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## RELIGION IN THE PUBLIC SQUARE

DAVISON M. DOUGLAS\*

One of the more contentious issues in America today is the question of the proper role of religion in our public life. The 2000 election campaign for the Presidency brought this issue once again to the forefront as the candidates from both major political parties made clear that their religious beliefs play an important role in their public policy choices.<sup>1</sup> Democratic vice presidential candidate Joseph Lieberman, whose campaign public persona was linked closely to his deep religious commitments as an Orthodox Jew, repeatedly emphasized over the course of the campaign the positive role that religion does and should play in preserving the moral climate of our country.<sup>2</sup> Although Lieberman's comments proved

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1. Democratic candidate Al Gore announced that he often makes policy decisions by asking, "What would Jesus do?" Nancy Gibbs, *Whose Bully Pulpit Now? When Politics and Piety Mix, the Real Question is Less What Candidates Say Than What They Plan to Do*, TIME, Sept. 11, 2000, at 38. Republican candidate George Bush, when asked what political philosopher he most identified with, replied "Christ, because he changed my heart." Darrel Rowland, *Religion Taking Prominent Role in 2000 Election*, COLUMBUS DISPATCH, Sept. 10, 2000, at 1A.

2. Lieberman, for example, stated that "[m]orality cannot be maintained without religion" and, quoting George Washington, noted that "the American people should 'renew the dedication of our nation and ourselves to God and God's purpose.'" Michael Hedges, *Lieberman's Rhetoric Revives Debate Over Church and State*, HOUSTON CHRON., Sept. 4,

controversial,<sup>3</sup> the religious beliefs of political candidates are important to many Americans.<sup>4</sup> In another recent controversy concerning religion in public life, the Supreme Court banned student-led prayer at high school football games in a Texas community,<sup>5</sup> triggering a campaign throughout much of the South to preserve the tradition of praying before playing.<sup>6</sup>

This debate over religion in the public square takes place at multiple levels. Proponents and opponents of the infusion of religion in public life wage their debate in both constitutional terms, arguing whether a variety of public acts and statements constitute unconstitutional establishments of religion, and in normative terms, arguing whether the direct or indirect support of the government for religious activity is good social policy. The debate also considers whether elected officials should rely on their personal religious beliefs in making policy choices. These are not idle academic speculations. Critical policy issues of the next few years, such as school vouchers and the use of religious organizations to

2000, at 26; John Rivera, *Unease Over Faith in Politics Campaign: The Anti-Defamation League says Joseph I. Lieberman, Al Gore and George W. Bush Have Stepped Over the Line in the Way They Have Used Religious References in the Presidential Race*, BALT. SUN, Sept. 7, 2000, at 2A. These claims were not novel. Dwight Eisenhower, for example, though apparently not a deeply religious man himself, claimed that religious faith was a condition of democracy. See Michele Landsberg, *E.B. White Acts Like Good Bacteria on Religious Frenzy*, TORONTO STAR, Sept. 9, 2000, at 1L. Similarly, Ronald Reagan announced that "the Bible contains 'all the answers to all the problems that face us today.'" Editorial, *Rendering Unto Caesar*, OMAHA WORLD-HERALD, Sept. 6, 2000, at 10. See generally JOSEPH LIEBERMAN, IN PRAISE OF PUBLIC LIFE 139-51 (2000) (extolling the importance of religious faith for the future of the American polity).

3. Lieberman's explicit "God talk" won him sharp rebukes from many quarters. See, e.g., Rivera, *supra* note 2, at 24 (citing criticism from Anti-Defamation League); Tom Teepen, *Let's Get Candidates Out of the Pulpit*, DAYTON DAILY NEWS, Sept. 5, 2000, at 6A (criticizing Lieberman and other candidates' use of religion in presidential campaign).

4. According to a poll taken prior to the 2000 election, almost sixty percent of Ohio voters surveyed said that a candidate's religious beliefs were "at least somewhat important" in deciding for whom they would vote. Rowland, *supra* note 1, at 1A. Many political observers noted the enthusiasm of many voters—even those with policy views arguably more consistent with the Republican Party—for the Democrat Lieberman precisely because of his religious devotion. See Howell Raines, *When Devotion Counts More Than Doctrine*, N.Y. TIMES, Sept. 17, 2000, § 4, at 18. Recognizing the importance of religion to many American voters, a senior Gore policy adviser announced in 1999 that "the Democratic Party is going to take back God this time." Rowland, *supra* note 1, at 1A.

5. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000).

6. See David Firestone, *South's Football Fans Still Stand Up and Pray*, N.Y. TIMES, Aug. 27, 2000, at 1A.

provide an array of publicly supported social services, undeniably are linked to this issue of the proper role of religion in public life.

This Symposium was organized for the purpose of exploring some of the thorny issues of the religion-in-public-life debate. Although each author was given broad latitude to address his or her own particular interests within the larger theme, the articles published here do an excellent job of leading us through some of the most critical issues in the debate over religion in the public square.

### RELIGION IN PUBLIC DISCOURSE

One of the threshold issues for those concerned with the role of religion in public life is the question of the propriety of political actors relying on their religious understandings in making and defending their policy choices. This debate has drawn the attention of legal scholars and political theorists for more than a decade. Indeed, fifteen years ago, the *William and Mary Law Review* published a symposium on religion in American life—also sponsored by the Institute of Bill of Rights Law—that contained one of the first scholarly exchanges on this topic.<sup>7</sup> That collection of articles helped shape the “religion and democracy” debate for the next several years. But, as noted above, this is no mere academic inquiry as the question of the proper role of religious belief in the policy choices of elected officials reemerged with a fury during the recent presidential election.<sup>8</sup>

Professor Michael Perry has long engaged this issue with a great deal of perception.<sup>9</sup> In his essay for this Symposium, *Political Reliance on Religiously Grounded Morality Does Not Violate the*

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7. See Kent Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011 (1986), and responses to Greenawalt: Michael J. Perry, *Comment on “The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment,”* 27 WM. & MARY L. REV. 1067 (1986); Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075 (1986); Michael E. Smith, *Religious Activism: The Historical Record*, 27 WM. & MARY L. REV. 1087 (1986); Diane Leenheer Zimmerman, *To Walk A Crooked Path: Separating Law and Religion in the Secular State*, 27 WM. & MARY L. REV. 1095 (1986).

8. See *supra* notes 1-4 and accompanying text.

9. See, e.g., MICHAEL J. PERRY, RELIGION IN POLITICS (1997); Michael J. Perry, *Liberal Democracy and Religious Morality*, 48 DEPAUL L. REV. 1 (1998); Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 LOY. L.A. L. REV. 1421 (1996).

*Establishment Clause*,<sup>10</sup> Perry considers the difficult question of whether it is constitutionally legitimate for an elected official to rely on religious beliefs when making policy decisions that disfavor certain types of conduct such as abortion or same-sex marriage. Perry concludes that such reliance is not only consistent with liberal democratic theory, but also does not violate the Establishment Clause. In reaching this conclusion, Perry argues that to hold otherwise would violate the “equal citizenship of religious believers”:<sup>11</sup> “[S]uch . . . deprivileging [of] religious grounds for moral belief relative to secular grounds would be conspicuously unfair. Such deprivileging would discriminate against religious grounds for moral belief, thereby subverting the equal citizenship of religious believers . . . .”<sup>12</sup> In reaching this conclusion, Perry rejects the argument that there must be an independent secular ground supporting the religiously grounded decision to disfavor certain conduct.<sup>13</sup>

Professor Steven Smith, in his essay *Religion, Democracy, and Autonomy: A Political Parable*,<sup>14</sup> asks a question similar to that posed by Perry: should legislators (or voters or judges) feel free to rely on their religious beliefs in deciding to disfavor certain conduct

10. Michael J. Perry, *Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663 (2001).

11. *Id.* at 675.

12. *Id.* at 682.

13. *See id.* at 675. Perry elaborates:

[F]rom the perspective of many religious believers in the United States, to forbid legislators to make a political choice on the basis of a moral belief with a religious ground unless the belief also has a plausible, independent secular ground . . . would be to import into the Constitution a controversial conception of the proper relation between morality and religion, according to which morality . . . can and should stand independently of religion. . . . For such Americans, to construe the nonestablishment norm to forbid legislators to base a political choice on a religiously grounded moral belief unless the belief also has a plausible, independent secular ground would be to unfairly deprivilege religious faith (relative to secular belief) as a ground of moral judgment – and to unfairly deprivilege too, therefore, those moral judgments that cannot stand independently of religious faith.

