of religious strife on American society. Each took a different approach to the issue of religious divisiveness. Justice Thomas conceptualized religious strife and its impact narrowly, as “political divisiveness.”¹¹⁰ He then dismissed this concern as one rightly disregarded by the Supreme Court after *Aguilar v. Felton*.¹¹¹ According to Thomas, concerns about religious divisiveness are speculative.¹¹² Justice Scalia implicitly agreed with Justice Thomas when referring to *Lynch v. Donnelly*¹¹³ for the proposition that concerns about “political divisiveness” could not be used to hinder religious expression and symbolism.¹¹⁴ However, Justice Scalia took a different approach

¹⁰⁹ *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

¹¹⁰ *Mitchell v. Helms*, 530 U.S. 793, 825 (2000).

¹¹¹ *Id.*; *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that the use of public employees, paid with tax dollars, in religious schools to provide educational and support services violates the Establishment Clause as an excessive entanglement of church and state).

¹¹² *Mitchell*, 530 U.S. at 825-26.

¹¹³ 465 U.S. 668 (1984).

¹¹⁴ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 126 (2001) (Scalia, J., concurring).

from that of Justice Thomas. Instead of dismissing religious divisiveness as speculative, unimportant, and irrelevant, Justice Scalia welcomed it. He saw value in religious divisiveness when he sarcastically wrote, “even if, as Justice Stevens fears, without support in the record . . . its actions may prove (shudder!) divisive.”¹¹⁵ Scalia referred to the actions of the after school religious club as proselytizing, and seemed to imply that such divisive behavior had positive aspects.

[18] In 2000 and 2001, Justices Stevens, Souter, Scalia and Thomas vaguely and implicitly debated whether religion was divisive and whether it mattered to Establishment Clause analysis. Divisiveness tended to be narrowly conceptualized in school and in the political system. Souter only implied something broader about the importance and potency of religious divisiveness when he cited to *Everson*, *McCullum*, and *Vitale*. In 2002, in *Zelman v. Simmons-Harris*,¹¹⁶ the debate changed and became explicit, broader, and sharper. Even though *Zelman* involved religion in the context of education, Justice Stevens shifted his concern from religion creating student cliques and student disunity in the context of schools,¹¹⁷ to religion serving as a trigger for broader societal violence and as a force in American history. He wrote, “I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another.”¹¹⁸ Presumably, he named the Balkans, Northern Ireland and the

¹¹⁵ *Id.* (Scalia, J., concurring).

¹¹⁶ 536 U.S. 639 (2002).

¹¹⁷ *Good News Club*, 533 U.S. at 131-32 (Souter, J., dissenting).

¹¹⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

Middle East to highlight the danger of violence resulting from religious disagreement.¹¹⁹ Justice Stevens ominously warned, “[w]hen we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife.”¹²⁰

[19] In *Zelman*, Justice Souter first focused on what he called “the scramble for money” among religious groups.¹²¹ For him, sectarian competition for public resources will tap sectarian capacity for discord.¹²² However, the scramble for money will do more than just leave some people angry about public priorities and receiving less than someone else. Fiscal competition will draw religious groups into intense public opposition over religious social positions such as the Catholic attitude toward the death penalty, the Jewish endorsement of religious Zionism, and Muslim views of differential treatment of the sexes. For Souter, the American political system stood threatened by religious disagreement that failed to remain moderate.¹²³ Souter found that religious divisiveness is an “expectable friction,”¹²⁴ which implied that religion and friction are natural companions, especially when public monies are involved.

[20] Though Justices Souter and Stevens became more explicit and urgent in their focus on religious strife, they both deferred to Justice Breyer to explain more fully why religious strife must be an important consideration in Establishment Clause doctrine. In Justice Stevens’ dissent

¹¹⁹ See generally MARK JUERGENSMEYER, *THE NEW COLD WAR: RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE* (1993).

¹²⁰ *Zelman*, 536 U.S. at 638 (Stevens, J., dissenting).

¹²¹ *Id.* at 715 (Souter, J., dissenting).

¹²² *Id.* (Souter, J., dissenting).

¹²³ *Id.* (Souter, J., dissenting).

¹²⁴ *Id.* (Souter, J., dissenting).

he referred to Justice Souter's and Breyer's dissents in *Zelman*,¹²⁵ while in Justice Souter's dissent he stated explicitly that Justice Breyer had addressed the religious strife issue in his dissenting opinion.¹²⁶ Both Souter and Stevens joined Breyer in his dissent, devoted solely to the issue of what Breyer characterized as "religiously based social conflict." Breyer asserted that the Framers of the Constitution intended that the Establishment and Free Exercise Clauses included the objective of an America free of religious strife.¹²⁷ For Breyer, the Establishment Clause protected the nation's social fabric and social concord.¹²⁸ Like Justice Stevens,¹²⁹ Justice Breyer implicitly and indirectly recognized a relationship between religion and violence when he discussed anti-Catholic beatings and expulsions in American history.¹³⁰

[21] Justice Breyer alluded to the mindset of early Americans at the time of the adoption of the Constitution and the Bill of Rights. Those early Americans adopted the Establishment and Free Exercise Clauses to protect against a repeat of decades of religious war. Justice Breyer failed to clarify where and in what decades that war occurred, though he did mention, "an American Nation free of the religious strife that had long plagued the nations of Europe."¹³¹ The crux of Breyer's thinking about the prevention of religious strife in America involved a historical distinction. Breyer implicitly conceded that in early American society, presumably at the time of

¹²⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639, 685 (2002) (Stevens, J., dissenting).

