
Volume 35

Issue 5 *The Inaugural William French Smith
Memorial Lecture & Symposium: An Enigmatic
Court? Examining the Roberts Court as it
Begins Year Three*

Article 5

3-15-2008

Standing Still - Did the Roberts Court Narrow, but Not Overrule, Flast to Allow Time to Re-think Establishment Clause Jurisprudence?

Douglas W. Kmiec

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Courts Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Douglas W. Kmiec *Standing Still - Did the Roberts Court Narrow, but Not Overrule, Flast to Allow Time to Re-think Establishment Clause Jurisprudence?*, 35 Pepp. L. Rev. Iss. 5 (2008)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol35/iss5/5>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact Katrina.Gallardo@pepperdine.edu, anna.spath@pepperdine.edu, linhgavin.do@pepperdine.edu.

Standing Still—Did the Roberts Court Narrow, but Not Overrule, *Flast* to Allow Time to Re-think Establishment Clause Jurisprudence?

Douglas W. Kmiec*

The Roberts Court has yet to take up the confusion that inhabits religion-clause jurisprudence. The primary case to be discussed here comes at the subject matter indirectly, but importantly, through the issue of standing. With one notable exception, taxpayers—for good reason—lack standing in federal court. The voice of the taxpayer is the voice of policy, and the decision whether to raise taxes or how to spend the accumulated revenue belongs in the policy-making branches of the government, rather than the judiciary. The general denial of taxpayer standing thus separates the powers in a practical and understandable way.

In *Hein v. Freedom from Religion Foundation, Inc.*,¹ taxpayers who politically opposed President George W. Bush's sponsorship of conferences to promote the inclusion of faith-based social service providers in government programs sued to stop him. Why were taxpayers able to make a federal case out of their political opposition? Good question, and the answer is a Warren Court mistake. It is a mistake that tied both sides in the *Hein* oral argument in knots, and left the Court perplexed. After Solicitor General Clement struggled gamely for some minutes trying to shore up the Warren Court handiwork, Justice Alito thoughtfully asked, “[A]re you . . . arguing that these lines that you’re drawing make a lot of sense . . . [o]r are you just arguing that this is the best that can be done . . . within the body of precedent that the Court has handed down in this area?”² When Clement said “[t]he latter,” the Court breathed a sigh of relief and Justice Stevens wondered out

* Caruso Family Chair & Professor of Constitutional Law, Pepperdine University

1. 127 S. Ct. 2553 (2007).

2. Transcript of Oral Argument at 20, *Hein*, 127 S. Ct. 2553 (No. 06-157), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-157.pdf.

loud whether his fellow Justices thought they had “a duty to follow precedents that don’t make any sense.”³

In *Flast v. Cohen*,⁴ the Warren Court disregarded settled principles of constitutional litigation and sauntered off in its own direction. *Flast* held that taxpayers had standing to challenge the use of funds under the Elementary and Secondary Education Act of 1965, a law that provided educational assistance to public and religious schools alike in mathematics, reading, and other subjects.⁵ The inclusion of religious schools in this educational assistance was claimed to be an unconstitutional establishment of religion.⁶ It is not deemed so now, as modern precedent more or less says, but Warren thought differently, so he bent the rules to allow the taxpayers into court.

Allowing the challenge to that portion of the legislative expenditure shared with religious schools, Warren gave only lip service to the importance of standing. This was jurisprudential error, and as discussed below, it compounds some unfortunate misinterpretation of the Establishment Clause.

Flast invented a two-part standard. First, taxpayers had to establish a logical link between that status and a spending measure.⁷ Second, taxpayers had to establish a nexus between that status and the precise nature of the constitutional infringement alleged.⁸ The formula has been committed to memory by every law student since, but unfortunately for the separation of powers, it meant nothing. As Justice John Marshall Harlan II in dissent thoughtfully pointed out, neither of the *Flast* factors did anything to differentiate an Establishment-Clause taxpayer case from any other grievance a taxpayer might have with a spending measure.⁹ The requirements were at best makeweights, both could be easily fulfilled, and both were off point in terms of keeping courts focused on the resolution of specific disputes on the basis of written law. It was not as if, Harlan pointed out, the complaining taxpayer under the two-factor test would get a refund if he prevailed: “The taxpayer cannot ask the return of any portion of his previous tax payments, cannot prevent the collection of any existing tax debt, and cannot demand an adjudication of the propriety of any particular level of taxation,” remarked Harlan,¹⁰ “[H]is tax payments are received for

3. *Id.*

4. 392 U.S. 83 (1968).

