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CONSTITUTIONAL STRUCTURE, INDIVIDUAL RIGHTS, AND THE PLEDGE OF ALLEGIANCE

LUKE MEIER *

INTRODUCTION

Let us assume that the Supreme Court will eventually determine that public school teachers do not violate the Constitution when they lead their class in reciting the Pledge of Allegiance, as currently written to include the words “under God.” Indeed, it is probably not that much a leap of faith. The Court has intimated numerous times before that the Pledge is constitutional.¹ Justice Thomas has written an official opinion expressing the view that the Pledge is constitutional,² while Justice Scalia has made unofficial comments indicating that leading school children in the recitation of the Pledge does not violate the Establishment Clause.³ It seems highly likely that new Court members Justice Alito and Chief Justice Roberts would tend to view the issue similarly to Justices Thomas and Scalia. Justice Breyer has opined, in another case, that the absence of an Establishment Clause challenge over a period of forty years indicates that no unconstitutional state religious “message” is present.⁴ Furthermore, Justices Stevens, Souter and Ginsburg are surely not unaware of the political consequences of a Supreme Court decision ruling that teachers cannot lead school children in the Pledge as currently written, and it is perhaps not a coincidence that these Justices seemed

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perfectly happy to avoid the merits of the case in their presidential-election-year decision in *Elk Grove Unified School District v. Newdow*. Given these circumstances, it seems highly unlikely that the Pledge would be declared unconstitutional by the current Court. Of course, not all constitutional scholars would agree with a Supreme Court decision upholding the Pledge. Indeed, despite the Court dicta indicating the constitutionality of the Pledge, the Ninth Circuit (or, at least, two Judges on the Ninth Circuit) concluded that the Pledge was unconstitutional in *Newdow* by applying the various modern tests the Supreme Court has used in Establishment Clause cases. On this point, at least, Justice Thomas agreed in *Newdow* with the Ninth Circuit: the Pledge was unconstitutional under modern Court doctrine.

If, however, we assume the Court’s conclusion that the Pledge is not unconstitutional under the Establishment Clause, we can jump ahead to the more interesting question as to how the Court will reach this conclusion. There are two basic options. The first is to attempt to get to this result by working within the framework of existing Supreme Court doctrine. This was the approach taken by Justice Rehnquist in *Newdow*, distinguishing between the unconstitutional coercion of a “religious exercise” in *Lee v. Weisman* and the Pledge, which for Rehnquist was not a religious exercise.

The second option in concluding the Pledge is constitutional is to work outside existing doctrine. There has been a substantial amount of scholarship in the last two decades arguing that the Establishment Clause should not be incorporated against the States. As will be discussed in Part II, this current academic debate over the incorporation of the Establishment Clause centers mainly on whether the Establishment Clause should be viewed as a structural provision or, instead, as a clause which protects individual rights or liberties. Under the structural view of the Clause, the primary purpose of the Clause is to prevent the national

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8. See *Newdow*, 542 U.S. at 49 (Thomas, J., concurring in the judgment).
10. See *Newdow*, 542 U.S. at 18 (Rehnquist, C.J., concurring).
government from interfering with the states' ability to establish religion as the citizens of that state may wish.\textsuperscript{11} Under this structural view, obviously, incorporation of the Establishment Clause against the states makes little sense. Incorporation would prevent exactly what the Clause was designed to protect: state establishments of religion. If the Establishment Clause is viewed as protecting individual rights to be free from government involvement with religions, however, incorporation of the Clause makes total sense.

That there could be such fundamental confusion, at this point, regarding the proper understanding of a clause in the Constitution is surprising. Nevertheless, the confusion does exist. My goal in this Essay is to look at one isolated piece of the puzzle: Supreme Court case law and how the Supreme Court has tended to view the Establishment Clause when deciding actual cases under the Clause. Based on the remedies the Supreme Court has fashioned in actual cases litigated under the Establishment Clause, and based on the standing rules the Court has used in Establishment Clause cases, I conclude that the Court has tended to view the Clause as more of a structural provision rather than as a clause protecting individual rights.

In Part II of this article, I will briefly summarize the current academic debate regarding incorporation of the Establishment Clause. In Part III, I will consider the remedies the Supreme Court has implemented in actual cases when the Court has found a violation of the Establishment Clause. The Court's consistent practice in these cases is to strike down the statute in question on its face, rather than as applied to the facts of a particular case, suggesting that the Court views the Establishment Clause as more of a structural limitation rather than a protection of individual rights. In Part IV, I will look at the standing rules governing Establishment Clause cases. Although the evidence here is not as clear, I once again conclude that the Supreme Court's rules regarding standing in Establishment Clause cases lean towards viewing the Clause more as a structural guarantee rather than a protection of individual rights or liberties.

