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## FOREWORD

### FUNDING, RELIGION, AND THE CONSTITUTION: THE 1999 PROGRAM OF THE AALS SECTION ON LAW AND RELIGION

HEATHER S. GUILLETTE\*

The Supreme Court's traditional Establishment Clause jurisprudence is often characterized under a theory of separationism. As is evident in the Court's 1971 opinion in *Lemon v. Kurtzman*,<sup>1</sup> the rule of separation is simply this: the government must not cause religious effects.<sup>2</sup> With its decision in *Widmar v. Vincent*<sup>3</sup> in 1981, and its subsequent decisions in *Rosenberger v. Rector*<sup>4</sup> and *Agostini v. Felton*,<sup>5</sup> however, the Court began to turn away from this theory of strict separation toward a theory of neutrality. Neutrality theory is centered on a presumption that individuals make their own religious choices, with minimal government interference.<sup>6</sup> "The neutrality model allows individuals and religious groups to participate fully and equally with their fellow citizens in America's public life, without being forced either to shed or disguise their religious convictions or character."<sup>7</sup> Nowhere is the distinction between separationism and neutrality more evident than in the issue of government funding to religious organizations—whether in the case of aid to schools or to faith-based social service providers.

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1. 403 U.S. 602 (1971).
2. See John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75 (1997).
3. 454 U.S. 263 (1981).
4. 515 U.S. 819 (1995).
5. 521 U.S. 203 (1997).
6. See Carl H. Esbeck, *A Constitutional Case for Governmental Co-Operation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 4 (1997).
7. *Id.* at 21.

The articles contained in this issue were prepared for a program presented by the Section on Law and Religion at the 1999 Annual Meeting of the Association of American Law Schools (AALS)<sup>8</sup> that considered this very topic. The Section's program was divided into two separate panels. The first, moderated by Co-Chair John Garvey, dealt with the subject of funding and education. The second, moderated by Co-Chair Marci Hamilton, considered the issue of funding and social services.

In his article, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free-Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, Alan Brownstein notes that, in light of the Court's traditional separationist theory, and as a result of the rise of neutrality theory, the Court's interpretation of the Establishment Clause "does not represent stable constitutional doctrine today," and that "[c]hange is in the wind."<sup>9</sup> Brownstein criticizes this change from separationism to neutrality theory for three reasons: he argues first, that neutrality theory is not truly neutral; second, that neutrality theory is misdirected in its objective; and third, that neutrality theory pays inadequate attention to the positive role that government should play in promoting religious liberty and equality. In contrast to Brownstein, in *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, Carl Esbeck notes the benefits of the neutrality principle as applied to government funding programs. Esbeck argues that neutrality, rather than the "pervasively sectarian" standard put forth by "no-aid separationists," provides a feasible solution to the Establishment Clause problem involved in government funding of faith-based social service providers. Stephen Monsma expounds on the idea of using faith-based agencies to meet societal needs in *The "Pervasively Sectarian" Standard in The*

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8. The AALS is a non-profit association of 162 law schools. It serves as the learned society for law teachers, and is legal education's principal representative to the federal government and to other national higher education organizations and learned societies. See *What is the AALS?* (visited April 29, 1999) <<http://www.aals.org/about.html>>. The AALS holds an Annual Meeting every year in January and five or six workshops and conferences throughout the year. Much of the activity of the AALS is planned and undertaken by 78 AALS Sections. These sections are interest groups composed of members of the faculty and professional staff of AALS member schools. See *AALS Sections* (visited April 29, 1999) <<http://www.aals.org/sections/index.html>>. The Section on Law and Religion is co-chaired by Dean John Garvey, of Boston College Law School, and Professor Marci Hamilton, of Yeshiva University.

9. Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free-Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 243 (1999).

*ory and Practice.* Like Esbeck, Monsma considers in depth the separationist “pervasively sectarian” standard, and concludes that the neutrality principle is a better solution.

In addition to its application to faith-based social service providers, the separationism-neutrality distinction is particularly relevant in the case of aid to religious schools—more specifically, school vouchers. In *Equal Treatment Is Not Establishment*, Eugene Volokh considers this issue generally by asking whether the Constitution requires discrimination against religious schools and the parents who choose them. Volokh concludes that this discrimination is not required; in fact, he argues that the Constitution compels equal treatment of, and not discrimination against, religious schools.

Ira Lupu, Abner Greene, and Ruti Teitel all consider the separate question of the constitutionality of school vouchers. In *The Increasingly Anachronistic Case Against School Vouchers*, Ira Lupu analyzes the three foundational arguments against school vouchers—the distinction between direct and indirect aid, the asserted non-neutrality of voucher arrangements, and the traditional, separationist theory of *Lemon* and its progeny—and concludes that the constitutional case against school vouchers is extremely weak. Like Lupu, in *Why Vouchers Are Unconstitutional, and Why They're Not*, Abner Greene suggests that the core value promoted by the Establishment Clause is not jeopardized by voucher programs. Greene also considers the issue of school vouchers and other government aid to religion in light of the Free Exercise Clause. For her part, Ruti Teitel focuses on several political and social trends which are generally left out of the prevailing voucher policy debate. In *Vouchsafing Democracy: On the Confluence of Governmental Duty, Constitutional Right, and Religious Mission*, Teitel proposes that the debate over voucher policy should occur within the context of three contemporary trends—namely, the devolution of traditional government functions to the private sector, the churches' deprivatization, and a paradigm shift in recent years of theories of knowledge. Teitel contends that consideration of this salient political context has implications for reframing the voucher debate.

The last article in this issue, Shimon Shetreet's *State and Religion: Funding of Religious Institutions—The Case of Israel in Comparative Perspective*, goes beyond the American political and judicial context that Teitel identifies, and considers the issue of funding from a global perspective. Shetreet analyzes the relationship of church and state in his native Israel in an effort to add a dimension to the ongoing debate in the United States about government funding and charitable choice. In light of his analysis of

the separation of church and state in Israel, Shetreet advocates a separationist policy. He concludes that in the voucher system that is virtually required by neutrality theory, there is a possibility that powerful religious institutions might take advantage of the system and in so doing, create centers of power through the provision of social services.

In addition to the aforementioned articles concerning the separationist-neutrality debate in the areas of educational and social service-based funding to religious organization, this issue contains three student notes on various topics in the broader field of law and religion. Michelle Mack's article, *Religious Human Rights and the International Human Rights Community: Finding Common Ground—Without Compromise*, concerns the field of religious human rights, and specifically, the relationship between the secular human rights community and religious advocates for religious freedom. Touching on the debate concerning whether a religious perspective is permitted to enter the "secular public arena," Mack explores the extent to which it is either possible or effective for her to rely upon and express her identity as a Christian, as she advocates in the secular arena for the promotion and protection of religious human rights.

In *The Immigrant First As Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy*, Kristina Oven argues for an integration of fundamental principles of human dignity in immigration policy. Oven maintains that there are three national influences on immigrants which need to be "humanized:" societal attitudes toward immigration and immigrants, immigration legislation and policy from the federal government, and treatment of immigrants at the border by the Immigration and Naturalization Service (INS).

Finally, in *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, Erik Ablin considers the Internal Revenue Code's section 501(c)(3) provision, which, as a condition of tax-exempt status, prohibits churches from engaging in electioneering. Ablin explores this Code provision in light of some contemporary controversies where various churches have arguably crossed the line. He then provides a brief constitutional analysis of the ban on politicking, notes several historical occasions when churches have intervened in the political process and why they have done so, and concludes by surveying alternative proposals that would remove the risk that a church will lose its tax-exempt status by participating in de minimis campaign activities.