Deconstructing Deconstruction (Review of The Rhetoric of Church and State, by Frederick Mark Gedicks)

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Book Review

Deconstructing Deconstruction

The Rhetoric of Church and State
by Frederick Mark Gedicks

I. INTRODUCTION

In The Rhetoric of Church and State, Frederick Mark Gedicks attempts to weave a common thread through what has become, by most accounts, a “tangled web” of Supreme Court religion clause jurisprudence. Professor Gedicks states that his book “is generally a work of description.” This characterization, however, is misleadingly modest; the book goes far beyond merely cataloguing the frustratingly inconsistent and, at times, inequitable parade of religion clause cases the Court has decided in recent years.

Although Professor Gedicks stops short of explicitly offering normative solutions to this problem of inconsistency, he focuses intensely on the theoretical underpinnings of the Court’s approach to the interaction between religion and the state. This focus leads Gedicks to the hypothesis that the confusion in this area of law is not simply the result of an ad hoc approach to religious liberty issues. Rather, it stems from a shift by the

3. GEDICKS, supra note 1, at 7.
4. In fact, Professor Gedicks affirmatively states in his introduction, “My purpose here is not to articulate and defend a particular normative vision of church-state relations.” Id. However, the subtext of the book seems to advocate a regime in which religion is allowed a more prominent role in public discourse than it is under the Court’s current understanding. See infra Part III.

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Court away from a “religiously informed communitarian discourse,” in which religion, as the primary source of societal values, is welcome in public debate, toward a “secular, neutral, individualist discourse,” in which religion is viewed with suspicion and given no legitimate place in the public decision-making process. Professor Gedicks concludes that this secular individualist discourse, which has been influenced by twentieth century notions of relativism, naturalistic science, and legal realism, has utterly failed to provide a satisfactory system of interaction between church and state and, therefore, “should be abandoned.”

In reaching this conclusion, Professor Gedicks identifies two flaws inherent in the secular individualist discourse. First, he shows that while secular individualism justifies its exclusion of religion from public debate on the distinctly postmodern grounds that religion is “subjective,” it simultaneously fails to recognize its own subjectivity. Professor Gedicks illustrates this theoretical flaw through a discussion of the Court’s inability, despite its use of the rhetoric of objectivity, to convincingly ascribe “inherent meaning” to the neutrality principle in estab-

5. Gedicks, supra note 1, at 4.
6. See id. at 11; see also Frederick Mark Gedicks, The Improbability of Religion Clause Theory, 27 SETON HALL L. REV. 1233, 1237 (1997) (noting that “[r]eligious communitarianism presumes a society in which church and state are institutionally but not politically or culturally separated”). Professor Gedicks argues that something like this religious communitarian discourse dominated American politics and law through the nineteenth century, resulting in the “de facto establishment” of Protestant Christianity as the state religion. See Gedicks, supra note 1, at 16-17 (citing Mark De Wolfe Howe, The Garden and the Wilderness 11-15 (1965)).
7. Gedicks, supra note 1, at 4. Professor Gedicks makes clear that these competing discourses should not be taken too literally as “an attempted reconstruction of the past as it was experienced by those who lived it.” Id. at 24. Instead, they are “ideological constructions for a contemporary purpose—to reorganize and understand more deeply the religion clause jurisprudence of the Supreme Court.” Id. at 23-24. The value of this dichotomy, he says, “lies not in [its] historical, but in [its] rhetorical plausibility.” Id. at 24.
8. See id. at 12 (“Public life is the realm of the objective, secular discourse protected from the irrationality and subjectivity of faith.”). Professor Gedicks notes elsewhere that, on a societal scale, this shift began in earnest early in the twentieth century. See id. at 18. Not until Everson v. Board of Education, 330 U.S. 855 (1947), did the Court “abandon[] religious communitarianism as a normative guide to church-state relations, in favor of secular individualism.” Gedicks, supra note 6, at 1241.
9. See Gedicks, supra note 1, at 18.
10. Id. at 125.
11. Id. at 30.
lishment clause cases. Second, Professor Gedicks shows that secular individualism will not countenance some policy results that both the Court and the American people desire; the Court’s "deep commitment" to the rhetoric of secular individualism therefore forces it to manufacture implausible secular justifications for undeniably religion-friendly outcomes. As Professor Gedicks puts it, the Court often finds itself "defend[ing] results that are possible only within religious communitarian discourse with arguments that can be made only with secular individualist discourse." Gedicks demonstrates this practical flaw by examining the contradictory results of seemingly similar cases dealing with issues such as parochial schools, religious colleges, religious exemptions from generally applicable legislation, and religious tax exemptions.

