Nonestablishment, Standing, and the Soft Constitution

Steven D. Smith

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
NONESTABLISHMENT, STANDING, AND THE SOFT CONSTITUTION

STEVEN D. SMITH

It is not usual for legal scholars working in establishment clause jurisprudence—and it is especially not usual for me—to say nice things about what the Supreme Court has done to the subject. But that is what I mean to do today. I don't want to be too agreeable or cheerful, though, so this time, although commending the Court, I am going to take issue with the commentators. More specifically, I want to praise a recent development that most commentators seem to deplore—namely, the Court’s recent practice of using the slightly disreputable doctrine of standing as a device to avoid deciding Establishment Clause cases on the merits.

Thus, in Elk Grove Unified School District v. Newdow, the Court used a dubious “prudential” standing doctrine to avoid deciding whether the words “under God” in the Pledge of Allegiance were unconstitutional. In the recent case of Salazar v. Buono, the decisive votes to reverse a decision ordering removal of a cross from federal property in the Mojave Desert were premised on the Plaintiff’s ostensible lack of standing to seek the particular relief ordered. Most importantly, in Hein v. Freedom from Religion Foundation, Inc., the Court turned back a challenge to the “faith-based initiatives” program by interpreting taxpayer standing narrowly; the decision portended a potentially drastic narrowing of the class of plaintiffs who will have standing.

† Warren Distinguished Professor of Law, University of San Diego. A distilled version of this Article was presented at the Religious Legal Theory Conference at St. John's School of Law on November 5, 2010. I thank Larry Alexander, Dick Arneson, Janet Madden, Michael Perry, and participants in a workshop at University of San Diego, as well as participants in the St. John's conference, for helpful comments and suggestions.

2 130 S. Ct. 1803 (2010).
to challenge ostensible Establishment Clause violations. Standing is again a central issue in the pending case of Arizona Christian School Tuition Organization v. Winn; as of the time I write, what the Court will do with standing in the case remains uncertain.

Commentators have criticized these recurring resorts to standing doctrine as unprincipled, evasive, and subversive of religious freedom. My own contrary judgment—namely, that this development is to be welcomed—is not the product of any sophisticated or innovative analysis of standing doctrine. Rather, my judgment is the conclusion, or moral of a story, that I need to tell in stages.

The first, preliminary chapter is not so much a narrative as a proposed distinction between two kinds of constitutionalism, which I will call "hard" and "soft" constitutionalism. With this distinction in place, the story proper—told in more detail in another paper and distilled here—then recounts how, from the founding through about the 1960s, debates and decisions about the relation between government and religion were mostly a matter of soft constitutionalism. And this was a complicated, messy, but generally fortunate state of affairs.

In the 1960s, however, this situation changed, as the Supreme Court elevated a construction that I will call "political secularism" to the status of hard constitutional doctrine. Though

---

4 For one example of the narrower approach to standing, see In re Navy Chaplaincy, 534 F.3d 756 (D.C. Cir. 2008), where the D.C. Circuit held that Protestant Navy chaplains lacked standing to challenge allegedly preferential treatment of Catholic chaplains.

5 562 F.3d 1002 (9th Cir. 2009), cert. granted, 130 S.Ct. 3350 (2010).


7 Steven D. Smith, Constitutional Divide: The Transformative Significance of the School Prayer Decisions, 38 Pepp. L. Rev. 945 (2011) [hereinafter Smith, Constitutional Divide].
well-intended, this elevation in effect unlearned the fundamental lesson of disestablishment that the American experience had taught and transformed what had been a generally healthy contest of interpretations of the American Republic into a nastier and more divisive conflict.

Our current so-called “culture wars” are in part a product of this unfortunate move by the Court. Prospects for easing the conflict do not appear bright; but if there is any solution, it will involve shifting more of the disputes over religion out of the hard constitutional category and back into the soft category. And the Supreme Court’s recent use of standing doctrine is hopeful because it may reflect an effort to do just that.

That is the preview. Now for the actual story.

I. HARD AND SOFT CONSTITUTIONALISM

We should begin with the crucial distinction. Hard constitutionalism should not pose any great difficulty: By “hard constitutionalism” I simply refer to what we usually have in mind when we talk about “constitutional law.” Hard constitutionalism is composed of constitutional law enforceable in the courts. The key element is judicial enforceability.\(^8\)

Marbury v. Madison\(^9\) was the great victory for hard constitutionalism: The decision insisted that the Constitution is law—law in the same sense that statutes are law and hence judicially enforceable in the same way statutes are. Marbury may be responsible for a sort of prejudice in favor of hard constitutionalism, or even for an incapacity to imagine any other sort of constitutionalism. Thus, Chief Justice Marshall sometimes seems to claim that if the Constitution were not hard law, it would be a meaningless, empty sham.\(^10\)

\(^8\) Thus, the difference between “hard” and “soft” constitutionalism, as I am using the terms here, is not equivalent to the difference between written and unwritten constitutional commitments, or between definite and vague commitments. A constitutional rule might be specific and concrete but nonetheless “soft” because not judicially enforceable. See, e.g., United States v. Richardson, 418 U.S. 166, 170 (1974) (ruling that Plaintiff lacked standing to enforce accounting requirement of Article I, Section 9, Clause 7 against the CIA, and acknowledging that no one else might have standing either). Conversely, a constitutional doctrine might be highly amorphous and only loosely tied to the constitutional text but nonetheless “hard” because judicially enforceable: The “right to privacy” is arguably an example.

\(^9\) 5 U.S. 137 (1803).

\(^10\) See id. at 176–77.
But surely this claim overreaches. As a counterfactual exercise, imagine that *Marbury* came out “the other way,” as we say—that Chief Justice John Marshall concluded that even though, in his opinion, the 1789 Congress violated the Constitution by conferring original jurisdiction over such cases on the Supreme Court, there was nothing the Court could do about this violation. More generally, suppose the Constitution came to be viewed not as hard law enforceable in the courts, but rather as a set of venerable precepts, prescriptions, and prohibitions solemnly issued by “We the People,” not judicially enforceable, but intended to be understood, respected, and followed by government officials and citizens generally. Would this soft Constitution have been meaningless? Or, as Marshall put it, “absurd?”

I don’t think so. Though not judicially enforceable, the Constitution still would likely work to frame discussions and influence political decisions. Government officials or institutions that deviated from the Constitution’s prescriptions might not be censured in the courts, but they would likely be called to account in other forums—other branches of government and, ultimately, in the forum of public opinion. It is even possible, as James Bradley Thayer suggested, that these other forums would take their responsibility of understanding and preserving the constitutive mandates more seriously if they did not suppose this

To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

*Id.*

11 *Id.* at 177.
to be a task solely, or at least primarily, for courts.\textsuperscript{12} And political discourse would be quite different than it would be if no such body of rules and instructions had been adopted, so that there were no such materials to guide political deliberation and every decision was straightforwardly "political" in the rawest sense.

Consequently, assigning some or all public matters to the domain of soft constitutionalism would be quite different than rejecting constitutionalism altogether in favor of leaving all public matters to ordinary politics. As an example, imagine a proposal to proscribe pornography under the kind of statute that Catharine MacKinnon promoted several years ago.\textsuperscript{13} Under our hard Constitution, any such prohibition would surely be challenged in court, and if the court concluded that the prohibition violates the First Amendment the prohibition would be invalidated as unconstitutional.\textsuperscript{14} Under a soft constitutional approach, by contrast, courts would refrain from invalidating such a law. But, the legislature considering the proposal—a legislature composed of delegates sworn to uphold the Constitution and answerable to the electorate for failure to abide by this oath—would still debate the measure’s consistency with the First Amendment and would enact it only if willing at least to say that constitutional requirements were satisfied. Such reasoning and assertions would likely come in for public scrutiny, including at the next election. Such a situation would be distinctly different than one in which the pros and cons of

\textsuperscript{12} Thayer famously observed that:
[T]he exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. . . .

The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.
JAMES BRADLEY THAYER, JOHN MARSHALL 106–07 (Da Capo Press 1974) (1901). For a recent attempt to apply Thayer’s perspective to contemporary constitutional law, see generally MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT (2009).


\textsuperscript{14} See generally Am. Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
pornography regulation—its costs and benefits, so to speak—would be hashed out without reference to any generally accepted constitutional commitment to freedom of speech.

Although not meaningless, however, a regime of soft constitutionalism would have a different character than the hard one we are familiar with. Different citizens and officials would likely interpret the Constitution in different ways, and there would be no one to tell them that they were officially and definitively wrong. Thus, different constitutional understandings would continue to be available, and to compete actively with each other, as political decisions were made.

