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## Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience Essay

Rene Reyes

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## Essay

### Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience

RENÉ REYES

*Justice David Souter retired from the United States Supreme Court at the end of the 2008–2009 term. Reflecting upon his legacy, a number of commentators have identified Souter's joint opinion in *Planned Parenthood v. Casey* as his most noteworthy contribution to the Court's constitutional jurisprudence. But beyond *Casey*, surprisingly few of Souter's opinions have been identified as particularly remarkable or enduring. This suggests that Justice Souter's judicial legacy may have been rather modest—perhaps owing to the fact that, as a member of the Court's liberal minority, he was often in dissent in key cases.*

*However, this Essay argues that Justice Souter's legacy was potentially quite profound in at least one area of constitutional law: liberty of conscience under the First Amendment's Religion Clauses. During Souter's tenure, the Supreme Court decided nearly two dozen cases involving significant Religion Clause issues. Souter's opinions in these cases reveal a commitment to protecting liberty of conscience that is notably more explicit and consistent than that of any other Justice currently sitting on the Court. Moreover, to a degree that has been largely underappreciated, Justice Souter's opinions are consistent with many of the most compelling historical and normative accounts of freedom of conscience that have been offered by liberal and conservative scholars alike. Souter thus leaves behind a jurisprudential legacy that has the potential to lend intellectual and theoretical coherence to an area of law that has long been criticized for its inconsistency and internal tensions.*

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# Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience

RENÉ REYES\*

## I. INTRODUCTION

Justice David Souter retired from the United States Supreme Court at the end of the 2008–2009 term. Retirements, of course, are a natural occasion on which to reflect upon a justice's legacy,<sup>1</sup> and a number of legal scholars have begun to offer preliminary assessments of Souter's nineteen years on the Court. Several commentators have identified Souter's opinion in *Planned Parenthood v. Casey*<sup>2</sup>—which was jointly authored with Justices Kennedy and O'Connor—as his most noteworthy contribution to the Court's constitutional jurisprudence.<sup>3</sup> For many conservatives, the *Casey* opinion is emblematic of Souter's larger legacy as a “stealth liberal,” the appointment of whom was George H.W. Bush's greatest mistake as president.<sup>4</sup>

But beyond *Casey*, surprisingly few of Souter's opinions have been identified as particularly noteworthy or enduring. Indeed, when asked to comment on the significance of his years as a Justice, even many of Souter's admirers have focused on his demeanor, intellectual rigor, and integrity rather than on his opinions in any specific cases or areas of the

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<sup>1</sup> The retirements of William Rehnquist and Sandra Day O'Connor, for example, were followed by tributes in the *Harvard Law Review*, *Stanford Law Review*, *University of Pennsylvania Law Review*, *Yale Law Journal*, and many other journals. E.g., Donald Ayer, Tribute, *William H. Rehnquist: A Man for All Seasons*, 115 YALE L. J. 1842 (2006); Erwin Chemerinsky, Keynote Address, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331 (2006); Justice Ruth Bader Ginsburg, Tribute, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1239 (2006); Symposium, *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor*, 58 STAN. L. REV. 1661 (2006). No doubt similar tributes to Justice Souter will be forthcoming.

<sup>2</sup> 505 U.S. 833, 846 (1992) (reaffirming the “essential holding” of *Roe v. Wade*, and recognizing “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State”).

<sup>3</sup> See, e.g., Lawrence Lessig, Posting to *The Judgment on Justice Souter*, N.Y. TIMES ROOM FOR DEBATE BLOG (May 1, 2009, 6:19 PM), [hereinafter *Judgment*] <http://roomfordebate.blogs.nytimes.com/2009/05/01/the-judgment-on-justice-souter/> (speculating that Souter's most “notable” contribution may have been to convince Justices Kennedy and O'Connor not to overrule *Roe* in deciding *Casey*); Lucas A. Powe, Jr., Posting to *Judgment, supra* (noting that *Casey* was Souter's most “memorable” opinion); Kermit Roosevelt, Posting to *Judgment, supra* (suggesting that the *Casey* opinion was Souter's most “obvious” contribution to Supreme Court jurisprudence).

<sup>4</sup> See M. Edward Whelan III, Posting to *Judgment, supra* note 3 (“My guess is that Justice Souter will, in the end, be remembered most as President George H.W. Bush's worst mistake.”).

law.<sup>5</sup> This suggests that Justice Souter's judicial legacy may have been rather modest—perhaps owing to the fact that, as a member of the Court's liberal minority, he was often in dissent in key cases.<sup>6</sup>

However, this Essay argues that Justice Souter's legacy was potentially quite profound in at least one area of constitutional law: liberty of conscience under the First Amendment's Religion Clauses. This is not to say that Souter's voice was the dominant one in Religion Clause controversies—after all, the Court decided nearly two dozen cases under the Establishment and Free Exercise Clauses during his tenure, and Souter wrote for the majority in only two of them.<sup>7</sup> Nor did Souter offer an analytical framework for Religion Clause cases that has drawn as much judicial and scholarly attention as the three-part *Lemon* test<sup>8</sup> or Justice O'Connor's "endorsement" test.<sup>9</sup> Nevertheless, Souter did write a total of fourteen opinions in Establishment and Free Exercise cases—many of them of considerable length and detail.<sup>10</sup> A close examination of these opinions reveals a commitment to protecting liberty of conscience under both Religion Clauses that is more explicit and consistent than that of any other Justice currently sitting on the Court. Moreover, to a degree that has been largely underappreciated, Justice Souter's opinions are consistent with many of the most compelling historical and normative accounts of freedom of conscience that have been offered by liberal and conservative scholars alike. Souter thus leaves behind a jurisprudential legacy that has the potential to lend intellectual and theoretical coherence to an area of law that has long been criticized for its inconsistency and internal tensions.

