

CONSTITUTIONAL QUESTIONS ABOUT VOUCHERS

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There is no simple answer to the question of whether school vouchers are constitutional. The first step toward answering this question may be to recognize that the issue of vouchers, like other constitutional questions involving the meaning of the religion clauses, is much more complicated and harder to resolve than many contemporary commentators and jurists suggest.

The Establishment Clause doctrine is an area of constitutional law where virtually nothing is settled.¹ Some constitutional scholars today, such as Akhil Amar, even question whether the Establishment Clause should apply to states at all and suggest that most of the Court's work in this area should be redetermined under applicable Free Exercise, Equal Protection, and Privileges and Immunities Clause principles.² Free Exercise doctrine is grounded on the holding of *Employment Division v. Smith*,³ which sets out a rule with two exceptions. The rule, that the Free Exercise Clause provides no protection against neutral laws of general applicability,⁴ is almost universally condemned by the people who exercise the right this constitutional provision purports to guarantee.⁵ One of the excep-

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1. See, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117-20 (1992) (noting that "the Warren and Burger Courts were free to reach almost any result in almost any case," due to the doctrinal confusion between the Establishment and Free Exercise clauses); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 123-25 (1992).

2. See AKHIL AMAR, *THE BILL OF RIGHTS* 246-54 (1998) (arguing that it may not matter very much whether the Establishment Clause is incorporated into the Fourteenth Amendment because many violations of Establishment Clause doctrine would also violate "free-exercise principles, equal-protection principles, equal-citizenship principles, or religious-liberty principles").

3. 494 U.S. 872 (1990).

4. See *id.* at 878-882.

5. The depth and extent of the criticism of *Smith* is illustrated by the extraordinary range of religious and civil rights groups that sought a rehearing in the case or supported the enactment of the Religious Freedom Restoration Act ("RFRA"), a legislative response to *Smith*. See, e.g., Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65, 88 (1995) (noting that [t]he need to protect religious liberty brought together . . . [g]roups that disagreed on almost everything else [but] found common ground in the need for RFRA"); Paul S. Zilberfein, Em-

tions, relating to “hybrid rights,” is unintelligible. The other, relating to discretionary decision making, is inherently ambiguous and so broad that it has the potential to swallow the entire rule.

In applying the religion clauses, we are not really sure what we are protecting. First, there is no accepted definition for religion or the exercise of religion in the case law. It is not even clear that religion means the same thing for Free Exercise and Establishment Clause purposes.⁶ No consensus exists as to why we protect religious freedom or have an Establishment Clause.⁷

Second, it is unclear which Supreme Court Justices support religion. The Warren and Burger Courts, the only judicial majorities that took Free Exercise rights seriously in our constitutional history, are regularly condemned for their alleged hostility to religion (ostensibly expressed in their Establishment Clause decisions).⁸ Conversely, the current Court is often hailed for its support for religion,⁹ although it has eviscerated Free Exercise protection¹⁰ and

ployment Division, Department of Human Resources of Oregon v. Smith: *The Erosion of Religious Liberty*, 12 PACE L. REV. 403, 441 (1992) (explaining that “[t]he breadth of RFRA’s support demonstrates the degree to which the *Smith II* decision is perceived as erosive of religious liberty”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (describing the “unusually broad-based coalition of religious and civil liberties groups from right to left and over a hundred constitutional law scholars” who sought a rehearing in *Smith*).

6. See Stanley Ingber, *Religion or Ideology: A Needed Classification of the Religion Clauses*, 41 STAN L. REV. 233, 233-40 (1989); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L. J. 1519, 1555 (1983); *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1186 (2d ed. 1988).

7. See JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42-57 (1996) and Alan E. Brownstein, *The Right Not To Be John Garvey*, 83 CORNELL L. REV. 767, 793-818 (1998), for competing explanations of why we protect religious liberty. Compare THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 195-222 (1986), with LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (2d ed. 1994), offering different conceptions of the origins of the Establishment Clause.

8. See, e.g., R. Randall Rainey, S.J., *Law and Religion: Is Reconciliation Still Possible?*, 27 LOY. L.A. L. REV. 147, 176 (1993) (criticizing the Warren and Burger Courts for embracing a “strict separationist policy ‘that disclosed a deep and abiding suspicion, if not a certain measure of hostility, toward religion in a variety of public settings’”); JAMES W. FRASER, BETWEEN CHURCH AND STATE 172, 219 (1999) (quoting Representative Cook of Utah’s argument that “[i]n the last 20 years, our right to free, personal religious expression has been virtually destroyed by misguided court rulings and wrong-headed public policy”).

