

**RELIGION
AND
THE STATE**

Second Edition

2010 Up-Date Memorandum

Steven G. Gey

*David and Deborah Fonvielle & Donald and Janet Hinkle Professor of Law
Florida State University College of Law*

LEXISNEXIS

2010 Up-Date Memorandum

This memorandum was prepared by Steven G. Gey for the benefit of students and faculty. The closing date for materials was June 30, 2010. Permission is granted to distribute copies free of charge to students in classes using the casebook.

Chapter 3

THE PROBLEM OF DEFINING RELIGION

Page 153, add after Note on Other Idiosyncratic “Religions”:

The enactment of RLUIPA has done little to allay the ongoing dispute over the nature of religion and religious practice in the prison context. Consider the following discussion by a federal district court of claims brought under RLUIPA by an atheist prisoner in a Wisconsin state prison. See *Kaufman v. Schneider*, [474 F.Supp.2d 1014](#) (W.D.Wis. 2007):

Petitioner is an atheist. He contends that prison officials have violated his rights under the free exercise clause and RLUIPA in three ways: (1) by refusing to authorize a study group for inmates who have described themselves as atheists, freethinkers, humanists and “other” and those who have identified themselves to prison officials as having no religious preference; (2) by failing to provide petitioner with publications about atheism; and (3) by preventing him from ordering publications about atheism.

Petitioner has not stated a claim under the free exercise clause for one simple reason. He does not allege (nor is it possible to see how he could plausibly do so) that merely reading books about atheism or meeting in a study group with inmates of various philosophical bents constitutes the exercise of his religion, that is “the observation of [] central religious belief[s] or practice[s]” of atheism. *Civil Liberties for Urban Believers* [*v. City of Chicago*], [342 F.3d at 760](#). Therefore, petitioner must be denied leave to proceed on his claim that respondents violated his First Amendment free exercise rights by refusing to provide him with materials about atheism or to authorize a study group for

atheist, humanist and freethinking inmates and inmates with no or an “other” religious preference.

To put petitioner’s claim in context, it is helpful to summarize briefly petitioner’s past litigation on the issue of inmate study groups. In Case No. 03-C-027-C, petitioner brought a claim against prison officials contending that they had violated his rights under the free exercise and establishment clauses by refusing to allow him to form a study group for atheist inmates on the same terms the prison authorized study groups for inmates of other faith traditions. This court dismissed petitioner’s claims for failure to state a claim upon which relief could be granted. *Kaufman v. McCaughtry*, 2004 WL 257133 (W.D.Wis. Feb.9, 2004). In *Kaufman v. McCaughtry*, [419 F.3d 678, 684](#) (7th Cir.2005), the court of appeals upheld the decision to dismiss petitioner’s free exercise claim because petitioner could not show that the decision to deny him a study group burdened his right to exercise his atheism in any significant way. However, the court of appeals reversed the decision to deny petitioner’s establishment clause claim on the ground that petitioner’s sincerely held atheist beliefs were entitled to accommodation on the same terms as the accommodations granted to prisoners of other faith traditions.

Nevertheless, the court was quick to note that prison officials are not required to indulge secular interests in the same way they are required to accommodate religious beliefs. *Id.* (“[N]o one says that a person who wants to form a chess club at the prison is entitled under the Establishment Clause to have the application evaluated as if chess were a religion, no matter how devoted he is to the game.”). In this case, petitioner is not challenging the prison’s decision to deny atheists the opportunity to meet together to discuss their commonly held religious beliefs. Instead, petitioner alleges that he asked prison officials to authorize a group for inmates of differing religious and philosophical persuasions, including inmates with no religious

preference at all, to meet together to discuss their differing ideas. Such an activity is more akin to a debate

society meeting than to a group religious practice. Although petitioner might wish to share his atheist beliefs with others (just as a Christian inmate might wish to evangelize his fellow prisoners), prison officials do not violate inmates' free exercise rights when they refuse to permit gathering of inmates of different religious or philosophical persuasions for the purpose of facilitating inter-religious dialogue. By refusing to authorize a study group for inmates who designate themselves as atheists, humanists, freethinkers and "other" and inmates who have no religious preference, respondents did not violate petitioner's rights under the free exercise clause or RLUIPA.