\textsuperscript{11} See Akhil Reed Amar, \textit{The Bill of Rights as a Constitution}, 100 \textit{Yale L.J.} 1131, 1157-58 (1991) (arguing that the Establishment Clause protects the rights of state governments as against the federal government and therefore cannot be incorporated).
I. THE CURRENT ACADEMIC DEBATE

In his concurring opinion in Newdow, Justice Thomas indicated that adherence to Lee v. Weisman\(^{12}\) and other Supreme Court precedent would require the Court to conclude that the school’s policy of saying the Pledge every morning was unconstitutional.\(^{13}\) However, for Justice Thomas, this fact simply illustrates the need to rework existing doctrine. The challenge for Justice Thomas and others who would find the Pledge constitutional by “rethinking” existing doctrine is to articulate a new standard for determining Establishment Clause challenges. Based on Justice Thomas’ opinions in both Newdow and Zelman v. Simmons-Harris\(^{14}\) it seems clear that, if the slate were clean, Justice Thomas would reject any incorporation of the Establishment Clause. The slate, of course, is not clean, and there is over sixty years of Supreme Court jurisprudence that assumes the application of the Establishment Clause to the states.

In light of this rather extensive Supreme Court history indicating that the Establishment Clause is incorporated against the States, Justice Thomas has begun to expound a view that would provide for incorporation of the Establishment Clause against the States, but in a very limited manner. In Newdow, and previously in his concurring opinion in Zelman, Justice Thomas suggested that the Establishment Clause applies to the States only when there is state action somehow implicating an “individual religious liberty interest.”\(^{15}\) It appears, however, that there are very few cases in which Justice Thomas would conclude that an Establishment Clause claim would implicate an individual religious liberty interest. In Newdow, an individual liberty interest was not implicated, according to Justice Thomas, because students who did not want to recite the Pledge could simply opt out and refrain from participating.\(^{16}\) Thus, Justice Thomas seems to define individual religious liberty interests in terms of being free from state coercion to participate in religious activities. If actual state compulsion

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15. Id. at 679 (Thomas, J., concurring); Newdow, 542 U.S. at 49-50 (Thomas, J., concurring in the judgment).
to participate in religious activities is the relevant barometer, it seems that there are very few cases in which Justice Thomas would find an Establishment Clause violation. Indeed, Justice Thomas has acknowledged both that "[t]he Establishment Clause does not purport to protect individual rights"\textsuperscript{17} and that his incorporated Establishment Clause might simply mirror the requirements of the incorporated Free Exercise Clause.\textsuperscript{18}

Justice Thomas has been criticized for his failure to take incorporation "seriously."\textsuperscript{19} His views, however, seem to be heavily influenced by the quite serious scholarship on incorporation by Yale law professor Akhil Amar. In a series of thorough articles\textsuperscript{20} and finally a book on the topic,\textsuperscript{21} Professor Amar presents an understanding of the original Bill of Rights (including the Establishment Clause) and the Fourteenth Amendment that stands in stark contrast to what he describes as the "conventional wisdom"\textsuperscript{22} understanding of the Bill of Rights and how those Amendments apply to the states. The conventional wisdom regarding the Bill of Rights holds that the rights it guarantees serve to protect minorities in society against governments controlled by majorities.\textsuperscript{23} This understanding of the Bill of Rights is flawed, says Amar.\textsuperscript{24} The Founders were much more concerned with a non-responsive, Leviathan-like government that suppressed the liberties of all citizens.\textsuperscript{25} In other words, the fear the Founders were addressing when they created the Bill of Rights was not a government that was too

\begin{itemize}
  \item 17. \textit{Id.} at 50 (Thomas, J., concurring in the judgment) (alteration added).
  \item 18. \textit{See id.} at 53 n.4 ("It may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause . . . ").
  \item 22. \textit{See Amar, The Bill of Rights as a Constitution, supra note 20, at 1132.}
  \item 23. \textit{See id.}
  \item 24. \textit{See id. at 1132-33.}
  \item 25. \textit{See id.}\
\end{itemize}
majoritarian; instead, the fear was that government would not be majoritarian enough.26

After articulating his framework for understanding the Bill of Rights, Amar proceeds to explain that many provisions in the Bill of Rights are not, actually, "rights" at all. Rather, they are structural provisions that seek to limit the power of the newly created federal government, often times in favor of States.27 The Establishment Clause, according to Amar, is one such structural provision.28 Although some Founders, particularly James Madison, clearly believed in a strict separation between church and state, this was not the primary impetus for the Establishment Clause.29 The Clause was designed to keep the federal government out of the area of religion so that States could establish religion as they saw fit.30 Thus, the Clause is not so much a protector of individual rights as it is a structural limitation on the federal government, with the States (rather than individuals) being the primary beneficiary of the Clause.31 Once one accepts this interpretation of the Establishment Clause, it seems that the Clause has more in common with other clear structural provisions found in the original Constitution, such as the Interstate Commerce Clause, than with some of the clauses of the Bill of Rights which clearly do protect individual rights, such as the criminal procedure protections found in the Fourth Amendment.