9. See Carl Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 285, 319 (1999) (applauding the Court’s movement away from separationism and toward neutrality

invalidated a congressional attempt to restore some uniform security for religious practices from government interference.¹¹

Maybe we—academics, lawyers, and judges—who deal with these issues are not very bright people. More probably, this incoherence and doctrinal instability suggests that these constitutional clauses raise very difficult problems that can not be easily resolved. Acknowledging the difficulty of the problems and the futility of searching for simple doctrinal formulas to solve them may be the necessary first step in determining the constitutional relationship between church and state.

My own view is that the religion clauses cross constitutional boundaries and invoke multiple constitutional values. There are liberty, equality, and speech dimensions to the religion clauses.¹² When constitutional provisions serve multiple purposes, they are intrinsically hard to interpret and apply: It is no easy job to arrive at a win, win, win solution to problems. Often something of real value is sacrificed regardless of which doctrinal solution is accepted.

Moreover, the interpretation and application of constitutional provisions involving multiple values raise serious concerns about

as recognizing “religion as an enduring attribute of the human condition that call[s] for unique handling”).

10. See Kent Greenawalt, *Should the Religion Clauses Be Amended?*, 32 *LOY. L.A. L. REV.* 9, 17 (1998) (coming “to the disconcerting conclusion that the Supreme Court has nearly written the Free Exercise Clause out of the Constitution”); see also Shelly Ross Saxer, *Zoning Away First Amendment Rights*, 53 *WASH. U. J. URB. & CONTEMP. L.* 1, 4-5 (1998) (noting that “recent Supreme Court decisions . . . threaten to eviscerate constitutional concepts of free speech and free exercise of religion by ignoring constitutional protections against content-neutral infringements on First Amendment rights”).

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

12. I have written several articles about how these values are implicated by the religion clauses and should inform the interpretation of the Free Exercise Clause and the Establishment Clause. A brief summary of these ideas is described later in this paper. Interested readers should refer to the sources cited below for a more extensive treatment of these issues. See Alan E. Brownstein, *Evaluating School Voucher Programs through a Liberty, Equality, and Free Speech Matrix*, 31 *CONN. L. REV.* 871 (1999) [hereinafter Brownstein, *Evaluating School Voucher Programs*]; 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 (1999) [hereinafter Brownstein, *Interpreting the Religion Clauses*]; Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 *OHIO ST. L. J.* 89 (1990) [hereinafter Brownstein, *Harmonizing the Heavenly and Earthly Spheres*]; Alan E. Brownstein, *Constitutional Questions about Charitable Choice*, in *WELFARE REFORM AND FAITH-BASED ORGANIZATIONS* 219 (Derek H. Davis & Barry Hankins eds., 1999) [hereinafter Brownstein, *Constitutional Questions about Charitable Choice*].

the role of the courts and the utility of judicial decisions. Multi-factor analyses invariably require the use of standards and balancing tests, which are inherently subjective and indeterminate.¹³ Arguably, such judicial subjectivity undermines the legitimacy of holdings and, certainly, the application and enforcement of the law becomes more intricate and less practical. The discretion of the lower courts becomes more difficult to supervise, and the results of cases are necessarily less uniform and less predictable.¹⁴ These structural concerns as well as substantive values have to be factored into the discussion.

In addition to the liberty, speech, and equality matrix of values and the foregoing structural concerns, there are two other important ingredients that need to be included in this constitutional brew. First, there is a substantive as well as a formal dimension to religious liberty and religious equality.¹⁵ From a religious liberty perspective, there is no limited set of conventional religious practices the way there are conventional expressive activities such as speaking or writing. To the contrary, religion permeates a wide range of human conduct. Thus, we cannot simply forbid the government from passing laws that interfere with religious practices the way we forbid government from passing laws that regulate speech. To protect religious liberty, government sometimes has to take the religious nature of specific activities into account and exempt these religious practices from otherwise applicable regulations.¹⁶

The same is true for religious equality. People of different faiths are not similarly situated. They are not always treated equally

13. See Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58-59, 60-62 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

14. See Scalia, *supra* note 13, at 1179 (expressing concerns about the lack of uniformity and predictability that results from the use of standards rather than rules); see also Sullivan, *supra* note 13, at 27, 57-59 (noting frequently expressed concerns about judges "translating raw subjective value preferences into law" and standards affording courts excessive discretion that increases the likelihood that similar cases will be decided differently).

