Boston College Law School
Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers

7-1-2012

The Constitutional Politics of the Establishment Clause

Richard Albert
Boston College Law School, richard.albert@bc.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/lsfp

Part of the Civil Procedure Commons, Constitutional Law Commons, Courts Commons, and the First Amendment Commons

Recommended Citation
Richard Albert. "The Constitutional Politics of the Establishment Clause." *Chicago-Kent Law Review* 87, no.3 (2012): 867-897.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.

THE CONSTITUTIONAL POLITICS OF THE ESTABLISHMENT CLAUSE

RICHARD ALBERT*

INTRODUCTION 867
I. RELIGION AND THE STATE 870
A. Faith at the Founding 871
B. The Modern Premise 875
II. THE SPECIALNESS OF RELIGION 877
A. The Rise of Taxpayer Standing 879
B. The Erosion of Taxpayer Standing 882
III. THE REDISCOVERY OF THE ESTABLISHMENT CLAUSE 887
A. The Path to De-Incorporation 887
B. The Nonjusticiable Establishment Clause? 891
CONCLUSION 896

INTRODUCTION

What drives judges to grant or deny standing, specifically taxpayer standing under the Establishment Clause, as they do? Perhaps judges are motivated by a deep reverence for the separation of powers, and see constitutional and prudential standing as a straightjacket to keep courts within their own sphere of authority.[1] Perhaps courts handcuff themselves to

* Assistant Professor, Boston College Law School; Yale University (J.D., B.A.); Oxford University (B.C.L.); Harvard University (LL.M.). These reflections were prepared for a Symposium at the Duquesne University School of Law held on November 3, 2011, on the subject of "The Future of the Establishment Clause in Context: Neutrality, Religion, or Avoidance?" I am grateful to Bruce Ledewitz for his kind invitation to offer my thoughts on the topic of taxpayer standing under the Establishment Clause, and for the honor of sitting alongside the distinguished group of panelists he convened for this important event. For their comments and criticisms in the course of our Symposium, I am pleased to thank my fellow panelists and the engaged audience in attendance. It also gives me great pleasure to thank Sean Baird, K. Adam Kunst, and Evan Williams for their suggestions in developing the ideas in this paper.

1. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); Allen v. Wright, 468 U.S. 737, 752 (1984); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

the rules of standing so as to protect the integrity of the border separating law from politics, recognizing that permissive standing rules create vast space for courts to engage in deliberations that more closely approximate the legislative function than the judicial one.[2] Or maybe it is the good-faith intention to begin from neutral principles in order to ultimately reach the right jurisprudential result.[3] We can posit each of these as the answer, or at least part of the answer.

But perhaps the real answer is even more simple, and indeed more troubling, than we might suppose. The Court's taxpayer standing rules under the Establishment Clause have pressed Pamela Karlan to ask how long the Court will continue to "manipulate standing rules to privilege claims it values . . . and to defeat claims it dislikes."[4] Justice Brennan himself advanced a similar line of argument quite forcefully while sitting in the minority. He argued that the Court's hostility to the Framers' understanding of the Establishment Clause, as well as to the Court's enforcement of that understanding, had led the Court to deny standing as a way to "vent[] that hostility under the guise of standing, 'to slam the courthouse door against plaintiffs who as the Framers intended are entitled to full consideration of their Establishment Clause claims on the merits.'"[5] We should therefore consider the possibility that judges have misused the standing doctrine,[6] such that judicial decision-making on taxpayer standing is motivated by nothing more than "naked politics."[7] Could the standing doctrine be merely a smokescreen that conceals the political preferences of judicial actors? One recent study answered the question in the affirmative, concluding that "judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges."[8]

2. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 179 (1974); Massachusetts v. Laird, 400 U.S. 886, 888–89, 893 (1970).

3. *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 454 (1994).

4. Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 882 (2010).

5. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 513 (1982) (Brennan, J., dissenting) (quoting Barlow v. Collins, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in result and dissenting)).

6. Michelle M. Huhnke, *Standing and the First Amendment: A Preenforcement Challenge to Child Pornography Forfeiture Laws*, 61 GEO. WASH. L. REV. 1689, 1690 (1993).

7. Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 149 n.310 (1998).

8. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999).

The charge, then, is both devastating and direct: that the Court chooses whether to grant or deny standing according to what will serve the ideological interests of the governing judicial majority.[9] The Court, we are told, manipulates the standing doctrine in order to make or avoid substantive judgments,[10] much like the Court is seen as having done in the Burger era to align its rulings with the ascendant conservative strand of constitutional law.[11] On Mark Tushnet's analysis, "the Court finds standing when it wishes to sustain a claim on the merits and denies standing when the claim would be rejected were the merits reached."[12] In this way, the Court has deployed standing as a Bickellian passive virtue,[13] a device that allows the Court either to sidestep matters of moral controversy or to grab hold of ones it wishes to engage. Whatever the Court's motivation for granting or denying taxpayer standing under the Establishment Clause, Bruce Ledewitz is right to observe that the Court's establishment case law is a collection of many missed opportunities to engage in "genuine judicial statesmanship."[14]

In these brief reflections, I explore the connection among the founding design of the Establishment Clause, its modern interpretation and reinterpretation, and the doctrine of taxpayer standing. I argue that the creation and evisceration of the taxpayer standing doctrine under the Establishment Clause is the bridge that connects the Clause's founding design with its modern incarnation, rendering the two more similar than we might suppose. I begin with the colonial era and the early years of the American republic, examining the intensity of religious faith at the founding, which manifested itself in a pervasive culture of religious establishment even after the adoption of the Bill of Rights. State establishments of religion abounded, as did religious tests and restrictions. But the eventu-

9. *See, e.g.*, Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 171 (2011); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 580–81 (2007); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 126 (2007); Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 347–48 (2004); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 613–14 (2004); William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 249 (2001); Patrick Lloyd Proctor, *No Generalized Grievances: The "Law of Rules" Approach to Standing*, 19 OHIO N.U. L. REV. 927, 945–46 (1993); Peter H.A. Lehner, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 648 n.134 (1983).

10. Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 14–24 (1982).

11. Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 635 (1985).

12. Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 664 (1977).

13. David J. Weiner, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 227 (2001).

14. BRUCE LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM 144 (2011).

al move toward disestablishment in the several states ultimately spurred federal courts to create the taxpayer standing doctrine to conform American constitutional law to the new reality in the United States: that the modern premise had shifted away from religious establishment and the fusion of church with state toward pluralist democracy and the separation of religion from government.

I subsequently trace the development and demise of the taxpayer standing doctrine. Its emergence is attributable to the same forces that have since quickened its decline: the impulse to recognize the specialness of religion and to grant a measure of autonomy in the choice to adhere, or not, to religion. Courts were concerned that the effect of compelling a nonadherent to support a religion, or religion period, would be to ascribe to her beliefs that are not necessarily her own. In a good-faith effort to establish a sanctuary for citizens and their beliefs, courts therefore carved out a permissive exception for taxpayer standing from the customarily uncompromising rules of federal standing. The consequence of enforcing these new rules governing taxpayer standing under the Establishment Clause was to localize religious beliefs within the individual and away from the several states, where it had been anchored at the founding.

Yet more recently, as I later demonstrate, the taxpayer standing doctrine has come under pressure. It is now on the brink of falling into desuetude. The modern decline of taxpayer standing has curiously derived from the same heightened solicitude for religion, recognizing that religion is special, and that the federal government should keep its hands off. The result of this erosion of taxpayer standing has likewise been to localize religion, though not exclusively within the individual. As I will argue in the pages to follow, the regulation of religion and religious belief are increasingly becoming localized within the several states. The rise and recent erosion of taxpayer standing therefore have a similar impetus and product. The implications of the argument I advance in these pages are more provocative still: the collapse of taxpayer standing could actually have the consequence of returning the republic to the founding design of the Establishment Clause.

