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Teaching about law in the liberal arts

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Religion and Law: School Vouchers, the RFRA, and Other Controversies

by John Paul Ryan

The intersections of religion and law bring to the forefront a variety of theoretical and policy questions. How, if at all, has First Amendment jurisprudence changed, as America's religious landscape has become far more diverse? Does Congress have the authority to clarify the meaning of the "free exercise of religion," as it sought to do through the Religious Freedom Restoration Act of 1993? In what ways do today's controversies about the separation of church and state echo debates of our founding fathers? Should school voucher programs, now dramatically on the rise nationwide, be permitted to include religious-affiliated schools in their "choice" plans, or does that violate the Establishment clause of the First Amendment?

These and other topics were discussed at a recent conference sponsored by the American Bar Association Division for Public Education on "Law, Religion, and the Moral Order," held May 13–15 in San Antonio, Texas. This issue of *Focus* reprises a sampling of these discussions.

The conference's San Antonio venue offered a poignant backdrop for discussion of *Boerne v. Flores*, the 1997 Supreme Court decision striking down the Religious Freedom Restoration Act. *Focus* Editor Hannah Leiterman highlights a roundtable discussion of the *Boerne* case, from the perspective of the town (located just a few miles northwest of San Antonio) and the trial court litigants.

The desirability and constitutionality of school vouchers are debated by Teresa Collett, a law professor at South Texas College of Law, and Caren Dubnoff, a political scientist at Holy Cross College. Check out this dialogue online, which includes court cases, references, and other resources for teaching about the controversy, at <www.abanet.org/publiced/focus/voucher.html>. Charles Williams, Editor of the ABA's *Preview of U.S. Supreme Court Cases*, analyzes state supreme court decisions on school vouchers.

The roots of contemporary church/state controversies are explored in the historical perspective provided by Catharine Cookson, a lawyer and religious studies scholar who directs the Center for the Study of Religious Freedom at Virginia Wesleyan College.

Max Richardson, a political scientist at Concordia College, discusses teaching at a religious-affiliated college, and Andrew Walsh, a religious studies faculty member at Indiana University/Indianapolis, talks about teaching his discipline at a secular university.

Many resources for the classroom are identified and discussed, including a multi-media CD-ROM, authored by featured conference speaker Diana Eck, a professor of comparative religion at Harvard University. Web sites and books on religion, law, and the First Amendment are also briefly annotated.

Legal Studies Directory Now Available Online

The most recent edition of the ABA's *Directory of Undergraduate Programs of Law and Society, Legal Studies, Etc.* is now available online at <www.abanet.org/publiced/undergrad/>.

The directory features summary descriptions of the programs at 60 colleges and universities in the United States and Canada. Information about the program's mission, curriculum, and internship/service learning opportunities can be found. Also included is contact information, typically with e-mail link, for the faculty director and/or program coordinator.

For a number of colleges, there is also a direct link to the home page of the program's web site. Check out the excellent web pages of legal studies programs at Amherst College, Arizona State University, the University of California at Santa Barbara, the University of Delaware, and the University of Massachusetts at Amherst, among others.

The online version offers greater accuracy, allowing for ongoing changes and additions. Print copies of the Directory (6th edition, 1999) remain available. Contact Hannah Leiterman by e-mail, leitermh@staff.abanet.org, or phone, 312/988-5736.

IN THIS ISSUE

Boerne, Texas Journal

by Hannah Leiterman

[This article is taken from a panel discussion of the City of Boerne, TX v. Flores *(1997) case that was part of the ABA Division for Public Education's 1999 Higher Education Conference on Law, Religion, and the Moral Order, May 13–15, 1999 in San Antonio, Texas. The discussants included Lowell Denton, Thomas Drought, Greg Davis, and Emily Hartigan, . . . San Antonio participants or observers in the case. The moderator was Jay Erstling, professor of Legal Studies at the University of St. Thomas in St. Paul, MN and author of a 1998 case note on* Boerne.*]*

The local Catholic church in a small Texas city moves to expand its facility to accommodate a growing parish. The City denies the church's request for a building permit, arguing that the church is a historic building and cannot be altered because of zoning laws. The church sues the City, arguing that its parishioners' First Amendment Free Exercise rights have been violated. By the time the dispute is settled, it will have gone through three levels of courts to reach the U.S. Supreme Court; an uncontroversial piece of congressional legislation on religious freedom will have been overturned to the distress of a wide variety of religious groups; the Supreme Court will have reasserted its ultimate authority to interpret the Constitution; the church will have spent millions more dollars than it had intended in order to comply with City ordinances; and notions of sacredness, religious legitimacy, and minority rights will have been challenged and refined.

At first glance, *Boerne* appeared to be a straightforward "free exercise" case that would become a test case for the constitutionality of Congress's Religious Freedom Restoration Act of 1993. St. Peter Catholic Church, a cathedral in Boerne, Texas, a small city of 5,000 near San Antonio, wanted to expand its structure to meet the needs of an expanding congregation. In recent years, the population of Boerne had grown substantially, and the congregation of St. Peter had grown with it. At some Sunday masses as many as 60 people could not be accommodated. Archbishop Flores of the San Antonio Archdiocese approved a plan for renovations, and the church applied for a building permit in 1993. The City Landmark Commission denied the request, saying that the church was located in a historic district and could not be altered.

The Archdiocese of San Antonio–the district in which Boerne lay–was befuddled by the City's denial. Historic Districts were established in Boerne in 1991, some months after St. Peter had begun to move toward expanding. Greg Davis, architect for the church, remembers that those involved found the historic district law "arbitrary," but were assured by their contacts at the City that the church's planned expansion should be "no problem." When the church received the Historic Review Committee's response, Davis says, that it was "not to touch a stone" of St. Peter's Catholic Church, they were "stunned." Puzzlingly, the historic districts did not include the entire church: they were drawn so that only the façade of the church was within the boundaries. Further, it was unclear what made the church "historic;" it was built in 1923 by an unknown architect. According to Thomas Drought, attorney for the church, "the church is not distinguished . . .. It was modeled on a mission and sits prominently on a rise, and has become an important feature of Boerne. But it's not in any sense historic." The San Antonio Archdiocese, however, felt pressure not to dispute a City ruling. "The Archdiocese is an extremely responsible preservation citizen in this part of the country," conceded Lowell Denton, attorney for the City, but it was finally decided that St. Peter simply must be expanded to meet the needs of its parishioners.

In 1993, the Archdiocese appealed the Landmark Commission's decision to the City, but the City also denied the church's application. By this time, however, Congress had passed the Religious Freedom Restoration Act (RFRA)–a legislative attempt to expand religious free exercise rights–potentially offering St. Peter's a basis to claim that its parishioners' religious freedom rights had been violated. The Act had been passed largely in response to the Supreme Court's ruling in the 1991 Free Exercise case *Employment Division v. Smith*. The Court had ruled against two Native Americans who were dismissed from their jobs after a drug test had detected peyote–a powerful hallucinogen that they used as part of religious ceremonies. The majority had maintained in that case that neutral laws not motivated out of religious bigotry cannot be said

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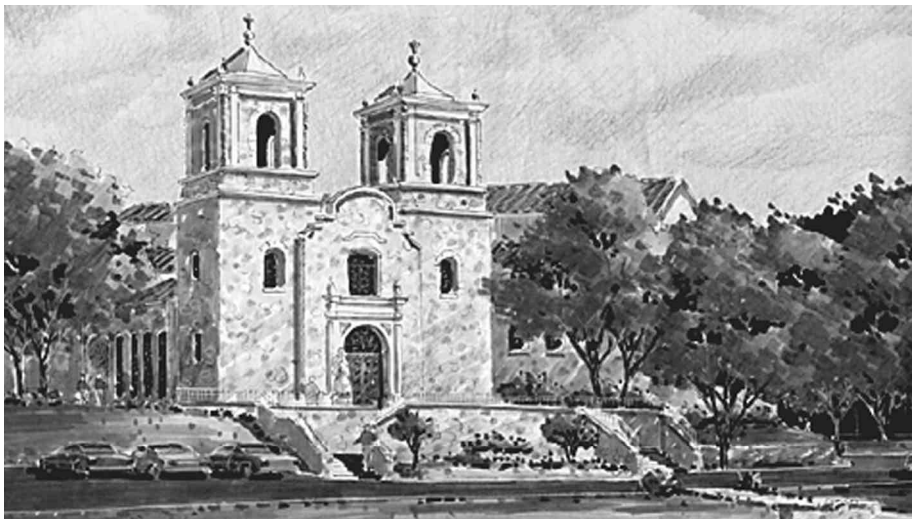
Focus on Law Studies (circulation: 5,194) is a twice-annual publication of the American Bar Association Division for Public Education that examines the intersection of law and the liberal arts. Through the essays, dialogues, debates, and book reviews published in *Focus*, scholars and teachers explore such subjects as law and the family, human rights, law and science, and constitutional interpretation, as well as such legal policy controversies as capital punishment, affirmative action, and immigration. By examining the law from a variety of disciplinary and interdisciplinary viewpoints, *Focus* seeks both to document and nourish the community of law and liberal arts faculty who teach about law, the legal system, and the role of law in society at the undergraduate collegiate level. The views expressed herein have not been approved by the House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the American Bar Association.

to offend Free Exercise. The authors of the RFRA felt that this decision would place unnecessary burdens on some religious practices. They designed the RFRA in order to require that any law that burdened individuals' religious practices had to satisfy a "compelling state interest," and that the state must impose that burden only by means narrowly tailored to achieve that interest. The RFRA was intended to be "sweeping in scope," and applicable to all levels of government action. It had broad, bipartisan support; was approved unanimously in the House of Representatives, and passed by all but three votes in the Senate with the support of a wide array of interest and advocacy groups.