As noted, *Marbury* declared that our own system would operate under hard constitutional law. But *Marbury* could not, and did not, banish all soft constitutional law from our political practice. In fact, the American political system has had considerable experience with soft as well as hard constitutionalism. Thus, Larry Kramer describes what he calls the "popular constitutionalism" that Americans inherited from the British and that characterized American constitutionalism up to and even beyond *Marbury.15" Constitutionalism," he explains, referred to "a set of understandings and conventions about rights and liberty that...yielded a framework for argument rather than a fixed program of identifiable outcomes."16 Kramer elaborates, "Eighteenth-century constitutionalism was less concerned with quick, clear resolutions. Its notion of legality was less rigid and more diffuse—more willing to tolerate ongoing controversy over competing plausible interpretations of the constitution, more willing to ascribe authority to an idea as unfocused as 'the people.' "17

Kramer argues that in its historical context, *Marbury* did not so much eliminate this older notion of constitutionalism as assert the judiciary's right to participate in it.18 Today, he thinks, we have largely lost the conception of popular constitutionalism. "In our world," he observes, "there is law and there is politics, with

16 Id. at 30–31.
17 Id. at 30.
18 See id. at 114–27.
nothing much in between. For us, the Constitution is a subset of law, and law is something presumptively and primarily, even if not exclusively, within the province of courts."

Kramer's assertion may be mostly accurate as a description of how people today think about constitutional law; but in this, as in other respects, our practice is richer than our theorizing. A soft quality continues to inhere in some constitutional discourse today. Thus, some constitutional provisions or notions—the Republican Form of Government Clause is a common example—are essentially nonjusticiable. Such provisions remain available for purposes of evaluating and criticizing governmental actions or institutions, but they are not enforceable in the courts.

Similarly, some scholars describe doctrines that have what these scholars call "subconstitutional" status. Other provisions or doctrines may have a hard justiciable core surrounded by softer penumbras: In the penumbral margins the Constitution remains relevant, but courts would likely defer to the decisions of other branches. These constitutional doctrines have both hard and soft domains. Under Section 5 of the Fourteenth Amendment, for example, Congress has some authority to determine that practices that the Court has not seen fit to condemn nonetheless violate the Constitution.

19 Id. at 24.
20 Of course, many may believe that the abandonment of popular constitutionalism in favor of a more unified constitutionalism centering on judicial supremacy is a welcome advance. See generally Larry Alexander & Lawrence B. Solum, Popular? Constitutionalism?, 118 HARV. L. REV. 1594 (2005) (critically reviewing KRAMER, supra note 15). For a forceful defense of judicial supremacy, and hence of hard constitutional law, on the ground that settlement of constitutional issues is imperative, see generally Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 CONST. COMMENT. 455 (2000).
21 See generally STEVEN D. SMITH, LAW'S QUANDARY (2004).
22 See F. Andrew Hessick, Rethinking the Presumption of Constitutionality, 85 NOTRE DAME L. REV. 1447, 1475–76 (2010) ("Indeed, for some matters, legislatures are the only bodies to consider constitutional questions. For example, Congress has exclusive authority to interpret some constitutional provisions, like the Republican Form of Government Clause, the Declaration of War Clause, and the clauses relating to impeachment.").
24 See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 658 (1966). However, Congress's section 5 power to interpret the Constitution differently than the Court has done was limited in City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
In sum, our political system exhibits a mix of hard and soft constitutionalism, as well as ordinary politics unconstrained by constitutional restrictions, either hard or soft. Both as a descriptive and normative matter, it is debatable how much of our political life is, or should be, assigned to these different domains. And the answers to those questions may change from time to time. Thus, it would be fair to say that the Warren Court dragged a good deal of what had previously been subject to ordinary politics, or soft constitutionalism, into the hard constitutional category. Subsequent courts have sometimes preserved, or even expanded, the scope of hard constitutional law—it was, after all, the Burger Court that decided Roe v. Wade—but sometimes have nudged some particular matters back into the soft constitutional or ordinary politics zones.\(^{25}\)

II. THE SOFT SEPARATION OF CHURCH AND STATE

With these distinctions in mind, we can ask about the matter of religious nonestablishment, or the “separation of church and state.” The label refers to a set of commitments and questions that have often been of great public interest and concern. But are those commitments and questions—and should they be—within the domain of hard constitutional law, soft constitutionalism, or ordinary politics?

A. Soft Constitutionalism and Contesting Visions

Matters of nonestablishment have always lapped into all three categories, but the proportions and allocations have varied. Through much of American history, separation of church and state was mostly, but never entirely, a matter of politics guided and constrained by soft constitutionalism.

Initially, the scope of hard constitutional law was real, but minimal. Thus, the original Constitution adopted one very specific constitutional prohibition—presumably one that could have been judicially enforced—against religious tests for federal public office.\(^{26}\) Shortly thereafter, the First Amendment prohibited the establishment of any national religion. Justices and scholars have fiercely debated just what this prohibition entailed, of course, but the evidence suggests that at the time of

\(^{25}\) 410 U.S. 113 (1973).

\(^{26}\) U.S. CONST. art. VI, cl. 3.
enactment and in the Republic's early years, the hard content of the prohibition was understood to be relatively narrow. Thus, at the conclusion of a careful recent study, Donald Drakeman explains that

it is important to appreciate that [the Establishment Clause] was not the statement of a principle of secularism, separation, disestablishment, or anything else. It was the answer to a very specific question: Would the new [national] government countenance a move by the larger Protestant denominations to join together and form a national church? The answer was no....

At the time it was adopted, the [Establishment Clause] addressed one simple noncontroversial issue, and the list of those who supported it demonstrates that it cannot reasonably be seen as encompassing a philosophy about church and state....

Though the hard content of the nonestablishment clause was narrowly limited, the clause together with its companion, the Free Exercise Clause, also expressed—or at least came to be viewed as expressing—a broader commitment to religious freedom that emanated outward to animate and inform a much larger and contested area of softer constitutionalism. For example, although James Madison seems not to have publicly opposed legislative prayer in the First Congress—he sat on the House committee that approved the appointment of a chaplain—and although as President he issued thanksgiving proclamations, years later, in retirement and in private memoranda, he could doubt the constitutionality of these measures. And when the question arose whether the Post Office should deliver mail on Sundays, Americans hotly debated the implications of church-state separation for this issue. The question was not one to be


28 See James Madison, Detached Memoranda (1817), reprinted in The Sacred Rights of Conscience 589–93 (Daniel L. Dreisbach & Mark David Hall eds., 2009) [hereinafter Sacred Rights]. This memorandum, believed to have been written between 1817 and 1832 and not discovered and published until much later, advocates a strict separation of government from religion and opposes official chaplains and executive declarations of days of fasting and thanksgiving.
submitted to the courts for definitive resolution, but it was nonetheless a question understood to sound in central constitutional commitments.  

Later in the nineteenth century, issues of prayer and Bible reading in the public schools provoked similar debates. In some localities these issues were submitted to state courts (which reached different conclusions on the question) but these questions were not understood to be susceptible of hard constitutional answers under the national Constitution. Such issues generated a variety of views about the constitutional commitment to religious freedom, but many of these views can be grouped under two general headings, reflecting two major interpretations of the relation of religion to government in the American Republic. I have elsewhere described this contest at greater length, here I will only give a summary of the situation. From the outset, and continuing to the present day, American political history has exhibited (and has been shaped by) a sometimes collaborative and sometimes more conflictive contest between two major conceptions, or families of conceptions, that can be called “ecumenical providentialism” and “political secularism.”

Depending on the prevailing demographics, providentialism has struggled to encompass (in nondenominational fashion) Protestants, or more broadly, Christians, or even more broadly, Christians and Jews, or more broadly still, theists generally.

---


30 John Jeffries and James Ryan observe that “by the early twentieth century, a few state courts had outlawed Bible reading and other religious observances in public school as violative of state constitutions, though most courts continued to approve these practices.” John C. Jeffries, Jr., & James E. Ryan, A Political History of the Establishment Clause, 100 MICH. L. REV. 279, 304 (2001).

31 See generally Smith, Constitutional Divide, supra note 7.

32 By the 1950s, Will Herberg argued most Americans had come to believe in the conception of the three “communions”—Protestantism, Catholicism, Judaism—as three diverse, but equally legitimate, equally American, expressions of an overall American religion, standing for essentially the same “moral ideals” and “spiritual values.” WILL HERBERG, PROTESTANT-CATHOLIC-JEW 87 (1983). This “common faith,” Herberg reported, “makes no pretensions to override or supplant the recognized religions, to which it assigns a place of great eminence and honor in the American scheme of things.” Id. at 88–89.

