

THE UNITED STATES SUPREME COURT AND THE PRIVATIZATION OF RELIGION

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The case law of the United States Supreme Court has moved beyond a hostility to a public role for religion. Yet, the Court seems also committed to requiring a secular public life—to require the government to act as if there is no God. This article examines in detail how the Court has advanced this secular agenda in two areas of law: adjudication of the Establishment Clause of the First Amendment, and the area of public morality.

In a certain sense, the topic for this article ought to be regarded as a bit surprising. Historically, the United States is associated with religious freedom. For example, Judge Noonan, whose recent book, *The Lustre of Our Country: The American Experience of Religious Freedom*,² goes so far as to describe the free exercise of religion, and here he has in mind the idea of inscribing in fundamental law an ideal of freedom of religion, “as an American invention.”³ Pope John Paul II has described religious tolerance as “one of the cultural cornerstones of American democracy[,...]”⁴ and stated that “The American separation of church and state as institutions was accompanied from the beginning of your republic by the conviction that strong religious faith and the public expression of religiously informed judgments contribute significantly to the moral health of the body politic.”⁵

In the early years of our country, the Framers were not reticent about proclaiming the special value of religion. For example George Washington, in his Farewell Address, stated: “Of all the dispositions and habits, which lead to political prosperity, Religion, and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens...And let us with caution indulge the supposition, that morality can be sustained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”⁶ Thomas Jefferson (who coined the wall of separation metaphor⁷)

asked “And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever.”⁸ The observations of Alexis de Tocqueville from his 1831 trip to America provide an apt summary: “Religion, which never intervenes directly in the government of the American society, should therefore be considered as the first of their political institutions, for although it did not give them the taste for liberty, it singularly facilitates their use thereof. The inhabitants of the United States themselves consider religious beliefs from this angle. I do not know if all Americans have faith in their religion — for who can read the secrets of the human heart? — but I am sure that they think it necessary to the maintenance of republican institutions. This opinion is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks.”⁹

Although the Framers did separate the institutions of church and state at the national level, this was clearly not understood as requiring the exclusion of religion from public life. The idea of a wholly secular government or a wholly secular political life was foreign to Americans at this point in our history. As Professor Smith has commented: “Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. For that reason, Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out.”¹⁰

Much of this has, of course, changed in the last half the 20th century. There have been increasing complaints in America that religion is being marginalized, that it is being privatized, and that much of this marginalization and privatization has been influenced by decisions of the United States Supreme Court.¹¹ In 1993, a liberal Yale law professor published a book whose title captured this sentiment; I am referring to Stephen Carter’s book *“The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion.”*¹² There, Professor Carter writes about how American law treats religion as a hobby—like building model airplanes. In this view, religion is “something quiet, something private, something trivial—and not really a fit activity for intelligent, public-spirited adults.”¹³ Professor Gerry Bradley had earlier noted that “[t]he Court is now clearly committed to articulating and enforcing a normative scheme of ‘private’ religion.”¹⁴

There is much truth to this assessment of what the United States Supreme Court has done in this area of the law. What I hope to do in this paper is to examine in detail the United States Supreme Court’s role in mandating the privatization of religion.¹⁵

There is much bad news here. There are plenty of examples of decisions and opinions of individual Justices that reflect a hostility to a public role for religion. But in recent years, there has been some improvement from the Court. Recent decisions do not reflect the same hostility, although the Court is still a long way from recognizing the distinct value of religion, as the comments from Washington and Jefferson and de Toqueville did. Whether our liberties can be thought secure without this recognition is still an open question.

I thought I'd begin by describing what I mean by the privatization of religion. The idea is that religion is a private affair that should not play a role in public life. I have in mind here a broad understanding of "religion;" I mean religious institutions, religious individuals, and religiously-influenced moral principles. Many of the cases arise under the Establishment Clause (Congress shall make no law respecting an establishment of religion), but it is important not to limit the discussion to religion clause cases. Many of the cases that more clearly reveal the Justices' understanding of the relationship between religion and the legal order arise in the area of public morality (abortion, assisted suicide, etc.), which are decided under different doctrinal labels (substantive due process and equal protection, for example).

