Dueling Values: Balancing Competing Constitutional Interests in *Pinette*

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Introduction

In *Capitol Square Review and Advisory Board v. Pinette*,[1] the United States Supreme Court held that a local review board could not refuse the private placement of a large cross (by the Ku Klux Klan) on a "public forum" adjacent to the state capitol, notwithstanding the Board's professed concern that such a placement would violate the Establishment Clause.[2] A public forum is government property, such as a park or the square at issue in *Pinette*, which has by tradition or law been dedicated to public use for the exchange of ideas and information.[3] On such a public forum, the state may not impose access restrictions based on the content of the speech in question unless the restriction is narrowly tailored to meet a compelling government interest.[4] Thus, the Justices in *Pinette* considered whether the Board's articulated desire to avoid violating the Establishment Clause met this stringent standard so as to justify the exclusion of the cross in question. The majority concluded that it did not.

This result is not particularly surprising considering the Court's recent decisions requiring that religious groups be given equal access to government property that has been made generally available for private use,[5] but the case fractured the Court badly and produced no majority opinion.[6] The difficulty with the case, it seems to me, lies not only in its doctrinal complexity or in deeply felt ideological differences between the Justices,[7] but also in the fact that it required the Court to weigh competing constitutional rights claims: the free speech rights of the Klan to equal access to a public forum and the rights of the public to be free of a government establishment of religion.

Cases that, like *Pinette*, involve conflicting private constitutional rights claims present a distinctive set of problems which have confounded the Court. In the typical constitutional rights case, the question is whether government action that allegedly burdens a constitutionally protected interest can be justified because the action in question furthers a sufficiently important government purpose. Thus, individual rights are pitted against a broad public interest. The Court has developed and applies a comprehensive framework for weighing individual rights claims against such public interests, and (despite occasional disclaimers of its competence to decide public policy) has exhibited little discomfort in weighing the public interest against individual rights. But in cases requiring the resolution of conflicting individual rights claims, the Court has had considerably greater difficulty developing a coherent approach to weighing the competing constitutional concerns.[8]

Pinette is an excellent illustration of this phenomenon. Although there was a clear conflict of constitutional values in *Pinette*, none of the Justices confronted that conflict or offered any coherent explanation of why one set of values should take

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precedence over the other. Instead, each of the Justices adopted a definitional approach that effectively eliminated one set of values from consideration by denying the existence of any constitutionally protected right. To be sure, it is always necessary to decide at the threshold whether the constitutional values implicated in a given case are sufficiently strong to justify recognition of a claimed constitutional right. But the definitional approaches used in *Pinette* are ultimately unsatisfying because they fail to give an adequate account of the constitutional values at stake and divert attention from real issue in the case, which is how to balance those competing constitutional values.

In this essay, I will consider the problem of balancing competing constitutional rights claims, using *Pinette* as an example. After briefly describing the conflicting rights claims and constitutional values at issue in *Pinette*, the essay engages in a fairly detailed analysis of the Justices' various positions in *Pinette*. This analysis demonstrates that each of the Justices definitionally excluded one of the rights claims at issue, and thus avoided weighing the competing constitutional values in the case. These definitional analyses, however, did not give a satisfactory account for the rejection of the claimed right, and thus failed to explain why it was outweighed by countervailing constitutional interests. The essay then discusses other types of cases that present conflicting rights claims — cases involving the tension between the religion clauses and state action cases — which reflect a similar pattern of definitional reasoning to avoid balancing competing constitutional values. Finally, the essay considers alternative approaches to resolving conflicting rights claims, including explicit balancing and deference to the political process, and concludes that a combination of definitional reasoning, explicit balancing, and deference to the political process would improve the analysis of these difficult cases.

Conflicting Rights in *Pinette*

At the outset, it should be clear that the facts of the *Pinette* case presented conflicting private claims to constitutional rights.[9] The Klan claimed a free speech right to place the cross in question on the square as a means of expressing its religious views. The Board, on the other hand, asserted the rights of other observers to be free of a government establishment of religion, which might reasonably be implied by the placement of an unattended cross near the seat of government.[10] Each of these individual rights claims had some measure of support on the facts under existing doctrine, and clearly implicated the underlying values of the constitutional provisions in question.

Consider first the Klan's free speech rights in the case. It was undisputed that the Capitol Square was a "public forum" by virtue of both tradition and explicit statutory provisions.[11] Under settled doctrine, the government's power to limit expression in a public forum is strictly limited. It may impose reasonable, content-neutral restrictions on the time, place, and manner of expression.[12] Such content-neutral measures are seen as less threatening to free speech values because they do not turn on the message of the speaker.[13] Thus, many of the Justices in *Pinette* recognized that a general prohibition on unattended displays might pass constitutional muster.[14] The rejection of the Klan's cross, however, was not based on such a content-neutral restriction, but rather the Board excluded the cross because of the religious message it conveyed (i.e., its communicative content). Indeed, the exclusion was actually "viewpoint based" because the Board had approved the private placement of a menorah for roughly the same period in time.[15] Because content-based restrictions generally, and viewpoint based restrictions in particular, are seen as especially offensive to First Amendment values,[16] they can only be sustained if they are narrowly tailored to meet a compelling governmental interest.[17] Thus, there can be little doubt that the Klan had a powerful free speech claim to placing the cross on the Capitol Square.