¹²⁶ *Id.* at 657 (Souter, J., dissenting).

¹²⁷ *Id.* at 658 (Breyer, J., dissenting).

¹²⁸ *Id.* at 728-29 (Breyer, J., dissenting).

¹²⁹ *Id.* at 685 (Stevens, J., dissenting).

¹³⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting).

¹³¹ *Id.* at 718 (Breyer, J., dissenting).

the adoption of the Constitution and Bill of Rights, there existed, “a less clear-cut church/state separation compatible with social tranquility.”¹³² Breyer noted that early American school students recited Protestant prayers and learned Protestant religious ideals, all without any particular violent breakdown of American society.¹³³ Breyer distinguished early American society from the more modern twentieth century by cataloguing the growth of religious diversity in America through waves of immigration.¹³⁴ The potential for religious strife has increased as America has grown “exponentially more diverse.”¹³⁵

[22] Like Justice Souter,¹³⁶ Justice Breyer pointed to a twentieth century Supreme Court concern about religious divisiveness in the context of Establishment Clause doctrine.¹³⁷ Breyer explicitly read the twentieth century cases as decided by the Supreme Court, with the full awareness that American society had since diversified dramatically.¹³⁸ For Breyer, the diversity of modern American religion made providing every religion with an equal opportunity to utilize public monies an impossibility¹³⁹ because government would be pulled into fundamental theological and religious disputes between religions with no way to resolve the disagreements.¹⁴⁰

¹³² *Id.* at 720 (Breyer, J., dissenting).

¹³³ *Id.* (Breyer, J., dissenting).

¹³⁴ *Id.* at 720-21 (Breyer, J., dissenting).

¹³⁵ *Zelman v. Simmons-Harris*, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting).

¹³⁶ *Mitchell v. Helms*, 530 U.S. 793, 872 (2000) (Souter, J., dissenting).

¹³⁷ *Zelman*, 536 at 718 (Breyer, J., dissenting).

¹³⁸ *Id.* at 718-19 (Breyer, J., dissenting).

¹³⁹ *Id.* at 722 (Breyer, J., dissenting).

¹⁴⁰ *Id.* at 724 (Breyer, J., dissenting).

Breyer's only solution to the intractable divisiveness of religion involved "drawing fairly clear lines of separation between church and state."¹⁴¹ Any other resolution risked "creating a form of religiously based conflict potentially harmful to the Nation's social fabric."¹⁴²

[23] Chief Justice Rehnquist, writing for the majority in *Zelman*,¹⁴³ reacted negatively to Justice Breyer's explicit and in depth focus on religious divisiveness and its impact on Establishment Clause doctrine and analysis. Chief Justice Rehnquist accused Justice Breyer of raising an illusory and invisible specter of religious divisiveness and strife. Rehnquist could identify no strife created by the Cleveland, Ohio voucher program other than the current litigation. In addition, the Chief Justice could not conceive of how the concept of divisiveness fit into an Establishment Clause analysis. Chief Justice Rehnquist noted that the Supreme Court had rejected the argument that the speculative potential for divisiveness had any bearing on the constitutionality of educational programs that benefited religious schools.¹⁴⁴

[24] *Zelman* showed that religious divisiveness and strife remained a contentious topic on the Supreme Court. Justice Breyer exposed religious strife as an arguably major factor in Establishment Clause and Free Exercise doctrines. Breyer made a vague connection with early American history much like Souter had done more implicitly with his citations to earlier twentieth century Establishment Clause cases. Breyer again vaguely referred to the mindset of

¹⁴¹ *Id.* at 723 (Breyer, J., dissenting).

¹⁴² *Zelman v. Simmons-Harris*, 536 U.S. 639, 728-29 (2002) (Breyer, J., dissenting).

¹⁴³ *Id.* at 643-63.

¹⁴⁴ *Id.* at 662, n.7.

the Framers of the Constitution.¹⁴⁵ Justice Breyer added a modernist dimension to the discourse by referring to the religious diversification of America through immigration and the need for modern Establishment Clause and Free Exercise doctrines to take that sociological phenomenon into consideration. Breyer and Stevens implied that religion and violence somehow became entwined. Chief Justice Rehnquist, Justice Thomas, and Justice Scalia disagreed completely with Justices Breyer, Stevens, and Souter. They also disagreed among themselves. Rehnquist and Thomas denied that religious strife was anything more than a speculative problem, while Scalia welcomed religious divisiveness as somehow healthy to the education of children. Nowhere did the Supreme Court really focus extensively on both the nature of religion as a trigger for dissension and violence and on early American history as an escape from religious violence.

III. THE NATURE OF RELIGION AND THE RESPONSE TO THAT NATURE BY THE FRAMERS

[25] The Supreme Court remains divided and confused about how religions divisiveness should fit into Establishment Clause doctrine. Three justices believe religious divisiveness should be a factor in analyzing Establishment Clause problems, though they are not clear in how divisiveness should fit into the analysis. Not even Justice Breyer's lengthy dissent in *Zelman* is clear about what impact religious strife should make. The other three Justices favor avoiding religious strife as a factor in the analysis, either because religious divisiveness fails as a tangible problem, or because religious divisiveness might be a positive force. In the debate, mostly implicit but sometimes explicit, during 2000 through 2002, the Court failed to focus clearly on

¹⁴⁵ Mitchell v. Helms, 530 U.S. 793, 872 (2000).

the nature of religion and how that nature fit into American history especially in the years prior to the framing of the Constitution.

