

Unifying Establishment Clause Purpose, Standing, and Standards

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As Justice Thomas has correctly observed, “[The Supreme] Court’s Establishment Clause jurisprudence is in disarray.”¹ The disarray comes in several forms. To begin with, there is extensive disagreement among judges and scholars about what purpose the Establishment Clause serves. Moreover, the Court has been unable to create a principled standing doctrine for Establishment Clause cases. This disagreement has bled into the Supreme Court’s merits decisions in Establishment Clause cases: over the last seventy years they have used at least six different standards to resolve such cases. This confusion has left lower courts and litigants struggling to interpret what they are supposed to do in Establishment Clause cases. In this paper, I argue that the Court could resolve all of these issues if it were to adopt a uniform Establishment Clause standard that focused on whether the alleged establishment had caused political divisiveness. This standard would go some distance in resolving (or at least avoiding) the tension over the purpose of the Establishment Clause and would give courts and litigants a clear measure to apply for both the standing and the merits inquiries.

I. INTRODUCTION

In the last eight decades, the United States Supreme Court has used six different standards to decide dozens of Establishment Clause

1. Rowan Cty. v. Lund, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting).

cases.² In the words of Justice Thomas, “[The Supreme] Court’s Establishment Clause jurisprudence is in disarray.”³ Eleventh Circuit Judge Kevin Newsom put it even more bluntly in a recent opinion, describing the current state of Establishment Clause jurisprudence as a “hot mess.”⁴ In the same case, Middle District of Georgia Judge C. Ashley Royal, sitting by designation, “agree[d] with Judge Newsom that the Establishment Clause jurisprudence is a ‘hot mess,’” and further described it as “a wilderness with misdirecting sign posts and tortuous paths.”⁵ Such criticisms of the Court’s Establishment Clause jurisprudence are ubiquitous and are not just made by judges. Some religious institutions have blamed “[o]pen-ended [and] subjective legal standards” for “constant litigation” that “produces unnecessary societal division.”⁶ Scholars, too, have noted the muddled nature of the Court’s Establishment Clause cases. One academic has opined that “Establishment Clause doctrine is notoriously confused and disarrayed.”⁷

These critics have a point. The disarray is easily seen in the Supreme Court’s morass of opinions, concurring opinions, opinions concurring in part, opinions concurring in the judgment, and dissenting

2. See *infra* Part IV; see also John M. Bickers, *False Facts and Holy War: How the Supreme Court’s Establishment Clause Cases Fuel Religious Conflict*, 51 IND. L. REV. 305, 307–13 (2018) (identifying five standards). Only five of the standards have been adopted by a majority of the Court at any one time. See *infra* Part IV.

3. *Lund*, 138 S. Ct. at 2564; see also *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring) (“[O]ur ‘doctrine [is] in such chaos’ that lower courts have been ‘free to reach almost any result in almost any case.’” (quoting Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119 (1992))); *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994, 997 (2011) (Thomas, J., dissenting) (“Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases.”).

4. *Kondrat’yev v. City of Pensacola*, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J., concurring)

5. *Id.* at 1184 (Royal, J., concurring).

6. Brief of Religious Denominations and Other Religious Institutions as Amici Curiae Supporting Petitioners at 2, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (Nos. 17-1717, 18-18).

7. Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 60 (2017).

opinions in Establishment Clause cases. For instance, in a recent Establishment Clause opinion:

Alito, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-B, II-C, III, and IV, in which Roberts, C.J., and Breyer, Kagan, and Kavanaugh, JJ., joined, and an opinion with respect to Parts II-A and II-D, in which Roberts, C.J., and Breyer and Kavanaugh, JJ., joined. Breyer, J., filed a concurring opinion, in which Kagan, J., joined. Kavanaugh, J., filed a concurring opinion. Kagan, J., filed an opinion concurring in part. Thomas, J., filed an opinion concurring in the judgment. Gorsuch, J., filed an opinion concurring in the judgment, in which Thomas, J., joined. Ginsburg, J., filed a dissenting opinion, in which Sotomayor, J., joined.⁸

A “hot mess,” indeed!

The Court’s Establishment Clause jurisprudence has another anomaly, as well. Establishment Clause plaintiffs are almost never required to demonstrate that they have standing—at least not in the Supreme Court.⁹ This is odd because standing is jurisdictional.¹⁰ Without it, there is no case or controversy within the meaning of the Constitution, and the Court does not have jurisdiction to hear the case.¹¹ It is doubly odd because the same considerations that govern the merits inquiry should also apply to standing: the two are—or at least should

8. *Am. Legion*, 139 S. Ct. at 2067.