Now consider the Establishment Clause rights at issue in the case which were asserted by the Board on behalf of potential observers of the cross. It was clear under settled doctrine that the government could not display such a cross and that it could not give preferential access to private groups seeking to display a cross on public property.[18] To do so would undeniably "endorse" religion in a manner forbidden by the Establishment Clause. *Pinette*, however, involved the private placement of a cross on a public forum, which is neutral from the perspective of the government, in the sense that the government treats all displays alike and does not purposefully endorse religion. Nonetheless, from the observer's perspective a message of endorsement may well be sent and received on the facts of *Pinette*. The cross was large and located in close proximity to the seat of government.[19] Because the cross was unattended, there was nothing to distinguish it from government-sponsored displays (such as statues) in the same square, and an observer might reasonably believe that the cross was government sponsored. Even a clearly posted disclaimer identifying the cross as privately sponsored and disavowing any government approval of its message could not completely eliminate the possibility that an observer might reasonably interpret the cross as a government endorsement of religion, because the disclaimer might not be visible from a distance, or because "other indicia of endorsement . . . outweigh the mitigating effect of the disclaimer . . . ."[20] Whether this sort of neutral, non-purposeful message of endorsement violates the Establishment Clause is the subject of some disagreement on the Court,[21] but on the facts, the placement of the cross surely engaged some of the values underlying the Clause.

Conflict Avoidance in *Pinette*

As described above, in *Pinette* the Klan could legitimately

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claim a free speech right to place the cross, but allowing the cross to be placed would also implicate important Establishment Clause values. The essential premises of this conflict were acknowledged by all of the Justices. The Justices agreed that because the square was a public forum, settled First Amendment doctrine established that the Klan had a right to display the cross in question which could not be denied because of its communicative content unless the denial was necessary to further a compelling government interest and narrowly tailored to achieve that interest.[22] The Justices also agreed that whether the display of the cross violated the Establishment Clause depended upon whether it was a government endorsement of religion,[23] and that some observers might reasonably interpret the display of a cross in close proximity to the state capitol as constituting such an endorsement.[24]

[A]ll of the Justices' opinions avoid the conflict by effectively denying the existence of one set of rights.

One might have expected, then, that the Justices would have engaged in a reasoned discussion of why one set of constitutional interests should be given priority. But instead of acknowledging the conflict and attempting to resolve it in some principled manner, all of the Justices' opinions avoid the conflict by effectively denying the existence of one set of rights. None of these approaches offers a satisfying solution to the underlying issues in the case.

The plurality opinion, authored by Justice Scalia, adopted a per se rule that allowing private religious displays equal access to a public forum never violates the Establishment Clause.[25] The plurality refused to evaluate whether the placement constituted an endorsement on the facts by concluding that allowing access to a public forum is inherently "neutral" and any benefit to religion is purely incidental.[26] Under this rule, even if some people might reasonably interpret allowing access to religious speech as a government endorsement of religion, that simply did not engage any Establishment Clause interests. Put differently, if the government did not *intend* to send a message of endorsement, it is irrelevant that a message of endorsement was received. Thus, under the plurality's analysis, there were no Establishment Clause rights at issue, and the only question was whether denying access based upon the communicative content of the cross violated the Klan's free speech rights, which was an easy question under settled law.

The essence of Justice Scalia's position seems to be that so long as the government acts neutrally and does not *intend* to endorse religion, it does not violate the Establishment Clause, regardless of how observers might interpret the government's action. The problem with this approach is that it fails to provide an adequate explanation of why the effect of the cross's placement (i.e., the message received) is irrelevant. Justice Scalia assumes this position without mentioning the deep-seated conflict on the Court with respect to this very issue. The endorsement test derives from *Lemon v. Kurtzman*,[27] and by its terms prohibits government action that "either has the purpose *or effect* of endorsing religion."[28] While Justice Scalia has advocated overruling *Lemon*, he has been unable to obtain the necessary majority to do.[29] Until the Court repudiates the effects strand of the *Lemon* test, Justice Scalia's failure to consider the effects of the placement of the cross ignores Establishment Clause interests that are cognizable under current doctrine.

Perhaps in an effort to overcome this difficulty, Justice Scalia characterized the per se rule he applied as having been established by prior cases, including *Lamb's Chapel* and *Widmar v. Vincent*.[30] As Justice O'Connor pointed out effectively in her concurring opinion, however, neither decision articulated or applied a per se rule. In both cases the Court concluded that allowing private religious groups access to government property that was open to use by nonreligious groups did not constitute an establishment of religion, but in both cases the Court examined on the facts whether the access in question would have the effect of endorsing religion.[31]

Thus, Justice Scalia's plurality opinion fails to provide an adequate explanation as to why there were no Establishment Clause rights at stake. It may be that this problem is as much the result of Justice Scalia's underlying position on Establishment Clause issues as the product of any desire (conscious or unconscious) to avoid the problem of balancing competing constitutional views. But at the very least, it appears that the particular context of competing constitutional rights claims provided an occasion for Justice Scalia to divert attention from the difficult Establishment Clause issues in the case by emphasizing the countervailing free speech claim.

Justice O'Connor's concurring opinion took a more subtle approach, but likewise avoided the need to balance the competing constitutional values at stake in the case by defining away the Establishment Clause interests raised by the placement of the cross. Justice O'Connor rejected the plurality's per se rule, and instead asked whether, on the facts, allowing the display constituted a government endorsement of religion.[32] In her view, the long history of the square as a public forum meant that no reasonable viewer from the community could mistakenly believe that the display was endorsed by the government.[33] While Justice O'Connor acknowledged that a stranger to the community might

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reasonably infer government endorsement from the proximity of the display to the state capitol, she emphasized that the purpose of the Establishment Clause is to prevent the government from making religion relevant to one's standing in the political community. Thus, "the endorsement test creates a more collective standard to gage 'the "objective" meaning of the [government's] statement in the community,'"[34] and whether the placement of the cross could be interpreted as a government endorsement of religion must be determined from the perspective of a reasonable member of the community in question, who would know and understand that the square was a public forum.[35]

This rationale effectively eliminates the Establishment Clause from the case by limiting its protection to members of the community whose rights could not be violated because they could not reasonably interpret the cross's placement as a government endorsement of religion. This reasoning has two problems. First, it is by no means clear that, just because the Capitol Square is a public forum, no reasonable member of the community could interpret the placement of the cross as a government endorsement of its religious message. The history of prior unattended displays in the square was quite limited, government sponsored displays were also present in the square, and few nonlawyers in the community could be expected to know and understand the implications of public forum analysis for the placement of the cross. Second, Justice O'Connor does not fully explain why only members of the community are entitled to be free of government endorsement of religion. While she does suggest that the primary focus of the Establishment Clause is to prevent the exclusion of nonadherents from the political community,[36] it does not necessarily follow that the perceptions of visitors to or "uninformed" members of a community are irrelevant. Under this reasoning, a community composed exclusively of members of one religion could establish that religion because no one would be excluded, yet that would surely be inconsistent with the principles of the Establishment Clause. More generally, visitors to and new or prospective members of a community also have an interest in being free of government endorsed religion.

