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# The Future of the Establishment Clause in Context: Neutrality, Religion, or Avoidance?

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

## INTRODUCTION

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Religion is not going to disappear from public life in the United States any time soon. As William O. Douglas said six decades ago in *Zorach v. Clauson*: "We are a religious people whose institutions presuppose a Supreme Being."[1] According to the Pew Foundation, 86 percent of Americans are affiliated with one religious faith or another. On any given Sunday, Saturday, or Friday (depending on your faith) 41 percent of all Americans are in a church, a synagogue, a mosque, or a temple, according to the Gallup Poll. We place "In God We Trust" on our money. We salute the Stars and Stripes with the words "one nation under God." We have national Christmas Trees and national days of prayer and thanksgiving declared by our national government. Our Congress uses chaplains to open sessions of both the House and the Senate. Each branch of our national armed services employs a chaplain corps.

At the same time, the First Amendment to our Constitution prohibits Congress from making any law respecting an establishment of religion. Our founding document appears to say that there can be no official, national recognition of religion and yet such recognition appears to abound, supported by a self-declared religious populace who, when polled, say that they want it to abound, especially the assertive religious Christian right that has become so highly visible in recent years. It must be noted, though, that in recent years, there has been an astounding growth in secularism and religious non-affiliation among the American people. While the 86 percent believers figure cited above seems impressive, that number is actually lower than it has been in years, witnessing a downward trend in religious affiliation among the

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1. 343 U.S. 306, 313 (1952). Neither this, nor any of the case citations that follow are my original research. They are based on the work of the authors being cited, but are placed here for the reader's convenience.

American populace. This divide provides the context for our symposium on the future of the Establishment Clause.

There is obviously a thorny question here: in this context, what should be the response of government to questions of religious recognition? Not just the national government, but state and local government as well, ever since *Everson v. Board of Education* decided that the First Amendment, via the Fourteenth Amendment, was applicable to the states.[2] Most importantly, what does our Supreme Court, entrusted with the interpretation of our Constitution, say is the proper meaning of the Establishment Clause: what does it allow the government to do in regard to recognizing religious rights; what does it not allow the government to do? What direction have our Supreme Court Justices given to the nation, to the lower courts on this matter?

Confronting this issue of the ongoing meaning of the Establishment Clause, six highly accomplished and talented professors of law met at Duquesne University School of Law last November 3, 2011 in a symposium entitled *The Future of the Establishment Clause in Context: Neutrality, Religion, or Avoidance?.* The symposium was sponsored by *The Chicago-Kent Law Review.* The speakers were the organizer and guiding light of the event, Professor Bruce Ledewitz from Duquesne Law School, Professor Christopher C. Lund from Wayne State University Law School, Professor Samuel J. Levine from Touro Law Center, Professor Zachary R. Calo from Valparaiso University School of Law, Professor Mark C. Rahdert from Temple University School of Law, and Professor Richard Albert from Boston College Law School. Ledewitz and Lund spoke on government neutrality towards religion; Calo and Levine spoke on government recognition of religion; and the final two speakers, Albert and Rahdert, spoke on the justiciability of Establishment Clause issues.

Ledewitz's analysis of what the government can do and still remain neutral to a religious establishment is highly nuanced. Basically, Ledewitz believes that the government can constitutionally use imagery that is considered traditionally religious when those images are used to endorse secular values. Ledewitz says that the American people as a people want to be able to express confidence in the future, want to encourage what is worthy of respect in society, want to meet national challenges. These are all clearly secular goals expressing ob-

2. 330 U.S. 1 (1947).

jective values. None of these expressions violate government neutrality towards religion mandated by the Establishment Clause.

Ledewitz then asks if these objective, neutral, secular value expressions can be expressed by the government, or with the endorsement of the government, in religious imagery. Ledewitz believes that they can be, primarily because this kind of religious imagery is not exclusively religious in its meaning. The "God" mentioned in the Pledge of Allegiance and the "God" mentioned on our dollars and cents can mean the Lord, Creator of the Universe, to some; but to others, it may simply mean an ideal value or the ground of being. When religious terms are used in this way, Ledewitz says, violence is done neither to the beliefs of believers nor to the neutrality of the government.