5. *Id.* at 105-06.

6. *Id.* at 85-86.

7. *Id.* at 102.

8. *Id.* at 102-03.

9. See *id.* at 124-26 (Harlan, J., dissenting).

10. *Id.* at 128.

the general purposes of the United States, and are, upon proper receipt, lost in the general revenues.”¹¹

Moreover, there is no good reason to think that the Establishment Clause creates any more limits on the spending power than do other constitutional provisions, such as due process or equal protection, rights for which no taxpayer standing exists. Said Harlan, “I can attach no constitutional significance to the various degrees of specificity with which these limitations appear in the terms or history of the Constitution.”¹²

The Roberts Court had an opportunity to undo the *Flast* mistake in its entirety, but chose instead only to apply it to the *Hein* dispute. The case was thus resolved narrowly. After *Hein*, taxpayers had no standing to challenge the expenditures not specifically traceable to a legislative enactment that allegedly violates the Establishment Clause.¹³ Justice Alito wrote that the line of precedent following *Flast* had never extended that case beyond its facts.¹⁴ He emphasized its “narrow application” and held that “[t]he link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here.”¹⁵ Further, the Court rejected the Freedom from Religion Foundation’s argument that a distinction between executive and congressional expenditures was arbitrary.¹⁶ The Court noted that the *Flast* exception to the general standing rule was specifically in relation to Congress’ taxing and spending power, and that an executive expenditure from general funds was too attenuated from that to confer standing.¹⁷ Such an extension “would surely create difficult and uncomfortable line-drawing problems.”¹⁸ If an egregious violation were

11. *Id.*

12. *Id.* at 127.

13. *Hein v. Freedom from Religion Foundation, Inc.* 127 S. Ct. 2553, 2568 (2007) (plurality opinion). It is not merely a distinction between executive and legislative spending. See, e.g., *Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly*, 506 F.3d 584, 598-99 (7th Cir. 2007) (finding no standing after *Hein* in a case where a taxpayer challenged a legislative administrative rule inviting visiting clerics to give an invocation). The plurality in *Hein* explained: “[T]his case falls outside the ‘narrow exception’ that *Flast* ‘created to the general rule against taxpayer standing established in *Frothingham*’” because “the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment.” *Hein*, 127 S. Ct. at 2568 (plurality opinion). The key distinction is whether the lawsuit is directed at an exercise of congressional power, and thus has the “requisite ‘logical nexus’ between taxpayer status ‘and the type of legislative enactment attacked.’” *Id.* at 2568 (quoting *Flast*, 392 U.S. at 102).

14. *Hein*, 127 S. Ct. at 2568 (plurality opinion).

15. *Id.* at 2566.

16. *Id.* at 2568.

17. *Id.* at 2563.

18. *Id.* at 2570.

committed, as the Foundation speculated, Congress could step in,¹⁹ or a plaintiff with a more definite harm²⁰ could bring suit. Finally, the Court concluded that it was not necessary to address the continuing validity of *Flast*, since “a precedent is not always expanded to the limit of its logic.”²¹

