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October 29, 2011: Why Any Change in the Establishment Clause?

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Title: Why Any Change in the Establishment Clause?

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10/29/2011—On Thursday, November 3, six legal scholars will gather at Duquesne University School of Law to debate the future of the Establishment Clause. Two speakers, Bruce Ledewitz, the author of this blog, and Christopher Lund, Assistant Professor of Law, Wayne State University Law School, will discuss possible futures for government neutrality toward religion. Two speakers, Samuel J. Levine, Professor of Law, and Director of the Jewish Law Institute, Touro College Jacob D. Fuchsberg Law Center and Zachary R. Calo, Associate Professor of Law, Valparaiso University School of Law, will address the future relationship of religion and government. Finally, Mark C. Rahdert, Charles Klein Professor of Law & Government, Temple University Beasley School of Law and Richard Albert, Assistant Professor of Law, Boston College Law School will consider the Supreme Court's latest turn standing law to keep Establishment Clause cases out of court. There is great interest in this event. Duquesne has had to close registration because we were receiving too many reservations for the space. There seems to be a feeling that we are on the verge of a momentous change in the way the courts decide issues of church and state. Although all six scholars share the view, one way or another, that change in Establishment Clause jurisprudence is coming, I have begun to wonder just why I feel that way. Why can't the Supreme Court just keep muddling through, lurching from one decision to the next? Obviously, that could be the case. Nevertheless, there are several reasons to assume that some kind of change is imminent. For one thing, the Court seems to be closely divided between very different views, neither of which has managed to gain a coherent majority. Three Justices—Sotomayor, Kagan, and Ginsburg—seem ready to cut back on government religious expression. Four Justices—Scalia, Thomas, Alito and Chief Justice Roberts—seem ready to allow government to engage in more religious expression. Justices Kennedy and Breyer are harder to identify. If the latter Justices made up their minds, change would happen. Second, the context seems unstable. Religion is politically dominant, but not so culturally. The culture seems increasingly hostile to religion or at least not mindful of it. But this is not so in the political realm. Can that continue to be the case? Finally, there is a feeling among law professors that the only thing keeping the Court from moving is that no new approach seems to work. Therefore, law professors line up with their proposals.