Because of the structural and federalism nature of the Establishment Clause, Amar concludes that the Establishment Clause is a poor candidate for incorporation unless "the Establishment Clause had come to be viewed as affirming an individual right against establishments rather than an agnostic federalism rule."32 Various scholars have attempted to justify incorporation by claiming that anti-establishment had, in fact, come to be viewed as an individual liberty. Professor Lash has argued that incorporation of the Establishment Clause is legitimate because the Establishment Clause had come to be understood in the first half of the century, particularly by state judges, as protecting individual rights against establishment, regardless of the

26. See id.
27. See generally id. at 1138-82.
28. See id. at 1157-61.
29. See id.
30. See id.
31. See id.
32. See Amar, Some Notes on the Establishment Clause, supra note 20, at 5.
government involved. In addition, because individual rights to non-establishment had been “trampled” on in the antebellum South, the founders of the Fourteenth Amendment clearly meant to apply the Establishment Clause, as it was then understood as protecting individual rights against Establishment, to the States. Imminent religion law scholar Douglas Laycock has made a similar conclusion regarding whether the Establishment Clause does, in fact, protect an individual right rather than simply being a structural limitation:

A taxpayer objecting to such a tax [to support a state-sponsored clergy] would be asserting a claim of individual right under the Establishment Clause. That right is a privilege or immunity of citizens of the United States, as readily incorporated as any other provision of the Bill of Rights . . . . [T]he claim that [the Establishment Clause] protects no individual rights is, in my judgment, false to constitutional text and structure. Thus, the current academic debate over incorporation, as reflected in Justice Thomas’s opinions in Zelman and Newdow, is whether, and to what extent, the Establishment Clause can be viewed as a protection of individual religious rights. Justice Thomas seems to conclude that the Establishment Clause does not protect individual rights, while those arguing in favor of incorporation, such as Professors Laycock and Lash, argue that the Establishment Clause does, in fact, protect individual rights.

II. FACIAL VERSES AS-APPLIED HOLDINGS

When a court decides the merits of a constitutional challenge to a statute, there are generally two different ways in which the holding of the court affects the future application of the statute. In some instances, the statute will cease to have any future validity. In other instances, the

34. See id. at 1136-53.
court's holding on the merits of the constitutional challenge to the statute will not prevent future, constitutional applications of the statute under a different fact situation than that before the court when it determined the constitutional challenge.

Modern terminology describes these two different scenarios using the terms "facial challenges" and "as-applied challenges." This terminology is somewhat misleading, for it suggests that it is the litigant challenging the constitutionality of the statute who controls the breadth of the court's holding. In some instances this is true, but in others it is clearly not. For purposes of this Essay, the manner in which the litigant argues and briefs the constitutional question is not as relevant as the actual effect of the court's holding. To clarify this distinction, the terms facial and as-applied "holdings" will be used instead of the more common terminology of facial and as-applied "challenges."

What do facial and as-applied holdings have to do with whether the Establishment Clause should be viewed as a structural provision or as a clause protecting individual rights? On a theoretical level at least, it would seem that Supreme Court decisions striking down laws based on a potential conflict with a structural provision in the Constitution should more likely be facial holdings. The problem is not that the statute might apply to the detriment of an individual’s constitutional rights; rather, the entire statute is defective because of a structural flaw. Because of the structural defect inherent in the statute, there are no valid applications of the statute. Some commentators have referred to this type of adjudication as a "valid rule facial challenge." For our purposes, the

36. See, e.g., Reno v. ACLU, 521 U.S. 844, 883 (1997) (deciding to analyze the constitutionality of the Communications Decency Act on its face in part because the plaintiffs had styled their challenge as a facial challenge).