In both contexts (cases involving the Establishment Clause and cases involving public morality issues), "religion is typically involved in an explicitly public role. For example, many Establishment Clause issues involve aid to religious institutions. The constitutional debate in these cases often turns on whether it is permissible for the religious institution to play an active role in performing a "public" task, such as education or child care. The privatization thesis requires that institutions retaining their religious character be denied direct government support. [These schools must be tolerated, and I mean toleration in the sense of a grudging concession to a practice of which one disapproves. But these schools cannot be regarded as equal players in the public task of education]...In [cases involving constitutional challenges to laws promoting public morality (laws banning abortion and homosexual conduct, for example), the courts have frequently considered] ...the appropriate role of religiously influenced moral principles in public decision-making.... Here, the privatization thesis works in two ways. First, religiously influenced moral judgments are not taken into account in support of the constitutionality of legislation because such judgments do not constitute 'secular' interests that the government may advance. Second, religiously influenced moral judgments are viewed as dispositive of the case against the constitutionality of legislation because it [supposedly] violates the Establishment Clause for 'religious' views to be embodied in secular legislation."¹⁶

I will largely exclude cases decided under the free exercise clause.¹⁷ This is not because these cases are unimportant; I exclude them here because these

cases typically do not involve religion in a “public role.” Rather, the free exercise claimant is typically seeking an exemption from some expression of “public order.” The *Smith*¹⁸ case, where the Court considered whether the Free Exercise Clause required that the religious use of peyote be exempted from the criminal prohibitions on the use of that drug, is a good example. In recent years, the Court has largely abandoned the idea that religiously motivated individuals may be able to obtain an exemption from laws prohibiting socially harmful conduct. To allow such exemptions would permit a religious individual “to become a law unto himself.”¹⁹ In an important way, free exercise cases seeking exemptions from expressions of public morality are, as Gerry Bradley has stated, “one aspect of the post-World War II takeover of our civil liberties corpus by the political morality of liberal individualism.”²⁰

It should be no surprise, therefore, that the Justices who are the strongest advocates of the privatization thesis (and of extreme notions of individual autonomy) are the strongest advocates of a vigorous free exercise clause. These Justices are quite willing to support religious liberty claims when “religion” is not seeking to undertake a direct public or culture-forming role. The free exercise cases reveal, therefore, that the privatization thesis does not involve deciding whether a Justice or the Court is hostile to religion. The privatization thesis simply rejects a public role for religion. The privatization thesis is not hostile to religion in general; rather, it is hostile to a particular type of religion.

I will begin, then, with a review of the two main areas where the Court had promoted the privatization of religion. As I noted, there has been some change in the Court’s perspective on these questions over the last 30 years.

First, in the Establishment Clause area, the Court was for a time (mainly in the 1970s) quite aggressive in finding Establishment Clause violations when the government provided some form of financial assistance to religious schools. Many of these opinions reflected a hostility to religious institutions playing an active role in performing a “public” task such as education. This was in large part because the opinions reflected a negative assessment of the religious schools, as demonstrated by the opinions’ persistent references to the schools’ purposes of religious indoctrination and inculcation. To the liberal, secular mindset that figured so prominently in these cases, the “authoritarian” character of these schools was hardly attractive. There was some straightforward anti-Catholicism reflected in these cases. Moreover, the Court’s view of the religious schools reflected a more general antipathy to the supposedly “irrational,” freedom-restraining, undemocratic character of traditional religion. The views expressed in one of Justice Brennan’s opinions are illustrative. In *Abington Township v. Schempp*²¹, Justice Brennan noted that “It is implicit in the history and character of American public education that the

public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religion. This is a heritage neither theistic nor atheistic, but simply civic and patriotic....The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own.”²²

These decisions, which turned in part on the characterization of these schools as “pervasively sectarian,” encouraged religious schools to abandon their distinctive, religious identities (in order to preserve their eligibility for public funds). The Court’s willingness to allow aid to religiously affiliated colleges and universities presents an interesting contrast. Because the Court viewed these schools as essentially secular, they did not present the dangers of organized religion, i.e., religious indoctrination.