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<sup>5</sup> See Edward Lazarus, Posting to *Judgment*, *supra* note 3 ("His greatest contribution, however, lies not in any isolated set of opinions but in the intellectual rigor that he brought to the more liberal wing of a deeply divided Court."); Powe, Posting to *Judgment*, *supra* note 3 ("Of the current nine, my favorite justice is retiring. . . . He couldn't be my favorite for what he wrote; he was my favorite for what he was. . . . He was a judge, a man who in his confirmation hearings said he would listen and was telling the absolute truth."); Orin Kerr, Posting to *Judgment*, *supra* note 3 ("Justice Souter's main contribution has been as a thoughtful and intelligent member of the Supreme Court's liberal voting bloc. . . . Justice Souter's most pronounced quality has been his integrity. Justice Souter will long be remembered for the unmatched personal and intellectual integrity he brought to the Court.").

<sup>6</sup> For a discussion of Justice Souter's dissenting opinions, see *infra* Part II and notes 62, 68, and accompanying text.

<sup>7</sup> *McCreary Cnty., Ky. v. ACLU of Ky.*, 544 U.S. 844 (2005); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). For a discussion of *McCreary* and *Kiryas Joel*, see *infra* notes 18, 28–30 and accompanying text.

<sup>8</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (internal citation omitted) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 674 (1970))).

<sup>9</sup> Justice O'Connor first developed the endorsement test in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 688–89 (1984).

<sup>10</sup> For a discussion of Establishment and Free Exercise cases in which Justice Souter participated, see *infra* Part II.

## II. SOUTER'S JURISPRUDENCE IN RELIGION CLAUSE CASES

Between Justice Souter's confirmation in 1990 and his retirement in 2009, the Supreme Court decided twenty-two cases that presented significant Religion Clause issues.<sup>11</sup> Of these cases, seventeen primarily involved the Establishment Clause.<sup>12</sup> Souter wrote for the majority in two of these cases, and filed concurring or dissenting opinions in ten others. Hence, there is an ample body of writing from which to discern Souter's approach to Establishment Clause claims.

The first Establishment Clause case in which Justice Souter participated was *Lee v. Weisman*.<sup>13</sup> The case presented a challenge to prayers offered at a public high school graduation ceremony.<sup>14</sup> Souter joined Justice Kennedy's opinion for the Court, which held that the prayers indirectly coerced students to participate in a religious observance and ran afoul of the State's "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."<sup>15</sup> However, Souter also wrote separately to address two questions left unresolved by the majority: "[W]hether the Clause applies to governmental practices that do not favor one religion or denomination over others, and whether state coercion of religious conformity, over and above state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation."<sup>16</sup> Souter answered both questions emphatically in the negative. In what would become a common practice in his Religion Clause opinions, Souter drew heavily on the writings of Madison and Jefferson and on the historical record surrounding the drafting of the First Amendment to argue for a more robust right to freedom of conscience than was explicitly recognized by the majority—a right that could be threatened even by non-preferential, non-coercive governmental endorsement of religion.<sup>17</sup>

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<sup>11</sup> This tally includes three cases which involved significant issues of religion but were not argued or decided under the Religion Clauses: *Pleasant Grove City, Utah v. Sumnum*, 129 S. Ct. 1125 (2009) (discussed *infra* note 24); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (discussed *infra* note 68); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (discussed *infra* note 68). It does not include *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), wherein a Free Exercise claim was initially raised but did not play a significant role in the Court's majority opinion or in Justice Souter's concurrence.

<sup>12</sup> For a discussion of the seventeen Establishment Clause cases, see *infra* Part II.

<sup>13</sup> 505 U.S. 577 (1992).

<sup>14</sup> *Id.* at 580.

<sup>15</sup> *Id.* at 592.

<sup>16</sup> *Id.* at 609.

<sup>17</sup> Given Souter's position on non-preferential, non-coercive prayer in school settings, it is no surprise that he also joined the majority in subsequently striking down a district policy authorizing student-led prayers at high school football games. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). The majority noted that the district's policy had "the improper effect of coercing those present to participate in an act of religious worship" and "empower[ed] the student body majority with the authority to subject students of minority views to constitutionally improper messages." *Id.* at 312, 316.