The same analysis applies to prayer at public school graduations, at the opening of legislative sessions and other government ceremonies. While for some, such appeals to the divine being do have a religious meaning, that is not their only meaning. They are just as capable of being seen as stressing the seriousness of the occasion, the commitment of those gathered to a common, unitive purpose.[3]

Ledewitz's view is a very irenic one. Rather than drive traditional religious expression from the public square, he would like to see more expressions of value in our public discourse. He would let ministers and rabbis and imams speak at civil ceremonies, but also poets and scientists, too. In that way, religious speech is seen for what it is: one of many possible and permissible expressions of value and meaning by the representatives of a secular society in a secular society.

Christopher Lund has difficulty, not with the sincerity or the internal logic of Ledewitz's position on the ways that government may remain neutral to religion without eschewing the use of religious terms, but with the hidden premise or the "lie" that he thinks is behind it.[4] The "lie" is that courts label governmental expressions that are known to have religious meaning as being truly or primarily secular in order to uphold the Establishment Clause's requirement of government neutrality towards religion.

3. This, as Ledewitz recognizes, requires the overturning of Lee v. Weisman, 505 U.S.577 (1982) which prohibited prayers at public school graduations. Marsh v. Chambers, 463 U.S. 783 (1983), permitting prayers to open legislative sessions, of course, would stand, although not for the same reasons.

4. This is not Lund's characterization. It comes from Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 225 (2004), whom Lund credits.

For this proposal, he cites the recent Kentucky case, *Office of Homeland Security v. Chisterson*.[5] There the Kentucky Court of Appeals examined the constitutionality of a state statute creating a state department of homeland security in which the Kentucky legislature said in its legislative findings justifying the act that "[t]he safety and security of the Commonwealth cannot be achieved apart from reliance upon Almighty God... For as was written long ago 'Except the Lord keep the city, the watchman waketh but in vain."[6] Despite amicus briefs from the legislators who wrote these words, insisting that they intended a religious meaning, the Kentucky Court of Appeals found the statute mostly secular, and therefore constitutional.

Lund also has trouble with the workability of Ledewitz's idea of government neutrality. Atheists, Lund says, are unlikely to accept the word "God" as a stand-in for an expression of their deepest values. Their deepest values are that there is no God. On the other hand, if Ledewitz is right, and atheists do accept such a meaning of "God" in governmental expressions, those who truly think that this "God" is the divine being who created them and the universe they live in, and who seek the government's endorsement of this meaning of the concept of "God," will begin to seek clearer government endorsements of their views, leading to more civil and judicial strife.

There is also the matter of the indefiniteness of Ledewitz's approach. Lund is not sure how Ledewitz gets nonreligious meaning out of religious symbols and words. He also does not see the conflict between believers and non-believers seeking government endorsement going away, and rather than deny that conflict, he believes that the best way to handle it is for the government to stay out of it completely, in other words, complete neutrality. While giving full credit to Ledewitz's desire to maintain a rich public discourse by not enforcing a strict governmental neutrality towards religious expression, Lund believes that a public moral discourse on the important topics of right and wrong,

5. 2011 WL 5105253 (Ky. Ct. App. Oct. 28, 2011), as cited by Lund.

6. KY. REV. STAT. ANN. § 39A.285(3) (West 2002) (quoting *Psalms* 127:1), as cited by Lund. This is the Protestant King James Version, and by choosing that translation, as opposed to one like the New Standard Revised Version that both Catholics and Protestants could accept, the Legislature was making another religious statement. The King James Version is also probably a slight mistranslation. The Catholic Douay-Rheims Version says, "Unless the Lord keep the city, he watcheth in vain that keepeth it." The New Revised Standard Version says, "Unless the LORD guards the city, the guard keeps watch in vain." The Latin vulgate says, "nisi Dominus custodierit civitatem frustra vigilat qui custodit eam." Vigilare can mean to be awake, to watch, to be vigilant, or to keep vigil. The Septuagint says, " ⍰⍰ν μ⍰ Κυριος φυλαξ⍰ πολιν, ε⍰ς ματην ⍰γρυπνησεν ⍰ φυλασσων."

human dignity, and human equality is entirely possible without the government taking a religious position, which is the only thing that he says the Establishment Clause bars. (In fairness, he would also probably admit that, under Ledewitz's reading, the government's use of religious terms and symbols that are also capable of a non-religious meaning is not the government taking a religious position; he just does not find emptying such words of their religious meaning credible or possible.)