A. The Nature of Religion: Cosmic War, Violence, and Strife

[26] The Supreme Court has failed to recognize the people's need for God as well as a way to relate to God. Religion has existed since early human history,¹⁴⁶ and it constituted the first social form to exist in human society.¹⁴⁷ In fact, one hundred thousand religions have existed over the course of human history.¹⁴⁸ The United States serves as a prime example of how religion is a basic human institution and societal force. In *Zelman*, Justice Breyer described the modern diversity of American religion,¹⁴⁹ though he ascribed much of that diversity to immigration.¹⁵⁰ Justice Breyer neglected to address, however, that in the United States there exist over one hundred eighty Christian churches and sects,¹⁵¹ in addition to the Jews, Muslims, Buddhists, and Sikhs that he did mention. This is a much greater number than the fifty-five major religious groups and subgroups discussed by Justice Breyer.¹⁵² In addition, the Supreme

¹⁴⁶ RODNEY STARK & WILLIAM SIMS BAINBRIDGE, *A THEORY OF RELIGION* 25 (1987).

¹⁴⁷ *Id.* at 94.

¹⁴⁸ *Id.* at 155.

¹⁴⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting).

¹⁵⁰ *Id.* at 720 (Breyer, J., dissenting).

¹⁵¹ *YEARBOOK OF AMERICAN AND CANADIAN CHURCHES*, 52-164 (1998).

¹⁵² *Zelman*, 536 U.S. at 723 (Breyer, J., dissenting).

Court, including Justice Breyer, overlooked how American society has served as a fertile birth place of new religions.¹⁵³

[27] God and religion are basic elements of human life because humans possess an irrepressible desire to ask “why.”¹⁵⁴ Humans seek to increase their rewards or the value of their lives, while at the same time they seek to minimize their costs or what they have to give up in life.¹⁵⁵ Humans, by nature, are limited in what they can know and achieve. The best example of human limitation is death; the inability to extend life for as long as people choose. All of humanity is deprived of the reward of immortality and everyone faces the cost of death. Limitations are the existential condition of humanity.¹⁵⁶ Religion exists as a means to relieve people of spiritual and moral anxiety in a universe where humans may sense freedom while they sense their own limitations.¹⁵⁷ Religion serves as a compensator, creating generalized and unverifiable rewards in the future for what humans cannot possess or create by and for themselves.¹⁵⁸

[28] Moreover, religion concerns itself with the meaning of the universe.¹⁵⁹ It allows humans to “make rational a variety of things that otherwise would be irrational.”¹⁶⁰ People use

¹⁵³ HAROLD BLOOM, *THE AMERICAN RELIGION, THE EMERGENCE OF THE POST-CHRISTIAN NATION* 77-188 (1992).

¹⁵⁴ STARK & BAINBRIDGE, *supra* note 146, at 37.

¹⁵⁵ *Id.* at 27.

¹⁵⁶ *Id.* at 52.

¹⁵⁷ William P. Marshall, *The Other Side of Religion*, 44 *HASTING L. J.* 843, 852 (1993).

¹⁵⁸ BLOOM, *supra* note 153, at 257-258.

¹⁵⁹ *Id.* at 40-41.

their relationship with God as a way to bring rationality to their lives by attempting to satisfy needs that cannot always be satisfied by means within their own control.¹⁶¹ Religion allows people to understand the human role in their cosmos, and to resist the idea that human existence is random or incomprehensible.¹⁶²

[29] People need God and religion.¹⁶³ Religion will continue to exist “so long as humans desire rewards they cannot have and pursue lines of action guided by anything less than complete knowledge.”¹⁶⁴ Religion is compelling for humans as a way to overcome the chaos of existence that faces all people.¹⁶⁵ The function of religion, in helping people overcome the chaos, creates the ever-present potential for religious violence, strife, and divisiveness. Religion fights wars for the primacy of order over chaos, fighting even against the chaos of inevitable human death. Usually, religion utilizes warfare ritualistically, making violence a purely symbolic cosmic

¹⁶⁰ *Id.* at 85.

¹⁶¹ *Id.* at 84-85.

¹⁶² Marshall, *supra* note 157, at 853-54.

¹⁶³ The deep human need for God, religiosity and religion is evidenced by the longevity of the concept of God and the institutions of religion in human history. This is seen even in early human history. *See* THOMAS CAHILL, *THE GIFT OF THE JEWS: HOW A TRIBE OF DESERT NOMADS CHANGED THE WAY EVERYONE THINKS AND FEELS* 16-17, 20-41, 44-48 (1998). God, religion and religiosity continue to exist in the face of science, technology, and the modern city. *See generally* PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (1990). It is clear that this author understands the need for God, as he indicates that he could not imagine being without the presence of God and the existence of religious practices. *Id.*

¹⁶⁴ STARK & BAINBRIDGE, *supra* note 146, at 279.

