

The Privatization of Religion and Catholic Justices

Richard S. Myers

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcls>



Part of the [Catholic Studies Commons](#)

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Catholic Legal Studies by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE PRIVATIZATION OF RELIGION AND CATHOLIC JUSTICES

RICHARD S. MYERS†

The privatization of religion has been a major theme in American law and culture over the last several decades.¹ There have been increasing pressures to marginalize religion.² A recent noteworthy example has been the attacks on the Catholic Justices of the United States Supreme Court.³ One commentator suggested that the presence of five Catholic Justices on the Court itself violates the Constitution.⁴ There have been, in addition,

† Richard S. Myers, Professor of Law, Ave Maria School of Law. This Paper is a revised version of a talk that was given on October 27, 2007, at the Fifteenth Annual Society of Catholic Social Scientists Meeting at St. John's University School of Law.

¹ See Richard S. Myers, *The Ten Commandments Cases and the Future of the Religion Clauses of the First Amendment*, 11 CATH. SOC. SCI. REV. 245, 250–53 (2006) [hereinafter Myers, *The Ten Commandments Cases*]; Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1991) [hereinafter Myers, *Privatization of Religion*]; Richard S. Myers, *The United States Supreme Court and the Privatization of Religion*, 6 CATH. SOC. SCI. REV. 223 (2001) [hereinafter Myers, *The United States Supreme Court*]; see also STEPHEN L. CARTER, CULTURE OF DISBELIEF: HOW LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 3 (1993) (“Contemporary American politics faces few greater dilemmas than deciding how to deal with the resurgence of religious belief. . . . [W]e have created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them.”); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 779–80 (2001) (noting that both the belief that religion should be part of the public sphere and the attitude that religion should “stay out of politics” are “deeply rooted” in American traditions); Steven G. Gey, *Rewriting the Establishment Clause for One Nation Under (a) God*, 41 TULSA L. REV. 737, 747–48 (2006) (discussing the continuing debate over “the principle that government should be completely a purely secular institution and religion should be an entirely private affair”).

² See, e.g., Matthew A. Ritter, *Constitutional Jurisprudence of Law and Religion: Privacy v. Piety—Has the Supreme Court Petered Out?*, 40 CATH. LAW. 323, 326 (2001) (“Secularism . . . marginalizes religion, banishing it to the purely private sphere, from which private sphere it exerts no moral claim upon the public sphere and thus poses little subversive harm to the civic order.”).

³ See Alan Cooperman, *Court Could Tip to Catholic Majority: Some Say Slant Is Dangerous; Others See Historic Victory*, WASH. POST, Nov. 7, 2005, at A03.

⁴ Michael J. Gerhardt, *Why the Catholic Majority on the Supreme Court May Be Unconstitutional*, U. ST. THOMAS L.J. 173, 174 (2006). Gerhardt argues that

many attacks on the Catholic Justices after the Court's April 2007 decision in *Gonzales v. Carhart*.⁵ In that case, the five Catholic Justices constituted the majority that upheld the constitutionality of the Partial-Birth Abortion Act of 2003.⁶ In this Paper, I will discuss and critique these developments and offer some reflections on the proper role of religion in shaping the culture and the law.

First, I will begin with some of the legal background. The privatization of religion has been an important theme in Supreme Court cases and in legal commentary for several decades now. For a time, the Court seemed committed to privatizing religion. The Court's decisions have improved somewhat in recent years, but the situation is still highly unstable. This instability is due, in part, to the cultural pressures I will note below.

There is much bad news here. There are plenty of examples of decisions and opinions of individual Justices that reflect a hostility to a public role for religion.⁷ I think, though, that the general trend in religion clause cases over the last twenty-five years has been positive. In the mid-1970s, the Supreme Court's decisions were contributing greatly to the privatization of

Republican presidents intentionally appointed Catholic Justices since the Justices could be expected to "rigidly adhere to their ideological preferences," and thus produce consistently conservative rulings. Gerhardt believes this preference of ideology over law and precedent violates the rule of law. Also, the selection process for the Catholic Justices may have violated Article VI's prohibition of religious tests for federal office, the Fifth Amendment's Due Process Clause, and the First Amendment's Establishment Clause. *Id.*