Both flaws evidence a certain intellectual dishonesty that has generated "ridicule by commentators, and lack of popular support" on both sides of the debate. Although an analysis of each flaw, and its potential relationship with the other, would be enlightening, the remainder of this Book Review will focus on Professor Gedicks’s theoretical treatment of the first flaw: the overconfidence of the secular individualist discourse in its own ability to provide absolute meaning in public debate. Part II will describe in greater detail Professor Gedicks’s analysis, giving particular attention to his attempt to deconstruct the subjective/objective dichotomy upon which secular individualist discourse relies. Part III will begin by suggesting that an acceptance of the subtext of Professor Gedicks’s arguments inevi-
tably leads to a return to a religion clause jurisprudence in which religion is allowed a more prominent role in public debate. Part III will then present the possibility that such a discourse may exhibit a theoretical flaw similar to that which Gedicks identifies in the secular individualist discourse, and will suggest that, if this is the case, all discussion of religion clause theory in terms of these competing discourses becomes useless. Finally, Part III will suggest that there may indeed be a characteristic of religion-based discourse that recommends it as theoretically superior to the secular individualist discourse. Although this conclusion will not completely resolve the subjective/objective dichotomy from a postmodern viewpoint, it demonstrates that a religion-based discourse avoids the internal inconsistency inherent in the secular-based discourse and, therefore, is to be theoretically preferred.

II. DECONSTRUCTING THE SECULAR INDIVIDUALIST DISCOURSE

Professor Gedicks begins his discussion of the secular individualist discourse’s theoretical flaw by noting that “[c]ontemporary philosophers have largely abandoned the classical account of truth and knowledge under the pressure of postmodern arguments that human beings cannot experience the world without simultaneously altering it.” As a result, “[f]acts are not taken to have any essential characteristics or meaning;” instead, facts only “mean” something by reference to the theory or structure that orders them. Observers operating from different theoretical perspectives thus “see (and fail to see) certain aspects of the world that seem absent (or present) in the experience” of other observers. Indeed, for proponents of such postmodern models, “objectivity is impossible.”

The secular individualist discourse embraces this postmodern model of truth and uses it to discredit religion as a basis for decision-making in the public sphere. As Professor Gedicks

19. This is despite his claims to the contrary. See supra note 4.
20. GEDICKS, supra note 1, at 9.
21. Id.
22. See id. For a good basic exposition of this postmodern approach to truth in the context of literary criticism, see David L. Cowles, Poststructuralism, in THE CRITICAL EXPERIENCE 102 (David L. Cowles ed., 1992).
23. GEDICKS, supra note 1, at 26-27.
25. Indeed, as has been mentioned, the discourse displays affinities for other
notes, secular individualism proceeds on the assumption that "no single set of values can be objectively shown to be better than any other set." Therefore, the discourse emphasizes "preservation of individual choice through value-neutral procedures, so that individuals remain free to act upon the truths they discover in the exercise of their own reason." Reason will presumably lead each individual to different value choices; thus the secular individualist discourse avoids "imposing] a set of strong values on society."  

According to the secular individualist discourse, only actions that can be "justified empirically or rationally, by reference to the observable and explainable phenomena of the exterior world" may be properly employed in public life. In contrast, the religious communitarian discourse sees nothing wrong with employing privately held religious beliefs in public decision-making; in fact, religion-based values lie "at the heart of community preservation." However, because the secular individualist discourse views these values as inherently subjective and unverifiable by any rational method, their consideration in politics and law is per se improper. The secular individualist discourse thus "treat[s] . . . religious belief . . . as a subjective value preference restricted to private life."  

