

THE JURISPRUDENCE OF
COLLIDING FIRST AMENDMENT INTERESTS:
FROM THE DEAD END OF NEUTRALITY TO THE
OPEN ROAD OF PARTICIPATION-ENHANCING REVIEW

Gregory P. Magarian *

First Amendment interests in both speech and religion often collide with one another. A political activist claims a free speech interest in the right to purchase advertising time on a television network, while the network claims a free speech interest in its decision not to sell the time. A religious enclave claims a free exercise interest in having a dedicated public school district, while its neighbors claim a nonestablishment interest in the government's not extending the group special treatment. In this article Professor Magarian examines the phenomenon of colliding First Amendment interests, explains and critiques the Supreme Court's failure to acknowledge and resolve First Amendment collisions, and proposes a new theoretical basis for resolving them: participation enhancing review. The article first catalogues Supreme Court cases that involve colliding First Amendment interests, including expressive access, religious accommodation, and religious speech disputes. The Court avoids confronting First Amendment collisions through two techniques: denial that one or the other interest exists or matters, and deference to elected officials' balancing of the competing interests. The Court's approach embodies a strong posture of judicial neutrality, based on the concern that substantive resolution of First Amendment collisions would interfere with elected officials' policy-making discretion. Professor Magarian contends that the Court disserves democracy when it abrogates its duty to construe and enforce the critical

© 2006 Gregory P. Magarian. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format, at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision and copyright notice.

* Professor of Law, Villanova University. Thanks to Mike Carroll, Ellen Goodman, Michael Moreland, Christina Wells, and workshop participants at the University of Missouri-Columbia School of Law for helpful comments on an earlier draft.

protections of the First Amendment. He proposes substantive resolution of First Amendment collisions under the theory of participation enhancing review, a variation on the familiar theory of representation reinforcing review. Representation reinforcement theory roots judicial enforcement of constitutional rights in democratic principles. Representation reinforcement, however, cannot justify substantive resolution of First Amendment collisions, because the theory rests on a formal account of democratic participation that does not encompass First Amendment collisions. Participation enhancing review, in contrast, rests on a substantive account of democratic participation, which would commit First Amendment doctrine to protecting the inclusive and informational attributes of democratic discourse. Such an approach would lead courts, in analyzing First Amendment collisions, to emphasize the distinctive value for democracy of expressive dissension and religious pluralism.