Chapter 7

EXPLICIT GOVERNMENT ENDORSEMENT OF RELIGION IN OTHER CONTEXTS

C. "In God We Trust," the Ten Commandments, and Other Religious Inscriptions

Page 445, add after Notes:

PLEASANT GROVE CITY, UTAH, *et al.* v. SUMMUM

United States Supreme Court
___ U.S. ___ (2009)

Justice Alito delivered the opinion of the Court.

I.A.

Pioneer Park (or Park) is a 2.5 acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11 of which were donated by private groups or individuals. These include an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM"¹ and be similar in

¹ Respondent's brief describes the church and the Seven Aphorisms as follows:

size and nature to the Ten Commandments monument. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics.

In May 2005, respondent's president again wrote to the mayor asking to erect a monument, but the letter did not describe the monument, its historical significance, or Summum's connection to the community. The city council rejected this request.

III.

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been

"The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.' See The Teachings of Summum are the Teachings of Gnostic Christianity, <http://www.summum.us/philosophy/gnosticism.shtml> (visited Aug. 15, 2008).

"Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai... . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. See The Aphorisms of Summum and the Ten Commandments, <http://www.summum.us/philosophy/tencommandments.shtml> (visited Aug. 15, 2008)." Brief for Respondent 1-2.

built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. Neither the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely--and reasonably--interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

Public parks are often closely identified in the public mind with the government unit that owns the land. City parks--ranging from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City--commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

IV.B.

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing "the message" that the monument conveys.

We see no reason for imposing a requirement of this sort. The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required to escape Free Speech Clause restrictions. Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.

In this case, for example, although respondent argues that Pleasant Grove City has not adequately "controll[ed] the message," of the Ten Commandments monument, the City took ownership of that monument and put it on permanent display in a park that it owns and manages and that is linked to the City's identity. All rights previously possessed by the monument's donor have been relinquished. The City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf. And the City has made no effort to abridge the traditional free speech rights--the right to speak, distribute leaflets, etc.--that may be exercised by respondent and others in Pioneer Park.

Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately donated

memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.

Justice Scalia, with whom *Justice Thomas* joins, concurring.

As framed and argued by the parties, this case presents a question under the Free Speech Clause of the First Amendment. I agree with the Court's analysis of that question and join its opinion in full. But it is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's Establishment Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called "wall of separation between church and State," *Reynolds v. United States*, respondent exploiting that hesitation to argue that the monument is not government speech because the city has not sufficiently "adopted" its message. Respondent menacingly observed that while the city could have formally adopted the monument as its own, that "might of course raise Establishment Clause issues."

The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment.

In *Van Orden v. Perry*, this Court upheld against Establishment Clause challenge a virtually identical Ten Commandments monument, donated by the very same organization (the Fraternal Order of Eagles), which was displayed on the grounds surrounding the Texas State Capitol. Nothing in that decision suggested that the outcome turned on a finding that the monument was only "private" speech. To the contrary, all the Justices agreed that government speech was at issue, but the Establishment Clause argument was nonetheless rejected. For the plurality, that was because the Ten Commandments "have an undeniable historical meaning" in addition to their "religious significance," *id.* (opinion of Rehnquist, C. J.). Justice Breyer, concurring in the judgment, agreed that the monument conveyed a permissible secular message, as evidenced by its location in a park that

contained multiple monuments and historical markers; by the fact that it had been donated by the Eagles "as part of that organization's efforts to combat juvenile delinquency"; and by the length of time (40 years) for which the monument had gone unchallenged.

Even accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden*, there is little basis to distinguish the monument in this case: Pioneer Park includes "15 permanent displays"; it was donated by the Eagles as part of its national effort to combat juvenile delinquency; and it was erected in 1971, which means it is approaching its (momentous!) 40th anniversary.