The postmodern model of truth upon which the secular individualist discourse is founded, however, makes this marginalization of religion problematic. While adherents to the postmodern model recognize that facts have only the subjective meaning assigned to them by the theory that orders them, they are still called upon to evaluate which theories give the best "account[] of the facts they purport to explain." This qualita-

relativist theories that have developed during the twentieth century. See supra note 9 and accompanying text.

26. GEDICKS, supra note 1, at 30.
27. Id. at 13.
28. Id.
29. Id. at 9. In another formulation of this principle, Professor Gedicks describes secular individualist discourse as holding that "only if a belief is confirmed by widely shared human experience, scientific investigation, or reasoning from premises that can be verified by such experience or investigation does it qualify as knowledge upon which government legitimately can act." Id. at 31.
30. Id. at 13.
31. Id. at 32.
32. Professor Gedicks refers to this difficulty as an "antimony." Id. at 9.
33. Id.
tive evaluation necessarily proceeds “on the basis of some pre-theoretical meaning these facts are assumed to possess.” In effect, a theory that embraces the postmodern idea that meaning only occurs by reference to the ordering system risks becoming internally inconsistent. By its own admission, it is impossible for observers operating from a different theoretical perspective to appreciate the truth of the “facts” within the system. At the same time, by definition, the acknowledgment of the subjectivity of truth should preclude those operating within the system from having any absolute faith in the “meaning” the system has created.

By self-confidently pointing to religion’s lack of objectivity as the basis for its disqualification from public debate, the secular individualist discourse partakes of this internal inconsistency. The secular individualist discourse confines “subjective” religion to the private sphere, while reserving a place in the public sphere for secular knowledge; therefore, it tacitly argues, contrary to its postmodern assumption, that secular knowledge has inherent, objective meaning. Said another way, the secular individualist discourse denies that the boundary between “moral” and “immoral” can be absolutely defined by religion, but then assumes that its own definition of the “boundary between the private world of subjective preference and the public world of objective fact is natural, fixed and inevitable.” As Gedicks suggests, “[w]ithout a postulate of inherent meaning, such a conclusion should be suspect.

Professor Gedicks illustrates this internal inconsistency by analyzing the Supreme Court’s unsatisfying Establishment Clause policy of “government neutrality” toward religion. The policy mandates that, to avoid favoring one subjective value system over another, government actors must make decisions based on objective secular knowledge alone. Within the secular individualist discourse, which considers religion subjective, this approach is plausibly viewed as “neutral.” However, those operating from within a religion-based discourse view such a policy, with equal plausibility, as “bald . . . religious persecu-

34. Id.
35. Id. at 32.
36. Id.
37. See id. at 30 (“The state . . . stay[s] aloof from the pursuit of values in private life and act[s] only on the basis of objective facts . . . .”).
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an improper "privileging of secular knowledge" over religious belief. The Court's policy is thus inherently "neutral" only if religion is inherently subjective and if those who subscribe to religious beliefs are inherently mistaken. Given the secular individualist distaste for concepts of inherent meaning, the circularity of such an argument is obvious.

Thus, not only does the secular individualist discourse lack objectivity from the perspective of outside observers, its inconsistent utilization of postmodern theory to critique religious communitarian discourse further damages its theoretical credibility. While some postmodern theorists deal with this internal inconsistency problem by acknowledging and, indeed, reveling in it, the secular individualist discourse takes itself seriously, seemingly oblivious to its own flaw. In so doing, the discourse demonstrates not only inconsistency but a troubling intellectual dishonesty as well.