Another feature of the early school aid cases also reflects the privatization thesis. The Court expressed concern that school aid programs might lead to “political fragmentation and divisiveness on religious lines.”²³ Those who sought state assistance for parochial schools were inappropriately “intruding into the political arena.”²⁴ This involvement in the political process was an example of religion not respecting its proper, private place. In fact, this involvement in the political process was regarded as undemocratic.

The Court’s approach to issues of public funding has changed considerably over the years. Since roughly the mid-1980s, the Court has been far more receptive to aid to religious institutions, including religious schools. The Court no longer views the *Constitution* as requiring that those in religious schools should have to forfeit their access to services that the state makes available to the rest of the population.

I will give a couple of examples. In *Witters v. Washington Department of Services for the Blind*,²⁵ the Court concluded that it did not violate the Establishment Clause for the state of Washington to extend financial aid under a vocational rehabilitation program to a blind man who was studying at a Christian college to prepare himself for a career as a pastor, missionary, or youth director. In *Zobrest v. Catalina Foothills School District*,²⁶ the Court concluded that it did not violate the Establishment Clause for the state to pay for a sign language interpreter for a deaf child, even though the child attended a Catholic high school. In *Agostini v. Felton*,²⁷ the Court held “that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees....”

The most recent example is *Mitchell v. Helms*, which was decided by the US Supreme Court on June 28, 2000.²⁸ *Mitchell* involved the constitutionality

of a federal program that provides library books and instructional equipment (computer software and hardware) to public and non-public schools, and most of the non-public schools are religious. The Court, by a 6-3 vote, concluded that this form of aid did not violate the *Constitution*. The Court relied principally on the principle of neutrality. As it has done in a series of recent cases, the Court upheld government aid because it was offered to a broad range of schools. These cases make it clear that the Court is not troubled when aid is offered on the basis of neutral, secular criteria that neither favor nor disfavor religion and when aid is made available to both religious and secular beneficiaries on a nondiscriminatory basis. In *Mitchell*, as in many recent cases, the Court was not troubled by the religious character of some of the schools that received aid. The Court recognized here, as in other cases, that religious institutions can adequately further the government's secular purpose. In fact, one of the opinions in the *Mitchell* case (the opinion authored by Justice Thomas for 3 other justices, so that it does not constitute a majority view) would have eliminated the "pervasively sectarian factor altogether. As this opinion noted, the concern about funding "sectarian" schools was rooted in anti-Catholic bigotry. Justice Thomas concluded that "this doctrine, born of bigotry, should be buried now."²⁹

The more recent cases reflect the declining influence of the privatization thesis, or at least its more extreme manifestations. The Court is increasingly receptive to aid programs, and no longer displays the same suspicion about the "sectarian" character of the institutions receiving aid. The Court's comment in *Bowen v. Kendrick* that "nothing in our cases prevents Congress from...recognizing the important part that religion or religious organizations may play in resolving certain secular problems..."³⁰ is light years away from the concern about the undemocratic, politically divisive parochial school system.

Moreover, the Court has largely buried the political divisiveness test.³¹ The Court no longer regards the political divisiveness that may be engendered by religious involvement in the political process as a warning signal of Establishment Clause problems. The Court seems to have rejected the view that political division along religious lines is an evil, reasoning that such divisiveness is a normal part of the political process and not a cause for concern. The Court's more recent cases reflect an increasing receptivity to religious activism in politics.