The city can safely exhale. Its residents and visitors can now return to enjoying Pioneer Park's wishing well, its historic granary--and, yes, even its Ten Commandments monument--without fear that they are complicit in an establishment of religion.

Justice Souter, concurring in the judgment.

Even though, for example, Establishment Clause issues have been neither raised nor briefed before us, there is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause, see *ante* (*Scalia, J.*, concurring). The interaction between the "government speech doctrine" and Establishment Clause principles has not, however, begun to be worked out.

The case shows that it may not be easy to work out. After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flat-out establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized. In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvious that the government is speaking in its own right simply by maintaining the monuments.

If a case like that occurred, as suspicion grew that some of the permanent displays were not government speech at all (or at least had an equally private character associated with private donors), a further Establishment Clause prohibition would surface, the bar against preferring some religious speakers over others. See *Wallace v. Jaffree* (Rehnquist, J., dissenting) ("The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others"). But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.

Whether that view turns out to be sound is more than I can say at this point. It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate. It is an occasion, however, to try to keep the inevitable issues open, and as simple as they can be. One way to do that is to recognize that there are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind. And to recognize that is to forgo any categorical rule at this point.

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land. This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases. See, e.g., *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter* (O'Connor, J., concurring in part and concurring in judgment). The adoption of it would thus serve coherence within Establishment Clause law, and it would make sense of our common understanding that some monuments on public land display religious symbolism that clearly does not express a government's chosen views.

D. The Pledge of Allegiance

Page 492, add after *Pinette*:

Note

The basic facts of *Pleasant Grove City v. Summum* [see *supra* this Chapter] -- involving a religious group's effort to place a sectarian monument in a public park -- strongly resemble the facts of *Pinette*. Indeed, *Summum* attempted to rely on *Pinette* to support its quest for access to the park. By declaring the existing religious monument to be government speech, the Court avoided relying on *Pinette*. Indeed, the majority opinion in *Summum* seemed almost to disparage the use of the public forum concept in this context, which is odd given the fact that many of the conservative Justices who joined the plurality opinion in *Pinette* were also members of the *Summum* majority. The portion of the *Summum* majority opinion that discusses *Pinette* and the public forum issue is reprinted below:

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles . . . are out of place in the context of this case." *United States v. American Library Assn., Inc.* (2003). The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. The Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees. See *Cornelius*. A public university's student activity fund can provide money for many campus activities. See *Rosenberger*. A public university's

buildings may offer meeting space for hundreds of student groups. See *Widmar v. Vincent* (1981). A school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators. See *Perry Ed. Assn.*. See also *Arkansas Ed. Television Comm'n v. Forbes* (1998) (noting that allowing any candidate to participate in a televised political debate would be burdensome on "logistical grounds" and "would result in less speech, not more").

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, " 'time out of mind, . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions,' " *Perry Ed. Assn.* (quoting *Hague*), but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments." (Lucero, J., dissenting from denial of rehearing en banc).

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators--often, for all who want to speak--but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays." Brief for Respondent. On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a)

declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New

York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

While respondent and some of its *amici* deride the fears expressed about the consequences of the Court of Appeals holding in this case, those concerns are well founded. If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. New York City, having accepted a donated statue of one heroic dog (Balto, the sled dog who brought medicine to Nome, Alaska, during a diphtheria epidemic) may be pressed to accept monuments for other dogs who are claimed to be equally worthy of commemoration. The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

Respondent compares the present case to *Capitol Square Review and Advisory Bd. v. Pinette* (1995), but that case involved a very different situation--a request by a private group, the Ku Klux Klan, to erect a cross for a period of 16 days on public property that had been opened up for similar temporary displays, including a Christmas tree and a menorah. Although some public parks can accommodate and may be made generally available for temporary private displays, the same is rarely true for permanent monuments.