III. A RETURN TO A RELIGION-BASED DISCOURSE?

As has been mentioned, Professor Gedicks's critique of the secular individualist discourse does not extend to an overt recommendation that the Supreme Court return to the "de facto Protestant establishment" of the eighteenth and nineteenth centuries. Indeed, Professor Gedicks notes that such a return is unlikely, at least in the immediate future, given the confused state of current Supreme Court precedent. More fundamen-

38. Id. at 43.
39. Id. at 32.
40. See id. at 43 ("The privatization of religion by secular individualist discourse is an act of power that can plausibly be defended as religiously neutral only if religion is presented as a 'naturally' private activity, excluded from public life like all value preferences.").
41. Professor David Cowles's analysis of the theories of Jacques Derrida, a pioneer of postmodern literary criticism, demonstrates this approach:

This kind of paradox occurs everywhere—including in Derrida's own work, as he is the first to recognize...with wry humor. Derrida himself emphasizes the impossibility of explaining his theories using traditional systems of logic and exposition—as I have of necessity tried to do here. Like Derrida, I can only explain deconstruction using the very languages and systems it subverts. Though we recognize its paradoxes and inconsistencies, we have no other language to work with.

Cowles, supra note 22, at 114. For Derrida, the internal inconsistency inherent in postmodern criticism was best described as "play." Id. at 111.
42. GEDICKS, supra note 1, at 16 (citing Howe, supra note 6, at 11-15).
43. See id. at 122 ("Religion clause jurisprudence would need radical surgery before religious communitarian discourse could give an account of it that is any more co-
tally, he worries that "at least some [consequences of a return to religious communitarianism] are undesirable." In the end, Gedicks specifically rejects the religious communitarian approach as he has defined it: "Religious communitarian discourse is not a viable alternative to secular individualism." Despite this disclaimer, the subtext of Professor Gedicks's arguments seems to suggest a predilection for a return to some form of religion-sensitive public discourse. For example, Gedicks uses language in his description of the secular individualist discourse that subtly betrays his bias. He describes the secularist argument that religion is unfit for public discourse as the "marginaliz[ation] of religious belief," and refers to the modern prevalence of secularism over religion as an indefensible "act of power" and as "violence." More directly, Gedicks notes that "[a]t present, secular individualism and religious communitarianism are the only two imaginable alternatives. Virtually every proposal of theoretical or doctrinal reform in religion clause jurisprudence modulates between" these two discourses. If this is true, any move away from secular individualist discourse necessarily becomes a move toward religious communitarian discourse. Gedicks may indeed disagree with a return to a "de facto establishment;" however, given the alternatives he presents, his criticism of the secular individualist discourse seems at least to suggest a preference for an approach in which religious values are not completely banished from the public square.\footnote{But see id. at 123 (arguing that, because the discourses are "antithetical" to each other, "efforts to mediate a compromise position between the two are doomed"); id. at 124 ("Even granting the dubious assumption that a coherent (if unholy) combination of [the discourses] is rhetorically possible, championing this amalgamated discourse is likely to have little practical effect."). Although a "combination" of religious communitarianism and secular individualism may indeed be theoretically impossible, another option may be to resort to a religion-based discourse that defines "religious values" on a level of greater generality than did the discourse which resulted in the de facto Protestant establishment. Such a discourse would need to be crafted to allow consideration of traditional religious morality in Establishment Clause cases, while still protecting acts of religious devotion under the Free Exercise Clause by members of minority religious groups. Admittedly, such a
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A return to a religion-based discourse would bring with it some of the problems of subjectivity that Professor Gedicks identifies in his critique of the secular individualist discourse. Just as secular individualism looks subjective to outside observers, religious belief is subjective from a secular point of view. If this subjectivity problem alone disqualifies all theories from public debate, further theoretical discussion of religious clause jurisprudence would be meaningless—according to the postmodern model of truth, no discourse can escape this external subjectivity. It is, of course, improbable that theorists will stop talking about theory in the religion clause debate; what remains is to determine which theory, despite its postmodern flaws, supplies the best “account[] of the facts [it] purport[s] to explain.”

On a purely theoretical level, religion-based discourse seems to possess a quality that recommends it as superior to secular individualist discourse. By disqualifying religion from public debate on the grounds that the “facts” it contributes are subjective, secular individualism subscribes to the postmodern model, which describes all meaning as bound to the history discourse would not resolve the subjectivity problem; its outlines would be controversial and would require counter-majoritarian balancing by the Court.