The position's core claims are that America's history and institutions are subject to an overarching Providence,\textsuperscript{34} that public morality and civic virtue rest on a religious foundation, and that not only individual citizens but the nation qua nation ought to acknowledge their dependency on Providence—\textit{but} that government can and should remain noncommittal with respect to specific creedal differences, which are not important for civic or political purposes. The conception of ecumenical providentialism was nicely expressed by Dwight D. Eisenhower, who famously insisted that "[o]ur form of government has no sense unless it is founded in a deeply felt religious faith[,] and I don’t care what it is."\textsuperscript{35}

Political secularism, by contrast, insists that religion is, and should be, a private affair. Although some secularists have been self-consciously and aggressively hostile to religion—think of Christopher Hitchens\textsuperscript{36}—for the most part political secularists in this country have not opposed religion itself. On the contrary, they have sought to respect religion and to maintain religious freedom, and indeed have sometimes argued for political secularism primarily on religious grounds.\textsuperscript{37} But, political secularists maintain that religion is not something that should be expressed or acted upon by government or its agencies and institutions.

These competing visions have been "constitutional" in the sense that their proponents typically understand themselves to be expressing something about the essential character of the American Republic or about what "constitutes" it as a political community.\textsuperscript{38} In addition, proponents support their interpretations by invoking foundational documents and statements from American history—documents and statements that are "constitutional" at least in a lower case sense of the term. Supporters of the providentialist view regularly quote the

\textsuperscript{34} For an argument asserting the pervasiveness of this theme through American history, see Stephen H. Webb, \textit{American Providence} 29–50 (2004).


\textsuperscript{36} See, e.g., Christopher Hitchens, \textit{God Is Not Great} (2007).

\textsuperscript{37} For an excellent recent example, see Darryl Hart, \textit{A Secular Faith} (2006).

\textsuperscript{38} Noah Feldman observes that questions about the relation between government and religion "go to the very heart of who we are as a nation. They raise the central challenges of citizenship and peoplehood: who belongs here? To what kind of nation do we belong?" Noah Feldman, Divided by God 7 (2005).
Declaration of Independence, with its appeal to "Nature and... Nature's God" and its bold assertion that men "are endowed by their Creator with... Rights." Other favorite texts include Jefferson's Virginia Statute for Religious Freedom, presidential proclamations and inaugural addresses by early luminaries such as Washington and Jefferson, and Lincoln's celebrated Second Inaugural Address: "With malice toward none, with charity for all..." Conversely, proponents of the secularist interpretation point to an array of evidence, including the deliberate omission by the framers to include religious

---


40 Thomas Jefferson, Virginia Act for Religious Freedom (Jan. 16, 1786), reprinted in Church and State in the Modern Age 63-64 (J. F. Maclear ed., 1995). Jefferson's Statute began with the declaration that "Almighty God hath created the mind free," and that governmental coercion in matters of religion represented "a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do." Id. at 64.

41 Washington's First Inaugural Address contained these words:

[I]t would be peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the Universe... In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own; nor those of my fellow-citizens at large, less than either. No People can be bound to acknowledge and adore the invisible hand, which conducts the Affairs of men more than the People of the United States. Every step, by which they have advanced to the character of an independent nation, seems to have been distinguished by some token of providential agency... These reflections, arising out of the present crisis, have forced themselves too strongly on my mind to be suppressed.

George Washington, First Inaugural Address (Apr. 30, 1789), reprinted in Sacred Rights, supra note 28, at 446-47. In his Second Inaugural Address, Jefferson expressed a similar notion:

I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me... .


42 Lincoln's address, now engraved on the wall of the Lincoln Memorial, was, as one historian observed, a "theological classic," containing within its twenty-five sentences "fourteen references to God, many scriptural allusions, and four direct quotations from the Bible." Elton Trueblood, Abraham Lincoln 135-36 (1973).

language in the Constitution itself,44 Jefferson’s “Wall of Separation” letter45 and his refusal to declare a national day of prayer and thanksgiving,46 James Madison’s “Detached Memoranda,”47 and a statement in the Treaty with Tripoli.48

But although both conceptions are constitutional in nature, through much of the nation’s history they exhibited a soft constitutional character. Usually they were not offered or taken as judicially enforceable interpretations of what the national Constitution itself formally and bindingly mandates. Thus, when nineteenth-century courts heard cases challenging prayer and Bible reading in the schools, they considered and then accepted or rejected these claims as matters of state law, not federal constitutional law.49 Judges and American citizens generally were free to reach different conclusions: Since the judicial decisions did not purport to be enforcing the United States Constitution, it was possible for school prayer to be deemed acceptable in one place and unacceptable in another place.

To be sure, there have been citizens who have wanted their favored conceptions to be constitutionalized in a harder or more formal sense. Opponents of the original Constitution contended that it should have included some acknowledgment of the Almighty, as the state constitutions did and as the Articles of Confederation had done.50 This position was again popular in the north during the Civil War.51 Conversely, other citizens favored a more explicit constitutional affirmation of governmental secularism.

Following the Civil War, consequently, opposing movements agitated for constitutional amendments that would have expressly acknowledged Christianity in the Constitution or,
conversely, would have explicitly affirmed that the Constitution required governments to be secular. But these movements did not succeed. Americans, it seemed, preferred to leave the question open. They were content to govern themselves, in this respect, under a soft constitution.

B. The Virtues of Soft Separationism

Soft constitutionalism meant that contested practices could vary from time to time and place to place. As noted above, one state or one school district might conduct prayer or Bible reading exercises in its public schools; another state or school district might reject the practice as contrary to the constitutional commitment to separation of church and state. Especially to those who take hard constitutionalism for granted, this situation may appear to be chaotic, unprincipled, and intolerable. Rodney Smith expresses a common view in condemning, as an unacceptable "mishmash," a situation in which the relation between government and religion can vary by time and place.

In an article that I will discuss in more detail below, Ira Lupu and Robert Tuttle worry that a tightening up of standing requirements might leave more Establishment Clause adjudication in the hands of state courts. "[T]he loss of a unifying federal voice in these matters may eventually subvert the uniformity of federal law," they warn, adding that "[w]hatever one's view of the Establishment Clause, [the loss of uniformity] cannot be seen as salutary for either religious freedom or the constitutional system as a whole."

My own view is different. Again, I have argued extensively for this view elsewhere and can only state my conclusions here, but I think soft constitutionalism has a good deal to recommend it. The fact is that neither providentialism nor political secularism can claim the full credentials that a conception ideally ought to exhibit in order to be canonized as enforceable

52 For a detailed discussion of these movements for a Christian amendment and a secular amendment, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 289–334 (2002).
54 See infra pp. 440–44.
55 Lupu & Tuttle, supra note 6, at 166.
constitutional orthodoxy. Either view is compatible with the original understanding of the First Amendment, I would argue, but neither can accurately claim to have been mandated by the enactors of the First Amendment.\(^5\) And neither reflects a consensus of American opinion, past or present. Religious liberty in the American Republic is an essentially contested concept, as the philosophers say, and while both the providentialist and secularist interpretations are respectable and venerable renderings of that concept, neither can claim to be or to give the meaning of religious freedom in America.

Moreover, religion itself has hardly been a static force in this country; it has waxed, waned, and shifted through a complex series of developments that historians valiantly, but somewhat clumsily, try to capture under labels like “awakenings,” “revivals,” and “disestablishments.”\(^6\) As opposed to more Procrustean consolidations, a soft constitutionalism in which both leading candidates remain viable competitors was adaptable to the ever fluctuating conditions of religion and politics in this country.

In addition, soft constitutionalism allows more space and incentive for a broad constitutional conversation, involving not just judges and lawyers, but government officials and citizens generally. Under a hard regime, in which courts have the (presumptively) final and definitive say, citizens are naturally

\(^5\) Cf. Feldman, supra note 38, at 9 (“Both evangelicals and secularists like to claim that our constitutional past and tradition support their approach. Both are wrong.”).

\(^6\) A standard view discerns a major revival of religion, or “Great Awakening,” in the first half of the eighteenth century, and a Second Great Awakening in the early nineteenth century. See Mark A. Noll, A History of Christianity in the United States and Canada 90–113, 166–90 (1992). As noted, Will Herberg described “the great and almost unprecedented upsurge of religiosity under way today” in the post-World War II period. Herberg, supra note 32, at 256; see also A Conscripted Prophet’s Guesses About the Future of Religious Liberty in America (2007), reprinted in 1 Douglas Laycock, Religious Liberty 445, 446 (2010) (“We have for some time been in the midst of a great outpouring of evangelical religious fervor, which I will call the Fourth Great Awakening . . . .”). But cf. Jon Butler, Awash in a Sea of Faith 165 (1990) (asserting that the Great Awakening “might better be thought of as an interpretive fiction and as an American equivalent of the Roman Empire’s Donation of Constantine, the medieval forgery that the papacy used to justify its subsequent claims to political authority”).