I. RELIGION AND THE STATE

Whether the state should stand separate from religion, or integrate itself with it, is a deeply contentious question of constitutional design. It is in many ways the first and most difficult choice constitutional designers must make before moving on to delineate the other dimensions

of the state's power and its relationship with citizens. Though many may presuppose that Church and State should be separate, separation is not a necessary condition of liberal democracy.[15] We should therefore not be surprised to see many variations on Church-State religions across the globe. And we have. Some countries have adopted a fiercely separationist approach, mandating an uncompromising division of religion from government.[16] Others have chosen the contrary approach, enthusiastically merging religion into the state such that there may no longer be a discernible distinction between their respective spheres of influence.[17] But the American experience has been unique. It has exhibited both separationist and integrationist characteristics in its lived history. What is more, the relationship between Church and State is today much different from what it was at the founding, and it may yet evolve again.

A. Faith at the Founding

Early Americans were intensely religious. Though the colonists who had left the Old World in search of a new one ultimately found religious refuge in what would become America,[18] their first actions were to establish deep bonds between religion and government in their respective colonies. Most of the early colonies adopted an official religion to which their inhabitants were committed just as intensely as those who had driven them from England had been committed to their own faith.[19] Importantly, the colonies identified with different religions and therefore reflected different religious affiliations.[20] Religious diversity among the colonies was therefore the norm, but religious diversity within the colonies remained uncommon.[21] The point, though, is clear: at the founding, religious

15. *See* Kent Greenawalt, *Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint*, 30 SAN DIEGO L. REV. 647, 672–73 (1993).

16. *See, e.g.*, 1958 LA CONSTITUTION art. I (Fr.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] Apr. 25, 1974, art. 288(c) (Port.); TÜRKÍYE CUMHURÍYETÍ ANAYASASI [CONSTITUTION] NOV. 7, 1982, art. 2 (Turk.).

17. *See, e.g.*, THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 26, 2004, art. 149 (Afg.); CONSTITUTION DE LA REPUBLIQUE ALGERIENNE DEMOCRATIQUE ET POPULAIR Nov. 28, 1996, art. 178(3) (Alg.); QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 12 [1980] (Iran).

18. Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 933 (1995).

19. MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 35 (1992).

20. LOREN P. BETH, THE AMERICAN THEORY OF CHURCH AND STATE 59–60 (1958).

21. CLIFTON E. OLMSTEAD, RELIGION IN AMERICA PAST AND PRESENT 27 (1961).

establishments were, as Jed Rubenfeld demonstrates, "features of the American landscape."[22]

The adoption of neither the United States Constitution, nor even the Bill of Rights, did much to change the establishmentarian disposition among the several states. And one should not have expected much to change either, because the Bill of Rights was not intended to disrupt the state religious establishments at the time. Looking back to the actual political practice of the day, the Establishment Clause "did not disestablish anything," writes Michael McConnell, stressing the most important point to appreciate about the Clause: "It prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states."[23] The founding design of the Establishment Clause is therefore more correctly understood as a federalism-reinforcing device, intended to protect the states from the intrusive reach of the national government in matters of religion and to safeguard the sphere of sovereignty belonging to states.[24]

Consider the religious establishments that existed at the founding, some of which persisted even after the adoption of the Establishment Clause and the larger Bill of Rights. Connecticut's 1776 Constitution established Christianity as the governing faith[25] and the state mandated a religious test for office requiring a disavowal of Catholicism.[26] It was not until 1818 that the state finally disestablished its state church.[27] The Massachusetts Constitution gave a preference to Protestantism,[28] a preference which endured until 1833 when the state formally disestablished.[29] For its part, New Hampshire established Congregationalism,[30] held fast to a Protestant test for office,[31] and did not disestablish until 1819.[32] South Carolina established Protestantism[33] and disestablished it in 1790.[34]

22. Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really was Unconstitutional*, 95 MICH. L. REV. 2347, 2351 (1997).

23. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2109 (2003).

24. Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003).

25. CONN. CONST. of 1776 pmbl.

26. Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 681–83 (1987).

27. EDWIN S. GAUSTAD, FAITH OF OUR FATHERS 120 (1987).

28. MASS. CONST. art. III.

29. SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 5–6 (2010).

30. Michael R. O'Neill, *Government's Denigration of Religion: Is God the Victim of Discrimination in Our Public Schools?*, 21 PEPP. L. REV. 477, 525 n.380 (1994).

31. N.H. CONST. Bill of Rights, art I, § VI.

But religious establishments are not the only way to exhibit a preference for religion or an antipathy for non-religion. State religious tests are an equally effective way to signal an official position, and they did not run afoul of the Establishment Clause in the early years of the republic. Although some states had no officially established religion after the adoption of the United States Constitution, they nonetheless imposed religious tests for public office within the state. This is true of Delaware,[35] Georgia,[36] Maryland,[37] New Jersey,[38] New York,[39] North Carolina,[40] and Pennsylvania.[41] As for Virginia, it was not until 1830 that its Constitution was amended to enshrine within it a proscription against religious tests.[42] The only state to neither establish a religion nor require a religious test was Rhode Island,[43] which was founded by Roger Williams, the great defender of religious freedom.[44]

That was the founding landscape of law and religion in early America. The portrait actually becomes clearer if we examine the founding landscape from a higher level of abstraction. Looking at the whole of the early American tradition of religion and government against the backdrop of the lived experiences of the states as well as the constitutional text itself allows us to uncover the three general signposts that informed the founding design of the Establishment Clause: (1) national interdiction; (2) congressional disability; and (3) state sovereignty. Let us understand these three signposts as the three principles that stand at the very base of the founding design of the Establishment Clause.

32. Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 BYU L. REV. 439, 452 n.41 (1995).

33. S.C. CONST. of 1778, art. XXXVIII.

34. Frederick V. Mills, Sr., *Disestablishment*, *in* ENCYCLOPEDIA OF RELIGION IN THE SOUTH 260, 261 (Samuel S. Hill et al. eds., 2005).

35. DEL. CONST. of 1776, art. XXII.

36. GA. CONST. of 1777, art. VI.

37. *See* Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (invalidating Maryland's religious test).

38. N.J. CONST. of 1776, art. XIX.

39. MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 58 (1996).

40. N.C. CONST. of 1776, art. XXXII.

41. PA. CONST. of 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania § 10.

42. ABEL C. THOMAS, STRICTURES ON RELIGIOUS TESTS, WITH SPECIAL REFERENCE TO THE LATE REFORM CONVENTION 21 (1838).

43. Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 483 (1999).

44. Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 462–63 (1991).

The Establishment Clause's first founding principle is prohibitory. At the founding, the Clause constrained the actions of only the national government, not the states.[45] Proof positive is the multiplicity of intimate relationships between religion and government within the several states even after the adoption of the Establishment Clause—relationships that would have otherwise violated the Clause had it applied to the states. The second principle in the design of the Clause is derivative of the first and also disabling in the sense that it disempowers an institution from taking action. The Establishment Clause did not prohibit the entirety of the national government from establishing a religion. It was only Congress that was the target of the drafters of the Establishment Clause. This is evident in the very language of the Clause: "Congress shall make no law respecting an establishment of religion. . . ."[46] Finally, the third principle that lay beneath the founding design of the Establishment Clause is state sovereignty. States were to retain the power to regulate matters of faith according to their own local rules and conventions, undisturbed by the risk of encroachment by the new national government.[47]

National interdiction, congressional disability, and state sovereignty—those, then, were the three principles that informed the design of the Establishment Clause. Together, they created wide latitude for states to manage the boundary between religion and government, such that some states ultimately opted to erect a wall between the two while others chose a more osmotic membrane that allowed close collaboration and interchange between them. While the Establishment Clause had forbidden the national government, specifically the Congress, from cultivating too cozy a connection to religion and religious institutions, the Clause had mandated no such proscription upon the states. Quite the contrary, the states remained free to continue their own preferred practices as to the relationship between religion and government. There were therefore two regimes gov-

45. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 251 (1833) ("These amendments [listed in the Bill of Rights] contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.").