St. Peter Catholic Church, Boerne, TX. Image courtesy of Davis, Durand-Hollis, & Rupe, Architects, San Antonio, TX.

Armed with the RFRA, the Archdiocese decided to file suit against the City, arguing that its ruling against St. Peter's application for a building permit burdened the church's right to free exercise without showing any compelling reason to do so. The church lost. The Federal District Court in Texas found the RFRA to be an unconstitutional expansion of congressional power, and ruled in favor of the City. The Archdiocese then appealed the District Court's decision to the U.S. Court of Appeals for the Fifth Circuit. Douglas Laycock, law professor at University of Texas School of Law, and prominent advocate for religious liberty and the RFRA joined the church's legal team. Marci Hamilton, constitutional law scholar at Cardozo School of Law and an equally prominent opponent of the RFRA joined the City's side. Both had testified before Congress about the RFRA. To quote Denton, "there was a dynamic interest in finding an answer to the constitutionality of that statute." The church finally received the ruling it sought—the Fifth Circuit overturned the District Court's decision, finding the RFRA to be constitutional legislation, and ruled in favor of the church

But the City ultimately appealed to the Supreme Court for review of the case. With the constitutionality of federal legislation in question, the Supreme Court chose to hear the case, and overturned the District Court decision by a margin of 6-3.

Like many Supreme Court cases, the Court's decision in *City of Boerne, TX v. Flores* had little to do with the City of Boerne or Archbishop Flores and St. Peter Catholic Church. It had mostly to do with the separation of powers and the roles of the legislative and judicial branches vis-á-vis lawmaking and constitutional interpretation. Speaking for the majority, Justice Anthony Kennedy found the RFRA to be an unconstitutional attempt by Congress to alter the meaning of the Free Exercise clause. He cited the 1803 case *Marbury v. Madison*, which gave the judicial branch "the province and duty. . . to say what the law is." In the Court's view, Congress had, in enacting the RFRA, usurped the power of the Supreme Court. The ruling in *Boerne* admonishes that Congress has the power to enforce a right, but not to change what that right is, and the "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."

Justice Sandra Day O'Connor, in her dissenting opinion, took the side of the church, arguing that religious practices should be protected to a higher degree, and that *Smith* had been wrongly decided. Before *Smith*, O'Connor instructed, the Free Exercise Clause of the First Amendment had been interpreted to mean that government must show "compelling state interest" when a law burdened religious practice, "regardless whether it was specifically targeted at religion or applied generally." Justice John Paul Stevens, concurring with the majority opinion, responded that his opposition to the RFRA came from what he saw as an unacceptable establishment of religion: "the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." Justice Antonin Scalia, also concurring with the majority, explained that the Court in its decision felt that a better means of preserving religious free exercise was to leave it in the hands of the states.

Today, the 1993 RFRA is invalidated, but its advocates are busy gathering support for the Religious Liberty Protection Act, a new version of the RFRA designed to comply with the Supreme Court's ruling. Several states, including Texas, are in the process of drafting or passing similar religious freedom acts. St. Peter Catholic Church has expanded to a size more appropriate to its parish population, but abandoned its original plans in favor of renovations that comply with the Historic District. An additional $1.4 million and the destruction of a $300,000 fellowship hall later, the renovated St. Peter Catholic Church remains with its original façade and towers as a fixed feature of the Boerne panorama.

Many would argue that this compromise was the best possible outcome for both sides. Emily Hartigan, law professor at St. Mary's University Law School in San Antonio, disagrees. In the *Boerne* case, she feels, "the Supreme Court took away . . . free exercise rights." Along with other religion and law scholars, Hartigan suggests that the precedent set by the Court's previous opinions on free exercise cases favors mainstream religions over minority religions. The RFRA offered legal protection to those minority religious groups whose practices (e.g., peyote use) might be burdened by neutral laws. Overturning it, Hartigan laments, removes that protection.

It remains to be seen whether the RFRA

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Authentic Pluralism: The Case for Including Religiously-Affiliated Schools in Publicly-Funded Voucher Systems

by Teresa Stanton Collett

There is a widespread perception that public schools are failing to properly educate a substantial number of their students. Often inner-city schools are held up as examples of high-cost, low-performance educational institutions, yet the decline in students' test scores is not restricted to inner-city students, any more than the growth of student violence is contained within big city limits. Continuing poor academic performance, increasing episodes of violence, and ongoing claims by some public educators that any existing problems can be solved by simply appropriating more money leave many members of the public looking for solutions outside the public education system.

On the federal level last year, Congress passed both the D.C. Student Opportunity Scholarship Act of 1997, providing 2000 D.C. students vouchers of up to $3200 to attend the schools of their choice, and Senate Bill 1133, providing for limited tax-free educational savings accounts. Both bills enjoyed strong bipartisan and public support, yet failed to go into effect because of presidential vetoes.

At the state level, Missouri, Idaho, New York, Utah, and Virginia joined 29 other states in allowing the establishment of "charter schools"–publicly-funded but privately run schools licensed by the state through contracts between the state and the educational provider. Freed from local school board direction, and many other state-imposed policies and regulations, many of these schools offer innovative approaches to instruction.

Local governments also were active in advancing school choice. The City of Milwaukee successfully defended its school choice plan before the Wisconsin Supreme Court. At the same time, New York City officials began actively reviewing Mayor Rudolph Giuliani's proposal of a school choice plan for one of that city's failing community school districts.

Such strong political momentum has caused one commentator to observe that "debates over 'public school choice' have focused less on the desirability or undesirability of the concept . . . than on the details of implementation." Among these details is the hotly contested issue of whether to include religiously-affiliated schools. Often discussed as a single concern, this issue is best addressed by separating the two questions inherent within it. First, is inclusion of religiously-affiliated schools in a school choice plan desirable as a matter of public policy; and second, is such inclusion permitted under present judicial interpretation of the religion clauses contained in the First Amendment? The answer to both questions is "yes."

Inclusion of religiously affiliated schools in a school choice plan is desirable because it allows parents a fuller range of opportunities and philosophies from which to select when seeking a good education for their children. Since the basic purpose of education is to enable students to succeed as adults, it is critical for families and educators to have a shared understanding of what constitutes success. Yet according to philosopher Ronald Dworkin, one of the fundamental tenets of liberalism is that the state ought to be neutral among competing conceptions of what constitutes success or the good life (Dworkin, 1989: 502–504). If the state assumes primary responsibility for educating the young, it must either abandon this neutrality and embrace some conception of a good life, or it must seek to fulfill a purpose that it cannot fully define. Both of these strategies have been adopted by various public schools.

Inclusion of religious schools in school choice plans allows parents a wider range of options.

Some public schools have embraced an economic conception of the good life, emphasizing the transmission of knowledge and skills necessary for students to become economically self-sustaining members of society. Co-op education and school-to-work programs are examples of this approach. In attempting to insure that students are free from the "tyranny of the belly" that can arise when basic physical needs go unfulfilled, these schools offer a crabbed view of human fulfillment. Material goods and physical comforts become the sole measure of human achievement. "Unnecessary requirements" like fine arts are displaced by consumer-oriented courses. For the most extreme of these programs, the essence of the person is captured by the phrase "homo economus."

Other public school systems have embraced a more republican or Aristotelian conception of the good life, reminiscent of the initial justifications for a public system of free schooling. These schools promote a vision of the good life as active participation in the polity. Development of civic virtue is the goal of education and "homo civitatus" is the essential character of the student. The public dimension of human life is presented as the pinnacle or sum of all human experience. Concepts like multiculturalism and diversity pose some problems in this approach to education, but can be surmounted if combined with a relativist understanding of political systems. Thus a school can both urge students to exhibit the civic virtues of honesty, industry, and communal concern, while maintaining that no system can reasonably claim superiority since each is merely the product of the time and place-bound preferences of the people subject to it.

