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THE FUTURE OF THE ESTABLISHMENT CLAUSE IN CONTEXT: NEUTRALITY, RELIGION, OR AVOIDANCE?

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Section I: Neutrality

Some form of government neutrality toward religion, in contrast to a more pro-religion stance or a turn toward nonjusticiability, is the only interpretation of the Establishment Clause that can potentially lead to a national consensus concerning the proper role of religion in American public life. But to achieve that goal, neutrality theory must acknowledge and engage the need for the expressions of deep meaning on public occasions and in the public square generally. Current neutrality doctrine promotes a silent and empty public square. This article proposes an interpretation of neutrality that would allow a symbol-rich, meaning-full public square without violating the Establishment Clause. While such morally substantive symbolic government speech is more easily justified as neutral when religious imagery is avoided, even the utilization by government of traditional religious language and symbols may be understood as neutral toward religion as long as the overall content of the public square is not religious. This more vibrant form of government neutrality invites more, rather than less, expression into public life. The article utilizes the context of legislative and high school graduation prayer to illustrate the difference between current neutrality doctrine and meaning-full neutrality.

Section II: Religion

As a number of commentators have observed, the Supreme Court's record in adjudicating the free exercise claims of religious minorities—in particular, unfamiliar and unpopular religious minorities—is vulnerable to the critique that the Court's rhetoric and, at times, the Court's holdings demonstrate an inability or unwillingness to look beyond majoritarian religious perspectives. Building on this scholarship, this article analyzes the Court's adjudication of Establishment Clause cases in the context of different religious perspectives, including those of religious minorities, religious minorities, and nonbelievers.

In exploring these questions, this article traces the Court's Establishment Clause jurisprudence through several decades, examining a number of landmark cases through the prism of religious minority perspectives. In so doing, the article aims to demonstrate the significance of religious perspectives in the development of both the doctrine and rhetoric of the Establishment Clause. The article then turns to the current state of the Establishment Clause, expanding upon these themes through a close look at the 2004 and 2005 cases *Elk Grove Unified School District v. Newdow, Van Orden v. Perry*, and *McCreary County v. American Civil Liberties Union of Kentucky*. The article concludes that the ongoing debates among Supreme Court Justices over the relevance of religious minority perspectives contribute to more general divisions that continue to characterize the current state of the Court's Establishment Clause jurisprudence.

There are two dominant traditions of understanding the secular, both with long genealogical resonance in western thought: Christian secularity and secularism. The former links the secular to a theological narrative, while the latter defines the secular as standing over and against religion. Constitutional debate has commonly framed the issue of religious symbols as demanding resolution in favor of one of these traditions. Rather than offering a way to overcome the divide and the culture war it generates, the Court's jurisprudence has instead concretized the binary. Only by cultivating a new understanding of the secular in law might there emerge an approach to Establishment Clause jurisprudence that overcomes the regnant binary. This article offers the idea of higher law secularism as way of reconceptualizing the secular that opens the Establishment Clause to such alternative forms of meaning.

Section III: Avoidance

Flast v. Cohen held that federal taxpayers have standing to challenge government spending for religion. While *Frothingham v. Mellon* generally prohibits taxpayer standing in federal courts, the Court reasoned that the Establishment Clause specifically prohibits taxation in any amount to fund unconstitutional religious spending. For several decades *Flast* has been settled law that supplied jurisdiction in many leading establishment cases. But *Hein v. Freedom from Religion*

Foundation, Inc. and *Arizona Christian School Tuition Organization v. Winn* signal that *Flast* may soon be overruled. This jurisdictional ferment raises two questions: Why this sudden shift? And what does it signify for the Establishment Clause?

This article develops two themes. The first is that the Court wants to cut down on the amount of Establishment Clause litigation, in an asymmetrical fashion that increases the prospect of government aid for religion. This "court reform" explanation denies the relevance of individual psychic harm from and suggests that the Clause has little to do with governmental religious spending. The second theme is that the Justices are preparing a major substantive departure from existing doctrine, but have not yet worked out its contours. Rather than clouding doctrine with messy transitional rulings, they seek "breathing space" until the best opportunity arises for a bold transformative departure. A cutoff of taxpayer standing, by reducing the frequency of Establishment Clause litigation, may afford the time and circumstances needed to fashion a new direction.

The retreat from *Flast* has important ramifications. By removing an entire class of cases, it surrenders control over those issues to the government's political branches, giving them largely unreviewable discretion about whether and how to treat religion in taxing and spending. This converts financial arrangements between church and state from a constitutional to a political issue. It also renders the commands of the Establishment Clause regarding spending on religion largely precatory.

In these reflections presented at a Symposium hosted by Duquesne University School of Law on "The Future of the Establishment Clause in Context: Neutrality, Religion, or Avoidance?" I examine the constitutional politics driving the interpretation of the Establishment Clause. I suggest that the Supreme Court's recent case law on taxpayer standing may signal a return to the founding design of the Establishment Clause. At the founding, the Establishment Clause constrained the actions of only the national government, disabled only Congress from establishing a religion, and vigorously protected the sovereignty of states. Each of these three signposts—national interdiction, congressional disability, and state sovereignty—may yet again soon hold true if the Supreme Court continues on what appears to be its current path toward de-incorporating the Establishment Clause.

THE PIPER LECTURE

The boundary between work and private life is blurring as a result of changes in the organization of work and advances in technology. Current privacy law is ill-equipped to address these changes and as a result, employees' privacy in their electronic communications is only weakly protected from employer scrutiny. At the same time, the law increasingly protects certain socially valued forms of employee speech. In particular, collective speech, speech that enforces workplace regulations and speech that deters or reports employer wrong-doing are explicitly protected by law from employer reprisals. These two developments—weak protection of employee privacy and increased protection for some socially valued forms of employee speech—are at odds because privacy and speech are closely connected. As privacy scholars have emphasized, protecting privacy promotes speech values by granting individuals space to explore and test new ideas, and to associate with like-minded others—activities that are often important precursors to public speech. Similarly, in the workplace context, some measure of privacy to explore ideas and communicate with others may be necessary to ensure that employees actually speak out in socially valued ways. Ironically, then, the law is simultaneously expecting more from employee speech and protecting employee privacy less, even though the latter may be necessary to produce the former.

STUDENT NOTES

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Section I: Neutrality