46. U.S. CONST. amend. I. It is also evident by inference from the religiously-inspired words and deeds of the President of the United States and some Justices on the Supreme Court of the United States, the two other branches in the national government. Early Presidents invoked Christianity in their respective Inaugural Addresses, see, for example, John Adams, President, Inaugural Address (Mar. 4, 1797), at para. 12, *available at* http://avalon.law.yale.edu/18th_century/adams.asp; William Henry Harrison, President, Inaugural Address (Mar. 4, 1841), at para. 24, *available at* http://avalon.law.yale.edu/19th_century/harrison.asp; James Buchanan, President, Inaugural Address (Mar. 4, 1857), at para. 19, *available at* http://www.bartleby.com/124/pres30.html, and a Supreme Court Justice used a majority opinion as a forum within which to call America a "Christian nation," see Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

47. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004).

erning the constitutional law of religion and government: one for the national government and one for its state counterparts.

B. The Modern Premise

It was not until the incorporation of the Establishment Clause that the American superstructure of law and religion changed as a matter of constitutional law. Before then, the relationship between law and religion was governed largely according to state-specific choices. Unconstrained by the Establishment Clause, states could establish or disestablish, favor or disfavor, fund or defund religion according to the will of their constituents and state political actors.[48] "In short," writes Akhil Amar, "the original establishment clause was a home rule-local option provision mandating imperial neutrality."[49] It was a hands-off rule that militated in favor of state autonomy. But that changed—and quite dramatically—when the Court cast aside the founding design in recognition of the new social and political realities of modern America.

Beginning in the 1920s, the Supreme Court began to interpret the Bill of Rights as restricting not only the national government but also the several state governments.[50] The consequence of incorporating the Bill of Rights against the states was to chip away at the independence they had enjoyed in the founding regime, when they could not only regulate matters of religion and religious belief but more broadly individual rights and liberties like the freedom of association[51] and criminal defense protections.[52] The Court's greater oversight of state law and political practice sprang from its growing concern about federalism as a rights safeguard. Although federalism had originally been conceived as a structural protection for personal rights and as a guarantor of interstate pluralism, the twentieth-century Court began to see federalism as providing insufficient protection for the nation's budding intrastate pluralism.

The defense of intrastate pluralism helps explain the Court's first judgment, in 1940, to apply the First Amendment's religious protections to the states. In *Cantwell v. Connecticut*, the Court incorporated the Free Exercise Clause against the States, holding that a state statute could not

48. H. Wayne House, *A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?*, 13 BYU J. PUB.. L. 203, 209–10 (1999).

49. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 246 (1998).

50. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353 (1937); Powell v. Alabama, 287 U.S. 45 (1932); Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

51. *See, e.g.*, New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988); United States v. Cruikshank, 92 U.S. 542 (1875).

52. *See, e.g.*, Presser v. Illinois, 116 U.S. 252 (1886); Hurtado v. California, 110 U.S. 516 (1884).

lawfully ban Jehovah's Witnesses from distributing religious pamphlets in a residential neighborhood.[53] Writing for the Court, Justice Roberts explained that the Fourteenth Amendment had brought the states within the reach of the Bill of Rights and that the states could no longer take shelter under the cover of state sovereignty to immunize their rights violations.[54] That was a critical point in the Court's decision. But the most important statement appeared in the Court's justification for incorporating the religious liberties in the Bill of Rights against the states. Anticipating the criticism that states should be free to regulate religion, as had been the case under the founding design, the Court brandished its new argument of pluralism as a reason why the Bill of Rights should temper state power: "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."[55] The Court therefore affirmed itself as the defender of individual rights, against incursions by both the national government and the states.

The same theme reappeared when the Court incorporated the Establishment Clause. *Everson v. Board of Education* concerned a New Jersey law that reimbursed parents for the cost of their children's transportation to public schools as well as to private Catholic schools.[56] The plaintiff challenged the law as a violation of the Establishment Clause because it compelled him to financially support Catholicism through his tax dollars.[57] The Court disagreed, but still invoked the principle of pluralism upon which it had relied seven years prior in *Cantwell*.[58] The Establishment Clause cannot tolerate a program that gives a financial preference to one religion over another, wrote the Court, because that ignores the religious pluralism within the state of New Jersey.[59] If it wants to respect the Clause, New Jersey "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[60]

53. Cantwell v. Connecticut, 310 U.S. 296 (1940).
54. *Id.* at 303.
55. *Id.* at 310.
56. Everson v. Bd. of Educ., 330 U.S. 1 (1947).
57. *Id.* at 3–4.
58. *Id.* at 15–17.
59. *Id.*
60. *Id.* at 16 (emphasis in original).

Here, again, we see the Court's solicitude for the new reality of religious pluralism within states.

Intrastate pluralism, then, is what spurred the Court to reset the balance of powers between the national and state authorities. In all types of cases implicating religion and its establishment, the Court began to insert itself as a protective shield between states and their citizens, where there had once been nothing but state-level institutions to mediate the boundary separating citizens from their state. With the Establishment Clause as its sword and the defense of religious pluralism within states as its purpose, the Court struck down state-mandated school prayer in public schools,[61] Bible readings in public schools,[62] Ten Commandments' displays in public schools,[63] and prohibitions on teaching evolution in public schools.[64] In the interest of religious pluralism, the Court also struck down public subsidies for textbooks and salaries at religious schools[65] as well as the erection of a nativity scene on public property.[66] Amid the Court's several invalidations, the Court also upheld many state laws that, in its view, accorded with the new modern premise of religious pluralism.[67]

II. THE SPECIALNESS OF RELIGION

Deep within the core of the Court's case law on religion is a conviction that religion is special.[68] From the founding to today, religion has commanded a deep reverence from the Court. And with reason, because the founders intended religion to benefit from protections more robust than those conferred upon other manifestations of thought and action.[69] Indeed, the special protection for religion is perhaps America's foremost constitutional value,[70] enshrined as it is in the very first words of the very first amendment to the Constitution. Nowhere is the specialness of religion

61. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962).

62. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963).

63. *See* Stone v. Graham, 449 U.S. 39, 40–41 (1980).

64. *See* Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

65. *See* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

66. *See* County of Allegheny v. ACLU, 492 U.S. 573, 601–02 (1989).

67. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983); Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970); Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

68. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 14–34 (1985).

69. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 676–77 (2002).

70. JOHN HART ELY, DEMOCRACY AND DISTRUST 94 (1980).

more evident than in the Court's development and dismantling of taxpayer standing under the Establishment Clause.

Yet the rules of taxpayer standing are neither obvious nor reducible to a clear and concise statement. Quite the contrary, the Court has itself recognized that "the concept [of standing] cannot be reduced to a one-sentence or one-paragraph definition."[71] Scholars have been more critical, one describing the Court's standing approach as "confused,"[72] another suggesting that the Court's "strange doctrine in this area need[s] clarifying,"[73] and still another decrying that "the Supreme Court's own explanation of the [taxpayer standing] exception borders on gibberish."[74]

What lies beneath these criticisms, however, is more than invective. It is a legitimate grievance that taxpayer standing under the Establishment Clause is anchored to what has evolved into something of a right that concerns more government expenditures than religious liberty.[75]

Part of the Court's difficulty in promoting clarity in taxpayer standing has been its own disquiet about the theory of standing that should govern access to courts. Faced with three standing options before it—a public rights model of standing where citizens may sue in the name of the larger public interest, a private rights model which limits standing to those who have suffered a personal injury, and a quasi-public model—the Court ultimately chose the last one: a standing regime under which, as Andy Hessick defines, "litigants no longer had standing only to vindicate their own, private rights but also could sue to vindicate public interests."[76] Today, the taxpayer standing doctrine blends both public and private rights because taxpayer suits under the Establishment Clause rest on twin misgivings about the government overstepping the boundary separating religion from the state and also about personal liberties.[77]

But whether the Establishment Clause should invite the vindication of both private and public rights is unclear. On one common view, a public

71. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982).

72. Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 607 (1997).

73. Kyle Duncan, *Misunderstanding Freedom from Religion: Two Cents on Madison's Three Pence*, 9 NEV. L.J. 32, 33 (2008).

74. Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365, 370 (2006).

75. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 348 n.163 (1986).

76. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 294 (2008).

77. Donald L. Beschle, *The Supreme Court's IOLTA Decision: Of Dogs, Mangers, and the Ghost of Mrs. Frothingham*, 30 SETON HALL L. REV. 846, 876 (2000).

endorsement or censure of a religion or of religion in general triggers the rights of only the affected sub-class of individuals whose religion is disfavored.[78] For instance, where the state grants tax exemptions to parents whose children attend Christian denomination private schools, only those parents whose children attend non-Christian denomination schools could be argued to suffer an injury, if indeed that treatment amounted to an injury at all. According to the competing view, however, any governmental effort to advance religion or indeed to hinder it implicates the rights of all citizens, irrespective of their personal relationship to the favored or impugned religion.[79] For whether or not a person is an adherent to the religion, or any religion, her status as either an adherent or a non-adherent will be affected by the government's choice to involve itself in religious affairs. In this respect, the right against a governmental establishment of religion is the paradigmatic public right that touches all persons. And that is precisely what spurred the Court to give taxpayers special access to federal courts for Establishment Clause violations.

A. The Rise of Taxpayer Standing

Taxpayer standing was prohibited before it was allowed. In the Court's opening pronouncement on taxpayer standing, individuals were denied the right to challenge federal appropriations in their capacity as citizens required to pay federal taxes.[80] On the theory that the plaintiff's alleged injury was interchangeable with what any other taxpayer might raise as an injury suffered on the same facts, the Court rejected the argument that a citizen could challenge a federal expenditure as violative of her constitutional rights. This reflects the Court's prohibition against hearing claims that challenge an alleged harm too diffuse to allow anything but abstract review. The general rule holds that the Court refuses standing "when the asserted harm is a generalized grievance shared in a substantially equal measure by all or a large class of citizens."[81] The Court's initial posture was therefore to refuse standing to a taxpayer insofar as she was indistinguishable from her fellow citizens with respect to the interests she claimed had been violated by federal expenditures.

78. *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 414 n.356 (2002).

79. *See, e.g.*, Anne Abramowitz, *A Remedy for Every Right: What Federal Courts Can Learn from California's Taxpayer Standing*, 98 CALIF. L. REV. 1595, 1609 (2010); Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 839 (1998).

80. Frothingham v. Mellon, 262 U.S. 447, 487–99 (1923).

81. Warth v. Seldin, 422 U.S. 490, 499 (1975) (internal quotation marks omitted).

But the Court later created an exception to the rule against taxpayer standing. Taxpayers are not all created equal, suggested the Court in *Flast v. Cohen*, at least when federal expenditures implicate a taxpayer's religion and religious beliefs.[82] More broadly, the *Flast* Court sought to give constitutional cover to an individual challenging a federal appropriation that violates a constitutional provision—even though such a claim might otherwise be disqualified as a generalized grievance. Unlike the conventional rules of standing which require the claimant to prove that she has suffered an injury that sets her apart from the larger community of citizens,[83] taxpayer standing calls for no such showing under the holding of *Flast*. Even though the claimant may not have been subjected to the coercive force of the state and her religious observance may not have been burdened, the Court's taxpayer standing policy grants her the right to stand as a surrogate for the larger population that would object to the complicity between religion and government.[84] In Carl Esbeck's view, the *Flast* exception has constitutional merit because it is indispensable to the rights preserved under the Establishment Clause.[85]

Flast involved a challenge to federal expenditures that plaintiffs argued were unconstitutionally subsidizing religious schools. Retreating from its rule in *Frothingham*, the Court began to lay the foundation for permitting religion-based taxpayer standing when it observed that there exists "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs."[86] Given that the *Flast* plaintiffs sought to invalidate a congressional program under the Establishment Clause, the Court granted them standing, though not before articulating its nexus test, which all taxpayers requesting standing must satisfy.[87] The test has two parts: first, the taxpayer must demonstrate a rational connection between her status as a taxpayer and the governmental action she seeks to invalidate; and second, the taxpayer must establish what the Court called a "nexus" between her status as a taxpayer and the alleged constitutional violation.[88] To refine the point, the nexus test applies only where Congress has exercised its taxing and spending

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

83. *See* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 80 (1978).

84. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 35–36 (1998).

85. Carl H. Esbeck, *What the* Hein *Decision Can Tell Us About the Roberts Court and the Establishment Clause*, 78 MISS. L.J. 199, 212 (2008).

86. *Flast*, 392 U.S. at 101.

87. *Id.* at 102.

88. *Id.*

powers, not any other power delegated to it under Article I.[89] On the facts of *Flast*, the challengers met the two-part test because the Establishment Clause's purpose, reasoned the Court, was to forbid the federal government from taxing and spending to the benefit of religion.[90]

The doctrine of taxpayer standing is really about the vindication of specific rights, in this case the right to religious freedom and the corollary right to freedom from government establishments of religion. It transforms the structural protection of the Establishment Clause that erects a barrier between religion and government into an individual right against public funding flowing to religious institutions.[91] This makes eminent sense from our vantage point now, looking back at the development of taxpayer standing. But the rise of taxpayer standing was not preordained in America's constitutional unfolding nor does the constitutional text itself even gesture toward it. All of which raises an important question: Why did the Court deem it necessary to create an Establishment Clause exception to the standing rules?

There are two reasons why the Court created the Establishment Clause exception to taxpayer standing. The first reason was the difficulty the Court perceived citizens would have in meeting the general test for achieving standing. And the second reason was the Court's inclination to constitutionalize the specialness of religion. Back to the first, which is the more obvious of the two, the underlying concern is that establishment violations, like other far-reaching injuries, are generally too diffuse for a challenger to meet the requirements of standing.[92] Without the taxpayer exception, there would have been no way for establishment challengers to clear the high hurdle set by the Court's standing rules given the proscription on generalized grievances. Still, this does not explain why the Court wanted to make possible establishment challenges as opposed to other challenges that are barred by standing rules. The answer lies in the second reason for the Court's taxpayer standing exception.

The real nub of the reason why the Court created the Establishment Clause exception was to recognize the specialness of religion. In order to grasp this point, it is necessary to understand the difference between what Ira Lupu calls a polity principle and a rights principle.[93] A rights princi-

89. *See* Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in* DaimlerChrysler v. Cuno, 4 GEO. J.L. & PUB. POL'Y 47, 55 (2006).

90. *Flast*, 392 U.S. at 103.

91. *See* Saul Zipkin, *Democratic Standing*, 26 J.L. & POL. 179, 232 (2011).

92. *See* Gwendolyn McKee, *Standing on a Spectrum: Third Party Standing in the United States, Canada, and Australia*, 16 BARRY L. REV. 115, 122 (2011).

93. Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 235 (1994).

ple, explains Lupu, is one that operates to limit court access to parties whose own personal interests are triggered by state action.[94] Therefore, to vindicate a rights principle, there must exist a strong connection among the action, the right implicated, and the party to whom the right personally belongs. In contrast, a polity principle can be enforced in court by persons who are not directly impacted by the state action at issue.[95] As Lupu writes, "enforcement of polity principles through adjudication requires assignment of enforcement rights to private attorneys general, i.e., to those who lack a strong personal stake but nevertheless are sufficiently committed to the cause that they will litigate aggressively on behalf of structural concerns."[96]

The Court's taxpayer standing exception is a polity principle pursuant to which virtually anyone could challenge a governmental action thought to violate the Establishment Clause, even if the state action had not compromised the claimant's own personal right.