The second area I want to discuss is the issue of public morality, which most often arises under a doctrine called substantive due process. This is another area where the influence of the privatization thesis has waned in recent years. The idea here is fairly simple: certain "coercive restraints on [individual liberty] ...become constitutionally suspect when, in contemporary

circumstances, they can no longer be justified to society in the non-sectarian terms that constitutional principles require.”³² Thus, some argue that laws prohibiting the use of contraceptives, abortion, consensual homosexual acts, and same-sex marriage ought to be held unconstitutional because they cannot be justified in non-sectarian terms. Although this argument has received significant scholarly support and support from certain judges (including some on the United States Supreme Court),³³ a majority of the Supreme Court has rejected the argument.

The clearest judicial example is Justice Stevens’s opinion in *Webster v. Reproductive Health Services*,³⁴ in which he concluded that the preamble to the Missouri abortion statute violated the Establishment Clause.³⁵ The preamble stated that “the life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and well-being.” The preamble required that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the *Constitution* and Supreme Court precedent. According to Justice Stevens, “the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause.”³⁶ That conclusion was based on his conviction “that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose.”³⁷

More recently, a lower court opinion that invalidated a law banning assisted suicide was based in part on the idea that a law prohibiting assisted suicide is an effort to impose religious convictions.³⁸ Justice Stevens’s opinion in *Boy Scouts of America v. Dale*³⁹ is to the same effect. There, in a case involving whether the Boy Scouts could be prevented from not allowing homosexuals to serve as troop leaders, Justice Stevens referred to the Boy Scouts’ views about homosexuality as “atavistic opinions ...[whose] roots have been nourished by sectarian doctrine.”⁴⁰ According to Justice Stevens, it was not appropriate for the Court to permit the Boy Scouts to rely on such “prejudices;” according to Justice Stevens, “the light of reason” required that these prejudices be eradicated.⁴¹

This argument depends on the idea that legislation must be supported by a certain form of secular rationality. Fortunately, a majority of the Supreme Court has rejected this position. “The Court continually reaffirms the idea that a moral position should not be regarded as religious [and therefore illegitimate] simply because it happens to coincide with the tenets of some religious organizations....The Court has consistently refused to restrict the types of moral arguments that are considered a legitimate part of public debate....The Court has not insisted that laws be supported by a certain form of secular

reasoning....The Court has adopted a wide understanding that permits the inclusion of a range of comprehensive moral views, even if some might regard one or more of these comprehensive moral views as religious in some sense.”⁴²

The real divide is whether the *Constitution* requires moral relativism, as some commentators argue.⁴³ The debate on this question is not furthered by labeling one side as “religious.” The “religious” label is usually invoked for the purpose of discounting a view without having to confront it on its merits.⁴⁴ There is some support in Supreme Court opinions for the view that moral relativism is a constitutional command. The principal support for this view is the joint opinion in *Planned Parenthood v. Casey*,⁴⁵ where the joint opinion declared that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁴⁶ Outside the context of abortion, the Court has shown little interest in extending the philosophical liberalism that this statement from *Casey* reflects. The Court’s opinion in *Washington v. Glucksberg*,⁴⁷ in which the Court upheld the constitutionality of laws banning assisted suicide, seems to be a decisive refutation of the broader implications of *Casey*. The Court’s opinion contained a lengthy, quite respectful, review of the long tradition of laws prohibiting assisted suicide, a tradition that had religious antecedents. The Court’s opinion in *Glucksberg* establishes that it is permissible for the state to act on the basis of moral judgments, even though some might regard that moral position as having been religiously influenced in some sense.

Thus, it seems clear that the privatization thesis has been losing influence on the United States Supreme Court. The Court seems far more willing to accept the constitutionality of including religious institutions in publicly funded programs. As noted above, the Court has gotten away from the suspicion with which it used to regard religious schools. Moreover, the Court seems willing to accept the legitimacy of legislation that embodies moral judgments, even if some might regard those moral judgments as having been religiously-influenced in some sense. The more extreme forms of hostility to a public role for religion seem to be a thing of the past, at least at the level of Supreme Court doctrine. (Although there are still obviously cultural pressures moving in that direction.)