Justice Souter (who joined Justice O'Connor's concurrence along with Justice Breyer), authored a separate concurrence that was joined by Justice O'Connor and Justice Breyer.[37] In addition to challenging the plurality's reading of the case law to establish a per se rule,[38] Justice Souter offered a somewhat different rationale for concluding that the Board's refusal to allow the placement of the cross did not pass muster. Justice Souter acknowledged the Board's Establishment Clause concerns as legitimate (in light of the appearance of endorsement), but concluded that the refusal to allow the cross to be placed was not narrowly tailored to meet that concern because the Board had two less restrictive alternatives.[39] First, the Board could have required the Klan to place a sign, visible at a distance, explaining that the cross had been privately placed. Second, the Board could have restricted all free-standing private displays to a limited area marked with a permanent sign.

Although this approach does involve some accommodation of competing rights by identifying ways in which the Board might have resolved the conflict with less encroachment on either the free speech or Establishment Clause interests at stake, it also refuses to weigh the conflicting interests that remain. Neither of Justice Souter's less restrictive alternatives would have completely eliminated the competing rights claims. A disclaimer would have limited, but not avoided, the Establishment Clause problem because not all observers would see the sign, even if it were legible from a distance, and the sign would not completely remove the appearance of endorsement that would arise from the size of the cross, its proximity to the seat of government, and the presence of other, government sponsored, displays in the same area.[40] A content neutral rule restricting displays to a limited area of the square with clearly marked disclaimers might prevent Establishment Clause problems, but not without sacrificing some First Amendment interests insofar as even content neutral restrictions do burden freedom of expression.[41] These two options, therefore, like the other Justices' approaches, resolve the case by effectively defining away one set of rights.

The dissenting Justices also avoided weighing the competing rights, but (in contrast to the plurality and concurrences) did so by defining away the free speech interests of the Klan. Justice Stevens applied the endorsement test to conclude that unattended private religious displays near the seat of government inevitably constitute an endorsement of religion and are therefore barred by the Establishment Clause,[42] and Justice Ginsburg's separate dissent employed similar reasoning.[43] This approach assumes that restricting speech to avoid Establishment Clause problems is narrowly tailored to meet a compelling interest; i.e., it "trumps" free speech rights.[44] But it is unclear why this should be so. One could just as easily argue that the compelling free speech claims in the case justified government action that might otherwise violate the Establishment Clause. Nor is it clear why any Establishment Clause interest is sufficient to overcome any free speech interest without regard to the particulars of the case. Thus, even if there is a valid Establishment Clause right at issue in the case, neither of the dissenting Justices explained why that right should outweigh the Klan's free speech claim. Instead, the dissenting Justices effectively ignored the free speech implications of refusing to allow the cross to be placed in the square. Indeed, Justice Ginsburg's dissent focused entirely on her conclusion that allowing the placement of the cross violated the Establishment Clause and never mentioned the First Amendment interest of the Klan.

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Conflict Avoidance in Other Cases

Pinette is not the only case in which the Court has confronted conflicting constitutional rights claims. Although most cases involve the weighing of individual rights against countervailing governmental interests, conflicting individual rights claims do arise in other contexts.[45] In such cases, the Court has shown a similar reluctance to engage in an explicit weighing of these constitutionally protected interests.

> ***[W]hen there is a dispute between private parties, the state must inevitably choose between them . . . .***

The potential for conflicting rights claims is particularly significant under the religion clauses, because of the tension between the Establishment and Free Exercise Clauses. To the extent that government "accommodates" particular religious practices (by, for example, exempting them from generally applicable laws) it may effectively endorse that religion or religion in general.[46] Such cases require the Court to draw an appropriate line between permitted (or required) accommodation and prohibited establishment of religion, which in essence involves the weighing of two potentially conflicting sets of rights; i.e., the rights of religious adherents to exercise their religion free of government interference may conflict with the rights of nonadherents to be free from a government establishment of religion. While the tension between the two religion clauses has often been noted, most efforts to reconcile them focus on seeking doctrinal principles that prevent such conflicts from arising. Indeed, the underlying assumption appears to be that there is something wrong with the Court's jurisprudence if it means that Establishment and Free Exercise Clause rights may come into conflict. But there is nothing inherently surprising about the notion that individual rights may come into conflict in a free society, and in other contexts such conflicts are not necessarily viewed as anomalous or problematic.[47]

Responses to conflicting rights under the religion clauses, such as the principle of government neutrality toward religion which has been advocated by some commentators (and was apparently embraced by the *Pinette* plurality), have the effect of definitionally excluding one set of rights from consideration. This approach often results in the failure to consider fully the implications of government action for both sets of rights at issue. For example, the celebrated problem of prayer in the public schools ultimately involves a conflict between the asserted rights of those who wish to pray and those who wish to be free of government sponsored prayer. Under current doctrine, government sponsored school prayer violates the Establishment Clause because it has the purpose and effect of promoting religion.[48] While this may be true, it does not eliminate the fact that prohibiting school prayer may limit the ability of some students for whom prayer in the school setting would be an important aspect of their religious practice. Conversely, because allowing voluntary prayer is neutral, it may be permissible, even in formal settings where it may have the appearance of government endorsement and lead to nonadherents' feeling excluded from the political community.[49] This is not to say that either of these results is wrong; rather, by focusing solely on the nature of the government's role, neither rule really explains why the preferred set of rights ought to be given preference in a given case.

