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October 22, 2011: Standing on God/Pleading With God

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Title: Standing on God/Pleading With God

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10/22/2011--I am in Chicago at the Loyola Law School Constitutional Law Colloquium. I gave a talk on the relationship between standing and pleading rules in Establishment Clause cases. I criticized the Supreme Court for its increasing refusal to hear Establishment Clause cases on the ground that plaintiffs lack standing. At a certain point, no one will be able to bring Establishment Clause cases, even against the very abuses of government endorsement of religion that inspired the Establishment Clause in the first place. I suggested that this is happening because of the difficulty of actually resolving the dilemma the Court is facing over the meaning of the Establishment Clause. The Court promised government neutrality toward religion and now perhaps wants to change that, but cannot muster a majority for any different approach. I suggested that the answer is first a new understanding of the Establishment Clause that recognized the rich meaning of religious images, including their secular meaning. For readers of this blog, the substantive proposal is familiar from my new book, *Church, State, and the Crisis in American Secularism*, which I got to show around here at the Colloquium. I added a technical twist yesterday, which I must admit will be of interest primarily to lawyers. If the meaning of the Establishment Clause changes, the nature of church/state legal challenges must change as well. Right now, a plaintiff can bring a purely legal challenge every time the government utilizes religious imagery. The ease with which this can be done perhaps explains the turn to standing to dismiss such cases. But if religious images are sometimes permitted, and if the Supreme Court can explain coherently just when that is, the rules of bringing the challenges will change as well. The relevant case here is *Bell Atlantic Corp. v. Twombly*, which is a 2007 antitrust case that required pleading more facts before a claim can be brought. Under my proposal, plaintiffs would have to plead facts to show that a particular use of a religious image is an endorsement of religion and not a nonreligious use. Some of the time that will be possible—as in the prominent and unique Christmas display that was mounted in the Allegheny County courthouse. But usually no such showing will be made because the government claims, plausibly, that the religious image in question is promoting nonreligious as well as religious values and there are no reasons to doubt that. Such cases would then be dismissed.