\(^8\) For an interpretation indicating three “disestablishments”—the first in the founding period, the second in the early twentieth century, and the third in the late twentieth century—see Philip E. Hammond, Religion and Personal Autonomy 8–11, 167–77 (1992).
tempted to leave constitutional questions for judicial resolution. Conversely, if the meaning of a constitutional provision is understood to be perpetually open and contestable, citizens have more incentive to participate in the conversation. Soft constitutionalism also has another important, though rarely noted, advantage in this area. Because under soft constitutionalism both the providentialist and secularist visions are subordinate to the formal Constitution, citizens who dissent from, at least temporarily, prevailing but objectionable (to them) policies, decisions, and government expressions informed by one or another of these visions are able to look beyond these and to attach their allegiance to a higher and non-offending authority and symbol. Thus, atheists like Michael Newdow are understandably opposed to the national motto “In God We Trust.” But they can if they so choose look to a more foundational political reality—the Constitution—in which this objectionable (to them) belief is deliberately and conspicuously not affirmed. And because that agnostic document and symbol is accepted as the community’s supreme and constitutive law, they can take consolation in the fact that the political community itself is not constituted by a commitment they reject.

The point can be generalized. We often talk of “majorities” and “minorities,” but such talk reflects a superficial sociology. Scholars have noted that in this country, nearly all citizens regard themselves as, in some senses and contexts, embattled minorities. “America,” as Will Herberg observed, “is preeminently a land of minorities.” As a result, nearly all of us will in different times and circumstances likely find ourselves out of harmony with the expressions and philosophies emanating

61 Newdow v. LeFevre, 598 F.3d 638 (9th Cir. 2010) (rejecting a constitutional challenge to the use of national motto on coins).
63 Herberg, supra note 32, at 231 (“Since each of the three [religious] communities recognizes itself as fitting into a tripartite scheme, each feels itself to be a minority, even the Protestants who in actual fact constitute a large majority of the American people. In this sense, as in so many others, America is pre-eminently a land of minorities.”).
from governments. But we can nonetheless remind ourselves that these expressions and philosophies are not ultimately constitutive of the political community. Above them in the hierarchy of legal and political authority stands the Constitution—the Constitution that remains steadfastly and serenely agnostic as between the providentialist and secularist visions of the country."64

So soft constitutionalism has its attractions. And in any case, for more than a century and a half after the Constitution's adoption, the nation survived and even flourished under a mostly soft constitutionalist regime of religious freedom. Religion was not merely a matter of ordinary politics; on the contrary, citizens by consensus agreed that the nation was committed to religious freedom, and they argued vociferously about what this commitment entailed. Inevitably, not everyone was happy with the decisions reached in different times and places. For example, Catholics, Jews, Quakers, Unitarians, and later secularists chafed under the generic Protestantism, perhaps euphemistically called "nonsectarian," of the nineteenth-century public schools.65 Sometimes these disagreements turned ugly, even violent.66 Anti-Catholicism was pervasive in the nineteenth century (and later, and perhaps still) and Mormons were subjected—not, it should be said, without some provocation on their part, to violent persecution.67

Even so, the religious establishments remaining from colonial days were dismantled—without any pressure from the Supreme Court or the hard Constitution. Religious diversity increased, even exploded, as a variety of new religions sprang up through importation, internal division, or home-grown creation.68 And overall, the Republic supported a measure of religious liberty and toleration on a scale probably not matched in Western history. All of this happened under the regime of soft constitutionalism that prevailed from the founding up until about the 1960s.

---

64 To see these arguments developed at much greater length, see generally Steven D. Smith, Our Agnostic Constitution, 83 N.Y.U. L. Rev. 120 (2008).
68 See generally BUTLER, supra note 58.
III. CONSTITUTIONAL HARDENING: THE ELEVATION OF POLITICAL SECULARISM

The situation changed, subtly but drastically, in the mid-twentieth century, as the Supreme Court selected one of the perennial contenders—namely, political secularism—and raised it to the status of hard constitutional law. The crucial turning point, as I have argued at length elsewhere, was not *Everson v. Board of Education*, as is commonly supposed, but rather the school prayer decisions: *Engel v. Vitale* and *Abington School District v. Schempp*. Important though it was, *Everson* was an expression of one contested but relatively concrete American political tradition—the tradition, which *Everson* commended, of denying public financial assistance to churches or to "sectarian" schools. The school prayer decisions, by contrast, were a constitutional turning point, working to transform not only the jurisprudence of religious freedom but constitutional discourse generally.

The importance of the school prayer cases was not simply that they ended prayer in the public schools. Most schools probably did not conduct prayer exercises anyway, and, as noted, some state courts had prohibited public school prayer almost a century earlier under state constitutions. The Supreme Court's school prayer decisions were transformative, rather, because of the general doctrine they declared. The Court might have found school prayer unconstitutional under a limited rationale—the inherent coerciveness of the school setting, for example—but in fact the Court chose to announce a much more sweeping constitutional doctrine.

---

69 See Smith, Constitutional Divide, supra note 7.
70 330 U.S. 1 (1947).
73 Bible reading was practiced in over two-thirds of schools in the east and in over three-quarters of the schools in the south, but the numbers were drastically lower in the midwest and west—less than twenty percent. FRANK J. SORAUF, THE WALL OF SEPARATION 297 (1976).
74 Although this rationale is not without its problems, the Court would later use it in declaring graduation prayer unconstitutional. See generally Lee v. Weisman, 505 U.S. 577 (1992). The rationale would seem to apply *a fortiori* to classroom prayer involving younger students.
Actually, in the first prayer decision, *Engel*, this change was mostly implicit: The Court offered only a terse explanation for its result, citing not a single supporting precedent. But the next year, in *Schempp* the Court elaborated, declaring that in order to satisfy the demands of the Establishment Clause, a law or practice must be "secular": It must have been adopted to serve a "secular" purpose, and it must have a predominantly "secular" effect. And the Court set out these requirements in the form of what it described as a two-part "test," thus leaving no doubt that these requirements were doctrine, not dicta. A few years later, the Court added a third requirement—of no excessive entanglement between government and religion—and the *Schempp* test became the much-cited and much-debated *Lemon* test.

The Justices who decided *Engel* and *Schempp* seem to have been unaware of doing anything especially audacious. And their innocence, whether genuine or feigned, is understandable. For one thing, the term "secular" indicates a slippery and many-sided notion. In one classical sense of the term, it had been assumed by virtually all Americans from the founding on—and indeed by virtually all inhabitants of western nations throughout the course of Christendom—that governments were supposed to be "secular." Governments, that is, were supposed to deal with temporal matters—with the concerns of this world and this life. For another thing, as noted, "political secularism" had been one of the leading interpretations of the American Republic under the soft constitutionalist regime from the beginning; what the Court did in *Schempp* was simply to capitalize the "C" in Constitution, so to speak. Moreover, it has taken time for the implications of the *Schempp* test to work themselves out; indeed some of those implications continue to be disputed.

---

75 *Schempp*, 374 U.S. at 222.
76 See id.
78 See Dienerfield, *supra* note 65, at 132 ("In a rare moment of political tone-deafness, [Chief Justice Earl] Warren did not anticipate the fallout from the [Engel] case."). Justice Brennan insisted that the rulings were not radical or novel, but rather "accord[ ] with history and faithfully reflect[ ] the understanding of the Founding Fathers." *Schempp*, 374 U.S. at 294 (Brennan, J., concurring).
79 For a greater development of this point see Smith, *Constitutional Divide, supra* note 7.
But if the Justices themselves failed to perceive the larger significance of what they were doing, the general public did not. Writing at the time, Philip Kurland observed that “[t]he immediate reaction to Engel was violent and gross.” Bruce Dierenfield reports that Engel provoked “the greatest outcry against a U.S. Supreme Court decision in a century.” At a Conference of State Governors, every governor except New York’s Nelson Rockefeller condemned Engel and urged passage of a constitutional amendment to overturn it. Lucas Powe notes that “Engel produced more mail to the Court than any previous case (and few write to say what a good job the justices are doing).”

Observers like Kurland deplored this public reaction, finding it exaggerated and hysterical. Kurland thought that Engel, the first prayer decision, was “important but narrow in breadth,” and he denigrated the decision’s opponents as “religious zealots” who were akin to “racists” and John Birch Society extremists. In retrospect, though, and whichever side one may favor on the merits, it seems that the indignant public was more prescient than Kurland, the constitutional scholar. That is because the school prayer decisions, with their canonization of political secularism as hard constitutional doctrine, were not narrow in their implications; on the contrary, they have had far-reaching effects, not only for Establishment Clause jurisprudence but for constitutional law and indeed the American self-understanding generally.

Again, I have tried to present this argument at length elsewhere; here I will only offer the conclusions of that longer analysis. Although it took years for the teachings of Engel and Schempp to be assimilated and developed, in retrospect it is apparent that the decisions redirected Establishment Clause jurisprudence away from the “no aid” separationism of Everson and in the direction of greater emphasis on governmental

81 DIERENFIELD, supra note 65, at 72.
82 Id. at 146.
84 DIERENFIELD, supra note 65, at 136.
86 See Smith, Constitutional Divide, supra note 7.
secul arity.87 Hence, both the increasing receptivity of courts to governmental assistance to religious entities for secular purposes (as in school voucher programs and faith-based initiatives, for example) and the judicial concern to prevent government from "endorsing" religion (in municipal Christmas displays, for example) were foreshadowed in the school prayer decisions.