¹⁶⁵ Marshall, *supra* note 157, at 855-57.

struggle.¹⁶⁶ One of the main functions of religion is to create the vicarious experience of warfare.¹⁶⁷ The most basic means for people to overcome the universal chaos is to classify or characterize by way of a good and evil dichotomy. Effective and meaningful religion, by its very nature, emphasizes the distinction between good and evil.¹⁶⁸ The confrontation of good and evil within religious worldviews is not idiosyncratic.¹⁶⁹ Religions fix labels, often negative, on the confusion and disorder of the world.¹⁷⁰

[30] Symbolic and ritualistic violence, pitting chaos against order and good against evil, are important aspects of effective and meaningful religion. Unfortunately, the line between symbolic and actual violence remains a thin one.¹⁷¹ The potential for violence always exists, especially when religion becomes entwined with political, social, and ideological circumstances.¹⁷² Violence and religious strife can erupt when the imagined cosmic war between order and chaos, and good and evil becomes understood as occurring in the human world rather than in a mythical context, and people personalize their political and social

¹⁶⁶ MARK JUERGENSMEYER, TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE 155-60 (2000).

¹⁶⁷ *Id.* at 156.

¹⁶⁸ STARK & BAINBRIDGE, *supra* note 146, at 112-16.

¹⁶⁹ JUERGENSMEYER, *supra* note 166, at 150.

¹⁷⁰ GILLES KEPEL, THE REVENGE OF GOD: THE RESURGENCE OF ISLAM, CHRISTIANITY AND JUDAISM IN THE MODERN WORLD 191 (1994).

¹⁷¹ JUERGENSMEYER, *supra* note 166, at 160.

¹⁷² *Id.* at 10.

circumstances as part of cosmic struggles.¹⁷³ God and religion therefore can serve as generalized compensators for what is beyond human control and knowledge. Unfortunately, much of day-to-day life, including social forces surrounding people, remains beyond the control and understanding of people. For instance, modern social change makes people feel powerless, whereas religion provides an answer to a world that seems adrift.¹⁷⁴ It is not then surprising that religion thrives during times of social breakdown and reorganization.¹⁷⁵ For example, a correlation exists between urbanization and industrialization and the rise of fundamentalist religious movements.¹⁷⁶ Images of divine warfare remain “persistent features of religious activism.”¹⁷⁷ For people faced with uncontrollable social change that they perceive as weakening them, especially in terms of prestige,¹⁷⁸ religion and religious activism provide a weapon of cosmic war transformed into real, tangible religious strife and violence.¹⁷⁹

[31] Justice Breyer and other members of the Supreme Court either vaguely recognized or refused to recognize the inherent and inescapable potential for religious violence and strife.¹⁸⁰

¹⁷³ *Id.* at 160-63. Cosmic war involves a conflict beyond the human existence, in the realm of God, or the gods, in which the forces of good and evil battle. *Id.*

¹⁷⁴ KEPEL, *supra* note 170, at 47-48.

¹⁷⁵ *Id.* at 193.

¹⁷⁶ MARTIN REISEBRODT, *PIOUS PASSION: THE EMERGENCE OF MODERN FUNDAMENTALISM IN THE UNITED STATES AND IRAN* 17, 93-94 (1993).

¹⁷⁷ JUERGENSMEYER, *supra* note 166, at 146.

¹⁷⁸ REISEBRODT, *supra* note 176, at 96.

¹⁷⁹ JUERGENSMEYER, *supra* note 166, at 182-86.

¹⁸⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting); *See supra* notes 78-98 and accompanying text.

The religious composition of United States is made up mostly by Christians with Jewish, Muslim and other non-Christian minorities.¹⁸¹ The Supreme Court avoided focusing on the traditional violent nature of Christianity, Judaism, and Islam, which fit well into the model of religion as constituting, at least in part, cosmic warfare. The Torah, in Judaism, includes of imagery of holy war,¹⁸² while Christianity, despite its central tenets of love and peace, “has always had a violent side.”¹⁸³ The concept of Christian soldiering developed early in Christian tradition, and by the Fourth Century, it involved actual military conflict.¹⁸⁴ The concept of “jihad,” on the other hand, remains basic to Islam.¹⁸⁵ Christianity, Judaism, and Islam imported into America, the religious cosmic war ideation, and as the introduction to this article demonstrates, that ideation results in tangible religious violence, symbolism and strife. President George W. Bush utilized a Washington, D.C. pulpit to assure the world that America would take revenge for the September 11, 2001 attacks,¹⁸⁶ while at the same time, a Florida mayor attempted to exorcise the forces of chaos from her town by banning Satan and thereby evoking some bitter public reactions.¹⁸⁷ Unfortunately, American religious cosmic war fails to restrict itself to the symbolic as evidenced by the Davidians in Waco,¹⁸⁸ abortion clinic bombings,¹⁸⁹ and Christian Identity attacks.¹⁹⁰

¹⁸¹ YEARBOOK, *supra* note 151.

¹⁸² JAMES TURNER JOHNSON, THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS 34 (1997).

¹⁸³ JUERGENSMEYER, *supra* note 166, at 19.

¹⁸⁴ JOHNSON, *supra* note 182, at 40.

¹⁸⁵ *Id.* at 35.

¹⁸⁶ *See supra* notes 15-19 and accompanying text.

¹⁸⁷ *See supra* notes 10-14 and accompanying text.

Cosmic war violence is not limited to far away places like India.¹⁹¹ Instead, religious violence possesses a place in the American political and social landscape, although the Framers of the Constitution intended otherwise.

B. American Constitutional Roots: A Land of Peace

[32] The American Revolution served as “the last great war of religion in the western world,”¹⁹² and constituted “at its ideological heart a war of religion.”¹⁹³ The American Revolution ended a series of wars that erupted after the Protestant Reformation including, religious wars in France, the Dutch Revolution, the Thirty Years War, and the English Puritan Revolution.¹⁹⁴ Post Reformation warfare resulted in devastation, especially in Northern Europe and after the Thirty-Years War.¹⁹⁵ European religious warfare tended to be ferocious.¹⁹⁶ The

¹⁸⁸ JOHN R. HALL, PHILIP D. SCHNYLER & SYLVAIN TRINH, APOCALYPSE OBSERVED, RELIGIOUS MOVEMENTS AND VIOLENCE IN NORTH AMERICA, EUROPE, AND JAPAN 44-75 (2000).