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument--for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

SALAZAR v. BUONO

Supreme Court of the United States

[130 S. Ct. 1803](#) (2010)

[In many ways Salazar is just another variation on the theme of Pinette. Whereas Pinette dealt with the placement of private religious symbols on government property defined as a public forum, Salazar dealt with the placement of private religious symbols on government property with the government's endorsement. Specifically, Salazar dealt with the placement by the Veterans of Foreign Wars of a large Latin cross in the federally owned Mojave National Preserve. A retired Parks Service employee challenged the continued presence of the cross on federal land. The court of appeals agreed with the district court's conclusion that the presence of the cross violated the Establishment Clause. The court of appeals affirmed the district court's injunction requiring the government to remove the cross. The government did not appeal this ruling. Subsequently, Congress enacted a land transfer statute transferring to the V.F.W. the government's interest in this small parcel of land on which the cross sits. After considering this statute, the lower courts concluded that the transfer was an attempt by the government to keep the cross where it was; therefore, the courts invalidated the land transfer statute. This is the ruling that the Supreme Court addressed in Salazar. Although the Supreme Court ultimately rejected the lower courts' reasoning, the Court did not re-instate the

land transfer statute, choosing instead to simply remand to the lower courts to revisit the case again.]

Justice Kennedy announced the judgment of the Court and delivered an opinion, in which *The Chief Justice* joins and *Justice Alito* joins in part.

The question now before the Court is whether the District Court properly enjoined the Government from implementing the land-transfer statute. The District Court did not consider whether the statute, in isolation, would have violated the Establishment Clause, and it did not forbid the land transfer as an independent constitutional violation. Rather, the court enjoined compliance with the statute on the premise that the relief was necessary to protect the rights Buono had secured through the 2002 injunction.

Here, the District Court did not engage in the appropriate inquiry. The land-transfer statute was a substantial change in circumstances bearing on the propriety of the requested relief. The court, however, did not acknowledge the statute's significance. It examined the events that led to the statute's enactment and found an intent to prevent removal of the cross. Deeming this intent illegitimate, the court concluded that nothing of moment had changed. This was error. Even assuming that the land-transfer statute was an attempt to prevent removal of the cross, it does not follow that an injunction against its implementation was appropriate.

By dismissing Congress's motives as illicit, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage. Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers. Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness. Members of the public gathered regularly at Sunrise Rock to pay their respects. Rather than let the cross deteriorate, community members repeatedly took it upon themselves to replace it.

Congress ultimately designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage. Research discloses no other national memorial honoring American soldiers -- more than 300,000 of them -- who were killed or wounded in World War I. It is reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained.

In belittling the Government's efforts as an attempt to "evade" the injunction, the District Court had things backwards. Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations. Here, Congress adopted a policy with respect to land it now owns in order to resolve a specific controversy. Congress, the Executive, and the Judiciary all have a duty to support and defend the Constitution. The land-transfer statute embodies Congress's legislative judgment that this dispute is best resolved through a framework and policy of accommodation for a symbol that, while challenged under the Establishment Clause, has complex meaning beyond the expression of religious views. That judgment should not have been dismissed as an evasion, for the statute brought about a change of law and a congressional statement of policy applicable to the case.

[Chief Justice Roberts', Justice Alito's, and Justice Scalia's concurring opinions are omitted]

DISSENT

Justice Stevens, with whom Justice Ginsburg and Justice Sotomayor join, dissenting.

The objective of the 2002 judgment, as the plurality grudgingly allows, was to "avoi[d] the perception of governmental endorsement" of religion. The parties do not disagree on this point; rather, they dispute whether the transfer would end government endorsement of the cross. The District Court rightly found that the transfer would not end government endorsement of the cross.