Finally, Lund fears what he calls "cherrypicking," i.e., the government eventually choosing images, symbols, words that are more indicative of one religious faith than another, once it is agreed that the use of such words and symbols does not violate the Establishment Clause. At this point, Lund says, the fight will be over my symbols and words, not yours, and the fight will be without any clear guidelines minus the neutrality that he understands the Establishment Clause to require.

Speaking on the current status of Establishment Clause jurisprudence and what ways the government can and cannot recognize religion, Samuel J. Levine finds the Supreme Court's views on the Establishment Clause splintered at best. He cites recent U.S. Supreme Court Free Exercise cases to support his claim that when it comes to protecting the religious rights of minorities, under either clause, the Court uses a majoritarian approach that is unsympathetic to non-mainstream religions. Given the wide diversity in American religions, and the arrival on the scene of secularists and non-believers in greater numbers than before, this makes Establishment Clause analysis even more complex.

Levine starts with a history of pre-*Lemon v. Kurtzman*[7] cases dealing with religious diversity: Douglas's sympathetic dissent in favor of minority religious rights in *McGowan v. Maryland*,[8] a case upholding Sunday blue laws; *Torcaso v. Watkins*,[9] decided just weeks after *McGowan*, striking down of a state law that required a declaration of belief in God as a pre-requisite for public office; *Engel v. Vitale*,[10] decided just a year later, striking down required prayers in public schools in New York; *Abington School District v. Schempp*,[11] decided another year later, striking down a Pennsylvania law that mandated Bible readings

7. 403 U.S. 602 (1971).
8. 366 U.S. 420 (1961).
9. 367 U.S. 488 (1961).
10. 370 U.S. 421 (1962).
11. 374 U.S. 203 (1962).

at the start each public school day. These cases, Levine says, demonstrate a Supreme Court that was sympathetic to minority religious viewpoints, which led to *Lemon* itself, eight years after *Abington School District.* Lemon struck down Pennsylvania and Rhode Island laws that provided some financial support to religious schools, and gave us the famous three part *Lemon* test. To pass Establishment Clause muster, a law must: (1) have a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster an excessive government entanglement with religion.[12]

Levine explains that, in the years following, disagreements among the Justices about how to apply what appears to be a clear test prevented *Lemon* from being the clear standard that it appeared to be in Establishment Clause jurisprudence. One of the factors leading to this dysfunction, Levine holds, is an ongoing dispute on the Court about how to value the viewpoints of religious minorities and nonbelievers. *March v. Chambers,*[13] decided in 1983, upheld the constitutionality of the Nebraska legislature's practice of starting each daily legislative session with a prayer by a state salaried chaplain. In his majority opinion, Chief Justice Burger said that legislative prayer acknowledged "beliefs that are *widely* held among the *people* of this country."[14] Levine points out that the flip-side of Burger's statement is that the government is free to ignore those who do not share those widely-held beliefs. In his dissent, Levine states, Brennan opined that a group of law students being asked to apply the rule in *Lemon* to the "hypothetical" facts of this case would have found Nebraska's practice unconstitutional. A year after *March,* the Supreme Court in *Lynch v. Donnelly*[15] allowed as constitutional a Nativity scene that was included in a much larger, but publicly funded, city Christmas display. Again ignoring *Lemon* in his opinion for the court, Burger simply said that it would be ironic for the Court to find unconstitutional the inclusion of "a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries."[16] The plastic reindeers on display pulling Santa in his sleigh were evidently sufficient in number to water down the religiosity of the "single symbol" of the Bethlehem scene. In dissent, it again fell to Brennan to point out

12. *Lemon,* 403 U.S. at 612–613.
13. 463 U.S. 783 (1983).
14. *Id.* at 792, cited by Levine (his emphasis).
15. 465 U.S. 668 (1984).
16. *Id.* at 686, cited by Levine.

the contrariness of holding a crèche scene not to be a religious symbol with clear religious meaning, with its consequent deleterious effect on non-Christian citizens.