*Id.* at 678–79. For Perry, such a “conception of the proper relation between morality (in the public square) and religion” should not be accorded “constitutional status in a society in which the question of the proper relation between morality and religion is so disputed.” *Id.* at 679.

14. Steven D. Smith, *Religion, Democracy, and Autonomy: A Political Parable*, 42 WM. & MARY L. REV. 685 (2001).

such as abortion and same-sex marriage? Whereas Perry is primarily interested in whether such reliance is permitted under the Establishment Clause, Smith's concern is whether reliance on religious motivations is appropriate in a democratic society. Dismissing the oft-argued notion that religiously based arguments are in some sense "inaccessible" to nonbelievers and hence should be excluded from the political process, Smith focuses instead on the philosophical argument that democracy is properly grounded in and dependent upon the autonomy of individual participants in the self-governing process, and that reliance on religious understandings is inconsistent with notions of autonomy.<sup>15</sup> Given the emphasis of many political theorists on Kantian notions of autonomy, Smith therefore frames the question as whether "*the introduction of religion into public deliberation [is] inappropriate because it offends a justified commitment to autonomy.*"<sup>16</sup> Or, put another way, is making a policy choice "because God wants it" inconsistent with notions of autonomy that call for individuals to think and act for themselves?<sup>17</sup>

Smith pursues this question by constructing a political parable in which various political actors debate the merits of deciding, in democratic fashion, to sacrifice their autonomy by choosing to defer to someone—or something—else to make the really difficult policy choices. Placing himself in the tradition of the law professor who presents the hypothetical construct without offering resolution, Smith declines to directly answer his question. But Smith's fantastical tale clearly calls into question the notion that autonomy should preclude reliance on religiously based motivations for certain political choices.

Professor John Witte's essay, *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global*

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15. As Smith notes: "This commitment to autonomy supports a cluster of intertwined Kantian propositions that have become virtually axiomatic in much modern liberal democratic theory: that 'autonomy is the supreme good,' that only obligations that we legislate for ourselves are binding on us, that autonomy is the essential basis of human dignity . . ." *Id.* at 689 (quoting GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 8 (1988)).

16. *Id.* at 691.

17. *Id.* at 690.

*Perspective*,<sup>18</sup> while not directly addressing the issue of the propriety of relying on religious beliefs in making policy judgments, nevertheless speaks to it indirectly by arguing that religion must play a central role in the ongoing struggle to articulate human rights norms in the modern world.<sup>19</sup> Believing that “human rights norms need religious narratives to ground them,” Witte calls for religious communities to “reclaim their own voices within the secular human rights dialogue” and to “play a more active role in the modern human rights revolution.”<sup>20</sup> Witte concedes that his thesis may appear counterintuitive because of the vast array of human rights abuses that have been perpetrated over the years in the name of religion, and the many ways in which religion has “helped to perpetuate bigotry, chauvinism, and violence.”<sup>21</sup> Yet relying in part on the long—though often ignored—theological embrace by Christianity, Judaism, and Islam of basic human rights norms, and the central role that religious groups have played in the modern human rights revolution, Witte argues that religious institutions can and should continue to play a vital role in the ongoing struggle to secure protection for human rights around the world.<sup>22</sup> To better perform this role, Witte urges religious groups to “reclaim the human rights voices within their own internal religious dialogues.”<sup>23</sup>

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18. John Witte, Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 WM. & MARY L. REV. 707 (2001).

19. Witte writes:

Religion is an ineradicable condition of human lives and human communities. Religions invariably provide many of the sources and “scales of values” by which many persons and communities govern themselves. . . . Religions must thus be seen as indispensable allies in the modern struggle for human rights. To exclude them from the struggle is impossible, indeed catastrophic.

*Id.* at 713.

20. *Id.* at 714.

21. *Id.* at 715.

22. Witte notes that “the theory and law of human rights are neither new nor secular in origin. Human rights are, in no small part, the modern political fruits of ancient religious beliefs and practices . . .” *Id.* at 714.