9. Lower court judges, on the other hand, continue to evaluate whether a plaintiff has standing. Compare *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (no discussion of standing), with *Galloway v. Town of Greece*, 681 F.3d 20, 30 (2d Cir. 2012) (discussing whether the plaintiffs have standing), and *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 214–15 (W.D.N.Y. 2010) (same). Standing, for those unfamiliar, requires the plaintiff to prove that she was personally harmed in some way, that the defendant caused her harm, and that the court has the power to redress her harm. See, e.g., *United States v. Hays*, 515 U.S. 737, 742–43 (1995).

10. *Hays*, 515 U.S. at 742.

11. See *id.*; see also U.S. CONST. art. III, § 2, cl. 1 (declaring that “[t]he judicial Power shall extend to all Cases” and “Controversies” falling within certain enumerated categories.).

be—closely tied in Establishment Clause cases.¹² Nonetheless, the Court rarely addresses whether Establishment Clause plaintiffs have standing. Indeed, as one scholar has pithily observed, “the requirements for [Establishment Clause] standing are more easily characterized by what does not suffice . . . than by what does.”¹³ Lower courts are left to fumble through the standing inquiry with precious little guidance from on high.

Part of the reason the Court has developed so many standards and has struggled to develop a uniform standing doctrine may be that the Justices, along with litigants and commentators, are in disagreement as to the overall purpose of the Clause. According to one view, the Establishment Clause is a federalism provision that prevents the federal government from establishing its own religion or interfering with state establishments.¹⁴ Others argue that the Clause is a structural prohibition on a relationship between *any* government and religion.¹⁵ The final camp believes the Clause protects individual rights.¹⁶ Because the holders of these views differ drastically with regard to what they think the Establishment Clause does, they also vary widely with regard to how they think Establishment Clause cases should be evaluated and who they believe has standing to bring them.¹⁷

12. See *infra* Section V.B.2.

13. Note, *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 2002 (2010); cf. David Spencer, Note, *What’s the Harm? Nontaxpayer Standing to Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL’Y 1071, 1078–79 (2011) (highlighting examples of what did suffice to meet the “injury-in-fact requirement” for standing purposes in the “religious symbol context”).

14. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in judgment).

15. See, e.g., Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691–92 (1969).

16. See, e.g., NOAH FELDMAN, *DIVIDED BY GOD* 46–51 (2005).

17. See William P. Marshall & Maripat Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at Valley Forge*, 11 HOFSTRA L. REV. 63, 65–66 & n.11 (1982) (“The application of standing limitations to establishment concerns has serious implications for substantive establishment issues. . . . [T]he instances where standing to allege an establishment clause violation has been allowed indicate as much about the Court’s understanding of establishment as they do about its concept of standing.”).

This Article argues that these three issues are related. The Court employs many standards because the Justices cannot agree on the purpose of the Establishment Clause. These standards generally do not require the plaintiff to prove that she has been harmed in some way by the alleged establishment.¹⁸ This, in turn, has prevented the Court from developing a robust Establishment Clause standing doctrine. This is because the standing “harm” requirement generally aligns with the inquiry on the merits into whether the plaintiff was harmed, at least in cases involving individual rights.¹⁹ Creating a single standing doctrine that works with many different merits standards is difficult, and separating the standing and merits inquiries means that if the Court does not address standing, the lower courts are left without guidance.

Because the Court’s difficulties in articulating purpose, standing, and standard in Establishment Clause cases are interconnected, this Article argues that any reform to the Court’s Establishment Clause jurisprudence should come wholesale: it should provide a unifying purpose, a clear indication of when a plaintiff has standing to sue, and a single standard that applies to every Establishment Clause case. Consequently, this Article suggests that the Court should adopt a uniform Establishment Clause standard based on whether the alleged establishment caused political divisiveness in the plaintiff’s community. Under this standard, the plaintiff would have standing to sue (and would win on the merits) if she could demonstrate that the alleged establishment caused an actual harm to her community.

The divisiveness standard this Article advocates for is based on the premise that not every government interaction with religion is worth resolving in the courts. Most relationships between the government and religion violate the Establishment Clause, but that does not mean the proper reaction in every case is to immediately go to court for

18. *See infra* Part III.