¹⁸⁹ JUERGENSMEYER, *supra* note 166, at 20-30.

¹⁹⁰ *Id.* at 30-36.

¹⁹¹ *See supra* notes 1-9 and accompanying text.

¹⁹² J.C.D. CLARK, THE LANGUAGE OF LIBERTY 1660-1832, POLITICAL DISCOURSE AND SOCIAL DYNAMICS IN THE ANGLO-AMERICAN WORLD 305 (1994).

¹⁹³ *Id.* at 139.

¹⁹⁴ JOHNSON, *supra* note 182, at 31.

¹⁹⁵ *Id.* at 101.

¹⁹⁶ *Id.* at 112-15.

American Revolution reflected images of earlier British religious fratricides,¹⁹⁷ specifically Seventeenth Century memories reinforcing older English Puritan and Presbyterian fears of episcopacy.¹⁹⁸

[33] The American consciousness of British religious strife arose early in colonial history when Puritan dissidents migrated to New England and High Church Anglicans migrated to Virginia, during the English Civil War.¹⁹⁹ Many more fled to the American colonies in 1685 when James Stuart II succeeded to the throne and took revenge on Protestant anti-Stuart rebels.²⁰⁰ Images of the English Civil War and the Glorious Revolution, along with images of denominational persecution in Europe, strongly influenced pre-Revolutionary American thinking of liberty and independence.²⁰¹ American revolutionaries identified with both religious rebellions of the British Revolution: The Glorious Revolution and the English Civil War.²⁰²

[34] In the American colonies, daily life was infused with denominational identity, which included negative images of rival denominations that were bitterly resented for past slights and oppressive crimes.²⁰³ In addition, the first Great Awakening increased a sense of religious fervor

¹⁹⁷ KEVIN PHILLIPS, *THE COUSINS' WARS: RELIGION, POLITICS, AND THE TRIUMPH OF ANGLO-AMERICA* 75 (1999).

¹⁹⁸ *Id.* at 92-93.

¹⁹⁹ *Id.* at 40.

²⁰⁰ *Id.* at 67.

²⁰¹ CLARK, *supra* note 192, at 57-58.

²⁰² PHILLIPS, *supra* note 197, at 106-7.

²⁰³ CLARK, *supra* note 192, at 35.

in America by making religious belief a personal choice.²⁰⁴ People were beckoned to convert and to be born again.²⁰⁵ Revivalists created new religious identities, which further heightened religious frictions.²⁰⁶ The Great Awakening especially weakened the Church of England.²⁰⁷ The American Revolution involved a zeal for liberty, an enthusiasm drawn from religious revivalism traceable to the Great Awakening,²⁰⁸ which resurrected many of the sects and religious enthusiasms of the Cromwellian English Civil War in the American colonies.²⁰⁹ This, in turn, involved the emergence of a variety of sects.²¹⁰ By the time of the American Revolution, religious fault-lines had been drawn, because the revolution involved a civil war between Low Church Anglicans, with support from some dissenting sects, and High Church Anglicans. The three major American patriotic factions were the Congregationalists, the Low Church Anglicans, and the Presbyterians.²¹¹ Patterns of settlement in the American colonies reflected religious diversity²¹² as geographic mobility increased opportunities for sectarian frictions.²¹³ Religious

²⁰⁴ MARTIN MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* 108-09 (1984).

²⁰⁵ *Id.* at 114-26.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 122.

²⁰⁸ CLARK, *supra* note 192, at 262, 336.

²⁰⁹ PHILLIPS, *supra* note 197, at 107.

²¹⁰ *Id.* at 36-63.

²¹¹ *Id.* at 162.

²¹² CLARK, *supra* note 192, at 205.

²¹³ *Id.* at 208.

cleavages occurred in revolutionary America on a county by county and region by region basis.²¹⁴

[35] The American Revolution was a revolution within a revolution. Not only did the American Revolution act as a violent confrontation between sects, but the colonial revolution also served as a catharsis for bringing colonial-religious strife to an end. The American Revolution “wiped the state clean and erased[,] in retrospect[,] the very conflicts and equivocations which had brought it about.”²¹⁵ Religious differences prior to the civil war became much less important after the war. Instead, nation building became the highest priority, creating a debate about how powerful the central government should be in relation to the states.²¹⁶ America created the myth of the social melting pot that assimilated immigrants into a nation where religion remained important, but submerged under the social whole.²¹⁷ Although the war brought independence, it did so at the cost of violent devastation.²¹⁸ Like the Europeans who had survived post-reformation sectarian devastation,²¹⁹ the Americans also sought a more peaceful religious existence. By the first centennial of the American Revolution, the different sects that fought each other during the war viewed the Revolution as a religious homogenization forgetting old, sectarian rivalries.²²⁰

²¹⁴ PHILLIPS, *supra* note 197, at 164-210.

²¹⁵ CLARK, *supra* note 192, at 380.

²¹⁶ PHILLIPS, *supra* note 197, at 329-30.

²¹⁷ CLARK, *supra* note 192, at 383-84.

²¹⁸ *Id.* at 386.