⁵ 127 S. Ct. 1610 (2007); see Geoffrey R. Stone, *Our Faith-Based Justices*, CHI. TRIB., Apr. 30, 2007, at C19 (arguing that in *Gonzales v. Carhart*, the Catholic Supreme Court Justices may have ignored the separation of church and state, and "mandate[d] [their] own moral code"); Robin Toner, *Subtext of Abortion Ruling: Religion; Catholics Dominate Supreme Court*, INT'L HERALD TRIB. (Paris), Apr. 26, 2007, at 4 (noting the debate concerning the Supreme Court's Catholic majority following the Court's decision in *Gonzales v. Carhart*); Frances Kissling, *Why I Won't Stay Silent Anymore*, SALON.COM, May 11, 2007, <http://www.salon.com/opinion/feature/2007/05/11/kissling> (arguing that the majority in *Gonzales v. Carhart* "cannot distinguish the Constitution from the catechism of the Catholic Church").

⁶ The majority in *Gonzales* consisted of Chief Justice Roberts and Justices Kennedy, Scalia, Thomas, and Alito. See *Gonzales*, 127 S. Ct. at 1618. For my evaluation of *Gonzales v. Carhart*, see Richard S. Myers, *The Supreme Court and Abortion: The Implications of Gonzales v. Carhart*, in LIFE AND LEARNING XVII: THE PROCEEDINGS OF THE SEVENTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE (Joseph W. Koterski ed., forthcoming 2008).

⁷ See Myers, *The United States Supreme Court*, *supra* note 1, at 225.

religion.⁸ The title of Stephen Carter's 1993 book—*The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*—captures this evaluation of the Court's work product. In that book, Professor Carter wrote about how American law treats religion as a hobby—like building model airplanes. In this view, religion is “something quiet, something private, something trivial—and not really a fit activity for intelligent, public-spirited adults.”⁹ In the mid-1980s, Gerry Bradley had noted: “The Court is now clearly committed to articulating and enforcing a normative scheme of ‘private’ religion.”¹⁰

Under this view, privatization meant that religion had to be treated as a private affair that should not play a role in public life. I have in mind here a broad understanding of “religion”; I mean religious institutions, religious individuals, and religiously-influenced moral principles. Many of the cases arise under the Establishment Clause,¹¹ but it is important not to limit the discussion to religion clause cases. Many of the cases that more clearly reveal the Justices' understanding of the relationship between religion and the legal order arise in the area of public morality (abortion, assisted suicide, etc.), which are decided under different doctrinal labels (substantive due process and equal protection, for example).

In both contexts (cases involving the Establishment Clause and cases involving public morality issues)

religion is typically involved in an explicitly public role. For example, many Establishment Clause issues involve aid to religious institutions. The constitutional debate in these cases often turns on whether it is permissible for the religious institution to play an active role in performing a “public” task,

⁸ See *Meek v. Pittenger*, 421 U.S. 349, 362–63 (1975) (invalidating a state law providing educational equipment and materials to nonpublic schools as “an impermissible establishment of religion”), *overruled in part by Mitchell v. Helms*, 530 U.S. 793 (2000); *Sloan v. Lemon*, 413 U.S. 825, 828 (1973); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779–80 (1973) (rendering the same holding as in *Sloan v. Lemon* that state laws providing reimbursement to parents whose children attended nonpublic schools were unconstitutional under the Establishment Clause, since the laws had “the effect of advancing religious institutions”).

⁹ CARTER, *supra* note 1, at 22.

¹⁰ Gerard V. Bradley, *Dogmatomachy: A “Privatization” Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 276–77 (1986).