19. This Article assumes that the standing harm inquiry should align with the merits harm inquiry. For substantial treatments of this topic, see generally Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1144–54 (1977); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 232–39 (1988); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 204–06 (1992). For this argument in the context of the Establishment Clause, see, for example, Fallon, Jr., *supra* note 7, at 119–27; *infra* Section V.B.2.

an injunction.²⁰ Many interactions between the government and religion are so minimal that they are best resolved by the political process. Even some major establishments could be resolved if the government knew that it had offended religious minorities. The divisiveness standard allows—indeed, it requires—would-be plaintiffs to initially use the political process to attempt to resolve alleged establishments. Doing so helps courts avoid the difficult question of what the purpose of the Establishment Clause is. It also helps courts to develop sensible Establishment Clause jurisprudence that is built around a uniform standard, which will help them build a coherent Establishment Clause standing framework.

This Article proceeds in four parts. Part II briefly discusses different views about the purpose of the Establishment Clause. Part III details case law and scholarly work related to Establishment Clause standing. Part IV describes the Court's many Establishment Clause standards. Finally, Part V explains how the Court could fix its Establishment Clause standing doctrine, increase predictability about the outcome of cases, and promote social harmony by adopting a political divisiveness standard for Establishment Clause cases.

II. WHAT IS THE PURPOSE OF THE ESTABLISHMENT CLAUSE?

One reason the Court has struggled to articulate an Establishment Clause standing doctrine and has developed so many merits standards is because there are three competing visions about the purpose of the Establishment Clause. While there is a broad consensus that the Framers intended the Clause to prevent the kind of religious divisiveness that was common at the time of the founding,²¹ there is extensive disagreement as to *how* the Clause was expected to achieve that aim. Two camps view the Clause as a structural, government-centric provision. The first of these groups believes the Clause is a federalism provision that prevents the federal government from taking any action related to religion, including any action to restrict the power of the individual states to establish their own religions, should they choose to do so. The second such group believes that the Clause forbids the

20. For a far more artful exposition of this view, see LEONARD LEVY, *THE ESTABLISHMENT CLAUSE* 239–40 (1994).

21. See *infra* notes 233–34 and accompanying text.

government—any government—from having any relationship with religion whatsoever. Finally, the third camp believes that the Establishment Clause protects the rights of individuals to be free (to varying degrees) from establishments. This view falls in the middle of the extremes of the structuralist groups.

At first, it may seem as though the debate between the three competing views is academic. For at least the last fifty years, the Court as a whole, and the Justices individually, has largely subscribed to the view that the Establishment Clause protects individual rights.²² However, the competing views inform the debate over which standards to apply and whether particular plaintiffs have standing.²³ A person who believes that state establishments are permissible will support stringent standing requirements and standards that view relationships between government and religion leniently. A person who believes that the Establishment Clause forbids all relationships between government and religion will feel much the opposite: they will support lax standing requirements and stringent merits standards. A person who believes that the Clause protects individual rights will fall somewhere between the two extremes on both issues. Understanding the competing visions of the Establishment Clause is therefore critical to comprehending the various standards applied by the Supreme Court and the debate about which plaintiffs have standing to sue in the first place. Accordingly, they are briefly reviewed in this Part.

22. The debate is all the more academic because *both* camps may well be right. Even if “the Establishment Clause is indeed a structural provision,” that “is not mutually exclusive with its also conferring individual rights.” Michael Dorf, *Standing, Substantive Rights, and Structural Provisions in the Challenge to Muslim Ban 2.0*, DORF ON L. (Mar. 7, 2017), <http://www.dorfonlaw.org/2017/03/standing-substantive-rights-and.html>.

23. Presumably, those who believe the Establishment Clause is a federalism provision will be reluctant to find any harm caused by an alleged establishment and will believe that no one should have standing to challenge it. Those who believe that the Clause prevents *any* relationship between government and religion will be primed to find that it has been violated and will allow nearly anyone to bring suit. Those that believe the Clause protects personal rights will sometimes find a violation and will only want those who have actually been harmed to bring suit.

A. A Structural Restriction

Two groups view the Establishment Clause as a structural provision that limits the relationship between the government and religion. However, they differ greatly over what the structural prohibition is.

