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1-15-2009

January 15, 2009: The Problem with Today's Church-State Jurisprudence

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Repository Citation

Ledewitz, B. (2009). January 15, 2009: The Problem with Today's Church-State Jurisprudence. Retrieved from <https://dsc.duq.edu/ledewitz-hallowedsecularism/239>

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Title: The Problem with Today's Church-State Jurisprudence

Date: 2009-01-15T16:56:00.002-05:00

1/15/2009—In his book, *Masters of Illusion*, Michigan State Law Professor Frank S. Ravitch points to the need for “pragmatic accommodation” to explain such things as the Supreme Court’s reluctance to remove the words “under God” from the Pledge of Allegiance. He writes, “the whole notion of pragmatic accommodationism is that there are certain areas where the normal doctrines do not apply. This makes a certain amount of sense given the religious nature of much of our populace. After all, to protect religious freedom in the broad range of cases there may be some areas that must be left untouched lest public backlash lead to the destruction of Establishment Clause values through amendment or less direct (and perhaps unconstitutional) means. This reflects the pragmatic notion that it may be unwise to fight a particular battle that may be winnable, but which could weaken broader Establishment Clause concerns, and thus lose the 'war'." This passage is symbolic of the problem with the law of church and state. Essentially, the legal establishment wants a secular public life, but knows that the great unwashed majority is too religious to stand for that. So, law professors and other legal thinkers try to get the courts go as far as they can in that direction without sparking a rebellion (as if a constitutional amendment could be destructive of constitutional values--maybe it would be reflective of proper constitutional values). You should know that you something is wrong when you are pushing a constitutional doctrine that dare not say its own name. The Court’s job is to announce constitutional values clearly and openly. That’s what the Court did when it protected flag burning. Then the people can either accept or reject the Court’s approach. That is the only kind of constitutionalism that is consonant with democracy. It is not clear to me that pragmatic accommodating is what Professor Ravitch himself is doing in his book. It is likely instead that he is just noting what has been happening. His description is accurate. But it is a recipe for public cynicism. Somehow, we need a law of church and state we can actually live with.