More common than either of these approaches, however, is the smorgasbord approach to defining human nature and the good life that students should be seeking. Public schools adopting this approach (by design or by inattention) provide information about a broad array of values and potentials, and emphasize the capacity of students to choose among what are presented as equally desirable characteristics and objectives. Within this educational philosophy the essence of the person is fluid and

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The Inclusion of Religious Schools in Public Voucher Systems is Unconstitutional

by Caren Dubnoff

Publicly-funded school voucher systems have been instituted in a number of states, and are generally defended on policy grounds. Proponents claim that public schools have failed to provide quality education and teach proper values. Their failure, it is claimed, is particularly detrimental to low-income children. Their advocates argue that vouchers will remedy this problem by expanding educational choice. Low-income children will be able to obtain an education they otherwise could not afford, and public education will improve as local schools compete for students.

But even if these claims are true, which is by no means clear, a strong argument can be made that voucher programs must include only non-religious schools, because the use of public funds for tuition at private religious schools violates the Establishment Clause of the First Amendment. If this challenge has merit, as I shall argue it does, it makes no difference that vouchers for religious schools might provide secular benefits. One could otherwise argue that the government could directly fund a church because such funding might advance public morality.

State courts have differed on the constitutionality of public tuition grants for religious schools–the Maine Supreme Court recently struck such grants while the Wisconsin Supreme Court allowed them. Ultimately, the issue will likely be decided by the U.S. Supreme Court. I believe that the Maine Supreme Court was correct, and that such vouchers will be found unconstitutional.

The Establishment Clause provides that "Congress shall make no law respecting the establishment of religion," and it has long been incorporated via the Fourteenth Amendment to apply to state governments as well. The broadest question regarding the Establishment Clause is whether its essence is separation–the prohibition of government support to all religions–or something less than this, such as treating all religions equally, or avoiding support that is coercive to individuals.

The separation interpretation was endorsed by a unanimous Supreme Court in *Everson v. Board of Education of Ewing Township* (1947), an opinion that barred taxation "to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." This did not mean that no government funds could be conveyed to religious schools. The majority upheld the reimbursement of transportation costs to parochial schools on the grounds that transportation was, like police and fire protection, a general government service open to all citizens regardless of religious affiliation. To exclude religious individuals "from receiving the benefits of public welfare legislation" would impede "citizens in the free exercise of their own religion."

Vouchers would be permissible for nonsectarian schools, but most private schools are church-affiliated.

In order to distinguish permissible from impermissible aid the Supreme Court later developed the *Lemon* test, a tripartite test of government action associated with religion. To be permissible, "first the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . and finally, the statute must not foster an excessive government entanglement with religion."

Proponents of vouchers often assert that in recent years the Supreme Court has replaced the separation principle with a neutrality principle and has abandoned the *Lemon* test. Alternatively, they claim that vouchers meet even the traditional Establishment Clause requirements.

Chief Justice Rehnquist has long argued that separation should be abandoned in favor of non-preference among religions, and Justices Scalia and Thomas agree. All three would abandon the *Lemon* test in favor of a doctrine that made only religious coercion unconstitutional. But there is as yet no majority for non-preference, neutrality, or a new test for implementing Establishment Clause values. Separation remains the operative principle. The *Lemon* test in modified form serves to guide such assessments. This is true even after the Court's most recent decision in *Agostini v. Felton.*

The issue in this case was whether government could place public school employees in church-related schools, and the Court reversed an earlier holding that such practice was impermissible. But *Agostini* did not change the rule that the Establishment Clause barred government financial support of religion or taxation for religion. The permitted services were acceptable because they were secular and supplemental, and as such did not "relieve sectarian schools of costs they otherwise would have borne in educating their students." Nor did *Agostini* repudiate the *Lemon* test. To the contrary, it applied a close variation of it. The operative principle continues to be that "government aid cannot directly and substantially advance the sectarian enterprise of the school or finance religious indoctrination."

Some proponents of vouchers contend that vouchers are permissible even under the separation principle, since funds reach the coffers of religious schools only as a result of choices made by individuals. The Court has at times been more tolerant of programs that channel support to individuals rather than to religious institutions themselves. In *Mueller v. Allen* (1983), the Supreme Court upheld a Minnesota program that allowed parents a tax deduction for educational expenses incurred at either public or nonpublic schools. In *Witters v. Wash. Dept. of Services for the Blind* (1986), the Court allowed a blind student to use a vocational rehabilitation

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subject to self-construction, limited only by social conventions or personally-imposed constraints. In this way, schools attempt to maintain the neutrality that Professor Dworkin describes as fundamental to liberalism.

Many religiously-affiliated schools embrace a different approach to education. Beginning with the premise that the child is created in the image and likeness of God, these schools understand the essence of the person to be given by God, rather than constructed by man. The good life is defined as communion with God, or compliance with His norms and precepts. Many Hebrew and Christian schools embrace Solomon's insight as the foundation of their educational philosophy: "The fear of the Lord is the beginning of wisdom: and the knowledge of the holy is understanding."

It is this very educational philosophy that led the United States Supreme Court to forbid direct funding of religiously-affiliated elementary schools as "pervasively sectarian" in *Lemon v. Kurtzman* (1973), while permitting religiously-affiliated, but operationally secular, colleges and universities to share in programs of government aid in *Tilton v. Richardson* (1971). Disguised by claims of neutrality, driven by a fear that religion is uniquely divisive, the Court has vacillated on the constitutional relationship between government, church, and education. Secular texts and transportation can be provided to religiously-affiliated schools, but instructional equipment and other secular materials can not. Student-directed payments can be made by the government to advance a college student's study of theology, but initially the Court denied the constitutional legitimacy of public school instructors offering remedial assistance to students in religiously-affiliated schools.

In 1997, the Court took the unusual step of reversing its prior opinion in the same case to allow public school teachers to assist students in religiously-affiliated schools. In *Agostini v. Felton* the Court recognized that exclusion of religiously-affiliated schools from government programs affording secular benefits to the participants is more properly understood as hostility to religion than neutrality.

It now seems clear that school-choice programs may constitutionally include religiously-affiliated schools if they are properly constructed. Three rules should be observed. First, parents or other non-government parties should determine where the funds should be applied. Establishing individual trust accounts for each student, or issuing individual vouchers may be the safest course. Second, participation should be determined by neutral criteria, with no incentive or disincentive to choose religious schools. Third, governmental regulation of the educational providers should be kept to the minimum necessary to insure the government's educational objectives are achieved. Compliance with these rules should insure the program's constitutionality under the federal religion jurisprudence.

American political society was intentionally structured to insure that individuals, families, and other voluntary associations define the common good and the goals and ideals of the individual, rather than the state. Religiously-affiliated schools offer a valuable alternative to the educational philosophies embraced by public schools. For many families, these schools offer the most congenial understanding of the human person and the ideals and goals that should govern each life. Comprehensive school choice programs, including religiously-affiliated schools, are the logical, constitutional, and desirable embodiment of our political commitment to structured liberty.

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Reference

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program to study for the ministry, and in *Zobrest v. Catalina School Dist.* (1993), it allowed a deaf student to obtain a publicly-funded signer to assist him at a Catholic High School. However, in these decisions the financial benefit to the religious school was minimal. In fact, the Court has often looked to the effect of a program rather than the recipient of the aid in assessing constitutionality. Instructional materials that were loaned to students and parents rather than directly to religious schools did not save an Ohio program in *Wolman v. Walter* (1977).

The Supreme Court has said that the Establishment Clause prevents state support of religious education even "though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike" (*Roemer v. Md. Board of Pub. Works*, 1976). Vouchers accomplish exactly what the Establishment Clause forbids–they provide substantial government aid to religion. The line the Court has drawn is between support for religion and support for secular government services. Unlike past aid allowed by the Court, vouchers will be used for education that has a strong religious component. As noted in *Lemon*, the secular and religious missions of parochial schools are "inextricably intertwined."

Vouchers could be used for nonsectarian private schools without violating the Constitution, but in fact the overwhelming majority of nonpublic elementary and secondary schools are church-affiliated. They already have facilities and students, giving them a competitive advantage over attempts to organize new secular private schools. In addition they have an advantage in resources, with access to support from their religious bodies as well as from the state.

Finally, though the focus here has been on the constitutionality of voucher programs, a few words about the policy arguments are in order. The case for vouchers is not nearly as clear as asserted, and they may well have some important negative consequences. Religious schools, attracting as they do, their own adherents, would divide society along religious lines, which many would find undesirable. Also, the presumed benefits of competition to public schools are largely unproved and quite doubtful. Any drain of students and resources from the public schools would also lessen the political support needed to reform these schools, leaving those who remain in a worse situation than previously, and likely leaving society with an even larger problem.

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The Return of Religion Law

by Charles F. Williams

It's official. Religion law is back. Not only has the Supreme Court's grant of certiorari in *Mitchell v. Helms* this summer ended the prolonged drought of high-profile cases, but it is also becoming increasingly clear that the earlier calm on the High Court's docket has only belied the continuing tumult in the lower appellate courts, where the church-state fireworks have never been hotter.