The concept of governmental endorsement of religion—and the related concept of governmental neutrality<sup>18</sup>—featured prominently in Justice Souter’s opinions in cases involving religious displays on public property. In the first such case to come before the Court during his tenure, *Capitol Square Review & Advisory Board v. Pinette*, Souter concurred with the majority’s holding that the Establishment Clause did not prohibit a state from allowing a private group to display a Latin cross on statehouse grounds.<sup>19</sup> But Souter wrote separately to emphasize that he would not recognize a *per se* rule permitting religious displays whenever they were privately sponsored and erected in a public forum; rather, he would continue to subject all such displays to the endorsement test.<sup>20</sup> More specifically, he would ask whether “an intelligent observer would reasonably perceive private religious expression in a public forum to imply the government’s endorsement of religion.”<sup>21</sup> Souter applied this same test late in his judicial career in a pair of cases involving displays of the Ten Commandments on government property: *Van Orden v. Perry*<sup>22</sup> and *McCreary County, Kentucky v. ACLU of Kentucky*.<sup>23</sup> The two cases were argued on the same day, but each was decided on its own facts. Souter believed both displays to be unconstitutional; he found himself writing for the dissent in the first case and for the majority in the second.<sup>24</sup>

In *Van Orden*, the challenged display was one of seventeen monuments spread throughout the twenty-two acres of the Texas State

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<sup>18</sup> Neutrality was also an important theme in Souter’s first majority opinion in a Religion Clause case. See *Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 707 (1994) (stating that “it is clear that neutrality as among religions must be honored”). There, the Court held that the creation of a school district along religious lines violated the Establishment Clause. Writing for the Court, Souter explained that:

The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way. The anomalously case-specific nature of the legislature’s exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.

*Id.* at 703.

<sup>19</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 783 (1995) (Souter, J., concurring in part and concurring in the judgment).

<sup>20</sup> See *id.* at 784 (stating that the *per se* rule would be “an exception to the endorsement test, not previously recognized and out of square with our precedents”).

<sup>21</sup> *Id.* at 786.

<sup>22</sup> 545 U.S. 677, 738 (2005) (Souter, J., dissenting).

<sup>23</sup> 545 U.S. 844, 866 (2005).

<sup>24</sup> The Court decided a third case involving religious displays during Souter’s final term on the bench, but evaluated the case solely on Free Speech grounds. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1129 (2009) (holding that government was not required to permit a private religious group to install a religious monument in a public park where other private monuments had been accepted, because acceptance of such monuments constituted government speech not subject to the Free Speech Clause). Justice Souter noted the potential for tension between the “recently minted” government speech doctrine and the Establishment Clause, but agreed that the present case was not the occasion to resolve such tensions. *Id.* at 1141–42 (Souter, J., concurring).

Capitol grounds and was held by a majority of the Court to constitute a permissible acknowledgment of the role played by the Ten Commandments in American history.<sup>25</sup> Souter's dissent argued that the majority's holding violated the general rule of government neutrality toward religion mandated by the Establishment Clause: "If neutrality in religion means something, any citizen should be able to visit [his] civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion."<sup>26</sup> In Souter's view, the lack of a common theme among the other monuments on the grounds meant that a reasonable observer would take each display on its own terms—and in light of both the history of the Decalogue itself and the details of the Texas monument, any reasonable observer would understand "that the government of Texas is telling everyone who sees the monument to live up to a moral code because God requires it . . . ."<sup>27</sup> Similarly, in his majority opinion in *McCreary*, Souter emphasized that the purpose behind courthouse displays of the Ten Commandments would be evaluated with reference to "'an objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute' or comparable official act."<sup>28</sup> The history in this case showed that the defendant counties had a religious purpose in displaying the Commandments, and a reasonable observer would "probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."<sup>29</sup>

Souter's guiding principle in these cases is that government must remain neutral with respect to religion because religious belief "is reserved for the conscience of the individual."<sup>30</sup> He cites the arguments of Madison and Jefferson against "employing Religion as an engine of Civil policy"<sup>31</sup> and against official support for religion—a practice which "degrades from

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<sup>25</sup> However, there was no majority opinion: Chief Justice Rehnquist wrote for himself and Justices Scalia, Kennedy, and Thomas, *Van Orden*, 545 U.S. at 680 (plurality opinion), while Justice Breyer wrote separately and concurred in the result only. *Id.* at 698 (Breyer, J., concurring in the judgment). The plurality opinion declined to apply either the *Lemon* test or the endorsement test and instead focused on "the nature of the monument and . . . our Nation's history." *Id.* at 686 (plurality opinion). Breyer's concurring opinion acknowledged that no single test could neatly resolve the case, but nevertheless focused on the primary effect and message that the monument conveyed. Breyer also placed emphasis on the fact that the monument had stood unchallenged for some forty years, and expressed concern that its forced removal would suggest hostility to religion and promote the kind of religious divisiveness the Establishment Clause was meant to avoid. *Id.* at 702–04 (Breyer, J., concurring).

<sup>26</sup> *Id.* at 745–46 (Souter, J., dissenting).

<sup>27</sup> *Id.* at 739–40.

<sup>28</sup> 545 U.S. at 862 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985)).

