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In late 1995, two proposed amendments to the Constitution were introduced in Congress. One proposal, sponsored by Representative Istook (R-Neb.), provides:

> To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.[1]

A second proposed amendment, co-sponsored by Senator Hatch (R-Utah) and Representative Hyde (R-Ill.), states simply:

> Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.[2]

These proposals are different versions of what has become known as the "Religious Equality Amendment," and are the subject of the essays in this symposium.

The impetus for a religious equality amendment comes from the perception of many religious individuals and institutions that the Supreme Court's Establishment Clause doctrine has imposed unfair restrictions on the participation of religion in

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1. H.R.J. Res. 127, 104th Cong., 1st Sess. (1995).

2. S.J. Res. 45, 104th Cong., 1st Sess. (1995); H.R.J. Res. 121, 104th Cong., 1st Sess. (1995).

American public life, restrictions that improperly single out religious belief and activity for different treatment by the government than that accorded comparable nonreligious beliefs and activities.[3] Both proposals can be understood as seeking to return modern Establishment Clause doctrine to its initial touchstone of neutrality.

Since the Establishment Clause was first applied to the states in 1947, the Court has repeatedly emphasized that government must be neutral as between religious sects and as between religious and nonreligious beliefs and activities.[4] Yet the Court's Establishment Clause doctrine has long imposed special restrictions on government interaction with religion that are not imposed on government relations with comparable nonreligious entities and activities. There is nothing constitutionally problematic, for example, with direct financial aid by the government to private *secular* schools, only with such aid to private *religious* schools.[5] Similarly, in evaluating content discrimination under the First Amendment, which is normally considered a per se violation of the speech clause, a majority of the Court appears reluctant to find an automatic violation of the First Amendment when the government discriminates on the basis of the *religious* content of speech or expression.[6] This differential treatment of

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3. *See, e.g.*, 141 CONG. REC. S19,259-60 (daily ed. Dec. 22, 1995) (remarks of Sen. Hatch); *Religious Freedom: Testimony of Michael W. McConnell before the Senate Judiciary Committee*, Oct. 20, 1995, *available in* 1995 WL 615788 (F.D.C.H.); *Religious Liberty and the Bill of Rights: Testimony Before the Subcommittee on the Constitution of the House Judiciary Committee*, June 8, 1995, *available in* 1995 WL 352661 (F.D.C.H.) (testimony of Professor Michael S. Paulsen). *See generally* STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1988).

4. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 414 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985); Mueller v. Allen, 463 U.S. 388, 397-98 (1983); School Dist. v. Schempp, 374 U.S. 203, 222 (1963); Everson v. Board of Educ., 330 U.S. 1, 16-17 (1947).

5. *See generally* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 45-52 (1995) (examining the Supreme Court's arguments against the granting of financial aid to religious schools).

6. *Compare* Cspitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., & Kennedy & Thomas, JJ.) (conditioning speaker's access to public forum on the basis of the religious content of his speech is per se violation of the First Amendment) *with id.* at 2451 (O'Connor, J., concurring in part and concurring in the judgment, joined by Souter & Breyer, JJ.) (judging constitutionality of content-based restrictions on religious speech under the endorsement test); *id.* at 2464 (Stevens, J., dissenting) (arguing that unattended

religion is even more pronounced among government administrators and lower courts, which routinely allow the violation of constitutionally protected parental and speech rights to avoid what they perceive to be Establishment Clause violations.[7] A religious equality amendment can therefore be understood as an attempt to pour some content into the mostly empty neutrality rhetoric of modern Establishment Clause decisions.

While acknowledging that there have been problems with Establishment Clause decisions, opponents of a religious equality amendment nevertheless fear that the amendment would eliminate those aspects of the separation of church and state that have served the United States well since its founding, aspects which, in their view, have saved it from the most serious manifestations of religious persecution and conflict that characterized reformation Europe.[8] The Court's separationist decisions have prohibited public schools from sponsoring group and individual prayer,[9] displaying religious symbols,[10] and offering

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religious displays in public forum presumptively violate Establishment Clause); *id.* at 2474-75 (Ginsburg, J., dissenting) (arguing that unattended cross standing in public forum is impermissible blending of church and state).

7. *E.g.*, Settle v. Dickens County Sch. Bd., 53 F.3d 152 (6th Cir.) (holding that school teacher's refusal to allow student to write term paper on "The Life of Jesus Christ" did not violate First Amendment even though other students were permitted to write on reincarnation (including its relationship to Hinduism and Buddhism), spiritualism and the history of magic), *cert. denied*, 116 S. Ct. 518 (1995); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (holding that parents had no right to remove children from public school reading class that used religiously offensive materials), *cert. denied*, 484 U.S. 1066 (1988); Bender v. Williamsport Area Sch. Dist., 741 F.2d 538 (3d Cir. 1984) (conducting voluntary extracurricular student Bible study and prayer group violates Establishment Clause), *vacated on other grounds*, 475 U.S. 534 (1986); Perumal v. Saddleback Valley Sch. Dist., 198 Cal. App. 3d. 64 (Ct. App.) (prohibiting students from distributing invitations to Bible study group), *cert. denied*, 488 U.S. 933 (1988); *see also* 141 CONG. REC. S19,259-60 (daily ed. Dec. 22, 1995) (remarks of Sen. Hatch) (noting hostility to religion among local, state and federal governments spawned by the Court's Religion Clause jurisprudence); AMERICAN JEWISH CONGRESS ET AL., RELIGION IN THE PUBLIC SCHOOLS: A JOINT STATEMENT OF CURRENT LAW (1995) (noting that many public school officials are unfamiliar with the wide range of private religious activity permitted in public schools under current constitutional law).