On the Establishment Clause side, the big issue has been school vouchers. On the Free Exercise side, the effects of the 1997 demise of the Religious Freedom Restoration Act (RFRA) in *City of Boerne v. Flores* continue to reverberate.

Vouchers

Across the country, the same legal lines are being drawn by litigants battling over the constitutionality of government-funded tuition voucher programs, designed to enable low-income families to send their children to private or other public schools. While voucher opponents contend that the Establishment Clause is violated whenever religious schools receive vouchers financed by public monies, voucher proponents insist that there is no constitutional problem so long as it's the parent or student who is deciding where the money will be used, and the vouchers do not begin to create a financial incentive for parents to choose religious schools over other private or public schools.

But while the legal arguments have remained essentially the same, the outcomes have been all over the judicial map.

Wisconsin

In *Jackson v. Benson*, for example, a June 1998 decision, the Wisconsin Supreme Court rejected an Establishment Clause challenge to the Milwaukee Parental Choice Program, which permits Milwaukee students from low-income families to attend any approved private school of their choice, religious or not.

According to the Wisconsin court, the program satisfied the three-pronged "Lemon test" (announced by the Supreme Court in *Lemon v. Kurtzman*, 1971), for analyzing Establishment Clause claims. First, the Wisconsin program had a secular purpose: to increase educational opportunities available to children from low-income families. Second, it did not have the primary effect of advancing religion, because the program aided "both sectarian and nonsectarian institutions" on the basis of "neutral, secular criteria" that neither favored nor disfavored religion, and only as a result of "numerous private choices" of the individual parents. Third, the program would not result in "excessive government entanglement" with religion, because it did not involve the government in the schools' governance, curriculum, or day-to-day affairs.

Maine

In April 1999, the Supreme Court of Maine came to the opposite result in *Bagley v. Maine*. Whereas the Wisconsin plan ended up in court because voucher opponents objected to the legislature's decision to *add* religious schools to its tuition voucher program, just the opposite happened in Maine, where religious schools had been part of the Maine voucher program. In 1981, the legislature amended the law to *exclude* religious schools, and parents who wanted to send their children to private religious schools sued their school district and state department of education on the ground that the exclusion violated their rights under the Establishment Clause, Free Exercise Clause, and the Equal Protection Clause.

The Maine court applied the same *Lemon* test as the Wisconsin court, but came to a starkly different conclusion. "Although the school is chosen by parents, not the State," the Maine court concluded, "choice alone cannot overcome the fact that the tuition program would directly pay religious schools for programs that include and advance religion."

Ohio

Meanwhile, the voucher case most in the news this fall came from Cleveland, where a federal district judge in *Simmons-Harris v. Zelman* issued a preliminary injunction against that city's voucher program.

If the numerous court opinions are to be believed, the Cleveland public schools have long done a very poor job of educating students. In 1995, a U.S. district court ordered the state to take over the schools and do something about this problem. Among other things, the state created a voluntary "Ohio Pilot Scholarship Program," whereby low-income Cleveland students could enter a lottery to try to win scholarships of up to $2,500 to attend the private schools of their choice or to go to any public school in any adjacent suburban school district. The area's Catholic schools readily agreed to participate in the program, but not one of the suburban public schools was willing to accept any low-income scholarship students. That left the state in the position of funding students' switch to a good number of religious schools but no public schools, and only a few non-religious private schools, a circumstance that in the court's view had the primary effect of advancing religion.

Religious Freedom Restoration Act

Free Exercise issues have remained hot as well. In the 1997 case *Boerne v. Flores*, the Supreme Court struck down the RFRA of 1993. Congress had enacted this law for the express purpose of rejecting the Supreme Court's 1990 decision in *Employment Division v. Smith* that "neutral, generally applicable" state laws may be applied to religious practices even when not supported by a "compelling" governmental interest. The RFRA provided that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that interest."

Congress stated that RFRA was a proper exercise of the congressional power "to enforce" by "appropriate legislation" the Fourteenth Amendment's guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws." But in *Boerne*, the Supreme Court disagreed, holding that the "enforcement power" found in Section 5 of the Fourteenth Amendment only gives Congress the power to enforce constitutional rights, "not the power to determine what constitutes a constitutional vi-

continued on page 16

Foundations of Church/State Relations

by Catharine Cookson

Government exists to maintain and protect civil order. Law, and the enforcement of law, are the foundations of that civil order. Accordingly, at the heart of every issue of conscience versus the state lies the problem of order. The tension between law and religion might thus be approached through the question, "What is required for civil order?" In the United States, the response to this question has produced two complex approaches, distinct and yet joined, as if partners in a dance.

Setting the Stage: Anglicans versus Puritans versus Dissenters

To resolve the question of what is required for civil order, we must first define the term "order." Within the Western tradition, four basic typologies of the relationship between conscience, order, and the state have led to four different conceptions of "order." (1) The "two kingdoms" type (Tertullian) holds that the good of civil order is achieved when the secular and the sacred each exercises the power and authority that belong to it alone. Serious disorder occurs when one strays into the other's jurisdiction. (2) In the "duly-ordered relationships" type (Augustine), there is no conflict. All authority comes from God, and thus God and civil order both require obedience to civil authority. Otherwise, anarchy reigns. (3) The "levitical" type (Puritans) equates order with purity. Tolerance is a vice, not a virtue. (4) The "enlightenment" type (Locke) holds that order is achieved by moderation and balance: the essence of this type is an esteem for common sense and reasonableness.

Let's examine these theories in the context of 17th and 18th century England and its American colonies. The Anglican Church was the established church of England and of several American colonies, including Virginia. Anglicans believed that civil order was achieved through obedience to higher authority (both civil and ecclesiastical), with the monarch holding ultimate authority over both. Puritans believed in order as obedience, but more predominant was their levitical belief in order as purity. Thus, Puritans could condemn the Anglican Church's establishment while not advocating a broad freedom of religion, because Anglican theology and ritual were considered not biblically pure enough. Dissenters (Baptists such as Roger Williams, John Leland, and Isaac Backus) and other Christians such as James Madison championed the two kingdoms paradigm, criticizing any incursions by the government into religious matters. The government had no authority over religion, and so had created serious civil disorder by legally imposing religious requirements on the citizens and using their tax monies to support religion. To this mix can be added the Enlightenment rationale early advocated by William Penn and John Locke, and later by moderate Enlightenment politicos and Founding Fathers such as Thomas Jefferson, James Madison, etc., who viewed order as reasonableness and moderation.

Patrick Henry and others argued that government support of religion was vital to civil order.

The tensions created by such disparate views of civil order ineluctably led to a showdown. In the early 1770's, Virginia authorities (civil and ecclesiastical) accosted and jailed Baptist dissenters for "preach[ing] contrary to the laws and usages of the Kingdom of Great Britain" (Semple, 1894: 481-83). The persecutions outraged and disgusted the young James Madison (Kurland, 1987: 60-61). Prevailing winds began to shift against all things monarchical, including the Anglican establishment, and in 1776, the Virginia Declaration of Rights proclaimed that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and . . . it is the mutual duty of all to practice Christian forbearance, love, and charity, towards one another" (Kurland, 1987: 70).

The Virginia Statute for Religious Freedom: The Dance Begins

The Virginia Declaration of Rights did not resolve the issue of what was required for civil order, however. Patrick Henry and other leaders reasoned that since religion was necessary to make citizens virtuous, religion was thus necessary to civil order, and, therefore, government support of religion was vital to civil order. To fill what he perceived to be a dangerous void left when Virginia disestablished the Anglican Church, Henry introduced a bill to provide for teachers (ministers) of the Christian religion. The bill was what we would today call "non-preferentialist" in that it exacted a tax that went to the church of one's choice. He premised his arguments in both the duly-ordered authority type and the levitical type, seeking to address the need for both paternal authority and obedience to it, and responding to levitical fear of the spread of anarchy through immorality.

Madison and a groundswell of Christian dissenters wrote petitions (Madison, 1785: 295) opposing this bill, basing their arguments both in the two kingdoms (government had no authority or jurisdiction over religion) and the Enlightenment type (government support of religion was corrupting and useless). As Madison understood the issue, the question was not whether religion was necessary to government, but whether government was necessary to religion. His answer: No (Noonan, 1998: 62, 64). Henry lost this round, and Madison, seizing the moment, quickly introduced a bill Jefferson had written back in 1777. The Virginia Congress passed this bill in October 1785, and it became the Statute of Virginia for Religious Freedom (Kurland, 1987: 77).

And the Beat Goes On

Three years later, at the Virginia Ratifying Convention, the Henry tradition took the dance lead. Willing to compromise to get Virginia's vote for ratification, the Madisonian traditionalists acquiesced to Henry's insistence that Virginia submit a proposed amendment to the United States Constitution. Henry's proposed amendment regarding religious freedom was a rewriting of the 1776 Virginia Declaration

of Rights, leaving out "Christian charity and forbearance" in favor of a non-preferentialist establishment of religion (whose language did not make it into the final Bill of Rights) (Kurland, 89).

