

PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM

*From the State House to the Schoolhouse: Religious
Expression in the Public Sphere*

INTRODUCTION: MEGAPHONES AND DUCT TAPE: LEGAL TOOLS SHAPING RELIGIOUS EXPRESSION IN THE PUBLIC SPHERE

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The 2006 Program on Law and State Government Fellowship Symposium, *From the State House to the Schoolhouse: Religious Expression in the Public Sphere*, brought together a stellar faculty from around the state and nation to inform us about how laws, lawmakers, and citizens shape religious expression in the public square and in the public schoolhouse. The sixth fellowship event since the Program on Law and State Government's inception in 1997, the 2006 symposium and the articles in this issue emanating from that event embody the Program's mission of fostering the study and research of critical legal issues facing state governments.¹ A vital component of the Program on Law and State Government, the Fellowships offer an extracurricular academic opportunity for students interested in contributing to the contemporary scholarship of law and state government.² As the custodian of this Fellowship experience at this school,

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1. The Program on Law and State Government Fellowship Symposium, *From the State House to the Schoolhouse: Religious Expression in the Public Sphere*, was held on September 29, 2006, in the Wynne Courtroom of Indiana University School of Law—Indianapolis.

2. Awarded on a competitive basis, the Program on Law and State Government Fellowships allow two students the opportunity to work together for one year exploring a topic of their choice concerning a critical legal issue facing state governments in exchange for tuition credits of up to \$5000. Working under the guidance of the Director of the Program on Law and State Government, Fellowship responsibilities have included hosting an academic event, collaborating to write an

I laud the work, tenacity, and sincerity of the 2006 Program on Law and State Government Fellows, Mr. Chris Campaniolo and Ms. Carrie Lynn, in tackling this complex topic with such grace and integrity.

Religious expression, like poetry, art, law, and engineering, can encompass limitless variety and purpose. As Rabbis Sasso and Sasso of Indianapolis's Beth-El Zedek congregation have so eloquently expressed, religion can bring "an attitude of reverence and humility, a spirit of compassion, a fervor for justice, concern for rights and equality, care for the land, and respect for all."³ However, as we know, religion is not without its social costs. As headlines from today's newspapers and a multitude of chapters from history books reveal, religious expression can divide and destroy communities at every political level. Jonathan Swift put it this way, "We have just enough religion to make us hate, but not enough to make us love one another."⁴

From the beginning of American history when "Puritanism . . . laid, without knowing it, the egg of democracy,"⁵ religion and the practice of democracy have been closely intertwined. Our history is rich with the logistic, semantic, and very real conundrums of this fact. In 1789, Congress authorized paid chaplains three days before reaching final agreement on the Bill of Rights, which bars Congress's establishment of religion through law.⁶ George Washington said in his farewell address to a country operating under the First Amendment, "Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports."⁷ President Washington continued, "In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men & citizens."⁸

After all these years, the evidence suggests that we are, to put it mildly, divided as a country as to how we think and feel about these issues. A recent Pew Forum on Religion and Public Life report stated that 67% of Americans consider this country a Christian nation.⁹ However, a Gallup poll from 1999 reported that over 50% of Americans cannot name the first book of the Bible and that 60% of Americans could not define the Holy Trinity.¹⁰ The Pew poll also reported that

academic paper on the Fellowship topic, or contributing to policy development and analysis at the state government level.

3. Dennis Sasso & Sandy Sasso, *What We Mean by the Role of Religion*, INDIANAPOLIS STAR, Sept. 5, 2006, at A6.

4. JONATHAN SWIFT, THOUGHTS ON VARIOUS SUBJECTS (1711), *reprinted in* MICELLANIES IN PROSE AND VERSE, VOL. 1, at 388 (Alexander Pettit ed., 2003).

5. JAMES RUSSELL LOWELL, NEW ENGLAND TWO CENTURIES AGO (1865), *reprinted in* AMONG MY BOOKS, VOL. 2, at 16 (AMS Press 1966) (1870).

6. *Marsh v. Chambers*, 463 U.S. 783, 786-88 (1983).

7. George Washington, Farewell Address to the People of the United States (Sept. 19, 1796), *available at* <http://gwpapers.virginia.edu/documents/farewell/intro.html>.

8. *Id.*

9. THE PEW FORUM ON RELIGION AND PUBLIC LIFE, *available at* <http://pewforum.org/docs/index.php?DocID=153> [hereinafter PEW FORUM].