37. See, e.g., Tennessee v. Lane, 541 U.S. 509 (2004). In Lane, the State of Tennessee's position was that the Court was required to determine the validity of Title II of the ADA in all of its applications. See Brief of Petitioner, Lane, 541 U.S. 509 (No. 02-1667), available at http://supreme.lp.findlaw.com/supreme_court/briefs/02-1667/02-1667.mer.pet.pdf. Nevertheless, the Court decided to look at Title II's validity as applied to the context of access to courtrooms only. See Lane, 541 U.S. at 531-35. Similarly, in Gonzalez v. Raich, 545 U.S. 1 (2005), users and growers of marijuana for medical purposes argued that Congress lacked the power to criminalize their specific behavior. See id. at 15-16. The Court, however, was reluctant to view the issue to be decided so narrowly. See id. at 15-22.

important point is that, at least theoretically, challenges based on the failure to comply with a structural provision in the Constitution would seem to be more susceptible to facial holdings.

The Court's opinion in *United States v. Lopez* is a great example of the Court striking down a statute on its face because the statute was inconsistent with a structural provision of the Constitution. *Lopez* involved a challenge to the Gun Free School Zones Act. The defendant in question had claimed that his conviction under the Act could not stand because Congress lacked authority under the Commerce Clause to pass the statute. All constitutional scholars would probably agree that the Commerce Clause, which grants Congress the power to regulate interstate, but not intrastate, commerce is a structural constitutional provision rather than a provision that protects individual liberties. Clearly, Congress's power in this area was limited, not because of the desire to protect individual rights, but rather to preserve this area of regulation to the States. In *Lopez*, the Supreme Court concluded that the statute was beyond Congress's power to regulate interstate commerce, and thus the statute was void in its entirety. Appropriately, the decision was a facial holding. It did not matter to the Court whether the actual gun in question had, in fact, traveled in interstate commerce. Because the challenge was based on Congress's failure to comply with a structural provision of the Constitution, the statute had to be struck down in its entirety, even if it could be applied to particular factual circumstances in which interstate commerce might be implicated.

While it would seem that challenges to statutes based on structural provisions of the Constitution would tend to require a facial holding by the Court, as in *Lopez*, the opposite would seem to hold true for challenges to statutes based on constitutional provisions which protect individual rights. If the statute merely violates an individual right held by the litigant, the proper remedy would seem to be an as-applied holding; the statute does not apply to the litigant under the facts of the case, but because there is no structural deficiency in the statute it could conceivably apply under different circumstances. The constitutional

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40. Id. at 551-52.
41. Id. at 552.
42. Id.
rights are protected and the Court’s opinion has precedential effect, but the statute is not completely voided.

There is a plethora of language in Supreme Court opinions to suggest that this model of as-applied holdings in cases involving individual rights is actually how the Court adjudicates cases involving individual constitutional rights. For instance, the Court has stated that “the Court’s practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law in toto, but rather to reverse the particular conviction.” 43 Similarly, the Supreme Court has repeatedly held that “constitutional rights are personal and may not be asserted vicariously.” 44 And finally, the Court has famously stated in United States v. Salerno 45 that “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” 46

Not surprisingly, it turns out that actual Supreme Court holdings, particularly recent ones, sometimes stray from the notion that structural clauses require facial holdings while individual rights warrant as-applied holdings. The Supreme Court sometimes strikes down statutes on their face in cases involving individual constitutional rights, even if some of the above-quoted language from Supreme Court opinions would suggest otherwise. The most explicit example of this practice of invalidating entire statutes even though the constitutional challenge is based on a clause protecting individual rights is the Overbreadth Doctrine. Under the Overbreadth Doctrine, a court can strike down a statute as violating the Free Speech Clause even though there might be applications of the statute that would not violate any individual constitutional rights to free speech. 47 This practice has been rationalized based on a need to prevent the chilling of constitutional speech, where speakers might refrain from engaging in constitutionally protected speech because it violates the

46. Id. at 745 (alteration added).
language of a specific statute.\textsuperscript{48} Even outside the context of the Overbreadth Doctrine, it is relatively easy to find facial holdings involving a constitutional provision that clearly protects an individual right. There are numerous examples under the Free Speech Clause.\textsuperscript{49} In addition, as many scholars and even some Justices have noted, Court decisions involving the constitutional individual right to abortion have almost always involved facial holdings.\textsuperscript{50}

There are also examples in which challenges based on constitutional structural clauses were adjudicated in an as-applied holding. The most recent example involves Tennessee v. Lane.\textsuperscript{51} In Lane, the Court considered whether Title II of the Americans with Disabilities Act\textsuperscript{52} (ADA) "exceed[ed] Congress’ power under § 5 of the Fourteenth Amendment."\textsuperscript{53} Clearly, the Enforcement Clause\textsuperscript{54} of the Fourteenth Amendment is a structural clause, rather than a clause which protects individual rights. Nevertheless, in Lane the Court employed an "as-applied" approach to determining the constitutionality of Title II, much to the chagrin of some of the dissenting Justices.\textsuperscript{55} Rather than determining whether the statute, as a whole, was within Congress’s power, the Court only determined whether Congress could have passed a hypothetical statute that addressed the particular problem before the Court.\textsuperscript{56}

Thus, it is apparent that the Supreme Court has not always followed the seemingly logical approach of issuing facial holdings in cases involving constitutional challenges based on structural clauses and as-applied holdings based on individual rights. In a forthcoming Article, I criticize the Court for straying from this approach and argue that separation of powers concerns actually require the Court to issue facial holdings.