<sup>29</sup> *Id.* at 873.

<sup>30</sup> *Id.* at 881.

<sup>31</sup> *Van Orden*, 545 U.S. at 737.

the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”<sup>32</sup> Neutrality thus serves both to guard against civic divisiveness and to protect the integrity of the individual’s conscience by preventing the government from taking sides in matters of religious opinion.<sup>33</sup>

To an even greater extent than in the context of religious displays on public property, Justice Souter frequently invoked Madison, Jefferson, and liberty of conscience in the context of government funding for religious activity. In *Rosenberger v. Rector & Visitors of University of Virginia*,<sup>34</sup> for example, the Court held that public funding of an evangelical student newspaper’s printing costs was consistent with the Establishment Clause—and that the denial of such funding amounted to viewpoint discrimination in violation of the Free Speech Clause.<sup>35</sup> In a vigorous dissent, Souter argued that “[u]sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.”<sup>36</sup> Souter supported his argument with extensive citations to Madison. In particular, Souter focused on Madison’s *Memorial and Remonstrance Against Religious Assessments*, comparing the student activities fees that funded the religious newspaper to the religious taxes that were the subject of Madison’s *Remonstrance*.<sup>37</sup> Although he did not explicitly frame his dissent in the language of liberty of conscience, Souter clearly understood the case to present a threat to conscientious freedom—for “[w]ho 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?”<sup>38</sup>

The connection between public expenditures in support of religion and liberty of conscience was suggested again in Souter’s opinion in *Agostini v. Felton*.<sup>39</sup> Dissenting from the majority’s decision permitting New York City’s Board of Education to send public school teachers into religious schools to provide remedial education, Souter maintained that the Establishment Clause imposes an “unwavering rule” against such subsidization of religious education.<sup>40</sup> The reasons for this rule are

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<sup>32</sup> *McCreary*, 545 U.S. at 878.

<sup>33</sup> *Id.* at 875–76.

<sup>34</sup> 515 U.S. 819 (1995).

<sup>35</sup> *Id.* at 845–46.

<sup>36</sup> *Id.* at 868 (Souter, J., dissenting).

<sup>37</sup> *Id.* at 868–73.

<sup>38</sup> *Id.* at 868 (omissions in *Rosenberger*) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 65–66 (1947) (Rutledge, J., dissenting)).

<sup>39</sup> 521 U.S. 203, 243 (1997) (Souter, J., dissenting).

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

twofold: government support for religion has the potential to limit the freedom of the supported faith, and also to compromise religious freedom for members of dissenting faiths.<sup>41</sup>

While liberty of conscience was thus an implicit theme for Souter in *Rosenberger* and *Agostini*, it became explicit in several cases that followed. Two of these cases again involved public aid for religious education; a third involved expenditure of public funds to promote “faith-based initiatives.”<sup>42</sup> The first education case was *Mitchell v. Helms*,<sup>43</sup> involving an as-applied challenge to a program under which federal funds were distributed to local agencies in Louisiana, which in turn lent educational materials to private religious schools.<sup>44</sup> Although no opinion commanded the support of more than four Justices, a majority of the Court agreed that the program was consistent with the Establishment Clause.<sup>45</sup> Justice Souter dissented and argued once more that the program at issue ran afoul of the Establishment Clause’s bar against use of public funds in support of religion. This bar serves several important ends: “to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes.”<sup>46</sup> With respect to liberty of conscience in particular, “Madison’s and Jefferson’s now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it.”<sup>47</sup> Coherence in Religion Clause jurisprudence would be possible only

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<sup>41</sup> *Id.* at 243–44. Justice Souter’s concern with liberty of conscience in the school context was also apparent in his dissenting opinion in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). In *Good News Club*, the majority held that the Free Speech Clause required, and the Establishment Clause permitted, a school to give a children’s church group equal access to school property after hours. *Id.* at 119–20. Souter dissented from the Court’s Free Speech analysis, and from its decision to even reach the Establishment Clause question (which was not addressed by either the trial or appellate courts below). *Id.* at 134 (Souter, J., dissenting). But while Souter would not have decided the Establishment Clause issue, he nevertheless emphasized the fact that “Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion.” *Id.* at 138. He further emphasized the vulnerability of children’s consciences, noting that “Establishment Clause cases have consistently recognized the particular impressionability of schoolchildren . . . and the special protection required for those in the elementary grades in the school forum.” *Id.* at 142–43 (internal citations omitted). Thus, even on the limited record before the Court, there was reason to conclude that “Good News’s exercises blur the line between public classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not.” *Id.* at 144–45.

<sup>42</sup> See *Hein v. Freedom From Religion Found. Inc.*, 551 U.S. 587, 592 (2007).

<sup>43</sup> 530 U.S. 793, 801 (2000).

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

<sup>45</sup> *Id.* at 835, 867.

<sup>46</sup> *Id.* at 868 (Souter, J., dissenting).

<sup>47</sup> *Id.* at 870.

if the Court kept these fundamental principles in mind.