10. George Gallup, Jr. & D. Michael Lindsay, SURVEYING THE RELIGIOUS LANDSCAPE:

almost half of Americans believe that Conservatives have gone too far in imposing their religious values; conversely, 70% believe that Liberals have gone too far in keeping religion out of government.¹¹ Currently, public debate and the ongoing litigation about the propriety and the merits of legislative prayer emanating from Indiana's State House highlight the deep divisions of understanding surrounding the fundamental legal concepts of religious expression and government speech.¹²

With these facts, it hardly comes as a surprise when teachers, citizens, and judges struggle with issues concerning how to create contours of religious expression in the public sphere that allow robust debate but do not marginalize or disenfranchise those holding a religious view that is not held by the majority. Understanding and interpreting controversial issues of public life must take into account that the borders between what is secular and what is sectarian may be perceived quite differently. From the vitriolic and sometimes violent controversies surrounding public schools' use of the Protestant Bible in the late nineteenth century¹³ to more recent debates about whether public school curricula should reference historical dates with the Christian-based B.C. (Before Christ) and A.D. (*Anno Domini*, Latin for year of the Lord) instead of B.C.E. (before the common era) and C.E. (common era),¹⁴ the starting points of the questions blur the boundaries of the answers.

For some the question is "how can we keep democracy safe from religion?"¹⁵ For others, the question is "how can democracy survive without religion?"¹⁶ The Fellowship symposium presented an opportunity to explore how we draw the

TRENDS IN U.S. BELIEFS 49 (1999); *see also* Bill Broadway, *Are the Faithful Misinformed?*, WASH. POST, Aug. 5, 2000, at B9.

11. PEW FORUM, *supra* note 9, at 10.

12. *See* Motion for Stay, *Hinrichs v. Bosma*, Nos. 05-4604 & 05-4781 (7th Cir. Mar. 1, 2006) (Plaintiffs alleged the Indiana House of Representatives' practice of opening its proceedings with overtly sectarian prayer, usually Christian, violates the Establishment Clause of the First Amendment.).

13. *See generally* Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121 (2001); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

14. *See Stateline: B.C. or B.C.E.?*, STATE LEGISLATURES, Sept. 2006, at 11.

15. *See* ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH* 253-55 (2003) ("There is, then, no reason to fear that the faithful are a threat to liberal democratic values. . . . the United States continues to honor religion publicly."); *see contra* CORNEL WEST, *DEMOCRACY MATTERS* 146 (2004) ("This Christian fundamentalism is exercising an undue influence over our government policies, both in the Middle East crisis and in the domestic sphere, and is violating fundamental principles enshrined in the Constitution . . .").

16. *See* A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 341 (1985); *see also* RICHARD NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984) (providing a critique of the political doctrine and practice that would exclude religion from the conduct of public business).

gossamer lines of religious expression in the public sphere as we travel between our concentric circles of communities to do our work, teach our children, and live our lives.

The 2006 Fellowship Symposium began with Program on Law and State Government Fellow Chris Campaniolo's remarks addressing states' expression of religion in the modern public sphere.¹⁷ First, Mr. Campaniolo set the stage for the day's symposium by contrasting de Tocqueville's assertion that religion was "indispensable to the maintenance of republican institutions"¹⁸ with Thomas Jefferson's understanding that the Establishment Clause of the First Amendment built "a wall of separation between church and state."¹⁹ Then, drawing upon current events, contemporary scholarship, and state constitutional references to God and religion, Mr. Campaniolo urged us all toward "a more thorough understanding of an area of law that is as complex and nuanced" as the relationship between government and religion itself, and he encouraged "meaningful, respectful, thoughtful discussion" rather than debate.²⁰

Next, Professor Douglas Laycock²¹ shared remarks entitled, *Government Money, Government Speech, and the Establishment Clause in the Supreme Court*.²² He began by pointing out that collectively "we still make forms of the Puritan Mistake."²³ Professor Laycock noted "both sides tend to think that all of the close questions should be resolved in their favor and all of the risk of judicial error should be put on the other side."²⁴ After giving a brief history of religious speech issues in America, Professor Laycock observed that two of the major issues in the courts and legislatures today, school funding and prayer in school, grew out of jurisprudence formed during the mid to late nineteenth century of American history.²⁵ Professor Laycock contrasted the "remarkable stability" of

17. Christopher Campaniolo, States' Expressions of Religion in the Modern Public Sphere, Address at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006) [hereinafter Campaniolo Address].

18. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1831).

19. Letter from Thomas Jefferson, to the Danbury Baptist Association (Jan. 1, 1802), available at http://www.stephenjaygould.org/ctrl/jefferson_dba.html.

20. Campaniolo Address, *supra* note 17.

21. Professor Laycock teaches at the University of Michigan School of Law.

22. Douglas Laycock, *Government Money, Government Speech, and the Establishment Clause in the Supreme Court*, Address at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006) [hereinafter Laycock Address].