The lead in this dance continued to be contested as the 18th century drew to a close. Dissenters and others of the Madisonian tradition were dying out just as the second Great Awakening began to reap a harvest of souls for evangelical churches that had benefitted from the new free marketplace of religion. As Evangelical Protestantism gained cultural dominance in the 19th century, so the Henry tradition became the dominant partner in the dance. The United States became caught up in its "Christian Manifest Destiny." In an 1840 treatise on the U.S. Constitution, Justice Joseph Story wrote that "it is the especial duty of government to foster and encourage [Christianity] among all the citizens" (Story, 1840: 314–15). Although left a weakened partner, the Madisonian tradition nonetheless did not leave the dance. For example, the House Committee on the Judiciary in 1874 rejected a petition to amend the Constitution to include an "acknowledgment of God and the Christian religion," reasoning that the Founders envisioned the United States as a haven for all, Christian or Pagan (H.R. Report No. 143).

The dance continues in the Supreme Court today, and the bewildering array of positions taken by the Court on religious freedom issues might in part be explained by the persistent influence of the two traditions. The cleanest example of this persistence and the divergent results created under each can be found in the pair of cases involving Jehovah's Witness children who were punished for failing to salute the flag. Justice Frankfurter wrote the opinion for the Court in the first case, *Gobitis*, and relied heavily on themes from the Henry tradition: the bedrock of civil order is uniform obedience to the laws, and all deference is due to the lawmakers. Just a few years later, this opinion was overruled by the Supreme Court in the *Barnette* case. Under similar facts, the Court instead reasoned within the Madisonian tradition that the state itself had violated good order by going beyond its proper realm of authority to compel conscience (two kingdoms) and, furthermore, the requirement was unreasonable (enlightenment) because the practical goal of the flag salute law (instilling patriotism) could not be gained by the use of force.

Outright government endorsement of Christianity has been struck down using the two kingdoms aspect of the Madisonian tradition in cases involving government-sponsored prayer in public schools (*Engel v. Vitale*, and *Lee v. Weisman*, for example), and the display of a lone creche in a government building (*County of Allegheny v. ACLU*). The enlightenment aspect of the Madisonian tradition (reasonableness and moderation forbid vendettas) can also be seen in cases in which the Court protected non-dominant religious groups from laws targeting (as enacted or as enforced) their religious practices, such as the *Church of the Lukumi Babalu Aye* (ritual animal sacrifice targeted by a city ordinance). The Henry tradition is evident in cases in which order is defined as obedience to legal authority, such as *Employment Division. v. Smith* (which eliminated all free exercise exemptions, declaring that the right to religious liberty extends only to legal behavior), which revived the *Gobitis* rationale.

Perhaps it is time to admit that the holy grail of *the* original founding intent simply is not an historically provable fact. Like our own era, the Founding Era was a complex time of nuanced trajectories of thought. Balancing the relationship between religion and the state has never been a simple matter.

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Related Cases

The full text opinion is available at <www.findlaw.com>.

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Teaching at a Religious-Affiliated College

By Max Richardson

I teach at Concordia College, a liberal arts college in northern Minnesota affiliated with the Evangelical Lutheran Church in America. The word "affiliated" is a bit weak. The following mission statement is from the college catalog:

> The purpose of Concordia College is to influence the affairs of the world by sending into society thoughtful and informed men and women dedicated to the Christian life.

Unlike most institutional mission statements, ours is part of the fabric of the place. It is etched in stone monuments located strategically on campus, featured prominently in college publications, and repeated mantra-like at countless college functions. Most faculty know the mission statement by heart. The mission statement is not uncontroversial, of course. To some, its language marginalizes non-Christian students and staff. And others ask if there is such a thing as "*the* Christian life"? At times it seems that the mission of Concordia College is to engage eternally in mission statement exegesis!

As one who spent the first twenty years of his teaching career in public higher education, and as one who is not a religious person, the dialectic of faith and reason is always apparent to me. (Perhaps faculty who are truly "of" this place don't notice a dialectical tension at all.) At times and in ways, I find the dialectic healthy, fostering among faculty and students an ongoing dialogue about the ethical implications of our intentions and actions, public and private. At other times and in other ways, I find the dialectic unhealthy, fostering an uncritical smugness and self-righteousness that harms the academic enterprise and its participants.

Typically, administrators here do not use Concordia's faith mission to dictate *what* we teach. The liberal arts are highly valued here. I feel as free to require my students to read Nietzsche as St. Augustine. Perhaps some religious-affiliated colleges or universities impose real curbs on academic freedom. Concordia College is thankfully not one of them. But if the faith mission is not used to place formal curbs on our academic freedom, it is often used to determine *who* is permitted to teach. As a department chair, I have found this aspect of teaching at a religious-affiliated college the most troublesome, and the most troubling. While the administration does not require that a particular percentage of the faculty be Lutheran (perhaps because the market could not supply a sufficient number of Lutheran Ph.Ds), it has determined that there needs to be a "critical mass" of Lutheran faculty. This predisposition to hire Lutherans has the effect of producing a rather too homogeneous faculty for my tastes. The problem of maintaining institutional identity (a positive goal) without becoming too one-dimensional, too univocal, or too self-satisfied is a persistent one.

Also problematic is the tendency of colleges like Concordia to value teaching over scholarship, and the objective of student character formation over vocational preparation. While I happen to agree with this value equation, I nevertheless recognize the problems such an equation typically generate. Every liberal arts college worthy of the name will wrestle with the problem of how to evaluate teaching excellence, and how to help faculty achieve such excellence. Every liberal arts college will wrestle with the ideal balance between vocational education and the formation of character. At places like Concordia College, the faith mission is central to any conversation about the kind of character our curriculum would seek to form. Indeed, whether our curriculum should seek to form a *particular* character is itself questioned.

In spite of these tensions and problems, there is something very special about teaching at a religious-affiliated liberal arts college—even for those of us who may feel at times like resident aliens. Most of the faculty truly enjoy teaching and mentoring young people, and most are quite good at both. Most of the students come from strong families and small towns, which makes teaching a much easier, and very much more enjoyable, task. Our religious affiliation tends to attract students who are already predisposed to community service, which explains why Concordia has one of the largest Habitat for Humanity chapters in the nation. And for the most part, our campus community demonstrates the virtue of hospitality. Aristotle teaches that communities are best when they are characterized by equality and friendship. We fall short of that goal all too often, but our history demonstrates that our small size and peculiar mission make the goal both possible and desirable (Schwehn, 1993).

The 1999 Higher Education Conference on Law, Religion, and the Moral order in San Antonio did a good job of reminding us how thorny the issue of church and state truly is, in both its choice of topics and speakers. The conference would have been even better if we had explored more concretely how a regime which is committed to a separation of church and state can effectively construct a "moral order" at all. Any regime which embraces political and religious liberty has already rejected the idea of a singular moral order, an identifiable human character as definitive of, and established by, the regime. Such a regime has chosen to delegate character formation to the private realm—to families, to religious communities, to civic associations, and yes, to religious-affiliated colleges like Concordia. The Council on Civil Society, a joint project of the Institute for American Values and the University of Chicago Divinity School, refers to such institutions as "seedbeds of virtue," and it seeks to promote public policies which are hospitable toward these character-forming institutions, especially our religious communities (Council on Civil Society, 1998). If government cannot, and should not, prefer one religion over another, must it also be prohibited from nourishing, in a non-preferential way, the character-forming and community-building activities of America's communities of faith?

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Teaching about Religion at a Secular University

by Andrew Walsh

About a dozen conferees participating in the roundtable discussion, "Teaching About Religion at a Secular University" concurred that educated people should understand the influence of religion in human history, though we did not necessarily agree on what that influence has been.

We identified three basic reasons that many educators have chosen to ignore religion. First, many educators are afraid to discuss religion at all. Although the Supreme Court has repeatedly said that public schools may teach about religion as long as teachers do not proselytize, many teachers and administrators fear that they will cross that line, or they fear that religious people will be offended if they fail to cross that line. Second, some educators, who would like to confine religion to the dustbins of history, have no desire to learn more about religion or to teach students about religion. Third, many educators do not know enough about traditions other than their own to teach objectively about religions.

At this point, we began to debate the meaning of objectivity and found two seemingly incommensurate definitions: a scientific definition that relevant theories must be empirically verifiable, and a political definition that the teacher must avoid all bias. The (social) scientific approach focuses upon how and why human beings construct religions. Its defenders argued that we need not get bogged down in philosophical questions of truth to discuss how religious beliefs, customs and institutions shape society, as well as the ways that society shapes religion. On the other hand, if one begins with a more political definition of objectivity as removing all bias, then the goal of the academic study of religion is not to convert people to any religious or secular worldview, but to understand the world in its fullest complexity.