To allow any citizen to raise an establishment claim—contrary to the conventional rules of standing—is to signal quite emphatically that religion and religious claims are special. By creating the taxpayer standing exception, the Court set religion apart from the other rights, freedoms, and structures that are subject to the limitations against generalized grievances, abstract review, and concrete and particularized injury-in-fact. True, the Court has never foreclosed the possibility that taxpayer standing could well extend beyond the Establishment Clause context.[97] That could conceivably undercut religion's claim to specialness. But that the Court has not yet applied taxpayer standing to anything but the Establishment Clause proves to us that the Court regards the freedom from establishment differently from other constitutional protections, at least for now. Whether the Court will shift on this question is anyone's guess.

B. The Erosion of Taxpayer Standing

Despite the Court's insistence that taxpayer standing remains a viable vehicle for contesting the coziness of religion and government,[98] scholars have reached a contrary conclusion. Today, writes one commentator,

94. *Id.*

95. *Id.*

96. *Id.*

97. Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 275 (2008).

98. *See* Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011).

"taxpayer standing is as unsuccessful a way to challenge public accommodation of religion as it was some eighty years ago in *Frothingham*."[99]

There is some truth to that criticism. Over the past thirty years, the Court has gradually eroded the ground upon which the *Flast* exception was built. But it has done so without dispossessing religion of the specialness in which *Flast* clothed it.

The first major blow to the doctrine of taxpayer standing came in *Valley Forge*.[100] The *Valley Forge* Court, according to Abram Chayes, "went out of its way to strip *Flast* of any remaining generative potential."[101] The two cases reach such apparently contradictory results that William Fletcher has remarked that "it should be clear that either *Flast* or *Valley Forge* is wrongly decided."[102] At the time clearly divided among themselves, the justices in *Valley Forge* began what may now in retrospect be interpreted as a careful effort to delimit *Flast*.[103] Whereas *Flast* had authorized taxpayers to challenge federal expenditures that conferred upon religious institutions the imprimatur of the government in violation of the Establishment Clause, the facts in *Valley Forge* did not persuade the Court that the same risk of entangling state with church exists when the federal government grants land to a religious institution.[104] The *Valley Forge* Court consequently denied standing to a citizen who had objected to a congressional land grant to a religious college.[105] The result in *Valley Forge* is important because it demonstrates the Court's reluctance to expand, and indeed its effort to shrink, the *Flast* exception.[106]

A subsequent case did nothing to strengthen *Flast*. In *Newdow*, which was an unsuccessful challenge to the constitutionality of the Pledge of Allegiance, the Court denied standing to a father who had sought to bring a suit on behalf of his daughter.[107] Although the plaintiff's claims were grounded in the Establishment Clause—which would have presumably placed him squarely within the realm of taxpayer standing, for which

99. Catherine M.A. McCauliff, *Religion and the Secular State*, 58 AM. J. COMP. L. 31, 48 (2010).

100. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

101. Chayes, *supra* note 10, at 12.

102. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 268 (1988).

103. *See* Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and* Valley Forge, 61 N.C. L. REV. 798, 819 (1983).

104. *Valley Forge*, 454 U.S. at 479–80.

105. *Id.* at 490.

106. Luke Meier, *Constitutional Structure, Individual Rights, and the Pledge of Allegiance*, 5 FIRST AMEND. L. REV. 162, 179 (2006).

107. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

the only exception recognized thus far is the Establishment Clause itself—the Court did not even cite *Flast*. This is admittedly consistent with the Court's earlier and later rulings involving taxpayer standing in which the Court gave *Flast* little deference. Yet to not even gesture toward the leading case in the subject matter area is unusual for the Court. Unless, that is, the Court has carefully considered its omission. Perhaps at the time of *Newdow* the omission could have been seen as an honest oversight. But today, given the Supreme Court's rulings in the aftermath, it seems something more was at play, namely the marginalization of the *Flast* rule.

The Court struck a more serious blow to *Flast* in *Hein*.[108] Two justices, in a concurring opinion, took the view that the Court should overrule the *Flast* exception.[109] Imagine for a moment America without the *Flast* exception. Were *Flast* overruled, the rule in *Frothingham* would control whether taxpayers could bring their establishment claims to federal court. Recall that *Frothingham* denies individuals the power to challenge federal appropriations as violative of the Establishment Clause in their personal capacity as citizens obligated to pay taxes to the federal government.[110] The consequence of denying taxpayers the power to sue in federal court under the Establishment Clause is to effectively shield states from federal judicial oversight. In such a regime approximating the founding design of the Establishment Clause, states would conceivably displace citizens as the proper plaintiffs. In a return to the founding regime where the Establishment Clause is effectively deincorporated, Congress could not make any law establishing a religion. And were Congress to pass a law affecting the right of states to establish or not establish a religion, states could in turn file suit to vindicate their freedom from congressional intrusion into their sovereign sphere.

But *Flast* has not yet been repudiated. Nonetheless, although the *Hein* plurality did not expressly overrule *Flast*, it did limit the *Flast* rule quite severely to a set of circumstances that in many ways belies the *Flast* Court's intended application. *Hein* held that a taxpayer could not sue under *Flast* to invalidate the White House's practice of using, at its discretion, general Executive Branch appropriations to organize conferences in furtherance of the President's faith-based initiatives program.[111] The basic rule emerging from *Hein* is therefore that taxpayer standing does not extend to a claimant wishing to challenge discretionary Executive ex-

108. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007).
109. *Id.* at 618 (Scalia, J., concurring).
110. Frothingham v. Mellon, 262 U.S. 447, 487–99 (1923).
111. *Hein*, 551 U.S. at 605.

penditures that violate the Establishment Clause, and instead applies only to what was at issue in *Flast*: congressional expenditures, or expenditures specifically authorized by Congress, that violate the Establishment Clause.[112]

One could certainly defend the Court's distinction in *Hein*. But the distinction cannot be anchored in *Flast*, where the Court rests it, because *Flast* did not cite, nor even hint at, the difference between Executive Branch and congressional expenditures.[113] Quite the contrary, the *Flast* Court spoke only of the "expenditure of federal tax funds,"[114] which would capture expenditures by all branches of government. The animating theory of *Flast* did not turn on where the government expenditures originated, whether the legislative or executive branch. Instead, *Flast* articulated plainly its disapproval of public dollars being used in violation of the Establishment Clause, which implicates tax dollars impermissibly spent both by Congress and under the direction of the President.[115] Yet *Hein* interpreted *Flast* otherwise, such that now it appears to be the case that taxpayer standing under the Establishment Clause is available only pursuant to an identifiable congressional appropriation, and that alone.[116]

The Court's most recent taxpayer standing case has only further entrenched the unfavorable disposition toward the *Flast* exception. In *Winn*, the Court weighed the constitutionality of an Arizona law that afforded tax credits for private donations in support of School Tuition Organizations, which distributed those funds to private school students, including some who attended religious schools.[117] The Court denied standing to a group of Arizona taxpayers who argued that the law infringed upon the Establishment Clause.[118] Yet the Arizona law had appeared to be a state government analogue to the very facts that had been contested in *Flast*: a taxing and spending provision authorized by the legislature disburses public funds to religious institutions. Given that the plaintiffs were taxpayers who could reasonably be argued to meet the two prongs of the *Flast* test—a logical connection to the legislative taxing and spending power and a nexus between the alleged violation and the taxpayers' inter-

112. *Id.* at 610.

113. *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 10 (2010).

114. Flast v. Cohen, 392 U.S. 83, 103 (1968).

115. Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 29–30 (2009).

116. *See* Gillian E. Metzger, *Remarks of Gillian E. Metzger*, 64 N.Y.U. ANN. SURV. AM. L. 459, 462 (2009).

117. Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011).

118. *Id.*

ests—one could have expected the Court to grant standing. But it did not, distinguishing *Flast* from this particular case on the theory that the money being disbursed to religious schools came not from the public but rather from private individuals, in contrast to the facts in *Flast* where the money had been fully public.[119] In the aftermath of *Winn*, the rule of taxpayer standing is narrower than ever before.