A government practice violates the Establishment Clause if it "either has the purpose or effect of 'endorsing' religion." "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'

The 2002 injunction was based on a finding that display of the cross had the effect of endorsing religion. That is, "the Sunrise Rock cross . . . project[s] a message of government endorsement [of religion] to a reasonable observer." The determination that the Government had endorsed religion necessarily rested on two premises: first, that the Government endorsed the cross, and second, that the cross "take[s] a position on questions of religious belief" or "'mak[es] adherence to religion relevant . . . to a person's standing in the political community.'" Taking the District Court's 2002 finding of an Establishment Clause violation as *res judicata*, as we must, the land transfer has the potential to dislodge only the first of those premises, in that the transfer might change the Government's endorsing relationship with the cross. As I explain below, I disagree that the transfer ordered by § 8121 would in fact have this result. But it is also worth noting at the outset that the transfer statute could not (and does not) dislodge the second premise -- that the cross conveys a religious message. Continuing government endorsement of the cross is thus continuing government endorsement of religion.

In my view, the transfer ordered by § 8121 would not end government endorsement of the cross for two independently sufficient reasons. First, after the transfer it would continue to appear to any reasonable observer that the Government has endorsed the cross, notwithstanding that the name has changed on the title to a small patch of underlying land. This is particularly true because the Government has designated the cross as a national memorial, and that endorsement continues regardless of whether the cross sits on public or private land. Second, the transfer continues the existing government endorsement of the cross because the purpose of the transfer is to preserve its display. Congress' intent to preserve the display of the cross maintains the Government's endorsement of the cross.

Chapter 8

GOVERNMENT FINANCIAL SUPPORT OF RELIGION

Page 693, add after Note on Charitable Choice:

D. Standing to Challenge Government Financial Support of Religion

In recent years the Supreme Court has imposed strict limitations on plaintiffs' standing to challenge government violations of statutes and the Constitution. The Supreme Court's recent decisions have imposed several requirements for a plaintiff seeking standing, including requirements that the plaintiff's injury be concrete, non-conjectural, imminent, and that the plaintiff's injury be traceable to the defendant and redressable by the courts. *See Lujan v. Defenders of Wildlife*, [504 U.S. 555, 560-561](#) (1992). One of the few exceptions to the strict requirements for standing is the rule that taxpayers may challenge government programs financing religious activity in violation of the Establishment Clause.

Early efforts to use taxpayer standing to bring Establishment Clause claims were unsuccessful. In *Doremus v. Board of Ed. of Hawthorne*, [342 U.S. 429](#) (1952), the Court rejected an effort by taxpayers to challenge a New Jersey statute requiring public school teachers to read five verses of the Old Testament at the opening of each school day. The Court held that "the grievance which [plaintiffs seek] to litigate here is not a direct dollars-and-cents injury but is a religious difference," and that plaintiffs' taxpayer status would not create a valid case or controversy without proof that the plaintiffs had a more substantial financial interest in the outcome of the lawsuit.

Sixteen years later, in *Flast v. Cohen*, [392 U.S. 83](#) (1968), the Court granted taxpayer standing status to plaintiffs challenging as a violation of the Establishment Clause the allocation of federal funds

under the Elementary and Secondary Education Act of 1965. Under this statute, the federal government financed instruction and the purchase of educational materials for use in religious and sectarian schools. In *Flast*, the Court held that “standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause.” The Court then described the precise nature of the analysis it would apply in these cases:

Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power. Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education*. Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply

that the enactment is generally beyond the powers delegated to Congress by Art. I, 8. When both nexuses

are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

In *Flast* itself, plaintiffs satisfied both nexuses. A key ingredient of this holding was the historical importance of popular opposition to government financing of religious activities.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark

against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, 8.

Flast was decided at the very end of the Warren Court era, when the Court was liberalizing standing rules in general. As noted above, in more recent years the Court has significantly retreated from this liberalizing tendency. The holding of *Flast* has not been immune from the effects of the Court's retrenchment on the rules relating to standing to sue in federal court. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, [454 U. S. 464](#) (1982), for example, the Court held that *Flast* did not apply to a case in which taxpayers challenged a decision of the Secretary of Health Education and Welfare to convey to a Christian college a 77-acre tract of government-owned land, which was worth approximately \$577,500. According to Court:

Unlike the plaintiffs in *Flast*, respondents fail the first prong of the test for taxpayer standing. Their claim is deficient in two respects. First, the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property. Second, and perhaps redundantly, the property transfer about which respondents complain was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, 8. The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, 3, cl. 2.