At this point we began to debate whether Marxism, Kantianism, Feminism, or other "secular" orientations were functionally equivalent to "religion." We noted the increasing trend in religious studies textbooks (such as Ninian Smart's *Worldviews: Crosscultural Explorations of Human Beliefs*) and arguably in recent Supreme Court Decisions (*Rosenberger v. University of Virginia*, 1995) to regard secular and religious worldviews as competing on the same plane.

Returning to our analysis of the political definition of objectivity as avoiding all bias, one scholar pointed out that this paradigm maintained a tension between multiple establishment and multiple disestablishment of religion. Critics of this paradigm pointed out that such an education is nihilistic, that it does not promote civic values, and that it cannot even defend its own obvious preference for pluralism. One supporter of this political definition of objectivity conceded that the academic study of religion at a state university would not make students better people, but simply more knowledgeable about religion. He suggested that scholars of religion at a state university ought to embrace this more humble goal. Anything else, he argued, is the establishment (or disestablishment) of religion.

We began to discuss whether it is possible to teach objectively about religions and to provide students with the critical thinking skills necessary to evaluate competing claims. Just as we were on the verge of clarifying these issues and adopting a clear model that could be adopted by public schools at the primary levels, we ran out of time . . . .

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Religious Colleges and Academic Freedom

Is there a Baptist world view to the teaching of chemistry or psychology? Can gay and lesbian student groups be denied recognition at Catholic universities? Should faculty at religious-affiliated colleges have greater restrictions on their 'freedom of speech' pertaining to doctrinal and/or social issues?

One way to address these questions, at least vis-á-vis faculty prerogatives, is to study the imposition of censure by the American Association of University Professors (AAUP). Based upon standards first issued in 1940, the AAUP has censured the administrations of more than fifty colleges and universities for one or multiple violations of the principles of academic freedom and/or tenure. Among these are 16 religious-affiliated colleges and universities.

Some of these institutions have been censured for actions designed to preserve their religious mission, including the firing of professors because (1) their views were repugnant to external ecclesiastical authorities (Concordia Seminary, 1975; Catholic University, 1990; St. Menard School of Theology, 1997), or (2) their personal actions, e.g., remarriage, contradicted church doctrine (Pontifical Catholic University of Puerto Rico, 1987). The most prominent recent controversy involves Brigham Young University, censured in 1998, in part for firing a female English professor for contradicting Mormon church doctrine and attacking BYU in campus speeches and publications.

What discretion should religious-affiliated universities have to set *limitations* on academic freedom, so as to preserve their religious missions–which the AAUP acknowledges to be a prerogative of these colleges? Do secular standards of academic freedom (and nondiscrimination) violate a religious-affiliated college's right to the free exercise of religion, as legal scholar Douglas Laycock argued in a 1993 article "The Rights of Religious Academic Communities" (*Journal of College and University Law)?* Or, do such institutions serve primarily *secular* ends, so that courts, accrediting organizations, and/or other academic groups can require them to uphold established principles of academic freedom?

For further information about censure, contact the AAUP at 1012 Fourteenth Street, NW, Suite #500, Washington, DC 20005; tel: 1-800-424-2973; <www.aaup.org/censure.htm>.

John Paul Ryan

The Strands of Belief that Bring Americans Together: *On Common Ground* CD-ROM Review

by Hannah Leiterman and Hilary Glazer

The Pluralism Project at Harvard University was begun by Comparative Religion Professor Diana Eck in 1991 with three goals: to document the impact of immigration on religious pluralism in the U.S., to analyze how those religions have changed with their transplantation, and to examine how the U.S. has changed as a result of their presence. The resulting CD-ROM, *On Common Ground: World Religions in America*, goes a step further, providing users with the tools to understand traditions radically different from their own as similar to their own, through an emphasis on commonalities rather than differences. Even with this focus on the familiar rather than the strange, one takes away from the CD a vivid sense of the diversity and texture of the American religious landscape.

To gather data for the project, Arts and Science and Divinity School students were engaged over the summers from 1991–1993 to do research on cities and events across the United States, presenting their work at an annual Pluralism Project fall conference. In 1994 the CD-ROM project was started, and won a Ford Foundation grant to extend the depth and scope of the research. *On Common Ground* has since won numerous awards. Professor Eck herself was one of several recipients of the 1998 National Humanities Medal, conferred by President Clinton.

The CD is organized into three sections, each of which features an audio introduction from Professor Eck, and a more in-depth "video" that uses a slide show format to give the user a sampling of the images and audio clips that supply the focus of that section. "Exploring the Religious Landscape" features an interactive map of the United States, and allows users to click on 18 cities and areas to get a sense of the religious diversity there. "America's Many Religions" features fifteen clickable religious symbols–including the Zoroastrian faiths, Shintoism, and Afro-Carribean traditions, to name just a few–through which the user can explore each branch of faith in-depth through a combination of audio-clip songs, anecdotes, interviews, chants, and prayers; photographs; original texts; history and timelines, and in some cases, simply text descriptions. "Encountering Religious Diversity" is a special section that looks at how very different religions overlap, complement each other, and peacefully coexist, both historically and today.

On Common Ground is technologically very straightforward and easy to use. It includes features such as bookmarks and an index, that allow the user to get the most out of the program. The bookmarking feature is like that of an Internet browser's–it allows the user to build up a library of screens for future quick access. The index is arranged by topic. Clicking on a general topic opens up a sublist which includes "links" to the more specific screens within the topic. One drawback of the index is that it's not as simple to find things as it could be, and it doesn't include listings of people who are profiled–whether as historical figures or actual participants. The navigation system, bookmarking, index, and help features, combined with the ability to print individual screens, make *On Common Ground* an effective reference and learning tool.

The substantive strength of *On Common Ground*, and what makes CD-ROM an ideal medium for the project, is its ability to take the user closer to a tangible understanding of the religions it profiles, by combining image and sound; history and present. In the video clip "Hindus in America," for example, different Hindu people discuss their experiences of faith. While users hear these voices, they see photos of Hindus practicing in the U.S. The words and images give users the sense of looking through someone's photo album, and invite them to relate the narrators' experiences of faith to their own. Other audio/video clips offer insights into the struggles religious groups face in their attempts to integrate into American society while remaining true to their religion. For example, "American Muslims" includes a high school student relating how his American teacher had called him a "terrorist" for wearing a traditional turban to school. A video clip "A New Muslim Landscape" discusses the demographics of the migrations of Syrian and Lebanese Muslims to Detroit's automobile plants during the auto boom. And lest the user begin to think it an uncritical monument to the success of multiculturalism, he need merely delve into the Native Peoples section to see and hear about the U.S. government's disregard for the Piscataways' religious beliefs. While video clips allow the user a glimpse of an Apache women's Sunrise ceremony, audio clips feature, for example, a woman talking about preserving her native language as a form of resistance and survival. Others offer painfully frank discussion of the Indian holocaust.

On Common Ground will serve as a valuable tool for teachers and students of not only religious studies, but also history, social studies, and even English and English as a Second Language. Aside from its compelling multi-media features, it offers an extensive database of original sources and texts, sociological and geographic data, and glossary terms, as well as a directory of names and addresses of religious centers in every part of the U.S. It also presents religion as an important element of the immigrant experience–images from every part of the project show immigrants of all faiths and their children working and living in American culture but finding in their religions a time and place to reconvene, speak their own languages, find continuity in the ongoing performance of ancient rituals, and restore themselves. One potential weakness of *On Common Ground* for classroom use is its apparent lack of balance–understandable given the scope of the project. A section on the problems for Christians confronting the issue of homosexuality, for example, makes the user wonder how other traditions deal with the issue, but that information is absent. The obvious remedy for these minor problems is an expanded edition, which we hope to see soon.

Hannah Leiterman is Editor of Focus on Law Studies. *Hilary Glazer is Information Services Coordinator for the ABA Division for Public Education.*

Religion, Law, and the First Amendment

The Becket Fund. <http://www.becketfund.org/> The Becket Fund for Religious Liberty is a bipartisan, ecumenical, public-interest law firm that seeks to protect the free expression of all religious traditions. To that end, its site features news and information in the fields of religion and law on both the national and international levels. One of its sections focuses solely on religion in public schools. This website is a good resource for finding out what's happening in Congress as it relates to religious liberty issues.

Council on Religious Freedom. <http://www.c-r-f.org/> Features a state-by-state listing of legislation and cases related to religious freedom; links to international religious freedom organizations and articles; and a newsletter exploring current events in that area.

Equal Access Act and the Public Schools: Questions and Answers. <http://www.clsnet.com/> This online brochure, sponsored by many organizations and housed on the Christian Legal Society's site, focuses on the Equal Access Act which was passed by Congress in 1984. The brochure includes the Act itself, and 20 questions and answers, including what the Act does, and definitions of terms and phrases within the Act. A list of the sponsoring organizations follows, along with contact information for each. Especially interesting is that the organizations did not all share the same viewpoint of the Act, but they all agree that its provisions need to be understood clearly by the public.