²¹⁹ JOHNSON, *supra* note 182, at 11.

²²⁰ CLARK, *supra* note 192, at 390.

[36] The urge for a unified, peaceful nation can be seen in the thoughts of the framers and supporters of the pre-Bill of Rights Constitution. The Federalist Papers include a subtext supporting a peaceful American nation and avoiding religious strife. The framers intended that the Constitution secure the peace at the expense of strife. John Jay's description of the new American nation established the tone for the Federalist Papers; Jay described America as "one connected, fertile, wide spreading country."²²¹ Jay envisioned that God had given America, as one connected country, to one united people. For him, the amazing diversity of colonial America had been transformed by nationhood into "a people descended from the same ancestors, . . . professing the same religion, . . . fighting side by side."²²² In Jay's vision, the tensions and divisions between colonial High Anglicans and Low Anglicans were forgotten because religion became one of many common social characteristics along with language, ancestors, principles of government, manners and customs.²²³ Americans existed as "a band of brethren, united to each other by the strongest ties."²²⁴ Unity prevailed among all denominations. Jay characterized the Constitutional Convention as reflecting this peaceable republic as considering the Constitution "[i]n the wild season of peace, with minds unoccupied by other subjects... in cool uninterrupted and daily consultation."²²⁵

²²¹ THE FEDERALIST, NO. 2, at 8 (John Jay) (Jacob E. Cooke ed., 1961).

²²² *Id.*

²²³ *Id.* at 9.

²²⁴ *Id.*

²²⁵ *Id.* at 7.

[37] Jay warned America against experiencing the dissensions and unfriendly passions of Europe.²²⁶ Hamilton believed that territorial disputes between the states could result in hostility between nation states,²²⁷ and he warned Americans to avoid getting, “entangled in all the pernicious labyrinths of European politics and wars.”²²⁸ Hamilton utilized ancient Greece and Italy as examples of strife driven societies that America must avoid.²²⁹ Instead, America must exist as a haven from such frictions and tensions, a nation built on moderation guarding against anarchy, civil war, perpetual disagreements among the states, and military despotism threatened by demagogues. The Constitution came into existence “in time of profound peace, by the voluntary consent of a whole people.”²³⁰

[38] In the context of the Federalist Papers envisioning a socially unified nation living in peace, James Madison warned against the dangers of factions. For Madison, the American Union constructed by the Constitution should “break and control the violence of faction,”²³¹ which arise due to the latent nature of people.²³² A faction is a group of people united by a “common impulse of passion . . . adverse to the rights of other[s] . . . [and] the community.”²³³ So for Madison, zealous opinions concerning religion definitely contributed to the creation of

²²⁶ THE FEDERALIST NO. 5, at 23-24 (John Jay) (Jacob E. Cooke ed., 1961).

²²⁷ THE FEDERALIST NO. 7, at 36-43 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²²⁸ *Id.* at 33.

²²⁹ THE FEDERALIST NO. 9, at 50 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²³⁰ THE FEDERALIST NO. 85, at 594 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²³¹ THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961).

²³² *Id.* at 56.

²³³ *Id.* at 57.

factions dividing mankind and inflaming mutual animosity.²³⁴ Madison feared that a “religious sect, may degenerate into a political faction.”²³⁵ Morality and religion cannot be relied upon to control factions, including religious sects.²³⁶ Although the cause of factions cannot be removed, the effects of factions can be controlled.²³⁷ Thus, Madison looked to the American constitutional framework to control the violence and oppression of factions, including zealous religious sects. Representatives of the Republican Government created a deliberative process to check such passions and, in addition, the federal nature of the American system in combination with the great population of American and geographic size of the nation encouraged a fluid social-political system in which a great variety of interests countered each other.²³⁸ A multiplicity of sects assured that everyone could live in security and freedom.²³⁹ Madison recognized a distinction between private and public affairs²⁴⁰ and qualified a religious faction as a private, personal trait. In the context of qualifications for office holding Madison wrote that, “[n]o qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people.”²⁴¹

²³⁴ *Id.* at 58-59.

²³⁵ *Id.* at 64.

²³⁶ *Id.* at 61.

²³⁷ *Id.* at 60.

²³⁸ *Id.* at 62-64.

²³⁹ THE FEDERALIST NO. 1, at 351-352 (James Madison) (Jacob E. Cooke ed., 1961).

²⁴⁰ THE FEDERALIST NOS. 51, 57, at 349, 386 (James Madison) (Jacob E. Cooke ed., 1961).

²⁴¹ THE FEDERALIST NO. 57 at 319 (James Madison) (Jacob E. Cooke ed., 1961).

[39] The framers of the Constitution wrote the pre-Bill of Rights Constitution to secure a peaceful, unified nation. Even without an Establishment Clause, religion an element of the American social scene. Hamilton believed a Bill of Rights unnecessary because the Constitution granted only enumerated powers to the Federal Government,²⁴² which, in turn, implied that governmental support for religion remained impossible where no such power existed. For the framers, religion remained a personal and social trait; one of many of a diverse people in a vast, new land, rather than as a source of public strife. The framers began the process of creating a welcoming, open, and tolerant American social melting pot, so that by the centennial of the Revolution, the bitter religious schisms that resulted in the Revolution were forgotten.²⁴³ The American Constitutional framers joined Europeans in seeking to banish centuries of religious war and strife that followed the Protestant Reformation, because²⁴⁴ they saw the inherent dangers of religion as a schismatic and high social-tension process.²⁴⁵

IV. THE SUPREME COURT RECONSIDERING RELIGIOUS DIVISIVENESS

[40] The Supreme Court, between 2000 and 2002, discussed religious strife in the context of the Establishment Clause in *Zelman v. Simmons-Harris*,²⁴⁶ *Mitchell v. Helms*,²⁴⁷ *Good News v.*

²⁴² THE FEDERALIST NO. 84 at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²⁴³ CLARK, *supra* note 192, at 390.