This is not to say that there are no weaknesses in how the United States Supreme Court treats religion. And some argue that the Court is still committed to privatizing religion. This view is based on the idea that the Court has committed itself to the idea that government must be absolutely neutral both as between particular religions and as between religion and nonreligion.⁴⁸ The Court seems to believe “that religious liberty is secure only where the government is agnostic about the value of religion.”⁴⁹ The Court does not permit religion to be identified as a uniquely valuable human activity entitled to

uniquely strong constitutional protection.⁵⁰ As a result, “although individuals may choose to be religious in private life, there is no public role for religion beyond the effect of private choice.... [W]hatever religious institutions exist in American society exist as the consequence of the undistorted private choices of religious Americans.”⁵¹

I think some of this analysis overstates the problem. The Court has clearly moved in the right direction over the last 15 years. The Court no longer places religion under special disabilities—which was true under the Court’s cases involving aid to religious institutions. This is not to say that all the defects have been eliminated. But I think it is fair to say that the Court does not express the negative views of religion that characterized the earlier cases. The Court seems willing to give religion an equal role in the political process, and that improvement is worthy of note. We have moved from a hostility towards a public role for religion to neutrality.

The Court does, however, seem unwilling to acknowledge a special role for religion, and in that sense we are far removed from the Framers worldview reflected by the comments of Washington and Jefferson I quoted at the outset. A good illustration of this is the current controversy about the role of religious symbolism in public life. There are so many examples it is hard to select just one.⁵² Perhaps the best example is the current debate about the constitutionality of the national motto (“In God We Trust”) and various state mottoes. Although the Supreme Court has never directly decided that the national motto is constitutional, three federal courts of appeals have so held.⁵³ Yet, a federal court recently held that Ohio’s motto, “With God All Things Are Possible,” was unconstitutional because a majority of the court concluded that the motto constituted an endorsement of Christianity.⁵⁴ This decision is being reheard, but the same reasoning has led a variety of groups to argue that a recent resolution of the state board of education in Colorado encouraging public schools to display the national motto is unconstitutional. The reasoning is that the display of the national motto on coins is permissible because at least in that context the motto has lost any religious significance. To display the motto in schools is different, according to this argument, because it is a governmental effort to promote a religious idea, and is therefore unconstitutional.⁵⁵

The effort in these cases is to assess the religious intensity of these displays, and if the display is regarded as religious it is considered unconstitutional. Even the Pledge of Allegiance, which contains the phrase “one nation under God,” would be considered unconstitutional if it were regarded as a religious statement.⁵⁶

Jefferson had asked: “Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?” The public display of religious

symbols expresses the view that our nation is “under God” and subject to a transcendent order. These displays help to “underscore the idea that the health of a political community depends on its acknowledgement that there are ‘at least a minimum of objectively established rights not granted by way of social conventions, but antecedent to any political system of law.’”⁵⁷ The relentless exclusion of religious symbols from public life may well undermine that conviction. As Cardinal Ratzinger has stated: “The ultimate root of all attacks on human life, is the loss of [a belief in] God [and in a transcendent order]. Where [this belief] disappears, the absolute dignity of human life disappears as well.”⁵⁸ It is no surprise therefore that the Justices who are most receptive to the privatization thesis are the ones most receptive to the American regime of abortion on demand.

The case law of the United States Supreme Court has moved beyond a hostility to a public role for religion. Yet, the Court seems also committed to requiring a secular public life—to require the government to act as if there is no God.⁵⁹ Whether this is a secure foundation for human rights remains to be seen.