Justice Kennedy, who joined the *Hein* opinion in full, wrote separately to emphasize why the separation of powers does not permit *Flast*'s extension.²² Extending *Flast* would make the exception “boundless,” and would call into question the freedom of the Executive to experiment with creative responses, even religious ones, to governmental concerns.²³ There cannot be “constant supervision,” wrote Justice Kennedy of Executive operations and dialogues, or the Court would end up in the inappropriate role of “speech editors” or Executive “event planners.”²⁴ In a concurrence in the judgment (joined by Justice Thomas), Justice Scalia sought to undo *Flast* altogether. He wrote that “if this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides” between taking *Flast* to its logical conclusion or overruling it.²⁵ He distinguished between “Psychic Injury” and “Wallet Injury” for the purpose of taxpayer challenges.²⁶ Wallet Injuries, he expounded, were a concrete type of injury, but Psychic Injuries were too attenuated from the expenditure to be traceable and redressable, as standing rules require.²⁷ Psychic Injuries consist of the mental displeasure of thinking one's tax money is being used for unlawful purposes.²⁸ The *Flast* exception, he noted, conferred standing “only if the constitutional provision allegedly violated is a specific limitation on the taxing and spending power” and only in Psychic Injury cases.²⁹ This was squarely at odds with the normal rule that there is no standing based on the “generalized grievance that the law is being violated.”³⁰ Further, it made

19. *Id.* at 2571.

20. The difficulty of what counts as a more “definite harm” is of course bound up with the underlying interpretation of the Establishment Clause. As Justice Scalia outlines in his concurrence in the judgment, he understands this as unlikely to include mere “psychic” injury. *Id.* at 2574. So then, who does have standing to challenge the hypothetical presidential decision to use discretionary funds to build a mosque on the White House lawn? Presumably, an otherwise qualified, non-Islamic contractor could challenge an exclusion of his services based on his personal faith, but one would not necessarily conclude that other faiths, merely because the president exercised his discretion against building a church or synagogue, would have an injury under *Hein*.

21. *Id.* at 2571.

22. *Id.* at 2572-73 (Kennedy, J., concurring).

23. *Id.* at 2573.

24. *Id.*

25. *Id.* (Scalia, J., concurring, joined by Thomas, J.).

26. *Id.* at 2574.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

no sense, if a true injury had occurred, to restrict standing to cases involving the Taxing and Spending Clause, disallowing cases, for example, originating out of unconstitutional uses of the Property Clause by Congress.³¹

Given the persuasiveness of the Scalia opinion, what lies behind the hesitation of the Roberts Court to overrule *Flast* altogether, other than the obvious need for Justice Kennedy's fifth vote? In writing for the plurality, Justice Alito conceded the validity of much of Justice Scalia's analysis,³² and at oral argument, the Chief Justice had suggested that the executive/legislative line the plurality ultimately accepted was little more than formalism.³³ Notably, efforts by Andrew Pincus for the Freedom from Religion Foundation to add even more bells and whistles, like a "non-incident" use of appropriated funds for a core religious purpose, led at oral argument to protracted discussions of how many bagels could be purchased for a prayer breakfast or how many Secret Service personnel could attend to the president when he attended a religiously-sponsored event.³⁴ There were no satisfactory responses, and so the skimpy ruling by the plurality looks odd. While Chief Justice Roberts prefers narrow rulings that build consensus, he also presumably favors clarity and logic. The anomalous Establishment-Clause taxpayer standing exception is incapable of yielding that. Justices Souter and Breyer seem its strongest defenders, loosely referencing Madison's famous *Memorial and Remonstrance* and positing that people who are "upset" about religion need a cause of action.³⁵ With respect, this is mis-citing Madison, whose famous *Remonstrance* challenged the coercive taking of even "three pence" not for the otherwise disinterested taxpayer "upset" by the inclusion of faith groups in a general program, but for the compelled support of an established church and coerced "conformity" thereto. That is a substantial difference.

There is little question but that the Warren Court's anomalous Establishment-Clause standing doctrine has drawn the Supreme Court into disputes over the evenhanded inclusion of religious schools in federal grant programs. It also has enmeshed the judiciary in all manner of challenges to religious holiday displays and the after-hours use of schools' empty classrooms by student religious clubs. To the extent that citizens disagree

31. See generally *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

32. *Hein*, 127 S. Ct. at 2572 (plurality opinion).

33. Transcript of Oral Argument, *supra* note 2, at 39.

34. *Id.* at 38-40.

