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# Standing on Holy Ground: How Rethinking Justiciability Might Bring Peace to the Establishment Clause

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# STANDING ON HOLY GROUND: HOW RETHINKING JUSTICIABILITY MIGHT BRING PEACE TO THE ESTABLISHMENT CLAUSE

JOHN M. BICKERS\*

## ABSTRACT

The Establishment Clause is home to both procedural and substantive disorder. Particularly when evaluating religious speech by the government, the Supreme Court has applied a number of distinct tests, with varying degrees of strictness. There has never been an overarching principle for determining which test would appear at which time; commentators, and occasionally the Justices themselves, have suspected that desired results drove the choice of tests. At the same time, the Court has articulated a series of requirements necessary for a plaintiff to have standing to challenge government action, only to ignore them in government religious speech cases. The resulting lack of clarity leaves lower courts to their own devices in endeavoring to calm increasingly intense struggles. This article sets out a theory that altering one of these problems might correct the other. Analogizing to the Treaty of Westphalia's temporal limit on the airing of grievances, the Supreme Court could replace the current standing chaos with a limit to claims against current government activity. Such a rule would foreclose the ability of pro-religion forces to new domination of the public square, but would also prevent anti-religion forces from removing the vestiges of past government activity that are central to the American experience. Current doctrine ends with many of the same results, but doing so under the standing doctrine would remove the camouflage of alternative substantive tests. Simultaneously, it would decrease the incentive of participants in the national political struggle over religion to ever more hostile moves. The clarity this doctrinal shift would provide could help improve both religious freedom and peace in the national dialogue.

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I.	“THAT FOR MANY YEARS PAST, DISCORDS AND CIVIL DIVISIONS BEING STIR’D UP”: <sup>1</sup> THE MESS THAT IS THE ESTABLISHMENT CLAUSE	

The Establishment Clause<sup>2</sup> is a mess. It sometimes seems like everyone says so.<sup>3</sup> This is true in widely divergent areas in which the government and religion touch,

<sup>1</sup> Treaty of Westphalia (Oct. 24, 1648), available at [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp) [hereinafter Westphalia].

<sup>2</sup> “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I.

<sup>3</sup> Not literally everyone, of course. But Supreme Court Justices and academics alike have gotten in on the act. See, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (“our Establishment Clause jurisprudence is in hopeless disarray”). See also Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 24 (2010) (“the Court’s modern decisions interpreting those [religion] clauses have shed more heat than light on the discussion and have provoked ongoing controversy instead of any settled resolution of the issues”).

from public funding for religious schools<sup>4</sup> to government resolution of internal religious property and employment disputes.<sup>5</sup> When the government is itself speaking or acting in an arguably religious way, the chaos of the Establishment Clause doctrine is nothing short of remarkable.

It is possible that this doctrinal uncertainty is not all that bad. Much government religious activity could plausibly be characterized as *de minimis*, so any alleged constitutional injury is the equivalent of a flesh wound. Yet constitutional limitations on government religious speech and conduct—real or imagined—seem to be among the most contentious issues in our modern republic. This is potentially grave: widespread public hostility to what is believed to be bad constitutional practice can only undermine confidence in the Constitution, the government, or both.

In this paper I will suggest that Establishment Clause jurisprudence is rare in that it contains both procedural and substantive disorder. I will argue that the conflicting substantive “tests” for the Establishment Clause reflect a desire by courts, especially the Supreme Court, to reach solutions in difficult cases that seem instinctively correct.<sup>6</sup> In short, the Court will use the test that will allow them to reach the result that appears—somehow—to be the most appropriate for a particular matter in front of them. The article will then consider ways in which the procedural rules of the Establishment Clause, particularly the requirement of standing, represent such internal contradiction that they beg for reform.<sup>7</sup> Such reform is urgent if the Court is not to resolve the chaos of its own Establishment Clause jurisprudence by simply withdrawing from the field of battle, leaving it to political forces to determine the meaning of the Constitution in this area.<sup>8</sup>

The article offers a different way out. If it is correct that current Establishment Clause standing doctrine is hopelessly unmoored from any workable standards, it is possible that a procedural repair could offer some clarity to the substantive issues. I will suggest that this new standard be one derived from the Treaty of Westphalia, the 1648 agreement that ended the Thirty Years’ War. That treaty endeavored to achieve a spatial peace by imposing a temporal one; it articulated careful rules for religion and religious tolerance, but those rules were all designed to be forward-

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<sup>4</sup> The Supreme Court’s most recent foray into this particular area, *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011), resisted the temptation to provide clarity in the area by resolving the question as a matter of standing.

<sup>5</sup> Although this area is comparatively slightly more consistent, there are still significant disputes. Compare *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (courts may not interfere with decisions by hierarchical churches in ecclesiastical matters), with *Jones v. Wolf*, 443 U.S. 595, 602 (1980) (permitting courts to decide intra-church disputes upon the basis of “neutral principles of law,” and reading *Milivojevich* only as prohibiting courts not from intervening, but from deciding cases on the basis of religious doctrine or practice).

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part III.

<sup>8</sup> At least one Justice believes that has in fact happened. “[I]n the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling “excluded”; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

looking. The treaty drew a curtain over past activities, recognizing that settling future conflicts would be immeasurably more difficult if each argument tomorrow could include the refighting of matters settled yesterday. Justice Breyer has hinted at such a path to religious peace.<sup>9</sup> Unfortunately, because he sought a substantive path, his solution attracted no support among his colleagues. I will suggest that Justice Breyer's goal for the Establishment Clause—increasing tolerance and seeking religious peace—can be sought more effectively by redesigning the standing doctrine.

If the Supreme Court adopts a rule of standing that imposes a temporal peace, courts would continue to allow challenges to current forms of government religious speech. Complaints against speech of the past, such as long-standing monuments, could not proceed. This standing rule would be the equivalent of applying a restrictive rule for current government speech, but a much more permissive one for historical events. As the Court has done essentially this in recent years, there would be little change in the outcome of the few cases that make their way to the highest court. But the Court would no longer camouflage such decisions by using alternate substantive tests without clear reasons. This would leave lower courts and governmental bodies throughout the nation with a much clearer path before them. Real peace requires clarity, and clarity is possible through a change in the standing rules.

## II. "THE DISORDERS OF A LONG AND CRUEL WAR":<sup>10</sup> THE SUBSTANTIVE CHAOS OF THE ESTABLISHMENT CLAUSE

Since the Supreme Court first entered into the fray regarding the Establishment Clause, it has relied heavily on the proposition that the Constitution requires the government to remain neutral in the area of religion.<sup>11</sup> I have elsewhere argued that neutrality is impossible, at least in the area of government speech.<sup>12</sup> Whether that is correct or not, it is demonstrably the case that the quest for neutrality has led to the adoption of a variety of tests that are inconsistent at best and contradictory at worst.

This is especially true when the conduct being measured against the Establishment Clause is the government's own speech. Whether it is the display of religious iconography,<sup>13</sup> references to God in the Pledge of Allegiance,<sup>14</sup> or the hiring of chaplains to offer daily prayers,<sup>15</sup> the Supreme Court has moved from test

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<sup>9</sup> See *infra* Part V.A.

<sup>10</sup> Westphalia, *supra* note 1.

<sup>11</sup> This principle is often derived from the pronouncement of the Supreme Court that the core meaning of the Establishment Clause is that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

<sup>12</sup> John M. Bickers, *Of Non-Horses, Quantum Mechanics, and the Establishment Clause*, 57 U. KAN. L. REV. 371 (2009).

<sup>13</sup> See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

<sup>14</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

<sup>15</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

to test with inadequate explanations and inconsistent holdings. The entire area leaves lower court judges adrift,<sup>16</sup> unsure how to approach these problems,<sup>17</sup> and often left to their own devices in ways that even they find unappealing.<sup>18</sup>

#### A. *The Flawed Establishment Clause “Tests”*

Establishment Clause doctrines are constitutional orphans, unloved by even those who use them. Ever since Chief Justice Burger endeavored to impose a logical order on the smattering of diverse rulings that preceded him, justices<sup>19</sup> and scholars<sup>20</sup> alike have expressed displeasure over not only his proposed solution, but also every one offered in response to it. There may be some profit in quickly surveying Chief Justice Burger’s test, announced in the oft-mentioned (and oft-vilified) *Lemon v. Kurtzman*,<sup>21</sup> before proceeding to the other schemes for evaluating Establishment Clause cases that have been advanced to supplant or augment it. Each offers an array of failures of its own.

##### 1. *Lemon*

When plaintiffs challenged the augmentation of salaries of teachers in private schools in Pennsylvania and Rhode Island (and also textbook support in Pennsylvania),<sup>22</sup> the Supreme Court took the opportunity to try to bring order from the disorderly stare decisis that existed.<sup>23</sup> In a variety of decisions notable for their sweeping prose, the Court had held that the Establishment Clause allowed public school districts to pay the public transportation costs of students attending private (including religious) schools,<sup>24</sup> to loan secular textbooks to such schools without charge,<sup>25</sup> or to release public school students during the school day for instruction at

<sup>16</sup> Or even in Limbo. *See* *Green v. Bd. of Cnty. Comm’rs*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006) (“the state of the Establishment Clause jurisprudence is hardly Paradise. Indeed, it may be more akin to Limbo. Dante envisioned Limbo as a place of sorrow without torment, illuminated by the light of reason and home to virtuous pagans unfit to enter the kingdom of heaven. Yes, we are definitely in Limbo.”).

<sup>17</sup> *See, e.g., Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 500 (5th Cir. 2007) (DeMoss, J., concurring) (“The Supreme Court cannot continue to speak out of both sides of its mouth if it intends to provide real guidance to federal courts on this issue.”).

<sup>18</sup> *See, e.g., ACLU v. Mercer Cnty.*, 432 F.3d 624 (6th Cir. 2005) (“we remain in Establishment Clause purgatory.”).

<sup>19</sup> *See, e.g., McCreary Cnty. v. ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) (“the utter inconsistency of our Establishment Clause jurisprudence”).

<sup>20</sup> *See, e.g., Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test*, 86 MICH. L. REV. 266, 269 (1987) (“Although the *Lemon* test has survived for over a decade and a half, few have found the formulation satisfactory.”).

<sup>21</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>22</sup> *Id.* at 607.

<sup>23</sup> *Id.* at 612 (“Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years.”).

<sup>24</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>25</sup> *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

religious centers.<sup>26</sup> Cities might also grant tax exemptions for real property used solely for religious purposes.<sup>27</sup> On the other hand, the Court had held that the Establishment Clause prohibited religious instruction by members of the clergy in public schools.<sup>28</sup> The Constitution also forbade beginning each public school day with an official prayer<sup>29</sup> or with a reading of Bible verses,<sup>30</sup> and States could not outlaw the teaching of evolution.<sup>31</sup> The opinions offered an array of reasons why, but they lacked reference to each other in a way that would allow lower court judges to give confident answers to hard questions.

Just as the Burger Court was to attempt to do for obscenity<sup>32</sup> and abortion,<sup>33</sup> the Court sought to combine prior case law and its own constitutional philosophy into a clear, intelligible, and consistent doctrine. The opinion in *Lemon* viewed the precedents as offering three principles to courts in evaluating government compliance with the Establishment Clause. In its famous formulation, “the statute must have a secular legislative purpose . . . its principle or primary effect must be one that neither advances nor inhibits religion . . . [and it] must not foster ‘an excessive government entanglement with religion.’”<sup>34</sup>

Purpose and principle effect certainly made a logical pairing in the abstract; act and intent are routinely linked in the law.<sup>35</sup> Even from the initial announcement in 1971, the requirement that the behavior not excessively entangle government and religion seemed a little disconnected from the other two. The Court believed that it was required by precedent, though,<sup>36</sup> and it turned out to be the pivotal feature of the Pennsylvania and Rhode Island programs on which the Court was ruling.<sup>37</sup>

The opinion seems to carry a tone of confidence, a sense that the test would be a useful one. That confidence has proven to be ill-placed.<sup>38</sup> Nonetheless, it was a

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<sup>26</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>27</sup> *Walz v. Tax Comm’n*, 397 U.S. 664 (1970).

<sup>28</sup> *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948).

<sup>29</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>30</sup> *Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

<sup>31</sup> *Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>32</sup> *See Miller v. California*, 413 U.S. 15 (1973).

<sup>33</sup> *See Roe v. Wade*, 410 U.S. 113 (1973).

<sup>34</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

<sup>35</sup> *See, e.g.*, MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

<sup>36</sup> The quotation marks in that portion of the *Lemon* test are because that language is drawn verbatim from the Court’s approval, the previous year, of New York’s property tax exemption for places of religious worship. *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970).

<sup>37</sup> *Lemon*, 403 U.S. at 620-21 (“the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state.”).

<sup>38</sup> *See discussion infra* Parts II.A.2-II.A.5.

valiant effort to clarify a confusing doctrine.<sup>39</sup> *Lemon* bravely announced that there would be a new coherence to the world of church-state relations.

## 2. History

A decade later, though, that world had apparently changed, albeit with no fanfare. In 1983, the Supreme Court confronted the Nebraska legislature's practice of using public money to hire a chaplain to open each day with a brief devotional prayer.<sup>40</sup> Chief Justice Burger wrote the opinion in the case, concluding that the program did not violate the Establishment Clause because the practice of opening legislative sessions with prayer was "deeply embedded in the history and tradition of this country."<sup>41</sup> Although the majority almost laconically noted that the Eighth Circuit had found that the Nebraska practice violated all three parts of the *Lemon* test,<sup>42</sup> the opinion overturning that ruling made no use of that test at all.<sup>43</sup> To make matters worse, the majority opinion came from the pen of Chief Justice Burger, the author of the *Lemon* test.

The absence of *Lemon* in the *Marsh* recipe served an obvious purpose according to the skeptics of the majority opinion. The *Lemon* test, taken seriously, would have required the Court to prohibit the chaplaincy program. It borders on the incredible to ascertain a secular purpose for the hiring of chaplain whose only duty is to offer a prayer to and for lawmakers.<sup>44</sup> And while the primary effect of this small gesture may not have benefitted religion by successfully converting anyone, the dissent pointed out that the prayers "explicitly link religious beliefs and observance to the power and prestige of the State."<sup>45</sup> This linkage was heightened by the fact that a single preacher, from a single denomination of Christianity, had been the chaplain for sixteen years.<sup>46</sup> Finally, there was arguably an entanglement problem as well. As the dissent noted, the very decision to hire a particular chaplain from a particular faith involved the government in deciding which faiths were "suitable."<sup>47</sup>

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<sup>39</sup> It survives, commemorated not only by Justice Scalia's famed characterization of it as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," but in the fact that more than 1,700 cases have had to confront and construe it. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, A., concurring).

<sup>40</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>41</sup> *Id.* at 786.

<sup>42</sup> *Id.*

<sup>43</sup> Indeed, *Walz*, which had been so heavily relied on in formulating the *Lemon* test, *see supra* note 36, was now characterized as notable for the way in which it "considered the weight to be accorded to history." *Marsh*, 463 U.S. at 790.

<sup>44</sup> *See Marsh*, 463 U.S. at 797 (Brennan, J., dissenting) ("That the 'purpose' of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. 'To invoke Divine guidance on a public body entrusted with making the laws,' is nothing but a religious act").

