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### November 7, 2010: How to Fix the Establishment Clause

Bruce Ledewitz

*Duquesne University*, ledewitz@duq.edu

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Title: How to Fix the Establishment Clause

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11/7/2010—I heard University of San Diego law professor Steven Smith speak at the St. John's Law School Religious Legal Theory Conference on Friday. His topic was how to fix the Establishment Clause.

What is wrong with the Establishment Clause? Simply put, the Supreme Court has promised a secular government while allowing all kinds of government religious expression, such as "In God We Trust" on our money.

Smith's answer is for the Court to walk away from these cases by making it harder for people to sue unless the government coerces people or engages in severe sectarianism (as in "In Christ We Trust"). This would take the cases out of federal court and move them into the political realm, where people could argue their competing constitutional visions. Smith calls this kind of constitutional arguing "soft constitutionalism".

There is a good reason in Smith's view for judicial walking away. The problem with the Establishment Clause cannot actually be fixed. The Supreme Court made a mistake in the school prayer and Bible reading cases by taking one side in an unresolvable fight between the constitutional visions of secularists and providentialists. Unresolvable because both sides have more or less equally good arguments. The Court could have found coercion in the school cases and never have decided between these two positions. By instead choosing the secular side as the proper interpretation of the Establishment Clause, the Court poisoned political debate and helped usher in the winner-take-all tone of the culture wars.

I have a lot of sympathy for Smith's position. But he fails to anticipate the harm that turning politics into fights about God will do. I think the Court's job is to resolve the Establishment Clause crisis in a way that promotes a genuinely shared constitutional vision. Smith thinks this cannot be done. If he is right about that, he is probably also right about standing.

My reason for promoting an inclusive Establishment Clause formulation has nothing much to do with the Establishment Clause per se. The problem with the political secularism position is what it is doing to a growing American secularism. Secularists today are cut off from religious sources of meaning about existence because of a wooden secular interpretation of religious imagery and language. Unless secularists manage to reinterpret the concept of God away from a supernatural being, secularists will be left with relativism, materialism and maybe nihilism as the foundation of reality. Or, to put it another way, if we don't trust in God because there is no God, can we still affirm that we trust?

I believe we secularists can indeed affirm that we trust the universe. That we trust reality. And that is the reason we need to resolve the Establishment Clause crisis in a way that inclusively reinterprets one Nation under God.

As to how to do that, well, buy my book, *Church, State and the Crisis in American Secularism*, when it comes out in May.