In four cases that followed in the next ten years, from 1985–1995: *Wallace v. Jaffre*,[17] striking down Alabama's moment of silence for prayer or meditation at the start of the public school day; *County of Allegheny v. ACLU*,[18] outlawing a crèche scene on the county courthouse steps, but permitting display of a menorah and a Christmas tree on public property; *Lee v. Weisman*,[19] declaring nonsectarian prayers by clergy at public high school graduations constitutionally impermissible; and *Capitol Square Review and Advisory Board v. Pinette*,[20] allowing the display of a cross on state capitol grounds, Levine writes that the Court in decisions, which often split three different ways, failed to create any unified Establishment jurisprudence.

In the 2004 case of *Elk Grove Unified School District v. Newdow*,[21] the Court failed to decided the constitutional issues involved in the "under God" part of the Pledge of Allegiance on standing grounds, but did provide three concurring opinions from Rehquist, O'Connor, and Thomas addressing the constitutional issues, but without any precedential value. But then, the following year, in the cases of *Van Orden v. Perry*[22] and *McCreary County v. ACLU of Kentucky*,[23] Levine thinks that a roadmap begins to emerge for future Establishment Clause cases. These were both five to four decisions, and both involved public displays of the Ten Commandments. The majority in *Van Orden* found the display constitutional. Writing for a four justice plurality (himself, Scalia, Kennedy, and Thomas), Chief Justice Rehnquist eschewed the *Lemon* test as being unhelpful in dealing with passive monument cases, but instead turned to history, as the Court had done in *Lynch*, to hold that the Ten Commandments had an important value in legal history apart from any religious meaning. The monument also was one of many on state capitol grounds, emphasizing various aspects of Texas history. Justice Breyer provided the fifth vote, saying that, in context, the long-

17. 472 U.S. 38 (1985).
18. 492 U.S. 572 (1989).
19. 505 U.S. 577 (1992).
20. 515 U.S. 753 (1995).
21. 542 U.S. 1 (2004).
22. 545 U.S. 677 (2005).
23. 545 U.S. 844 (2005).

standing Ten Commandments monument on the Texas state capital grounds had a "mixed, but primarily nonreligious purpose."[24]

In my opinion, that sounds very much like Professor Ledewitz's thesis, that neutral, secular value expressions can be expressed by the government, or with the endorsement of the government, in religious imagery. Perhaps, this is the roadmap that Levine finds in these two disparate cases, because in *McCreary County, Levine points out,* the Court went the other way, this time holding, 5–4, against the constitutionality of a public display of the Ten Commandments in Kentucky courthouses. The displays were initially stand alone, with no historical context. And that appears to have been the difference. It seems to me that the lack of context reduced these courthouse postings of the Ten Commandments to clearly religious speech, while the history and context of the Texas capital monument allowed Breyer's characterization of a "mixed, but primarily nonreligious purpose."

On the other hand, when it comes to the presence of religious symbols on public property, Zachary R. Calo thinks that the entire legal analysis has been confused "by a binary understanding of the idea of the secular." The secular, he says, has been understood according to two dominant traditions in the western world: Christian secularity and secularism. It is either linked to a theological understanding of how religion and law should interrelate that privileges religion, or it is seen as "standing over and against religion in a manner that fails to resonate" with our country's own history and religious beliefs and traditions. In order to solve this problem, Calo writes, it is necessary to reconceptualize what the secular means.

The basic question in this dichotomy, according to Calo, is whether or not secular politics derives its grounding and logic from religious insight. This requires a historical review, in which Calo disputes the oft-heard assertion that the Enlightenment gave rise to the concept of "secularism." In its origins, which Calo roots in early Christianity's relationship with the Roman Empire, first persecutor then ally, the secular was not so much antithetical to religion as it was simply "apart" from it. Note that "apart" does not mean "opposed." The secular was considered to be autonomous from the religious, but still, even the secular derived "its meaning, foundations and logic from a theological account of the world." This version of the secular is "secularity" or Christian secularism.