<sup>45</sup> *Id.* at 798 (Brennan, J., dissenting).

<sup>46</sup> *Id.* at 823 (Stevens, J., dissenting).

<sup>47</sup> *Id.* at 799 (Brennan, J., dissenting). Justice Stevens also noted that the majoritarian faith for any given region would dominate such a selection process.



Pinned between the reasoning of an appellate court it was overturning and the attacks of the dissenters, the Court never sought to explain why those views of *Lemon* were wrong.<sup>48</sup> Neither did it repudiate the *Lemon* test. After noting the Eighth Circuit result, Chief Justice Burger simply ignored his own test of twelve years earlier. That decision may have been a particularly painful blow to *Lemon* because of its source, but it was certainly not to be the last event in what would become the perpetual abuse of *Lemon*.

### 3. Endorsement

When Justice Sandra Day O'Connor arrived on the Court, she brought with her an idea about the Establishment Clause that was distinct from *Lemon*. In her view, the real problem that the Establishment Clause was meant to prevent was the threat that religion would be made relevant in politics, creating increased difficulties in both areas. Her desire to preserve a religious peace led her to outline a new test, one that has garnered both admiration and hostility.<sup>49</sup>

The "endorsement test" she championed sought to prevent the government from "making adherence to a religion relevant in any way to a person's standing in the political community."<sup>50</sup> Justice O'Connor's goal was to prevent the government from sending "a message to nonadherents that they are outsiders . . . and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>51</sup> There is an undeniable appeal to this formulation: it calls out to the best angels of everyone's natures, and hearkens back to the oldest constitutional protection of religious liberty, the guarantee of Article VI that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."<sup>52</sup>

Although the Court never explicitly adopted the endorsement test as a substitute for *Lemon*,<sup>53</sup> it sometimes relied heavily on endorsement. Among the cases in which

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Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature.

*Id.* at 823 (Stevens, J., dissenting).

<sup>48</sup> The majority opinion in *Marsh* never directly engages the *Lemon*-based criticisms of the dissents.

<sup>49</sup> See, e.g., Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986). But cf. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 192 (1992) (the endorsement test "exacerbates religious division and discord by heightening the sense of grievance over symbolic injuries.").

<sup>50</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

<sup>51</sup> *Id.* at 688.

<sup>52</sup> U.S. CONST. art. VI.

<sup>53</sup> Indeed, Justice O'Connor herself seemed to view the test as replacing only the first two elements of *Lemon*, retaining the "excessive entanglement" prohibition as necessary to preventing the standing of members of the political community from being affected by their religion. See *Lynch*, 465 U.S. at 687-88.

it appears prominently are one prohibiting the addition of the words “or voluntary prayer” to an existing state statute authorizing a moment of silence in public schools “for meditation”<sup>54</sup> and another removing a crèche from a courthouse stairway.<sup>55</sup> The test’s apogee may have come in 2000, in a case in which the Court struck down a high school football pre-game prayer that was to be delivered by the winner of an election.<sup>56</sup> The Court used a variety of tests to find the practice unconstitutional, but it relied heavily on the idea that the Constitution prohibited the school from sending “the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community.’”<sup>57</sup> That the Court used other tests—generally including *Lemon*—is certainly true. It is noteworthy, though, that the endorsement test had become a part of the way to understand the Establishment Clause. Its repeated appearance suggests that the justices had begun to see it as a helpful guide to the Establishment Clause, especially in government speech cases, even though it was not destined to take a position as the “Grand Unified Theory” of the Establishment Clause.<sup>58</sup>

Quite probably there were few who thought that the Endorsement Test would become such a theory, effortlessly solving all establishment clause problems laid before it. Even in the more limited role it attained, however, it aroused objections. In a harsh critique of the test, Justice Kennedy outlined a series of noteworthy governmental religious activities: Presidential proclamations of Thanksgiving, legislative prayers (and even a National Day of Prayer), and the inclusion of “under God” in the Pledge of Allegiance.<sup>59</sup> He argued that these practices could not “withstand scrutiny under a faithful application of this [endorsement test] formula.”<sup>60</sup>

Perhaps defensively, Justice O’Connor responded that there were certain public acts that constituted only “longstanding government acknowledgements of religion” and not improper endorsement.<sup>61</sup> Labeling these acts “ceremonial deism,” she

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<sup>54</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (“In applying the purpose test, it is appropriate to ask ‘whether government’s actual purpose is to endorse or disapprove of religion.’”) (quoting *Lynch*, 465 U.S. at 690).

<sup>55</sup> *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (“In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had a place in our Establishment Clause jurisprudence.”).

<sup>56</sup> *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>57</sup> *Id.* at 309 (quoting *Lynch*, 465 U.S. at 688).

<sup>58</sup> The endorsement test’s creator herself introduced this idea into the Court’s Establishment Clause jurisprudence. See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 718 (1994) (O’Connor, J., concurring in part and concurring in the judgment) (“It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases under a particular Clause . . . . But the same constitutional principle may operate very differently in different contexts.”).

<sup>59</sup> *Cnty. of Allegheny*, 492 U.S. at 671-72 (Kennedy, J., concurring in the judgment in part and dissenting in part).

<sup>60</sup> *Id.* at 670.

<sup>61</sup> *Id.* at 630 (O’Connor, J., concurring in part and concurring in the judgment).

insisted that they “serve the secular purposes of ‘solemnizing public occasions,’ and ‘expressing confidence in the future.’”<sup>62</sup>

This is an odd and seemingly ad-hoc exception. It does not seem unreasonable to think that avowed atheists, and possibly polytheists, receive the message that they are outsiders when subjected to the sound of raised patriotic voices proclaiming their commitment to being “one Nation under God.”<sup>63</sup> Such a message might also reasonably be received when these nonadherents function in a nation which makes both Thanksgiving<sup>64</sup> and Christmas<sup>65</sup> national holidays, and in which the official motto declares the nation’s trust in the one God of the Pledge.<sup>66</sup>

Justice Kennedy’s question—why must objectors and dissenters be free from religion that alters their standing in the public square, unless the religion in question is “ceremonial deism”—has never been effectively answered. It cuts religious identity very thinly to suggest that nonadherents are excluded by the appearance of a crèche, but not by the legislative celebration of Christmas, or that “in God we trust” proclaimed on the coins makes no one feel like an outsider, but that similar words said before a Friday night football game do.

The ceremonial deism exception, ultimately, seems very much a functionalist device. Difficult to justify theoretically, it appears to rescue the endorsement test just when application of the test would yield discomfiting results. The existence of such an exception, like the non-use of *Lemon* in hard cases, demonstrates that it is not a test that even its proponents wish to rely on solely.<sup>67</sup>

#### 4. Coercion

Yet another test offered to combat the perceived failings of *Lemon* was one designed to protect all believers from coerced participation in religious activities.<sup>68</sup> Although it might be said that this was properly the focus of either the Free Speech Clause or the Free Exercise Clause rather than the Establishment Clause,<sup>69</sup> the justices who sponsored this view of the Establishment Clause spoke of the Framers’ desire to use the clause to protect something that was historically often called the

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<sup>62</sup> *Id.*

<sup>63</sup> 4 U.S.C. § 4 (2002); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (the argument that this language constituted religious indoctrination was raised by Michael Newdow in his suit against the public school his daughter attended).

<sup>64</sup> 5 U.S.C. § 6103 (1998).

<sup>65</sup> *Id.*

<sup>66</sup> 36 U.S.C. § 302 (2002).

<sup>67</sup> *But, cf.*, Joseph Blocher, *Schrödinger’s Cross: The Quantum Mechanics of the Establishment Clause*, 96 VA. L. REV. 51 (2010) (arguing that the endorsement test is valuable because it removes from judges the responsibility of determining the underlying social meaning of government religious speech).

<sup>68</sup> *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (“It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . .”).

<sup>69</sup> Intriguingly, Justice Kennedy has argued that the Free Exercise clause “has close parallels in the speech provisions,” but that the Establishment Clause “has no precise counterpart in the speech provisions.” *Id.* at 591.

“liberty of conscience.”<sup>70</sup> To require someone to attend worship service was obviously unacceptable, as was taxing him or her to support a religious activity.<sup>71</sup> On the other hand, if a public university provided funding for publication by a religious student group, observers would not conclude that the university was doing the talking, and thus there could be “no real likelihood that the speech . . . [was] being either endorsed or coerced by the State.”<sup>72</sup> Unhappy observers were always able simply to look away. This approach was typically paired with a requirement of nondiscrimination: if the government allowed a religious group to use a government program or facility, that program or facility had to be available to other, similarly situated religious groups.<sup>73</sup>

The reliance on “coercion,” even where accompanied by a role for “non-discrimination,” was ultimately to prove no more successful at unifying Establishment Clause thought than the *Lemon* test or the endorsement test had been. This was displayed decisively during what should perhaps have been coercion’s triumphant moment. For in relying on coercion to strike down the practice of inviting a religious speaker to give a non-sectarian prayer at an eighth grade graduation ceremony,<sup>74</sup> the Court aroused the wrath of a previous proponent of that very rubric. In dissent, Justice Scalia argued that coercion, within the meaning of the Establishment Clause, was that which was accomplished “*by force of law and threat of penalty.*”<sup>75</sup> Psychological or peer-pressure coercion was simply not sufficient, in Justice Scalia’s view, to constitute coercion in violation of the Establishment Clause.<sup>76</sup>

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<sup>70</sup> See, e.g., *The Commission of New Hampshire of 1680*, quoted in *Everson v. Bd. of Educ.*, 330 U.S. 1, n.6 (1947).

<sup>71</sup> Like so many other principles of modern Establishment Clause law, these ideas were given early voice in Justice Black’s list of “thou shalt nots” issued to the government in the seminal *Everson v. Bd. of Educ.*. See *id.* at 15-16 (“Neither a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church . . . or force him to profess a belief or disbelief in any religion . . . No tax in any amount, large or small, can be levied to support any religious activities . . .”).

<sup>72</sup> *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 842 (1995).

<sup>73</sup> Perhaps the easiest “least common denominator” to find agreement among Supreme Court Justices of diverse ideology is the principle of non-discrimination, from those who seek a powerful Establishment Clause to those who seek an Establishment Clause more accommodating toward expression of religion in the public square. Compare *Widmar v. Vincent*, 454 U.S. 263, 281 (1981) (Stevens, J., concurring in the judgment) (“[q]uite obviously, however, the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege.”) with *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“[t]he Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.”). All Justices seem agreed in principle that the government may not allocate benefits on the basis of faith. See *infra* Part II.A.5 (for a disturbingly discordant note in this symphony in the discussion of the “monotheism exception”).

<sup>74</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>75</sup> *Id.* at 640 (Scalia, J., dissenting).

<sup>76</sup> See *id.* at 642 (arguing that the Court’s error was in seeking a definition of coercion by reading Freud rather than the “disciples of Blackstone”).

This divide has brought much attention to the intricacies and failings of the coercion test.<sup>77</sup> For the purposes of this paper, it hardly matters which version of the test one uses. For whether one is concerned only with official punishment, or takes into account the group psychology accompanying the government action, it is difficult to believe that a serious argument exists that coercion should be the *only* test in areas of government speech challenged under the Establishment Clause.

A simple thought experiment demonstrates this. Imagine that a group of donors, troubled by what they perceive as the decline of religion in American society, raises money for a seventy-five foot tall cross. The cross will bear the following inscription, in letters three feet high, on its base: “Dedicated in honor of Jesus Christ, recognizing the American people’s united commitment to the teachings of the Prince of Ethics.”<sup>78</sup> The group wishes to install the cross on the National Mall, and enlists the help and support of a handful of key members of Congress. Those members add an amendment granting the group’s wishes to an omnibus budget bill. Other members may oppose this, but most do not wish to incur the electoral wrath that they fear will accompany a motion to remove the cross from the bill. The bill passes, and the cross is duly assembled.

Can it be that a giant symbol of a particular religion, declaring our nation’s religious unity as members of that faith, does not constitute an establishment of religion? Few who take the Constitution seriously would say so, and it is difficult to imagine a favorable result for this act were we able to put it before either the Framers of the Constitution themselves or the generation that adopted the Constitution. It certainly would fail both the *Lemon* and endorsement tests.

Yet it seems that it would pass the coercion test,<sup>79</sup> under either its force-of-law-and-threat-of-penalty or peer-pressure-and-psychological-coercion models. No one, after all, has to look at or admire any particular government monument. Because the money was private, no taxpayer support contributed to it. Because it is in neither a residential neighborhood nor a school, no one is captive in its presence. If the coercion test cannot give a reliable answer to such an extreme hypothetical, its usefulness in testing government speech under the Establishment Clause cannot be great.<sup>80</sup>

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<sup>77</sup> See, e.g., Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 483 (2009) (after reviewing the modern status of the test, Professor Strasser concludes that “it is simply unconscionable for the Court to offer such a confused and confusing jurisprudence.”).

<sup>78</sup> This rather rare title for Jesus of Nazareth seems to have first appeared in Supreme Court jurisprudence with the attempt of some Kentucky counties to post the Ten Commandments in their courthouses. See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 899 (2005). The title was used in a motion to adjourn the Commonwealth Legislature in 1993 in honor of Jesus in this capacity.

<sup>79</sup> See, e.g., Frederick Mark Gedicks, *Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance*, 46 WILLAMETTE L. REV. 691, 704 (2010) (“A statue of Moroni in a park owned and administered by an overwhelmingly Mormon city is clearly an endorsement of Mormonism by the city, but it is not coercive, and thus apparently not a constitutional violation under Justice Kennedy’s favored Establishment Clause test.”).

<sup>80</sup> This is not to say that proponents of the coercion test would vote to allow such a monument; virtually all are also advocates of a non-discriminatory, non-sectarian model of the Establishment Clause. A monument so obviously favoring a single religion would presumably incur their wrath as well. This mental experiment merely demonstrates that the

## 5. Monotheism

In the twin Ten Commandments cases of 2005,<sup>81</sup> a new theory appeared. Justice Scalia argued<sup>82</sup> that use of the Ten Commandments in American public spaces was permissible because they represented, not a particular sect that was receiving favored treatment, but rather an American tradition of support for monotheism.<sup>83</sup> Such a tradition, Justice Scalia proclaimed, was woven into our Constitutional fabric. He even allowed this rule to perform an exclusionary function: “it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”<sup>84</sup>

Onlookers might find themselves either horrified or pleasantly impressed by this characterization. For those who initially recoil from this formulation, one mitigating approach could conclude that this understanding of the Establishment Clause is a cousin, if not a sibling, of the ceremonial deism exception to the endorsement test. It appears to rely on historical tradition<sup>85</sup> and seems to stress a general popularity and inoffensiveness, just as the ceremonial deism exception did.<sup>86</sup>

On reflection, though, the “monotheism test” is actually quite different from the ceremonial deism exception. While ceremonial deism at least demands a broad level of inoffensive generality, the monotheism approach allows much more government speech that is sectarian, or at least limited to one or a few faiths. Despite Justice Scalia’s protestation that the Ten Commandments are, essentially, the same as ceremonial deism,<sup>87</sup> the same day he joined the opinion that acknowledged that “the Ten Commandments are religious—they were so viewed at their inception and so

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coercion test simply does not add any analytical value when considering a case of government monumental speech.