Souter returned to this theme in the Cleveland school voucher case, *Zelman v. Simmons-Harris*.<sup>48</sup> There, the majority rejected an Establishment Clause challenge to an Ohio program that provided families with vouchers that could be spent at any participating public or private school, notwithstanding the fact that ninety-six percent of students used the vouchers to pay tuition at religiously-affiliated institutions.<sup>49</sup> Justice Souter devoted the first half of his dissenting opinion to an extensive analysis of the Court's Establishment Clause precedent, from *Everson v. Board of Education of Ewing*<sup>50</sup> through *Mitchell*.<sup>51</sup> Souter criticized the majority for ignoring *Everson* and misapplying the standards set forth in more recent cases—indeed, he viewed the majority's departure from precedent to be so extreme as to constitute “doctrinal bankruptcy.”<sup>52</sup>

But Souter's dissent did not focus on application of precedent alone. To the contrary, even if he were to assume “*arguendo* that the majority's formal criteria were satisfied on the facts,” Souter would have found the majority's conclusion to be “profoundly at odds with the Constitution.”<sup>53</sup> Specifically—and as emphasized in his previous opinions—Souter would have found any scheme of public support for religion to be inconsistent with the history and purpose of the Establishment Clause. Enlisting the support of Madison and Jefferson once more, Souter argued that “every objective underlying the prohibition of religious establishment is betrayed by this scheme . . . the first being respect for freedom of conscience.”<sup>54</sup> To be sure, the Ohio program also posed threats to the independence of the religious schools and to religious and social harmony. Nevertheless, the threat to freedom of conscience remains an object of particular attention in Souter's opinions—perhaps because “[a]s a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause.”<sup>55</sup>

The final funding case in which Souter explicitly emphasized the centrality of liberty of conscience under the Religion Clauses was *Hein v. Freedom From Religion Foundation, Inc.*<sup>56</sup> The case presented an Establishment Clause challenge to the use of government funds to promote President George W. Bush's faith-based initiatives program.<sup>57</sup> However, the majority held that plaintiffs lacked standing to bring suit; the Court

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<sup>48</sup> 536 U.S. 639 (2002).

<sup>49</sup> *Id.* at 647, 662.

<sup>50</sup> 330 U.S. 1 (1947).

<sup>51</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>52</sup> *Zelman*, 536 U.S. at 688 (Souter, J., dissenting).

<sup>53</sup> *Id.* at 707–08.

<sup>54</sup> *Id.* at 711.

<sup>55</sup> *Id.* at 711 n.22.

<sup>56</sup> 551 U.S. 587, 637 (2007) (Souter, J., dissenting).

<sup>57</sup> *Id.* at 592 (plurality opinion).

accordingly declined to reach the merits of the Establishment Clause claim.<sup>58</sup> In his dissent, Souter again argued that the “very extraction and spending of tax money in aid of religion” constitutes an injury to the conscience.<sup>59</sup> Nor is this kind of harm a mere “[p]sychic [i]njury” that amounts to little more than disagreement with government policy—it is rather an injury that has “deep historical roots going back to the ideal of religious liberty in James Madison’s *Memorial and Remonstrance Against Religious Assessments*.”<sup>60</sup> In sum, “[t]he right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause are . . . not to be split off from one another.”<sup>61</sup> It therefore made no difference to Souter whether the expenditure was made by the Executive or by the Legislature—for the injury to liberty of conscience would be equally real in either instance.

Promoting liberty of conscience was thus a consistent theme in Justice Souter’s opinions in Establishment Clause cases. Some critics—both on the bench and in academia—have suggested that Souter’s opinions in these cases may reflect a hostility to religion or a commitment to an overly-rigid “separation” of church and state.<sup>62</sup> But these criticisms give insufficient weight to Souter’s oft-expressed commitment to accommodating religious activity. Beginning with the first opinion he wrote in an Establishment Clause case, Souter left no doubt that government may lift discernible burdens on religious practice: “The State may ‘accommodate’ the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings.”<sup>63</sup> In other words, Souter did not invoke liberty of conscience simply to defend the rights of the secular; he also invoked it to promote the rights of the religious.

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<sup>58</sup> Plaintiffs asserted standing as taxpayers under the rule recognized in *Flast v. Cohen*, 392 U.S. 83 (1968). The Court held that *Flast* recognized taxpayer standing only in cases where funds were spent pursuant to a specific Congressional authorization; it did not grant standing where—as here—the funds were spent out of general Executive Branch appropriations. *Hein*, 551 U.S. at 593.

<sup>59</sup> *Hein*, 551 U.S. at 638 (Souter, J., dissenting) (internal quotation marks omitted).

<sup>60</sup> *Id.* at 638–39 (italics added).

<sup>61</sup> *Id.* at 638.

<sup>62</sup> For instance, in his *McCreary* dissent, Justice Scalia criticizes Souter’s majority opinion for “ratchet[ing] up the Court’s hostility to religion.” *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting). In a similar vein, Justice Thomas suggests that Souter’s dissenting opinion in *Mitchell* “reserve[s] special hostility for those who take their religion seriously.” *Mitchell v. Helms*, 530 U.S. 793, 827 (2000); see also MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* 298 (2008) (noting that “vestiges of separationism” are discernible in Justice Souter’s thought).