24. McCreary Co., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005).

The rise of the moderns state, especially after the religious wars that wracked Europe in the sixteenth and seventeenth centuries, gave rise to a different concept of the secular in which there was a true opposition to religion, based understandably on opposition to religiously inspired violence. The Enlightenment expanded on this development in western thought, and from then on, the secular was understood in the sense of opposition to religion, as a means of reducing the influence of religion on government and politics, as a separation of law from religion. In this separation, law is seen to have its own logic, apart from religion, and religion exists only in a private, not a public, sphere. This is secularism.

Secularity "seeks to maintain a link between the secular and religion, particularly Christianity in which the secular maintains an essentially theological foundation." Secularism, on the other hand, "advances a more totalizing rupture between religion and the secular." It is against this dichotomy, Calo writes, that we must see the debate over the public use of religious symbols.

American legal history has worked out its own version of this dichotomy, one in which our founding document, the Constitution, denied to the national government any ability to recognize a religious establishment, while at the same time coupling this religious freedom "to strong public and political religiosity," thus combining, in Calo's view, aspects of both the Enlightenment and Christian secularity. It was a circular logic where "religious freedom was the foundation of a democratic order that made religious freedom possible."

In the years after our founding, Calo believes, a robust Protestantism was a kind of de facto Establishment[25]—a "Christian nationalism in law and culture that undergirded the American tradition." With nineteenth century emigration, this gives way to America as Protestant-Catholic-Jew, the basis of a national religious consensus that held until recent times, but no longer does, due to "the forces of pluralism, secularism, and aggressive forms of resurgent religion." This breakdown has led to the religious culture wars in which we now find ourselves and has "pushed deliberation about the meaning of the secular ever more deeply into the realm of law and politics." The debate about the meaning of the Establishment Clause must be seen in this context. Calo writes that "The constitutionality of religious symbols [has become] a referendum on the virtues of Christian secularity ver-

25. Calo cites MARTIN MARTY, RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA 35-36 (1970) for this phrase.

sus secularism," and that "constitutional debates over the Establishment Clause have become the situs of more elemental political and cultural debates about the character of American public life."

So where does this leave us in the debate about the public use of religious symbols. According to one side, they are "problematic because they violate the normativity of legal secularism and may be allowed only because "their meaning has been denuded of any religious or theological content." On the other side, the public use of religious symbols is "permissible, at least within certain boundaries, on the grounds that the Constitution does not demand secularism or the exclusion of religion from public life." Calo finds that neither side "offers an adequate and sustainable intellectual model by which to entangle the current crisis in Establishment Clause jurisprudence." What is needed, he says is "a way of rethinking the idea and content of secular politics that moves beyond both the anti-religious impulses of secularism and the exclusionary impulses of Christian secularity."

Calo finds this in a "higher law of secularism" This concept "is premised on the idea that the binary currently shaping this jurisprudence rests on a false premise, namely that the Establishment Clause must be interpreted in a manner that either advances the goods of religion or the goods of secularism." Higher secularism privileges neither, but "rather advances a way of seeing religion as contributing to the character of an open and plural society." The secular should not be "framed as standing ineluctably in tension with religion," but rather stands open to dialogue with it. It sees the goods of religion as a source of insight into the secular. Here he agrees with Ledewitz's description of higher law as not being narrowly theological or monotheistic in its meaning. Higher secularism, then, is a "decidedly pragmatic and non-ideological approach to overcoming a problematic cultural divide." It does not attempt to settle this debate, but what it rejects about it is the false dualism that it presents. In this understanding, Establishment Clause jurisprudence becomes a place of "encounter, engagement and contestation for which there need not be a settled univocal source of meaning."

In this view, the Establishment Clause cases involving the public display of religious symbols become questions of not of "the binary between religion and the secular, but rather with the ways in which religion has the capacity to shape the goods of the secular state."