First Amendment Center. <http://www.freedomforum.org/religion/resources/resources.asp> This site includes among its religious liberty resources an FAQ section, a listing of religion Supreme Court cases, a bibliography, links to other organizations, and *Finding Common Ground*, a First Amendment guide to religion and public education.

First Amendment Cyber Tribune: Religious Liberty. <http://w3.trib.com/FACT/1st.relig.liberty.html> A page of annotated links to sites containing information about religious liberty. Links to documents cover all time periods, ranging from the historical (Thomas Jefferson) to the present (President Clinton). Good for studying how views have changed (or remained the same) over the centuries.

Freedom of Religion: An overall view of religious liberty as defined by U.S. Supreme Court Cases. <http://w3.trib.com/FACT/1st.religion.html> Housed on First Amendment Cyber Tribune's site, this page gives a case-by-case listing on the subject of religious freedom as it pertains to schools, public office, nativity displays . . . anything religious and in the public eye.

The Justice Fellowship Religious Liberty Protection Act Page. <http://www.justicefellowship.org/rlpa_links.htm> This site features the various testimony before Congress on the Religious Liberty Protection Act (RLPA–religious freedom advocates' response to the overturning of RFRA) including that of Douglas Laycock, the University of Texas law professor who argued on the side of Archbishop Flores before the Supreme Court. It also includes background on RLPA, as well as scholarly analysis of the legislation, and Q & A and fact sheets.

Law, Religion, and the Moral Order: The 1999 Higher Education Conference. <http://www.abanet.org/publiced/higheredconf99.html> This website, a project of the American Bar Association Division for Public Education, features a variety of resources centered on religion and law, including Internet and print resources. It also includes links to syllabi for law and religion college courses available online, as well as information about the conference speakers, experts in various aspects of the topic.

People for the American Way: Religious Liberty. <http://www.pfaw.org/issues/liberty/> This organization advocates religious freedom and the separation of church and state. The site features relevant court cases dealing with religious freedom and public schools, as well as information on congressional legislation dealing with the topic.

Professor Marci Hamilton's Religious Liberty Legislation Page. <http://www.marcihamilton.com/rlpa/> Professor Marci Hamilton argued on the side of the City of Boerne in *City of Boerne, TX v. Flores*. Her Web site includes her criticism of the Religious Freedom Restoration and Religious Liberty Protection Acts, her testimony before Congress about the Acts, background and updates on both Acts, and information on religious freedom legislation by state.

Religion in U.S. Public Schools. <http://www.religioustolerance.org/ps_pray.htm> An informative page about prayer in schools. Includes sections on what the U.S. Constitution does and does not cover, factors to consider about school prayer, a possible compromise, and court decisions (landmark and recent). Housed on the Ontario Consultants on Religious Tolerance site, a volunteer group dedicated to explaining different religious beliefs and topics while advocating none.

The Religious Movements Homepage at the University of Virginia. <http://cti.itc.virginia.edu/~jkh8x/soc257/home.htm> This project, an outgrowth of Professor Jeffrey Hadden's sociology of religion courses, seeks to profile hundreds of new religious movements, including cults and para-religious organizations, both in the United States and internationally, in the interest of promoting awareness and tolerance. The site includes sections devoted to religious freedom, religious broadcasting, and course materials and syllabi for Hadden's Sociology of New Religious Movements course.

Teaching the Role of Religion in American History. <http://www.ihc4u.org/relhist.htm> Papers, articles, and photos are the culmination of this 5-year project sponsored by the Indiana Humanities Council. It includes frameworks that span a certain number of years; each timetable framework includes the views of religion, etc. of various peoples. The project explores how elementary and secondary school teachers should present the role of religion as it applied to the formation of American history, society, and culture.

Leading New Books SCHOLARS IN FIELDS AT THE INTERSECTION OF RELIGION AND LAW RECOMMEND NEW AND RECENT BOOKS ON Law, Religion, and the First Amendment

LIEF CARTER, McHugh Distinguished Professor of American Institutions and Leadership at The Colorado College, and author of *Reason in Law* (Addison Wesley, 1997; 5th ed.) and *An Introduction to Constitutional Interpretation: Cases in Law and Religion* (Longman, 1991), observes:

At the beginning of the decade I wrote a slim volume arguing that every legal theory of religious free exercise and disestablishment is inherently indeterminate. **Jesse Choper's *Securing Religious Liberty*** (University of Chicago Press, 1995) did not change the conclusion. The books that best illustrate the post-modern trend of the 1990s thus do not claim to achieve descriptive or theoretical right answers. Rather, they construct perspectives and rhetorics that we actually find useful in the hurly burly of political disputation about concrete programs. In this category I put **Michael Perry's *Religion in Politics*** (Oxford University Press, 1997), and more generally **Ronald Dworkin's *Life's Dominion*** (Random House, 1993). Both books, read either together or separately, teach us how to make the following argument more effectively: "No policy position may be advanced or dismissed if the argument for doing so is itself religious. Those motivated by religious conviction may advance their positions enthusiastically as long as they use an inclusive and secular rhetoric to do so." Thus, for example, the argument against employment benefit coverage for same-sex life partners fails so long as the argument can be shown to rest on religious rather than secular assumptions. Neither Perry's nor Dworkin's positions are philosophically particularly defensible. The reasons why we should nevertheless embrace them are best expressed in the writings of **Richard Rorty**, whose ***Contingency, Irony, and Solidarity*** (Cambridge University Press, 1989) is must reading for all inquiring minds.

STEPHEN M. FELDMAN, Professor of Law and Political Science at the University of Tulsa and the author of *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* (NYU, 1997) and editor of an anthology, *Law and Religion: Critical Essays* (NYU, forthcoming) observes:

A dominant story of the First Amendment religion clauses asserts that the Framers uniquely created the separation of church and state as a constitutional principle that equally protects the religious liberty of all Americans, especially religious outgroups. Both **Steven D. Smith**, ***Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*** (Oxford, 1995), and **Naomi W. Cohen**, ***Jews in Christian America: The Pursuit of Religious Equality*** (Oxford, 1992), partly challenge this dominant story. In a highly abstract yet readable book, Smith argues that the First Amendment does not embody any coherent principle of religious freedom. Hence, when other theorists (or Supreme Court justices) attempt to articulate a principle that underlies and animates the religion clauses, they are doomed to failure. Cohen, meanwhile, interprets the religion clauses from an historical perspective, particularly from the standpoint of a prototypical religious outgroup, American Jews. This outsider viewpoint suggests that the separation of church and state did not adequately protect American Jews from religious persecution and oppression through much of the nation's history. Cohen also emphasizes how Jewish organizations played important roles in litigating some of the leading post-World War II Supreme Court cases on law and religion.

WINNIFRED FALLERS SULLIVAN, Assistant Professor of Religion at Washington & Lee University and the author of *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Harvard University Press, 1994), notes:

American scholarship on religion and law has tended to focus on the United States and on the U.S. Constitution and to be dependent on American understandings of what religion and law are. Recent books in legal anthropology and sociology that focus on the relationship between religion and law outside the United States challenge these understandings and help to put the American situation in a comparative context. For example, **Rebecca French's *The Golden Yoke: The Legal Cosmology of Buddhist Tibet*** (Cornell University Press, 1995) shows how what we would call secular legal ideas and institutions in pre-Chinese Tibet were structured by Buddhist understandings of human nature, causation, and the cosmos, understandings characterized by a "whirling, interpenetrating multiplicity, [an] atmosphere of interconnections and gaps, [a] determined indeterminacy." An American criminal lawyer and anthropologist, French is a lively guide to a fascinating legal world, at once familiar and exotic. **Ziba Mir-Hosseini's *Marriage on Trial: A Study of Islamic Family Law*** (I.B. Tauris, 1993) carefully compares the contemporary working of Shari'a family law in the courts of Iran and Morocco, displaying the strategies used by women to force change and accommodation and revealing the Shari'a as a legal system to be less "sacred" and more responsive to social practice than is usually acknowledged. **José Casanova**, in ***Public Religions in the Modern World*** (University of Chicago Press, 1994), uses case studies from Spain, Poland, Brazil, and the U. S. to show how secularization, as a sociological theory, has failed to account for the unexpected political power of religion in these countries.

ERIC MICHAEL MAZUR, Assistant Professor of Religion at Bucknell University and author of *The Americanization of Religious Minorities: Confronting the Constitutional Order* (Johns Hopkins, 1999) comments:

Two recent books have served me particularly well in the classroom (an undergraduate course on religion and constitutional law) and more generally in my thinking about religion and law. **Ronald Flowers' *That Godless Court? Supreme Court Decisions on Church-State Relationships*** (Westminster John Knox Press, 1994) is an excellent supplement to any casebook because it organizes more than 100 Supreme Court First Amendment de-

cisions thematically rather than simply chronologically. It includes sections on different stages of the free exercise clause, as well as sections on religion in public schools, funding for church-related schools, "Blue" laws, etc. Of particular value is an explanation of court procedure and a brief discussion of the history of religion and law leading up to the First Amendment. **Phillip Hammond's *With Liberty for All: Freedom of Religion in the United States*** (Westminster John Knox Press, 1998), is an essay on the nature of religion in the public arena. Hammond posits that the First Amendment privileges conscience rather than religion (traditionally understood), traces how this is evident from past Supreme Court decisions (such as *Ballard, Torcaso, Sherbert,* and *Seeger*), and discusses how it will affect such areas as abortion, euthanasia, and gay rights in the future.