<sup>81</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005).

<sup>82</sup> *McCreary Cnty.*, 545 U.S. at 885 (Scalia, J., dissenting).

<sup>83</sup> *See id.* at 894 (“Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion.”).

<sup>84</sup> *Id.* at 893.

<sup>85</sup> *See* Kyle Duncan, *Bringing Scalia’s Decalogue Dissent Down From the Mountain*, 2007 UTAH L. REV. 287 (2007) (arguing that Justice Scalia is merely using the tradition of monotheism as a historical baseline, and thus deferring to legislatures the primary responsibility for determining the further development government religious speech).

<sup>86</sup> *McCreary Cnty.*, 545 U.S. at 894 (arguing that all three Abrahamic religions venerate the Ten Commandments and noting that “[t]he three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic.”).

<sup>87</sup> *See id.* (Justice Scalia argued that the embrace of the Ten Commandments made them “indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God.”).

remain.”<sup>88</sup> This list of ten rules is, of course, profoundly religious, and specific to particular faiths.<sup>89</sup>

Justice Scalia’s “monotheism test” makes much of a supposed unity of the three Abrahamic faiths, but he never fully explains why a particular version of these rules is acceptable under this rubric.<sup>90</sup>

As Justice Stevens pointed out in response, there is a complete and utter lack of evidence that the founding generation had a uniform view of what was meant by the phrase “establishment of religion.”<sup>91</sup> Some framers certainly sought a large role for religion in public life; others shunned it.<sup>92</sup> To pretend they had a common view “stretches the evidence beyond tensile capacity.”<sup>93</sup> Indeed, to the extent that some of the Framers and ratifiers sought an increased place for religion in American public life, it was not on behalf of some generic, murky monotheism. As Justice Stevens noted: “history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses.”<sup>94</sup>

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<sup>88</sup> Van Orden v. Perry, 545 U.S. 677 (2005) (reading the Commandments makes this unavoidably clear: the first four Commandments outline particular requirements of religious faith and practice).

<sup>89</sup> Indeed, there are sectarian differences that matter among the versions of the Commandments. See *id.* at 718 (Stevens, J., dissenting).

<sup>90</sup> In a fascinating footnote, Justice Scalia acknowledges that there is a potential limit to the posting of the Ten Commandments. The note rewards consideration in full:

This is not to say that a display of the Ten Commandments could never constitute an impermissible endorsement of a particular religious view. The Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative. Here the display of the Ten Commandments alongside eight secular documents, and the plaque’s explanation for their inclusion, make clear that they were not posted to take sides in a theological dispute.

*McCreary Cnty.*, 545 U.S. at 894, n.4.

Note that the last sentence is oddly disconnected from what precedes it. The choice of a particular version of the Ten Commandments would be prohibited, the Justice tells us, because that would be an endorsement of a sect. The display at issue was permissible, though, not because it did not pick a particular version of the Ten Commandments—which it of course did—but because it surrounded the commandments with “secular documents.” Thus in this footnote, he acknowledges as problematic an action that would violate Justice O’Connor’s endorsement test. He then turns, unironically, to the purpose prong of the *Lemon* test, as formulated in *Cnty. of Alleghany*, to save the display.

<sup>91</sup> *Id.* at 879.

<sup>92</sup> Some of the most important figures of our history might well fall into Justice Scalia’s category of “believers in unconcerned deities,” see FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 159-61 (2003) (identifying a list of Deists that includes Benjamin Franklin, Thomas Jefferson, and Alexander Hamilton).

<sup>93</sup> *McCreary Cnty.*, 545 U.S. at 879.

<sup>94</sup> *Id.* at 880. (Justice Stevens also quotes Justice Story, for whom the Establishment Clause was meant “not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects.” *Id.*).

This observation shows the real difficulty with the monotheism test. If a historical exception is carved out for monotheism—indeed, a monotheism seemingly limited to the three Abrahamic faiths—it is difficult to find either its historical roots or its contemporary stopping point. Justice Scalia’s spirited writing cannot overcome a complete lack of evidence that the mostly-Christian Framers uniformly saw themselves as coreligionists with Jews, to say nothing of Muslims. Those who sought a favored place for religion sought it for Christianity, not “monotheism.” If one allowed Justice Scalia’s test to be the standard, though, further thought experiments demonstrate the difficulty of accepting Abrahamic monotheism as a test. All three faiths feature angels and devils. Would a national monument praising angels for their help, or denouncing the works of devils, truly not violate the Constitution’s prohibition on a law respecting an establishment of religion?<sup>95</sup>

### B. Why the “Tests” Fail

#### 1. Neutrality is Impossible

It is possible, though, that such a test cannot exist. Since the proclamation in *Everson*, the Court has sought to impose a condition of neutrality in the area of religion as a primary mandate of the Establishment Clause.<sup>96</sup> I have argued elsewhere that it is a truth recognized from ancient times that something cannot be neutral between a thing and its denial: one cannot occupy the ground in between a horse and a non-horse, because no such ground exists.<sup>97</sup> Much the same could be true of government speech about religion. It may be that there is nothing wrong with the particular tests used by members of the Court that accounts for their failure. It may be impossible to find a neutral position between religion and non-religion because no such position exists. A court decision that allows government speech about religion favors religion; a court decision that forbids such speech favors non-religion.<sup>98</sup>

Some scholars who defend neutrality recognize this problem, but propose, as a baseline, that the government avoid religious speech.<sup>99</sup> In this way, they argue, the

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<sup>95</sup> See *supra* Part II.A.4 (as with the case of the giant cross I posit to test the limits of the coercion test, a prominent monument to angels may not trouble some readers. I recognize the danger of rhetorical questions. It remains my belief, though, that most readers, like most Supreme Court Justices, would find such a monument troubling).

<sup>96</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (“Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

<sup>97</sup> See Bickers, *supra* note 12.

<sup>98</sup> See, e.g., Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1842 (2009) (“If any interpretive question simply turns on a choice between secular individualism and religious communitarianism, then in any Establishment Clause controversy, the state is taking sides between the forces of progressivism and religious traditionalism.”).

<sup>99</sup> Professor Laycock’s substantive neutrality seems to require this result. See, e.g., Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 72 (2007) (arguing that monetary aid to religious schools is permitted by substantive neutrality’s protection of individual choice, but government religious speech is not).



government truly is able to avoid promoting either religion or non-religion.<sup>100</sup> The failure of this approach is that it could work in a hypothetical new country without any history. One can certainly imagine a place of deliberate settlement, such as a colony in space, in which the original inhabitants require their government to avoid all mention, favorable or unfavorable, of matters of religion.

That is not the United States, however, and this avoidance solution avoids no difficulties.<sup>101</sup> The historical reality is that the United States was settled by peoples who brought their religion with them<sup>102</sup> and conducted their self-governance accordingly. Over the centuries the American people have enacted religious mottoes for state government units,<sup>103</sup> erected religious monuments in public spaces,<sup>104</sup> and named cities after saints and divinities.<sup>105</sup> Many of those past acts of governmental communication remain: a requirement of avoidance, enforced seriously, would force the courts to remove those tangible reminders of the past.<sup>106</sup> Changing of the name of a city or removing a monument with a backhoe is not, in the eyes of many religious observers, neutral between religion and non-religion.<sup>107</sup>

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<sup>100</sup> The opposite view is taken by some other scholars. See, e.g., Richard M. Esenberg, *Must God Be Dead or Irrelevant: Drawing a Circle that Lets Me In*, 18 WM. & MARY BILL RTS. J. 1, 27 (2009) (“The point is not that the failure to include religious perspectives ought to be a constitutional violation, but that doctrine that prohibits, or significantly restricts, their inclusion will not be neutral as between them and competing secular perspectives.”).

<sup>101</sup> Indeed, one scholar has noted that all existing monuments have social lives and meanings, as well as legal ones, and uses that observation to argue powerfully for the continuation of the endorsement test. See Blocher, *supra* note 67.

<sup>102</sup> See, e.g., 3 FRANCIS THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA*, 7, 3802 (1909) (The Mayflower Compact saw the Pilgrims covenant “[i]n the Presence of God and one another,” agreement between the Settlers at New Plymouth. Even such “secular” colonies as Virginia brought with them the established Church of England, complete with a prohibition on the entry into the colony of those “suspected to affect the Superstition of the Church of Rome,” until they had sworn a loyalty oath, Second Charter of Virginia).

<sup>103</sup> See, e.g., *ACLU v. Capitol Square Rev. & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001) (the Establishment Clause is not violated by Ohio’s state motto, “With God, All Things Are Possible.”).

<sup>104</sup> See *Van Orden v. Perry*, 545 U.S. 677, 688-89 (2005) (listing of appearances of the Ten Commandments and other religious representations at the Supreme Court and in other government monuments and buildings around Washington, D.C.).

<sup>105</sup> This practice was most common in the Spanish colonies, accounting for the large number of “San” or “Santa” towns in the Southwest. Religious naming was not unknown in other parts of the country, though, and there is charm in the fact that one of the preeminent cases in Establishment Clause interpretation took place in a city called Providence. See *Lee v. Weisman*, 505 U.S. 577 (1991).

<sup>106</sup> See, e.g., *Robinson v. Edmond*, 68 F.3d 1226 (10th Cir. 1995) (Edmond, Oklahoma, required to remove Cross from one quadrant of city seal); *Webb v. Republic*, 55 F. Supp. 2d 994 (W.D. Mo. 1999) (Republic, Missouri, required to remove Christian fish symbol from city seal).

<sup>107</sup> Indeed, this may be why courts shy away from the result. Despite occasional changes to seals, I am aware of no compelled change to the name of any political subdivision.

## 2. Favoritism is Undesirable

But the situation grows worse when one examines the alternatives. If true neutrality between religion and non-religion is impossible, favoritism of one over the other strikes many of us as unwise,<sup>108</sup> and possibly dangerous.<sup>109</sup> A regime that allows for untrammelled government religious speech begins to look a great deal different from a tolerant pluralism. The presence of unmistakably religious imagery in official places makes most people so uncomfortable that even most groups proposing them do so under the color of an argument about history, philosophy, or a non-religion specific set of community values.<sup>110</sup> There are some Americans—there have always been some Americans—who see this nation as a proper venue for pronouncing their particular understanding of religious truth.<sup>111</sup> Such individuals remain a numerical minority, however, and must always contend against a devotion to the separation of religion and government that traces its life back to the beginning of our shared constitutional experience.<sup>112</sup>

If the theocratization of the United States is an unsettling image, most Americans are equally appalled by the prospect of triumphalist non-religion. The notion that all symbols of worship that have found their way into our public life must be removed

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<sup>108</sup> Griffin, *supra* note 3, at 25, “The environment now mistakenly favors religion instead of religious liberty and fosters wars of religion instead of peaceful tolerance.”

<sup>109</sup> One of Justice O’Connor’s final opinions in the Supreme Court expressed this concern eloquently: “when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring).

<sup>110</sup> Part of this, no doubt, is tactical. After the issuance of the *Lynch v. Donnelly* opinion, many a city or town lawyer likely advised her client by reference to the “reindeer rule,” reading that case to allow a crèche on public land only if it is neutralized by a sufficient number of secular symbols, such as Santa Claus and his reindeer team. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (listing the display that had a crèche as also featuring Santa and sleigh, a Christmas tree, “a clown, an elephant, and a teddy bear”). Commentators have generally focused on the reindeer for naming this particular facet of Establishment Clause doctrine, although there does seem to be some dispute about the number of reindeer required. Compare Gedicks, *supra* note 79, at 699 (“three-reindeer rule”), with Alberto B. Lopez, *Equal Access and the Public Forum: Pinette’s Imbalance of Free Speech and Establishment*, 55 *BAYLOR L. REV.* 167, 195 (2003) (“two plastic reindeer rule”).

<sup>111</sup> The apotheosis may have occurred in what would otherwise be characterized as an immigration or labor case. *Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892). In holding that a prohibition on importing foreign workers did not apply to an Episcopal minister, Justice David Brewer famously intoned that “no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people.” *Id.* at 465. Six pages of historical quotes about the importance of religion in American government later, Justice Brewer declared more specifically that “this is a Christian nation.” *Id.* at 471.

<sup>112</sup> See LAMBERT, *supra* note 92, at 238-39 (discussing the famous Article 11 of the Treaty with Tripoli of 1797, which declared that the U.S. government was “not in any sense founded on the Christian Religion”).

might well lead to a severe backlash.<sup>113</sup> We are a nation with two national holidays that speak to religion, one specifically (Christmas) and the other generically (Thanksgiving). We are a nation that still does little governmental business on the day of the week sacred to Christians (Sunday).<sup>114</sup> Indeed, although retail activities flourish on Sundays in ways they once did not, there are still whole industries such as banking in which it is virtually impossible to conduct business on that day.<sup>115</sup> Our communities and parks abound with statuary that has an at least oblique reference to religion. The notion of all of it being changed—the statues removed, the work schedules altered, Christmas cancelled—is a bugbear hauled out by some advocacy groups to make rhetorical points or raise funds.<sup>116</sup> That such changes are, to those not engaged in such advocacy, inconceivable only highlights the problem for constitutional law. Indeed, skeptics on the Court have occasionally accused their colleagues of dodging the hard conclusions of their tests, for example by not using *Lemon* or by finding a ceremonial deism exception, simply to avoid facing the popular wrath that widespread adoption of non-religion might trigger.<sup>117</sup> They may be right; even if they are not, there must be a better way for the Constitution to contend with this problem.

Avoidance of hard conclusions seems to be the primary distinguisher among the various tests used by the Court. The *Lemon* test and its endorsement gloss are ignored at times because they prohibit things the Court seems to wish to protect, such as legislative opening prayers<sup>118</sup> or a Ten Commandments monument.<sup>119</sup> The tests proposed as alternates, in turn, are not used consistently because they would

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<sup>113</sup> *McCreary Cnty.*, 545 U.S. at 893 (Scalia, J., dissenting) (arguing that the Supreme Court does not apply a neutrality standard faithfully in Establishment Clause cases because it could not do so “without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.”).

<sup>114</sup> *See, e.g.*, 5 U.S.C. § 5546 (1998), authorizing premium pay (25% above normal rates) for any federal employee required to work on Sunday, except those in other countries where a different day is designated as “the day of rest and worship.”

<sup>115</sup> Although few jurisdictions prohibit much other than alcohol sales on Sundays any more, standing Supreme Court precedents hold that such “blue laws” do not violate the Establishment Clause. *McGowan v. Maryland*, 366 U.S. 420 (1961). *See also Braunfeld v. Brown*, 366 U.S. 599 (1961).

<sup>116</sup> “We live in a culture increasingly hostile to Christians and their faith. America has become a nation where public school students are prohibited from praying, acknowledging their dependence upon God, and forming religious clubs, where schools and communities are challenged from displaying nativity scenes, the Ten Commandments, and other symbols of our religious and moral heritage.” *Defending the Religious Freedom of Christians*, THOMAS MORE LAW CENTER, <http://www.thomasmore.org/qry/page.taf?id=38> (last visited April 17, 2012).

