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SYMPOSIUM: THE RELIGION CLAUSES IN THE 21ST CENTURY

INTRODUCTION

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On April 12 and 13, 2007, the West Virginia University College of Law and the American Constitution Society for Law and Policy hosted a symposium entitled *The Religion Clauses in the 21st Century*. It was our privilege to organize the symposium, and we are pleased to be able to present its proceedings in this issue of the WEST VIRGINIA LAW REVIEW.

Few subjects in American constitutional law capture the public's interest and inflame its passions more than the First Amendment's Religion Clauses. The recent history of those Clauses has given the public and the legal academy plenty to talk about. Over the past two decades, the Rehnquist Court made substantial changes to free exercise law through its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*[1] and to Establishment Clause funding law through a line of cases culminating in *Zelman v. Simmons-Harris*.[2] The Rehnquist Court also adopted Justice O'Connor's "endorsement test" to evaluate government religious speech,[3] though the Court's commitment to this test was called into doubt by its 2005 decisions in two cases involving government displays of the Ten Commandments.[4] Today, the Roberts Court may be on the verge of further doctrinal change. It has already moved to limit standing under the Establishment Clause,[5] and Steven Gey suggests in his contribution to this symposium that it will eventually move to deconstitutionalize Establishment Clause issues altogether by allowing church-state disputes to be

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1 494 U.S. 872 (1990).

2 536 U.S. 639 (2002)

3 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).

4 McCreary County v. ACLU of Ky., 545 U.S. 844 (2005); Van Orden v Perry, 545 U.S. 677 (2005).

5 Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553 (2007).

resolved through local political processes.[6] In light of all these doctrinal shifts, we thought the time was ripe for an examination of what the Religion Clauses will mean as we move further into the 21st Century. We invited some of the country's leading scholars to Morgantown, West Virginia, to help us conduct that examination.

The symposium included four panels organized around different themes as well as featured addresses by two of the most influential scholars currently writing about the law of church and state, Steven Gey and Douglas Laycock. The oral presentations and discussions during the symposium were consistently engaging. As participants listened to each other during the symposium and revised their work over the summer, the dialogue begun in Morgantown was carried to another level. These papers provide an invaluable window on the current state of Religion Clauses doctrine and theory.

Steven Gey's paper prepares us for *Life After the Establishment Clause*.[7] He predicts that in the next few years the Roberts Court will continue a paradigm shift in Establishment Clause jurisprudence that will completely displace any remaining vestiges of separationism with an approach that would integrate church and state. Gey discusses five key themes of this new integrationist approach and suggests that together they endorse a frankly majoritarian approach to church-state issues that is both inconsistent with the best of our constitutional heritage and insensitive to the country's changing religious demographics. He concludes, however, that this integrationist approach will not be viable over the long haul and that the pendulum will swing back towards separationism in the not too distant future.

Douglas Laycock's paper, *Substantive Neutrality Revisited*,[8] narrates the history of one of his best-known ideas and defends it against alternative proposals made by Steven Gey and Noah Feldman. The norm of substantive neutrality directs that government should seek to systematically minimize its impact on private religious choices, and Laycock contends that it offers a coherent and normatively attractive approach to issues of church and state. He further argues that substantive neutrality can largely explain the votes of median Justices Kennedy and O'Connor and consequently can explain much of the Rehnquist Court's approach to the Establishment Clause (if not the Free Exercise Clause).

The papers from the first symposium panel, "The Religion Clauses in Institutional Contexts," explore the functioning of the Establishment and Free Exercise Clauses in the context of two extremely important government institutions: the military and the public schools. Chip Lupu and Robert Tuttle present the most thorough treatment yet written of the constitutional issues surrounding the military chaplaincy.[9] They argue that the existence of the chaplaincy is best

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[6] Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1 (2007).

[7] Gey, *supra* note 6.

[8] Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007).

[9] Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. VA. L. REV. 89 (2007).

seen and defended as a permissible accommodation of the religious needs of service personnel. Lupu and Tuttle then apply the law of religious accommodations to several specific issues regarding the military chaplaincy that have provoked controversy in recent years, including the policies used in hiring, promoting, and retaining chaplains; the content of chaplains' prayers during official service functions, and the propriety of proselytizing by chaplains in certain pastoral care settings. In a detailed response to Lupu's and Tuttle's paper, Steven Green argues that most courts and commentators have underestimated the severity of the Establishment Clause problems raised by the military chaplaincy.[10] Green agrees with Lupu and Tuttle that the chaplaincy is best defended as an accommodation of religion, but suggests that the current law of religious accommodations may need to become more permissive for the chaplaincy to pass muster under an honest analysis.