Outside the Establishment Clause domain, Schempp's decree that government must act only for secular purposes has subtly but powerfully operated to restrict the sorts of interests that governments can invoke in support of challenged laws. Laws that would popularly be understood by reference to concerns or interests that sound "religious" (whatever that term means) have come to be viewed as suspect88 and, in some cases, have been invalidated. In this vein, Susan Jacoby is correct to observe that "the split over school prayer was a precursor of the bitter division over the 1973 Roe v. Wade abortion decision."89 And Noah Feldman notes the connection between Establishment Clause understandings and controversies that are not officially Establishment Clause matters at all, including "same-sex marriage[,] ... stem-cell research, abortion, euthanasia, and the death penalty."90

In effect, the school prayer decisions worked to create or at least entrench a constitutional divide with two dimensions. One dimension is historical. The constitutionalization of political secularism has in a complicated sense separated contemporary public discourse from a major part of the nation's past, including some of the more revered expressions and manifestations that have helped to constitute the American political tradition. The fact is that, historically, religion has figured prominently in much political and legal discourse. Political officials, including presidents and judges, have cited scripture and invoked providence in their official explanations and justifications for their actions and decisions.91 Leading jurists such as Chancellor

88 Thus, Edward Rubin argues that laws restricting abortion or same-sex marriage and laws prescribing abstinence-based sex education are unconstitutional under the establishment clause. Edward L. Rubin, Sex, Politics, and Morality, 47 WM. & MARY L. REV. 1, 40–47 (2005).
89 JACOBY, supra note 44, at 324.
90 FELDMAN, supra note 38, at 6.
91 See Smith, Constitutional Divide, supra note 7.
Kent and Justice Story declared without embarrassment that Christianity was part of the common law. As noted, the providentialist conception was clearly and sometimes eloquently manifest in some of the most important and revered (and constitutive) expressions of the American creed and spirit: Jefferson's Virginia bill, the Declaration of Independence, Lincoln's Gettysburg "one nation, under God," and Second Inaugural addresses.

The elevation of public secularism to constitutional status has placed these revered expressions in an awkward and ambiguous position. Such expressions appear to be in open violation of the conception of government as secular. How then to regard them? The difficulty is apparent in Justice O'Connor's strained and unconvincing attempts to explain why the words "under God" in the Pledge of Allegiance do not send a message endorsing religion, and in John Rawls's similarly labored and implausible effort to explain how Lincoln's profoundly and pervasively theological Second Inaugural Address might be reconciled with the secularizing constraints of what Rawls calls "public reason."察

93 See supra notes 39–42 and accompanying text.
95 Rawls tentatively suggested two reasons why Lincoln's Second Inaugural Address, which Rawls aptly described as offering a "prophetic (Old Testament) interpretation of the Civil War as God's punishment for the sin [of] slavery," was permissible. JOHN RAWLS, POLITICAL LIBERALISM 254 (1993). But Rawls's first reason—that the speech had "no implications bearing on constitutional essentials or matters of basic justice"—seems starkly implausible. Id. Slavery? The reconstitution of the Republic? Rawls's second reason—that Lincoln's basic message "could surely be supported firmly by the values of public reason"—even if plausible, suggests that the speech was permissible only because similar points could have been made without the theological content which was the essence of the speech's insight and power. Id.
The second kind of divide that the school prayer decisions and the secularism requirement helped to create, or entrench, is more cultural or sociological in nature. In embracing the secularist conception and rejecting the providentialist conception of America, Engel and Schempp imposed a view generally accepted in elite culture but widely rejected in more popular culture. Thus, John Jeffries and James Ryan observe that "the controversy over school prayer revealed a huge gap between the cultural elite and the rest of America." Public and scholarly reaction to the Ninth Circuit decision invalidating the words "under God" in the Pledge of Allegiance as recited by school children reflected a similar divide.

In one respect there is nothing new in this sort of division. As noted above, Americans from the beginning have contended among each other, and often within themselves, about whether the providentialist or secularist conception better expresses the nature of the political community. The American political character was shaped not by either of these visions in isolation, but rather by the ongoing conversation between them. Engel and Schempp could not silence that conversation, but they transformed the ongoing debate in one crucial respect: The secularist conception was officially declared to be the constitutional orthodoxy, embodied in hard constitutional law and hence binding on governments, local, state, and national. And the providentialist view was accordingly relegated to the category of constitutional heresies.

That transformation has inevitably altered the character of the debate. For one thing, at least when issues are discussed in a judicial forum, as the most heated controversies usually are, eventually, the proponents of the providential view are forced...
either to talk the language of secularism or else be ruled out of
court. Critics often and not implausibly suspect such advocates
of being disingenuous. But if their translation of their concerns
into secular talk is not fully forthcoming, these advocates are
reticent under duress, because it is only by adopting a secularist
vocabulary that they are permitted to participate in the legal
conversation at all.

Believers in the providential conception, conversely, feel
beleaguered and alienated. Noah Feldman observes that “[t]he
constitutional decisions marginalizing or banning religion from
public places have managed to alienate millions of people who
are also sincerely committed to an inclusive American project.”
The sometimes bitter struggle to preserve the vestiges of that
providentialist conception—the religious expressions conveyed in
such things as the words “under God” in the Pledge of Allegiance
or the Mt. Soledad cross—seems inexplicable to some. Why do
people get so worked up about these small, almost meaningless
gestures and symbols? But the passions are understandable as
manifestations of the apprehensiveness felt by people who, as
Feldman observes, have often come to view themselves as
strangers in their own land.

Consequently, the dynamic of mutual suspicion and
resentment is manifest in the clashing rhetorics of what is often
called, in a description that becomes increasingly apt, the
“culture wars.”

In elevating political secularism to the status of hard
constitutional law, the Supreme Court effectively ignored or
forgot what is often thought to be the main lesson of

99 See, e.g., Church and State in the United States: Competing Conceptions and
Historic Changes (2006), in RELIGIOUS LIBERTY, supra note 58, 399, 425, 440
[hereinafter Church and State in the United States].
100 FELDMAN, supra note 38, at 15.
101 In this vein, Richard Schragger argues that concern about governmental
religious expression “distracts from more significant Establishment Clause
concerns.” Richard C. Schragger, The Role of the Local in the Doctrine and Discourse
religious messages are literally symbolic acts, and while such acts may have effects
on the distribution of social power, they should not be considered more significant
than government actions that favor religious institutions with concrete financial or
regulatory power.” Id.
102 FELDMAN, supra note 38.
103 Douglas Laycock describes the “escalating series of provocations and legal
claims from both sides.” Church and State in the United States, supra note 99, at
423.
nonestablishment in this country. It is often observed, that is, that by allowing a diversity of religions while not establishing any religion, the United States managed to avoid the sort of destructive political conflicts that had so often accompanied established religion elsewhere.\textsuperscript{104} If one religion is to be established as the officially preferred faith, then the devotees of the various faiths will fight for that designation,\textsuperscript{105} as they did in the so-called Wars of Religion in early modern Europe. Conversely, if the government refrains from designating any religion as the official or preferred religion, then the various faiths can rise or fall in accordance with their respective merits and energies. That was the hope of America's "lively experiment" in nonestablishment, at least, and the experiment seems thus far to have succeeded. Religious pluralism has flourished; political community has not collapsed.

By elevating one of the major competing visions of America into hard constitutional law, however, and by thus effectively establishing political secularism as an official and enforceable national orthodoxy, the Supreme Court risked reviving just this sort of destructive dynamic. And the results are apparent in the current state of the "culture wars."

IV. SOFTENING UP THE CONSTITUTION?

So, is there any remedy for this condition—any way to undo the unfortunate results of a set of decisions that, though well intended, have led to a deeply divisive cultural struggle?

The prospects do not seem especially bright. To be sure, the Court might simply try to back away from some of its Establishment Clause decisions and doctrines. And indeed, there is evidence that some Justices perceive the need for such a retreat, and that they have acted in recent years to relax the application of some doctrines. Such a retreat is discernible in the Court's insistence in \textit{Locke v. Davey}\textsuperscript{106} over the strenuous objections of Justices Scalia and Thomas on allowing state

\textsuperscript{104} Cf. DIERENFIELD, supra note 65, at 11 ("In short, the Founding Fathers created the world's first secular government as the best way to minimize the religious tensions that had perpetually plagued Europe.").

\textsuperscript{105} Cf. Religious Liberty as Liberty (1996), in RELIGIOUS LIBERTY, supra note 58, 54, 70 ("If the government is allowed to take sides, the two sides will fight to control the government, and the government will disapprove of, discriminate against, or suppress the losers.").