Though some of the Court's recent taxpayer standing cases may suggest it no longer regards religion as special,[120] I think the contrary is true. As we read in *Newdow*, Justice O'Connor's concurring opinion recognizes that "[t]he Court has permitted government, in some instances, to refer to or commemorate religion in public life."[121] Why? Because "some references to religion in public life and government are the inevitable consequence of our Nation's origins."[122] Yet "[t]hese references are not minor trespasses upon the Establishment Clause . . . . [T]heir history, character, and context prevent them from being constitutional violations at all."[123] Justice O'Connor concluded with a tribute to the role of religion in American life: "It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it."[124] Justice O'Connor expressed similar views in *McCreary County v. ACLU*, where she affirmed that the Founders' reverence for "religion's special role in society" continues to inform the Court's approach to religion.[125]

But it is the Court's taxpayer standing judgments themselves that convince me religion remains special in its view. The Court's dismantling of the taxpayer standing doctrine is not without consequence, and the Court recognizes that. When the Court created the taxpayer standing doctrine, it was grounded in the Court's desire to grant autonomy to the individual to choose or reject religion. The consequence of granting taxpayer standing under the Establishment Clause was to localize religious beliefs within the individual and away from the several states, where it had been anchored at the founding. But the Court's recent retrenchment on taxpayer standing—though it has likewise been anchored in the Court's desire to give more autonomy to choose or reject religion—has

119. *Id.* at 1447.

120. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 488 (1982).

121. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring).

122. *Id.*

123. *Id.* at 37.

124. *Id.* at 44–45.

125. McCreary County v. ACLU, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring).

returned autonomy to the states, which now share it with the individuals located within each of the several states. We may therefore see the emergence of a state-specific menu of establishment rules. This is a different way of recognizing the specialness of religion: it projects the view that religion and religious belief are better protected by the states, which can speak directly and differently to their respective communities, rather than by the national government, which cannot accommodate state-specific religious sensibilities as efficiently or effectively as a state-centric Establishment Clause.

III. THE REDISCOVERY OF THE ESTABLISHMENT CLAUSE

The erosion of taxpayer standing has provoked observers to proclaim their disapproval with the Court's recent turn against granting standing in Establishment Clause cases. One critic has described the Court's distinction of *Hein* from *Flast* as "far from persuasive,"[126] another as "unprincipled and unsustainable,"[127] and still another as "fatuous."[128] This is a difficult charge to neutralize for a Court whose transparent effort to pinch down upon the taxpayer standing doctrine has been understood as "further muddl[ing] an already unclear taxpayer standing doctrine."[129] These charges may be right but they do not fully explain what lies beneath the Court's constitutional law. To understand the Court's taxpayer standing case law requires us to draw equally from constitutional law as from constitutional politics. Only then may we uncover what could be the Court's jurisprudential ambitions: returning to the founding design of the Establishment Clause.

A. The Path to De-Incorporation

The slow march toward the de-incorporation of the Establishment Clause may have paradoxically begun with its incorporation. In *Everson*, the Court applied the Establishment Clause against the states, finally bringing the state governments into conformity with the standards set by the Constitution.[130] Interestingly, *Everson* had been from the beginning a

126. Stephen Reinhardt, *Life to Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV.. 391, 400 n.36 (2010).

127. Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1083 (2009).

128. Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 431 (2007).

129. Lauren S. Michaels, Recent Development, Hein v. Freedom From Religion Foundation*: Sitting This One Out—Denying Taxpayer Standing to Challenge Faith-Based Funding*, 43 HARV. C.R.-C.L. L. REV. 213, 233 (2008).

130. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

case about taxpayer standing, but the Court chose not define it in those terms.[131] This is surprising given that the Court itself wrote in its judgment that "[t]he appellant, in his capacity as a district taxpayer, filed suit in a State court challenging the right of the Board to reimburse parents of parochial school students."[132]

Nonetheless, the *Everson* Court's ruling created a path dependency that may help explain where we are today on taxpayer standing. The relevant facts of *Everson* bear remembering: a New Jersey statute authorized travel reimbursements to parents of children attending public and private Catholic schools.[133] In reaching its judgment, the Court reasoned that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[134] This powerful line of reasoning would lead most readers to conclude that the Court invalidated New Jersey's reimbursement program, particularly given that the state had chosen to reimburse only Catholic schools among eligible private schools to the exclusion of other private denominational schools. But the Court concluded otherwise, somehow reasoning that "New Jersey has not breached [the wall of separation] here."[135] The great irony in *Everson* is the Court's proclamation that states were henceforth bound by the strictures of the Establishment Clause yet, on these particular facts, the Clause did not apply.

Everson was a peculiar case. On the one hand, *Everson* marked a win for those who believe in the separation of church from state insofar as the reach of the Establishment Clause was expanded to the states. That is of course the consequence of incorporating the Establishment Clause in the Bill of Rights through the Due Process Clause onto the states. It requires, at least nominally, the same degree of separation between religion and government at the state level as the Bill of Rights commands at the national level. On the other hand, though, that the *Everson* Court upheld the New Jersey law was also a triumph for those who champion state sovereignty. New Jersey's prerogatives were shielded against invalidation at the hands of national institutions and compulsions. This raises an important question: Why did the Court resolve *Everson* in this way, giving a partial victory to both separationists and state sovereigntists? The answer returns us to the founding design of the Establishment Clause.

131. Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL'Y 51, 60 (2009).

132. *Everson*, 330 U.S. at 3.

133. *Id.* at 3–4.

134. *Id.* at 18.

135. *Id.*

Recall that the founding design of the Establishment Clause was national-centric. The Clause, as originally designed and interpreted, constrained the actions of only the national government, not the states. Incorporation changed that, causing the Establishment Clause to constrain the actions of both the national and state levels of government. But there was a collision between old and new in the transition from the founding design of liberty to the modern premise of pluralism. It was difficult for the Court to shed its pre-incorporationist skin, pursuant to which it granted great deference and wide latitude to states. This theme is echoed in the Court's own words in *Everson* when it states, in the same breath, that the New Jersey law must be measured against the "limitations imposed by the First Amendment,"[136] but that the Court must be careful to "not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power."[137] The Court's equivocal statement of the law should not arouse criticism; it should instead invite understanding about the Court's difficulty in transitioning the republic from an Establishment Clause oriented toward only the national government to one that would also oblige the states.

Since *Everson*, the fate of the incorporated Establishment Clause has gone from uncertain to just about dead. Here is why: the three general signposts that informed the founding design of Establishment Clause prior to the Clause's incorporation are now true once again. National interdiction, congressional disability, and state sovereignty—these three principles have resurfaced as the organizing logic that gives the rules of taxpayer standing under the Establishment Clause their basic structure.

Consider the present status of each of these principles in turn, beginning with national interdiction. Remember that the first principle of the Establishment Clause's founding design is prohibitory, meaning that it restricts only the national government, not the states. The dissent in *Winn* explains to us why this is so, noting although the national government is barred by the Establishment Clause from subsidizing religion and religious institutions through the tax system,[138] no similar constraint applies to the state governments: "From now on, [a state] government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion."[139] Indeed, continues the

136. *Id.* at 16.

137. *Id.*

138. *See* Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1462 (2011) (Kagan, J., dissenting).

139. *Id.* at 1450.

dissent, under the current rules of taxpayer standing, a state could grant a tax credit to individuals who purchase a crucifix, and no federal court could grant standing to an individual to challenge the state's action.[140] This approximates what governed under the founding design of the Establishment Clause. Then, states had nearly free reign to help or hinder and promote or frustrate religion without worrying about citizens taking to the federal courts for relief. That appears to be the case—or if the trend continues, it may soon be the case—under the rules of taxpayer standing.