1. A Federalism Provision that Restricts the Powers of the Federal Government

Some prominent judges and academics view the Establishment Clause as a federalism provision that prevents the federal government from establishing a religion, but allows states and localities to establish a religion if they choose to do so.²⁴ Relatively few people subscribe to this position, but it still merits consideration because it has gained a loyal following from some prominent judges, such as Justice Thomas.²⁵ Under this view, “The establishment clause did more than prohibit Congress from establishing a national church. Its mandate that Congress shall make no law ‘*respecting* an establishment of religion’ also prohibited the national legislature from interfering with, or trying to *disestablish*, churches established by state and local governments.”²⁶ The First Amendment, then, “gloss[es] the Article I, section 8 catalogue of enumerated congressional powers by suggesting that Congress lacked the enumerated power to . . . regulate state religious policy—a kind of reverse ‘necessary and proper’ clause.”²⁷ Advocates of the federalism view of the Establishment Clause therefore feel the Clause should not have been incorporated against the states; to them it is

24. See Paul Horwitz, *Of Football, “Footnote One,” and the Counter-Jurisdictional Establishment Clause: The Story of Santa Fe Independent School District v. Doe*, in *FIRST AMENDMENT STORIES* 481, 504–05 (Richard W. Garnett & Andrew Koppelman eds., 2012); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.”); AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32–34 (1998). See generally Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 *NOTRE DAME L. REV.* 1843 (2006).

25. See Horwitz, *supra* note 24, at 504–05; see also *Newdow*, 542 U.S. at 49.

26. AMAR, *supra* note 24, at 32.

27. *Id.* at 36–37.

“iron[ic] that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy.”²⁸ Under the structural view, the Clause is exceedingly narrow: it applies *only* to “‘law[s]’ enacted by ‘Congress.’”²⁹ Presumably, therefore, any non-statutory action by the federal government and *any* action by a state or local government would not violate the Establishment Clause under this view.³⁰

Advocates of the federalism view reference the writings of early eighteenth-century scholars and judges as strong evidence that the Founders viewed the Clause as a federalism provision.³¹ Joseph Story’s *Commentaries on the Constitution* receives particular attention.³² Story forcefully articulated the federalism view:

It was impossible, that there should not arise perpetual strife, and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. . . . Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions³³

Chief Justice Marshall’s opinion in *Barron v. Baltimore*, in which he wrote that constitutional provisions that restrict the actions of government “are limitations of power granted in the instrument itself;

28. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting); *see also Newdow*, 542 U.S. at 49; *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting); AMAR, *supra* note 24, at 32–37.

29. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2095 (2019) (Thomas, J., concurring).

30. *See id. But see id.* at 2095 n.1 (“[T]he original meaning of the phrase ‘Congress shall make no law’ is a question worth exploring”); *Shrum v. Coweta*, 449 F.3d 1132, 1140–43 (10th Cir. 2006) (“[T]he First Amendment applies to exercises of executive authority no less than it does to the passage of legislation.”).

31. *See, e.g., Newdow*, 542 U.S. at 49–51.

32. *See generally* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1865–73 (Boston, Hilliard, Gray & Co. 1833).

33. *Id.* § 1873. Note that by the time Justice Story published the *Commentaries*, there were no longer any official state religions. *See* LEVY, *supra* note 20, at 42.

not of distinct governments, framed by different persons and for different purposes,”³⁴ is often relied on as well.³⁵

Justice Thomas argues that “the burden of persuasion rests with anyone who claims that the term [‘establishment’] took on a different meaning upon incorporation.”³⁶ This is a fair point, provided that we accept Justice Thomas’s premise that the original understanding of the Constitution should control modern interpretations of it and that the history is as clear as Justice Thomas and his supporters claim it is.³⁷ But as Dean Erwin Chemerinsky has written, “[W]e cannot resolve modern [Establishment Clause] issues by looking back at history; history is far too equivocal for that.”³⁸ Moreover, advocates of the federalism view of the Establishment Clause point to no evidence that in 1868 when the Fourteenth Amendment was ratified,³⁹ people viewed the Clause as the Founders did in 1789.⁴⁰

2. A Structural Restriction on Any Relationship Between the Government and Religion

Another view held by relatively few people is that the Establishment Clause serves as a structural restriction that prevents *any* relationship between the government and religion.⁴¹ Under this view, while

34. *Barron v. Baltimore*, 32 U.S. 243, 247 (1833).

35. *E.g.*, AMAR, *supra* note 24, at 33.