35. *Hein*, 127 S. Ct. at 2585 (Souter, J., dissenting) (citing 2 WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed. 1901)).

about these matters, the political process should resolve them. Religious divisiveness is heightened, not lessened, by empowering one side to run into court brandishing an exclusionary interpretation of the Establishment Clause. As Oliver Wendell Holmes Jr. admonished, the courts are not the only defenders of the Constitution, and the other branches of government “are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”³⁶

So again, why not toss *Flast* now? Because, as Mother used to say, “The soup is not ready yet.” In particular, a majority of judicial chefs were not prepared to say how the undoing of the illegitimacy of *Flast* would affect the perhaps equally problematic (from the vantage-point of constitutional misconstruction) “no endorsement” view. The primary benefit of the modest decision in *Hein* is that it gives the Roberts Court an opportunity to re-think the underlying religion-clause jurisprudence more carefully. The retirement of Justice O’Connor and the addition of Chief Justice John Roberts and Justice Samuel Alito create a favorable climate for a return to original understanding. As with other substantive areas, Justice Kennedy will likely play a pivotal role. Kennedy is sometimes said to occupy this position elsewhere, however, because of ambivalence; in the context of Establishment Clause interpretation, it is likely he simply believes his views are correct. Justice Kennedy has long dissented from the O’Connor idea which substituted “no endorsement” for the original meaning of the Establishment Clause. In its most recent application in the Ten Commandments cases,³⁷ the O’Connor approach yielded an outcome that found such displays to be unacceptable in a courthouse in Kentucky, but just fine on the state-house lawn in Texas. Such inconsistency has led Justice Kennedy to describe the no-endorsement theory as “flawed in its fundamentals and unworkable in practice,”³⁸ productive of “bizarre result.”³⁹

The no-endorsement idea was always something of a non sequitur, even by Justice O’Connor’s own description. O’Connor had originated the idea not from original meaning, historical practice, or precedent, but from what

36. *Mo., Kan., & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904). Rejecting *Flast* would not mean that proper Establishment Clause cases could not be heard. Obviously, where a taxpayer or any other citizen is coerced or disadvantaged by a prescribed imposition under law of a religious belief or practice, standing would exist. Similarly, as Justice Harlan pointed out, standing is appropriate for a challenge brought to a tax specifically designed for the support of religion. *Flast v. Cohen*, 392 U.S. 83, 116 (1968) (Harlan, J., dissenting). This again was the Virginia assessment opposed by James Madison.

37. *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU*, 545 U.S. 844 (2005).

38. *County of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part).

39. *Id.*

she termed “a clarification of our Establishment Clause doctrine.”⁴⁰ Writing a concurring opinion in *Lynch v. Donnelly*, involving a crèche display case from Rhode Island, O’Connor postulated that the Establishment Clause “prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”⁴¹ By itself, this is a proposition reasonably sustainable as it is bolstered not only by the original no-legal-coercion standard of the religion clauses, but also by the prohibition against religious test oaths. But Justice O’Connor deduced something far broader; namely, the proposition that the government violates the Constitution either through “endorsement or disapproval of religion.”⁴² By this, O’Connor puts her theory in direct conflict with George Washington’s farewell insight about the importance of religion to the nation’s prosperity,⁴³ as well as the presupposition in the Declaration of Independence of a Creator and man’s natural yearning for the transcendent captured well by such venerable American observers as Tocqueville. O’Connor thus made a founding precept into a constitutional transgression.

Some of our fellow citizens, of course, do dissent from the influence of religion. The Speech Clause in the First Amendment affirms this right of dissent.⁴⁴ What neither the Speech nor Religion Clauses envisioned was that dissenting voices had the equivalent of a heckler’s veto to weaken or erase the basis upon which the nation was incorporated. Yes, a person’s legal standing could not be made to turn on belief or practice, but an endorsement of religion generally without imposed legal consequence is simply not that. Failure to see this difference invites a level of judicial micro-management of human freedom—including the trivial aspects of the decor of holiday displays—that is seldom justifiable in any area of the law, let alone an area like religion where Hamilton observed that the federal government was without competence.⁴⁵

Justice O’Connor resisted an originalist interpretation of the Establishment Clause in the belief that it would render free exercise

40. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

41. *Id.*

42. *Id.* at 688.