Another interesting manifestation of the Court's reluctance to balance competing individual rights claims is its application of the "state action" doctrine, which limits the application of individual rights safeguards to protection from government, as opposed to private, action.[50] While the state action requirement appears to flow inevitably from the language of the Fourteenth Amendment and other constitutional rights provisions, in practice it is always possible to identify some conduct by the state that contributes to the alleged constitutional deprivation, even if it is only the state's failure to prevent the private conduct at issue. Put differently, when there is a dispute between private parties, the state must inevitably choose between them; even the failure to act effectively chooses between the parties by favoring the status quo. Thus, the "real" question in many of these cases is not whether there is state action, but whether the act or omission of the state violates the Constitution. Indeed, some commentators have observed that the state action doctrine prevents the courts from becoming involved in competing private claims of constitutional rights.[51] While the doctrine may serve this function, it does so by directing the inquiry into an exploration of the state's role in the challenged private conduct, and at the expense of any careful consideration of the balance of rights in a given case.

Consider, for example, *Moose Lodge No. 107 v. Irvis*,[52] in which the Supreme Court rejected an equal protection challenge to the racially discriminatory practices of a private club because state licensing of the club was insufficient to create state action.[53] The case essentially involved a conflict between two competing constitutional rights claims: the right of club members to freedom of association and the right of excluded racial minorities to be free of racial discrimination. The state's failure to prohibit discriminatory practices of private clubs (even though they were licensed by the state) gave precedence to the associational freedoms of club members, and the real question in the case was whether the state had some constitutional obligation under the Equal Protection Clause to prohibit the discriminatory practices.

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The Court's decision that there was no state action in the case effectively meant that there was no constitutional duty. It may be that such a conclusion was correct on the facts, either because the Constitution imposed no duty or because any duty was outweighed by the countervailing associational rights of club members. The Court's decision, however, did not offer any reasoned explanation of whether the Equal Protection Clause imposed any affirmative obligation to prohibit private discrimination[54] or whether on the facts the associational rights of club members were more weighty than the equal protection rights of minorities. Instead, the Court focused on the state's neutrality with respect to the discriminatory policies of the club. Because this neutrality meant "no state action," the equal protection rights of minorities were defined out of existence.[55]

My point here, again, is not that the result in *Moose Lodge* is necessarily wrong (although I personally disagree with it), but rather that reliance on the state action doctrine essentially avoids addressing the key question in the case by focussing on unrelated doctrinal considerations that arbitrarily remove one set of rights from consideration. Thus, if the state had prohibited racial discrimination in private clubs, there would have been state action and the associational rights of club members would have been considered, even if they may have ultimately been rejected. It is unclear why the countervailing equal protection interests should not be considered just because the state had not affirmatively acted.[56]

Resolving Conflicting Rights Claims

My criticism of the analysis in *Pinette* and other areas involving conflicting rights claims is not meant to suggest that there is something per se wrong about definitional resolution of such claims. As an initial matter, it is always necessary in constitutional rights cases to define the rights that are in fact subject to constitutional protection, and competing rights claims cases are no exception. If one (or both) of the asserted claims fails to meet the standards for recognition of the constitutional right in question, it is highly appropriate to dismiss those claims on that basis. The danger, however, is that these definitional approaches may be driven by the desire to avoid acknowledging and resolving conflicting rights claims, rather than by the coherent and consistent application of doctrine. This desire may not only lead to a distortion of existing doctrine, but it may also divert attention from the underlying issues in a case and mask the unspoken balancing that drives a particular decision.

However troubling the Court's refusal to balance competing rights may be, the question remains whether there is an alternative approach that is likely to produce any better analysis in these difficult cases. Two options are immediately apparent: The Court could explicitly weigh the competing rights claims and explain why one set of rights has more constitutional importance in the context of a particular case, or it could defer to the resolution of conflicting rights claims by the political process. Each of the approaches is defensible, but each also would present potential problems of its own.

If the Court were to explicitly balance competing rights, it would have to consider both the constitutional importance attached to particular rights in the abstract, and the degree to which each of the respective rights would be burdened if the case were resolved in favor of the other. Thus, for example, all the Justices in *Pinette* assumed that the Establishment Clause claim, if valid, would be a sufficiently compelling government interest to outweigh the Klan's free speech claims. The problem, however, was that none of the Justices explained why. Such a weighing of the relative constitutional importance attached to particular rights is, of course, a difficult endeavor. Text and history are unlikely to give any specific guidance, and underlying principles are likely to be so general that any conclusions would ultimately reflect the Justices' own values. In the final analysis, the answer in most cases would be that many individual rights have roughly equal constitutional weight.

This conclusion need not trouble us too much, however, because the key question in most cases would be the respective burdens that alternative resolutions of the case would place on the rights at issue. This question could only be answered through a fact-specific inquiry into the practical effects of particular results. Such an inquiry, too, may be problematic, but no more so than the weighing of governmental interests against individual rights that is contemplated in ordinary individual rights cases under current doctrine. Where the balance of rights is a close one, however, judicial balancing may be too open ended and place governments in the untenable position that whichever way they resolve conflicting rights claims, they may be deemed to have acted unconstitutionally if the courts determine that the balance should have been struck differently.[57]

To the extent that explicit weighing is problematic and places the government in a difficult position, an alternative approach might be to defer to the government's resolution of the competing individual rights claims, relying on the political process to draw an appropriate balance.[58] In the typical individual rights claims, the government asserts its own (i.e., public) interest in defense of any action burdening constitutional rights. In such cases, the government is acting as a "judge in its own cause," who might be expected to have some bias in favor of its own interests. In contrast, when the government resolves conflicting individual rights claims, it is acting as a neutral mediator between the conflicting private claims to constitutional protection. Thus, its resolution of the claims is arguably entitled to more deference than in the usual case. Under this approach, the Court would avoid the difficult task of balancing rights claims by allowing another governmental institution to draw the balance, and, coincidently, the government would be given leeway instead of

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being placed between a rock and a hard place. While this approach thus has some advantages, it is also problematic.