15. See Brownstein, *Interpreting the Religion Clauses*, *supra* note 12, at 250-56 (criticizing formally neutral laws that treat people of different faiths as if they were similarly situated and ignore substantive differences among religions that must be taken into account to promote religious liberty and protect religious equality).

16. See *Wisconsin v. Yoder*, 406 U.S. 216, 220 (1972) (explaining that "[T]o agree that grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability").

if government ignores their differences the way people of different races are treated equally if government ignores the color of their skin.¹⁷ Sometimes government must recognize the differences among people of the various religious faiths in our communities to achieve religious equality.¹⁸

Even standing alone, these are hard principles to implement. Courts do not handle issues of substantive liberty and equality very well.¹⁹ Free speech cases dealing with symbolic expression are usually difficult cases.²⁰ There is no easy formula that provides us the right answer. Similarly, affirmative action cases are hard cases.²¹ Courts have struggled in their attempts to monitor the scope and

17. The constitutional paradigm for race insists that the government must be color blind. Race is deemed to be such an irrational basis for distinguishing among people that whenever government classifies on the basis of race, it is presumed to be acting for invidious reasons. Accordingly, any attempt to take race into account, even for allegedly benign or remedial reasons, is subject to the most rigorous review. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). A different paradigm applies to religion. Individuals of different faiths are acknowledged to have distinct beliefs and practices. Government accommodations of these differences are acknowledged to be permissible. In some cases, government is constitutionally required to take religion into account. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

18. See Brownstein, *Evaluating School Voucher Programs*, *supra* note 12, at 909 (“When we move to religion, where the differences between groups are obvious, predictable, and profound, the utility and legitimacy of applying a formal neutrality standard to protect the rights and interests of individuals and groups that are not similarly situated becomes less and less defensible”); see also Brownstein, *supra* note 12, at 261 (“For example, unlike race, which is acknowledged to be an irrelevant characteristic of individuals and an unreasonable basis for government distinguishing between persons, religion is a legitimately recognized and protected aspect of an individual’s identity. Accordingly, for racial equality purposes we promote equality by ignoring racial differences, but for religious equality purposes sometimes it may be necessary to take religious differences into account. Blacks and whites are similarly situated in a way that Jews and Catholics are not”).

19. See, e.g., Alan Brownstein, *How Rights are Infringed: The Role of the Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994) (describing the difficulty and uncertainty involved in applying the undue burden test in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

20. See DANIEL FARBER, *THE FIRST AMENDMENT* 28-29 (1998) (describing the Court’s hopelessly fragmented attempts to determine when regulations of symbolic speech are content neutral); see also Alan Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 112-13 (1999) (reviewing DANIEL FARBER, *THE FIRST AMENDMENT* (1998)).

21. See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 320 (1997) (discussing how “courts and scholars have long had a difficult time justifying affirmative action, since affirmative action requires treating members of some groups differently from members of other groups”).

content of affirmative action programs because they have no clear vision of what equality means when the government does take race into account.²²

Second, underlying the meaning of the religion clauses are fundamental issues about the nature and scope of private and public life in our society. Private spheres of authority are less subject to constitutional requirements that protect liberty and equality than are their public counterparts, and they are shielded to a greater extent from government regulation.²³ But the line of demarcation between the two spheres has never been clear.²⁴ Competing visions of what belongs in the private and public spheres are not easily mediated. Moreover, when government begins supporting or regulating private institutions, such as religious schools or programs, the demarcation line may shift for purposes of religion clause analysis.²⁵ Depending on one's perspective, such decisions may be criticized as either privatizing public life or publicizing private life.

Given this background, it should come as no surprise when I suggest that vouchers for religious schools will be and should be a difficult problem for courts to evaluate and resolve. This is particularly true because of the scope of the problem that school vouchers pose for any interpretation of the religion clauses: despite attempts to limit the discussion, this issue extends well beyond a focus on one kind of funding mechanism and one category of religious institution and program. While some Justices on the Court contend that there is a constitutionally relevant distinction between vouchers and more direct per capita grants to religious institutions,²⁶

22. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (explaining that “[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics”); see also *Adarand*, 515 U.S. at 228 (insisting that “[s]trict scrutiny does not ‘trea[t] dissimilar race-based decisions as though they were equally objectionable[;]’ to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not”) (alteration in original) (emphasis in original) (citations omitted).

23. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

24. See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 16-23 (2000) [hereinafter McConnell, *The Problem*]; Brownstein, *Harmonizing the Heavenly and Earthly Spheres*, *supra* note 12, at 137-45.

25. See McConnell, *The Problem*, *supra* note 24, at 19.

26. See, e.g., *Mitchell v. Helms*, 120 S. Ct. 2530, 2559 (2000) (O'Connor, J., concurring) (recognizing that funding mechanisms that use vouchers or “private-choice” arrangements for religious institutions are more likely to withstand constitutional scrutiny than direct grants at least in some circumstances).

there is certainly reason to doubt that this doctrinal line can be maintained.²⁷ Vouchers inevitably raise broader questions about the direct, public funding of religious institutions. Similarly, the voucher debate is not easily limited to schools and educational programs. A Supreme Court decision upholding voucher payments to religious schools would not necessarily resolve all the questions that may be raised about the public subsidization of other religious institutions and programs. Nevertheless, disputes regarding religious school vouchers certainly invoke basic questions about the public funding of religious welfare programs, job training centers, drug treatment programs, recreational facilities, camps, libraries, mental health facilities and various other institutions and programs.

Whatever funding mechanisms or religious institutions are the subject of discussion, difficult constitutional questions are raised when the state funds programs that merge in their operation the state's secular mission and a religious institution's sectarian mission.²⁸ In all cases, we have to confront the issue of what constraints, if any, the Constitution imposes on such support.

Some of my questions about vouchers relate to religious equality among individuals and faith communities.²⁹ In some ways the Establishment Clause parallels the equal protection mandate applied to racial, ethnic, and gender classes.³⁰ From this perspective,

27. Indeed, challenges to the legitimacy of any doctrinal line distinguishing between vouchers and direct grants are raised from both sides of the voucher debate. See, e.g., Robert J. Bruno, *Constitutional Analysis of Educational Vouchers in Minnesota*, 53 ED. LAW REP. 9, 13 (1989) (arguing that “[w]here the school involved is a religious or religion-connected school, the voucher grant provision is a direct financial subsidy from the state to a religious organization” in violation of the Establishment Clause); *Mitchell*, 120 S. Ct. at 2546 (casting doubt on whether constitutionally permissible aid to religious schools must be in the form of vouchers or some other “indirect” mechanism since such a “formalistic line breaks down in the application to real-world programs”).

28. See *Lemon v. Kurtzman*, 403 U.S. 602, 670-71 (1971) (White, J., dissenting) (criticizing the majority's assumption that teachers of secular subjects in religious schools could not refrain from injecting religion into their classrooms, but recognizing that government financing of schools that mixed religious teaching with secular subjects involved the “financing of religious instruction by the State” and raised serious constitutional questions).

29. I will address the separate issue of equality between religious and secular beliefs later in the paper.

30. For example, the Establishment Clause parallels Equal Protection doctrine by repudiating discrimination against minority faiths. See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982) (noting “the clearest command of the Establishment Clause” is the requirement that “one religious denomination cannot be officially preferred over another”). Even those Justices assigning a limited scope to the Establishment Clause concede that it was intended to restrict govern-

the equality dimension of the Establishment Clause implicates constitutional values about promoting integration and equal opportunity and constitutional concerns about limiting isolation and discrimination.

I take it as a given that the public funding of religious schools is of substantial value to religious families and faith communities. It facilitates the free exercise of religion, helps children learn the substance of their family's religion, and strengthens and reinforces the beliefs and commitments of those faith communities that sponsor religious schools. There is no doubt that vouchers increase access to all of these religious benefits for some people. Whether the increased access and resulting religious advantages would be equally available to all religious families and communities under a voucher or subsidy program is less clear.

A commitment to distributing government largess on the basis of facially neutral criteria does not adequately answer the questions that voucher programs raise regarding equality of support among religious families and faiths. Facial neutrality of government action does not guarantee religious equality any more than it guarantees religious liberty. People of different religious faiths are not similarly situated, either with regard to their religious beliefs and practices or with regard to the number of their adherents and their institutional infrastructure in various communities. A facially neutral statute cannot respond to these factual disparities.