Turning from the military context to the public schools, Kristi Bowman's paper explores the parameters of the protection the Free Speech Clause provides for student religious expression.[11] Focusing on some recent cases involving student T-shirts with provocative religious messages, she asks whether school suppression of those messages under the standards adopted in *Tinker v. Des Moines Independent Community School District*[12] would constitute unconstitutional viewpoint discrimination. Through a careful reading of all the Court's student speech precedents including its recent decision in *Morse v. Frederick*,[13] Bowman suggests that the law of student speech may allow schools to discriminate against religious viewpoints that prove especially disruptive or that unduly interfere with the rights of others. John Taylor responds to Bowman's article by explaining how and why the Free Speech Clause rather than the Free Exercise Clause has come to be the primary protector of student religious speech in the public schools.[14] He argues that the dominance of the Free Speech Clause is constitutionally necessary, for any use of the Free Exercise Clause to privilege religious speech because of its religious character would be impermissible content discrimination under the Speech Clause.

The next set of papers emerged from the symposium panel on "Government Religious Expression," always a contentious issue in public debates about the Religion Clauses. The principal papers here both take their starting points from the Supreme Court's fractured decisions in *McCreary County v. ACLU of Kentucky*[15]and *Van Orden v. Perry*.[16] In their contribution, Fred Ge-

[10] Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167 (2007).

[11] Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187 (2007).

[12] 393 U.S. 503 (1969).

[13] 127 S. Ct. 2618 (2007).

[14] John E. Taylor, *Why Student Religious Speech is Speech*, 110 W. VA. L. REV. 223 (2007).

[15] 545 U.S. 844 (2005).

[16] 545 U.S. 677 (2005).

dicks and Roger Hendrix explore the implications of Justice Scalia's arguments in his *McCreary County* dissent that the Establishment Clause allows government to endorse monotheism.[17] They show that Justice Scalia's position is the latest attempt to invoke a Judeo-Christian "civil religion" as a force that can unify a diverse nation, but argue that this project is doomed to failure because the changing demographics of religion in the United States make it increasingly difficult to believe that a Judeo-Christian civil religion—or any civil religion—can produce unity rather than division. This is all the more true, they suggest, because the supposedly inclusive symbols of American civil religion are increasingly understood to carry sectarian messages associated with conservative forms of Christianity. Steven Smith challenges this last claim, which he dubs the "sectarianization thesis," in his response to Gedicks and Hendrix.[18] According to Smith, it does not follow as a conceptual matter that the inclusive character of civil religion is illusory simply because some people may attach specific, sectarian meaning to public religious symbols like Ten Commandments monuments. This, Smith says, is just one more illustration of the truth that people often agree about generalities and disagree about specifics. Where this is so, usually both the agreement and the disagreement are real and should be acknowledged as such. Smith also sees little evidence that as an empirical matter people actually understand public religious symbols as a coded endorsement of conservative Christian values. The real question, Smith says, is whether we want to undermine the legitimating and unifying force that public religious symbols may still possess when it is unclear what can replace their role as sources of political community.

Dan Conkle takes his cue from Justice Breyer's *Van Orden* concurrence, exploring the possibility that we might abandon the search for a rule-based approach to evaluating government religious expression under the Establishment Clause and instead adopt a more flexible standard that would consider four variables: the degree to which the government's religious expression involves coercion or aggressive imposition of a religious message, the nature and specificity of the expression (e.g., prayer vs. affirmation, sectarian vs. nonsectarian), the traditional character of the expression, and the degree to which the expression might be seen as private rather than public.[19] While Conkle remains ambivalent about whether such a standard-based approach would be jurisprudentially wise, he demonstrates its utility in explaining the pattern of the Supreme Court's decisions on government religious expression.

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[17] Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the 10 Commandments*, 110 W. VA. L. REV. 275 (2007).

[18] Steven D. Smith, *"Sectarianizing" Civil Religion?: A Comment on Gedicks and Hendrix*, 110 W. VA. L. REV. 307 (2007).

[19] Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315 (2007).

The third panel of the symposium was entitled "Accommodation of Religion." The papers by Kent Greenawalt[20] and Carl Esbeck[21] both attempt to synthesize the Supreme Court's case law concerning the degree to which the Establishment Clause limits discretionary governmental accommodations of religious practice. They differ largely in their degrees of optimism about the extent to which a satisfying and decision-guiding synthesis can be achieved. Greenawalt's contribution identifies a number of factors that seem critical for determining when government has crossed the line that separates permissible accommodation from forbidden establishment. A valid accommodation must (1) relieve a relevant burden on religious practice, (2) not grant relief far more extensive than the burden to which it responds, (3) not be intrinsically unconstitutional (e.g., because it assigns political authority to a religious group), (4) not impose unacceptable burdens on those who do not benefit from the accommodation, and (5) classify beneficiaries in an appropriate (e.g., denominationally neutral) way. These factors help courts to focus on the proper questions, but often they do not eliminate the need for line-drawing that turns on "subtle nuances" and "matters of degree."[22] Responding to Greenawalt, Esbeck grounds his account of accommodation on the Establishment Clause principle he labels "voluntaryism," meaning "that government is not to be actively involved in funding or otherwise supporting organized religion as religion."[23] So understood, the Establishment Clause is "pro-religious freedom" but not "pro-religion." For Esbeck, it follows that efforts to accommodate religion are generally permissible. He argues that the law of accommodations is a good deal simpler and more predictable than is commonly thought, and formulates ten "black-letter" rules that summarize this law.