First, the difference between the usual individual rights case and cases of conflicting rights should not be overstated in this context. The assumption that the government has an "interest" that it pursues is essentially a fiction; the real interests asserted in these cases are "public" interests. Thus, any time the government acts to further a public interest in a way that burdens individual rights, it has essentially drawn a balance between conflicting private interests: those of the "public" that benefits from government action and those of the individuals who claim their constitutional rights have been violated. Judicial review in such cases is premised on the recognition that the political process may not protect adequately the individual rights at stake. Likewise, the political process cannot assure an impartial resolution of conflicting rights claims. Rights asserted by politically unpopular groups, such as the Klan in *Pinette*, may be discounted by the government when resolving such claims, and any rule of deference to the political resolution of conflicting rights claims must account for the possibility of such a process failure.

Second, deferring to the political process seems inconsistent with the central role of the judiciary "to say what the law is."[59] The definition, articulation, and weighing of constitutional rights is an essential component of the judicial function. To delegate this task to the political process through a rule of deference is arguably an abdication of judicial responsibility. Conversely, there is no reason to suppose that the political resolution of such cases will be any better than a judicial one. Indeed, politicians typically lack the training, temperament, and process for careful deliberation over matters of constitutional rights.

[T]he potential for a conflict with other rights claims should not affect the application of doctrine to the rights asserted.

Beyond the Definitional Approach

In light of the foregoing considerations, it seems to me that conflicting rights claims should be evaluated under a three-step process that incorporates definitional analysis, balancing, and deference to the political process. The first step would be to determine whether the constitutional values at stake warrant recognition of either or both of the rights claimed in the particular case under the doctrinal construct that applies to each of the claimed rights. Each of the asserted rights should be evaluated independently of the other; that is, the potential for a conflict with other rights claims should not affect the application of doctrine to the rights asserted.[60]

If both constitutional rights claims warrant recognition, the Court should then determine whether the proper resolution of the competing claims is clearly indicated by the relative constitutional weight accorded to the particular interests at issue and the degree to which those interests would be burdened or otherwise engaged on the facts of the case. This weighing, of course, would not be easy and the result often would hinge on the values of the Justices. But this is not really that different from current practice (in which the balancing of interests is often hidden) and has the advantage of providing a more direct and realistic explanation of the result in a given case.

Finally, if the analysis of the competing claims does not provide a clear answer as to which should have priority, then the Court should defer to the political resolution of those claims, at least in the absence of any evidence that there has been a political process failure. In these circumstances — where constitutional considerations suggest that competing constitutional claims are of essentially equal weight — political resolution of the conflict is appropriate. It would not be an abdication of the judicial function because there is an absence of judicially discoverable and manageable standards.[61] Moreover, such a resolution would give the government some breathing room in these difficult cases, avoiding the problem (noted by Justice Scalia) of placing the government between a rock and a hard place. If, however, it appears that the political process has failed and the political resolution of the competing rights reflects the exclusion from the process of those whose rights are subordinated, then courts should intervene.

Applied to *Pinette* and the problem of access to a public forum for the private placement of religious symbols, the analysis would produce the following results. On the facts in *Pinette*, the analysis would generally favor the speech rights of the Klan, but not for the reasons advanced by any of the Justices in the majority.[62] The key here is that the Board had previously approved the private placement of a menorah on the same square. This factor is potentially relevant at all three steps of the analysis. At the definitional stage, it suggests that there were no Establishment Clause rights at issue in the case because the Board's assertion of those rights was merely pretextual. If the Board were truly concerned with the constitutional implications of apparently endorsing religion, then these same concerns would have required it to deny the placement of the menorah. The distinction drawn by the Board suggests that the Board's denial was in fact based on opposition to the Klan's political views.

One might defend the differential treatment of the menorah and the cross in Establishment Clause terms, however, in the sense that the religious symbolism of the cross is more dramatic

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and more coercive in light of its history and the status of Christianity as the majority religion. Even accepting that such an argument is enough to satisfy the definitional inquiry, at the next step the balance of constitutional interests clearly favors the speech rights of the Klan. Although the Constitution draws no clear preference between speech and Establishment Clause rights, on the facts (assuming the placement of the menorah) the speech interests are particularly strong and the Establishment Clause interests relatively weak. Regardless of the justifications for treating the menorah and cross differently, this differential treatment is viewpoint discrimination, which represents the most serious encroachment on free speech values.[63] Conversely, the placement of the menorah certainly attenuates any Establishment Clause claims, even if they are valid.[64] These factors, coupled with the availability of less restrictive alternatives to limit the message of endorsement sent by the placement of the cross, suggest to me that the clear weight of constitutional interests favors placement of the cross.

Finally, one might view the distinction drawn between the placement of the menorah and the cross as evidence of a process failure. The analysis here would be similar to the pretext point outlined above. Where the means chosen to effectuate a government purpose do not "fit" with the asserted purpose, that may be evidence of a process failure.[65] The line drawn in *Pinette* between the menorah and the cross does not fit the asserted Establishment Clause purposes because it is "under inclusive"; that is, if the Board wished to avoid Establishment Clause problems, it would refuse to place any religious symbols, not just the cross.

Insofar as this discussion suggests that I would reach the same result as the Court in *Pinette*, one might wonder whether the suggested analysis would be any improvement on the actual opinions in the case. The difference between the two approaches, however, is illuminated if one considers a case where privately placed religious symbols of all kinds would be excluded from a public forum. Under the analysis of the plurality (whether the Scalia plurality, the O'Connor concurrence, or the Souter concurrence), the same result would obtain in such a case as in *Pinette*. Justice Scalia's per se rule would apply, Justice O'Connor would still view the Establishment Clause interests in the case as limited to reasonable members of the community, and Justice Souter would still require the pursuit of less restrictive alternatives.