<sup>63</sup> *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (internal citation omitted); see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (“[T]he Constitution allows the State to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.”). Souter also joined the majority in holding that the heightened protections for prisoners’ religious rights provided by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a)(1)-(2) (2000), were consistent with the Establishment Clause. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

Nor was Justice Souter's acknowledgement of the rights of believers mere dicta offered to soften the rhetoric of his opinions in Establishment Clause cases. To the contrary, Souter's commitment to protecting the conscientious rights of religious individuals is a dominant theme in his opinions in the few Free Exercise cases decided by the Court during his tenure. Souter's most extensive such opinion was a concurrence in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, in which the Court held that a facially-neutral local ordinance was intended to suppress a particular religious practice and was therefore void under the Free Exercise Clause.<sup>64</sup> Souter agreed with the Court's holding, but disagreed with its reference to the rule announced in *Employment Division, Department of Human Resources of Oregon v. Smith* that a generally-applicable law which has the unintended effect of prohibiting religious practice does not violate the Free Exercise Clause.<sup>65</sup> Indeed, Souter expressed "doubts about whether the *Smith* rule merits adherence,"<sup>66</sup> and noted that "our common notion of neutrality is broad enough to cover . . . what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws."<sup>67</sup> While much of the language of Souter's analysis is framed in terms of government neutrality rather than liberty of conscience, the implication of his analysis would clearly offer much greater protection for religious conscience than was granted by the majority.<sup>68</sup>

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<sup>64</sup> 508 U.S. 520, 524 (1993).

<sup>65</sup> 494 U.S. 872, 890 (1990).

<sup>66</sup> *Lukumi*, 508 U.S. at 559 (Souter, J., concurring).

<sup>67</sup> *Id.* at 561–62.

<sup>68</sup> Justice Souter reiterated his doubts about the merits of the *Smith* rule in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The case presented a challenge to the Religious Freedom Restoration Act ("RFRA")—a piece of Congressional legislation that was intended to overturn *Smith* and to restore the "compelling interest" test as the governing rule for Free Exercise claims. *Id.* at 511. The Court held that enforcement of RFRA against the states was beyond Congress's power under the Fourteenth Amendment, in part because the statute attempted to change the meaning of "free exercise" as defined by the Court. *See id.* at 534 ("Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA."). In dissent, Souter argued that the uncertainty surrounding the precedential value of *Smith* prevented a sound analysis of RFRA's constitutionality, and that the instant case should be set down for plenary re-examination of the Free Exercise issues. *Id.* at 565–66 (Souter, J., dissenting).

Despite the holding in *Boerne*, RFRA remains valid as applied against the federal government. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006). In *O Centro*, the Court unanimously applied RFRA's compelling interest test in upholding a challenge to the federal government's ban on hoasca, a hallucinogenic tea used in religious ceremonies. The case presented no constitutional challenges to RFRA, and was decided on purely statutory grounds. *See id.* at 423 (noting that challenge was based "on the Religious Freedom Restoration Act of 1993, which prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government demonstrates that application of the burden to the person represents the least restrictive means of advancing a compelling government interest" and concluding that "the Government has not

Liberty of conscience was thus a consistent and unifying principle in Justice Souter's opinions in cases arising under both Religion Clauses. In Establishment Clause cases, Souter invoked Madison's and Jefferson's writings on liberty of conscience to argue against government sponsorship of religious activity through taxation, government endorsement of religion through the placement of religious symbols on public property, or government support of religious belief through prayer in school settings. In Free Exercise Clause cases, Souter again invoked the Framers to argue against rules that would limit the freedom of religious individuals to act in accordance with their conscientious beliefs. To be sure, Souter also emphasized other constitutional values in his Religion Clause opinions; maintaining government neutrality, protecting religion from government interference, and minimizing religious conflict are important examples. But none of these values are inconsistent with a strong theory of liberty of conscience; they simply lend such a theory additional support.

### III. SOUTER'S JURISPRUDENCE AND RELIGION CLAUSE SCHOLARSHIP

Justice Souter's emphasis on liberty of conscience in his Establishment and Free Exercise jurisprudence finds ample support in the academic literature—for a number of scholars have convincingly argued that protecting liberty of conscience was one of the central purposes behind the Religion Clauses. Perhaps most prominently, Noah Feldman and Michael McConnell have written thoroughgoing accounts of the role of liberty of conscience in the origins of the Establishment and Free Exercise Clauses. With respect to the Establishment Clause, Noah Feldman has argued that “[i]n the time between the proposal of the Constitution and of the Bill of Rights, the predominant, not to say exclusive, argument against established churches was that they had the potential to violate liberty of conscience.”<sup>69</sup> Michael McConnell has likewise maintained that a strong right to liberty of conscience was part of the original understanding of the Free Exercise Clause, and that this understanding arguably included a right to some conscientious exemptions from generally applicable laws.<sup>70</sup>

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carried the burden expressly placed on it by Congress in the . . . Act” (internal quotation marks omitted)).