\textsuperscript{51} 541 U.S. 509 (2004).

\textsuperscript{52} 42 U.S.C. §§ 12131-12165 (2000).

\textsuperscript{53} Lane, 541 U.S. at 513 (alteration added).

\textsuperscript{54} See U.S. CONST. amend. XIV, § 5.

\textsuperscript{55} See, e.g., Lane, 541 U.S. at 551-52 (Rehnquist, C.J., dissenting).

\textsuperscript{56} Id. at 551.
holdings when the challenge is based on a structural provision. These outlying cases, however, seem to be the exception and not the rule. The fact that almost all Establishment Clause cases have been decided through a facial holding suggests that the Court has tended to view the Establishment Clause as a structural provision rather than an individual rights provision.

To continue with the concept, consider a hypothetical in which school children are challenging the Pledge of Allegiance under either the Free Speech Clause or the Establishment Clause and the two different ways the Court would approach the remedy available under the two clauses. Imagine that there are two children who object to different parts of the Pledge of Allegiance recited in class. Our first child is John. As an African-American, John objects to the portion of the Pledge which states "with liberty and justice for all." John brings suit and makes a claim under the Free Speech Clause, which applies to the states as a result of its incorporation through the Fourteenth Amendment. The result of the suit is clear. Under West Virginia Board of Education v. Barnette, John cannot be compelled to recite the pledge. He has a constitutional right to opt out of partaking in the ritual. However, the Free Speech Clause does not require the school to refrain from requiring recitation of the Pledge simply because one student does not agree with the message. So requiring would effectively give John veto power over the speech of the school and the other students.

Now consider Jack. Jack is an atheist who objects to the inclusion of the words "under God" in the Pledge. Jack brings suit under the Establishment Clause. The success of his suit is questionable under current Court doctrine. However, the remedy if he is successful, at least under current Supreme Court jurisprudence, is clear: the class is prevented from reciting the Pledge, at least with the words "under God" included.

To be sure, the example of John and Jack is over-simplified. Both children would have the legal ability to bring a claim under the Establishment Clause and the Free Speech Clause. The simplification,

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57. I thank Rick Duncan for this hypothetical.
59. 319 U.S. 624 (1943) (holding that the Free Speech Clause prohibits compelled recitation of the Pledge of Allegiance at school).
however, serves a purpose, because it pinpoints an inconsistency in the way these clauses apply to state action. Why should there be a different (and stronger) remedy under the Establishment Clause than is available under the Free Speech Clause? Under the Free Speech Clause, a litigant is not able to silence the rest of the class from reciting a Pledge that he or she disagrees with or finds offensive. Why should this remedy be available under the Establishment Clause? If the Free Speech Clause is not violated so long as the student is not actually coerced into participating in the Pledge ceremony, why is the Establishment Clause violated without showing actual coercion to participate in the ceremony? And why is the remedy under the Establishment Clause not a right to merely opt out and avoid the ceremony, but instead the right to silence others?

I would submit that the answer to these questions is that the Establishment Clause has been interpreted as a structural constitutional provision instead of a guarantor of individual rights. The remedy under current Establishment Clause jurisprudence, silencing the entire class, only makes sense if there is a structural problem in the government action. If, instead, individual rights are being interfered with, the constitutional remedy would be an opt-out, as the Supreme Court has determined in cases involving the constitutionally protected individual right to free speech.

The response of academics who see a “right” in the Establishment Clause might be that the Establishment Clause “right” simply operates in a manner different than, for instance, Free Speech rights. Under this theory, the Establishment Clause “right” means not only the right to be free from government coercion in religious activities, but also the “right” to not be exposed to religious activities and the “right” to prevent others from engaging in these activities, at least with government sponsorship. These semantics, however, stretch the word “right” to its limits. As Justice Thomas acknowledges in his opinion in Newdow, actual “legal coercion” should be the standard if the Establishment Clause is about protecting individual rights or liberties.61 And under current Establishment Clause jurisprudence, there are very few cases in which actual legal coercion can be found. In most of these cases, the issue is not about a citizen who simply wants to be free from

government compulsion or punishment. Instead, it is about individuals who want to restrain government from doing something with which the individual disagrees. This "right" to prevent government from acting is not an individual right or liberty, at least in the traditional sense. Government might not have the "right" or authority to enact the law or policy in question, but this is different than government action which abridges or denies an individual right.