23. *Id.*

## GOVERNMENT AID TO RELIGIOUS INSTITUTIONS

One of the central issues in both contemporary Establishment Clause jurisprudence and political debates over the proper relationship of government and religion is that of government aid to religious institutions. Professor Ira Lupu, in his essay, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*,<sup>24</sup> notes a divergence in the Supreme Court's Establishment Clause jurisprudence. In cases that Lupu describes as "government message" cases, in which the government sponsors a religious message, a majority of the Court remains committed to a separationist perspective. This perspective was reflected most recently in the Court's *Santa Fe* decision in which a six-justice majority declared unconstitutional a local school policy that allowed a student to deliver a prayer before a public high school football game.<sup>25</sup> Indeed, argues Lupu, "[w]hat remains of the popular notion of 'separation of church and state' has little if anything to do with churches; rather, the remnants of separationism attach most doggedly to questions of state sponsorship of religious messages and themes."<sup>26</sup>

In cases involving various types of government financial aid to religious institutions, however, Lupu notes that the Court over the course of the past decade has rejected the Burger Court's strong separationist stance. As Lupu notes, the Court's recent plurality decision in *Mitchell v. Helms*<sup>27</sup> "explicitly overrule several Burger-Era precedents on the subject of school aid and opens the door to substantial provision of in-kind benefits by government to all schools, including the most sectarian among them."<sup>28</sup> Indeed, religious institutions, such as schools or welfare providers, increasingly are performing important social services for which they

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24. Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001).

25. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000).

26. Lupu, *supra* note 24, at 774.

27. 120 S. Ct. 2530 (2000).

28. Lupu, *supra* note 24, at 773.

receive explicit government support—and now with the blessing of the Court.

This divergence of judicial interpretation of these two paradigmatic Establishment Clause claims, Lupu argues, constitutes a departure from eighteenth-century concerns. During the late eighteenth century, government financial aid to religious institutions was fiercely resisted, whereas some government sponsorship of religious messages was tolerated.<sup>29</sup> Lupu attributes the recent shift in the Court's jurisprudence to a variety of cultural factors—pluralism, egalitarianism, secularism, prosperity, an expanded role for government in the provision of social services, and a revolution in communications—that help “to explain the rising trajectory of constitutional concerns about government speech and the falling trajectory of comparable concerns about government money.”<sup>30</sup> Moreover, a majority on the Court now embraces a theory of neutrality, pursuant to which the government must treat religious groups the same as other nonsectarian private groups when distributing its largesse.

Professor Marci Hamilton, in her essay *Free? Exercise*,<sup>31</sup> also addresses the question of government aid to religious institutions. Hamilton, like Lupu, notes the Court's increasing acceptance of this kind of assistance,<sup>32</sup> and strongly argues from both history and constitutional doctrine that such governmental aid is unwise as a matter of both constitutional law and policy. Outlining the many different ways in which religious institutions receive direct or indirect financial aid from the state—such as tax exemptions, aid to religious schools, and financial support for the provision of social services—Hamilton argues that these payments offend Madisonian notions that the government should not be supporting churches.<sup>33</sup> But Hamilton goes further. Not only does such aid violate the Establishment Clause, it is unwise public policy, as neutrality principles require the government not to discriminate among

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29. As Lupu notes, “What the Virginians and others did fight about [in the eighteenth century], and what then became the primary focus in our legacy of nonestablishment, was not government speech. It was government money.” *Id.* at 777.

30. *Id.* at 788.

31. Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823 (2001).

32. *See id.* at note 123 and accompanying text.

33. *See id.* at 835-42.

institutional recipients, even though such discrimination may be desirable: "When the Luciferians want to assist troubled youth or the Ku Klux Klan seeks to oversee welfare-to-work, they cannot be rejected on the basis of their theology."<sup>34</sup>

Hamilton also argues the converse: not only is government aid to religious institutions bad for the state (and society), it also is bad for the religious recipients of the aid. Hamilton contends that as religious institutions take more and more government money, their agendas invariably will be compromised by the state: "As religion becomes the beggar, . . . asking for this amount of money for this mission at this particular time, government will become the enslaver, capable of demanding accountability and loyalty."<sup>35</sup> Hamilton outlines how this has occurred in the arts-funding context.<sup>36</sup>

Professor Carl Esbeck, on the other hand, welcomes the jurisprudential shift favoring government aid to religious institutions. Esbeck, who in an important earlier article laid out a doctrinal justification for government aid to religious social service providers,<sup>37</sup> argues in his essay *Religion and the First Amendment: Some Causes of the Recent Confusion*,<sup>38</sup> that the Supreme Court's recent decisions in *Mitchell v. Helms*,<sup>39</sup> *Agostini v. Felton*,<sup>40</sup> and *Rosenberger v. Rectors & Visitors of University of Virginia*,<sup>41</sup> which legitimated various forms of government aid to religious institutions, are consistent with both the mandates of the Establishment Clause and neutrality principles that oblige the state not to discriminate against religious institutions.