¹¹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

such as education or child care. The privatization thesis requires that institutions retaining their religious character be denied direct government support.¹²

These schools must be tolerated, and I mean toleration in the sense of a grudging concession to a practice of which one disapproves. But these schools cannot be regarded as equal players in the public task of education. In cases involving constitutional challenges to laws promoting public morality (laws banning abortion and homosexual conduct, for example), the courts have frequently considered

the appropriate role of religiously influenced moral principles in public decision-making. . . . Here, the privatization thesis works in two ways. First, religiously influenced moral judgments are not taken into account in support of the constitutionality of legislation because such judgments do not constitute "secular" interests that the government may advance. Second, religiously influenced moral judgments are viewed as dispositive of the case against the constitutionality of legislation because it [supposedly] violates the Establishment Clause for "religious" views to be embodied in secular legislation."¹³

As late as the early 1980s, the Court seemed to be moving strongly in this direction.¹⁴ I do think, and I have explored this topic in some detail in several articles,¹⁵ that in general the law has improved in this area. The Court no longer seems to place religion under special disabilities—which was true under the Court's cases dealing with aid to religious institutions through about 1985. The Court's approach—and this is most-readily seen in *Zelman v. Simmons-Harris*¹⁶—is that there is no

¹² Myers, *Privatization of Religion*, *supra* note 1, at 22–23.

¹³ *Id.*

¹⁴ See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (holding that city programs that sent public school teachers into religious schools to provide instruction and guidance services were an unconstitutional advancement of religion), *overruled by* *Agostini v. Felton*, 521 U.S. 203, 236 (1997); *Sch. Dist. v. Ball*, 473 U.S. 373, 397 (1985) (holding that programs that provided classes to nonpublic school students at public expense in classrooms located in and leased from the local nonpublic schools had the effect of advancing religion and therefore violated the Establishment Clause), *overruled by* *Agostini*, 521 U.S. at 236.

¹⁵ See Richard S. Myers, *A Comment on the Death of Lemon*, 43 CASE W. RES. L. REV. 903, 904, 907–08 (1993) [hereinafter Myers, *A Comment*]; Myers, *Privatization of Religion*, *supra* note 1, at 29; Myers, *The Ten Commandments Cases*, *supra* note 1, at 250–53; Myers, *The United States Supreme Court*, *supra* note 1, at 223.

¹⁶ 536 U.S. 639 (2002) (finding no violation of the Establishment Clause by the Ohio Pilot Scholarship Program's voucher system because the program itself was

Establishment Clause violation if religion is treated on equal terms. Unfortunately, this neutrality is not required by the Constitution—equal treatment seems to be largely a matter of legislative grace, as the 2004 decision in *Locke v. Davey* demonstrated.¹⁷ There, a 7-2 majority (only Justices Scalia and Thomas dissented) had no problem permitting the State of Washington to discriminate against religion.¹⁸

In general, though, the Court no longer expresses the negative views of religion that characterized the earlier cases. The Court seems willing to allow religion an equal role in the political process, and that improvement is worthy of note. We have moved from hostility towards a public role for religion to neutrality.

Unfortunately, this situation is highly unstable. Some decisions, such as the 2003 decision in *Lawrence v. Texas*,¹⁹ seem to condemn the state's reliance on religiously informed moral norms, a development that seemed a thing of the past at the time of the Court's assisted suicide cases in 1997.²⁰ In the Establishment Clause context, some recent opinions have revived the divisiveness doctrine.

This latter point is worthy of more extensive treatment. At one point, the Court (in the 1970s and early 1980s) expressed concern that political divisiveness that might be engendered by religious involvement in the political process was a warning signal of Establishment Clause problems.²¹ By 1990 or so

[t]he Court seem[ed] to have rejected the view that political division along religious lines is an evil, reasoning that such divisiveness is a normal part of the political process and not a

neutral toward religion and any government aid that reached religious schools resulted from recipients' private choice).

¹⁷ 540 U.S. 712, 723–25 (2004) (holding that Washington State did not violate the Free Exercise Clause by forbidding recipients of its Promise Scholarship Program to apply the funding to a devotional theology degree).

¹⁸ See *id.* at 720–21.

¹⁹ 539 U.S. 558 (2003). For commentary on *Lawrence*, see Richard S. Myers, *Pope John Paul II, Freedom, and Constitutional Law*, 6 AVE MARIA L. REV. (forthcoming 2008).

²⁰ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 710–11 (1997).