In *Evangelium Vitae*, Pope John Paul II described the risks inherent in the exclusion of God from the cultural life of a nation: “When the sense of God is lost, there is also a tendency to lose the sense of man, of his dignity and his life; in turn, the systematic violation of the moral law, especially in the serious matter of respect for human life and its dignity, produces a kind of progressive darkening of the capacity to discern God’s living and saving presence....The eclipse of the sense of God and of man inevitably leads to a practical materialism, which breeds individualism, utilitarianism and hedonism....[This loss of a sense of God and of man has the effect of promoting the toleration and fostering of behavior contrary to life, and] encourag[ing] the ‘culture of death,’ creating and consolidating actual ‘structures of sin’ which go against life.”⁶⁰

This certainly describes our situation in the United States, as the recent decisions concerning partial birth abortion make clear.⁶¹ The United States Supreme Court bears some responsibility for this state of affairs. I think, though, that we must acknowledge the improvements in the Court’s decisions over the last 15 years. This experience offers some hope that the Court might move towards acknowledging the special value of religion. My reservations about whether this is likely to happen stem from a realization that the Court’s direction usually reflects the direction of the culture, particularly the culture of the intellectual elite. And that culture has moved in the direction of privatized religion.

In the long run, the battle is largely cultural. The battle will be won or lost as part of our ongoing cultural war between the culture of death and the culture of life and truth and love. As the Pope stated in *Evangelium Vitae*, it is

necessary for all of us “to offer this world of ours new signs of hope and work to ensure that justice and solidarity will increase and that a new culture of human life will be affirmed for the building of an authentic civilization of truth and love.”⁶²

Notes

1. Professor of Law, Ave Maria School of Law. An earlier version of this paper was delivered on September 7, 2000 at a Congress in Rome, Italy on The Rights of Individuals and Groups in the New Millennium.
2. John T. Noonan Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (1998).
3. *Id.* At 2.
4. Pope John Paul II, Homily at Camden Yards, reprinted in 25 *Origins* 312 (October 19, 1995).
5. Pope John Paul II, “The Great Moral Challenge of the New Millennium: Message to U. S. National Prayer Breakfast,” (February 3, 2000), reprinted in 29 *Origins* 574, 575 (February 17, 2000).
6. George Washington’s Farewell Address, September 17, 1796 (cited at Noonan, *supra* note 2, at 378).
7. For a discussion of the wall of separation metaphor, see Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson’s “Wall of Separation” Metaphor*, 16 *Const. Comment.* 627 (1999).
8. David Lowenthal, *No Liberty for License* 190 (1997)(quoting Thomas Jefferson in his Notes on Virginia).
9. Alexis de Tocqueville, *Democracy in America* 292-293 (J.P.Mayer ed., George Lawrence trans., Anchor Books ed. 1969 (13th ed. 1850)).
10. Steven D. Smith, *Separation and the “Secular”: Reconstructing the Disestablishment Decision*, 67 *Tex. L. Rev.* 955, 966 (1989).
11. For a general survey as of 1991, see Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 *Cath. U. L. Rev.* 19 (1991).
12. Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993).
13. *Id.* At 22. For Carter’s latest reflections on these themes, see Stephen L. Carter, *God’s Name in Vain: The Wrongs and Rights of Religion in Politics* (2000).
14. Gerard V. Bradley, *Dogmatomachy—A “Privatization” Theory of the Religion Clause Cases*, 30 *St. Louis U. L. J.* 275, 276-77 (1986).
15. In some ways, this paper updates the analysis in my earlier article, *supra* note 11. Much of the discussion here draws from that article. To avoid multiplying the footnotes in this paper, I will not provide a direct citation in every instance

when I draw from that article.

16. Myers, *supra* note 11, at 22-23.

17. The First Amendment provides in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” U.S. Const. Amend. I.

18. *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

19. *Smith*, 494 U.S. at 885 (citing *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

20. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 248 (1991).

21. 374 U. S. 203 (1963).

22. *Id.* At 241-42 (Brennan, J., concurring).

23. *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971).

24. *Id.*

25. 474 U.S. 481 (1986).

26. 509 U.S. 1 (1993).

27. 521 U.S. 203 (1997).

28. 120 S. Ct. 2530 (2000).

29. 120 S. Ct. at 2552

30. 487 U. S. 589, 607 (1988).