<sup>69</sup> Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398 (2002) [hereinafter Feldman, *Intellectual Origins*].

<sup>70</sup> See Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 831 (1998) [hereinafter McConnell, *Rights of Conscience*] (reviewing the intellectual and constitutional context in which the First Amendment was drafted, and concluding that “this history supports the view that impositions on religious conscience may be enforced only if they serve the fundamental interests of the state”); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990) [hereinafter McConnell, *Origins and Historical Understanding*] (acknowledging that “the historical evidence is limited and in some points mixed,” but concluding that a “doctrine of free exercise exemptions is more

Notably, however, Souter's approach to liberty of conscience does not neatly track either of these scholarly theories of the Religion Clauses. Rather, Souter's approach is consistent with some of the strongest arguments advanced in each theory, but also departs from some of the elements of each theory that are most open to criticism. Consider Noah Feldman's arguments about the history and interpretation of the Establishment Clause. Professor Feldman marshals considerable historical evidence to support the claim that liberty of conscience underlay objections to religious establishments in the Founding Era. Feldman demonstrates that compelled support of religious ministers was understood by many dissenters to violate liberty of conscience, and argues that Madison's case against the Virginia Assessment Bill was heavily influenced by Lockean ideals of conscientious liberty.<sup>71</sup> In sum, Feldman concludes that although there was "a live disagreement about whether nonpreferential funding of religion necessarily violated liberty of conscience," there was nevertheless "broad agreement in late-eighteenth-century America that liberty of conscience was the key value that ought to inform any discussion of church and state."<sup>72</sup>

Up to this point, Souter's approach to Establishment Clause controversies is consistent with and draws support from Feldman's historical analysis: Souter repeatedly argues that taxpayer-funded support for religion violated liberty of conscience, and he even cites Feldman in support of this proposition.<sup>73</sup> However, Souter's opinions do not follow the interpretive approach suggested in some of Feldman's more recent work. For Feldman also argues that the Supreme Court should reject the "secular purpose" and "endorse[ment]" tests in Establishment Clause cases and replace those tests with a "no coercion and no money" standard.<sup>74</sup> Under this analytical framework, the Court would be more vigilant about prohibiting public expenditures in support of religion and religious activity. But at the same time, the Court would be more accommodating of religion and religious symbolism in public life, provided that no coercion was involved. This approach would seem to allow greater room for such things as public displays of the Ten Commandments and for prayers at school football games and graduations<sup>75</sup>—practices to which Souter strenuously

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consistent with the original understanding than is a position that leads only to the facial neutrality of legislation").

<sup>71</sup> See Feldman, *Intellectual Origins*, *supra* note 69, at 383–84 (highlighting Lockean elements in Madison's objections to the Assessment Bill and noting that "[l]iberty of conscience was the dominant theoretical framework for Madison's argument against establishment").

<sup>72</sup> *Id.* at 397–98.

<sup>73</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 (2002) (Souter, J., dissenting).

<sup>74</sup> NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 237 (2005).

<sup>75</sup> See Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 72–74 (2007) (noting ambiguity in Feldman's understanding of "coercion," and exploring possibility that Feldman's

objected. Given its “decidedly contrarian”<sup>76</sup> implications, it is perhaps not surprising that Feldman’s proposed interpretive model has been met with some skepticism in the academic literature.<sup>77</sup>

Justice Souter’s jurisprudence is similarly consistent with many of the most compelling arguments set forth in Michael McConnell’s analysis of the origins of the Free Exercise Clause. Like Professor Feldman, Professor McConnell argues that the Framers of the Religion Clauses were strongly influenced by John Locke’s ideas about liberty of conscience.<sup>78</sup> However, McConnell also emphasizes that the Framers went well beyond Locke in protecting conscientious liberty—for while Locke insisted that conscientious objectors were not entitled to exemptions from generally applicable laws,<sup>79</sup> the historical evidence suggests that the Framers intended to permit such exemptions in at least some cases.<sup>80</sup> Souter noted the potential relevance of this history—and McConnell’s work in particular—in expressing doubts about the soundness of *Smith* and in urging the Court to reconsider the case’s holding.<sup>81</sup>

Nevertheless, it is not clear that Justice Souter was prepared to accept all of Professor McConnell’s arguments. Perhaps most significantly, McConnell’s reading of constitutional history indicates that religious claims of conscience are entitled to greater protection and accommodation than secular claims of conscience. McConnell supports this reading by noting that the First Congress rejected an earlier formulation of the Religion Clauses that mentioned “rights of conscience” and instead adopted the language of “free exercise of religion.”<sup>82</sup> McConnell further notes that “[t]he textual insistence on the special status of ‘religion’ is, moreover, rooted in the prevailing understandings, both religious and philosophical, of the difference between religious faith and other forms of

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approach might allow for “displays like Nativity scenes and Ten Commandments monuments” and for “school-sponsored prayer . . . at special events like graduations”).

<sup>76</sup> 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 456 (2008).

<sup>77</sup> CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 152–56 (2007); GREENAWALT, *supra* note 76, at 456–61; Laycock, *supra* note 75, at 68–80.