²¹ See, e.g., *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797–98 (1973) (“And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a ‘warning signal’ not to be ignored [that the Establishment Clause is in jeopardy].”).

cause for concern. The Court's more recent cases[, I said some years ago,] reflect an increasing receptivity to religious activism in politics.²²

In *McCreary County v. American Civil Liberties Union of Kentucky*²³ and in some of the opinions in *Van Orden v. Perry*,²⁴ in contrast, there are constant references to concerns about divisiveness. Justice Souter, for example, noted with great alarm that "the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual."²⁵ The solution, for Justice Souter, is privatization. This reemergence of a focus on divisiveness is, therefore, a cause for concern.

My most serious reservation about the Court's Establishment Clause opinions is that a majority of the Court still seems far removed from being able to acknowledge a special role for religion. Whether our liberties can be thought secure without this recognition is still an open question.²⁶ The Court is still worlds away from the view expressed in *Dignitatis Humanae* that "[g]overnment . . . ought indeed to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare."²⁷

I think, in sum, that the legal doctrine has improved quite a bit in recent decades. The extremes of the Court's Establishment Clause cases from the 1970s and the early 1980s have been softened considerably, although the recent concerns about divisiveness from certain Justices on the Court ought to give one pause. In the area of public morality, a majority of the Court has never clearly held that the government may not rely on religiously influenced moral values, although again recent opinions such as *Lawrence* ought to give one pause.

My major concern is that the theme of privatizing religion still seems to have great resonance among prominent legal scholars, as well as in the culture at large. For example, in an

²² Myers, *The United States Supreme Court*, *supra* note 1, at 223.

²³ 545 U.S. 844 (2005).

²⁴ 545 U.S. 677 (2005).

²⁵ *McCreary County*, 545 U.S. at 881.

²⁶ Myers, *The United States Supreme Court*, *supra* note 1, at 223–24, 231–34.

²⁷ PAUL VI, DECLARATION ON RELIGIOUS FREEDOM *DIGNITATIS HUMANAЕ* ¶ 13 (Dec. 7, 1965).

article in the *Michigan Law Review* a few years ago, Chris Whitman exclaimed at some length about how the legal and moral controversy over abortion could not usefully be addressed by focusing on an issue such as when life begins because that question is a “religious” one about which the government cannot take sides.²⁸ Michael Gerhardt’s article, *Why the Catholic Majority on the Supreme Court May Be Unconstitutional*, is difficult to summarize, but one of its principal concerns is about the “religious convictions” of the Catholics on the Supreme Court as they relate to the great issues of the day, in particular the issue of abortion.²⁹ In contrast, the views of Justices such as Breyer and Ginsburg on abortion are merely ideological commitments that raise no similar concern.

Perhaps the most-noteworthy example of this phenomenon (the support for the privatization of religion from prominent academics) was in some of the reaction to *Gonzales v. Carhart* and, in particular, the reaction that noted with alarm that all five Justices in the majority are Catholic.

Some of this commentary was from people such as Frances Kissling who predictably complained that, “the decision injected orthodox Catholic teaching into the interpretation of constitutional rights.”³⁰ But it was more telling in my view to see the same basic point made by Geoffrey Stone, one of the most prominent professors of constitutional law in the country. Stone complained that the five Catholic Justices “failed to respect the fundamental difference between religious belief and morality” and threatened the separation of church and state.³¹ Stone was appropriately taken to task by many. Writing in the *Wall Street Journal*, John Yoo stated that

[p]laying the religion card is worse than silly because it shows how intellectually lazy the liberal defense of *Roe* has become. . . . Rather than develop reasoned responses to the court or the arguments of conservatives, liberal critics resort to the mystical for easy answers. They suggest that irrational

²⁸ Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1993–96 (2002). For a critical comment on Professor Whitman’s article, see Richard S. Myers, *Reflections on “Looking Back on Planned Parenthood v. Casey,”* in LIFE AND LEARNING XIII: THE PROCEEDINGS OF THE THIRTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 3–19 (Joseph W. Koterski ed., 2004).

²⁹ See Gerhardt, *supra* note 4, at 183–89.

³⁰ Kissling, *supra* note 5.

