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The Court after Scalia: "An establishment of religion"

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Speculating on the impact that a newly appointed Justice will have on Establishment Clause cases is risky business. Justices must take care to preserve their independence and avoid making statements that might lead to reasonable questions about their impartiality, so asking how the newly appointed 113th Justice of the Supreme Court of the United States would define the phrase "an establishment of religion" is likely to elicit a polite, but firm, statement declining to speculate about the outcome of any hypothetical case that might come before the Court. Nonetheless, it is a question worth asking.

As I will explain below, a Justice – liberal or conservative – who accepts the post-*Everson* definition of the phrase will make no effort to put an end to the wrangling over the symbolic minutiae on which most Establishment Clause cases turn. A substantive response – even if only to concede that such an "academic" question raises serious questions – would be a strong indicator that the new Justice is an independent thinker who is likely to make a significant contribution to a body of law rightly ridiculed as "often puzzling," "nebulous," "Januslike," "'arbitrary,' 'illogical,' and lacking in 'comprehensiveness and rationality.'"

The "working" definition

Since *Everson v. Board of Education*, the Court has viewed "an establishment of religion" as any government policy, statement, or practice that *impermissibly* supports, accommodates, facilitates, or suppresses the expression or exercise of individual, communal or cultural religious commitments, public or private.

Under this definition, the Court's role is that of enlightened regulator and occasional censor. The Establishment Clause gives it the power "genuinely to uncouple government from church," and the Due Process Clause of the Fourteenth Amendment gives it the power to strike "sensible balances" between and among the competing interests of the individuals and factions involved in Establishment Clause cases.

The approach is exquisitely "fact-sensitive." Justices consider not only the "historical facts" developed by the attorneys in the case before them, but also the social context in which the cases arise. "Close" Establishment Clause cases like *Town of Greece v. Galloway* and *Capitol Square Review & Advisory Board v. Pinette* thus turn on all-but-impossible-to-measure factors. In *Galloway*, the constitutionality of the prayers before town meetings turned on whether town officials had *sufficiently* demonstrated their commitment to religious diversity in their selection process. In *Pinette*, it was whether the government disclaimer posted next to a privately sponsored religious symbol in a public forum was "*sturdy" enough* to reassure "an intelligent observer" that the "private religious expression [of others] in a public forum [does not] imply the government's endorsement of religion."

Jefferson's "wall of separation" becomes a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship" because a truly secular state requires both "workable limits to the government's license to promote the free exercise of religion" and occasional censorship of "purely private religious speech" in public fora. If the 113th Justice shares this view, nothing will change. It might get worse.

An alternative vision

An eminently plausible, alternative understanding of "an establishment of religion" can be drawn from at least *five* clauses of the Constitution of 1787. Notably, each of them protects individuals from the power of factions who would, unless restrained, exclude certain of their religiously motivated fellow citizens from equal participation in the federal government and in the many programs it would someday spawn. These provisions expressly prohibit abuses that were commonplace in Colonial times: The Oath or Affirmation and No Religious Test Clauses of Article VI, the Qualification Clauses of Article I §§2-3, and the Qualification and Presidential Oath Clauses of Article II §1. Members of the founding generation actually knew legislators, judges, and governors who used the power of the state to impose religious conditions intended to limit citizens' access to political bodies, public spaces, and programs. The community's culture-forming institutions, such as schools, churches, and charities, were also expected to toe the "establishment" line.

In Pennsylvania, whose religious freedom at the time of the Founding was both a point of civic pride and one reason it was described as "an asylum for

The Pennsylvania experience and the religious tests imposed by states like Maryland, Delaware, South Carolina and Vermont show that "an establishment of religion" forbidden by the Establishment Clause *operates* as a political faction. Like every faction, its members can be diverse in their own politics and beliefs (or lack thereof), but they are united in a common goal: to impose and enforce a limited role for some (but not all) religious believers in society, politics, public life, education, foreign policy and other communal or cultural endeavors.

A close reading of the opinions in *Everson* supports the proposition that the Court's understanding of the Establishment Clause is itself an "engine of a ruling party" more concerned about control than it is about equality. Transportation to religiously-affiliated schools should be denied, wrote the late Justice Robert Jackson in *Everson*, because "[o]ur public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values."

Post-*Everson* jurisprudence thus permits some citizens and litigants (but not all) to seek judicial decrees, administrative rules, and legislation that limit the political choices, freedoms and equality of others. Its focus on "aid" or "endorsement" is also about control, and is thus deliberately under-inclusive. We also need to know whether the *outcomes* of its decisions consolidate or decentralize ideological control of important institutions and fora – like education, health care, and public space – at the federal level.

Justice Samuel Alito has written that the "Court's Establishment Clause jurisprudence is undoubtedly in need of clarity." Justice Clarence Thomas has suggested that the only way to get it is for the Court to "rethink[] the Establishment Clause." Justice Elena Kagan's opinion in *Town of Greece* provides the starting point. She writes that the Establishment Clause embodies a robust "norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian."

If Justice Kagan's theory is correct, we have a constitutional norm of crystal clarity. In a jurisprudence of the Establishment Clause rooted in the myriad affirmations of the principle of *individual* political and religious equality found in the Constitution, Bill of Rights, and post-Civil War Amendments, it is unnecessary to revisit the Court's "mechanical incorporation [of the Establishment Clause]," or to debate whether Establishment Clause protects individual rights." A newly appointed Justice simply needs to rethink the nature of the harms the Establishment Clause was designed to prevent.

A newly appointed Justice who votes to take a suitable case raising free speech and press issues arising from the campus "safe space movement" might recognize that its intellectual roots lie squarely in the Court's well-intentioned efforts to create "safe spaces" for plaintiffs who are uncomfortable when their fellow citizens pray or display the symbols of their respective faiths. He or she might also vote to reconsider the role of primary religious texts and religious experts in the public school classroom. If the Establishment Clause does not permit age-appropriate reading assignments that include "sectarian" books like the Bible, the Qur'an, the Torah, and the Hadith, how are students supposed to understand the history and traditions of a faith as its own adherents understand them?

So, ask the newly appointed 113th Justice what the phrase "an establishment of religion" means. Whatever the answer or non-answer, it will be revealing.

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