In deciding whether to decide Establishment Clause cases, the U.S. Supreme Court may be deciding more than simple standing or

justiciability according to Mark C. Rahdert. Originally, under *Frothingham v. Mellon*,[26] taxpayers were denied standing to attack federal spending measures in the federal courts. This remained the law from 1923 until 1968 when *Flast v. Cohen*[27] created an exception for taxpayers who wanted to challenge government spending that aided religion. This, writes Rahdert, seemed to be settled law until 2007, when the Court's decision in *Hein v. Freedom from Religion Foundation*[28] without specifically overruling *Flast*, practically eviscerated it, holding that there was no taxpayer standing to challenge President Bush's funding of faith-based initiatives. True, the Court drew a distinction, saying that it was unwilling to extend *Flast* beyond legislative appropriations to executive implementation of a spending program, but Rahdert says that the rationale that the Court gave to deny taxpayer standing in *Hein* would apply equally to the facts of *Flast*.

Rahdert believes that the final nail in *Flast's* coffin arrived last year in the case of *Arizona Christian School Tuition Organization v. Winn*.[29] While *Hein* was a pluraliy opinion, in *Arizona Christian*, a solid majority of the Court concluded that Arizona taxpayers had no standing to challenge a legislative scheme that permitted state tax credits to be given to an organization that funded private, primarily religious schools. Again, lip service was paid to *Flast*, saying it should not be extended from legislative appropriations to tax breaks, but Kennedy's majority opinion clearly expressed the dangers to the Article III limits on the federal courts, noted in *Frothingham*, that allowing taxpayer standing in such cases would create.

Apart from funding cases, Rahdert also notes *Elk Grove Unified School District v. Newdow*,[30] the Pledge of Allegiance case, which the Court ducked on standing grounds (the plaintiff was not the legal custodial parent of the child offended by having to recite "under God" in the pledge), and *Salazar v. Buono*,[31] where the Court was in doubt about the plaintiff's standing once the pubic land where the offending cross was constructed had been transferred to private hands.

Whence this lack of desire by the Court to actually adjudicate important Establishment Clause cases? Rahdert provides two hypotheses. First, he thinks, the Court simply wants to reduce the number of Estab-

26. 262 U.S. 447 (1923).
27. 392 U.S. 83 (1968).
28. 551 U.S. 587 (2007).
29. 131 S. Ct. 1436 (2011).
30. 542 U.S. 1 (2004).
31. 130 S. Ct. 1803 (2010).

lishment cases heard in the federal courts and denial of standing is a way of doing that which will cut back on the number of such challenges and, in the funding cases, allow those funds, absent effective taxpayer challenge, to flow to religious organizations. Second, in an analysis that he admits is much more speculative than the first, Rahdert thinks that the Justices are buying time. They want to turn away from existing Establishment Clause jurisprudence, but they have not yet worked out what the alternative will look like, and denial of standing is, in this way, a time-buyer for them.

To support his first hypothesis, Rahdert recites a brief history of Establishment Clause litigation, explaining that *Flast* truly opened the door to numerous suits in the federal courts challenging government actions and government support in favor of religion. In the decades just after *Flast*, Rahdert believes that the Court took a rather strict approach enforcing government neutrality towards religion. That neutrality, in the last two decades, has given way to a Court granting government more leeway in acknowledgment of and financial support of religion. But these two contrasting trends have evolved a confusing state in Establishment Clause jurisprudence.

Trying to read the judicial tea leaves, with the substantial support of his own impressive scholarship in the field, Rahdert predicts that the standing issue will break out like this: Government actions that involve regulations that "command and control" the populace have the best prospect to create standing in the offended plaintiffs. Government actions that communicate religious messages come next in their ability to create a plaintiff with a genuine injury who could achieve standing. Passive government use of religious terms and symbols come next, with a high likelihood that no standing exists here absent some claim that regular exposure to these symbols sets the plaintiff apart, especially when the exposure is either mandated or unable to be avoided. At the lowest rung lie those cases where there is a financial relationship between government and religion, unless the funded activity is clearly and solely religious. Here, Rahdert thinks that recent Supreme Court cases make the possibility of a plaintiff being able to allege anything beyond a hypothetical injury slim at best. His conclusion is that Court reform in this area is "meant to confine establishment litigation to regulatory, ideological and symbolic measures." This he says will leave next to no judicial oversight over church-state financial transactions. Here, he writes," "the Establishment Clause is about message, not money."

Rahdert's second hypothesis is that the denial of standing is a way of creating some "breathing space" so that the Court can decide where it wants to take its Establishment Clause jurisprudence. He thinks that, starting in the 1980s the Court has been divided not only over the doctrine of non-establishment, but also its application, and certainly the history of Establishment Clause litigation summarized by him and the other authors in this symposium substantiate that.