36. *Newdow*, 542 U.S. at 51.

37. For the argument that neither of these premises is true, see generally Erwin Chemerinsky, *Why Church and State Should be Separate*, 49 WM. & MARY L. REV. 2193 (2008).

38. *Id.* at 2205.

39. Proclamation No. 13, 15 Stat. 708, 711 (1868).

40. *Cf.* LEVY, *supra* note 20, at 224–29; Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 509–10 (2006) (observing that the Fourteenth Amendment’s language allows for its extension beyond the original intent of its framers). *But cf.* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 449–50 (2002).

41. *See* Esbeck, *supra* note 40, at 456–71; Ira C. Lupu et al., *The Imperatives of Structure: The Travel Ban, the Establishment Clause, and Standing to Sue*, TAKE CARE (Apr. 3, 2017), <https://takecareblog.com/blog/the-imperatives-of-structure-the-travel-ban-the-establishment-clause-and-standing-to-sue>; *cf.* Chemerinsky, *supra* note 37, at 2204–05; Freund, *supra* note 15, at 1691–92.

the Establishment Clause does protect against establishments that violate personal rights, it also “prohibits a range of government actions that do not necessarily impose concrete harms on identifiable individuals.”⁴² Supporters of this view point to cases such as *Engel v. Vitale*, in which the Court invalidated a publicly authored prayer that was to be recited in New York State public schools, for the proposition that the Clause prohibits all relationships between any government and religion.⁴³ The Court in *Engel* ruled that it did not matter whether any students were compelled to recite the prayer against their will (injured).⁴⁴ Instead, what mattered was that the government had been involved in authoring the prayer, regardless of the actual impact the prayer had on the schoolchildren.⁴⁵

To supporters of the structural separation view, cases such as *Engel* demonstrate that any relationship between the government and religion constitutes an establishment.⁴⁶ However, this view fails to account for the cases, such as *Van Orden v. Perry*, in which the Court has allowed some church-state relationships that would be unconstitutional under a strict structural separationist view.⁴⁷ It may simply be that the

42. Lupu et al., *supra* note 41.

43. *Engel v. Vitale*, 370 U.S. 421, 422–24 (1962); Lupu et al., *supra* note 41.

44. *Engel*, 370 U.S. at 430–32.

45. *Id.* at 435–36. Of course, even under this highly restrictive standard, one would expect the plaintiffs to have to prove personal injury in order to demonstrate standing to bring the suit in the first place—a seemingly odd result that would require plaintiffs to prove more to bring the suit than they would have to prove to win it. For a more thorough discussion of this point, see *infra* notes 265–81. Surprisingly, the dissent made no mention of this point—perhaps because the plaintiffs did allege an actual injury. See generally *Engel*, 370 U.S. at 444 (Stewart, J., dissenting).

46. See Esbeck, *supra* note 40, at 459–60; Lupu et al., *supra* note 41.

47. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005); see also *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J. dissenting) (“I would suggest that such practices as the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Ros-tow’s apt phrase, as a form a ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2088 (1996) (listing situations in which the Court has invoked ceremonial deism to uphold the constitutionality of a government relationship with religion).

structural separationists believe the Court got it wrong in such cases.⁴⁸ This is a central tenet of most views of the Establishment Clause—the thesis of this Article, too, is that the Court gets a lot wrong about the Establishment Clause. The Court has decided so many Establishment Clause cases using so many different standards that virtually everyone can find cases that support or contradict their position.⁴⁹ But the Court must be allowed some flexibility in policing alleged establishments, which is why the divisiveness standard advocated for in this Article would allow *some* relationships between the government and religion, provided the relationship did not tear at the fabric of the community. Simply put, rules that are too inflexible risk shattering.⁵⁰

B. A Protection of Individual Rights

Despite vocal advocacy from both groups of the structural camp, the majority position is that the Establishment Clause protects individual rights.⁵¹ Under this view, the Establishment Clause protects the rights of citizens against “being placed in the position where they must act against conscience in the realm of religion.”⁵² Proponents of the individual rights interpretation support it with both historical evidence and contemporary policy rationales. On the historical side, they point to the Framers’ understanding that the religion clauses protected “liberty of conscience.”⁵³ These scholars note that “[a]t the very least, the Establishment Clause forbids Congress to use its taxing and spending powers to impose an earmarked tax on every citizen to support the clergy A taxpayer objecting to such a tax would be asserting a

48. See generally Epstein, *supra* note 47.

49. See *infra* Part III.

50. See LEVY, *supra* note 20, at 240; Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 402–11 (1985); *infra* Part IV.