<sup>78</sup> See McConnell, *Origins and Original Understanding*, *supra* note 70, at 1431 (“Locke’s ideas . . . are [an] indispensable part of the intellectual backdrop for the framing of the free exercise clause.”).

<sup>79</sup> See *id.* at 1430–35 (analyzing Locke’s theory of religious toleration and concluding that it “expressly precludes free exercise exemptions”).

<sup>80</sup> See *supra* note 70 and accompanying text.

<sup>81</sup> See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 574–75 (Souter, J., concurring in part and concurring in the judgment) (noting that “when the opportunity to reexamine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule’s consonance with the original understanding and purpose of the Free Exercise Clause”).

<sup>82</sup> See McConnell, *Origins and Historical Understanding*, *supra* note 70, at 1488–1500 (maintaining that Congress’s ultimate choice of words is “of utmost importance,” and explaining the interpretive implications of this choice).

human judgment.”<sup>83</sup> These understandings held that religious duties took precedence over all other duties, insofar as religious duties were owed to a higher power (i.e., God) than the civil government. McConnell argues that it is only these religious duties that are entitled to exemption and accommodation: “Unbelievers undoubtedly make judgments of right and wrong that sometimes conflict with generally applicable law. But if these do not stem from obedience to a transcendent authority prior to and beyond the authority of civil government, they do not receive exemption under the free exercise clause.”<sup>84</sup>

In short, one of McConnell’s main scholarly theses “is that ‘singling out religion’ for special constitutional protection is fully consistent with our constitutional tradition.”<sup>85</sup> But however accurate McConnell’s thesis may be as a reflection of original constitutional understanding, it is highly debatable as a standard for contemporary constitutional interpretation. Two of the most prominent opponents of special privileges for religion are Christopher Eisgruber and Lawrence Sager. In their recent and much-discussed book, Eisgruber and Sager argue that there is “no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities.”<sup>86</sup> Instead, religious claims should be evaluated under the theory of “equal liberty.”<sup>87</sup> This theory “demands that *all* persons—whether engaged in religiously inspired enterprises or not—enjoy rights of free speech, personal autonomy, associative freedom, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow religious practice to flourish.”<sup>88</sup> Kent Greenawalt has similarly argued that “constitutional considerations of equality” require that secular claims of conscience be treated equally with religious claims, “at least when claims of nonreligious conscience are common and can be feasibly assessed by a screening process.”<sup>89</sup>

As noted above, it is by no means clear that Justice Souter would have agreed with McConnell’s claim that religion should be “singled out” for special protection. It seems rather more likely that his favorable citation of McConnell’s writings on Free Exercise reflected Souter’s view that government should lift “discernible burden[s]” on religious practice when secular rules have been drawn without taking those burdens into account.<sup>90</sup> “In such circumstances, accommodating religion reveals nothing beyond a

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<sup>83</sup> *Id.* at 1496.

<sup>84</sup> *Id.* at 1500.

<sup>85</sup> Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000).

<sup>86</sup> EISGRUBER & SAGER, *supra* note 77, at 52.

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

<sup>88</sup> *Id.* at 52–53.

<sup>89</sup> Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1473 (1999).

<sup>90</sup> *Lee v. Weisman*, 505 U.S. 577, 629 (Souter, J., concurring).

recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all.”<sup>91</sup> This approach does not imply that religious believers should be given special privileges as a matter of constitutional law. Instead, it merely implies that religious believers should be given “equal regard” in the lawmaking process, and that government should “exempt religious observers from burdens that are not shared fairly with others.”<sup>92</sup> As this Essay has attempted to show, such equal regard for the consciences of religious and secular Americans was one of the hallmarks of Souter’s Religion Clause jurisprudence.

#### IV. CONCLUSION

Justice Souter leaves behind a legacy of Religion Clause opinions that expresses a consistent commitment to protecting liberty of conscience. Under the Establishment Clause, this commitment was reflected in Souter’s unwavering opposition to public funding for religious activity, and in his steadfast objection to government endorsement of religious belief—even if such endorsement was non-preferential and non-coercive. In Free Exercise cases, Souter’s solicitude for liberty of conscience was equally evident in his insistence that government could accommodate religion by lifting discernible burdens on religious practice.

While Souter himself acknowledged that interpretation of the Religion Clauses has “defied any simple test,”<sup>93</sup> his emphasis on liberty of conscience nevertheless has the potential to lend intellectual and theoretical coherence to Religion Clause jurisprudence. As demonstrated above, recent scholarship has shown that protecting liberty of conscience was one of the primary goals behind both the Establishment and Free Exercise Clauses. Souter’s jurisprudential legacy draws upon these original understandings of the Religion Clauses, while also reflecting contemporary commitments to equal liberty for believers and nonbelievers alike.

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<sup>91</sup> *Id.* at 628.

<sup>92</sup> EISGRUBER & SAGER, *supra* note 77, at 87.

<sup>93</sup> *Mitchell v. Helms*, 530 U.S. 793, 870 (2000) (Souter, J., dissenting).