The second principle of the founding design of the Establishment Clause is congressional disability. The important point here is that the Establishment Clause did not prohibit the whole of the national government from establishing a religion. It applied only to Congress. That was then. Today, *Hein* intimates a possible return to this second principle. *Hein*, of course, involved general Executive Branch appropriations in support of religion and religious institutions in connection with the program on faith-based and community initiatives. The Court sanctioned those expenditures precisely because they were executive expenditures, and not congressional ones. Indeed, the Court cautioned expressly that Congress could not constitutionally get away with the same kind of activity because Congress is subject to rules that differ from the ones that constrain other federal actors, namely the President and other executive branch officers.[141]

This point is even narrower still. The modern Court has interpreted taxpayer standing so as to restrict access to the judiciary only to challenges against congressional establishments of religion when Congress acts pursuant to its taxing and spending powers.[142] The exchange between Justice Stephen Breyer and Solicitor General Paul Clement at the Supreme Court oral argument in *Hein* is worth examining on this score. Would a taxpayer have standing, Justice Breyer asked the Solicitor General, if "Congress passes a statute and says in every city, town, and hamlet, we are going to have a minister, a Government minister, a Government church . . . dedicated to the proposition that this particular sect is the true sect . . . ."[143] The Solicitor General answered no, perhaps feeling understandably constrained by his uncompromising position that taxpayer standing exists only where Congress acts under its taxing and spending power to direct funds to religious institutions.[144] But the Solicitor General's dis-

140. *Id.* at 1457.

141. *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593, 595 (2007).

142. *Id.* at 604.

143. Transcript of Oral Argument at 17–18, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) (No. 06-157).

144. *Id.* at 18.

comfort is perhaps misplaced because the modern trend appears to support his view.

Finally, state sovereignty is the third principle in the founding design of the Establishment Clause. Yet it may also be the formative principle today as the Court continues to chip away at the taxpayer standing doctrine. State sovereignty holds quite simply that states have determinative authority in the resolution of local problems, free of incursions by the national government. Just as the first two principles of the Clause's founding design appear to have resurfaced today, we notice a similar development for this third principle of state sovereignty. According to the *Winn* dissent, the case "offers a roadmap—more truly, just a one-step instruction—to any [state] government that wishes to insulate its financing of religious activity from legal challenge."[145] Specifically, "[s]tructure the funding as a tax expenditure, and *Flast* will not stand in the way. No taxpayer will have standing to object."[146] And what will be the consequence? The dissent laments that, from now on, "[h]owever blatantly the [state] government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts."[147]

Given these recent cases—not to mention *Newdow*'s positive words about the place of religion in American civil society[148]—it may well be that the next generation of Establishment Clause case law will resemble the landscape prior to incorporation, characterized by three principles: national interdiction, congressional disability and state sovereignty.

B. The Nonjusticiable Establishment Clause?

The de-incorporation of the Establishment Clause could portend a new, perhaps laudable, judicial approach anchored in deference to state legislative choice. That may be what Chief Justice Rehnquist had in mind from the very beginning.[149] Writing in *Valley Forge*, Chief Justice Rehnquist declared that "federal courts were simply not constituted as ombudsmen of the general welfare."[150] Rehnquist appreciated that the *Valley Forge* plaintiffs had strong misgivings about what appeared to be a close

145. *Winn*, 131 S. Ct. at 1462 (Kagan, J., dissenting).

146. *Id.*

147. *Id.*

148. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35–40 (2004) (O'Connor, J., concurring).

149. *See* Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 125 (1996).

150. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 487 (1982).

relationship between religion and government, but ultimately ruled on behalf of the Court that the plaintiffs' emotional discomfort was insufficient for standing: "It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."[151] In Rehnquist's closing words in the majority opinion, he stressed that the Court should not take on the role of social engineer and depart from the narrow judicial role envisioned in the Constitution: he wrote that he was "unwilling to countenance such a departure from the limits on judicial power contained in Art. III."[152] Rehnquist's position has drawn significant criticism.[153] But it may nonetheless contain much to admire.

Let us remember from where springs the impetus to interpret standing rules narrowly. As the Court wrote in *Newdow*, "[t]he standing requirement is born partly of an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[154] It is part of a larger effort to move the judiciary toward deferring more readily to legislative choice. What underpins this effort is the theory of judicial minimalism, which holds that courts should decide matters of moral contention and social division on the narrowest possible procedural grounds so as to trigger legislative and popular deliberation on those matters.[155] There is great wisdom in cultivating a norm of judicial minimalism. It derives from what should be seen as an uncontroversial observation: that courts are less well institutionally equipped than legislatures and citizens themselves to express social, cultural and political values.

But it would be a mistake to associate exclusively with conservatism the posture of judicial deference to legislative choice. Though conservative constitutionalists typically favor a practice of judicial restraint, they are not alone; many prominent progressive constitutionalists likewise endorse judicial restraint bolstered by corollary theories of popular constitutionalism.[156]

151. *Id.* at 486.

152. *Id.* at 490.

153. *Id.* at 491 (Brennan, J., dissenting).

154. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (1994) (internal quotation marks omitted).

155. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

156. *See* Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 180 (2002).

The agreement does not stop at the academy, either. For proof, we may look to the far-from-conservative Obama Administration, which has in fact endorsed judicial restraint in taxpayer standing, most recently in a brief arguing against granting standing to the *Winn* plaintiffs and, failing that, urging the Court to uphold the impugned law in *Winn*.[157] There are therefore important continuities between conservatives and progressives when it comes to taxpayer standing. Nevertheless, it is difficult to counter the argument that the last decade has been anything but a victory for conservative constitutional interpretation on taxpayer standing.[158]

Consistent with the practice of judicial restraint, the modern Court may well have essentially adopted nonjusticiability as a rebuttable presumption for taxpayer standing under the Establishment Clause. The Court's taxpayer standing cases—*Newdow*, *Hein*, *Valley Forge*, *Winn*—all appear to tell a story about the Court's "unwillingness to police official statements or government ceremonies that would otherwise be susceptible to the Court's stated Establishment Clause principles."[159] That has been the consequence of the Court's push for a return to the founding design of the Establishment Clause. National interdiction, congressional disability, and state sovereignty—together, these three signposts of the Clause's founding design will effectively render inoperative the Establishment Clause at the federal level. Here is why: federal courts, as bound by Supreme Court precedent, will grant standing only to the currently constricted range of cases in which plaintiffs claim that Congress has acted pursuant to its taxing and spending powers to favor or disfavor religion. If the Court's current trajectory on taxpayer standing holds, all other cases will be dismissed for lack of standing, and therefore as nonjusticiable. This leaves very little room for a federal judicial role.

Justice Kagan, in *Winn*, objected quite passionately to the Court's new position on taxpayer standing. On her reading, too, the Court's current taxpayer standing case law suggests that it will hear very few Establishment Clause challenges. Writing in dissent, Justice Kagan expressed her fear that "the Court's arbitrary distinction [between appropriations and tax expenditures] threatens to eliminate *all* occasions for a taxpayer to

157. Erwin Chemerinsky et al., *The Supreme Court 2009 Term Overview and 2010 Term Preview*, 27 TOURO L. REV. 33, 52 (2011).

158. *See, e.g.*, Mitchell N. Berman, *Supreme Court Review—Foreword*, 44 TULSA L. REV. 467, 467–68 (2009); Lee Epstein et al., *The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear*, 43 TULSA L. REV. 651, 653, 663–64 (2008). *But see* Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983, 998 (2008).

159. Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 601 (2011).

contest the government's monetary support of religion."[160] She further observed, with palpable lament and deep regret, that federal courts will henceforth be foreclosed as an avenue for a taxpayer to seek redress for unconstitutional establishments of religion: "Today's holding therefore will prevent federal courts from determining whether some subsidies to sectarian organizations comport with our Constitution's guarantee of religious neutrality."[161] Justice Kagan is absolutely correct in her analysis of the consequences of the Court's taxpayer standing case law. But those consequences are not necessarily harmful.