Under my analysis, however, deference to the political process would be appropriate. First, at the definitional level, there would be both free speech and Establishment Clause rights at issue (at least until such time as the Court expressly repudiates the effects test). Second, constitutional considerations would not yield a clear preference for either set of rights. Contrary to the assumption of all the Justices, I would not assume that valid Establishment Clause interests "trump" the free speech rights at issues. One might as easily argue that the speech rights should supersede even otherwise valid Establishment Clause claims, and (while I have not exhaustively researched the historical materials) there is nothing of which I am aware that would suggest the Framers contemplated that one or the other of these rights were intrinsically more valuable in constitutional terms. Once the distinction between the menorah and the cross is removed, moreover, I do not believe that either constitutional claim is clearly more weighty on the facts. The free speech claim is somewhat weakened if only a "subject matter" rather than a viewpoint-based restriction is at issue. Conversely, if the Establishment Clause claims are not weakened by the placement of the menorah, the message of endorsement — even with a disclaimer — imposes a significant burden on the interests protected by the Clause. Under these circumstances, I would defer to the political process in the absence of evidence of a process failure. On the hypothetical facts, the differential treatment that suggests a process failure is no longer present and, absent some other evidence of failure, there is no reason to suspect the political resolution of the question. Thus, the state would be permitted to either allow the private placement of all religious symbols or exclude them all.

Conclusion

In a complex society governed by the rule of law in which constitutional rights are recognized, it is inevitable that these rights will at times come into conflict. The choice is not between resolving or not resolving the conflicts, but how to resolve them. Yet when confronted with conflicting individual rights claims, as in *Pinette*, the Supreme Court has shown a marked propensity to rely on doctrinal and procedural rules that divert attention from the underlying conflict and resolve the case on the basis of considerations that are not central to the underlying constitutional values or how those values play out on the facts of a given case.

The resolution of cases on such a basis may yield "correct" answers. Indeed, one has the suspicion that in cases like *Pinette*, the Justices' positions may be driven by their intuitive judgment regarding the respective weights of the constitutional interests advanced by the parties. But this means that the opinions of the Justices are unconnected to the real issues in the case at best and intellectually dishonest at worst. In any event, they do little to advance our understanding of the constitutional principles at stake or to provide useful guidance for resolving other competing rights claims in future cases.

I believe that it is important for judges generally, and Supreme Court Justices in particular, to give a candid, direct, and complete account of the reasons for their decisions. As Alexander Bickel has suggested, the legitimacy of the judiciary ultimately depends upon its distinctive capacity to deliberate

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about essential matters of first principle.[66] Before the Court can deliberate about matters of first principle, it must realistically assess how those principles are engaged on the facts of a given case. Judged against this standard, the decision in *Pinette* must be regarded as a failure.

Notes

*The author would like to thank David Gottlieb, Flip Kissam, Steve McAllister, Peter Schanck, and Tom Stacy for helpful comments on an earlier draft.

1. 115 S. Ct. 2440 (1995).
2. There was some dispute in the case as to whether this was the "real" reason for the denial of access or whether the Board's denial was in fact based upon its opposition to the Klan's political views, but the case was presented on the Establishment Clause ground and the Court accepted it as such. *See id.* at 2445 (plurality opinion); *id.* at 2450-51 (Thomas, J., concurring). For purposes of this essay, I too will evaluate the Board's expressed concern for not violating the Establishment Clause.
3. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
4. *See, e.g.*, *Pinette*, 115 S. Ct. at 2446.
5. *See* Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993) (school district's refusal to allow private religious groups to use school facilities made available to other civic groups violated free speech rights of religious groups even if facilities were not a public forum); Widmar v. Vincent, 454 U.S. 263 (1981) (university's refusal to allow student religious groups to use facilities generally available to student groups violated the free speech rights of those religious groups).
6. Justice Scalia was only able to obtain the votes of Chief Justice Rehnquist and Justices Kennedy and Thomas for the key portions of his opinion. *Pinette*, 115 S. Ct. at 2444. Justice Thomas also wrote a concurring opinion. *Id.* at 2450. Justice O'Connor wrote a separate concurring opinion advancing a different rationale for the result, which was joined by Justices Souter and Breyer, *id.* at 2451, and Justice Souter in turn wrote a separate opinion joined by Justices O'Connor and Breyer. *Id.* at 2457. Justices Stevens and Ginsburg each dissented in separate opinions. *Id.* at 2464 (Stevens, J., dissenting); *id.* at 2474 (Ginsburg, J., dissenting).
7. There was, of course, some doctrinal complexity because the case involved the intersection between public forum and Establishment Clause doctrine. Moreover, although the law respecting access to a public forum is fairly clear, there is some dispute within the Court concerning the proper standards to apply in determining whether government conduct constitutes an establishment of religion. *See infra* notes 27-29 and accompanying text. Nonetheless, seven of the nine Justices agreed on the result in the case. Indeed, Justice O'Connor indicated that under her approach she would be unlikely ever to reach a different result from the plurality "where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly." *Id.* at 2453.
8. *See infra* notes 45-54 and accompanying text (discussing other examples of conflicting rights cases).
9. For further discussion of the *Pinette* facts, see Phillip Kissam, *Aesthetics of the Cross: Competing Interpretations of the Ku Klux Klan Cross in Capitol Square Review and Advisory Board v. Pinette*, KAN. J. L. & PUB. POL'Y, Spring 1996.
10. Technically, the Board did not assert directly the rights of these third parties, and one might question whether the Board had standing to do so. Instead, the Board asserted a governmental interest in not violating the Establishment Clause. But this interest depended in turn on whether anyone's Establishment Clause rights would have been violated by the placement of the cross, and the case could not be resolved without considering those rights.
11. Both the district court and the court of appeals concluded that the square was a public forum, Pinette v. Capitol Square Review and Advisory Bd., 844 F.Supp. 1182, 1184 (S.D. Ohio 1993); Pinette v. Capitol Square Review and Advisory Bd., 30 F.3d 675, 678 (3d Cir. 1994), and the Supreme Court accepted that conclusion. 115 S. Ct. at 2446.
12. *Pinette*, 115 S. Ct. at 2446.
13. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (2d ed. 1988).
14. *Pinette*, 115 S. Ct. at 2446 (Scalia, J.) (noting parenthetically that "a ban on all unattended displays, which did not exist here, might be one such [permissible content neutral restriction]").
15. *Id.* at 2444. There was also a state-sponsored lighted Christmas tree. *Id.*
16. *See, e.g.*, TRIBE, *supra* note 13, at § 12-2.
17. *E.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
18. *See, e.g.*, Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (private placement of creche in county courthouse constituted an impermissible government endorsement of religion). *But cf.* Lynch v. Donnelly, 465 U.S. 668 (1984) (municipal display of creche did not constitute endorsement of religion because in context creche celebrated secular aspects of Christmas season).
19. 115 S. Ct. at 2474 (Ginsburg, J., dissenting).
20. *Id.* at 2462 n.2 (Souter, J., concurring) (relying on *Allegheny*).
21. *See infra* notes 25-27.

