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LAW AND CULTURAL CONFLICT

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INTRODUCTION: LAW AND CULTURAL CONFLICT
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LAW AND CULTURAL CONFLICT
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The relationship between law and cultural conflict is a subject that is relevant to numerous contemporary disagreements about the substance of rights. The Article does not attempt to intervene into these disagreements, but instead to construct a common framework of analysis that might facilitate constructive dialogue among those who would otherwise disagree. The framework offers three dimensions in which the relationship of law to cultural conflict might be assessed.

The first dimension concerns the sociological relationship between law and culture. The simplest model of this relationship, which the Article calls the "Devlin model," assumes that law is the expression of a coherent antecedent culture that is the ultimate source of society's identity and authority. This view of law underlies many contemporary formulations of constitutional and common law, as well as various claims to national self-determination and multiculturalism. The Devlin model is radically oversimplified, however, because it undertheorizes both law and culture. It fails to recognize the many ways in which law cannot only enforce an antecedent culture, but also constitute that culture, as well as displace it in the name of instrumental rationality. The Devlin model also fails to recognize that a society's culture is typically neither stable, coherent nor singular. The Article offers a typology of the various relationships that law can assume with cultural contestation and heterogeneity.

The second dimension concerns the form of legal intervention. Different forms of interventions place the law in different relationships with cultural conflict. Legislation differs from adjudication; criminal law differs from administration regulation. The Article uses the case of Romer v. Evans to explore how the fact of cultural conflict can affect the creation of judicially created constitutional rights. The dialectic between cultural conflict and judicially enforced constitutional rights should primarily be understood as a matter addressed by the substantive jurisprudence of constitutional law.

The third dimension concerns the nature of legal rights. Some rights, like those protected by the First Amendment, promote cultural diversity in ways that other rights, like those protected by the Equal Protection Clause do not. The first kind of rights are hospitable to cultural conflict; the second are not. The distinction turns on the difference between rights that understand cultural values as instantiated by particular forms of social relationships, and rights that understand the prevention of state regulation as a necessary but not sufficient condition for the realization of cultural values. The Article parses the various factors that are relevant for determining which kinds of rights the law ought to implement.
SIX OPINIONS BY MR. JUSTICE STEVENS:
A NEW METHODOLOGY FOR
CONSTITUTIONAL CASES?  

This Essay examines six opinions authored by Justice John Paul Stevens for the purpose of assessing whether his iconoclastic methodology might represent an attractive alternative to standard doctrinalism. Each of the opinions involves an effort to reconcile the right "to be left alone" with some other constitutional value. In all but one, conventional formulae are replaced by rather candid interest balancing that draws on nonlegal cultural resources in a relatively transparent way. At its best, this approach allows for realism and a commonsensical accommodation of disparate interests. However, at its worst it leads to opinions that are characterized by a limited and sentimental moral imagination, manipulative argumentation, and harsh intolerance. The hypothesis that emerges from this analysis is that Justice Stevens' methodology, as well as the cultural resources that it draws upon, are adequate, even promising, for validating political compromises on controversial issues but grossly inadequate for explaining why such compromises are unconstitutional.

IDEOLOGICAL CONFLICT AND THE
FIRST AMENDMENT

In the ongoing culture wars, no area is more controversial than freedom of expression. In the midst of this controversy, it is tempting to appeal to an ideal version of the First Amendment that stands above ideological conflict. As this Essay shows, however, the amendment has always been subject to competing interpretations that are rooted in differing political, social, and cultural views. It follows that the meaning of the First Amendment can never be wholly removed from ideological conflict. But such conflict should not be unbounded. Instead, a central task of constitutional jurisprudence is to develop a common language or framework within which to debate controversial issues. This Essay argues that such a framework can be found in a rights-based theory of the First Amendment. The Essay then applies this approach to the classic cultural conflict in this area—the problem of pornography. The Essay concludes that sexually oriented materials generally should receive First Amendment protection, but that such materials may legitimately be regulated to protect the rights of women and the community as a whole. In this way, the Essay seeks to develop some common ground between the liberal, feminist, and conservative positions on pornography.