Rahdert sees some difficulties with this "breathing space" approach, however. First, the rule of four—the four Justices required to grant certiorari—could allow a minority of Justices to place cases on the docket that the majority would rather dodge. Second, denying certiorari does nothing to the law. Lower courts, which do hear cases, will be stuck with the existing state of confusion, conceivably making bad law. Third, it leaves the law unchanged and stagnant, which exacerbates the second difficulty. But "breathing space" is also attractive, Rahdert says, also for three reasons: First, since taxpayer standing is unique to Establishment issues, cutting it off here will not "spillover" into other areas of the law. Second, this standing decision is "categorical," that is, it is status dependent: the denial of taxpayer standing in *Hein* and *Arizona Christian* means that no taxpayer similarly situated has standing. Third, it will have an asymmetrical result, favoring those who support state funding of religiously affiliated organizations, which appears to be the status quo *post Hein* and *Arizona Christian*.

But while this makes one kind of Establishment Clause effectively go away—the funding cases—it still leaves the others, the regulatory, the government use religious speech cases, both explicit and symbolic. This litigation will not disappear, and even the funding cases may simply be driven to state, as opposed to federal, courts. Doctrinally, *Hein* and *Arizona Christian* have equated government religious spending cases with other government spending cases, denying any particular harm because the object is religion. In *Arizona Christian*, Rahdert finds a "positive pregnant" in the Court's position that it is not the role of the courts "to adjudicate cases about religious taxing and spending," which in turn has the effect of increasing executive and legislative authority in such matters, by effectively depriving them of judicial oversight.

This is fine, Rahdert writes, if you think that such financial relations between church and state are permissible; not so if you believe that these kinds of church-state interaction were exactly what the Establishment Clause was meant to prevent.

Richard Albert also addressed the standing issue in the Supreme Court's Establishment Clause jurisprudence. He confronts head on the claim that made by Justice Brennan that Court "slams the door" on plaintiffs whose claims it disfavors. Certainly, in Rahdert's essay, one gets the clear idea that today's Court does disfavor those who would use the federal courts to challenge government funding of religious activities. Can this be the case? Do our Justices slam the courthouse door on plaintiffs who have valid constitutional claims because they in ideological disagreement with the tenor of those claims?

Albert's answer to this question is clear and comprehensive. He begins with an assessment of religion and government at our founding. While there was religious diversity in America of the late eighteenth century, state establishments of religion also abounded. The Constitution and the Bill of Rights, limited as they were to the national government, did not change this much. Certainly the First Amendment did not dis-establish any church. Rather, Albert says, it is better understood as a "federalism-enforcing device," preventing the national legislature from interfering with state legislatures, which had established religions in their own states and even had religious tests for state office. Albert finds these keynotes of "national interdiction, congressional disability and state sovereignty," present at the founding of our nation to be critical to any current understanding of the Establishment Clause.

But as our nation changed from its founding, so did the application of the Establishment Clause. Making the First Amendment applicable to the states, the Court decided in *Cantwell v. Connecticut*[32] that Connecticut could not keep Jehovah's Witnesses from their religious pamphleteering. In *Everson v. Board of Education*,[33] the Court upheld a New Jersey law funding both public and private, religious school transportation. Both cases, Albert thinks, mark a shift in how the Court saw federal rights, from the founding when federalism was "a structural protection for personal rights and a guarantor of *inter*state pluralism, the Court began to see federalism as providing insufficient protection for the nation's budding *intra*state pluralism." The cases that followed, striking down school prayer and Bible reading, Ten Commandment displays in the schools, prohibitions on teaching evolution, subsidies for religious school textbooks and teachers, Christmas crèches on pub-

32. 310 U.S. 296 (1940).
33. 330 U.S. 1 (1947).

lic property,[34] all were done by the Court to protect intrastate religious pluralism.