Further discussion of this possibility is beyond the scope of this Book Review. My suggestion here is simply that, although Gedicks’s stated purpose is to describe rather than solve the problem, his insightful theoretical analysis seems to readily give way to fatalistic resignation.

51. Because “religious communitarian discourse,” as Gedicks has defined it, implies elements of the de facto Protestant establishment that Gedicks finds objectionable from the perspective of minority religious groups, I refer here to a more general religiously informed discourse.

52. See supra note 24 and accompanying text.

53. That would be bad for the law professor business. However, in his most recent article on the subject, this seems to be what Professor Gedicks recommends, at least in the context of religious exemptions from generally applicable laws:

To justify granting an exemption from religiously neutral laws to adversely affected religious believers, one needs a theory that explains why religion is a uniquely valuable human activity entitled to uniquely strong constitutional protection. Such a theory, however, would fly directly in the face of the normative presuppositions of secular individualism. . . . Theories of special protection of religion will almost certainly remain voices crying in the wilderness, like parents lamenting that their children do not act like adults. And like parents, religion clause theorists might do better to deal with what is, rather than searching for what is unlikely ever to be found.

Gedicks, supra note 6, at 1258.

54. GEDICKS, supra note 1, at 9.
that defines it. By recognizing the impossibility of “inherent meaning,” secular individualism also makes impossible any absolute faith in its own account of the “facts,” even within the discourse itself. In postmodern terms, the secular individualist discourse fails to provide itself a “center” upon which meaning within the system can be grounded.

Religion-based discourse, in contrast, does not acknowledge the postmodern idea that truth is relative. Its disagreement with secular individualism is not that secularism is subjective, but that it is absolutely wrong. For the religion-based discourse, the “center” which provides absolute meaning within the system is God himself. Although access to this center may be problematic at times, belief in its existence allows for absolute faith in the truth of “facts” dependent upon such belief. For those who believe in God, the account given by religion-based discourse of the facts surrounding the church-state debate can be intellectually satisfying because, from their perspective, the absolute meaning of those facts is not impossible to conceive.

According to strict postmodern theory, even the “center” is part of the system it defines. The meaning provided by any center, although absolute to those operating within the system, will still be subjective to those viewing the facts from a different theoretical perspective. Thus, from a postmodern point of view, the fact that religion-based discourse is centered on the absolute wisdom of God does not allow it to escape the subjectivity problem. However, unlike the secular individualist discourse, the religion-based discourse’s center allows it to be internally consistent. And unlike secular individualism, which is forced by its own relativism to feign objectivity in order to create any meaning, religion-based discourse is theoretically honest. Even if God is dead, secular individualism, by its own admission, cannot be intrinsically “correct.” At least for religion-based discourse, the possibility of correctness exists.

55. See supra Part II.

56. See Cowles, supra note 22, at 106-07. Derrida refers to this concept of the “center” as the “transcendental signified.” Id. at 106.

57. Cf. GEDICKS, supra note 1, at 26 (“Most of those inhabiting the world of one church-state discourse . . . understand quite well the world of the other; they simply think the other is wrong.”).

58. “Strict postmodern theory” may be an oxymoron.

59. See Cowles, supra note 22, at 106 (noting that the impression of inherent meaning provided by a center is “an illusion” because “every center actually depends on the very system it supposedly grounds”).
Like Professor Gedicks, my purpose here has not been to propose a practical “solution” to the inconsistency that has occurred in religion clause jurisprudence. Rather, it has been to analyze Professor Gedicks’s theoretical approach and, in keeping with this focus, to explore the theoretical strengths and weaknesses of the competing discourses he identifies. I, like Professor Gedicks, have concluded that the secular individualist discourse fails to do what it promises: provide an objective, neutral answer to church-state issues. Unlike Professor Gedicks, I conclude that a broadly defined religion-based discourse is more theoretically satisfying. Although it is unclear what practical implications this theoretical discussion of the competing discourses may have, as Professor Gedicks notes, it is sometimes enough to simply demonstrate a problem in hopes that a solution will presently appear.60

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60. See GEDICKS, supra note 1, at 125.