23. *Id.* Professor Laycock described the Puritan Mistake as the Puritans' belief that, although they came to America in search of religious liberty for themselves, if anyone else wanted religious liberty other than that of the Puritan variety, they had the liberty to live anywhere else in the world other than Massachusetts and that was "plenty liberty enough." *Id.*

24. *Id.*

25. *Id.*

current government sponsored religious speech jurisprudence with the “huge turnaround” in jurisprudence regarding religious funding, noting that the last time the U.S. Supreme Court struck down any sort of government financial aid to religious educational institutions or religious providers of social services was 1985.²⁶

Premising his conclusion with the statement, “The goal of religious liberty is to preserve the liberty of every individual American to the greatest extent possible,” Professor Laycock explored the fundamental differences between the prayer cases and the funding cases.²⁷ After contrasting the funding cases’ individual choice ramifications with the collective choice aspects of the prayer cases, Professor Laycock briefly addressed the litigation before the Seventh Circuit arising from Indiana’s House of Representatives.²⁸ Noting current case law holding that government-sponsored prayer not be too intensely sectarian, Professor Laycock suggested that those in support of Indiana legislative prayer invoking the name of Jesus Christ “have an uphill fight.”²⁹

Recognizing that the “idea of universal, free public education has long been a powerful force in American ideology,”³⁰ Fellow Carrie Lynn presented her scholarship about religious expression in public schools.³¹ Ms. Lynn recognized the “challenges state governments and public school teachers face in determining the appropriate place for religion in the classroom,”³² and surveyed common law decisions addressing the Free Exercise Clause of the First Amendment.³³ She then suggested guidance on how the topic of religion “can effectively be incorporated into a school’s curriculum.”³⁴ Noting the judicial directives to public school teachers that teaching “about religion is acceptable and even encouraged in public schools”³⁵ while “conveying a teacher’s personal religious beliefs to a student would constitute state sponsorship of a particular religious belief system”³⁶ in violation of the Establishment Clause, Ms. Lynn urged the symposium audience to disregard the “stereotype that religion has no place in a

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Peter D. Enrich, *Race and Money, Courts and Schools: Tentative Lessons from Connecticut*, 36 IND. L. REV. 523, 523 (2003).

31. Carrie Lynn, Religious Expression in the Public Schools: An Ever-changing Dynamic, Address at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006) [hereinafter Lynn Address].

32. *Id.*

33. *Id.*

34. *Id.*; see FIRST AMENDMENT CENTER, A TEACHER’S GUIDE TO RELIGION IN PUBLIC SCHOOLS, available at <http://www.firstamendmentcenter.org/PDF/teachersguide.PDF>.

35. Lynn Address, *supra* note 31.

36. *Id.*

public sphere such as a school.”³⁷ She concluded her remarks with a quote from William James: “The process of education, taken in a large way, may be described as nothing but the process of acquiring ideas or conceptions, the best educated mind being the mind which has the largest stock of them, ready to meet the largest possible variety of the emergencies of life.”³⁸

The afternoon panel discussion, entitled *Religion in the Schoolhouse*, featured Professor Luke Meier,³⁹ Kevin McDowell,⁴⁰ and Ken Falk.⁴¹ Moderated by Fellow Carrie Lynn, the panel addressed a variety of legal issues arising from the presence or absence of religion in public schools. Professor Meier started the panel discussion by pointing out that public education’s efforts to inculcate moral values in our nation’s children has, throughout history, depended upon religious teachings and texts. Professor Meier cited the Massachusetts Education Law of 1647, the Northwest Ordinance of 1787, and recent polls as examples demonstrating that a political majority of Americans have always supported religion as a vehicle to teach morality as a part of public education.

Professor Meier noted that the tensions created by the political and legal realities of such an entrenched societal value require creative solutions. He counted voucher programs, after school prayer clubs, and funding of religious resources in public school libraries as essential tools to address the concerns of the political majority, accommodate the voice of the political minority, and continue to strengthen a public school system envisioned by Horace Mann and Daniel Webster. In his article, *Using Agency Law to Determine the Boundaries of Free Speech and the Establishment Clause*,⁴² Professor Meier suggests a framework for courts to assess these and many other creative solutions arising from religious expression in public schools.

Panelists Ken Falk and Kevin McDowell reminded symposium guests that case law has not quelled a variety of citizen concerns and questions about religious expression in public schools. Giving a variety of examples, Mr. Falk noted that school prayer issues, despite settled case law on the topic, remains a big part of his practice. Indiana’s requirement that every public school day begin with a moment of silence, while clearly condoned by courts, continues to raise questions from parents and families subject to this requirement. Other issues faced with regularity include release time programs, treatment of creationism in the classroom, and, “the bane of the existence of any ACLU lawyer,”⁴³ winter

37. *Id.*

38. WILLIAM JAMES, TALKS TO TEACHERS ON PSYCHOLOGY AND TO STUDENTS ON SOME OF LIFE’S IDEALS 145-46 (Dover Pub. 2001) (1899).