51. See, e.g., Horwitz, *supra* note 24, at 505. Where adherents to this view differ is in the degree to which they believe the Establishment Clause demands the separation of church and state. See *id.* at 505–06; Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 242 (2004).

52. FELDMAN, *supra* note 16, at 50; *cf.* LEVY, *supra* note 20, at 229–32.

53. See FELDMAN, *supra* note 16, at 47–49.

claim of individual right under the Establishment Clause.”⁵⁴ Accordingly, these scholars maintain that when the Bill of Rights was incorporated against the states, it was acceptable to incorporate the Establishment Clause as well because the Clause protects the individual right to liberty of conscience, *not* state establishments.⁵⁵

The individual rights view is supported not just by historical evidence, but also by important policy considerations. As James Madison wrote, “it is proper to take alarm at the first experiment on our liberties.”⁵⁶ Even though modern establishments may be different in character from historical ones, they do not differ in kind.⁵⁷ Establishments become no less noxious to the individuals that must endure them simply because they are less coercive today than they used to be. Moreover, even if one does not accept that the history the individual rights proponents use is conclusive, their view, grounded in the “general purposes” of the Establishment Clause, allows for the gradual “evolution of doctrine over time.”⁵⁸ Finally, treating the Establishment Clause as protecting individual rights most closely aligns with the Supreme Court’s actual practice over the last seven decades.⁵⁹

54. Laycock, *supra* note 51, at 242.

55. See FELDMAN, *supra* note 16, at 49; see also Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 908–09 (1986). Professor Feldman says the Establishment Clause could not have been viewed as a protection of state establishments because “[a]t the time that the First Amendment came into being, Americans were almost universally prepared to say that establishment of religion was a bad thing.” FELDMAN, *supra* note 16, at 49.

56. James Madison, *Memorial and Remonstrance*, in RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 173, 174 (John T. Noonan & Edward McGlynn Gaffney eds., 2001).

57. See Laycock, *supra* note 51, at 242–43.

58. Greenawalt, *supra* note 40, at 511; see also Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 795–96 (2005) (discussing the dangers of relying exclusively on historical evidence to divine the meaning of the Establishment Clause). The “general purpose[]” of the Clause, as mentioned above and discussed more fully below, is broadly accepted as preventing religious divisiveness. Greenawalt, *supra* note 40, at 511.

59. See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (“[Plaintiffs] fail to identify any *personal* injury” (emphasis added)).

III. ESTABLISHMENT CLAUSE STANDING

Before courts decide which of the many Establishment Clause standards they should apply to resolve a given case (a decision that is doubtless colored by individual judges' beliefs about the purpose of the Clause), they must determine whether the plaintiffs have standing to bring the suit in the first place. Standing is a constitutional doctrine the federal courts use to ensure that a plaintiff "is entitled to invoke the judicial process."⁶⁰ Standing requires the plaintiff to "show that the facts alleged present the court with a 'case or controversy' in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated,"⁶¹ and that they are not suing "based solely on their status as citizens with a grievance against a government action."⁶² This is of particular concern in Establishment Clause cases because disputes over religion can cause emotions to run particularly high.⁶³

Confusion about which plaintiffs have standing to sue in Establishment Clause cases is intimately tied to disputes about which standards courts should apply to resolve them and what purpose the Clause serves. This is because those who believe that the Clause is a federalism provision that protects the rights of states will argue that individuals should never have standing. Why should individuals be allowed to sue state and local governments to enforce a provision that is supposed

60. *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973). The Supreme Court has said that "standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). According to the Court, standing stems from Article III's requirement that the federal courts only resolve "Cases" or "Controversies." See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (quoting U.S. CONST. art. III, § 2). Standing ensures that the plaintiff has a stake in the matter being litigated, hopefully ensuring that the case is adequately litigated before the court. See *id.* at 559–62. The goal is to prevent litigants from using the courts simply to advance their policy preferences. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Clapper v. Amnesty Int'l U.S.*, 568 U.S. 398, 408 (2013).

61. *Linda R.S.*, 410 U.S. at 616. For an argument that Article III does not create strict standing requirements, see Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 187–201 (2012).