<sup>117</sup> *McCreary Cnty.*, 545 U.S. at 890 (Scalia, J., dissenting) (“the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.”).

<sup>118</sup> *See supra* Part II.A.2.

<sup>119</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005).

allow things that the Court seeks to prohibit, such as mandatory school prayer<sup>120</sup> or the display of a crèche on a courthouse staircase.<sup>121</sup>

This dichotomy actually suggests hope. For if there is some divivable distinction between the times the Court backs away from the tests that are too harsh and the tests that are too yielding, we may be able to locate a principle that is just right. Before we can find that principle, we must turn next to the very odd procedural aspect of Establishment Clause challenges.

### III. “THE ORDINARY PROCEEDINGS OF JUSTICE”:<sup>122</sup> THE INCONSISTENCY OF CURRENT STANDING DOCTRINE AND THE ESTABLISHMENT CLAUSE

#### A. *The Usual Limit of Standing*

It is a commonplace to observe that the government must be neutral in religious matters. As we have seen, for government religious speech, this uncontroversial statement is also problematic. Likewise, it is a commonplace to note that a plaintiff seeking to change some government action must have standing to sue.<sup>123</sup> The Constitution has long been read to incorporate such a requirement in Article III.<sup>124</sup> This idea is unsurprising. Requiring trial participants to have a stake in the outcome seems fundamental to the traditional role of the common-law court.<sup>125</sup>

In the modern era, though, this requirement has moved from a common-sense remark about how courts work to a Great Truth, a holy relic fundamental to our very Constitution.<sup>126</sup> The Constitution nowhere contains the word “standing.” The

<sup>120</sup> The history test would arguably permit such prayers. See Brief for Respondents at 11, *Engel v. Vitale*, 370 U.S. 421 (1962) (No. 468), 1962 WL 115798 at \*11 (justifying the Regents’ Prayer on the basis of “the history and growth of the United States”).

<sup>121</sup> *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (the crèche does not coerce anyone because those who disagree with the messages of religious symbols are “free to ignore them, or even to turn their backs”).

<sup>122</sup> WESTPHALIA, *supra* note 1, at art. CXXIII.

<sup>123</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue.”). The test for standing—that a plaintiff have suffered an injury, traceable to the defendant’s conduct, and redressable by the court—has been aptly labeled “trivially easy to state but notoriously hard to apply.” Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 952 (2008).

<sup>124</sup> *Lujan*, 504 U.S. at 560 (“One of those landmarks, setting apart the “Cases” and “Controversies” that are of the justiciable sort referred to in Article III—“serv[ing] to identify those disputes which are appropriately resolved through the judicial process,”—is the doctrine of standing”) (citation omitted).

<sup>125</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). *But cf.* Cass Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 172-73 (1992) (arguing that the modern standing test is “a historical blunder”).

<sup>126</sup> One commentator has identified a persistent problem in the area being the lack of a consistent purpose. A group of justices (and hence, some opinions) take the purpose of the

requirement derives from the Article III definition of the jurisdiction of federal courts as “extending . . . [to] Cases . . . [and] Controversies.”<sup>127</sup>

The Cases and Controversies requirement might only mark part of the jurisdiction of federal courts, and not create a constitutional barrier to those courts. At least one Framers, of considerable fame, seemed to believe that this was so.<sup>128</sup> Nonetheless, the Cases and Controversies clause has become, over the centuries, a requirement that a suitor in court must have an “actual case”<sup>129</sup> to give him or her standing to sue. This standing requirement has in turn come to include, as a constitutional matter, the need for the plaintiff to show an “injury-in-fact,”<sup>130</sup> and perhaps even a “wallet injury.”<sup>131</sup>

While there are certainly cases involving the Establishment Clause that present themselves as very ordinary for standing purposes, in many cases it has been quite difficult to figure out exactly what “injury-in-fact” exists. The government’s decision to give money to “someone else,” but not to “me,” certainly seems like a “wallet injury.”<sup>132</sup> The government’s decision to have prayer in public schools, however, or position a crèche inside a courthouse,<sup>133</sup> seems not to take any recognizable amount of anyone’s money. To opine about the meaning of the Establishment Clause in these cases, the courts must first allow some plaintiff to sue.

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standing doctrine to be the separation of powers. Murphy, *supra* note 123, at 946. Another group (and hence, other opinions) believe that standing guarantees sharply adversarial proceedings by allowing into court only the right plaintiff. *Id.* at 947. Depending on which view one takes will go a long way toward determining one’s feelings about cases such as *Flast*, discussed *infra* Part III.B.

<sup>127</sup> *Lujan*, 504 U.S. at 559-60.

<sup>128</sup> As President, George Washington famously sent the Supreme Court a request for advice on a series of issues in international law. Chief Justice John Jay politely rebuffed the father of the country, arguing that because the three branches were “in certain respects checks upon each other,” the judiciary could not offer opinions outside of the Case or Controversy requirement. William E. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 648 (2007). Jay’s answer to the question—or refusal to answer the question—has received significant attention. See, e.g., *U.S. v. Sharpe*, 470 U.S. 675, 728, n. 17 (1985) (Stevens, J., dissenting). Oddly, less attention is usually given to the fact that Washington asked for the advice, indicating his belief that answering it would not be improper for the Court.

<sup>129</sup> *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

<sup>130</sup> *Lujan*, 504 U.S. at 560.

<sup>131</sup> *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment).

<sup>132</sup> Such cases pose their own standing limitations, however. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011), discussed *infra* notes 176-179 and accompanying text.

<sup>133</sup> Frequently such items were gifts from private organizations. See e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 587 (1989) (menorah displayed at City-County building was owned by private Jewish group). Even where government bodies spent money on them, the amounts were usually de minimis. See *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984) (crèche initially cost less than \$1,500, no maintenance funds were spent on it for a decade, and the cost to set it up and take it down each Christmas was about \$20).

As Professors Lupu and Tuttle have observed, “[i]t is unimaginable that courts would adjudicate claims of psychological injury by observers of other constitutional wrongs, such as cruel punishments or patently unfair trials.”<sup>134</sup> Yet courts in religious challenges have done precisely that.<sup>135</sup> The Supreme Court has done so in the Establishment Clause area in two ways: a carefully built exception in the doctrine for one type of case, and a studious looking-away for another.

### B. Paying Taxes and *Flast*

The doctrinal exception allowing standing in Establishment Clause cases was explained by the Supreme Court in *Flast v. Cohen*.<sup>136</sup> There, the Court announced a quite surprising principle. The Court said that a plaintiff would have standing when challenging “allegedly unconstitutional federal taxing and spending programs.”<sup>137</sup> This principal is not interesting because it is conceptually unsound: indeed, it is possible to imagine a system of ordered (if arguably unwieldy) liberty in which all taxpayers have the right to hale the government into court to make it demonstrate the constitutionality of its expenditures.<sup>138</sup>

That, however, has not been the experience of the United States. In a series of cases, beginning with *Frothingham v. Mellon* in 1923, the Supreme Court has taken the position that status as a taxpayer is simply not enough to convey standing.<sup>139</sup> That a taxpayer alleges some wrongfulness in a government appropriation, which she or he is coerced to pay for in small part, is not enough.<sup>140</sup> The Court rejects such

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<sup>134</sup> Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom From Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. REV. 115, 119 (2008).

<sup>135</sup> “Establishment Clause standing doctrines are looser than most, for the prudential reason that the Clause would not be judicially enforced if traditional Article III rules applied.” *Id.*

<sup>136</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>137</sup> *Id.* at 101.

<sup>138</sup> Indeed, many other nations are far less stringent in blocking access to their courts. The German Constitution allows a Land (State) government to seek an opinion whether a federal law in an area of concurrent federal-state authority is no longer necessary, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at art. 93(2) (Ger.). Similarly, the Indian Constitution provides explicitly for the President to seek the advice of the Supreme Court when it is “expedient,” INDIA CONST. art. 143. More significantly, the Indian courts have expanded access to the courts by developing the concept of “citizen standing,” which allows any citizen to sue to enforce duties owed to them by the government because of their citizenship, without a more specific showing of injury. See Michael G. Faure & A.V. Raja, *Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables*, 21 FORDHAM ENVTL. L. REV. 239, 249 (2010).

<sup>139</sup> *Frothingham v. Mellon*, 262 U.S. 447 (1923) (taxpayer had no standing to contest the constitutionality of the Maternity Act, spending federal money to reduce the mortality of mothers and infants).

<sup>140</sup> For the *Frothingham* Court, this was in part a function of the separation of powers.

Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute

suits with regularity, often while remarking that “the alleged injury is not ‘concrete and particularized,’ but instead a grievance the taxpayer ‘suffers in some indefinite way in common with people generally,’”<sup>141</sup> or “[t]his is surely the kind of a generalized grievance described in both *Frothingham* and *Flast* since the impact on him is plainly undifferentiated and ‘common to all members of the public.’”<sup>142</sup>

As noted above, *Flast* specifically allowed just such a common grievance to be brought to the Court.<sup>143</sup> Why, then, should the Establishment Clause be different? This puzzle was not really solved by *Flast*, which simply remarked that “the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I.”<sup>144</sup> The Court noted the history of the fear of government support of particular sects,<sup>145</sup> but it also referred to the problem that would be caused if taxpayers had no standing to challenge such spending: “[t]he logic of the Government’s argument would compel it to concede that a taxpayer would lack standing even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects.”<sup>146</sup>

But the former argument, that the Constitution limits the spending powers of Congress, is true of all of the powers of Congress. There is no textual reason for treating the Establishment Clause as a limit on federal spending sufficient to grant standing when other guarantees such as the Free Speech Clause, the Search and Seizure Clause, and the Cruel and Unusual Punishment Clause are not. The second argument is, on reflection, even more jarring. It is true that if taxpayers cannot challenge spending for church-building then no one can. It is equally true that such absence of remedy has simply not availed plaintiffs in other areas.<sup>147</sup> Those

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an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.

*Id.* at 488-89.

<sup>141</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (internal citations omitted).

<sup>142</sup> *U.S. v. Richardson*, 418 U.S. 166, 176-77 (1974).

<sup>143</sup> The Court in *Flast* never identified specifically the amount of money at issue from the provision of federal funds through the Elementary and Secondary Education Act of 1965. *See generally*, *Flast v. Cohen*, 392 U.S. 83 (1968). As the Act allowed the federal Commissioner of Education to make grants to the States for assistance to low-income families, which the States could make available for use in both public and private schools, it is difficult to imagine that any particular taxpayer had a significant amount of “wallet injury” from the act. *See id.* at 85-87.

<sup>144</sup> *Id.* at 105.

<sup>145</sup> *Id.* at 103 (“Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.”).

<sup>146</sup> *Id.* at 98 n. 17.

<sup>147</sup> The observation of the Court on this point when rejecting a request by a taxpayer for an accounting of the expenditures of the Central Intelligence Agency merits consideration in full:

disappointed with the lack of judicial intervention are simply told to take their dispute to the political arenas.<sup>148</sup>

Conceptually, the injuries to plaintiffs such as Florence Flast, who sought to stop federal spending on textbooks for religious schools,<sup>149</sup> are not obvious. If the injury is conceived as a Wallet Injury—the government improperly taking money—it is difficult to see how she suffered differently from Harriet Frothingham, who sought to stop federal spending to reduce mortality among mothers and children.<sup>150</sup> Money, albeit in a vanishingly small amount, was unquestionably taken from both taxpayers for spending on programs they believed violated the Constitution.<sup>151</sup> The Court’s proclamation in *Flast* that standing does not exist when the plaintiff challenges merely “an incidental expenditure of funds in the administration of an essentially regulatory statute” is an *ipse dixit*.<sup>152</sup> The Court announced that specific prohibitions of the Bill of Rights are limits to Congress different from a lack of authority under Article I, despite the textual evidence of the Tenth Amendment seeming to make the opposite point.<sup>153</sup>

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It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the ‘ground rules’ established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

U.S. v. Richardson, 418 U.S. 166, 179 (1974).

<sup>148</sup> See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974) (*hereinafter* Reservists Committee) (“The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.”).

<sup>149</sup> *Flast*, 392 U.S. at 85.

<sup>150</sup> *Frothingham v. Mellon*, 262 U.S. 447, 479 (1923).

<sup>151</sup> This did not go unnoticed at the time: “how can it be said that Mrs. Frothingham’s interests in her suit were, as a consequence of her choice of a constitutional claim, necessarily less intense than those, for example, of the present appellants?” *Flast*, 392 U.S. at 124 (Harlan, J., dissenting).

<sup>152</sup> Justice Harlan noted the “formidable obscurity of the Court’s categories.” *Id.*

<sup>153</sup> “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST., amend. X. The *Flast* Court, in characterizing Mrs. Frothingham’s complaint as “attempting to assert



If, on the other hand, the injury to Ms. Flast is what Justice Scalia has called Psychic Injury,<sup>154</sup> it is difficult to see why the Establishment Clause should be an area so different from the rest of the Constitution that it allows for such suits. The Court has sometimes allowed cases to go forward in this area using something that looks much like Psychic Injury: it is difficult to find a non-psychic injury from merely seeing a government religious display.<sup>155</sup>

The dissonance between the Establishment Clause and everything else in standing doctrine has not gone unnoticed in the Court. This is especially true of those who seek a less aggressive use of the Establishment Clause, particularly in the area of government religious speech. Over the years the *Flast* doctrine—which at its announcement might have been quite expansive<sup>156</sup>—was limited in significant ways.<sup>157</sup>

In 2007, a divided Court offered a further twist to the standing doctrine in future Establishment Clause cases that further reduced the scope of *Flast*.<sup>158</sup> In considering the challenge by a group named Freedom from Religion Foundation, Inc.<sup>159</sup> to the President's Office of Faith-Based and Community Initiatives,<sup>160</sup> the justices were faced squarely with the possible elimination of the *Flast* incongruity. Freedom from Religion Foundation (FRF) contended that the president and other executive branch officers made speeches using “religious imagery” and that this violated the

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the State's interest in their legislative prerogatives,” 392 U.S. at 105, simply elided over the fact that the Amendment recognizes the retention of power in people as well as states.

<sup>154</sup> *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 619 (Scalia, J., concurring in judgment).

<sup>155</sup> *See Van Orden v. Perry*, 545 U.S. 677, 694 (Thomas, J., concurring) (“The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library.”).

<sup>156</sup> The test in *Flast* had required that the plaintiff allege that “his tax money is being extracted and spent in violation of specific constitutional protections,” *Flast*, 392 U.S. at 106, not merely the Establishment Clause.

<sup>157</sup> The most severe early limit was probably the confident pronouncement in 1982 that the plaintiffs challenging the transfer of real property worth one-half million dollars to an Assembly of God college lacked standing because the transfer “was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8 . . . [but rather] . . . an evident exercise of Congress' power under the Property Clause.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 480 (1982).

<sup>158</sup> *Hein*, 551 U.S. at 587.

<sup>159</sup> As their name indicates, Freedom from Religion Foundation, Inc. is a group which seeks to reduce the presence of religion in the public square. Among their judicial campaigns have been struggles against prayer rooms in the Illinois State Capitol, *see Van Zandt v. Thompson*, 839 F.2d 1213, 1220 (7th Cir. 1988); a statue of Jesus Christ in a public park, *see FRF v. City of Marshfield*, 203 F.3d 487, 489 (7th Cir. 2000); and a crèche atop the roof of a city hall, *see FRF v. City of Green Bay*, 581 F. Supp. 2d 1019, 1022 (E.D. Wis. 2008).