8. *See generally* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992) (arguing that the Establishment Clause creates a secular public order in the United States, which contributes to political stability).

9. Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985); School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

10. Stone v. Graham, 449 U.S. 39 (1980).

courses of sectarian religious instruction, even as electives.[11] The Court has also held that the Clause prohibits financial aid to private religious schools.[12] The enactment of a religious equality amendment would place these prohibitions in question. Especially in view of the demise of the Free Exercise Clause and uncertainties over the constitutionality of the Religious Freedom Restoration Act,[13] opponents fear that elimination of Establishment Clause barriers to government endorsement and encouragement of religious belief and practice would increase the pressure on religious minorities to conform to the dictates of majoritarian religious culture, perhaps even facilitating outright persecution.[14]

I see merit in both positions, and consequently my own feelings about the desirability of an amendment are conflicted. Two

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11. Edwards v. Aguillard, 482 U.S. 578 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968); McCollum v. Board of Educ., 333 U.S. 203 (1948). *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding the States' rights to release students during the school day for religious education).

12. *E.g.*, Aguilar v. Felton, 473 U.S. 402, 414 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also* Wolman v. Walter, 433 U.S. 229 (1977) (prohibiting funding for field trips, but allowing funding for diagnostic services); Hunt v. McNair, 413 U.S. 734 (1973) (upholding funding to a school which was predominantly Baptist because the Court found that the school had no official religious affiliation). The Court has held, however, that financial aid given directly to students at private religious schools or their parents does not violate the clause. *E.g.*, Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983); Board of Educ. v. Allen, 392 U.S. 236 (1968).

13. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994) (requiring that any governmentally imposed burden on religious belief or practice be justified as necessary to a compelling interest). The great weight of scholarly opinion is that RFRA is unconstitutional, although the only appellate court to consider the issue has upheld the statute. *Compare* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995) *and* Christopher L. Eisengruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) *with* Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) (upholding constitutionality of RFRA), *reversing* 877 F. Supp. 355 (W.D. Tex. 1995).

14. *See, e.g.*, *Religious Freedom: Statement of Douglas Laycock submitted to the Senate Judiciary Committee*, Oct. 20, 1995, *available in* 1995 WL 615787 at *2 (F.D.C.H.) ("The political objective [of many of the groups demanding an amendment] is to have teachers lead children in classroom prayer under conditions that make it difficult for any child to escape."); *Religious Freedom: Testimony of Oliver S. Thomas Before the Committee on the Judiciary, United States Senate*, Oct. 20, 1995, *available in* 1995 WL 615756 at *5 (F.D.C.H.) ("If . . . proponents of a religious equality amendment want something more than equality for religion, if they want to roll back the clock to the days when we had religious exercises in the classroom, their effort is dangerous and divisive.").

personal experiences capture this conflict. The first occurred nearly twenty years ago during my second year of law school in the late 1970s. While completing some law review assignments, I came across some articles on the abortion funding litigation that was then working its way through the lower federal courts. A number of abortion rights advocates had challenged congressional legislation that prohibited the use of federal funds to pay for most abortions. Noting that abortion funding restrictions coincided with the antiabortion beliefs of Roman Catholics, conservative Protestants, orthodox Jews, and Latter-day Saints (Mormons), representatives of all of which had lobbied for enactment of such restrictions, the abortion rights advocates argued that abortion funding restrictions violated the Establishment Clause. Though the Supreme Court rejected this argument,[15] I still have a vivid recollection of my disbelief and anger at the argument that participation by members of my church in the political process should he considered a violation of the Constitution. It was as if my Latter-day Saint faith were thought by others to be a virus that had infected the otherwise healthy process of American lawmaking.

Few other kinds of speech are subject to this kind of "procedural" objection—that is, where the substance of the position is never engaged by opponents, and the position is argued to be out-of-order rather than wrong on the merits. Indeed, laws that coincide with religious belief appear to be uniquely vulnerable to constitutional invalidation on the basis of their motivation; even laws that negatively and disproportionately impact racial minorities are not so strictly reviewed.[16] Now, as then, I believe that this exclusion of religion from politics and other arenas of public life is not only wrong as a matter of constitutional law, but ill-

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15. Harris v. McRae, 448 U.S. 297 (1980).