There are really multiple issues here. First, vouchers are not like police and fire protection and other general services that are equally available to all individuals and institutions. Nor are they like bus passes that provide equivalent transportation services to schoolchildren, regardless of which school a particular child may attend. These universal services are not vested to particular religious communities and cannot be tailored for religious purposes. They do not depend for their value on the infrastructure of a faith community. Vouchers are different because they distinguish among religious faiths in terms of their religious utility.

mental preference regarding faiths. *See, e.g.,* *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting). The two constitutional provisions also resonate with each other in their focus on status subordination. Justice O'Connor's endorsement test for interpreting the Establishment Clause clearly echoes equal protection concerns in condemning state action that communicates a message to religious individuals suggesting they are "outsiders, not full members of the political community" because of their faith. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

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Under most voucher programs, members of large, institutionally established faiths in a community will have disproportionately greater opportunities to purchase a religious school education with state funds than members of smaller faiths. In many communities, larger faiths have already created educational environments for their children where religious content is regularly merged with secular studies. If such schools are not already in existence, the promise of vouchers may justify their creation. The logistic realities for smaller faiths are much less positive. Smaller faiths often lack the numbers and resources to create their own educational institutions. Vouchers will not change their situation because of demographic constraints. Even with state support, some minority faiths will have too few members in a community to create a religious school. Notwithstanding the general availability of vouchers to virtually all schools through a facially neutral statute, the adherents of these faiths will have little choice other than to send their children to public school and pay for their children's religious education entirely out of their own pockets.

Second, and perhaps more importantly, there is no guarantee that vouchers will be made generally available to all schools. And if they are not, how will courts review the conditions that states impose on vouchers to ensure that states do not unfairly limit the vouchers' utility for different faith communities? It is easy to imagine conditions that would predictably skew the allocation of funds among faiths. Every substantive curriculum condition, teacher credentialing mandate, or equipment requirement for voucher eligibility may make it more difficult for the schools of smaller faiths in a community to satisfy the requisite criteria. Or, to take an extreme example, a state might demand that voucher schools be of a minimum size or have a proven track record in order to protect families from fly-by-night operations set up to prey on uninformed parents. How could we review the constitutionality of requirements like these that would obviously disadvantage smaller and less established faiths?

There seems to be no end to the potential questions raised by a voucher scheme. How should courts respond if the criteria for receiving subsidies conflicts with the tenets of a particular faith? How should we evaluate a program where vouchers are only available to schools that offer tutorials on Saturday, for example, or that teach evolution or sex education in ways that are inconsistent with the beliefs of some religions?

A separate equality concern relates to religious discrimination in hiring on the basis of religion in publicly funded programs. The

Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) of 1996 contains “charitable choice” provisions which permit government funding of certain social welfare services provided by religious institutions.³¹ These provisions incorporate Title VII’s exemptions, which allow religious institutions to discriminate on the basis of religion in hiring employees.³² Would similar discrimination be permitted by publicly funded religious schools? The answer is unclear.

An equal protection analogy is illustrative here. In the affirmative action context, courts and commentators worried about racial pork barrel legislation, and even proportional representation in hiring on the basis of race was thought to raise serious equality concerns.³³ Religion is not race, but the possibility of religious pork barrel legislation or proportional representation along religious lines in publicly funded jobs also raises significant equality concerns. At least with race-based affirmative action programs, there was a perceived political process check in place to limit the aggrandizement of resources by minority racial groups.³⁴ No such check exists in the context of religious discrimination in hiring that disadvantages minority faiths.

Finally, state funding of educational and other services in religious environments may fragment much of the public life of our communities, or what was thought to be the public life of our communities, along religious lines. Shifting programs from the public arena to religiously exclusive private spheres can isolate religious groups from each other in many contexts where positive interac-

31. See The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, 42 U.S.C. § 604a (1998).

32. See *id.* § 604a(f); Brownstein, *Constitutional Questions about Charitable Choice*, *supra* note 12, at 231-39.

33. See *Fullilove v. Klutznick*, 448 U.S. 448, 529 (1980) (Stewart, J., dissenting) (asserting that “since the guarantee of equal protection immunizes from capricious governmental treatment, ‘persons’ - not ‘races’ - it can never countenance laws that seek racial balance as a goal in and of itself”), *overruled on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); see also *Fullilove*, 448 U.S. at 541-42 (Stevens, J., dissenting) (reporting, in condemnatory terms, that “[t]he legislative history of the Act discloses that there is a group of legislators in Congress identified as the ‘Black Caucus’ and that members of that group argued that if the Federal Government was going to provide \$4 billion of new public contract business, their constituents were entitled to ‘a piece of the action’”).