<sup>160</sup> The President created the office by Executive Order, charging it with the responsibility “to establish policies, priorities, and objectives for the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law.” Exec. Order No. 13199, 3 C.F.R. § 752 (2001).

Establishment Clause.<sup>161</sup> The Office responded, and the District Court agreed, that FRF did not have standing to raise the claim.<sup>162</sup> The Seventh Circuit reversed, and the Supreme Court granted certiorari.<sup>163</sup>

FRF lost. This was unsurprising: a decision in their favor would have been extraordinarily activist for the Court, asserting a right to enter into the meetings held by officers of the executive branch, and to prohibit them from talking to religious groups or about matters of faith.<sup>164</sup> Such a result never seemed terribly likely.<sup>165</sup>

The way in which FRF lost, though, was noteworthy. The Court held that they lacked standing to sue. Justice Alito's plurality opinion, although recognizing the similarity to the *Flast* exception, chose to "decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures."<sup>166</sup> The plurality simply characterized spending by the executive as different, for the purpose of the Establishment Clause, from spending by the legislature.

This distinction was lost on the other justices. The dissenters objected, noting that it is the plaintiff who ought to be the focus of the inquiry into injury.<sup>167</sup> They rejected the characterization that FRF sought an "extension" of *Flast*.<sup>168</sup> They noted that the separation of powers concerns that the plurality marshaled on behalf of the executive should have been precisely the same as those afforded the legislature.<sup>169</sup> Defying Justice Alito's own portrayal of the claim of FRF as an extreme case, they set loose their own contrary parade of horrors, including the building of a chapel by the Department of Health and Human Services.<sup>170</sup>

If the dissenters were unconvinced by the plurality's executive-legislative distinction for *Flast*, though, it was Justice Scalia's concurrence in the result that most vividly captured dissatisfaction with this characterization. His opinion attacked the distinction between the sources of funding as having "no mooring in our tripartite test for Article III standing."<sup>171</sup> His proposed solution to what he viewed as

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<sup>161</sup> *Hein*, 551 U.S. at 592.

<sup>162</sup> *Id.* at 596.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 611 (noting separation-of-powers concern).

<sup>165</sup> Some constitutional adjudication includes the marshaling of a "parade of horrors" to demonstrate the limits of the doctrine at issue. In this case, however, the plurality noted that the parade was already included in the plaintiff's challenge itself, *id.* at 611 (amended complaint included the content of Presidential speeches as well as the public appearances of other officials).

<sup>166</sup> *Hein*, 551 U.S. at 609.

<sup>167</sup> "Here, there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion." *Id.* at 639 (Souter, J., dissenting).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 640.

<sup>171</sup> *Id.* at 630 (Scalia, J., concurring ).

a “meaningless and disingenuous distinction,”<sup>172</sup> was the opposite of that taken by the dissent. For Justice Scalia, the logical approach was to recognize that *Flast* had never made sense as a species of Wallet Injury, but was actually an example of the otherwise-prohibited category of Psychic Injury.<sup>173</sup> For him,<sup>174</sup> the solution was overturning *Flast* once and for all, but the plurality was “beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive.”<sup>175</sup>

Justice Scalia’s characterization accurately depicted the state of the law. After *Hein*, *Flast* remained a viable precedent; it just offered little help to most plaintiffs. The Court took up the issue yet again in 2011. This time the Court considered whether state taxpayers had standing to challenge the provision of dollar for dollar tax credits awarded by the state in return for contributions to School Tuition Organizations,<sup>176</sup> many of which allegedly used the money received to offer private school scholarships in religiously discriminatory ways.<sup>177</sup> The Court found that the *Flast* exception was “inapplicable,”<sup>178</sup> because of the “distinction between governmental expenditures and tax credits.”<sup>179</sup>

### C. Looking Away and the Lower Courts

In Establishment Clause challenges, *Flast*’s carved-out exception for taxpayers is not even the most startling anomaly. In cases challenging religious displays, the Court has sometimes allowed to pass without comment challenges that seem based on a truly insignificant interest. For example, when residents of Pawtucket, Rhode Island, joined by their local American Civil Liberties Union chapter, challenged the inclusion of a crèche in a seasonal public display, the Court never considered standing at all.<sup>180</sup> The Court moved directly to the purpose of the Establishment Clause,<sup>181</sup> and the word “standing” appears in the opinion only three times, and never as a requirement of justiciability.<sup>182</sup> Interestingly, the District Court had dispensed with the requirement of standing by noting that “[e]ven before *Flast v. Cohen* recognized the standing of federal taxpayers to challenge governmental expenditures on establishment clause grounds, municipal taxpayer standing had been permitted in

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<sup>172</sup> *Id.* at 633.

<sup>173</sup> *Id.* at 623.

<sup>174</sup> And Justice Thomas, who joined his opinion. *Id.*

<sup>175</sup> *Id.* at 636.

<sup>176</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011).

<sup>177</sup> *Id.* at 1450 (Kagan, J., dissenting).

<sup>178</sup> *Id.* at 1448.

<sup>179</sup> *Id.* at 1447. Once again, Justice Scalia took the time to note separately that *Flast* remains for him a “misguided decision,” *id.* at 1450 (Scalia, J., concurring).

<sup>180</sup> *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

<sup>181</sup> *Id.* at 671.

<sup>182</sup> *Id.* at 687 (“a person’s standing in the political community”), at 695 (“a crèche standing alone”), and at 706 (“people standing at the two bus shelters”).

this area.”<sup>183</sup> Thus there was for the trial court “little doubt”<sup>184</sup> that the plaintiffs had alleged a sufficient injury despite the fact that the uncontroverted testimony was that the city had bought the crèche eight years earlier for less than \$1,400, and spent less than \$40 each year on maintenance and supplies.<sup>185</sup>

In more recent cases, the Court has seemingly gone even farther afield, allowing cases to proceed to the merits on the basis of what appears to be no more than devout interest. When Texas lawyer Thomas Van Orden challenged the placement of a Ten Commandments monument by the state Capitol in Austin, the plurality rejected his challenge substantively without pausing to inquire into his right to bring it.<sup>186</sup> Remarkably, the District Court had gone even farther to allow the suit than the court in *Lynch*, finding it appropriate to proceed to the merits “[i]n light of the very liberal interpretation which the courts have given to the concept of standing in Establishment Clause cases.”<sup>187</sup> This is decidedly unusual: it has long been axiomatic that being particularly concerned about the action of government simply will not convey standing.<sup>188</sup>

The recent battle over a cross in the desert<sup>189</sup> offered the Supreme Court the opportunity to clarify the standing doctrine. The Court declined to do so.

*Buono* was an unusual case. In a nutshell, a group of World War I veterans had erected a wooden cross on a stone called Sunset Rock, in a part of the Mojave Desert that is owned by the Federal Preserve.<sup>190</sup> These veterans had fought and survived the War to End All Wars; they asked no one’s permission. To explain the memorial nature of the cross, they added wooden signs that said “The Cross, Erected in Memory of the Dead of All Wars,” and “Erected 1934 by Members of Veterans of Foreign Wars, Death Valley post 2884.”<sup>191</sup>

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<sup>183</sup> *Donnelly v. Lynch*, 525 F. Supp. 1150, 1162 (D.R.I. 1981) (citation omitted).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1156.

<sup>186</sup> *Van Orden v. Perry*, 545 U.S. 677, 695 (2005). One Justice did note that “[t]he only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library,” *id.* at 694 (Thomas, J., concurring), but the conclusions he drew from that observation concerned the substance of the Establishment Clause, not justiciability.

<sup>187</sup> *Van Orden v. Perry*, 2002 WL 32737462, 2 (W.D. Tex. 2002).

<sup>188</sup> *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (“a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself”). Judge Posner has offered a colorful example of the issue, *see DePuy, Inc. v. Zimmer Holdings, Inc.*, 384 F. Supp. 2d 1237, 1240 (N.D. Ill. 2005). *See also Aurora Loan Servs. v. Craddieth*, 442 F.3d 1018, 1025 (7th Cir. 2006) (stating “there is a sense in which I am ‘injured’ when I become upset by reading about the damage caused that fine old vineyard in Burgundy by a band of marauding teetotalers, yet that injury would not be an injury that conferred standing to sue under Article III”).

<sup>189</sup> *Salazar v. Buono*, 130 S. Ct. 1803, 1805 (2010).

<sup>190</sup> *Id.* at 1811.

<sup>191</sup> *Buono v. Kempthorne*, 527 F.3d. 758, 760 (9th Cir. 2008).

Years went by, and the harsh desert climate had the predictable erosive effect on the humble cross. It disappeared into the mists of time, although later characters in the story—perhaps interested in preserving the memory of World War I, and perhaps not—replaced the cross periodically.<sup>192</sup> Apparently, they did not replace the signs.<sup>193</sup> By the time the case drew near to the Supreme Court, the cross at issue was one that had been erected in 1998, was made of metal pipes painted white, was between five and eight feet tall, and had no explanatory signs.<sup>194</sup> It was about eleven miles from the nearest interstate highway, and was visible for about one hundred yards of driving on Cima Road, a narrow blacktop road that traveled through the federal preserve.<sup>195</sup>

The case came to the Supreme Court in a way that illustrates a broader theme in religious display cases. The 1934 veterans with their simple symbol in an out-of-the-way place do not seem to have been seeking warfare. The same could not be said for the forces which began contending at the site at the end of the twentieth century. By then, the cross had attracted a fervent supporter in Henry Sandoz, a local resident. At his own expense, he replaced the old rugged cross with the latest thing in metalwork. In place of the humble wooden symbol pinned into a natural crevice, he erected a cross made of painted metal pipe, ensuring its security by drilling holes for support brackets into the face of Sunset Rock.<sup>196</sup>

At the same time, the cross gained its first recorded foes. A retired National Park Service employee, writing under an alias, asked the Park Service for permission to erect a Buddhist stupa on a nearby spot of land.<sup>197</sup>

The next chapter in the story might have been the most predictable. Faced with a request for equal treatment with a monument that it did not seem to know much about,<sup>198</sup> the government might have acted in a pluralistic way, allowing minority as well as majority faiths to use this otherwise idle bit of federal land. Alternatively, the Executive Branch could endeavor to exclude all expressions of faith from this tiny spot. Unsurprisingly, the Park Service chose the latter course, informing Mr. Buono that the stupa could not be built and announcing plans to remove the cross.<sup>199</sup>

Then Congress got involved.<sup>200</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Buono v. Kempthorne*, 502 F.3d at 1072.

<sup>197</sup> The former employee, Harold Hoops, identified himself in the letter as “Sherpa San Harold Horpa.” *Buono*, 212 F. Supp. 2d at 1206.

<sup>198</sup> The Park Service responded to the “Sherpa San Harold Horpa” letter by announcing its intention to remove the cross. When the American Civil Liberties Union sent what might be called a warning letter threatening suit if the cross were not removed, the Superintendent for Ecosystem Management ordered an investigation into the history of the cross. *Id.* This investigation concluded that the cross was not sufficiently historical for protection in the Register of Historic Places. *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

In the version of constitutional governance often taught in American schools, there is a carefully honed balance among the branches. Congress, in this view, acts as the voice of the people, taking legislative steps upon considered deliberation. In reality, of course, members of Congress, having to run for reelection consistently, make many decisions to placate particular lobbies, interest groups, and voting blocks.

So it was with the Sunrise Rock Cross. It quickly became a cause célèbre among certain sections of the Christian community (largely, although not exclusively, Evangelicals). Local residents rejected requests from the Park Service to remove the cross voluntarily.<sup>201</sup> Some of them lobbied Congress, and found an eager supporter in Representative Jerry Lewis.<sup>202</sup> He added an amendment to the December 2000 Consolidated Appropriations Act, forbidding any use of federal funds for the removal of the cross.<sup>203</sup> The following year Congress acted again, this time designating the cross as an official World War I memorial and authorizing funds for the installation of a new plaque.<sup>204</sup>

Thwarted now by both the Executive Branch—which would not allow the symbol of a minority faith to be placed on public land—and the Legislative Branch—which would not allow the symbol of the majority faith to be removed—opponents of the cross turned to the Judicial Branch. So began the Jarndyce-like course of litigation<sup>205</sup> involving a few feet of pipe in a desert, an exercise in legal battles that went on for years before reaching the U.S. Supreme Court.

The District Court found that the presence of the cross on federal land “conveys a message of endorsement of religion.”<sup>206</sup> While the appeal was underway,<sup>207</sup> Congress again stepped in, this time requiring that the land in question be transferred to the Barstow post of the Veterans of Foreign Wars.<sup>208</sup> Congress required the new owners to maintain the property as a war memorial, or it would revert to the ownership of the United States.<sup>209</sup>

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<sup>201</sup> *Id.* at 1205-06.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1206.

<sup>204</sup> *Id.* at 1206-07.

<sup>205</sup> “Jarndyce v. Jarndyce” is the seemingly endless case in the Court of Chancery invented by Charles Dickens in *BLEAK HOUSE*, referred to by Chief Justice Roberts in *Stern v. Marshall*, 131 S. Ct. 2594, 2600 (2011).

<sup>206</sup> *Buono*, 212 F. Supp. 2d at 1217.

<sup>207</sup> The Ninth Circuit upheld the District Court. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004).

<sup>208</sup> Pub. Law No. 108-87 § 8121 (2003). In return for the one acre on which the cross stood, the U.S. would receive a five-acre parcel of land from Mr. and Mrs. Henry Sandoz, who had erected the cross at issue.

<sup>209</sup> *Id.* This part of the legislation appears to reflect congressional understanding of the contours of the Establishment Clause. Surely it is an odd choice otherwise to privatize a national monument, and demand its return if the private owner ever puts it to a non-memorial use.

The litigation resumed. Pointing to several Ninth Circuit cases in which such land “transfers” were held to be invalid attempts to Establishment Clause violations,<sup>210</sup> the plaintiffs went back to the District Court asking for the transfer to be enjoined.<sup>211</sup> The District Court agreed with the plaintiffs and enjoined the transfer, and the Circuit Court again affirmed.<sup>212</sup>

The battle now seemed to be perfectly joined for a resolution of the standing issue.<sup>213</sup> Buono had surely not suffered any Wallet Injury, and any recognition of an “injury-in-fact” would require a recognition that Psychic Injury sufficed to grant standing, at least in Establishment Clause cases.<sup>214</sup> Indeed, because any argument that traffic patterns *required* one to pass near the monument would be specious, the primary injury for the plaintiffs seemed to be that they knew the cross was out there in the desert.<sup>215</sup> It seemed possible that the Court would find that, like FRF, they simply had no standing to challenge this particular government action.<sup>216</sup>

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<sup>210</sup> See, e.g., *Paulson v. City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002).

<sup>211</sup> *Buono v. Norton*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005).

<sup>212</sup> *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007). Even this discussion has been an oversimplification of what Justice Kennedy termed a four stage process for the litigation. See *Salazar v. Buono*, 130 S. Ct. 1803, 1812 (2010).