FREE SPEECH AND CONFLICTS OF RIGHTS:
COMMENTARY ON ROBERT F. NAGEL,
"A NEW METHODOLOGY FOR CONSTITUTIONAL CASES?"
AND STEVEN J. HEYMAN, "IDEOLOGICAL CONFLICT
AND THE FIRST AMENDMENT"

Among the most celebrated statements ever issued in a Supreme Court opinion is Justice Robert Jackson's resounding declaration in West Virginia State Board of Education v. Barnette that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." By using the preposition "or" rather than "and," Jackson asserted two constitutional prohibitions: government may not force citizens to confess an orthodoxy, but government may also not prescribe any orthodoxy. Upon reflection, however, the "no prescription" prohibition is manifestly untenable, and neither justices nor scholars have ever tried to apply it in any consistent way. Nonetheless, this impossible prohibition exerts a powerful and unfortunate rhetorical influence over constitutional discourse: recent examples discussed in the Article include work...
by respected legal scholars including Kent Greenawalt and Michael McConnell and judicial decisions including the recent Newdow decision on the Pledge of Allegiance.

This Article first explains why the “no prescription” prohibition could not possibly be taken at face value. The Article then considers the various ways in which courts and scholars have tried to qualify or reinterpret that prohibition (such as by limiting the prohibition to religion), and it argues that these efforts do not succeed in avoiding the decisive objections to a “no prescribed orthodoxy” principle. Our constitutional discourse would be more honest and cogent, the Article concludes, if Barnette’s “no prescription” principle were excised “root and branch.”

ESTABLISHMENT, EXPRESSIVISM, AND FEDERALISM

Mark D. Rosen 669

The Supreme Court has held that the Fourteenth Amendment makes the Establishment Clause applicable “with full force to the States.” This Essay dubs this a “one-size-fits-all” approach and suggests that it may be desirable in the Establishment Clause context to “size” constitutional limitations to the level of government—federal, state, or local—that is acting. That is to say, it may be the case that states or localities should be permitted to regulate in ways that the federal government cannot, and vice versa. “Sizing” draws on underutilized flexibility that is inherent in our government’s federal structure. The struggle concerning religion and the state that is reflected in Establishment Clause disputes is a profoundly cultural conflict—at stake, in the view of advocates on both sides, is the very character of citizens and of society—and the cultural dimension of this struggle is an integral part of the normative justification for sizing the Establishment Clause.

LIBERALISM AND THE ESTABLISHMENT CLAUSE

Steven H. Shiffrin 717

Every political theory tolerates some things and not others. Every political theory promotes a particular kind of person even if it denies it is doing so. But the best liberalism does not confine itself to promoting a Rawlsian-tolerant citizen. Liberalism, like conservatism, has greater ambitions in the socialization of the young. The best liberalism, a neo-Millian liberalism, promotes a creative, independent, autonomous, engaged citizen and human being who works with others to make for a better society and speaks out against unjust customs, habits, institutions, traditions, hierarchies, and authorities.

Although government may promote a particular conception of the good life, in the overwhelming majority of cases, government does not purport to enter into the question of what God has to say. When government acts, it does so for civic reasons, not because God has something to say about the subject. These actions do not deny the existence of God or that God has something to say about the subjects in question. For many, the Establishment Clause is the price of religious peace. For others, it is necessary to protect religions from demagogic politicians, and for others still it protects religious liberty. These reasons are consistent with religious belief, but they, and other reasons supporting the Establishment Clause, need not be accompanied by religious belief. In the end, however, the Establishment Clause for the most part requires that the question of what God has to say must be bracketed from the governmental agenda.

NO EXPRESSLY RELIGIOUS ORTHODOXY:
A RESPONSE TO STEVEN D. SMITH

Andrew Koppelman 729

Steven Smith is correct: the Barnette principle as Justice Jackson states it is too sweeping to make sense. The principle has not done the mischief Smith attributes to it, however, because it has been subjected to some familiar qualifications that dispel his objections. Jackson's dictum applies only to religion, not to other possible objects of official orthodoxy. Even with respect to religion, it only prohibits action that explicitly endorses a religious view. This rule serves the purposes of the Establishment Clause well. In light of our deep disagreement about religious matters, and the obvi-
ous fact that religion can and does thrive without state support, there is no need for
the state to declare any official religious line, and there is danger in letting it try.

A War of Words: Revelation and
Storytelling in the Campaign
against Mormon Polygamy  Sarah Barringer Gordon 739

In the nineteenth century, the power of religious belief transformed the legal
landscape. This Article details how the Church of Jesus Christ of Latter-day Saints
(commonly called the Mormon Church) instilled a new and very different law of mar-
riage for followers. Plural marriage, or polygamy, was key to Mormons’ revisioning of
traditional Christian faith and practice. Polygamy was also key to a widespread popu-
lar campaign to outlaw the Mormon practice. Novelists drew on widely shared ideas
about the proper relationship of church and state, and also on theories that Christian
monogamy was the basic building block of society. Without separation of church and
state, they argued, polygamy would undermine all of American society. In the search
for a justification of action against polygamy, popular novelists claimed that the Con-
stitution must contain the power to legislate against the Mormons in Utah. This lay
legal culture, and the popularity of the fictional world it created, was effective despite
the fact that it fundamentally mischaracterized Mormon society and belief.