43. President George Washington, The Farewell Address (Sept. 19, 1796) at 20, available at <http://gwpapers.virginia.edu/documents/farewell/transcript.html#p20>.

44. As a matter of logic and consistency, a nonbeliever would not rely on the protection of free exercise.

45. THE FEDERALIST NO. 84 (Alexander Hamilton). In this regard, Justice O’Connor approved of a holiday display of a crèche when part of a larger exhibit with secular objects, but not when it was alone or with insufficient secular message. *Lynch*, 465 U.S. at 680 (1984).

protection redundant.⁴⁶ O'Connor derived this redundancy concern from the school prayer cases and some scholarly commentary,⁴⁷ which had asserted (incorrectly) that legal coercion was unnecessary to find an impermissible establishment.⁴⁸ Redundant protection of a fragile individual right is hardly problematic. Legal coercion should be put back at the heart of both clauses to ensure their correct construal. The clauses simply protect freedom from coerced belief or practice in two separate ways—by granting an immunity from both legally coerced prescription (no establishment) and legally coerced prohibition (free exercise). Religious liberty is sacrificed either when people are forced to worship at a church not of their own choosing or are stopped from praying in a chosen manner. Jurisprudentially, any modern redundancy that exists is the likely consequence of judicially incorporating against the states that which was intended as a federalism protection for state establishments.

One misconception of a clause does not justify another, however—especially when it yields the unintended exclusion of a central aspect of human nature. Interpreting the Establishment Clause to demand wholesale secularity is judicial fabrication. The *Flast* mistake compounded the canard and perplexed all manner of government programs, inviting inscrutable distinctions between types of public support. Books, but not maps, could be given to religious schools, for example, because the former could be certified for wholly secular use, whereas requests for the use of maps—presumably containing the Holy Land—were required to be denied. An exasperated Senator Daniel Patrick Moynihan was heard to remark, “What about an atlas—a, book of maps?”⁴⁹ The “no-endorsement” theory was simply a regrettable extension of this confusion. “No endorsement” had a facade of necessity only because it was thought necessary to avoid coerced prayer in public school. It was not. An Establishment Clause violation premised upon protection from legal coercion, including that exercised by public school teachers, would have been sufficient.

If it is reasonable to speculate that the Roberts Court did not want to fully close the standing door until the newly composed Court could reasonably address the Establishment Clause and better return it to its

46. See *Lynch*, 465 U.S. at 668-69.

47. See *School Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963) (holding that “[t]he distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended”); see also Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 922 (1986) (“If coercion is also an element of the [E]stablishment [C]lause, establishment adds nothing to free exercise[.]”).

48. *Schempp*, 374 U.S. at 668-69.

49. Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2000, available at <http://query.nytime.com/gst/fullpage.html?res=9D07E7D7143CF933A05752C0A9669C8B63&sec=&spn=&pagewanted=5>.

intended purpose, how might that re-thinking be accomplished? Justice Kennedy helpfully began the work of reconnecting no establishment with coercion in *Lee v. Weisman*.⁵⁰ While Kennedy's view of coercion was more psychological than faithfully legal in *Weisman*, it was clearly headed in the right direction. In addition, it is part of the legacy of the late Chief Justice William Rehnquist—shared in by Justice Kennedy—that there be greater acceptance of nonpreferential assistance to all schools, especially through vouchers,⁵¹ thereby removing another precedential support for the overly exclusionary no-endorsement idea.

The no-endorsement idea should be abandoned because only by setting aside the extraneous and subjective can the Establishment Clause be redirected at improper legal coercion. The most important consequence of re-focusing the Establishment Clause on legal coercion would be the uprooting of the exclusionary impulse mistakenly accepted since *Everson v. Board of Education*.⁵² In introducing what would become the First Amendment, James Madison made plain that the purpose of the religion clauses was the avoidance of legal coercion in the form of a national church, or of legal penalties or disabilities imposed because of the making of a personal faith choice other than a nationally favored one. By their terms, these clauses applied only to the national government. Indeed, the phraseology of the Amendment was intended to insulate various state establishments from national interference.⁵³ Instead of a focus on legal

50. 505 U.S. 577 (1992) (finding impermissible coercion in the context of a middle school graduation, where the prayer originated with the state officer (the school principal), the person selected to pray was designated by the state officer, and the prayer was then authored subject to the direction of the state officer).

51. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

52. 330 U.S. 1 (1947).

53. On June 8, 1789, James Madison rose in the House of Representatives and "reminded the House that this was the day that he had heretofore named for bringing forward amendments to the Constitution." 1 ANNALS OF CONG. 424 (Joseph Gales ed., 1834). Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good.

The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 434.

On the same day Madison proposed them, the amendments which formed the basis for the Bill of Rights were referred by the House to a Committee of the Whole, and after several weeks' delay were then referred to a Select Committee consisting of Madison and ten others. The Committee revised Madison's proposal regarding the establishment of religion to read: "[N]o religion shall be

coercion at the national level, since the late 1940s, this protection against federal imposition has become an instrument by which a wholly secular national and state environment might be achieved.⁵⁴ In this, neutrality was redefined—not as between faiths, but between faith and no faith. In its 1947 decision in *Everson*, the Supreme Court, under the guise of neutrality, articulated the exclusionary view that government may not aid religion generally⁵⁵—a truly extraordinary proposition for a nation informed by the “Laws of Nature and of Nature’s God.” While subsequent to *Everson* the Establishment Clause case law has taken the numerous twists and turns that exasperated Senator Moynihan, it proceeded primarily in an exclusionary progression. For example, as *Everson* became *Lemon v. Kurtzman*,⁵⁶ it was understood as prohibiting: (1) any public support for religion in purpose or effect; (2) any government action that might be perceived by a hypothetical observer as an endorsement of religion generally; and (3) the inclusion of

established by law, nor shall the equal rights of conscience be infringed.” *Id.* at 729.

The Committee’s proposed revisions were debated in the House on August 15, 1789. The entire debate on the Religion Clauses is contained in two full columns of the “Annals.” Representative Peter Sylvester of New York expressed his dislike for the revised version, because it might “have a tendency to abolish religion altogether.” *Id.* Representative John Vining suggested that the two parts of the sentence be transposed; Representative Elbridge Gerry thought the language should be changed to read “that no religious doctrine shall be established by law.” *Id.* at 730. Representative Roger Sherman of Connecticut had the traditional reason for opposing provisions of a Bill of Rights—that Congress had no delegated authority to “make religious establishments”—and therefore he opposed the adoption of the amendment. *Id.* Representative Daniel Carroll of Maryland thought it desirable to adopt the words proposed, saying “[h]e would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.” *Id.*

Madison then spoke, and said that “he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.” *Id.* He said that some of the state conventions had thought that Congress might rely on the Necessary and Proper Clause to infringe the rights of conscience or to establish a national religion, and “to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.” *Id.*

Representative Benjamin Huntington then expressed the view that the Committee’s language might “be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it.” Huntington, from Connecticut, was concerned that in the New England states, where state-established religions were the rule rather than the exception, the federal courts might not be able to entertain claims based upon an obligation under the bylaws of a religious organization to contribute to the support of a minister or the building of a place of worship. He hoped that “the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all.” *Id.* at 730-31.

54. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992), cited with approval in *Capitol Square v. Pinnette*, 515 U.S. 753, 817 (1995) (Ginsburg, J., dissenting) (noting that a “negative bar against establishment of religion implies affirmative establishment of secular public order”).

55. *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947).

56. 403 U.S. 602 (1971).

religious bodies in governmental programs that provide direct subsidies or in-kind benefits. Modern interpretation of the Establishment Clause was thus troubled not only by an unanticipated application of the clause to national and state government alike, but also an embedded bias toward secularity, disguised as neutrality.

The incorporation of the Establishment Clause against the states, while perhaps the most obvious break with original understanding, is also the one needing least attention. Respect was given to state establishments at the founding as an aspect of federalist bargaining rather than as acceptance of the coercion such establishments represented. Insofar as a state establishment would likely run afoul of the Free Exercise Clause today,⁵⁷ it is an academic exercise without policy merit to advocate the undoing of the judicial incorporation of the Establishment Clause against the states. There is no constituency for state establishment, nor should there be.