\textsuperscript{106} 540 U.S. 712 (2004).
governments more “play in the joints,” as the Court put it, in
deciding how to implement the separation of church and state.107
Similarly, a relaxation is apparent in Van Orden v. Perry where
the court upheld a Ten Commandments monument in Texas; it is
particularly apparent in Justice Breyer’s omission to invoke the
“no endorsement” doctrine and his explicit, if somewhat cryptic,
contention that in hard cases there is “no test-related substitute
for the exercise of legal judgment.”108

These developments have been harshly criticized by
commentators,109 however—and understandably so. For judges
and scholars who understand constitutionalism mainly or
exclusively in terms of hard constitutional law, the relaxed
application of a doctrine will seem merely unprincipled, or
perhaps sneaky or cowardly, and the retreat from a particular
doctrine will seem a move in the direction of embracing or
fashioning some alternative doctrine. Hence, a shift away from
political secularism as hard constitutional law will likely be
perceived as a step toward elevating secularism’s long-time
rival—ecumenical providentialism—to the status of hard
constitutional law. Justice Scalia’s endorsement of monotheism
in McCreary County appeared to critics to vindicate this
perception.110

But to constitutionalize the providentialist interpretation
would likely be as divisive as the constitutionalization of
secularism has been, and would be as much in disregard of the
lesson of nonestablishment discussed above. The Supreme Court
will not avoid the cultural contention resulting from its
endorsement of one controversial candidate by instead endorsing
a different, but equally controversial, candidate.

A more promising strategy would be to shift more of the
constitutional law of nonestablishment back into the domain of
soft constitutionalism, where it resided through much of the
nation’s history. But the prospects for such a shift seem

107 Id. at 718–19.
109 See, e.g., Erwin Chemerinsky, Why Justice Breyer Was Wrong in Van Orden
v. Perry, 14 WM. & MARY BILL RTS. J. 1, 2–3 (2005); Laycock, supra note 94, at 235.
110 See, e.g., Thomas B. Colby, A Constitutional Hierarchy of Religions? Justice
Scalia, the Ten Commandments, and the Future of the Establishment Clause, 100
NW. U. L. REV. 1097, 1098 (2006); Michael Newdow, Question to Justice Scalia: Does
the Establishment Clause Permit the Disregard of Devout Catholics?, 38 CAP. U. L.
uncertain at best—particularly given the fact that so many judges and scholars seem unable even to conceive of constitutionalism except in terms of hard constitutional law. And this is where the Court's recent turn to standing seems potentially promising.

A. The Turn to Standing

The recent turn to standing is evident in three cases. These cases have been discussed at length in popular and scholarly writing, but a brief rehearsal will be helpful.

1. The Pledge of Allegiance Case

In Elk Grove Unified School District v. Newdow, the Supreme Court reversed the Ninth Circuit's controversial Pledge of Allegiance decision, mentioned above, without actually addressing the contentious substantive issue of whether the words "under God" in the Pledge violate constitutional doctrine. The majority opinion by Justice John Paul Stevens seized on the fact that the Plaintiff, Michael Newdow, lacked custody of his daughter, a public school student, and concluded that Newdow had no standing to assert a claim on her behalf.

The Court's use of standing to avoid addressing the merits was sharply criticized in a concurring opinion by Chief Justice Rehnquist, and the majority effectively conceded that its application of standing doctrine was novel and "prudential," not constitutionally compelled. The Court's resort to standing was widely viewed as a strategy to avoid addressing a potentially inflammatory issue.

111 See supra note 19.
113 See supra note 98.
114 See Newdow, 542 U.S. at 1–2.
115 See id. at 18 (Rehnquist, C.J., concurring in the judgment).
116 See id. at 17–18 (majority opinion).
117 See, e.g., Sanford Levinson, Compromise and Constitutionalism, 38 PEPP. L. REV. 821, 834–35 (2011) (asserting that the Newdow majority "engaged in an all-out display of Bickelian 'passive virtues' by inventing patently specious 'standing' arguments that allowed the Court to dump the case").
2. The Faith-Based Initiatives Case

The Court's use of standing in *Newdow* was ad hoc and case-specific. In *Hein v. Freedom from Religion Foundation*, by contrast, the Court interpreted standing doctrine in a way that was likely to have wide-reaching implications.

In *Hein*, taxpayers challenged the use of federal funds to support a series of conferences in which the Bush Administration promoted so-called "faith-based initiatives"—namely, the inclusion of religiously-affiliated service providers in federally-funded service programs. Normally, taxpayer status is not deemed sufficient to confer standing to challenge ostensibly unconstitutional programs and expenditures. However, the Seventh Circuit, in an opinion by Judge Richard Posner, invoked an influential precedent, *Flast v. Cohen*, to permit the taxpayers to sue for alleged violations of the Establishment Clause.

In a fractured decision, the Supreme Court reversed. A plurality opinion by Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, ruled that the *Flast* exception applies only when Congress itself allocates public money to a religious institution or use. Since in this case it was not Congress but rather the Executive Branch that had sponsored and paid for the conferences out of general funds, the *Flast* exception did not apply.

Though Alito's turned out to be the controlling opinion, however, the other six Justices all found the plurality's distinction between congressional and executive expenditures untenable. But they went on to draw different conclusions. Justice Scalia, joined by Justice Thomas, would have eliminated the troublesome distinction by overruling *Flast* and denying taxpayer standing in both kinds of cases. Conversely, Justice

---

119 See id. at 595–96.
121 392 U.S. 83 (1968).
122 See *Hein*, 551 U.S. at 615.
123 See id. at 608–09.
124 See id. at 609.
125 See id. at 636–37.
Souter, joined by Justices Stevens, Ginsburg, and Breyer, would have interpreted *Flast* broadly to permit such standing in both kinds of cases.\footnote{126 See id. at 643.}

Though uncertain in its implications, *Hein*, at a minimum, signified a severely constricted view of taxpayer standing in Establishment Clause cases. And the *Hein* plurality opinion, though adhering to a strict reading of *Flast*, left open the possibility that taxpayer standing might be abandoned altogether in an appropriate future case.\footnote{127 See id. at 614–15.}

3. The Mojave Cross Case

In the more recent and procedurally convoluted case of *Salazar v. Buono*,\footnote{128 See id. at 614–15.} only two Justices voted to decide the case on standing grounds, but their votes were crucial to the outcome. The case involved an Establishment Clause challenge to a cross that had been erected in 1934 by members of the Veterans of Foreign Wars on federal land (the Mojave National Preserve in California) as a memorial to soldiers who had died in World War I.\footnote{129 130 S. Ct. 1803 (2010).} The Plaintiff, Frank Buono, was a retired Park Service employee who declared that he was offended by the placement of the cross on federal property.\footnote{130 See id. at 1811.}

In an earlier phase of the case, a federal district court had found the cross to be an unconstitutional endorsement of religion and had ordered it removed, and after an unsuccessful appeal to the Ninth Circuit, the federal government had not sought review in the Supreme Court.\footnote{131 See id. at 1812.} Instead, having already designated the cross and the surrounding property as a national memorial, Congress passed a statute directing the Secretary of the Interior to transfer the property to the Veterans of Foreign Wars in exchange for other property, on the condition that the property be maintained as a war memorial in some form.\footnote{132 See id. at 1812–13.} Buono then moved to enjoin the transfer, arguing in the alternative that the transfer would violate the original injunction or that the

\footnote{126 See id. at 643. 127 See id. at 614–15. 128 See id. at 614–15. 129 130 S. Ct. 1803 (2010). 130 See id. at 1811. 131 See id. at 1812. 132 See id. at 1812–13.}
injunction should be modified to prohibit the transfer. The
district court granted the Plaintiff’s motion, the Ninth Circuit
affirmed, and the government appealed to the Supreme Court.  

All of the Justices agreed that any challenge either to the
Plaintiff’s standing to bring the original action or to the original
injunction itself was foreclosed by the government’s failure to
appeal the Ninth Circuit’s earlier affirmance of the injunction. The
remaining and controlling question (in the view of seven
Justices, at least) was whether the proposed transfer of the cross
and surrounding property to a private party would violate the
original injunction. With respect to this question, the Justices
divided: Four Justices said “yes” and three said “no.”

The decisive votes in the case came from Justices Scalia and
Thomas. In an opinion joined by Thomas, Scalia argued that the
transfer of the property did not violate the original injunction.
On this view, Buono had in essence sought, and the district court
had given, a modification of the injunction to forbid the
transfer. But although Buono’s standing to seek the original
injunction could not now be challenged, he still needed to show
standing to seek this additional relief. And since by his own
testimony Buono was offended not by the cross itself but only
by the maintenance of the cross on federal property, he could claim
no injury once the cross was in private hands. But that was
exactly what Congress had tried to do—namely, situate the cross
on private property. In the absence of any injury, Scalia argued,
Buono lacked standing to seek modification of the injunction.