Legal Feeling: The Place of Intimacy
in Interracial Marriage Law  Nancy Bentley 773

A will to stigmatize and prohibit black-white interracial marriage has been a de-
fining national trait of U.S. culture. Although sex between the races was frequently
tolerated, interracial marriage generated enormous opposition, especially after the
Civil War. In order to understand this legal history, it is crucial to recognize the way a
species of intimacy, the desire to marry, has the potential to shape legitimacy—to
ratify or, conversely, to erode the authority of law itself. Jürgen Habermas’s theory of
the importance of the Intimsphäre to the public sphere helps to explain the force of
marital desire in legal history. As Habermas argues, the genre of the novel is instru-
mental in creating the public power of private feeling. A 1901 novel by African-
American author Charles Chesnutt, The Marrow of Tradition, illuminates the ironic
ability of the desire for legal marriage to challenge existing marriage laws.

Law, Culture, and Family:
The Transformative Power of
Culture and the Limits of Law  Nancy E. Dowd 785

Law’s relation to culture is both powerful and subordinate. That complex role is
apparent when the relationship of law and culture is viewed from the perspective of
families. Law supports a defined concept of family, and does so very powerfully. Law
acts as a barrier to other definitions and structures, and fails to recognize and honor
all family relationships. Ultimately, however, the cultural construction of family is so
strong that it can subvert and even change the law. Thus, culture can change law, but
law cannot change culture.

This interaction of law and culture with respect to family is evident in the descrip-
tion and analysis of miscegenation and polygamy of Professors Bentley and Gordon.
A more recent example of the interplay of law, culture and family is the treatment of
families after 9/11. All of these cases reveal both the transformative potential of cul-
ture as well as the silent maintenance of hierarchies that culture continues to embrace.

Afterword: Toward Stable Principles
and Useful Hegemonies  Gregory C. Pingree 807
THE QUALITY OF MERCY IS STRAINED:
HOW THE PROCEDURES OF SEXUAL
HARASSMENT LITIGATION AGAINST
LAW FIRMS FRUSTRATE BOTH THE
SUBSTANTIVE LAW OF TITLE VII
AND THE INTEGRATION OF AN ETHIC OF
CARE INTO THE LEGAL PROFESSION

Jay Marhoefer  817

Despite the Supreme Court’s clarification of substantive sexual harassment law in Faragher and Ellerth, achievement of remedies remains problematic because of the at times labyrinthine procedures of Title VII litigation. This is especially true when sexual harassment occurs in the legal profession because defendant law firms understand how to frustrate substantive outcomes and plaintiffs must look to the same system that engendered the harassment to provide them with remedies. Female plaintiffs that apply a feminist ethic of care to the dispute by seeking an in-house remedy first are likely to be further disadvantaged because of procedural requirements like mandatory waiting periods and statutes of limitations. This Note chronicles the thirteen-year litigation journey of RoxAnne Rochester, a female attorney, from the initial battery she suffered from her firm’s managing partner in 1990 through her current efforts to collect her judgment in bankruptcy court in 2003. Using Rochester as a case study, the Note analyzes the imbalance of power between sexual harassment plaintiffs and defendants at the pre-filing, discovery, trial, and post-trial stages of litigation. The Note concludes by proposing changes, both substantive and educational, to existing procedures that would encourage the equitable resolution of these types of claims before the commencement of litigation.

WHY ILLINOIS SHOULD ABANDON FRYE’S
GENERAL ACCEPTANCE STANDARD FOR THE
ADMISSION OF NOVEL SCIENTIFIC
EVIDENCE

Andrew R. Stolfi  861

This Note examines the standard for the admission of novel scientific evidence at trial in Illinois. After tracing the nationwide emergence, dominance, and current departure from Frye v. United State’s general acceptance standard, the Note focuses on the inherent problems and ambiguities involved in Frye’s application, and the problematic results that arise from using Frye. The future of Frye’s use in Illinois is examined in light of the conflict between Frye and the United States Supreme Court’s decision in Daubert v. Merrell Dow Pharmaceutical, Inc. Stolfi concludes that Frye has outlived its usefulness in our high-speed, technologically advanced nation and that only through adoption of a Federal Rule of Evidence 702 or Daubert-based approach will Illinois ensure that the jury’s fact-finding role is protected.