34. See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (confirming the political process axiom that “[w]hen the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and consequently employing a stringent brand of review, are lacking”).

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tions responding to common needs and interests could be the basis for forming bonds of empathy and mutual respect. Again, majority and minority faiths are not similarly situated in this respect. When the majority chooses to reject religious integration, religious minorities may be isolated whether they choose to be or not.³⁵

Vouchers also raise significant religious liberty concerns. The right to practice one's faith is an essential dignity and autonomy right. Religious liberty also serves an important instrumental and structural function in the constitutional scheme. As a source of private values and as an aggregation of private power, religion operates as a critical check on government conduct and authority. Like the press and political parties, we want religion to be separate from government—something that is neither dependent on, nor subordinate to, the power of the state.

Public funding of religious schools is likely to undermine some of the dignitary, autonomy, and structural values of religious liberty. For example, there is a coercive effect on religious liberty when job opportunities are granted or denied on the basis of an applicant's religious beliefs and practices. When the government funds religiously restricted jobs, the state is implicated in that coercion and the resulting burden on religious liberty.

Public funding also jeopardizes the autonomy of religious institutions. Controls follow subsidies. True, no school has to accept funding, but a school that refuses state support when other relig-

35. Neither I nor anyone else discussing vouchers can predict what the impact of vouchers will actually be on public schools or religious schools. I think vouchers and other forms of public subsidies for religious schools and religious service programs create incentives for the development of such institutions. Religious discrimination in hiring adds to this effect. There are also significant cost savings for a faith community that chooses to operate a publicly funded religious school that combines a religious and secular education as opposed to privately funding the religious education of the community's children while those children attend public school. For example, over 25% of Congregation Bet Haverim's annual budget, or about \$80,000, is allocated to religious school expenses. If the members of Bet Haverim sent their children to a fully state subsidized Jewish Day School, presumably most or all of that \$80,000 expense would be unnecessary, and the funds could be reallocated for other uses. If the congregation had \$80,000 available for annual mortgage payments, they could begin immediate construction on a new temple, which is needed, but which they may not otherwise be able to afford.

Also, institutional fragmentation along religious lines may influence families to choose to live in communities where there are sufficient co-religionists to support the development of a social service and educational infrastructure for the members of their faith. That result may reduce the religious integration of American society.

ious schools in town accept it may find itself subject to substantial pressure to compromise its integrity.

The coercive power of funding is not easy to resist. State governments provide the most obvious example. States do not have to accept federal conditions and regulations that are predicated on their acceptance of federal financial support.³⁶ They can refuse to accept the federal subsidies and maintain their independence from federal control. However, the record suggests that these offers are not easily or often rejected.

The instrumental goals of religious liberty are also jeopardized by the public funding of religious institutions. Subsidies create dependency and undermine independence. Partnerships between religious institutions and government may compromise the integrity of religion as a check on state action just as financial partnerships between government and the media would undermine the independence of the press.

Finally, vouchers raise government neutrality concerns. We have all heard the common axiom that government must act neutrally with regard to religion. But what specific values are invoked by this requirement? Part of the answer involves resolution of the religious liberty and equality questions I have already described. The voucher debate can also be framed by a marketplace of ideas discussion. Neutrality adds a marketplace of ideas dimension to the relationship between Free Exercise and Establishment Clause mandates. It suggests that the religion clauses should be interpreted to protect religious liberty and equality in a way that skews the ongoing competition in our society between religious and secular beliefs and perspectives in our society as little as possible.

Some commentators argue that public funding does not distort the marketplace of ideas.³⁷ They argue, on the contrary, that state funding cures existing distortion by counterbalancing the influence

36. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (explaining that while Congress may encourage enactment of particular state laws by providing funds contingent upon the state adopting specific legislation, "the enactment of such laws remains the prerogative of the States not merely in theory but in fact" because states are free to disclaim the afforded funds to avoid the accompanying condition).