Rooted deep within these decisions, Albert believes, is the understanding that religion is special, and because it is special, a governmental establishment of religion "is the paradigmatic public right that touches all persons." It was this proposition that led the Court, according to Albert, to create taxpayer standing to challenge government expenditures in favor of religion, which we know happened in *Flast v. Cohen*.[35] In *Flast*, the Court took the Establishment Clause, which had been seen as a wall separating government and religion, and created from it the right of an individual taxpayer not to have his tax dollars fund a religious organization. And Albert ties the root of this transformation, apart from the fact that standing was otherwise hard to achieve in such cases, to his thesis that the Court wished to "constitutionalize the specialness of religion." Giving any taxpayer the right to make establishment claims is, in fact, to say that religion is different, it is special. It sets religious rights apart from other rights under the Constitution.

But despite the fact that *Flast*'s creation of taxpayer standing in establishment cases has not been overruled, many scholars think it is dead. Certainly Rahdert does. Albert describes this decline, citing the cases that we have already seen, especially *Hein* and *Winn*. But this decline suggests that religion is no longer regarded by the Court as special. Albert disputes this. He says that when the Court first created taxpayer standing in Establishment Clause cases, it did so "to grant autonomy to the individual to choose or reject religion," thus indicating the specialness of religion. It placed the locus of religious belief in the individual and not the separate states. Now, with its post-*Flast* jurisprudence, Albert sees the Court, not as diminishing the specialness of religion, but simply moving the locus of its protection to the states.

And this fits in well with his thesis that the three concepts of national interdiction, congressional disability and state sovereignty, present at the design of the Establishment Clause by our founders, remain critical to its present day understanding. In fact, Albert lays the demise of an incorporated Establishment Clause to the re-emergence of these three signposts in the Court's jurisprudence.

34. Citing Engel v. Vitale, 370 U.S. 421 (1962), School District of Abington Township v. Schempp, 374 U.S. 203 (1963), Stone v. Graham, 449 U.S. 39 (1980), Epperson v. Arkansas, 393 U.S. 97 (1968), Lemon v. Kurtzman, 403 U.S. 602 (1971), and Allegheny Cnty. v. Greater Pittsburgh American Civil Liberties Union, 492 U.S. 572 (1989).

35. 392 U.S. 83 (1968).

As to national interdiction, Albert points out that the dissent in *Winn* notes that while "the national government is barred by the Establishment Clause from subsidizing religion and religious institutions through the tax system, no similar constraint applies to state governments. *National interdiction.* He draws from *Hein* the proposition that while Congress may not fund religious activities under the Establishment Clause, it says nothing about the other branches of government, such as Bush's executive branch faith-based program. He also cites *Hein* for the proposition that the current Court has granted taxpayer standing only when it involves a challenge to Congress acting under its taxing and spending powers. *Congressional disability.* Finally, as the Court minimizes taxpayer standing lawsuits, the states will be able to exercise their own proper sovereignty in this area. Albert again quotes the *Winn* dissent, to the effect that the denial of standing "offers a roadmap—more truly, just a one step instruction—to any [state] government that wishes to financing of religious activity from legal challenge."[36] *State sovereignty.*

The end result of this, Albert projects, will be the near-internment of Establishment Clause litigation in the federal courts, since standing will only exist where plaintiffs claim that Congress, under its taxing and spending powers, has acted to aid or prejudice religion. This is not a dead-end, though, because as Albert states, there remain state constitutions with their own establishment prohibitions and state litigation. There also remains the electoral process, where those legislators who vote for or against what a person perceives as his/her religious interests or those elected members of the executive who do the same, may simply be voted out or in on that basis.

November 3, 2011 was a very special day for Duquesne University School of Law The eminent symposium speakers in *The Future of the Establishment Clause in Context: Neutrality, Religion, or Avoidance?,* Professors Ledewitz, Lund, Calo, Levine, Albert, and Rahdert, each as much as the other, invited the audience into a deep, meaningful and respectful dialogue on the future of the Establishment Clause. It is obvious from my brief discourse on their remarks that they are not in agreement, but they are models to follow any future Supreme Court cases on the Establishment Clause. Their analyses were coherent, well-thought out, clear and didactic as any court decision should be. We are in their debt. I thank them, as I also thank *The Chicago-Kent Law Re-*

36. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011).

*view* for making their phenomenal scholarship available to a much larger audience than those of us who were fortunate enough to hear them in person.