Perhaps the best argument that the Establishment Clause does in fact protect individual rights is the argument that there is legal coercion when citizens are coerced to pay, through taxes, for state-sponsored religious activity. Although the argument is not as relevant to the Pledge of Allegiance case, in which it is harder to pinpoint the actual monetary cost to the taxpayers of the Pledge recitation, the argument has more weight in a case such as *Zelman* involving school vouchers, in which it is clear that the government activity does have a definite monetary cost. Even here, however, the argument falls apart when one considers how this "right" would work in the context of the individual right to free speech. If the individual "right" protected by the Establishment Clause is violated when government spends money in a manner contrary to the religious beliefs of some citizens, then why is it also not a violation of individual free speech rights when John is forced to listen to his fellow classmates recite the Pledge of Allegiance and declare America a place with "liberty and justice for all," even though he disagrees with such a statement? The "right" to free speech does not extend this far, and attempting to justify this veto result in the Establishment Clause context pushes the understanding and definition of "individual right" beyond the contemporary understanding of the term. Thinking of the Establishment Clause as a structural provision, rather than as an individual rights provision, is a much more straightforward and satisfactory way of explaining the disparity between the veto available to those litigating under the Establishment Clause and the opt-out right available to those litigating under the Free Speech Clause.

62. A good example is Congress's Interstate Commerce Clause power. It might be logical to say that Congress did not have a "right" to pass a particular statute because of an insufficient nexus to interstate commerce. But it would be unusual or irregular to say that individuals have a "right" to not have Congress regulate intrastate commerce.

III. STANDING

The Supreme Court’s complicated jurisprudence involving standing also provides insight regarding the nature of the Establishment Clause. Standing is a relatively modern Supreme Court doctrine that is founded in part in the Article III case and controversy requirement and in part on “judicially self-imposed limits.” If standing is lacking, as in the Newdow case, a federal court will not proceed to the merits of the dispute.

To meet Article III standing requirements, a plaintiff must show that he or she “has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” In most instances, the mere fact that the defendant has engaged in illegal or unconstitutional conduct will be insufficient to demonstrate actual injury. Rather, the plaintiff must show that the illegal or unconstitutional action has produced actual harm to the plaintiff in a manner different than the type of harm suffered by all citizens by illegal or unconstitutional action.

Despite the prohibition on general citizen standing in federal court to challenge illegal or unconstitutional government conduct, the Court has at times allowed what is called “taxpayer standing.” Taxpayer standing is based on the notion that there is real monetary harm when taxpayers are taxed to fund an illegal or unconstitutional government action, thus satisfying the Article III requirement that there

64. Newdow, 542 U.S. at 11-12.
65. Id. at 4.
66. See id. at 11.
68. See Diamond v. Charles, 476 U.S. 54, 62 (1986) (“This Court consistently has required, in addition, that the party seeking judicial resolution of a dispute show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the other party.”) (internal quotations omitted)).
be actual injury to the plaintiff. Because, under this theory, there must
be a link between the illegal or unconstitutional action and the tax
liability of individual taxpayers, it is not surprising that the Supreme
Court has most readily applied this theory to the municipality level. In
challenges by municipal taxpayers to municipal government action, the
Supreme Court had indicated that “the interest of a taxpayer of a
municipality in the application of its moneys is direct and immediate.”
Because a court’s decision to terminate a particular government practice
would likely have a real impact on the tax receipts required for the local
government, this link between the taxpayer’s individual monetary
interest and the legality of the government program is much tighter. As a
leading treatise explains:

As compared to the size of the federal budget and
current federal habits of legislating on taxing and
spending, it may seem more realistic to assert that
individual tax payments actually are affected by
discrete [local] spending programs. Local tax
rates, indeed, may well be adjusted directly to
account for the needs of specific programs.