The most recent case on this subject is *Hein v. Freedom From Religion Foundation*, [551 U.S. 587](#) (2007). In this case, the Court refused to apply *Flast* to support taxpayer standing to challenge the actions of executive branch officials to allocate government funds to religious organizations providing social services. The *Hein* litigation was a broad challenge to the funding of religious groups under the Bush Administration's various faith-based initiative programs. Congress did not specifically authorize the use of government money for these religious programs, although Congress did authorize the general

appropriations that the administration decided to use for religious purposes.

The plaintiffs in *Hein* won part of their case at the summary judgment stage in the district court. In the district court's summary judgment ruling, the court ruled on the merits that one of the programs funded by the administration did not unconstitutionally prefer religious organizations for government grants, but then went on to hold on the merits that a second program did use government funds to promote religion in violation of the First Amendment. Neither the plaintiffs nor the defendants appealed this part of the district court's ruling. The appeal in the case involved the portion of the lawsuit that challenged the administration's decision to fund conferences promoting the new faith-based initiatives. As the court of appeals summarized the substance of the appeal, the complaint characterized the conferences as "propaganda vehicles for religion[;] should this be proved one could not dismiss the possibility that the defendants are violating the establishment clause." The court of appeals, in an opinion written by Richard Posner, granted the plaintiffs taxpayer standing to pursue this part of their lawsuit. The Supreme Court reversed the court of appeals in a 5-4 decision. There is no majority opinion in the case. Three Justices ruled that *Flast v. Cohen* does not apply to lawsuits challenging expenditures of government funds that are not specifically earmarked by Congress; two Justices argued that *Flast* should be overruled; and four Justices dissented, arguing that the plurality had unreasonably narrowed *Flast*.

HEIN v. FREEDOM FROM RELIGION FOUNDATION

United States Supreme Court
[551 U.S. 587](#) (2007)

Justice Alito announced the judgment of the Court and delivered an opinion in which *The Chief Justice* and *Justice Kennedy* join.

This is a lawsuit in which it was claimed that conferences held as part of the President's Faith-Based and Community Initiatives program violated the Establishment Clause of the First Amendment

because, among other things, President Bush and former Secretary of Education Paige gave speeches that used “religious imagery” and praised the efficacy of faith-based programs in delivering social services. The plaintiffs contend that they meet the standing requirements of Article III of the Constitution because they pay federal taxes.

It has long been established, however, that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government. In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm. And if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.

In *Flast v. Cohen*, we recognized a narrow exception to the general rule against federal taxpayer standing. Under *Flast*, a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause. In the present case, Congress did not specifically authorize the use of federal funds to pay for the conferences or speeches that the plaintiffs challenged. Instead, the conferences and speeches were paid for out of general Executive Branch appropriations. The Court of Appeals, however, held that the plaintiffs have standing as taxpayers because the conferences were paid for with money appropriated by Congress.

Respondents argue that this case falls within the *Flast* exception, which they read to cover any “expenditure of government funds in violation of the Establishment Clause.” But this broad reading fails to observe “the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied.” *Valley Forge*.

The expenditures at issue in *Flast* were made pursuant to an express congressional mandate and a specific congressional appropriation. The expenditures challenged in *Flast* . . . were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate.

The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action.

In short, this case falls outside the “the narrow exception” that *Flast* “created to the general rule against taxpayer standing. . . .” Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents’ lawsuit is not directed at an exercise of congressional power, see *Valley Forge*, and thus lacks the requisite “logical nexus” between taxpayer status “and the type of legislative enactment attacked.” *Flast*.

Respondents argue that it is “arbitrary” to distinguish between money spent pursuant to congressional mandate and expenditures made in the course of executive discretion, because “the injury to taxpayers in both situations is the very injury targeted by the Establishment Clause and *Flast*--the expenditure for the support of religion of funds exacted from taxpayers.” The panel majority below agreed, based on its observation that “there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause.”