<sup>213</sup> An effort more than a decade earlier had failed. When the Court declined to hear a case involving the official city seal of Edmond, Oklahoma, three justices had dissented from the denial of certiorari, quoting language from *Valley Forge* noting that the plaintiffs “fail to identify any personal injury . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees.” *Edmond v. Robinson*, 517 U.S. 1201, 1202 (1996) (Rehnquist, C.J., dissenting). As noted *supra* note 157, *Valley Forge* was a case finding that property transfers did not fall within the *Flast* exception for expenditures of money. Nonetheless this language raises the dramatic tension between what the *Flast*-limiting cases have said about standing and the treatment of standing in cases involving government speech.

<sup>214</sup> Noting the lack of discussion of the issue at the Supreme Court, many lower courts had applied just such a standard. As one appellate judge wrote, “the Supreme Court’s consistent adjudication of religious display . . . cases over a span of decades suggests that the Court has thought it obvious that the plaintiffs in those matters had standing.” *Newdow v. Roberts*, 603 F.3d 1002, 1014 (D.C. Cir. 2010) (Kavanaugh, J., concurring in judgment). Judge Kavanaugh pointed also to the remarkable fact that in the Supreme Court’s “highly controversial and divisive” opinions in these display cases, “none of the dissenters . . . ever contended that the plaintiffs lacked standing.” *Id.*

<sup>215</sup> As discussed *supra* note 188 and accompanying text, being aware that there is a violation of law is never enough. In rejecting a challenge to the Texas Governor’s endorsement of a prayer rally, one district judge noted that “mere knowledge that Governor Perry will participate in a prayer rally is likewise insufficient to confer standing.” *Freedom From Religion Found. v. Perry*, 2011 WL 3269339 (S.D. Tex. 2011).

<sup>216</sup> Over the course of the litigation, the White House had changed the party affiliation of its primary occupant, but the position of the United States did not change. As one gifted writer noted about the Obama Administration possibly having difficulties taking a position initially advanced by the Bush Administration, “the institutional interest of the United States in No One Ever Having Standing makes this an easy case for them,” John P. Elwood, *What Were They Thinking?*, 12 GREEN BAG 429, 448 (2009).

Anyone in hope of resolution to the standing conundrum in *Buono* was doomed to disappointment. The plurality focused its inquiry on standing to sue to enforce the original injunction. The issue of standing in the original case simply was not before the Court.<sup>217</sup> Several justices were displeased with this resolution of the question. Although Justice Scalia agreed that standing to seek the original injunction (to remove the cross) was not before the court, the relief now sought (to block the transfer) was an expansion of the original injunction, and hence subject to a new standing determination.<sup>218</sup> In that analysis, Justice Scalia argued that Buono came up short because of the nature of his pleading, “*even assuming* that being ‘deeply offended’ by a religious display (and taking steps to avoid seeing it) constitutes a cognizable injury.”<sup>219</sup> In response, Justice Stevens argued that Buono would have standing even if the injunction at issue were a new one, because of his claim that he was “unable to freely use the area of the Preserve around the cross,” because he was offended by it.<sup>220</sup>

This studied looking-away from the standing problem by the Supreme Court has simply not helped.<sup>221</sup> As Judge Kavanaugh noted,<sup>222</sup> it seems extremely unlikely that the Supreme Court simply overlooked the standing problem while deciding cases that caused fierce conflicts inside and outside the Court.<sup>223</sup> The problem is made more serious by the Court’s repeated invocations of two principles that seem to point to opposite results in this situation. On the one hand, the Court has an obligation to inquire into standing even if neither party contests it and the lower courts never addressed it.<sup>224</sup> On the other, the Court frequently reminds us that we are not to draw conclusions from their silence on jurisdictional issues.<sup>225</sup>

It is no wonder other federal judges sometimes express frustration over the lack of consistent guidance. As Judge Demoss noted:

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<sup>217</sup> *Salazar*, 130 S. Ct. at 1814.

<sup>218</sup> *Id.* at 1825 (Scalia, J., concurring in judgment).

<sup>219</sup> *Id.* at 1826-27 (emphasis added).

<sup>220</sup> *Id.* at 1830 (Stevens, J., dissenting).

<sup>221</sup> Not only did the doctrinal contours not improve, but the desert did not even grow more peaceful. Less than a fortnight after the Supreme Court opinion, person or persons unknown simply took the cross from Sunrise Rock. See Randal C. Archibold, *Cross at Center of Legal Dispute Disappears*, N.Y. TIMES, May 11, 2010, at A15. Shortly thereafter, person or persons unknown (probably different ones) installed another cross. Determining that was merely a replica, the Park Service took it down. Lawsuits continue, a \$125,000 reward to locate the cross stands uncollected as of this date, and a local newspaper received an e-mail claiming that the cross had been removed “lovingly,” because the Supreme Court decision had “desecrated” it. Robert Barnes, *If There’s No Cross, Is There Still a Case?*, WASH. POST, Aug. 23, 2010, available at 2010 WLNR 16799789.

<sup>222</sup> See discussion of *Newdow v. Roberts*, 603 F.3d at 1014, *supra* note 214.

<sup>223</sup> See *infra* Part II.A.

<sup>224</sup> *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990).

<sup>225</sup> *Hagans v. Levine*, 415 U.S. 528, 533 n.5 (1974) (“[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.”).



The Supreme Court cannot continue to speak out of both sides of its mouth if it intends to provide real guidance to federal courts on this issue. That is, it cannot continue to hold expressly that the injury in fact requirement is no different for Establishment Clause cases, while it implicitly assumes standing in cases where the alleged injury, in a non-Establishment Clause case, would not get the plaintiff into the courthouse.<sup>226</sup>

The suggestion ultimately voiced by Judge DeMoss, that a fair reading of the standing doctrine would bar courts from hearing complaints regarding government religious speech or displays, is logical. It is also consistent with other standing doctrine. If the requirement of actual injury is truly settled and truly constitutional in nature, and if “psychic injury”<sup>227</sup> is insufficient to qualify as a case or controversy, the Supreme Court’s view of the merits of the questions such as the display of a crèche matter only as an academic exercise. Indeed, following *Hein* to its logical conclusion and eliminating the anomaly of *Flast* seems the approach most likely to bring consistency to this messy area.<sup>228</sup>

#### IV. “NEITHER UNDER THE COLOUR OF RIGHT, NOR BY THE WAY OF DEED”:<sup>229</sup> THE CONSEQUENCES OF ELIMINATING STANDING

If it would bring consistency, however, this approach would also come at what might be a terrible price. For one lesson of American political history old and new stands out: if no one has standing to enforce a particular constitutional requirement in the courts, that requirement will cease to exist as more than words on paper.

##### A. *An Officer and a Legislator*

One startling example of this phenomenon appeared in the summer of 1974.<sup>230</sup> Military reserve personnel and veterans formed an organization to oppose the war in Vietnam.<sup>231</sup> Possibly because they thought they could actually get some pro-war Congressmen removed from the military reserves, or possibly just to make trouble for them,<sup>232</sup> the Reservists’ Committee to Stop the War sued the Secretary of

<sup>226</sup> *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 500 (5th Cir. 2007) (DeMoss, J., specially concurring).

<sup>227</sup> *See, e.g., Hein v. Freedom from Religion Found.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in judgment), which defines psychic injury as “the taxpayer’s *mental displeasure* that money extracted from him is being spent in an unlawful manner” (emphasis in original). Of course, the injury of such mental displeasure is even more attenuated when the taxpayer’s money has not been spent because the monument was donated, as in *Van Orden*.

<sup>228</sup> *Id.* at 629 (Scalia, J., concurring in judgment) (arguing that retaining *Flast* as a precedent merely continues “the disreputable disarray of our Establishment Clause standing jurisprudence.”).

<sup>229</sup> WESTPHALIA, *supra* note 1, at art. II.

<sup>230</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

<sup>231</sup> *Id.* at 211.

<sup>232</sup> There is a hint in the District Court opinion that part of the goal was exposure of possible conflicts of interest through “extensive discovery into Pentagon files.” *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833 (D.D.C. 1971) [hereinafter *Laird*].

Defense. They sought to force him to dismiss the military reserve officers who were then members of Congress.<sup>233</sup>

The constitutional provision at issue seems quite clear,<sup>234</sup> and the Framers' reasons for it stemmed from the tradition of separation of powers and the concern over the corruptibility of legislators.<sup>235</sup> The District Court found that service as an officer in the military reserves violated the Constitution, and issued a declaratory judgment to that effect.<sup>236</sup>

After affirmation by the Appellate Court, however, the Supreme Court rejected the case out of hand. It was not that the Court found the District Court's understanding of the Constitution or the statute governing the Reserves unpersuasive;<sup>237</sup> it simply never considered it at all. The plaintiffs had no standing, said the Supreme Court, because of the "necessarily abstract nature of the injury."<sup>238</sup> The District Court had opined that the Committee had standing as citizens to challenge the behavior, in part because the case involved a "precise, self-operative provision of the Constitution."<sup>239</sup> It also mattered to the judge that "if these plaintiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can."<sup>240</sup>

These factors failed to move the Supreme Court. Chief Justice Burger categorized the arguable constitutional violation as "one which presents injury in the abstract," that would "adversely affect only the generalized interest of all citizens in constitutional governance."<sup>241</sup> To the notion that exclusion of these plaintiffs meant that no one could ever challenge the alleged violation of the Constitution, the Court

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<sup>233</sup> *Reservists Comm.*, 418 U.S. at 211.

<sup>234</sup> U.S. CONST. art. I, § 6, "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." This portion of the Constitution is often referred to as the Incompatibility Clause, *see Reservists Comm.*, 418 U.S. at 210.

<sup>235</sup> An early version of the clause had members of Congress ineligible to serve as officers for one year after leaving Congress; one possible reason for the removal of that bar was the concern expressed by James Wilson that such a rule might prevent the nation from using the services of the best military commanders during a time of crisis. *See Laird*, 323 F. Supp. at 835-37.

<sup>236</sup> *Id.* at 842. The district court declined to issue the requested injunction ordering the elimination of the legislators from the Reserves, finding that there was no "urgent necessity" for such action. *Id.* at 843.

<sup>237</sup> The Court certainly might have done so: although the Secretary of Defense's argument focused on standing, an amicus brief of The Reserve Officers Association articulated a statutory analysis of the military reserves arguing that such positions were not officers of the United States for constitutional purposes. Brief of the Reserve Officers Ass'n of the U.S. as Amicus Curiae on the Merits, *Richardson v. Reservists Comm. to Stop the War*, (No. 72-1188), 1973 WL 172290.

<sup>238</sup> *Reservists Comm.*, 418 U.S. at 220.

<sup>239</sup> *Laird*, 323 F. Supp. at 840.

<sup>240</sup> *Id.* at 841. The district judge rejected the other grounds for standing offered by the plaintiffs: their status as reservists, as opponents of the Vietnam War, and as taxpayers. *Id.* at 840.

<sup>241</sup> *Reservists Comm.*, 418 U.S. at 217.

noted merely that “[o]ur system of government leaves many crucial decisions to the political process.”<sup>242</sup> To this date, members of Congress continue to hold commissions as officers in the United States military reserves. The practice goes unchallenged because virtually no one can challenge it.<sup>243</sup>

### B. *Appointments and Emoluments*

The Constitution also prohibits the appointment of any member of Congress “during the Time for which he was elected” to any office of the United States “which shall have been created, or the Emoluments whereof shall have been increased during such time.”<sup>244</sup>

The language of the clause is direct,<sup>245</sup> and its purpose transparent. The Framers were concerned that the president could use his power of appointment “to corrupt or seduce a majority” of the legislators.<sup>246</sup> Yet on several occasions in the last hundred years, Presidents have reached out to sitting members of Congress to appoint them to cabinet positions for which the pay has been increased. The most recent case, the appointment of Senator Hillary Clinton as Secretary of State,<sup>247</sup> was resolved in the same way as the last few: the Saxbe fix.<sup>248</sup> The maneuver, named after William

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<sup>242</sup> *Id.* at 227.

<sup>243</sup> In extraordinarily rare circumstances, a plaintiff making an Incompatibility Clause challenge might actually have standing. Such a case involved Airman First Class Charles Lane, who pled guilty to cocaine use in a Special Court-Martial. Such convictions are initially reviewed by the Air Force Court of Criminal Appeals, a panel of uniformed military officers required to review cases de novo for legal and factual sufficiency. One member of Airman Lane’s panel was Lt. Col. Lindsey Graham, who was simultaneously a Senator from South Carolina. Airman Lane unsuccessfully challenged Sen. Graham’s assignment to the panel. In his appeal to the Court of Appeals for the Armed Forces (C.A.A.F.), the civilian court which hears appeals from the military Courts of Criminal Appeals, Airman Lane won a new review of his conviction and sentence. The C.A.A.F. held that his personal injury gave him standing, and agreed that service as a member of a Court of Criminal Appeals violated the principle of separation of powers written into the Incompatibility Clause. *See* U.S. v. Lane, 64 M.J. 1 (2006). In rejecting the government’s argument that Lane had no standing, the court noted that “[u]nder such a regime, the structural integrity of the Constitution would rest on a gravely weakened foundation.” *Id.* at 4. Note that this precisely contradicts the U.S. v. Richardson, 418 U.S. 166 (1974) observation, *see supra* note 147.

<sup>244</sup> U.S. CONST. art. I, § 6. Alternatively called the Emoluments Clause or, perhaps to distinguish it from the other emoluments reference in art. I, § 9, the Ineligibility Clause.

<sup>245</sup> Or, more precisely, was in 1787. My colleague Richard A. Bales observes that most of us no longer use the term “emoluments” to mean “advantage, profit, or gain received as a result of one’s employment or one’s holding of office.” BLACK’S LAW DICTIONARY 563 (8th ed. 2004).

<sup>246</sup> THE FEDERALIST No. 76, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>247</sup> Because Senator Clinton had been in the Senate when the pay of the Secretary of State had been increased, Congress passed a Joint Resolution reducing the pay for that position to its earlier level, *see* Compensation and Other Emoluments Attached to the Office of Secretary of State, S.J. Res. 46, 110th Cong. § 1(a), Pub. L. No. 110-455, 122 Stat. 5036 (2008).

<sup>248</sup> Oddly, the first beneficiary of the “Saxbe fix” was not Saxbe, but Philander Knox sixty-four years earlier. *See* Michael Stokes Paulsen, *Is Lloyd Bentson Unconstitutional*, 46 STAN. L. REV. 907, 909 (1994).

Saxbe, nominated to be Attorney General by President Richard Nixon following the “Saturday Night Massacre,”<sup>249</sup> requires Congress to pass a temporary reduction in the pay of the particular office.<sup>250</sup> Scholars disagree whether the Saxbe fix actually fixes anything.<sup>251</sup> The disputes are literally of only academic interest, however, as no one appears to have standing to complain.<sup>252</sup>

*C. One Nation Under God, by Act of Congress?*

The lesson found in these cases is that Constitutional provisions for which no one has standing to sue might as well simply not exist. The Framers’ elaborate plans to protect the separation of powers by preventing either the appointment of legislators to executive branch office they had created (or whose emoluments they had “encreased”) are widely ignored. The same is true for the Framers’ careful plan to prevent the service of officers as legislators are widely ignored. The only limit is an electoral one: provided a Senator does not offend his or her constituency by service in the military reserve, reelection will be possible. Provided a president does not shock the body politic by appointment of members of Congress to executive positions, few will care.