39. Professor Meier teaches for the University of Nebraska School of Law.

40. Mr. McDowell is General Counsel for the Indiana Department of Education.

41. Mr. Falk is Legal Director for the American Civil Liberties Union of Indiana.

42. Luke Meier, *Using Agency Law to Determine the Boundaries of the Free Speech and Establishment Clauses*, 40 IND. L. REV. 519 (2007).

43. Ken Falk, *Religion in the Schoolhouse*, panel discussion at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006).

holiday programs. Giving an update of current judicial treatment of issues such as school mascots and the celebration of Halloween, Kevin McDowell underscored the comments of Professor Meier and Ken Falk by stressing that accommodation and sensitivity are the keys to common sense solutions to such difficult issues. In *The Paradox of Inclusion by Exclusion: The Accommodation of Religion in Public Schools*,⁴⁴ Mr. McDowell shares a careful treatment of his insightful remarks with the readers of this volume.

Professor Thomas Berg⁴⁵ delivered the luncheon address, *State Governments and the Political Divisiveness of Religion*.⁴⁶ Professor Berg began his remarks by asking, “What is the proper general principle for interpreting the First Amendment’s religious clauses?”⁴⁷ He noted that over sixty years of jurisprudential development has not yet led to a “consistent, satisfactory answer” to this question.⁴⁸ Professor Berg examined this overall question from what he described as the Breyer-Feldman approach of “minimizing religious division” and the scholarship encouraging governments to “offer greater latitude for religious speech and symbols in public debate, but also impose a stricter ban on state financing of religious institutions and activities.”⁴⁹ Professor Berg then suggested that the avoidance of religious divisiveness should not be the guiding criteria in resolving these issues.⁵⁰

Noting that allowing government funding of religiously integrated educational settings may contribute to a “net reduction in religious political divisiveness,” Professor Berg quoted James Madison and George Washington in concluding that a judicially imposed “cure” or aim of reducing religious divisiveness may be worse than the “disease” of religious divisiveness in the first instance.⁵¹ Rather, Professor Berg urged that the Supreme Court’s current approach of respecting individual religious choice, in the school funding cases for example, serves as a better guiding principle.⁵² Applying this conclusion to the legislative prayer case out of the Indiana House of Representatives,⁵³ Professor Berg suggested that the courts could give voice to the fundamental goal respecting individual religious choice by policing the process by which

44. Kevin C. McDowell, *The Paradox of Inclusion by Exclusion: The Accommodation of Religion in the Public Schools*, 40 IND. L. REV. 499 (2007).

45. Professor Berg teaches for the University of St. Thomas School of Law (Minnesota).

46. Thomas Berg, *State Governments and the “Political Divisiveness” of Religion*, Address at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium: From the State House to the Schoolhouse: Religious Expression in the Public Sphere (Sept. 29, 2006) [hereinafter Berg Address].

47. *Id.*

48. *Id.*

49. *Id.*; see also Noah Feldman, *A Church-State Solution*, N.Y. TIMES MAG., July 3, 2005, at 28.

50. Berg Address, *supra* note 46.

51. *Id.*

52. *Id.*

53. *Hinrichs v. Bosma*, Nos. 05-4604 & 05-4781 (7th Cir. Mar. 1, 2006).

individuals and different faiths are invited to offer legislative prayer rather than policing required non-sectarian language of each legislative prayer.⁵⁴

The 2006 Fellowship Symposium gave participants the luxury of a few hours to ruminate about how the law gives the legal equivalents of both megaphones and duct tape to state governments, state government actors, and public school teachers in their respective roles in our public spheres. The law's efforts to give force and effect to the First Amendment of the U.S. Constitution and the states' efforts to allow meaningful religious expression as they carry out their work present difficult questions and even more difficult answers. To expect anyone, voter or legislator, to sterilize her public voice from her private faith, seems ludicrous to some and necessary to others. Whether it is a Christmas tree in the atrium of a public law school, a state government's recognition of Good Friday as a state holiday, or even the law's recognition of an "Act of God," it is my hope that the articles contained in this issue let us ask, answer, and, as Chris Campaniolo and Carrie Lynn suggested, to discuss with our fellow citizens these questions with empathy and understanding. Doing so is, and will be for the foreseeable future, an integral part of what is it to be an American.

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54. Berg Address, *supra* note 46.