---

133 See id. at 1813–14.
134 See id. at 1814.
135 See id. at 1815–16.
136 Justice Alito understood the injunction to prohibit maintenance of the cross
on federal land. Transfer of the property to a private owner, he thought, was a
permissible way of conforming to that order. See id. at 1821–24. Chief Justice
Roberts appears to have agreed with this conclusion; Justice Kennedy appeared to
be similarly inclined, but favored remanding the case for further consideration by
the district court. See id. at 1821. Justice Stevens, by contrast, argued in an opinion
joined by Justices Ginsburg and Sotomayor that the attempted transfer was an
unconstitutional attempt to evade the injunction. See id. at 1830–31. Justice Breyer
reached a similar result while stressing that he was merely applying the law of
injunctions and was not reaching constitutional questions. See id. at 1845.
137 See id. at 1825–26 (Scalia, J., dissenting).
138 See id. at 1826–27.
139 See id. at 1826.
The upshot of the fragmented decision was that the lower courts' judgment was reversed and remanded for further consideration. Only two Justices reached their conclusion on standing grounds, but without those votes the lower court rulings in favor of the Plaintiff would have been affirmed.

B. Evaluating the Cases

From a lay perspective, the results in these three cases may seem disappointing and evasive, and the Court may seem to have shirked its responsibilities. After all, controversies over money (government funding of religiously-affiliated institutions such as schools or social service providers) and over governmental religious expression (as in municipal Christmas displays, the National Prayer Day, the national motto, and so forth) have together made up the bulk of modern concerns associated with the "separation of church and state." The law regarding both kinds of issues is fervently contested and notoriously murky, but at least in theory the Court might have remedied this situation. The Hein case, challenging the federal faith-based initiatives program, squarely raised the funding issue;\(^\text{140}\) the Newdow and Buono cases, challenging the words "under God" in the Pledge of Allegiance and the Mojave cross, directly presented the expression issue.\(^\text{141}\) Hence, the cases might seem to have presented the Court with ideal opportunities for clarifying the law and enforcing what many regard as vital constitutional principles.

Instead, it may seem, the Court ducked the hard questions. Moreover, the decisions portended and invited more cases in which forthright discussion of vital substantive concerns is displaced by obscure and technical meanderings through the labyrinth of "standing."

In short, to the lay eye these cases may seem to have shunned clarification and enforcement of the Constitution in favor of pettifoggery. This reaction is not limited to lay observers. A similar censoriousness is apparent in scholarly reactions to the cases.\(^\text{142}\) So, is the criticism warranted?

\(^{140}\) See supra Part IV.A.2.
\(^{141}\) See supra Part IV.A.1, 3.
\(^{142}\) See supra note 109. Some commentators criticize the cases not so much for failing to clarify substantive establishment doctrine but instead mainly for their failure to bring coherence to the law of standing in this area. See, e.g., Joel Fifield,
The pointlessness of any merely technical analysis of that question is apparent, I think, from two general propositions that should provoke little disagreement. First, although “standing” surely has a technical dimension that can provide ample material for analysis and argument by those so inclined, in reality, “standing” is a notoriously malleable or squishy doctrine that leaves courts with a good deal of leeway either to permit or to preclude suits by particular plaintiffs in particular contexts. Some observers—most notably, Alexander Bickel—have celebrated this squishy quality of the standing doctrine as a valuable device by which courts can practice the “passive virtues.” But few lawyers or scholars will doubt that, for better or worse, the standing doctrine leaves a good deal of discretion in the judiciary. Consequently, to criticize a particular standing decision as if, like a student’s answer to an arithmetic problem, it could be adjudged “correct” or “incorrect” on purely technical grounds, would be to commit a category mistake.

Second, it is generally understood that the courts’ use of standing doctrines in the Establishment Clause area has departed drastically from usual standing rules and practices. Two departures in particular are conspicuous and important. The first departure involves the matter of “taxpayer standing.” Although the federal courts normally have declined to recognize taxpayer standing, in Flast v. Cohen, as noted, the Supreme Court made an exception that although not originally so explained has turned out to be an exception for Establishment Clause cases only. The reasoning by which the Flast majority

---


143 See Flast v. Cohen, 392 U.S. 83, 99 (1968) (“Standing has been called one of ‘the [most] amorphous (concepts) in the entire domain of public law.’”) (quoting Hearings on S. 2097 before the Subcomm. on Constitutional Rights of the S. Judiciary Comm., 89th Cong. 498 (1966) (statement of Prof. Paul A. Freund)); cf. Craig A. Stern, Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?, 12 LEWIS & CLARK L. REV. 1169, 1217 (2008) (“The malleability and flexibility of the standing doctrines are legend. They enable the federal courts to assume or to decline jurisdiction of cases without having to confront [the] merits, except perhaps sub rosa.”).


145 See Flast, 392 U.S. at 85, 102–03. The Flast Court did not explicitly say that taxpayer standing would be available only in establishment clause cases. Instead,
tried to explain and justify this exception was, to put the point
charitably, highly dubious. Justice Harlan wrote a devastating
dissent in the case, and in subsequent cases the Justices who
have been most friendly to the Flast exception have generally not
taken its explicit logic seriously. The result is ironic: Later
decisions that have adhered strictly to the reasoning and precise
ruling of Flast have been vulnerable to ridicule by dissenting
Justices as arbitrary, but their arbitrariness has consisted,
arguably, of scrupulously following a decision that made little
logical sense in the first place. The plurality opinion in Hein is a
conspicuous case in point. Conversely, the Justices most
enthusiastic about Flast have also been the ones to insist that
Flast cannot be taken to mean what it actually said.

The other major departure from typical standing doctrine
and practice has been the courts’ acceptance, often with little or
no discussion, of what might be called “offended observer”
standing in Establishment Clause cases. In most areas of law, a
plaintiff whose only injury is that he is offended
by what he perceives to be a constitutional violation would be peremptorily
thrown out of court for lack of standing. When beginning in the
mid-1980s the Supreme Court began to regard governmental

the Court purported to permit taxpayer standing when there was a “logical link”
between taxpayer status and “the type of legislative enactment attacked”—the Court
said this link would be present only in challenges to “exercises of congressional
power under the taxing and spending clause”—and when the taxpayer relied on
“specific constitutional limitations imposed upon the exercise of the congressional
taxing and spending power . . . .” Id. at 102–03. The meaning of this doctrine was
unclear, however, in part because the Establishment Clause is no more an explicit
limit on the spending power than other constitutional limitations are. In practice,
the Flast exception has turned out to be an Establishment Clause exception. See
Carl H. Esbeck, What the Hein Decision Can Tell Us About the Roberts Court and the
Establishment Clause, 78 Miss. L.J. 199, 211 (2008) (“This is unique, for no claim on
the merits other than one brought under the Establishment Clause has ever been
permitted in a federal court by a plaintiff asserting taxpayer standing.”).

146 See Flast, 392 U.S. at 124 (Harlan, J., dissenting) (“The logical inadequacies
of the Court’s criteria are thus a reflection of the deficiencies of its entire position.”).

147 See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of
in Flast itself, Justices who concurred in the result doubted the logic or coherence of
the doctrinal line the majority tried to draw. See Flast, 392 U.S. at 107 (Douglas, J.,
concurring); id. at 114 (Stewart, J., concurring); id. at 115 (Fortas, J., concurring).

148 A similar development is apparent in Valley Forge Christian College, in
which the majority took Flast literally in saying that it applied only to exercises of
the spending power, while the dissent attempted to respect and apply Flast by
departing from its literal terms. See Valley Forge, 454 U.S. at 478–79, 506–09.
endorsement of religion as a violation of the Establishment Clause, however, it came to be supposed that the offense suffered by observers was sufficient to confer standing.\textsuperscript{149} Such offense, it seemed, was precisely the injury that the "no endorsement" doctrine was designed to prevent.\textsuperscript{150} Lupu and Tuttle observe that

\begin{quote}
[\textit{t}hough judges may have become completely accustomed to recognizing this sort of injury in religious display cases, visual or aural exposure to a government wrong... would not constitute an injury sufficient to satisfy Article III requirements under any other constitutional provision. If someone visits a courthouse and observes patently unfair trials, or blatant acts of racial discrimination, or cruel and unusual punishments, the viewer would not have suffered an injury within the meaning of Article III. Standing for observers in Establishment Clause cases is thus as exceptional as standing for taxpayers. If the Establishment Clause context were to be removed, standing would likely disappear.\textsuperscript{151}
\end{quote}

To be sure, the injury inflicted by endorsement of religion might be described in ways that could distinguish it from some of Lupu’s and Tuttle’s examples. An atheist who is made to feel like an outsider by, say, the national motto “In God We Trust” is arguably not equivalent to a citizen who merely sees and is offended by, say, governmental racial discrimination against someone else. Rather, the atheist himself or herself is caused to feel like “an outsider”—which is the injury that the “no endorsement” test is calculated to prevent. Even so, Lupu and Tuttle are likely right that this sort of psychic injury or injury-by-observation would not support standing outside the establishment area.