This may be an interesting problem of the sort that troubles constitutional scholars<sup>253</sup> but ultimately does not imperil the republic.<sup>254</sup> The result of such an

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<sup>249</sup> The colorful phrase refers to the firing of Watergate Special Prosecutor Archibald Cox, which caused a major personnel shake-up when both the Attorney General Elliot Richardson and the Deputy Attorney General William Ruckelshaus resigned rather than following President Nixon’s order to dismiss the Special Prosecutor. *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 23-25 (1987).

<sup>250</sup> *Id.*

<sup>251</sup> A decade and a half ago, Prof. Paulsen argued that both plain language and prior practice indicated that the rule of the Emoluments is a rule, not a suggestion. Paulsen, *supra* note 248, at 911 (“It is not sufficient to satisfy the perceived ‘spirit’ of a constitutional provision. The letter of the law must be observed as well.”). More recently, Prof. Mark Tushnet has agreed that “[t]he Saxbe fix seems simply fraudulent.” Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

<sup>252</sup> Paulsen, *supra* note 248, at 916. Prof. Paulsen noted that what he called the “Lloyd Bentsen Relief from the Constitution Act of 1993” granted standing to anyone “aggrieved by an action of the Secretary of the Treasury.” *Id.* Note, though, that the same authorization to sue was contained in the law allowing Senator Clinton to become Secretary of State, *supra* note 247, but that in the only case in which a plaintiff raised this challenge, the District Court dismissed the suit for the familiar reason that the plaintiff, a State Department employee, lacked standing. *See* Rodearmel v. Clinton, 666 F. Supp. 2d 123 (D.D.C. 2009).

<sup>253</sup> Prof. Paulsen seemed saddened over the lack of concern about the Saxbe fix in the appointment of Senator Bentson to be Secretary of the Treasury. Paulsen, *supra* note 248, at 918 (“The Constitution, apparently, is not a very important political consideration, which doesn’t say much for our political stewardship of it.”).

<sup>254</sup> Prof. Tushnet refers to maneuvers like the Saxbe fix as a “constitutional workaround,” albeit a “fraudulent” one, that works because the political branches recognize that they must do something rather than simply ignoring the constitutional language, which itself “demonstrates a kind of fidelity to the Constitution,” Tushnet, *supra* note 251, at 1514.

approach in the area of the Establishment Clause, however, is far more ominous.<sup>255</sup> If no one were ever able to seek injunctions against government religious speech, it seems likely that expressions of endorsement of particular religions would increase, perhaps substantially.

Defenders of restrictive standing rules may argue that this is not a problem. The people, such critics might say, are the ultimate guardians of their own freedom. There is no harm in turning these fundamental problems over to the people for their ultimate solution.<sup>256</sup> After all, if the President was to be given a title, for example being named the “Royal Protector” of a foreign land, and the people objected, Congress would have a real incentive to impeach.<sup>257</sup> If the people did not mind, that would answer the question whether the people wished to see that provision enforced, preferring instead to allow the President to ignore the plain language of the Constitution.<sup>258</sup>

Such an approach does seem to call into question the desirability of having a written Constitution at all. Even if one does not find such a political solution troubling for some parts of the Constitution,<sup>259</sup> there is something that feels very disturbing about it when applied to the Establishment Clause.<sup>260</sup> For religion carries

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<sup>255</sup> In evaluating the *Flast-Hein* line of cases, even before the issuance of the decision in *Arizona Christian School Tuition Organization*, Prof. Manian noted that “[w]ithout such an exception to the restriction on taxpayer standing, the right guaranteed by the Establishment Clause would essentially have no remedy in many cases.” Maya Manian, *Rights, Remedies, and Facial Challenges*, 36 HASTINGS CONST. L.Q. 611, 624 (2009).

<sup>256</sup> Indeed, Justice Scalia seems to have advocated this specifically (“[I]n the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling ‘excluded’; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.”). *McCreary Cnty. v. ACLU*, 545 U.S. 844, 900 (2005).

<sup>257</sup> U.S. CONST. art. I, § 9.

<sup>258</sup> As Prof. Murphy has noted, the end result of some views of standing doctrine is to guarantee precisely this result. Murphy, *supra* note 123, at 974 (“Justice Scalia has followed the logic of this competency argument so far as to argue that restrictive standing doctrine improves government performance by protecting the Executive’s power to ignore the law from officious judicial efforts to enforce it.”).

<sup>259</sup> Many commentators find any such line-drawing with regard to the Constitution—as opposed to standing in statutory relief cases—troubling. As Judge Berzon has written, the Court in the mid-twentieth century seemed to believe “that the availability of some means of enforcement is implicit in the concept of a ‘right,’ and, more broadly, perhaps implicit in the nature of a constitution.” Hon. Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 685 (2009).

<sup>260</sup> It may be this instinct that caused Professor Tushnet to declare that “working around the thin Constitution’s provisions might be worrisome in a way that working around the thick Constitution’s provisions is not.” Tushnet, *supra* note 251, at 1507 (defining the “thick Constitution” as the organizational part of the document, and the “thin Constitution” as those provisions that “directly reflect . . . deep commitments”). See also Lupu & Tuttle, *supra* note 134, at 167 (arguing that judicial deference seen in areas such as war powers would be inappropriate to Establishment Clause questions “because minority interests are frequently at stake”).

with it a sense of identity, and a political solution, as noted in *Carolene Products*' celebrated fourth footnote,<sup>261</sup> only works against minority positions and minority identities. An enlightened majority may limit its own behavior to protect others,<sup>262</sup> but there is no political incentive for that enlightenment. Generally, majorities will be unenlightened; they will act in their own self-interest, not from a desire to be evil, but because they do not even realize they are doing it.<sup>263</sup>

There is no real reason to think that provisions of the Constitution that limit majority governance are equally well served by judicial enforcement and popular political choice.<sup>264</sup> If the Bill of Rights is to be enforced only through political choices, there was no reason to enfold it into our constitutional structure.<sup>265</sup> This is no mere hypothetical point. The history of American law—a law developed by a people whose majority has always been Christian in self-identification—has been one of quiet, unassuming favoritism for Christianity. Setting to one side those who have actively sought to use the machinery of the state for religious purposes,<sup>266</sup> the masses of well-meaning Christians have simply reflexively written laws that closed stores and entertainment on the Christian day of worship,<sup>267</sup> and commemorated the celebration of the Christian savior's birth as a national holiday.<sup>268</sup> In none of these acts was there a deliberate desire to harm members of minority faiths; indeed, many who support these actions based on Christianity are astonished by the argument that

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<sup>261</sup> In outlining areas which might be subject to more searching judicial scrutiny, Justice Stone included the possibility that religious minorities, like racial minorities, might be subject to prejudice that would “curtail the operation of those political processes ordinarily to be relied upon” to remove “undesirable legislation.” *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938).

<sup>262</sup> In rejecting a constitutionally-compelled exemption from general prohibitions on the use of peyote for religious reasons, the Court noted approvingly that it was “not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.” *Employ. Div. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>263</sup> Dissenting from the Court's rejection of an Air Force regulation that forbade the wearing of a yarmulke indoors, Justice Brennan observed that the practical effect of a no “visible dress and grooming” requirement, was to establish that “under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths.” *Goldman v. Weinberger*, 475 U.S. 503, 521 (1986) (Brennan, J., dissenting).

<sup>264</sup> See *Lupu & Tuttle*, *supra* note 134, at 153 (“Many religion-promoting acts by government create no obvious material or personal injury and may be quite popular. The political branches thus will frequently have incentives to violate the Clause.”).

<sup>265</sup> Even a defender of restrictive standing as a means of protecting self-government has noted that “[i]f a religious majority were to establish religion at the expense of religious minorities through legislative action, there is little prospect of a sufficient ‘political’ remedy for a disadvantaged religious (or even secular) minority.” Jonathon H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After Massachusetts and Hein*, 20 REGENT U.L. REV. 175, 196 (2008).

<sup>266</sup> See *Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892), *supra* note 111.

<sup>267</sup> See *McGowan v. Maryland*, 366 U.S. 420 (1961), *supra* note 115.

<sup>268</sup> 5 U.S.C. § 6103 (2012).

are acting in a religiously discriminatory way.<sup>269</sup> Instead, the majority simply fell victim to the predictable assumptions that arise within every culture. It is difficult to recognize that one's own local experiences do not define the field of human existence. If I am a Christian, surrounded by other Christians, I can easily, though mistakenly, conclude that *everyone* celebrates Christmas, or that the cross is a *universal* symbol of resting places for the dead. This is especially pronounced in an area of human identity as sensitive as religion: members of minority faiths sometimes take measures to avoid calling attention to that fact, so members of the majority faith may not even realize that there are worshippers of other religions in their midst.

But if there is no political incentive for the majority to regulate itself, and if the minority cannot seek the aid of Courts to rectify the situation, then an America open to religious pluralism is open only as a matter of legislative, and hence popular, grace. If recent developments in the area of government religious speech have shown any consistent trend, it is that this grace is noticeably diminishing in our time. An obvious example has been the treatment by the Supreme Court of the Ten Commandments, and the subsequent behavior of the American polity.

Since the Court held that the display of the outdoor stone monument to the commandments was permitted, other cities and towns have seized upon this example to erect their own monuments to this particular religious code.<sup>270</sup> Since the Court struck the indoor display in a courthouse using the *Lemon*<sup>271</sup> formulation because of the purpose evinced by the County, other cities and counties have had identical indoor displays approved because they were approved in silence or with solemn intonations of a secular purpose.<sup>272</sup>

This is all happening in a legal regime that permits the awkward and contradictory standing rules to live, albeit in a weak and sickly form. One need not be too cynical about human nature to fear the sort of things that might happen if the

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<sup>269</sup> During the oral argument in *Salazar v. Buono*, Justice Scalia asked a question containing a presumption: "the cross is the -- is the most common symbol of -- of -- of the resting place of the dead, and it doesn't seem to me -- what would you have them erect? A cross -- some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?" Transcript of Oral Argument at 38-39, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-427). When counsel for the petitioner responded that "[t]he cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew," Justice Scalia responded that the conclusion that the cross in question only honored Christians was "outrageous." *Id.* at 39, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-472.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-472.pdf).

<sup>270</sup> Albeit not always successfully, *see, e.g.*, *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009) (finding unconstitutional endorsement in the erection of the monument because of religious motivation). Ultimately the monument was relocated to an American Legion building about a block away, *see* Althea Peterson, *Settlement Set in Stone*, TULSA WORLD, July 28, 2010, at A13.

<sup>271</sup> *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

<sup>272</sup> *See, e.g.*, *ACLU v. Grayson Cnty.*, 591 F.3d 837 (6th Cir. 2010). The original display apparently went back up in McCreary County as well, albeit in a less conspicuous location. PETER IRONS, *GOD ON TRIAL: DISPATCHES FROM AMERICA'S RELIGIOUS BATTLEFIELDS* 214 (2007) (quoting the county judge-executive as saying that "the people here want the Commandments in the courthouse").

standing rules were made more consistent and logical. If only Wallet Injury were sufficient to allow citizens to complain of government conduct, much government conduct favoring majority religious practice would go unchecked.<sup>273</sup> It is not impossible to imagine the further ebbing of the populist grace that has marked public religion in America. It is not impossible to imagine a popular Christianity moving triumphantly to take possession of the public square.

V. “[A]PERPETUAL OBLIVION, AMNESTY, OR PARDON”:<sup>274</sup> THE SOLUTION STANDING REFORM MIGHT OFFER TO SUBSTANCE

Fortunately, America’s much-hyped “religious wars” are truly minor by comparison with other struggles in human history,<sup>275</sup> a mere “kerfuffle” in the words of one federal judge.<sup>276</sup> Just under four hundred years ago, European principalities brought to an end a war that had been “an unprecedented catastrophe for the German people.”<sup>277</sup> Although The Thirty Year’s War had large political motivations,<sup>278</sup> much of the ferocity of the war came from the religious identity taken on by many of the participants.<sup>279</sup> The war was never as simple as Catholic versus Protestant, but the slaughters conducted by groups of soldiers fighting under religious banners gave the war much of its particular fury.<sup>280</sup> When the time finally came that the flames of religious and political fervor burned lower,<sup>281</sup> the diplomats who settled down in Westphalia to conclude a peace treaty opted for the only solution they could find to stop fighting.<sup>282</sup> They stopped fighting.

<sup>273</sup> See, e.g., KY. REV. STAT. ANN. § 158.175 (2011) (permitting local school districts to “authorize the recitation of the traditional Lord’s prayer and the pledge of allegiance to the flag in public elementary schools”).

<sup>274</sup> Westphalia, *supra* note 1, at art. II.

<sup>275</sup> Indeed, some commentators argue that they are over-hyped, and that religious conflict is not truly a matter for worry in the United States. See, e.g., Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L. J. 1667, 1720 (2006) (arguing that divisions based on religion are not a sound basis for a finding of unconstitutionality because they are no more dangerous than political opinions that run along “racial or gender fault lines”). See also Koppelman, *supra* note 98, at 1838 (“It is not clear why division along religious lines is worse than divisions along lines of race, gender, age, ethnicity, or economic class.”).

<sup>276</sup> *Green v. Bd. of Cnty. Comm’rs*, 450 F. Supp. 2d 1273, 1274 (E.D. Okla. 2006).

<sup>277</sup> GEOFFREY PARKER, *THE THIRTY YEARS’ WAR* 215 (1984).

<sup>278</sup> CHARLES WILSON, *THE TRANSFORMATION OF EUROPE 1558-1648*, at 257-58 (1976) (describing Catholic France’s entry into the war on the side of the Protestant forces, making it essentially a Bourbon versus Hapsburg conflict).

<sup>279</sup> RICHARD S. DUNN, *THE AGE OF RELIGIOUS WARS 1559-1715*, at 86 (2d ed. 1979) (noting Wallenstein’s forcible conversion of cities he took).

<sup>280</sup> PARKER, *supra* note 277, at 125 (describing the “annihilation” of Magdeburg).

<sup>281</sup> WILSON, *supra* note 278, at 262 (characterizing Europe as “bankrupt, exhausted, and deadlocked” leading to the peace treaty).

<sup>282</sup> Scholars have noted the wisdom of Westphalia before, but primarily to focus on the spatial rather than the temporal nature of the Treaty. The settlement allowed princes and rulers to determine the religion of areas under their control. See, e.g., Akhil Reed Amar, *Race, Religion, Gender, and Interstate Federalism: Some Notes from History*, 16 QUINNIPIAC L.



### A. *Cease and Desist as Solution*

The seeming tautology is actually an observation of some value.<sup>283</sup> The great discovery of the diplomats gathered at Westphalia was that the wounds of the religious conflicts both before and during The Thirty Year's War ran extraordinarily deep. To allow each side to bring up, and demand restitution for, old injuries would doom the process. The very reparations and apologies would lead to further demands, the consideration of more old grievances, and the breakdown of the peace talks that all needed because of old injuries that all remembered.