²⁴⁴ JOHNSON, *supra* note 182, at 11.

²⁴⁵ STARK & BAINBRIDGE, *supra* note 146, at 121-53.

²⁴⁶ 536 U.S. 639 (2002).

²⁴⁷ 530 U.S. 793 (2000).

Milford Central School,²⁴⁸ and *Santa Fe Independent School District v. Doe*.²⁴⁹ Most of the discussion remained tangential to the doctrine being developed and the analysis utilized. An implicit debate ensued over what impact religious strife should have on Establishment Clause doctrine and analysis.²⁵⁰ Only Justice Breyer, in a dissent to *Zelman*,²⁵¹ explicitly and extensively analyzed the issue of religious strife in American society.²⁵² Justices Stevens and Souter showed some concern, but tended to be implicit and vague.²⁵³ Chief Justice Rehnquist and Justice Thomas dismissed religious strife as an issue,²⁵⁴ while Justice Scalia off-handedly seemed to invite religious divisiveness as a positive social force in the context of education.²⁵⁵ No member of the Supreme Court has clearly focused on the inherent connection between religion and violence. In addition, no Justice clearly outlined the religious nature and underpinnings of the American Revolution or the negative reaction of the framers and supporters of the pre-Bill of Rights Constitution to social divisiveness, including religious strife. The justices failed to connect, in a clear fashion, early American desires to avoid continued Post Reformation bloodshed with current examples of religious strife that threaten American and

²⁴⁸ 533 U.S. 98 (2001).

²⁴⁹ 530 U.S. 290 (2000).

²⁵⁰ *See supra* notes 78-98 and accompanying text.

²⁵¹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 717-729 (2002) (Breyer, J., dissenting).

²⁵² *See supra* notes 109-122 and accompanying text.

²⁵³ *See supra* notes 78-92 and accompanying text.

²⁵⁴ *See supra* notes 93-95 and accompanying text.

²⁵⁵ *See supra* notes 96-98 and accompanying text.

world peace. Justice Stevens made some general references to foreign strife,²⁵⁶ and Justices Souter and Breyer only provided hypothetical examples of religious disagreements that could convert into political polarization.²⁵⁷

[41] The justices have avoided focusing on the details of religious bloodshed in a democracy like India,²⁵⁸ the anger that arose when a Florida mayor officially banished Satan from the city limits,²⁵⁹ and the tragic irony of an American president utilizing the pulpit of a church to assure Americans, and the world, that America would defend itself stridently and militarily.²⁶⁰ The justices also avoided explicitly focusing on the religious strife evidenced by the words of their own judicial opinions.

[42] First, the justices neglected to discuss, in their implicit religious divisiveness debate, the need for litigant anonymity in *Santa Fe Independent School District*.²⁶¹ The Supreme Court noted the need for anonymity, but never connected this need with religious strife. In *Santa Fe*, one Mormon family and one Catholic family brought the District Court action to enjoin prayers at high school football games and the District Court allowed the families to remain anonymous “to protect them from intimidation or harassment.”²⁶² Passions ran so high that school district

²⁵⁶ *Zelman*, 536 U.S. at 686 (Stevens, J., dissenting).

²⁵⁷ *Id.* at 716 (Souter, J., dissenting).

²⁵⁸ *See supra* notes 1-9 and accompanying text.

²⁵⁹ *See supra* notes 10-14 and accompanying text.

²⁶⁰ *See supra* notes 15-20 and accompanying text.

²⁶¹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

²⁶² *Id.* at 294.

employees, students, and parents attempted to break the protection of anonymity in a number of ways, including: “questionnaires, individual interrogation or downright snooping.”²⁶³

[43] The Supreme Court noted that the District Court had issued an order protecting the litigants from discovery and threatening punishment for those who disobeyed the order.²⁶⁴ The fact that the litigants required anonymity and feared retribution should surprise no one, given that a Baptist teacher in the Santa Fe school district confronted a Mormon student, in class, calling Mormonism cult-like, and describing the evils of Mormonism, invited students in the class to compare Mormonism with the KKK.²⁶⁵

[44] Second, the Supreme Court focused on anti-Catholic bias. Again however, they only implicitly and indirectly connected that bias to religious strife in American society. In *Helms*, Justice Thomas asserted that the hostility to aid sectarian schools constituted bias toward Catholicism, while Justice Thomas argued that the word “sectarian” in court opinions and legislation, opposing aid to religious schools, served as a code word for “Catholic.”²⁶⁶ Justice Breyer, in his dissent in *Zelman*, also pointed to the American Catholic experience, and was much clearer than Justice Thomas in making the connection between anti-Catholic bigotry and religious strife. In fact, Justice Breyer mentioned how Protestants in the Nineteenth Century would terrorize Catholics and how Catholic students suffered beatings and expulsions.²⁶⁷ Both justices pointed to Nineteenth Century America as the implicit source of Anti-Catholic feeling.

²⁶³ *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F. 3d 806, 809, n.1 (1999).

²⁶⁴ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294.