31. Justice Thomas’s opinion in *Mitchell* commented that “[t]he dissent resurrects the concern for political divisiveness that once occupied the Court but that post-*Aguilar* cases have rightly disregarded.” 120 S. Ct. at 2550. The Court’s opinion in *Santa Fe Independent School District v. Doe*, which was decided just nine days earlier, does however note a concern about divisiveness along religious lines. 120 S. Ct. 2266, 2283 (2000).

32. Myers, *supra* note 11, at 61.

33. See generally Richard S. Myers, *Same-Sex “Marriage” and the Public Policy Doctrine*, 32 Creighton L. Rev. 45, 61 (1998).

34. 492 U. S. 490 (1989).

35. There are many other examples. For a discussion and citations to more extensive treatments of the topic, see Myers, *supra* note 33, at 59-65.

36. 492 U. S. at 566 (Stevens, J., concurring in part and dissenting in part).

37. *Id.* At 566-67 (footnote omitted).

38. For a discussion of this example, see Myers, *supra* note 33, at 62 & n.67.

39. 120 S. Ct. 2446 (2000).

40. 120 S. Ct. at 2477 (Stevens, J., dissenting).

41. *Id.* At 2478 (Stevens, J., dissenting).

42. Myers, *supra* note 33, at 63-64.

43. See Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70

Ind. L. J. (1995).

44. See Myers, *supra* note 33, at 64. See also Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 Utah L. Rev. 639, 656-57 (“One false view of separation is the view that religious ideas must not serve as rationales for public policy. This view, called the ‘principle of secular rationale,’ is put forward as a means of protecting the public sphere from divisive, absolutist, intolerant impulses and from arguments that cannot be supported on the basis of accessible public reasons. But in fact, it rests on inaccurate stereotypes and questionable epistemological premises, and it would disenfranchise religious persons as full participating members of the political community. The United States has never adhered to the principle of secular rationale. Indeed, our political history is rife with religious political activists and religious political arguments. As Professor Walzer concludes, there is no good democratic argument for excluding them. But more than this: to exclude them would be inconsistent with the very ideals of democratic equality that the principle of secular rationale ostensibly seeks to protect. It is time to stop challenging our fellow citizen’s right to be part of democratic dialogue, and time to engage their arguments on the merits.”).

45. 505 U. S. 833 (1992).

46. *Id.* At 851.

47. 117 S. Ct. 2258 (1997).

48. See generally Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 Seton Hall L. Rev. 1233 (1997). See also Gerard V. Bradley, *Dignitatis Humanae and American Constitutional Law*, Catholic Dossier, March-April 2000, at 49-53.

49. Bradley, *supra* note 48, at 50.

50. Gedicks, *supra* note 48, at 1258.

51. *Id.* At 1244.

52. For discussion of Nativity scene cases, see Richard S. Myers, *A Comment on the Death of Lemon*, 43 Case W. Res. L. Rev. 903, 908-10 (1993).

53. *Gaylor v. United States*, 74 F. 3d 214 (10th Cir.), cert. denied, 517 U. S. 1211 (1996); *O’Hair v. Murray*, 588 F. 2d 1144 (5th Cir.), cert. denied, 442 U. S. 930 (1979); *Aronow v. United States*, 432 F. 2d 242 (9th Cir. 1970).

54. *American Civil Liberties Union v. Capitol Square*, 210 F. 3d 703 (6th Cir.), vacated and rehearing en banc granted, 222 F. 3d 268 (6th Cir. 2000).

55. See Michael Janofsky, *Colorado Asks: Is ‘In God We Trust’ a Religious Statement?*, N. Y. Times, July 3, 2000, at A9.

56. See Richard S. Myers, *supra* note 11.

57. Myers, *supra* note 52, at 909 (quoting Cardinal Joseph Ratzinger, *Doctrinal Document on Threats to Life Proposed*, 20 *Origins* 755, 757 (1991)).

58. Id. At 758.

59. Bradley, *supra* note 48, at 49.

60. Pope John Paul II, *Evangelium Vitae* (1995), reprinted in 24 *Origins* 689, 697-98 (Apr. 6, 1995).

61. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

62. *Evangelium Vitae*, *supra* note 60, at 692.