But *Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures. *Flast* itself distinguished the “incidental expenditure of tax funds in the administration of an essentially regulatory statute,” *Flast*, and we have subsequently rejected the view that taxpayer standing “extends to ‘the Government as a whole, regardless of which branch is at work in a particular instance,’” *Valley Forge*.

It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts. We have declined

to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause. We have similarly refused to extend *Flast* to permit taxpayer standing for Establishment Clause challenges that do not implicate Congress' taxing and spending power. See *Valley Forge*. In effect, we have adopted the position set forth by Justice Powell in his concurrence in [*United States v.*] *Richardson* and have "limit[ed] the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the *results* in *Flast*"

Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action--be it a conference, proclamation or speech--to Establishment Clause challenge by any taxpayer in federal court. Such a broad reading would ignore the first prong of *Flast*'s standing test, which requires "a logical link between [taxpayer] status and the type of legislative enactment attacked."

It would also raise serious separation-of-powers concerns. As we have recognized, *Flast* itself gave too little weight to these concerns. By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* "failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-a-vis the other branches, concrete adverseness or not." *Lewis v. Casey*, [518 U. S. 343, 353, n. 3](#) (1996)

Respondents set out a parade of horrors that they claim could occur if *Flast* is not extended to discretionary Executive Branch expenditures. For example, they say, a federal agency could use its discretionary funds to build a house of worship or to hire clergy of one denomination and send them out to spread their faith. Or an agency could use its funds to make bulk purchases of Stars of David, crucifixes, or depictions of the star and crescent for use in its offices or for distribution to the employees or the general public. Of course, none of these things has happened, even though *Flast* has not previously been expanded in the way that respondents urge. In the unlikely event that any of these executive actions did take place, Congress could quickly step in. And respondents make no effort to show that these improbable abuses could not be challenged in federal court by plaintiffs

who would possess standing based on grounds other than taxpayer standing.

Justice Kennedy, concurring.

Flast established a “narrow exception” to the rule against taxpayer standing. *Bowen v. Kendrick*. To find standing in the circumstances of this case would make the narrow exception boundless. The public events and public speeches respondents seek to call in question are part of the open discussion essential to democratic self-government. The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns. The exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies sustains a free society. Permitting any and all taxpayers to challenge the content of these prototypical executive operations and dialogues would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real danger of judicial oversight of executive duties. The burden of discovery to ascertain if relief is justified in these potentially innumerable cases would risk altering the free exchange of ideas and information. And were this constant supervision to take place the courts would soon assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold.

The courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties.

It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.

Justice Scalia, with whom *Justice Thomas* joins, concurring in the judgment.

Today's opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently. If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast v. Cohen* should be applied to (at a minimum) *all* challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing.

Justice Souter, with whom *Justice Stevens*, *Justice Ginsburg*, and *Justice Breyer* join, dissenting.

Flast v. Cohen held that plaintiffs with an Establishment Clause claim could “demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.” Here, the controlling, plurality opinion declares that *Flast* does not apply, but a search of that opinion for a suggestion that these taxpayers have any less stake in the outcome than the taxpayers in *Flast* will come up empty: the plurality makes no such finding, nor could it. Instead, the controlling opinion closes the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury. I see no basis for this distinction in either logic or precedent, and respectfully dissent.

We held in *Flast*, and repeated just last Term, that the “‘injury’ alleged in Establishment Clause challenges to federal spending” is “the very ‘extract[ion] and spen[ding]’ of ‘tax money’ in aid of religion.” *DaimlerChrysler Corp. v. Cuno* (2006). As the Court said in *Flast*, the importance of that type of injury has deep historical roots going back to the ideal of religious liberty in James Madison's Memorial and

Remonstrance Against Religious Assessments, that the government in a free society may not “force a citizen to contribute three pence only of his property for the support of any one establishment” of religion. 2 Writings of James Madison 183, 186 (G. Hunt ed. 1901).