At the federal level, however, courts presume that federal
taxpayers challenging federal programs will not have a sufficient
personalized injury to satisfy Article III standing requirements: “This
Court has held that the interests of a taxpayer in the moneys of the
federal treasury are too indeterminable, remote, uncertain and indirect to
furnish a basis for an appeal to the preventive powers of the Court over
their manner of expenditure.” In regard to state taxpayers challenging
state expenditures, the Supreme Court has been somewhat unclear as to
whether to treat these taxpayers like federal or municipal taxpayers for
standings purposes. When the Court has directly addressed the issue, the
Court has “likened state taxpayers to federal taxpayers” and thus
declined to allow taxpayer standing. There are numerous instances,

71. See generally Wright et al., supra note 70 (explaining judicial
application of and limits to citizen and taxpayer standing).
73. See Wright et al., supra note 70, at 653 (alteration added).
75. Asarco Inc. v. Kadish, 490 U.S. 605, 613-14 (1989); see also Doremus,
however, particularly in cases in which the challenge is based on the Establishment Clause, where the Court has seemed to concede the standing of the state taxpayer.\textsuperscript{76}

Thus, it seems accurate to state that federal taxpayer standing is generally denied, municipal taxpayer standing is generally allowed, and state taxpayer standing is somewhere in between. In order to complete the picture, however, the exception to the prohibition on federal taxpayer standing needs to be addressed. In Flast v. Cohen,\textsuperscript{77} the Supreme Court recognized a very narrow exception to this presumption against federal taxpayer standing. In Flast, a federal taxpayer was found to have standing to challenge, on Establishment Clause grounds, the expenditure of federal funds to support religious schools.\textsuperscript{78} The Court reasoned that taxpayer standing was appropriate for two reasons. First, the Congressional action being challenged was based on the taxing and spending power enumerated in Section Eight of Article One of the Constitution.\textsuperscript{79} Secondly, the challenge was made pursuant to the Establishment Clause, which was a “specific constitutional limitation[] 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.”\textsuperscript{80}

The Flast exception to federal taxpayer standing has been roundly criticized,\textsuperscript{81} and Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.\textsuperscript{82} highlighted the limited extent of the exception. In Valley Forge, the Supreme Court concluded that federal taxpayers did not have standing to challenge, on Establishment Clause grounds, the transfer of government property to a religious college.\textsuperscript{83} The property transfer was made by an administrative

\textsuperscript{76} Kenneth Culp Davis, Administrative Law Treatise 309 (2d ed. 1983). There are instances in which the Court has assumed federal taxpayer standing as well. See Tilton v. Richardson, 403 U.S. 672, 689 (1971).
\textsuperscript{77} 392 U.S. 83 (1968).
\textsuperscript{78} Id. at 88.
\textsuperscript{79} Id. at 102.
\textsuperscript{80} Id. at 103 (alteration added).
\textsuperscript{81} Id. at 116-34 (Harlan, J., dissenting).
\textsuperscript{82} 454 U.S. 464 (1982).
\textsuperscript{83} Id. at 489-90.
agency, not by Congress pursuant to their taxing and spending power, and thus the first requirement of the Flast exception had not been met.\textsuperscript{84}

By strictly limiting the Flast exception to the facts of that case and the requirements delineated in the Flast opinion, Valley Forge reduces the vitality of the Flast exception outside the context of the Establishment Clause. To this author's knowledge, no other clause of the Constitution has been determined to be a "specific constitutional limitation[] imposed upon the exercise of congressional taxing and spending,"\textsuperscript{85} and Valley Forge indicates a reluctance to expand upon Flast. If anything, it seems more likely, given the current disposition of the Court, that the Flast exception will be further reduced or eliminated rather than expanded upon. Nevertheless, despite the minimal impact to taxpayer standing in other areas, the Flast exception is very relevant in Establishment Clause jurisprudence, at least currently. If the challenge is to a Congressional action under the Taxing and Spending Clause, and if the challenge is based on the Establishment Clause, Flast provides for taxpayer standing in these instances.

What does all of this have to do with attempting to ascertain whether the Establishment Clause is a structural provision or a guarantor of individual rights? One commentator has concluded that the Flast exception lends credence to the claim that the Establishment Clause is a structural provision.\textsuperscript{86} I disagree. If anything, recognizing federal taxpayer standing for Establishment Clause claims (if the challenge is to Congressional action pursuant to the Taxing and Spending Clause) bolsters the claims by those such as Professor Laycock that the Establishment Clause protects individual rights. Indeed, a taxpayer challenging government spending in support of religion is the very example that Professor Laycock uses to argue that citizens do have individual rights under the Establishment Clause.\textsuperscript{87} If federal taxpayers do not generally have a sufficient personalized injury to have standing to challenge Congressional action, then allowing taxpayers standing under the Establishment Clause suggests that there is an individualized harm to all citizens merely from the fact of a violation of the Establishment Clause.