62. CYNTHIA BROUGH, CONG. RESEARCH SERV., LEGAL STANDING UNDER THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE 2 (2009) (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974)).

63. See, e.g., Horwitz, *supra* note 24, at 493–96.

to *protect* those governments? In contrast, those who believe that the Clause prohibits any relationship between government and religion will argue that individuals should always have standing, because *any* relationship between government and religion violates the Clause, so *any* plaintiff who challenges such a relationship is proper. Finally, those who believe the Clause protects individual rights will argue that only individuals who are harmed should have standing. Moreover, the Court's inconsistent use of merits standards means that lower courts have a difficult time evaluating what harms are sufficient to give plaintiffs standing. When it is unclear what harm a plaintiff must prove to win on the merits, how can she prove that she has been harmed such that she is entitled to sue in the first place?⁶⁴

The plaintiff must demonstrate three things to establish that she has standing. She must show that she was (1) harmed (2) by the defendant's actions and (3) that the court has the power to redress her harm.⁶⁵ Typically, the harm element is the most difficult of the three for the plaintiff to prove.⁶⁶ This is because the plaintiff must prove that her harm is "actual or imminent" and "concrete and particularized"—it cannot be something abstract or uncertain.⁶⁷ Additionally, it is not enough that the plaintiff shows she is offended by a government action; her harm must be more tangible.⁶⁸ Economic injuries, for example, are generally a sufficient injury for standing purposes.⁶⁹ It is somewhat surprising, therefore, that the Court does not resolve most of its Establishment Clause cases on the basis of standing—plaintiffs are rarely harmed in any *tangible* manner.⁷⁰ Moreover, Establishment Clause

64. This point is discussed in substantially more depth in Section V.B.2.

65. *See, e.g., Lujan*, 504 U.S. at 560–61.

66. This is particularly true of Establishment Clause cases. *See Spencer, supra* note 13, at 1082–92.

67. *Lujan*, 504 U.S. at 560 (citations omitted).

68. *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.23 (1982) ("Respondent is . . . obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution.").

69. *See, e.g., id.* at 486.

70. *See Marshall & Flood, supra* note 17, at 64–65 & nn.10–11 ("While in a few cases a litigant may suffer particularized injury as a result of an establishment violation, these cases are the exception rather than the rule.").

plaintiffs frequently allege harms that are not specific to themselves, but rather “are inherently generalized.”⁷¹

The Court’s failure to resolve Establishment Clause cases on standing grounds is all the more surprising when one considers the intense disputes among the Justices over the proper standard to decide Establishment Clause cases, not to mention over what the purpose of the Clause is. Given these points of tension and the obvious difficulty of proving a concrete, specific harm, one might expect that the Justices would frequently refuse to reach the merits of Establishment Clause cases, and instead decide them on standing grounds. Yet, as described in Section A, the Court rarely addresses standing in these cases. Fortunately, as Section B details, scholars have not been so reticent.

A. *The Law*

The Court so rarely addresses standing in the Establishment Clause context that the doctrine is most easily understood in the negative—“the requirements . . . are more easily [understood] by what does not suffice for standing than by what does.”⁷² The difficulty is compounded because even in the cases where the Court makes an explicit ruling on the issue of standing, it rarely clarifies whether it made its decision on constitutional or prudential grounds.⁷³ However, some patterns have emerged.

71. *Id.* at 84.

72. *See* Note, *supra* note 13, at 2002.

73. *See* Marshall & Flood, *supra* note 17, at 90. If a court rules that it does not have standing on constitutional grounds, it means that it is not possible for the court to decide the case because it does not have jurisdiction. *See* *United States v. Hays*, 515 U.S. 737, 742–43 (1995) (discussing the jurisdictional aspects of constitutional standing). Sometimes, however, courts will decide that even if a suit meets the technical Article III standing requirements, it would not be prudent for a court to decide the case. *See* *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (noting that the other branches of government, rather than the courts, are sometimes better equipped to redress certain injuries). This is an important distinction because no federal court may decide a case if an element of constitutional standing is missing—the court does not have the power to do so, because it does not have jurisdiction. However, if all that is missing is an element of prudential standing, then the federal courts could still have the power to decide the case, provided that the Supreme Court ruled that doing so was prudent. The line between these two doctrines is theoretically important, but very

Litigants *are* allowed to bring suit even in the absence of a personal, economic harm.⁷⁴ In *Flast v. Cohen*, the Court ruled that taxpayers had standing to challenge federal laws that violated the Establishment Clause because the Clause modifies Congress's taxing and spending power—Congress has no authority to spend money to support religion.⁷⁵ Plaintiffs may also challenge establishments caused when the executive branch executes a statute by which Congress appropriated funds for the support of religion.⁷⁶ These are departures from typical standing doctrine, which does not allow plaintiffs to challenge the constitutionality of a federal statute based purely on their status as taxpayers, regardless of whether they allege the statute is inconsistent with Congress's constitutional powers.⁷⁷ Taxpayer standing in Establishment Clause cases, then, is more expansive than it is in other areas.