So the diplomats hit upon the solution of simply starting with a clean slate. The declaration of a "Universal Peace" and "perpetual, true, and sincere Amity"<sup>284</sup> was followed by the requirement that both sides would grant to the other "a perpetual Oblivion, Amnesty, or Pardon of all that has been committed."<sup>285</sup> In other words, the parties agreed to forgive, or forget, or both. In any event, the rule that would cover all subsequent time was a rule of peace. The princes and their civil and military lieutenants would "abstain for the future from all Acts of Hostility."<sup>286</sup> There was also a guarantee of "the free Exercise of their Religion,"<sup>287</sup> although this applied only to designated Lutherans in Catholic lands. Although by no means a universal declaration of acceptance for all forms of religion and non-religion alike, the Treaty did guarantee those affected the right to practice their faith both in "in public[] Churches" and "in private in their own Houses."<sup>288</sup>

Wars in Europe, of course, did not end at Westphalia. Religious struggles in Europe did not even end at Westphalia, but "religion no longer dominated international relations as it once had done."<sup>289</sup> The Treaty offered a real start in creating a vision for religious pluralism and tolerance, even though it was limited at the time to particular sects of the Christian faithful.

### B. *Standing as a Means of Ceasefire*

Is such a solution possible for America's current struggle over government religious speech in the public square? A revision of standing doctrine might offer just such an answer. It could accomplish a result procedurally that one justice has articulated substantively, in a powerful and thoughtful opinion that unfortunately failed to garner the support of any of his colleagues.

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REV. 19, 23 (1996) (arguing that the Establishment Clause "was the American equivalent of the Peace of Augsburg of 1555, or the Treaty of Westphalia in 1648, where religious warfare in Europe was resolved by allowing the religion of the local prince to determine the religion of the principality.").

<sup>283</sup> Such declarations are not unknown at the Supreme Court, *see, e.g.*, *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

<sup>284</sup> Westphalia, *supra* note 1, at art. I.

<sup>285</sup> Westphalia, *supra* note 1, at art. II.

<sup>286</sup> Westphalia, *supra* note 1, at art. CIV.

<sup>287</sup> Westphalia, *supra* note 1, at art. XXVIII.

<sup>288</sup> *Id.*

<sup>289</sup> PARKER, *supra* note 277, at 218.

The opinion that hoped for an end to religious strife came from the pen of Justice Breyer in *Van Orden v. Perry*.<sup>290</sup> His separate opinion in that case carried with it the fifth vote that allowed the Fraternal Order of Eagles' Ten Commandments monument to remain outside the Texas state capitol in Austin.<sup>291</sup> Eschewing the plurality's analysis, and specifically rejecting Justice Scalia's announcement of a "monotheism exception" to the Establishment Clause,<sup>292</sup> Justice Breyer focused on a variety of factors. Although he referred to the monument's setting among other (unequivocally secular) monuments,<sup>293</sup> foremost on his mind seems to have been the prevention of further religious struggle. He noted that "40 years passed in which the presence of this monument, legally speaking, went unchallenged."<sup>294</sup> Observing that nothing suggested that intimidation caused this period of peace, he concluded that "the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage."<sup>295</sup>

Justice Breyer found that under *Lemon* as well as Justice O'Connor's observations about endorsement, with which he specifically agreed, the monument passed constitutional muster.<sup>296</sup> Perhaps more importantly, he expressed his concern that

[t]o reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.<sup>297</sup>

His opinion announced that the primary distinctions between the Texas Commandments, which he voted to allow, and the Kentucky Commandments, which he voted to take down, were the purpose of the display and its effect on observers.<sup>298</sup> Yet he also characterized as the "determinative" factor the age of the Texas monument.<sup>299</sup> One admittedly simplistic way to read the distinction between the two was to view old monuments as permissible, but not new ones.

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<sup>290</sup> *Van Orden v. Perry*, 545 U.S. 677, 698 (2005).

<sup>291</sup> *See id.*

<sup>292</sup> *Id.* at 704 n. 17.

<sup>293</sup> *Id.* at 702.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 703.

<sup>296</sup> *Id.* at 704.

<sup>297</sup> *Id.* (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting)).

<sup>298</sup> *Id.* at 703.

<sup>299</sup> *Id.* at 702.

As a substantive matter this position is hard to defend.<sup>300</sup> Some commentators noted sharply that it takes an extraordinarily well-versed observer to note the differences between an old monument and a new one.<sup>301</sup> Indeed, other Ten Commandments monuments have appeared in other places since *Van Orden*. While most lack some of the stylistic devices of the group prepared by the Fraternal Order of Eagles four decades ago—some even containing misspellings<sup>302</sup>—it would be unsurprising if new arrivals in the town thought such monuments dated back to an earlier day. A legal brief filed with the Court can say when the monument was erected; unless there is a date on the monument itself, an observer likely will not know.

If the old/new dichotomy makes little sense as a substantive test, though, it serves magnificently to alleviate the procedural problem. If the Court were to recast standing, which seems necessary in any event, that doctrine could serve the same purpose as Justice Breyer's test.

To create a Westphalian solution, the Court could say: one has standing to raise an Establishment Clause challenge about a future or current act of government religious speech, but not a past one. The injury, the Court might say, occurs when the religious speech occurs, when the monument is erected or installed. Such monuments do not continue to speak, the Court could hold, thus protecting older monuments from the application of *Lemon*, which they might well fail. More importantly, such a doctrine would free the Court from the current agony of simply ignoring *Lemon* and substituting some other test in cases of long-ago government speech in which a majority of the Supreme Court does not like the result that a fair application of *Lemon* would bring.<sup>303</sup>

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<sup>300</sup> As Justice Scalia has noted, “the antiquity of the practice at issue . . . is hardly a good reason for letting an unconstitutional practice continue.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 892 (2005) (Scalia, J., dissenting). Others have pointed out that Justice Breyer's emphasis on divisiveness inherently works against minority faiths. See MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 263 (2008) (“Should we really say that a display that everyone likes and that isn't stirring up trouble, because the offended minorities are too powerless to make trouble, is for that reason constitutional?”). It is notable, though, that Professor Nussbaum seems to adopt a similar old/new test when resolving the case herself. See *id.* at 265 (“[T]he monument has stood there for forty-five years without controversy, so it can fairly be claimed that it has become a part of Texas tradition. Surely removing a monument in such circumstances is a far more aggressive judicial act than simply telling Kentucky it cannot proceed with its new program.”).

<sup>301</sup> See, e.g., Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 FIRST AMEND. L. REV. 139 (2006).

<sup>302</sup> See, e.g., *Green v. Bd. of Cnty. Comm'rs*, 450 F. Supp. 2d 1273, 1277 (E.D. Okla. 2006) (the monument at issue condemned something called “adultry”).

<sup>303</sup> Or, as one justice has argued, fears the logical result of the test:

What, then, could be the genuine “good reason” for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation, and the recognition that the Court, which “has no influence over either the sword or the purse,” cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.

## VI. WESTPHALIAN AMERICA

There would still be litigation under such an approach, but it would offer more clarity than what is currently available. An analysis of the expected outcomes of a few possible cases will illustrate what such a regime might look like.

Consider first our example earlier of a proposed giant cross on the national mall.<sup>304</sup> As a new monument, the cross is a change to the status quo. Because it is a change, anyone who personally disapproved would have standing to challenge the installation. There would be no need to navigate the contortions of finding an injury, no requirement that any person show that he or she had to use the mall for some reason, but was deprived of access by the oppressive effects of the cross. The fact of newness, the very creation of the monument, would suffice to allow a federal court to entertain the case. The court could then proceed to the substantive test for Establishment Clause violation. In this case, *Lemon* would seem to suffice. It is difficult to find a purpose other than a religious one in the creation of a giant, sectarian monument. Additionally, it is implausible that such a monument would not advance Christianity. Indeed, it is possible that the selection of the style of cross itself, from options as diverse as the Greek, Latin, or Russian crosses, could be evidence of excessive entanglement.

On the other hand, assume a challenge to the portrait of Moses carrying the Ten Commandments on the frieze inside the Supreme Court.<sup>305</sup> Under the current model of thinking, a court would first have to be convinced that some person suffered some injury from this particular bit of artwork. Having so concluded, it would then predictably go on to apply a historical exception analysis, or a coercion test, or a mere ceremonial deism rubric. Under a Westphalian analysis, none of this would be necessary. The court could examine the age of the frieze, and dismiss the plaintiff for want of standing.

Events that repeat would prove slightly more difficult, but not much. Standing would still focus on the age of the defendant's act, rather than any metaphysical state of the plaintiff. The question in repeating cases, though, would center on the originality of the act. One could distinguish here between a mere clerical act that does not imply a new decision, and an event that repeats through individual choices by government officials. So, for example, a newly minted coin bears the motto "In God We Trust." That action by the mint, though, is no more than a routine act<sup>306</sup> repeated more or less consistently since 1864.<sup>307</sup> Such a practice, offering no change

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*McCreary Cnty.*, 545 U.S. at 892-93 (Scalia, J., dissenting) (internal citation omitted).

<sup>304</sup> See *supra* note 78 and accompanying text.

<sup>305</sup> *McCreary Cnty.*, 545 U.S. at 874.

<sup>306</sup> This is true even setting aside possible coin redesign, which seems sure always to include the motto. Indeed, the recent issuance of commemorative presidential dollars illustrates this. For design purposes, the phrase was moved to the edge of the coins; an outcry caused the mints to move the phrase back onto the reverse. There was never really a possibility that coins would be issued without the motto. That did not stop an internet rumor campaign alleging that the United States was "phasing God out of America." See Historic Change, SNOPE.COM, <http://www.snopes.com/politics/religion/dollarcoin.asp> (last visited Mar. 28, 2012).

<sup>307</sup> U.S. DEPT. OF THE TREASURY, *History of 'In God We Trust,'* <http://www.treasury.gov/about/education/Pages/in-god-we-trust.aspx>. (last visited Mar. 28, 2012).

from the status quo, would not be subject to challenge. It does not matter whether the putative plaintiff was annoyed, intimidated, or even so paralyzed by opposition to the motto that he found himself unable to use the money. The court should dismiss the challenge as a challenge to a long-existing practice.

This differs from an official prayer at an annual graduation ceremony. Although such a practice might be traced back for years or decades, each year presents a new and distinct decision by some official to include the prayer, and a second decision as to the prayer's content. A member of the community concerned about such a practice could bring a challenge, and the court should recognize this as the kind of new religious speech that conveys standing. The court could then proceed to a *Lemon* analysis, augmented, if it wished, by the use of the endorsement or coercion tests. All three should produce the same results: the very factors of audience age and independence that would indicate whether the event was coercive would also demonstrate its purpose and primary effect. Just as with stationary monuments, in these cases of repeated acts, courts would be spared the unhelpful exercise of choosing the test to fit the desired result.

The toughest cases are those of monuments that are neither brand new nor encrusted with the patina of ages. If one imagines a small town erecting a monument to honor God on the courthouse steps, is the passage of five years sufficient to exclude standing when a new member of the community does sue? To answer such a puzzle, I would propose that the court look at the same sorts of factors that appeared in Justice Breyer's opinion: the age of the monument, the deliberation and publicity that was given to its installation, and the behavior of the public in their reaction to it.<sup>308</sup>

Consideration of factors like these, in the context of a Westphalian test, would direct the court's focus toward the extent to which the government speech in question is truly a thing of the past. Current standing doctrine requires instead that courts play an almost whimsical game of "is the plaintiff prevented from using this area?" If the court finds that the plaintiff is, indeed, barred from the use of a public place by an aggressively overhanging religious use, it must apply one of a variety of tests, with no real guidance on which test to use. As a result, courts are often allowed to choose the test that will reach the result the judge instinctively prefers. This is the worst possible result; not only is the doctrine not clear, it is subject to egregious acts of manipulation.

Thus the ultimate beneficiary of a Westphalian test for standing is thus the clarity of the doctrine itself. The only compelling explanation for the cafeteria-style variety of tests is that the courts find that *Lemon* at times fails to match their judicial instincts. The abundance of other tests lets courts pick and choose and camouflage instinctual behavior with the trappings of law. Allowing Westphalian standing to screen out some cases and screen in others would relieve *Lemon* from that task and allow it instead to sort the remaining sheep from the goats.

#### VII. "[A] CHRISTIAN AND UNIVERSAL PEACE?"<sup>309</sup>

In a far more gentle and civilized way, we find ourselves in much the same position as the Europeans of the mid-seventeenth century. Groups on alternate sides of religious questions in our polity view each other with the disdain once reserved

<sup>308</sup> See *Van Orden v. Perry*, 545 U.S. 677, 702-03 (2005).

<sup>309</sup> Westphalia, *supra* note 1, at art. I.

for heretics. Each side believes itself to be put upon, excluded, or oppressed. It does not take an outsider long to discover that each of these communities carries a deep sense of victimization by “them”—some other group that actually runs the country.<sup>310</sup>

Just as did the diplomats of Westphalia, we must call things off and demand tolerance for all before things grow worse. Using current government activity as a baseline for standing would ask both sides in the conflict to cease hostilities. Advocates of non-religion would be unable to demand the removal of old expressions of faith, springing from American experience of long ago. Advocates of religion would be unable to demand new government proclamations of religion. Such disputes have not served the nation well, and the best way to end this religious war is to end the religious war. Perhaps the best way to do that is to reorient our standing question in Establishment Clause cases from “Was it the legislature or the executive that made the decision to spend the money?” or “Is this the kind of psychic injury that conveys standing?” to “Is the government speaking religiously now, or is this something that happened in the past?”

The current chaotic jurisprudence tends to apply a restrictive constitutional rule when confronting a new act of government religious speech, and a permissive rule when looking at an old one. Although such a system may prevent religious warfare, it does so by adopting a series of distinctions that make little sense to onlookers. Extreme groups on both sides can also manipulate these tests to advance their own lines in the ongoing battles. The doctrine of the Establishment Clause ends up being pulled and torn until it makes little sense even to those who author it.

A standing rule, in contrast, would allow the Court to reach results likely to promote peace in a sensible way. A time-based rule would make sense to the public. Other courts would find it easier to apply than the current grab-bag of available tests. Critics might note that this way of resolving problems is artificial and pragmatic. A rule of standing that finds injury only in current government action, though, is no more artificial than a rule of standing that denies that there is harm in Psychic Injury, but allows some cases to proceed based on Psychic Injury. A time-based rule is no more artificial than a rule that recognizes injury from spending when done by the legislature but not the executive. And pragmatic is not a bad thing to be.

Such an approach would fail to mollify the extremists on either side, but it might calm enough combatants that many would be willing to lay down their metaphorical arms before the battles worsen. For ultimately, our nation must continue to face the question that Justice O’Connor asked us just before she left the Supreme Court: “Why would we trade a system that has served us so well, for one that has served others so poorly?”<sup>311</sup>

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<sup>310</sup> For a thoughtful analysis of the problem, and a different possible solution, see Griffin, *supra* note 3, at 25 (“[[T]he constitutional and political]environment now mistakenly favors religion instead of religious liberty and fosters wars of religion instead of peaceful tolerance.”).

<sup>311</sup> *McCreary Cnty. v. ACLU*, 545 U.S. 844, 882 (O’Connor, J., concurring).