The right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause are therefore not to be split off from one another. The three pence implicates the conscience, and the injury from Government expenditures on religion is not accurately classified with the “Psychic Injury” that results whenever a congressional appropriation or executive expenditure raises hackles of disagreement with the policy supported, see *ante* (Scalia, J., concurring in judgment). Justice Stewart recognized this in his concurring opinion in *Flast*, when he said that “every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution,” and thus distinguished the case from one in which a taxpayer sought only to air a generalized grievance in federal court.

Here, there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion. The taxpayers therefore seek not to “extend” *Flast*, *ante* (plurality opinion), but merely to apply it. When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury. And once we recognize the injury as sufficient for Article III, there can be no serious question about the other elements of the standing enquiry: the injury is indisputably “traceable” to the spending, and “likely to be redressed by” an injunction prohibiting it.

The plurality points to the separation of powers to explain its distinction between legislative and executive spending decisions, but there is no difference on that point of view between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one. We owe respect to each of the other branches, no more to the former than to the latter, and no one has suggested that the Establishment Clause lacks applicability to executive uses of money. It would surely violate the Establishment Clause for the Department of Health and Human Services to draw on a general appropriation to build a chapel for weekly church services (no less than if a statute required it), and for good reason: if the Executive could accomplish through the

exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.

Chapter 14

THE FREE EXERCISE CLAUSE AFTER *EMPLOYMENT SERVICES V. SMITH*

Page 878, add at the end of the Note after Gonzales:

One of the more provocative contributions to the debate over the meaning of the RFRA terms "substantially burden" and "exercise of religion" comes from the Ninth Circuit Court of Appeals. In *Navajo Nation v. United States Forest Service*, [535 F.3d 1058](#) (9th Cir. 2008), the Ninth Circuit held that the United States government did not violate RFRA when it permitted the use of recycled wastewater to make artificial snow for a commercial ski resort located in a national park on a mountain considered sacred by Native American tribes. The central issue, according to the court, was "whether the use of recycled wastewater on the Snowbowl imposes a 'substantial burden' on the exercise of the Plaintiffs' religion." The court ultimately determined that it did not. Using pre-*Smith* cases such as *Yoder* and *Sherbet* to assist it in defining the key terms in RFRA, the court held that there was no "substantial burden" on the plaintiffs' religion in this case because "[t]he use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit," and because "[t]he use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions." The court distilled its holding into the following general principle, which is probably the most controversial part of this opinion:

The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain.

Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment-serious though it may be-is not a "substantial burden" on the free exercise of religion.

The court elaborated on its conclusions in a footnote:

The dissent's assertion that we misunderstand the "nature of religious belief and practice" is misplaced. One need not study the writings of Sir Francis Bacon or William James to understand "religious exercise invariably, and centrally, involves a 'subjective spiritual experience.'" We agree with the dissent that spiritual fulfillment is a central part of religious exercise. We also note that the Indians' conception of their lives as intertwined with particular mountains, rivers, and trees, which are divine parts of their being, is very well explained in the dissent. Nevertheless, the question in this case is not whether a subjective spiritual experience constitutes an "exercise of religion" under RFRA. That question is undisputed: The Indians' religious activities on the Peaks, including the spiritual fulfillment they derive from such religious activities, are an "exercise of religion."

Rather, the sole question is whether a government action that affects only subjective spiritual fulfillment "substantially burdens" the exercise of religion. For all of the rich complexity that describes the profound integration of man and mountain into one, the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings. Under Supreme Court precedent, government action that diminishes subjective spiritual fulfillment does not "substantially burden" religion.

Does the Ninth Circuit's decision to differentiate so sharply between the statutory terms "substantially burden" and "exercise of religion" makes sense? In other words, once one concedes that a particular activity constitutes the "exercise of religion," is it logical also to conclude that a

government action significantly impinging upon that religious activity does not "substantially burden" the exercise of religion?