Because standing has been expanded in Establishment Clause cases, it is possible to describe recent decisions (especially Hein) either as truncating and frustrating the ability of courts to enforce Establishment Clause norms or, conversely, as helping to

\begin{footnotesize}
\textsuperscript{149} I discussed this aspect of the “no endorsement” test shortly after it was announced in Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test, 86 Mich. L. Rev. 266, \textbf{299–300} (1987).


\textsuperscript{151} Lupu & Tuttle, supra note 6, at 158–59.
\end{footnotesize}
restore Establishment Clause standing to normalcy. Neither description does much to anchor an assessment of the recent cases as sound or unsound.

Instead, as Lupu and Tuttle sensibly suggest, the proper criterion for evaluation is “functionality.” Nothing in the logic or essence of “standing” (if it has an essence) dictates whether taxpayer or offended observer standing should be permitted in Establishment Clause cases. Either conclusion is possible within the broad, supple scope of standing doctrine and decisions. So the question, as various Justices have recognized, is whether these exceptions to normal standing doctrine are desirable in furthering the purposes or functions of the clause.

C. Making Space for Soft Constitutionalism?

Applying that functionalist criterion, Lupu and Tuttle argue that the cases are unfortunate and misguided. They stress two major and closely related problems that they believe will follow from a contraction of standing in Establishment Clause cases. First, a contraction in standing may shift more Establishment Clause adjudication out of the federal courts, including the Supreme Court, and into the state courts. This shift would mean that different interpretations of nonestablishment might come to prevail in different jurisdictions: Thus, “the dilemma of non-uniformity looms.”

But the administration of nonestablishment by state courts would not only be non-uniform; it would also be, in some states at least, lax. “Many state court judges are elected, or are subject to electoral recall, and the political unpopularity of many Establishment Clause claims may well make state judges reluctant to apply existing constitutional principles with vigor.” Consequently, a reduction in standing might make for less judicial enforcement of nonestablishment norms overall. Stephen Gey puts the point more starkly. Decisions like Hein, he thinks, threaten to make structural provisions such as the

---

152 Id. at 153.
154 See Lupu & Tuttle, supra note 6, at 164.
155 Id. at 165.
156 Id.
157 See Gey, supra note 6.
Establishment Clause “virtually unenforceable.” Consequently, “[t]he effect of Hein on Establishment Clause litigation could be devastating.”

Lupu and Tuttle are careful not to overstate the case. There is little risk, they think, that plaintiffs will lack standing to challenge—in federal courts—actual legal coercion in religious matters or sectarian preference by government. And even establishment violations that do not present these core injuries, and hence might not support lawsuits by private parties, might nonetheless be redressable through suits brought by “[o]ther government officials, such as state attorneys general . . . .” But this sort of remedy is limited, they think, because “action by state officials to enforce federal constitutional law is extremely rare.” And the overall result of such relaxed enforceability and enforcement would be, as Lupu and Tuttle put it, a “gap between substance and justiciability.”

Assuming these predictions are correct, how worried should we be? The answer, I suggest, depends upon our judgments about how nonestablishment concerns should be allocated as between hard and soft constitutionalism. If we are convinced that separation of church and state needs to be solely or primarily a matter of hard constitutional law, then the developments that concern Lupu and Tuttle, along with other commentators (and some Justices) do indeed seem troublesome. Conversely, if a shift in the direction of soft constitutionalism is desirable in this area, as I have suggested, then what Lupu and Tuttle describe as looming problems may come to seem like promising possibilities.

Thus, the variations within jurisdictions foreseen by Lupu and Tuttle appear, from the perspective of soft constitutionalism, to be a definite advantage. Through most of American history the largely soft constitutional regime permitted just such

158 Id. at 32.
159 Id. at 30; see also Martha Nussbaum, Reply, 54 VILL. L. REV. 677, 701 (2009) (“Even though these violations may be ever so clear and ever so threatening, Hein concludes that no citizen has standing to challenge them so long as the President uses his discretionary funds. This seems to me a result that is unacceptable for the future of our nation.”).
160 See Lupu & Tuttle, supra note 6, at 135.
161 Id. at 155.
162 Id.
163 Id. at 120.
variations; that situation was, I have argued, generally healthy.
And indeed, lately a number of scholars (including, perhaps
ironically, Lupu and Tuttle) have begun to notice the virtues of a
more flexible approach to religious freedom responsive to both
state and local concerns and conditions.\textsuperscript{164}

Moreover, the transfer of nonestablishment concerns to
institutions other than the judiciary, and to “the people,” will
from this perspective be something to applaud, not to lament.
The transfer would of course not be total. As noted above, Lupu
and Tuttle acknowledge that standing would remain to challenge
what might well be regarded as the core nonestablishment
concerns: religious coercion and sect preference.\textsuperscript{165} Possibilities
would also persist for adjudication of other kinds of concerns:
Lupu and Tuttle mention suits brought by state attorneys
general, and other possibilities would likely exist as well.\textsuperscript{166}
To be sure, a contraction of standing doctrines might make such
adjudication less common, thus leading to something of a “gap
between substance and justiciability,” as they aptly put it.\textsuperscript{167} It is
precisely in that gap, however, that soft constitutionalism may
find the space to flourish.

Like most constitutional scholars, Lupu and Tuttle seem
scarcely to contemplate the possibility, much less the possible
virtues, of a soft constitution. For them, hard, judicially-
enforceable constitutional law and ordinary politics seem to
exhaust the possibilities. Hence, they are inclined to equate a
reduction in justiciability with a revision of constitutional
document itself.\textsuperscript{168} In this vein, Lupu and Tuttle maintain that

\textsuperscript{164} See generally, Ira C. Lupu & Robert W. Tuttle, Federalism and Faith, 56
EMORY L.J. 19 (2006); Mark D. Rosen, The Surprisingly Strong Case for Tailoring
Schrager, The Role of the Local in the Doctrine and Discourse of Religious Liberty,

\textsuperscript{165} See supra note 159.

\textsuperscript{166} For example, it is possible that Congress could authorize suits by private
parties to adjudicate classes of nonestablishment issues. See Massachusetts v. EPA,
549 U.S. 497 (2007) (allowing state to sue EPA under federal statute authorizing
such suits). Calvin Massey suggests that “[t]he most persuasive understanding of
EPA is that it permits states, as parens patriae, to assert generalized claims of
injury suffered in common by all of its citizens that would not be judicially
cognizable if asserted by any individual citizen.” Calvin Massey, State Standing

\textsuperscript{167} Lupu & Tuttle, supra note 6, at 120.

\textsuperscript{168} See id. at 138 (“Eventually, the substance of the Clause may be understood as
no broader than the norms of justiciability under the Clause . . . ”).
although some constitutional doctrines may be in need of revision, such revisions should be accomplished directly, not through adjustments of standing doctrine. “If the judiciary . . . is going to dismantle the current structure of non-Establishment law, it should do so straightforwardly, and not by stealthy attacks along the front of justiciability.”

Perhaps. Given a strong commitment to hard constitutional law, this suggestion makes sense. From the perspective of soft constitutionalism, conversely, the suggestion seems misguided—indeed, almost exactly wrong. The advantage of contracting justiciability, rather, is precisely that it moves a range of controversies out of domain of judicial finality without renouncing substantive commitments, doctrines, or principles. Thus, if there is any possibility of shifting separationism back toward the domain of soft constitutionalism, adjusting standing may be the best means of accomplishing that shift.

CONCLUSION

I have argued that recent nonestablishment decisions that have relied on standing instead of addressing the merits need not be viewed as evasive, “stealthy,” or irresponsible. These decisions may reflect a laudable attempt to move nonestablishment concerns back into the realm of soft constitutionalism, where they were through most of the nation’s history up until the 1960s. Viewed in this way, the decisions deserve praise, not scorn. If the hardening of constitutional establishment law has turned out to be a source of worrisome cultural conflict, softening may be the most promising strategy for turning down the conflict. The recent standing cases suggest an inclination to embrace that strategy.

It is possible, to be sure, that the modern domination of the judiciary over constitutional law has so stifled the American political and legal imagination, and sense of responsibility, that soft constitutionalism is no longer a viable possibility. Perhaps non-judicial officials, and citizens generally, can no longer be induced to take constitutional concerns and obligations seriously. Perhaps the decline in constitutional self-governance, or the “deaden[ing of the] sense of moral responsibility” that James Bradley Thayer feared as a consequence of active judicial

169 Id. at 167.
review,\textsuperscript{170} has already progressed beyond the point of no return. Still, it is not obvious that such pessimism is justified. And given the intensifying cultural conflict that the hardening of constitutional separationism has helped to produce, an effort to soften up the Constitution in this area seems worth attempting.

\textsuperscript{170} Thayer, \textit{supra} note 12, at 107.