What does have merit is returning to the original meaning of the word “establishment” as it now applies to both the national and state governments. The Framers understood an establishment “necessarily [to] involve actual legal coercion.”⁵⁸ *Lee v. Weisman*⁵⁹ edged the Court back in this direction, though as mentioned, Justice Kennedy there defined coercion too expansively. As Justice Scalia would point out in dissent, “The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”⁶⁰ Moreover, the financial support interdicted by the Establishment Clause was not for religion generally or a public program that included religious providers,⁶¹ but rather the compulsory patronage of certain religious services and the mandatory payment of taxes supporting ministers.

Were the Establishment Clause properly construed, public religious displays or acknowledgments which today are ensnared in Justice O’Connor’s “no-endorsement” theory would be unobjectionable.⁶² Thus, based on the original meaning of the Establishment Clause, Ten Commandments displays, the historical Latin Cross on Mt. Soledad, and Menorahs and crèches displayed during the holiday season would be fully constitutional. None of these symbolic efforts impose constitutional injury,

57. See *Cutter v. Wilkinson*, 544 U.S. 709, 729 n.3 (2005) (Thomas, J., concurring).

58. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment).

59. 505 U.S. 577 (1992).

60. *Id.* at 640 (Scalia, J., dissenting).

61. *Cf. Mitchell v. Helms*, 530 U.S. 793 (2000).

62. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984).

for they do not compel belief or action under law. Returning to the original meaning thus simplifies constitutional adjudication, but it also importantly avoids the extraordinary costs and divisiveness associated with litigation campaigns that make even the most minor mention of religion into complex federal litigation. Such litigation has led to unsatisfactory and uneven results: unsatisfactory because the outcomes often require draining religious symbols of their meaning; uneven because there is understandable hesitation to expunge the significance of religious reference in light of the corporate presupposition of a Creator. Few principled lines can now be drawn. As Justice Thomas remarked in his concurrence in *Van Orden*, “this Court’s jurisprudence leaves courts, governments, and believers and nonbelievers alike confused”⁶³ The confusion need not be perpetuated.

To the nonbeliever or dedicated secularist, however, doctrinal confusion is preferable to the restoration of religious reference. Religious reference is antithetical to contemporary skepticism and the re-founding of America upon a conception of human nature that is more desire and emotion—and, of course, personal gratification—than the self-evident truth of created equality. But if reason is made subordinate to desire, the prospects for religious freedom—indeed, for any freedom—are dim. As Professor Robert George has asked, what ultimately is the source of human right if it is neither God nor reason?⁶⁴ There may be none, other than an autonomy principle that nominally honors consent, but is then in tension with a secularist conception of man as the sum of desires prompted largely by external stimuli beyond his conscious freedom. This, of course, contrasts sharply with the founding corporate presupposition of the Divine origin of man, reflected in the Declaration’s affirmation of man’s intrinsic value (the possessor of inalienable right) and his reasoned pursuit of happiness.

Far more than Christmas displays are thus in play when religious freedom mutates into a secularist orthodoxy. After all, the “more perfect

63. See *Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (citing *Newdow*, 542 U.S. at 45 n.1 (2004) (Thomas, J., concurring in the judgment) (collecting cases)). The following religious references have been successfully challenged: a sign noting that a public building would be closed for Good Friday, *Granzeier v. Middleton*, 955 F. Supp. 741, 743, 743 n.2, 746-47 (E.D. Ky. 1997), *aff’d on other grounds*, 173 F.3d 568, 576 (6th Cir. 1999); a cross in the Mojave honoring war dead, *Buono v. Norton*, 212 F. Supp. 2d 1202, 1204-05, 1215-17 (C.D. Cal. 2002); and municipal seals, which have been frequent targets for religious erasure, see, e.g., *Robinson v. Edmond*, 68 F.3d 1226 (10th Cir. 1995); *Murray v. City of Austin*, 947 F. 2d 147 (5th Cir. 1991); *Friedman v. Bd. of County Comm’rs of Bernalillo County.*, 781 F.2d 777 (10th Cir. 1985) (en banc).