NICHOLAS MILLER, an attorney and Executive Director of the Council on Religious Freedom (CRF), and author of *Questions and Answers About State Religious Freedom Acts* (CRF, 1999) and *Wallbuilders or Mythbuilders: Is Separation of Church and State Really a Myth?* (Church State Council, 1995) comments:

An issue at the fore of the nascent presidential campaign for the 2000 election is the role of faith-based organizations in solving community welfare problems. Leading candidates Al Gore and George Bush have both endorsed the so-called "charitable choice" legislative provisions, which would partner churches with taxpayer funds to carry out state social programs. Just in time to illuminate some of the overlooked dark corners of this popular idea comes ***Welfare Reform & Faith-Based Organizations*** (Baylor University, 1999). Edited by **Derek Davis and Barry Hankins**, the book is a balanced collection of insightful essays written by leading "charitable choice" thinkers. Contributors include constitutionalist Carl Esbeck, who helped author the provision, and an opposing piece by First Amendment scholar Alan Brownstein. Also notable is an essay by Melissa Rogers of the Baptist Joint Committee, who succinctly articulates what practical dangers "charitable choice" legislation may pose to churches. On a more theoretical, but no less fascinating note comes **Akhil Reed Amar's *The Bill of Rights*** (Yale, 1998). While encompassing all ten amendments, plus the Fourteenth, it is worth the price merely for the sections relating to the religion clauses of the First Amendment. After Amar, the "whether" of the incorporation debate is over; all that remains to be discussed is the "how." And he has some good ideas on that as well.

FRANCIS J. BECKWITH, Associate Professor of Philosophy, Culture, and Law, Trinity Graduate School, Trinity International University (at which he holds adjunct appointments in both Trinity Law School and Trinity Evangelical Divinity School) and co-author of *Relativism: Feet Firmly Planted in Mid-Air* (Baker, 1998) and co-editor of *The Abortion Controversy 25 Years After* Roe v. Wade, 2nd ed. (Wadsworth, 1998) and *Affirmative Action: Social Justice or Reverse Discrimination?* (Prometheus, 1997), observes:

Some of the recent interest in the relationship between law and religion, at least among legal and political theorists, has concerned three questions: (1) Is the legal framework entailed by political liberalism (as defended by scholars such as John Rawls, Ronald Dworkin, and Bruce Ackerman) adequate to sustain the state's alleged Constitutional obligation to remain neutral between competing worldviews (or religious positions)?; (2) Is state neutrality possible in principle?; and (3) If it is possible, is it a legitimate basis by which to bar certain forms of citizen activism that appeal to religious reasons while permitting other forms of citizen activism that appeal to apparently secular worldviews or philosophical commitments? The revised edition of **Rawls' *Political Liberalism*** (Columbia, 1996) is a good place to start, for it is within the context of Rawls' perspective that allies, foes, and those in-between present their cases. ***Religion in the Public Square: The Place of Religious Conviction in Political Debate*** (Rowman & Littlefield, 1998), co-authored by Christian philosophers **Robert Audi** (U. of Nebraska) and **Nicholas Wolterstorff** (Yale), is a debate in which Audi defends a view similar to Rawls while Wolterstorff takes an opposing view. The virtue of this book is that each author is sympathetic to the concerns of the other, and for this reason, it is a model of respectful academic dialogue.

Probably the most provocative book on law and religion to come out in recent years is by Boalt Hall (UC Berkeley) law professor, **Phillip Johnson**. In ***Reason in the Balance: The Case Against Naturalism in Science, Law, and Education*** (InterVarsity, 1995), Johnson argues that metaphysical naturalism (the belief that the physical universe is all that exists) is the assumed, though unargued, established religion of America's elite culture. Most American intellectuals assume that science is the paradigm of knowledge, and since they assume (mistakenly, Johnson maintains) that science presupposes metaphysical naturalism, any claim outside of this view of science, including any claim that metaphysical naturalism is false, is not knowledge. But this automatically excludes the religious believer from shaping the legal framework or any aspect of the neutral social structure (e.g., teaching in public schools that intelligent design is a viable cosmological theory) in ways that may challenge or cast doubt on the primacy of naturalism, unless the believer is willing to capitulate and compartmentalize her metaphysical commitment. Although leading academic lights argue that such public exclusion of religion is necessary so that our society's commitment to tolerance and diversity be preserved, Johnson sees it as intellectual imperialism.

LUCINDA PEACH, Assistant Professor in the Department of Philosophy and Religion at American University, and editor of the book **Women in Culture: An Anthology** (Blackwell, 1998), observes:

I've found two books especially helpful in looking at the specific issue of the appropriate place of religious convictions in lawmaking. Kent Greenawalt and Michael Perry's most recent books make an interesting pair: the two works reflect mutual influence in the evolution of each theorist's ideas yet remain distinctive in their approaches. Both theorists are aware of and sensitive to the centrality that religious beliefs have to the lives of many citizens, including lawmakers, as well as the problems that government endorsement of religious views has in a government committed to the separation of church and state, especially in a social context of marked religious and moral pluralism.

Kent Greenawalt's *Private Consciences and Public Reasons* (Oxford, 1995) is based in liberal political theory.

Greenawalt not only lays out his own position in a detailed and comprehensive way, but also clearly describes and assesses the views of many other theorists who have addressed the issue of religious influences on law. Greenawalt's own liberal position represents a careful balance between the interests of lawmakers in relying on their religious convictions in making publicly-binding decisions, and those of others, especially religious minorities, who may be disadvantaged by the results of such religiously-informed lawmaking. In Greenawalt's view, religious convictions should not provide the basis for lawmaking in cases where publicly-accessible reasons are available to support the same policy choice. At the same time, he is reluctant to ban the use of all religion in deliberating and making decisions, especially when publicly accessible reasons are not available.

Michael Perry's *Religion in Politics: Constitutional and Moral Perspectives* (New York: Oxford University Press, 1997) is based more in communitarian moral theory, which put his proposals for addressing religious influences on lawmaking into a lively contrast with Greenawalt's liberal views. Contra Greenawalt, Perry would allow lawmakers and other citizens to rely on religious arguments regarding human worth. Arguments regarding human well being, by contrast, require an independent secular argument that reaches the same conclusion in order to be appropriately relied on. And in contrast to Perry's own earlier proposals, he now proposes that religious arguments in politics be governed by a "nonestablishment norm," according to which government can make political choices only on the basis of secular arguments.

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can be replaced. Perhaps the Court is sending a reminder that striking a balance between protecting a diversity of religious practices and preserving the rights of all citizens to equal treatment of the law will not be achieved through a sweeping piece of legislation. Perhaps as a society we can only come closer to resolving this question by continuing to discuss various aspects of the issue, as Court decisions such as *Boerne* force us to do.

Hannah Leiterman is Editor of Focus on Law Studies.

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olation." That interpretive power, said the Court, belongs to the judiciary.

Since then, RFRA supporters have counterattacked on two fronts, and the outcomes of those battles are yet to be determined. At the federal level, legislation entitled the Religious Liberty Protection Act of 1999 was passed by the U.S. House of Representatives in July and is now before the Senate Judiciary Committee. While substantively similar to RFRA, the new legislation would be enacted under Congress' powers under the Commerce and Spending Clauses rather than Section 5 of the Fourteenth Amendment.

In addition, local RFRAs have been passed in numerous states including Alabama, Arizona, California, Connecticut, Florida, Illinois, Rhode Island, South Carolina and Texas. All of these state laws are likely to face constitutional challenges from opponents who, in addition to Establishment Clause objections, point to separation of powers problems engendered by legislation that mandates a standard of judicial review.

RFRA opponents are also rallying to press their concerns that the new state laws will encourage attacks on statutes ranging from, in the words of RFRA opponent Pete Wilson, former Governor of California, "the payment of taxes to . . . laws against racial discrimination."

Recent examples of the kinds of cases raising RFRA-type issues include *Warner v. City of Boca Raton*, in which a lawsuit brought under Florida's RFRA challenged the authority of city officials to remove religious monuments at family grave sites in the municipal cemetery, and *Kerr v. Hoffius*, in which the Michigan Supreme Court ruled that a landlord's religiously based refusal to rent to unmarried tenants shielded him from a suit brought under the Michigan Civil Rights Act.

With religion law cases already on the front burners of courts around the nation, the Supreme Court is soon likely to be hearing and deciding many more religion cases and controversies.

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