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34. *Id.* at 877.

35. *Id.* at 876-77.

36. *See id.* at 842-50.

37. *See* Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997).

38. Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883 (2001)

39. 120 S. Ct. 2530 (2000) (upholding various types of government aid to religious schools such as computers).

40. 521 U.S. 203 (1997) (upholding provision of remedial education to students in religious schools and in process reversing prior Supreme Court precedent).

41. 515 U.S. 819 (1995) (holding that university must fund religious publication in order to avoid viewpoint discrimination).

## SCHOOL VOUCHERS

One of the central ways in which the state financially supports religious institutions is through various types of aid to sectarian schools. Such aid programs have loomed large in the Supreme Court's Establishment Clause jurisprudence for more than half a century. Perhaps the most dramatic and controversial example of this type of aid today is the provision of school vouchers to those parents whose children attend private religious schools. Cleveland, Milwaukee, and Florida each have established voucher programs,<sup>42</sup> and both California and Michigan recently considered—but rejected—statewide programs in November 2000 ballot initiatives.<sup>43</sup> The Court's decision this past summer in *Mitchell v. Helms* confirmed its increasing willingness to countenance government aid to religious institutions provided that it is done on a neutral basis, but *Mitchell* left open the question whether the government provision of school vouchers violates the Establishment Clause.<sup>44</sup>

Professor Neal Devins, in his essay *Social Meaning and School Vouchers*,<sup>45</sup> offers a robust defense of school vouchers on both normative and constitutional grounds. Devins argues that courts, confronted with arguments that school vouchers violate the Establishment Clause, should engage in "a type of minimalist

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42. See Ellen Belcher, *Voucher Debate Focuses on Ohio*, DAYTON DAILY NEWS, Jan. 7, 2001, at 6B, available in LEXIS, News Library, Dayton Daily News File (describing Cleveland voucher program); Tamara Henry & Anthony DeBarros, *Vouchers Enter Second Decade: Milwaukee Finds No Easy Answers in School Choice*, USA TODAY, Oct. 24, 2000, at 1D, available in LEXIS, News Library, USA Today File (describing Milwaukee voucher program); Kimberly Miller, *Special Education Vouchers Find Few Takers*, PALM BEACH POST, Nov. 19, 2000, at 1C, available in LEXIS, News Library, Palm Beach Post File (describing Florida voucher program).

43. See Mark Hornbeck & Tom Kiska, *Vouchers Denied: Michigan Voters Say No to Proposal 1*, DET. NEWS, Nov. 8, 2000, at Front 6, available in LEXIS, News Library, Detroit News File; Greg Lucas & Nanette Asimov, *Californians Again Turn Down Vouchers for Private Schools; Limits on Local Fees, Private Contracting for State Backed by Voters*, S.F. CHRON., Nov. 8, 2000, at A9, available in LEXIS, News Library, San Francisco Chronicle File.

44. Indeed, the decisive two-justice concurrence of O'Connor and Breyer in *Mitchell* specifically noted that no government funds "ever reach the coffers of a religious school," thus suggesting that these two swing justices regard the voucher issue as unsettled. *Mitchell v. Helms*, 120 S. Ct. 2530, 2562 (2000) (O'Connor, J., concurring).

45. Neal Devins, *Social Meaning and School Vouchers*, 42 WM. & MARY L. REV. 919 (2001).

decision making that allows states and municipalities to experiment” with voucher plans.<sup>46</sup> Devins suggests it would be “truly tragic”<sup>47</sup> to short circuit such plans by finding them to be unconstitutional establishments of religion, as certain lower courts have already done.<sup>48</sup> Devins grounds this argument in his view that courts should consider the “social meaning” of those government actions subject to constitutional challenge. For Devins, the social meaning of school vouchers has radically shifted in the past two decades, and as a result, many of the constitutional concerns with vouchers have dissipated. In particular, Devins argues that school vouchers are no longer seen as instruments of racial segregation—a widespread concern with such plans twenty years ago—and Catholic schools, one of the primary educational alternatives to public schools, have undergone a dramatic “secularization” in recent years that should reduce anxieties about religious indoctrination and the “pervasively sectarian” nature of religious schools.<sup>49</sup> Devins notes that the rhetoric of voucher opponents has shifted in significant measure away from constitutional concerns about the “state facilitating private religious instruction” to more pragmatic concerns like “the need to invest in public schools.”<sup>50</sup> As a result, in the contemporary debate over vouchers, “religion has taken a back seat” to secular concerns about educational quality in urban schools.<sup>51</sup> As an historical matter, Devins argues that courts, in resolving earlier constitutional disputes, have been influenced by larger social meanings; such influence continues to be appropriate

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46. *Id.* at 961.