\textsuperscript{84} Id. at 479-80.
\textsuperscript{85} Flast, 392 U.S. at 103 (alteration added).
\textsuperscript{87} See Laycock, supra note 35, at 242.
Clause. Indeed, Justice Harlan, dissenting in *Flast*, even acknowledges that the majority’s opinion rests on an understanding of the Establishment Clause as protecting individual rights:

Although the Court does not altogether explain its position, the essence of its reasoning is evidently that a taxpayer’s claim under the Establishment Clause is “not merely one of ultra vires,” but one which instead asserts “an abridgment of individual religious liberty” and a “governmental infringement of individual rights protected by the Constitution.”

By stepping back from the *Flast* exception, however, I think the Supreme Court’s overall standing jurisprudence in Establishment Clause cases reflects an understanding of the Clause as primarily structural. Start with cases involving challenges to local or state expenditures by taxpayers. Although the Supreme Court has almost always found taxpayer standing to challenge these local or state expenditures, this is not inconsistent with the Court’s general approach to local or state taxpayer standing outside the Establishment Clause area. As noted before, the Court has indicated that local taxpayers will most often be able to establish standing to challenge a local government action in federal court. And, although the law in regard to State taxpayer challenges is somewhat unclear, it is fair to characterize these Establishment Clause decisions in which standing is granted to the state taxpayer as a decision by the Court to treat state taxpayers as more akin to local taxpayers. Viewed from this perspective, then, the Court has found taxpayer standing in an abundance of cases because linking the expenditure in question to the actual tax bill of the taxpayer demonstrates individualized harm. If, however, the Establishment Clause actually protected an individual right against government establishment, the taxpayer basis for standing would be unnecessary and irrelevant. It would not be necessary to confirm that the challenger was, in fact, a taxpayer, because the individual right would be abridged regardless of whether the plaintiff paid taxes. The denial or abridgment of an individual constitutional right would constitute a sufficient injury for

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standing purposes. But the cases do not say this. When standing in a challenge to a state or local expenditure is discussed (and sometimes when it is not), the Court will almost always reference the fact that the plaintiff is a taxpayer. This discussion would be entirely unnecessary if the Establishment Clause represented the general "right" to disestablishment that some claim.

Of course, the above analysis is based on a particular understanding of cases involving challenges to state and local expenditures. However, the criticism holds once we move outside the realm of expenditure cases. Consider those cases in which the plaintiff challenges not a government expenditure, but rather a government action that cannot readily be linked with government expenditures and tax revenue needs. In these cases, if there are no readily identifiable government expenditures, a theory of taxpayer standing will not suffice. In these non-expenditure cases, the Court seems to require some sort of personal connection or exposure to the claimed Establishment Clause violation. Take, for instance, *Van Orden v. Perry.*

In *Van Orden,* Austin resident Thomas Van Orden made an Establishment Clause challenge to a Ten Commandments monument on the Texas State Capitol grounds. The monument had been donated and erected on the Capitol grounds by a private organization, so presumably there were no state expenditures in buying or erecting the monument. Although standing was not discussed, the Court detailed in its opinion how Van Orden frequently encountered the monument when visiting the Capitol. These facts are largely irrelevant to the case except to the issue of standing. There are other cases in which the Court has seemed to assume, without discussing, the standing of a plaintiff based on the plaintiff's personal connection or exposure to the government action in question. Circuit Courts are often more explicit in discussing this personal connection to the government action being challenged.

Requiring some connection to the alleged establishment of religion is an implicit rejection of the notion that the Establishment Clause protects individual rights. If individual rights were protected, it would not be necessary to link the plaintiff personally to the government

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89. 125 S. Ct. 2854 (2005).
90. Id. at 2858.
91. Id.
92. See, e.g., Glassroth v. Moore, 335 F.3d 1282, 1291-93 (11th Cir. 2003).
action. Rather, the very fact that there was a violation of the Establishment Clause would be an infringement on this personal right, and the abridgment of a constitutional right would undoubtedly constitute a sufficient standing injury. By requiring this individualized link to the plaintiff, the Court is treating the Establishment Clause like other structural provisions such as the Interstate Commerce Clause. A citizen or taxpayer would not have had standing to challenge the constitutionality of the Guns Free School Zones Act, but when a particular individual was prosecuted, the Court, in *Lopez*, was justified in considering the constitutionality of the Act because standing clearly existed.

**CONCLUSION**

Criticism of the incorporation of the Establishment Clause seems to be gaining momentum, both in the academic world and on the Court. As it now stands, the academic debate regarding the propriety of incorporation focuses on whether the Establishment Clause is a structural provision or a Clause that protects individual rights. The manner in which the Court has handled the issues of remedy and standing in Establishment Clause cases suggests that the Court, at least, has thought of the Clause as a structural provision.