²⁶⁵ *Santa Fe Indep. Sch. Dist.*, 168 F. 3d at 810.

²⁶⁶ *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

²⁶⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 720-21 (Breyer, J., dissenting).

Justice Thomas discussed the Congressional consideration in the 1870's of the Blaine Amendment, which would have constitutionally barred aid to sectarian, predominantly Catholic, schools.²⁶⁸ Justice Breyer also mentioned the Blaine Amendment,²⁶⁹ but he focused more on Nineteenth and early Twentieth Century immigration as a cause of bigotry.²⁷⁰ However, both justices neglected to provide a complete history of Protestant-Catholic strife. The American colonists shared with Protestant England a fear being forced to reconvert to Catholicism.²⁷¹ Popular suspicion of Catholicism existed in the American colonies as early as the 1680s,²⁷² even in Catholic Maryland.²⁷³ The American Revolution served as an extension of the Post-Reformation religious warfare between Catholics and Protestants.²⁷⁴ The antagonisms and tensions, faced by Catholics in the United States, have been faced by other religious groups, as well. For example, the Supreme Court overlooked the fact that although Jews were received well in many American colonial contexts, they too suffered anti-Semitism as early as the

²⁶⁸ *Mitchell*, 530 U.S. at 828.

²⁶⁹ *Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting)

²⁷⁰ *Id.* at 720-21 (Breyer, J., dissenting).

²⁷¹ CLARK, *supra* note 192, at 272-73.

²⁷² PHILLIPS, *supra* note 197, at 69.

²⁷³ MARTY, *supra* note 204, at 85.

²⁷⁴ *See supra* notes 192-214 and accompanying text.

1650s.²⁷⁵ The Supreme Court also disregarded the fact that Mormons faced suppression at the hands of the United States Government.²⁷⁶

[45] The Supreme Court has focused on religious strife and its impact on Establishment Clause doctrine without ever focusing on the issue with clarity. The Court has two choices. First, the Court could fall back to an older view of history, evidenced in *Everson v. Board of Education*, where the Court warned against “old-world practices and persecutions.”²⁷⁷ The *Everson* Court concluded that the prevention of religious strife in America required that a wall between church and state “[b]e kept high and impregnable.”²⁷⁸ On the other hand, if the Supreme Court continues to walk away from an impregnable wall of separation, the Court should utilize the safeguards of the Ohio statute authorizing vouchers²⁷⁹ as a constitutional standard to protect against religious strife. The Ohio statute required that no school discriminate on a number of bases, including religious, and that teaching religious hatred was illegal.²⁸⁰ The Establishment Clause should include a legal standard that requires governmental support of religion to avoid religious discrimination and espousal of religious hate. Such a standard would reflect the Constitution framers’ desire to see America as a unified, peaceful nation.

²⁷⁵ FREDERIC COPLE JAHER, *A SCAPEGOAT IN THE NEW WILDERNESS: THE ORIGINS AND RISE OF ANTI-SEMITISM IN AMERICA*, 87-90 (1994).

²⁷⁶ See *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890).

²⁷⁷ *Everson v. Bd. of Educ. of the Township of Ewing*, 330 U.S. 1, 10 (1947).

²⁷⁸ *Id.* at 18.

²⁷⁹ OHIO REV. CODE ANN. §§ 3313.974-.979 (Anderson 1999 & Supp. 2000).

²⁸⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002).

V. CONCLUSION

[46] So long as humans are limited by their own finite knowledge of the universe and by their inability to control that universe, religion will exist as a compelling part of human life.²⁸¹ Therefore, America will remain a religious nation for the foreseeable future. Whether America remains a unified and peaceful nation depends, at least in part, on the role religion continues to play in America. The link between religion, strife and violence emanates from the very Manichean nature of religion. Good and evil remain the backbone of meaningful religion, and the need to be passionate about God and being good remain a critical part of the religious experience.²⁸² The problem is whether those passions can be prevented from invading the day-to-day life of political and social tensions. The framers of the Constitution fully understood the dangers and risks of religion. As participants in and witnesses to the American Revolution, they experienced the last major religious war fought by Western Society. Unfortunately, many of the same tensions between Catholics, Protestants, Jews and others still exist today, as evidenced in part by the discourse of Justices Thomas and Breyer about anti-Catholicism in America.²⁸³

[47] The relationship between religion and violence can be seen close to the surface of American social and political life. Examples include the public reaction to the Florida mayor who banned Satan from her town²⁸⁴ and President Bush's use of a church pulpit to assure the

²⁸¹ STARK & BAINBRIDGE, *supra* note 146, at 279.

²⁸² *Id.* at 112-16. Manichean religious beliefs envision a conflict between the forces of good and evil.

²⁸³ *See supra* notes 266-273 and accompanying text.

²⁸⁴ *See supra* notes 14-21 and accompanying text.

world that America would respond militarily to the September 11, 2001 attacks on America.²⁸⁵

Though some members of the United States Supreme Court sense the religious strife and the potential for violence that lurks beneath the American social and political structures, these justices never explicitly examine the relationship between religion and violence and the constitutional answer to that risky relationship. Some members of the Supreme Court simply disregard the strife risked by religious participation in political and social issue contentions. The Supreme Court needs to debate more explicitly, directly and thoroughly the importance religious strife to Establishment Clause doctrine. If the Court recognizes the connection between the prevention of religious strife in American society and the Establishment Clause, the Court needs to develop doctrine that will address this problem.

²⁸⁵ *See supra* notes 22–28 and accompanying text.