Angela Carmella's paper moves to somewhat different ground within the general territory of religious accommodations.[24] She proposes a unified approach to both legislative and judicial religious exemptions which would be guided by the question of whether particular exemptions serve the common good as that concept is understood in Catholic social thought. In her view, this approach calls religious institutions and individuals to responsible freedom. Exemptions need not be seen as a license to ignore the common good; instead, they may rest on a recognition that the ethical and legal norms of religious communities may guide conduct towards the common good as effectively as the norms laid down the state. In her response to Carmella's paper, Laura Underkuffler emphasizes the extent to which Carmella's approach involves a radi-

[20] Kent Greenawalt, *Establishment Clause Limitations on Free Exercise Accommodations*, 110 W. VA. L. REV. 343 (2007).

[21] Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W. VA. L. REV. 359 (2007).

[22] Greenawalt, *supra* note 20, at 357.

[23] Esbeck, *supra* note 21, at 396.

[24] Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403 (2007).

cal departure from the way we ordinarily think about religious exemptions.[25] The usual approach is to think that religious exemptions are justifiable, if they are, because the state is not competent to question or assess claims of religious value. In contrast, to evaluate religious exemption claims by reference to the common good is to openly acknowledge that the state must judge religions against its own schemes of value. For Underkuffler, however, appreciating the radicalism of Carmella's proposal is a prelude to praise rather than scorn. She suggests that in the long run religious exemptions may only be sustainable in American society on terms similar to those proposed by Carmella.

The final set of papers was initially presented during a symposium panel on "Religion and Politics." Naomi Cahn and June Carbone address this theme by exploring the influence of religious belief on the regulation of sexuality in general and on abstinence-only sex education in particular.[26] They document the ways in which the much-discussed gap between "blue states" and "red states" tends also to track degrees of religious affiliation and different attitudes toward sex and its regulation by the government. Cahn and Carbone argue that government policies requiring abstinence-only sex education represent an unhealthy melding of religion and politics, for the available evidence suggests that abstinence-only education is ineffective in preventing teenage pregnancy and the spread of sexually transmitted diseases. In her response to Cahn and Carbone, Vivian Hamilton emphasizes the ways in which they seem to embrace a fairly robust version of the ideal of public reason and questions whether that commitment can be fully justified and defended.[27] While she shares Cahn's and Carbone's reservations about abstinence-only sex education, she suggests that there may be no practical alternative to allowing state experimentation with different approaches and hoping that an appreciation of policy consequences will ultimately prove more influential than religious ideology.

Like Cahn, Carbone, and Hamilton, Eduardo Peñalver is also concerned with the proper role of religious argument in public political deliberation. He manages to shed new light on that complex and much-discussed topic by asking whether the ideal of public reason might prove counterproductive.[28] Advocates of public reason, who insist (with varying degrees of stringency) on the exclusion of religious arguments from public deliberation, typically claim that a commitment to public reason is necessary to avoid the social instability that might otherwise result from our significant levels of religious pluralism. Peñalver argues, however, that pluralism can also enhance political stability by caus-

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25 Laura S. Underkuffler, *Religious Exemptions and the Common Good: A Reply to Professor Carmella*, 110 W. VA. L. REV. 449 (2007).

26 Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459 (2007).

27 Vivian E. Hamilton, *Religious v. Secular Ideologies and Sex Education: A Response to Professors Cahn and Carbone*, 110 W. VA. L. REV. 501 (2007).

28 Eduardo M. Peñalver, *Is Public Reason Counterproductive?*, 110 W. VA. L. REV. 515 (2007).

ing groups to moderate the demands they make of one another. Whether religious pluralism under a given set of social conditions tends to promote or undermine stability is an empirical question that is difficult to answer, but the answer has significant implications for the public reason debate. If religious pluralism actually promotes stability, insisting that religious groups abandon their native vocabularies for those offered by public reason could undermine political stability rather than promoting it.

We close this Introduction by expressing our thanks to all the participants whose work gave shape to our vision for a symposium on *The Religion Clauses in the 21st Century*. We also owe thanks to the many people at the American Constitution Society and the West Virginia University College of Law who gave their time and talents to the symposium. Finally, we thank the editors and staff of the WEST VIRGINIA LAW REVIEW for the hard work and professionalism they have demonstrated in producing this special symposium issue.