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22. *See id.* at 2446 (this portion of the plurality opinion was also joined by Justices O'Connor, Souter, and Breyer); *id.* at 2469 (Stevens, J., dissenting). Justice Ginsburg did not expressly approve the majority's statement of public forum doctrine in her dissent, but neither did she question it. *See id.* at 2474-75.
23. The plurality rejected the "endorsement" test applied by the concurring and dissenting opinions, but only because it erected a per se rule that permitting a private display on a public forum can never constitute government endorsement of religion. *See infra* notes 32-39 and accompanying text.
24. 115 S. Ct. at 2448-49 (plurality opinion) (arguing that the possibility an observer might mistakenly interpret the proximity of the cross to the seat of government as government endorsement is irrelevant so long as the government does not in fact favor religious speech); *id.* at 2454-56 (concurring opinion of O'Connor, J.) (arguing that even if those unfamiliar with the history and background of the public forum in question might reasonably believe that the government had endorsed a display, endorsement should be evaluated from the perspective of a reasonable observer familiar with the community); *id.* at 2466-69 (Stevens, J., dissenting) (arguing that placement of cross on public property and proximity to capitol would lead a reasonable observer to infer government endorsement); *id.* at 2674-75 (Ginsburg, J., dissenting) (same).
25. Although Justice Thomas joined the plurality, he also authored a separate concurring opinion that cast doubt on the religious content of the Klan's display of the cross, emphasizing the historical use of the cross by the Klan as a symbol of oppression and hate. *Id.* at 2450. This approach, like that of the plurality, avoids any conflict between constitutional rights by eliminating the Establishment Clause from consideration and treating the denial of access as based on the political, rather than religious, content of the message. Ironically, interpreting the cross as a hateful, negative message rather than a positive affirmation of religion would have made it easier to find in favor of the Klan.
26. The plurality reasoned that this principle had been established by the prior case law, *id.* at 2447-49, while the concurring and dissenting Justices concluded that prior decisions required a case specific inquiry into whether a particular placement constituted an endorsement of religion. *Id.* at 2452-53 (O'Connor, J., concurring); *id.* at 2458-61 (Souter, J., concurring); *id.* at 2471 (Stevens, J., dissenting).
27. 403 U.S. 602 (1971).
28. As Justice Souter's concurrence points out, "effects matter to the Establishment Clause," because they may send a message that nonadherents to a particular religion are disfavored members of the political community. 115 S. Ct. at 2458-59 (Souter, J., concurring).
29. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2149-50 (1993) (Scalia, J., concurring) (arguing for repudiation of the *Lemon* test); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting).
30. *See supra* note 26.
31. *See* 115 S. Ct. at 2452-53; (O'Connor, J., concurring) *accord id.* at 2458-61 (Souter, J., concurring).
32. *See id.* at 2452 (O'Connor, J., concurring).
33. *Id.* at 2456 (O'Connor, J., concurring).
34. *Id.* at 2455 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 485 U.S. 668, 690 (1984).
35. *See id.* at 2454-56 (O'Connor, J., concurring).
36. *See id.* at 2455.
37. *Id.* at 2457-64 (Souter, J., concurring).
38. *Id.* at 2458-61 (Souter, J., concurring).
39. *Id.* at 2461-62 (Souter, J., concurring).
40. *See supra* note 20 and accompanying text.
41. Thus, for example, relegating private displays to a limited area of the square would reduce the impact of the Klan's message and possibly its audience as well.
42. *See Pinette*, 115 S. Ct. at 2464-74 (Stevens, J., dissenting).
43. *See id.* at 2474-75 (Ginsburg, J., dissenting).
44. *Id.* at 2469 (Stevens, J., dissenting). Although Justice Ginsburg did not make this point explicitly, it is implicit in both her reasoning and result. This assumption was accepted by the plurality and concurring Justices as well. *Id.* at 2446 (plurality opinion); *id.* at 2457 (O'Connor, J., concurring). None of the Justices explained this assumption and only the plurality cited any authority for it. *See id.* at 2446 (citing *Lamb's Chapel* and *Widmar v. Vincent*). But neither of those decisions provide any further explanation for this result. In *Widmar*, the Court without elaboration simply stated that "[it] agree[d] that the interest . . . in complying with . . . constitutional obligations may be characterized as a compelling interest," Widmar v. Vincent, 454 U.S. 263, 271 (1981), and *Lamb's Chapel* quotes *Widmar* without further discussion. Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2148 (1993).
45. Another, high profile case that might be viewed in these terms is Roe v. Wade, 42 U.S. 113 (1973), where the Court rejected the claim that the fetus/unborn child is a person within the meaning of the Fourteenth Amendment. If the unborn child/fetus is a person, as abortion opponents contend, then abortion is essentially a problem of competing rights: the mother's right of privacy is pitted against the child's right to life. In contrast to *Roe*, for example, the German Constitutional Court concluded that the child has a constitutionally protected right to life and explicitly balanced that right against the mother's countervailing right. By concluding that the fetus/unborn child is not a person, the United State Supreme Court avoided having to balance these competing rights claims. Note that while such a balance might appear automatically to favor the child, as the