³¹ Stone, *supra* note 5.

religious faith or pure Catholic doctrine handed down from the Vatican drives the Justices. It is much easier to dismiss your opponents as driven by mysterious forces than to do the hard work of developing arguments built on human reason. This religious critique recalls the nativist fear of Catholicism that too often appears in U.S. history.³²

I think the responses to Professor Stone were devastating. But his commentary reflects a widespread notion in the culture (the idea of the privatization of religion) that it is important to resist. Fortunately, there is not much legal support for Stone's argument, although my conclusion is a tentative because of cases such as *Lawrence v. Texas*.³³ Stone's argument depends (as do the arguments of Whitman and Gerhardt) on the idea that legislation must be supported by a certain form of secular rationality. Fortunately, a majority of the Supreme Court has rejected this position:

The Court continually reaffirms the idea that a moral position should not be regarded as religious [and therefore illegitimate] simply because it happens to coincide with the tenets of some religious organizations. . . . The Court has consistently refused to restrict the types of moral arguments that are considered a legitimate part of public debate. . . . The Court has not insisted that laws be supported by a certain form of secular reasoning. . . . The Court has adopted a wide understanding that permits the inclusion of a range of comprehensive moral views, even if some might regard one or more of these comprehensive moral views as religious in some sense.³⁴

The conclusion from an article by Professor (now Judge) Michael McConnell provides an apt summary:

One false view of separation is the view that religious ideas must not serve as rationales for public policy. This view, called the "principle of secular rationale," is put forward as a means of protecting the public sphere from divisive, absolutist, intolerant impulses and from arguments that cannot be supported on the basis of accessible public reasons. But in fact, it rests on inaccurate stereotypes and questionable epistemological premises, and it would disenfranchise religious persons as full participating members of the political community. The United States has never adhered to the principle of secular rationale.

³² John Yoo, *Partial-Birth Bigotry*, WALL ST. J., Apr. 28, 2007, at A8.

³³ See Myers, *supra* note 19.

³⁴ Myers, *supra* note 6, at 13.

Indeed, our political history is rife with religious political activists and religious political arguments. . . . [T]here is no good democratic argument for excluding them. But more than this: to exclude them would be inconsistent with the very ideals of democratic equality that the principle of secular rationale ostensibly seeks to protect. It is time to stop challenging our fellow citizens' right to be part of democratic dialogue, and time to engage their arguments on the merits.³⁵

I think, as I have noted above, that the legal doctrine with regard to privatizing religion is now acceptable. Certainly, efforts to preserve this legal situation must be made. But perhaps more important in the long run is an effort to respond to the broader cultural pressures in favor of privatization. It is important for religion (broadly understood) to shape the culture. Religious institutions and individuals certainly ought to have an equal place at the table. Religiously informed moral arguments ought to as well. If they do not, then our culture and our law will ultimately lose any sense of God and of a transcendent order.³⁶ This sense is critical to the protection of human rights. As then-Cardinal Ratzinger stated: "The ultimate root . . . of all attacks on human life, is the loss of [a belief in] God [and in a transcendent order]. Where . . . [this belief] disappears, the absolute dignity of human life disappears as well."³⁷

Maybe, ironically, the Court's decision in *Gonzales v. Carhart*, which has elicited so much outcry, may suggest some possibilities. In its more controversial passages, the opinion focused on the impact of abortion on women.³⁸ Perhaps the work that religious groups have long done to deal with this problem (I am thinking of such work as Project Rachel)³⁹ and the work of crisis pregnancy centers (which are often sponsored by religious

³⁵ Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 656–57.

³⁶ See Myers, *A Comment*, *supra* note 15, at 909; Myers, *The Ten Commandments Cases*, *supra* note 1, at 252.

³⁷ JOSEPH RATZINGER, CONSISTORY OF CARDINALS ON THREATS TO HUMAN LIFE, *THE PROBLEM OF THREATS TO HUMAN LIFE*: ¶ 43 (1991), <http://www.priestsforlife.org/magisterium/threatstohumanlife.htm>.

³⁸ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007). For a more general discussion of *Gonzales v. Carhart*, see Myers, *supra* note 6.

³⁹ Project Rachel is a program sponsored by the Catholic Church that provides free services such as counseling to all persons negatively affected by abortion. See *There Is Hope After Abortion*, <http://www.hopeafterabortion.com> (last visited Feb. 2, 2008), for more information.

groups and which have been so prominent in the news of late) may help in this regard. This positive example of faith in action may help to rebuild the culture of life and may help to counter the idea of the privatization of religion.