64. Robert P. George, *A Clash of Orthodoxies*, FIRST THINGS 33 (Aug./Sept. 1999), available at http://www.firstthings.com/article.php3?id_article=3195.

If reason is purely instrumental and can’t tell us what to want but only how to get to what we want, how can we say that people have a fundamental right to freedom of speech? Freedom of the press? Freedom of religion? Privacy? Where do those fundamental rights come from? What is their basis? Why respect someone else’s rights?

Id.

union”⁶⁵ of the Constitution is fashioned to “fulfill the promise,” as one Chief Justice remarked of the Declaration.⁶⁶ It is intended to facilitate man’s flourishing in a community of other men. Human flourishing in the natural law tradition of the Declaration is necessarily bound up with the basic human goods of life, knowledge, family, friendship, and religion.⁶⁷ Augustine opined that one can always tell the nature of a people by the object of their love.⁶⁸ Insofar as these basic human goods can be said to be the product of reasoned deduction from the incorporating presupposition in the Declaration, what would be objects of our love if we are aggressively separated from them by imposed secularity?

The Roberts Court has yet to begin the journey back toward a historically faithful account of religious freedom. However, the opinion in *Hein* implicitly recognizes that the journey back is made far more difficult when the structural limitations on judicial power are not observed.⁶⁹ Even prior to *Hein*, the Roberts Court has shown a special interest both in standing and in maintaining the jurisdictional integrity of the judicial function, as shown by its decision in *DaimlerChrysler Corp. v. Cuno*⁷⁰ unanimously refusing to extend *Flast*⁷¹ to allow a taxpayer challenge to state investment

65. U.S. CONST. pmbl.

66. This eloquent short-hand summary of the relation between the Declaration and the Constitution is attributed to Chief Justice Warren E. Burger, as chairman of the bicentennial celebration of the Constitution. Charles Alan Wright, *In Memoriam: Warren Burger: A Younger Friend Remembers*, 74 TEX. L. REV. 213, 219 (1995); see also Akhil Amar & Douglas W. Kmiec, *The Constitution ‘to secure these rights,’ introductory essay to THE POCKET CONSTITUTION OF THE UNITED STATES* (National Constitution Center ed. 2003); Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L. J. 983, 994 (1987) (“The proper way to interpret the Civil War amendments is as extensions of the promise of the original Constitution which in turn was intended to fulfill the promise of the Declaration.”).

67. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) for a somewhat differently stated exposition of incommensurate, basic human goods.

68. St. Augustine writes:

[F]or example, if one should say, ‘A people is the association of a multitude of rational beings united by a common agreement on the objects of their love’, then it follows that to observe the character of a particular people, we must examine the objects of its love. And yet, whatever those objects, if it is the association of a multitude not of animals but of rational beings, and is united by a common agreement about the objects of its love, then there is no absurdity in applying to it the title of a ‘people.’ And, obviously, the better the objects of this agreement, the better the people; the worse the objects of this love, the worse the people.

ST. AUGUSTINE, *THE CITY OF GOD* bk. XIX 890 (Henry Bettenson trans., Penguin Books 2003) (1467).

69. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2570 (2007).

70. 126 S. Ct. 1854 (2006).

71. *Flast v. Cohen*, 392 U.S. 83 (1968).

tax credits that allegedly discriminated against interstate commerce.⁷² *Hein* invited the Court to rid itself once and for all of *Flast's* inevitable insinuation of the Court into policy questions.⁷³ That the Court declined the invitation⁷⁴—for now—may suggest merely that the fine-grained distinctions drawn by Justice Alito for the plurality are serviceable until such time as the Court is also prepared to free itself of the highly subjective no-endorsement inquiry. To have made it more justiciably difficult to reach Establishment Clause questions before the Clause, itself, had been repaired would have been imprudent. There is an unmistakable sorority between the mythical justiciability of *Flast* and the equally mythic psychic injury at the core of no endorsement.

72. *DaimlerChrysler*, 126 S. Ct. at 1865.

73. *Hein*, 127 S. Ct. at 2568.

74. *Id.*