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German Constitutional Court concluded, one might defend the result in *Roe* even on the assumption that the fetus is a person. *See* Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

46. The caselaw and commentary on the potential conflict between the Establishment and Free Exercise Clauses is too voluminous to canvass here. Some helpful discussions of the problem include Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

47. For example, the entire law of nuisance is essentially about resolving the conflicting property rights of owners and involves a weighing of those interests in individual cases.

48. Engel v. Vitale, 370 U.S. 421 (1962); *see also* Lee v. Weisman, 505 U.S. 577 (1992) (invalidating prayer at high school graduation ceremony).

49. The case law is unclear on this point. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court invalidated a "moment of silence" statute because the legislative background clearly revealed that its purpose was to promote prayer in the school. But many of the Justices appeared to acknowledge that a more neutral moment of silence that could be used voluntarily by students for purposes of prayer would not violate the Establishment Clause. Indeed, such a result would appear to be compelled by *Pinette*, *Lamb's Chapel*, and *Widmar*.

50. *See generally* TRIBE, *supra* note 13, at §§ 18-1 to 18-7.

51. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); David Pickle, Comment, *State Court Approaches to the State Action Requirement: Private Rights, Public Values, and Constitutional Choices*, 39 KAN. L. REV. 495 (1991).

52. 407 U.S. 163 (1972). The Court held, however, that insofar as the state licensing regime required the club to follow its racially discriminatory bylaws, there was state action. The solution to this problem was not to strike down the bylaws, but to enjoin the enforcement of the state's regulations requiring compliance with the bylaws. This was, of course, a Pyrrhic victory for the plaintiff since there was no indication either that the club wanted to admit racial minorities or that the state would have sought to require the club to comply with its bylaws had it decided to admit minorities.

53. *Id.*

54. The question of when, if ever, the Constitution imposes affirmative duties on government is a controverisal one, and the Court has been particularly reluctant to recognize any such duty. *See, e.g.*, Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) (no constitutional duty to prevent private abuse of a child by his parent). But that reluctance should be expressed directly, rather than through the distorted lens of the state action requirement.

55. *See* Chemerinsky, *supra* note 51, at 540 (noting that the state action doctrine always protects the rights of the challenged actor).

56. Notwithstanding the Court's general reluctance to recognize affirmative duties, the Equal Protection Clause may require affirmative action to protect minorities. Indeed, the language of the Clause is compatible with affirmative duties, since "protection" is an affirmative act. Thus, the question of whether the state could grant liquor licenses to racially discriminatory private clubs without requiring them to abandon their racially discriminatory practices certainly warranted some discussion on the merits, rather than to be dismissed summarily because there was no state action.

57. In *Pinette*, Justice Scalia criticized the concurring Justices' case-by-case application of the endorsement test because it imposed just such a dilemma on government and defended the adoption of a per se rule that allowing access to a public forum can never violate the Establishment Clause on the ground that it avoided the dilemma. *See Pinette*, 115 S. Ct. at 2449.

58. Such a solution to the problem of access to schools (addressed in *Widmar* and *Lamb's Chapel*) is effectively advanced in Geoffrey R. Stone, *The Equal Access Controversy: The Religion Clauses and the Meaning of "Neutrality,"* 81 NW. U. L. REV. 168, 168 (1986), which argues that the Constitution neither requires schools to grant or deny access to religious groups, leaving "public schools to decide for themselves whether to grant religious groups equal access to school facilities." A similar result has been achieved in practical effect respecting private groups' access to shopping malls for purposes of engaging in expressive activities. Under Hudgens v. NLRB, 424 U.S. 507 (1976), there is no First Amendment right of access to a shopping mall for purposes of engaging in expressive activity because the mall is private property and there is therefore no state action. On the other hand, in Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), the state may require the mall owner to allow access for such activity without violating the mall owner's property rights under the Takings Clause. Thus, the state is free to choose whether to grant or deny access. This result is fully consistent with the pattern described in this essay, because it was achieved by *denying* that either the prospective speakers or the mall owner had any constitutionally protected right at stake, rather than by acknowledging that there are in fact competing rights.

59. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

60. It may not be easy, of course, to ignore the implications of recognizing one right for other constitutional rights, but every effort should be made to do so lest the circumstance of a potential conflict lead to a distortion of doctrine.

61. The lack of judicially discoverable and manageable standards is one basis for applying the political question doctrine,

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see Baker v. Carr, 369 U.S. 186, 217 (1962), and is consistent with *Marbury v. Madison* because judicial review rests on the courts' obligation to follow the Constitution as superior law in any case where it conflicts with legislative action. If the Constitution does not provide any standard to apply, then there is no basis for the exercise of judicial review.

62. There is, however, some affinity between my analysis and that of Justice Thomas. *See supra* note 6.

63. Thus, for example, if the government has opened a forum to the public for some limited purposes, it may impose reasonable subject matter restrictions designed to preserve the property for its intended use, but it may not impose viewpoint based restrictions. *See, e.g.*, Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 800 (1985).

64. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989) (striking down free standing display of a nativity scene on main stairway of county courthouse but upholding the display of a menorah placed next to a Christmas tree as a salute to liberty).

65. *See, e.g.*, Richard E. Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. LAW REV. 329, 427-29 (1995).

66. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

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