47. *See id.*

48. *See, e.g.,* *Simmons-Harris v. Zelman*, 72 F. Supp. 2d. 834 (N.D. Ohio 1999) (striking down voucher program in Cleveland on Establishment Clause grounds), *aff'd*, Nos. 00-3055/3060/3063, 2000 U.S. App. LEXIS 31367, at \*1 (6th Cir. Dec. 11, 2000); *Holmes v. Bush*, 2000 WL 526364, at \*1 (Fla. Cir. Ct. Mar. 14, 2000) (striking down Florida voucher plan on state constitutional grounds).

49. *See* Devins, *supra* note 45, at 942-43. During the 1970s and 1980s, the Supreme Court was particularly suspicious of “pervasively sectarian” institutions when conducting Establishment Clause analyses. *See, e.g.,* *Aguilar v. Felton*, 473 U.S. 402, 412 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

50. Devins, *supra* note 45, at 921.

51. *Id.* at 953.

and should cause courts to take a restrained view when considering the constitutionality of school vouchers.<sup>52</sup>

Professor James Dwyer, in his essay *School Vouchers: Inviting the Public Into the Religious Square*,<sup>53</sup> also argues for the normative benefits of vouchers as well as their constitutionality. Dwyer's policy arguments for vouchers, however, differ from those of most voucher proponents. Dwyer notes at the outset that those who decline public services have no general claim on government resources to subsidize their private choices. Privately educated children, however, pose a unique set of problems. Because the decision to decline public services by enrolling in private schools is made not by children, but by their parents, and many parents may make poor choices on behalf of their children in the pursuit of certain ideological objectives, Dwyer argues that children in certain poorly operated and equipped private schools have their own right—apart from their parents—“to a fair share of state spending on education.”<sup>54</sup> Therefore, Dwyer concludes, “as a matter of fairness and as a matter of constitutional principle, every state in this country *must* create a voucher program.”<sup>55</sup>

Having concluded that school vouchers should be required for many children, Dwyer considers their constitutionality. He concludes that they are unconstitutional establishments of religion if they are not accompanied by “regulatory strings . . . needed to ensure that children in [the recipient] private schools receive a good secular education.”<sup>56</sup> Without such supervisory attention by the state, Dwyer argues, these programs would be unconstitutional. As to arguments that such regulation unconstitutionally intrudes on

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52. Indeed, Devins argues that “the changing social meaning of school choice suggests that vouchers neither violate equal educational opportunity nor Establishment Clause prohibitions.” *Id.* at 959.

53. James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963 (2001).

54. *Id.* at 977.

55. *Id.* at 978.

56. *Id.* at 992. The Court's most recent decision legitimizing the distribution of government aid to religious institutions acknowledged, at least implicitly, such a supervisory role when it held that such aid “to further some legitimate secular purpose” can be provided to private religious institutions so long as the recipients “adequately further that [secular] purpose.” *Mitchell v. Helms*, 120 S. Ct. 2530, 2541 (2000) (plurality opinion).

the operation of the private schools, Dwyer argues that the school can avoid this regulation by simply declining the voucher aid.

### FREE EXERCISE OF RELIGION

Since the Supreme Court's 1990 decision in *Employment Division v. Smith*,<sup>57</sup> both politicians and scholars have engaged in spirited debates of the merits of the Court's holding that the government need not show a compelling, narrowly tailored interest to justify its neutral regulations that impose a burden on the free exercise of religion. In response, Congress enacted by an overwhelming margin the Religious Freedom Restoration Act (RFRA), which in effect reversed *Smith*, requiring the state to justify its neutral laws that impose a burden on the free exercise of religion by demonstrating a compelling interest. Although the Supreme Court struck down RFRA on grounds that Congress lacked the power to so legislate,<sup>58</sup> Congress has continued to consider legislation to accomplish similar legislative goals through other constitutional means.<sup>59</sup> On the academic front, numerous scholars have argued that the Court in *Smith* misconstrued the purpose of the Free Exercise Clause.<sup>60</sup>

In response to *Smith*, many legislatures have enacted statutes that provide an exemption for religious individuals or institutions

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57. 492 U.S. 872 (1990) (holding that Free Exercise Clause does not require State of Oregon to grant an exemption from its drug laws for members of Native American Church who smoke peyote as part of their religious observations).

58. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

59. For example, Congress has recently considered enactment of a Religious Liberty Protection Act (RLPA) that would require the state to justify its neutral laws that infringe the free exercise of religion by a compelling government interest; to avoid the Court's *Boerne* decision, RLPA is grounded in Congress's power under the Commerce Clause. See Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1038-39 & nn. 119-20, 122 (2001). Congress enacted in 2000 a Religious Land Use and Institutionalized Persons Act that forbids the state from imposing a "substantial burden" on religious exercise through land use regulations absent a compelling interest. See David O'Reilly, *New Federal Law Reduces Clout of Zoning Boards Over Houses of Worship*, PHIL. INQUIRER, Oct. 27, 2000, available in LEXIS, News Library, Philadelphia Inquirer File.

60. See, e.g., James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). But see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

from otherwise generally applicable laws.<sup>61</sup> For example, the Oregon legislature created a statutory exemption from its drug laws for Native Americans who smoke peyote for religious reasons.<sup>62</sup> The courts generally have found such exemptions, or permissive accommodations, to be constitutional.<sup>63</sup>

Professor Lisa Bressman, in her article *Accommodation and Equal Liberty*<sup>64</sup> offers a sophisticated critique of why permissive accommodations for religious institutions and individuals violate constitutional commitments to equality grounded in the Equal Protection Clause of the Fourteenth Amendment and the Free Speech Clause of the First Amendment. In order to reconcile constitutional principles of both free exercise and equality, Bressman proposes that legislatures "respond to religious requests for accommodation on a permissive basis as long as they are prepared to extend any such accommodation to similarly situated nonreligious claimants."<sup>65</sup> Bressman concedes that her standard may impose some administrative difficulties, but urges that commitments to equality require that such difficulties be surmounted to justify granting legislative exemptions from generally applicable laws in the name of protecting liberty.

Professor Esbeck, on the other hand, argues in his essay that permissive accommodations violate neither the Establishment Clause nor commitments to equality since such legislative action

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61. See Bressman, *supra* note 59, at 1022-23.

62. See OR. REV. STAT. § 475.992 (1999).

63. See, e.g., *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding exemption of religious organizations from employment discrimination laws).

64. Bressman, *supra* note 59, at 1007.

65. *Id.* at 1014. Bressman's analysis might also call into question those laws that do not grant an exemption to religious institutions from generally applicable laws, but that also single out religious individuals for protection from adverse private action. For example, employment discrimination laws mandate that private employers not discharge an employee because of the employee's religious activities or affiliations, but offer no such protection to employees who are fired because of their nonreligious activities or affiliations, such as volunteering in an AIDS clinic. See Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000 (1994 & Supp. IV 1998) (prohibiting discrimination in workplace because of religion of employee and defining religion to include "all aspects of religious observance and practice, as well as belief"); *Brunner v. Al Attar*, 786 S.W.2d 784 (1990) (finding no wrongful discharge for firing employee because of volunteer work in AIDS clinic). Employment discrimination laws that favor religious commitments over similar secular commitments might violate Bressman's principle of equal liberty.

“reduces civic/religious tensions and minimizes governmental intrusions into religious matters, both objectives that help maintain the separate spheres of church and state so sought after by the Establishment Clause.”<sup>66</sup>

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The debate over religion in public life is as spirited as ever, as the presidential campaign of 2000 served to remind us. Many Americans welcome the embrace of a public role for religious institutions and belief that several political candidates articulated in their quest for high office. Others criticize such language and policy proposals as inconsistent with the principles of a modern secular democracy. This debate will not go away. Hopefully, however, the essays in this Symposium will offer some guidance to those seeking to better understand the proper role for religion in our public life.

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66. Esbeck, *supra* note 38, at 906; *see supra* text accompanying note 37.