True, federal courts may soon become—if they are not already—a dead-end for a taxpayer hoping to pursue an Establishment Clause claim. But that is not, nor has it ever been, the only avenue for a taxpayer seeking relief on Establishment Clause grounds. There have always been two other points of entry for a displeased taxpayer, and those would remain open to taxpayers even if Justice Kagan's prediction comes true. The first is the system of state courts; and the second is the electoral process. On the first point, it has always been true that a state taxpayer can petition her state courts for relief when the state violates her right to non-establishment or her right to religious freedom. State constitutions protect both of these rights.[162]

That is an effective way for a state taxpayer to vindicate the rights she argues she ought to enjoy. Second, though, a state taxpayer always re-

160. Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1450 (2011) (Kagan, J., dissenting) (emphasis in original).

161. *Id.* at 1451.

162. The vast supermajority of states prohibit religious establishments. *See, e.g.*, ALA. CONST. § 3; ALASKA CONST. § 1.4; ARIZ. CONST. art. II, § 12; ARK. CONST. art. II, § 24; CAL. CONST. art. I, § 4; COLO. CONST. art. I, § 4; DEL. CONST. art. I, § 1; FLA. CONST. art. I, § 3; HAW. CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, §§ 4, 6; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights § 7; KY. CONST. § 5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 7; MONT. CONST. art. II, § 5; NEB. CONST. art. I-4; N.H. CONST. art. 6; N.J. CONST. art. I, § 4; N.M. CONST. art II, § 11; N.Y. CONST. art. I, § 3; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OKLA. CONST. art. II, § 5; OR. CONST. art. I, § 5; PA. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 7; UTAH CONST. art. I, § 4; VA. CONST. art. I, § 16; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 19. Similarly, an equally vast number of states protect the right to religious freedom. *See, e.g.*, ALA. CONST. § 3; ALASKA CONST. § 1.4; ARIZ. CONST. art. II, § 12; ARK. CONST. art. II, § 25; CAL. CONST. art. I, § 4; COLO. CONST. art I, § 4; CONN. CONST. art. I, § 3; DEL. CONST. art I, § 1; GA. CONST.. art. I, § 1; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art I, §§ 2–4; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights § 7; KY. CONST. § 5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 5; MONT. CONST. art. II, § 5; NEB. CONST. art. I-4; NEV. CONST. art. I, § 4; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; N.H. CONST. art. V; N.J. CONST. art. I, § 3; N.M. CONST. art II, § 11; N.Y. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OR. CONST. art. I, §§ 2–4; PA. CONST. art. 1 § 3; R.I. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; UTAH CONST. art. I, § 4; VA. CONST. art. I, § 16.

tains the right to express her grievances with her ballot. The electoral process is the most direct way for a state taxpayer to right a wrong she believes has been committed by those elected to act in her name. The United States Supreme Court has long recognized this point:

> Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [] 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.[163]

So perhaps we should not fear the de-incorporation of the Establishment Clause as much as some might suggest. Taxpayers would still have at their disposal a number of avenues to pursue their claims against the government, both at the state level where public actors violate state constitutional provisions and at the federal level where Congress acts pursuant to its taxing and spending powers in violation of the Establishment Clause. Furthermore, de-incorporating the Establishment Clause could have salutary consequences for the standing of the federal judiciary insofar as it would encourage federal courts to limit themselves to narrow pronouncements and to avoid sweeping statements that redesign the law in ways that "result in rules of wide applicability that are beyond Congress' power to change."[164] That would be the undesirable result of a federal court exercising its judicial power and casting itself "in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them."[165] Were the Court to take that route, its insistence of serving as a court of general jurisdiction would "undermine public confidence in the neutrality and integrity of the Judiciary,"[166] to the detriment of the tripartite balance of powers that should govern the institutional structures of constitutional law.

Moreover, and perhaps most importantly, de-incorporating the Establishment Clause would be consistent with the project of cultivating a norm of judicial minimalism. To limit the role of federal courts is not to pinch down on civil and political rights nor is it to express a preference of majoritarianism for the sake of itself. Rather, it is to decentralize the gates of decision-making, removing the stranglehold the center currently enjoys and to disperse across the state and to their citizens meaningful tools of

163. United States v. Richardson, 418 U.S. 166, 179 (1974).
164. *Winn*, 131 S. Ct. at 1449 (majority opinion).
165. *Id.*
166. *Id.*

self-reflection and the fundamental power of self-definition. To situate the locus of authority in federal institutions without recognizing the diversity of views and sensibilities that governs across the land in the several states is to do a terrible disservice to our aspiration of creating a culture of active citizenship. Were federal courts to dismiss the counsel of self-restraint and zealously expand the standing doctrine rather than shrink it as they are currently doing,[167] they would risk short-circuiting or preempting important deliberative processes between citizens and their elected representatives and among citizens themselves. Those processes are critical to building public citizens who find fulfillment in popular engagement with fundamental questions of community and self-definition, of which religion is perhaps the most important of all.

CONCLUSION

Constitutional law makes most sense when we appreciate the constitutional politics behind it. Standing alone, the law of taxpayer standing appears confusing and confused because it suggests that the Court is not committed to any baseline constitutional principles. But when we view the law of taxpayer standing against the larger backdrop of the evolution of the Establishment Clause from the founding to today, we can more clearly perceive what the Court appears to be pursuing as a matter of constitutional policy: a return to the founding design of the Establishment Clause. At the founding, the Establishment Clause constrained the actions of only the national government, disabled only Congress from establishing a religion, and vigorously protected the sovereignty of states. The Court's unfolding Establishment Clause taxpayer standing case law suggests that each of these three signposts—national interdiction, congressional disability, and state sovereignty—may yet again soon hold true.

Perhaps we are correct to conclude that the Court is slowly deincorporating the Establishment Clause. After all, the membership of the current Court does not seem inclined toward the modern Establishment Clause. Two justices would undo much of the current establishment case law, two would ease the restrictions on the interrelationship between reli-

167. One scholar, for example, suggests expanding the First Amendment freedoms of religious institutions and concurrently broadening taxpayer standing to allow persons "to enforce the Establishment Clause precisely to preserve and maintain the integrity of religious entities as sovereign spheres." *See* Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 130 (2009).

gion and government, and one looks particularly favorably upon the role of religion in public life.[168]

To be fair, though, skeptics might suggest that the Court does not really have in mind the de-incorporation of the Establishment Clause when it cultivates deep confusion about taxpayer standing. Were the Court actually committed to de-incorporating the Establishment Clause, it could just declare it to be so, quite clearly and forthrightly, heeding the admonition one of its own members has often articulated.[169] Other alternatives exist: the Court could choose to finally bring clarity to taxpayer standing by either permitting generalized grievances or finally overruling *Flast* altogether.[170] Or, according to one scholar, the Court could tell us what is really driving its decisions in taxpayer standing cases and elsewhere: finding ways to discourage litigation in federal courts.[171] All of these are legitimate possibilities. But I suspect the answer is our initial hypothesis—the current court is pulling the nation back to the founding design of the Establishment Clause.

What does the future hold for the Establishment Clause? If it does indeed become de-incorporated for all intents and purposes, the consequence will be to return the United States to the state of affairs that governed at and around the founding, when the Establishment Clause constrained only what the national government could do. That development would visit a number of changes to the structure of constitutional protections for religious liberty under the United States Constitution. The most obvious change—and perhaps for most observers, also the most troubling one—would see states freed to govern matters of religion within their respective borders and according to their own state constitutional rules. What is more, with the de-incorporation of the Establishment Clause, states would no longer be bound by the rule preventing them from passing laws establishing a religion. We should of course be worried about the entrenchment of this new zero in the relationship between religion and state government. But it is not clear that we should consequently fear the dissolution of religious rights and liberties.

168. Stephen A. Newman, *From John F. Kennedy's 1960 Campaign Speech to Christian Supremacy: Religion in Modern Presidential Politics*, 53 N.Y.L. SCH. L. REV. 691, 714 (2008).

169. *See Winn*, 131 S. Ct. at 1450 (Scalia, J., concurring); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 618 (2007) (Scalia, J., concurring).

170. *See* Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555, 597 (2002).

171. *See* Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 342 (2009).