37. *See* Allan E. Parker Jr. & R. Clayton Trotter, *Hostility or Neutrality? Faith-Based Schools and Tax-Funded Tuition: A GI Bill for Kids*, 10 *Geo. Mason U. Civ. Rts. L.J.* 83, 104 (1999/2000) ("In contrast to the homogeneity of the public schools, the parent who is issued a voucher now has access to a mosaic of educational options, especially in an urban area. Some may favor Montessori permissiveness; some may be authoritarian. Some may be Afrocentric, bilingual or multicultural; others may seek to replicate an Anglophile prep school. Some may be founded on

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of secular instruction in public schools with alternative private voices.

This is a fair argument, but there is another way to think about this issue. Establishment Clause restrictions on government promotion of religion do not necessarily mandate the public funding of religious institutions as quid pro quo. The basic balance between religious and secular beliefs may be better expressed through a different equation, one that imposes serious Establishment Clause limits on state support for religion while providing aggressively enforced free exercise exemptions from regulatory interference. These exemptions would be supplemented when necessary by appropriate political accommodations for religious practices and institutions.

Indeed, there may be an unavoidable and basic choice to be made here between financial support and freedom from regulatory interference. The idea that government must fund religious institutions to further neutrality goals may actually undercut part of the foundation for both constitutionally mandatory and politically discretionary accommodations of religion. As a logical matter, it is hard enough to argue, although some Supreme Court Justices and religion clause commentators do,³⁸ that while neutrality principles are offended when religious and secular institutions are treated differently for funding purposes, neutrality is not undermined when religion alone is privileged by regulatory exemptions. It is even more difficult to contend that equality in funding and inequality in regulatory treatment provides a neutral playing field that does not distort the marketplace of ideas. Freedom from regulatory interference, after all, has clear competitive value. It reduces costs, promotes internal cohesion, and protects the integrity of messages.

I do not doubt the need or justification for religious exemptions and accommodations. I question whether the disequilibrium

a military school model. Some may teach academic content in a context of Christian, Jewish, or Islamic spirituality.”).

38. Justices Scalia, Rehnquist, and Kennedy, for example, joined the plurality opinion in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), last term, proclaiming that government was required by core neutrality principles on which the religion clauses were grounded to fund religious institutions on the same terms as secular ones. All three Justices, however, saw no neutrality problem with a state law that exempted religious periodicals from a sales tax that secular periodicals were required to pay. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 30, 33 (1989) (Scalia, J., dissenting). For commentary supporting both “exemptions from regulatory burdens” and “equal treatment as to benefit programs” for religious institutions, see Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 26 (1997).

they create between religious and secular belief systems is to be taken into account in a system that purports to respect neutrality as a constitutional value and how this would be done.

To take just one example, consider the newly enacted Religious Land Use and Institutionalized Persons Act (“RLUIPA”).³⁹ Land use regulations can be extraordinarily burdensome for all non-profit institutions, but only religious institutions receive strict scrutiny review as protection from these requirements.⁴⁰ Assume that RLUIPA applies to religious schools, although this is open to question.⁴¹ Now also assume that separate developers are planning to construct two private schools in a community: one religious school, and one secular school. Both the religious school and the secular school may reflect belief systems that are distinct from and even critical of the public school’s philosophy. Under a voucher system, both schools may receive equivalent, per capita, operating subsidies. However, under RLUIPA, only the religious school will be exempt from costly and burdensome regulatory interference that may be so severe as to prevent the construction of the secular school entirely.

It is hard to characterize such a system of equal funding and regulatory preferences as “neutral” or even stable. With so much emphasis on equality in funding, the very real risk is that this same formal equality model will be applied to require regulatory equality between religious and secular institutions as well. Ultimately, state support for religious institutions may “neutralize” much more than its proponents intended. It may extinguish the idea that there is something unique and special about religion in constitutional law. A new constitutional model that allows public funding of religious institutions could alter the traditional recognition that religious practices and institutions distinctly deserve protection from regulatory interference. Religious liberty and equality can be protected more effectively, without distorting the marketplace of ideas, by maintaining careful constitutional limits on all public funding of religious institutions, including funds distributed through vouchers.

39. Pub. L. No. 106-274 (2000), 114 Stat. 803.

40. *See id.*

41. *See* Sylvia Hsieh, *Cities and Towns Will Face More Zoning Challenges by Churches*, LAW WKLY. U.S.A., Oct. 16, 2000, at 19 (quoting Nicholas Miller, co-chair of a litigation task force on RLUIPA, for the position that a “whole range” of religious institutions including parochial schools could benefit from the Act).