16. The Court is far more willing to credit racially benign explanations for racially disproportionate government actions than it is religiously neutral explanations for religiously disproportionate government actions. *Compare* Washington v. Davis, 426 U.S. 229 (1976) (holding that a police qualification test failed by racial minorities in disproportionate numbers was justified by city's need for educated and literate police officers) *with* Stone v. Graham, 449 U.S. 39 (1980) (holding that state's requirement that the Ten Commandments be posted in classrooms together with notation of their status as a principal source of Western law was motivated by unconstitutional desire to encourage belief in Judeo-Christian religion) *and* Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that state initiative requiring teaching of creationism if evolution is taught was motivated by unconstitutional desire to impose fundamentalist beliefs about origin of earth and its inhabitants).

advised as policy, contributing to the alienation of many religious believers from politics and government by ruling their deepest and most meaningful beliefs out-of-order as a basis for personal political action.[17]

The second experience occurred in 1985, shortly after my family and I moved to Macon, Georgia, where I had accepted my first law teaching position. My wife Nicea went down to the local YWCA (which, for those who may have forgotten, is the acronym for "Young Women's Christian Association") to register one of our children for a gymnastics class. She walked into the main YWCA office where a number of employees were in the midst of performing administrative and secretarial tasks. One employee came over to find out what Nicea needed, and, in the course of completing some forms, Nicea struck up a conversation with her. Upon hearing that we were new in town, the employee asked Nicea where we went to church. (This is a friendly question in the rural South, usually a prelude to inviting a newcomer to attend one's own church.) Nicea replied that we attended the Mormon church on Williamson Road. The reaction was like one of those old E.F. Hutton commercials[18]—all activity in the office stopped, and everyone turned around to stare at this member of the strange Utah cult who had somehow landed in their Protestant midst.

This was my family's first introduction to the marginal place Mormons occupied in Macon, that of a tolerated but suspect religious minority. Our landlord would come around periodically, lamenting that such nice people as ourselves would be going to hell because we had not been saved. Local pastors frequently warned their congregations about the evils of cults like Mormonism. Anti-Mormon films and speakers made regular appearances in town, and these were uncontroversially advertised in the local paper.

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17. *See generally* FREDERICK MARK GEDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE 63-95 (1991).

18. For those too young to have seen one of these commercials, they depicted two people discussing their stock portfolios with each other in the middle of a crowd that does not appear to be listening—on a yacht, for example, or in a restaurant, or at a party. At some point, one of the conversation partners says to the other, "Well, my broker is E.F. Hutton, and E.F. Hutton says . . . ." The camera then pans back to show literally everyone in the vicinity frozen in time, leaning forward toward the two discussants to overhear "what E.F. Hutton says."

Yet, despite the overwhelmingly conservative Christian culture of Macon and all the not-so-subtle reminders of the tenuous place Latter-day Saints occupied on the peripbery of the orthodox Christian tradition, our children never had any trouble at school. This was, I think, because even in Macon the public schools were secular, and the distinctive beliefs and practices of our family simply never arose as issues that our children had to deal with in the classroom. Whatever the theoretical merits of the exclusion of religion from public schools, it undeniably made it easier for us to live as Mormons in Macon.

My ambivalence about a religious equality amendment may stem from the fact that on most church-state issues, Latter-day Saints are simultaneously "insiders" and "outsiders." Latter-day Saints as a group tend to be socially conservative and to identify politically with the conservative Christian plurality that controls state and local government in much of the United States. In addition, Latter-day Saints, given the prominence of religious faith in their lives, tend to see the secular background assumptions against which events in public life usually take place as hostile to their faith commitments. Thus, many Latter-day Saints are likely to see themselves as "insiders," those who belong to the dominant religious or cultural group. To the extent that a religious equality amendment would advance culturally conservative values in political conflicts over matters like public school prayer, abortion, and gay rights, while generally diminishing the secularism of public life, most Latter-day Saints are likely to see enactment of such an amendment as a good thing.

Whatever their objects of cultural identification, however, outside of the Rocky Mountains and a few suburban pockets like Southern California and Northern Virginia, Mormons are very much "outsiders," those who are potentially subject to discrimination or persecution by the dominant religious or cultural group. While it would be nice to have background assumptions in public life that reaffirm one's religious faith rather than constantly marginalizing or undermining it, things could be worse. Secular background assumptions are much easier for Latter-day Saints to deal with than the dangers that would attend overt and official identification of their children as religious minorities in public schools.

The broad religious pluralism of the United States guarantees that somewhere in this country, at some level of govern-

ment, everyone is a religious minority like the Mormons. One can legitimately question whether the greater risk to religious minorities is a public life governed by secular background assumptions that presume all religious belief irrelevant and out-of-place, or a public life captured by a religious majority or plurality that sees minority religion as a threat to the prevailing religious culture. Whatever a religious equality amendment might do to advance conservative cultural values in the United States, it remains unclear what it would do to the liberty of religious minorities.