Nonetheless, plaintiffs do not have standing to sue whenever they object to a relationship between government and religion. When they are not challenging an establishment caused by an act of Congress

murky in practice. *See generally* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–28 (2014).

74. *See* *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968).

75. *Id.* at 105–06. This permits standing in a relatively narrow—and narrowing—category of cases: those in which Congress has explicitly appropriated funds for the purpose of supporting religion. *See* *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011) (“When the government declines to impose a tax . . . there is no . . . connection between dissenting taxpayer and alleged establishment.”); *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 605 (2007) (“[The challenged] expenditures resulted from executive discretion, not congressional action. We have never found taxpayer standing under such circumstances.”). According to some, “*Flast* has been distinguished almost out of existence.” Frank Ravitch, *Judge Kavanaugh on Law and Religion Issues*, SCOTUSBLOG (July 30, 2018, 10:47 AM), <https://www.scotusblog.com/2018/07/judge-kavanaugh-on-law-and-religion-issues/>.

76. *See* *Bowen v. Kendrick*, 487 U.S. 589, 620 (1988).

77. *See* *Massachusetts v. Mellon*, 262 U.S. 447, 486–88 (1923). In the wake of cases such as *Lujan*, 505 U.S. at 560, in which the Court has dramatically expanded what qualifies as an injury for standing purposes, the Court's Establishment Clause standing jurisprudence may no longer be so distinct from its general standing jurisprudence. Some scholars have argued the Court was motivated to decide *Flast* in the manner that it did “by a desire to reach the merits of a higher number of [Establishment Clause] cases.” *See, e.g.,* Bradley Thomas Wilders, Note, *Standing on Hallowed Ground: Should the Federal Judiciary Monitor Executive Violations of the Establishment Clause?*, 71 MO. L. REV. 1199, 1199 (2006).

(that is, whenever they are challenging an establishment by a state or local government, or by the executive or judicial branches of the federal government), plaintiffs must allege some “personal injury” that goes beyond “the psychological consequence presumably produced by observation of conduct with which one disagrees.”⁷⁸ This requirement comes from *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, a case in which the plaintiffs challenged the federal government’s gift of a seventy-seven-acre parcel of land to a Christian college.⁷⁹ The plaintiffs were an organization committed to the separation of church and state and four of the organization’s employees, who had learned about the conveyance through a news release.⁸⁰ The Court held that because they suffered no “injury other than their belief that the transfer violated the Constitution,” they did not have standing to bring suit.⁸¹

Justice Gorsuch, joined by Justice Thomas, recently argued for the expansion of this principle in his concurring opinion in *American Legion v. American Humanist Ass’n*.⁸² This case involved a dispute over a thirty-two-foot tall World War I memorial in the shape of a Latin cross.⁸³ The American Humanist association argued that it had standing to sue because “its members ‘regularly’ come into . . . ‘unwelcome direct contact’ with” the memorial.⁸⁴ Although the majority did not

78. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

79. *Id.* at 468–69. The land, which was worth \$577,500 at the time of conveyance, was given to the college on the condition that they “use the property for 30 years solely for the educational purposes.” *Id.* at 468.

80. *Id.* at 469.

81. *Id.* at 487 n.23. This holding is—to put it generously—somewhat difficult to square with the Court’s rulings on the merits in many of its Establishment Clause cases. For example, “a *Flast* plaintiff realistically has nothing more to gain from a lawsuit than the satisfaction of helping to enforce the dictates of the Constitution”—the precise benefit the Court said was insufficient to create standing in *Valley Forge*. Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 496 (1995). I would also question whether a plaintiff would have standing to challenge an endorsement under this standard, as well.

82. 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring).

83. *Id.* at 2077 (majority opinion).

84. *Id.* at 2098 (Gorsuch, J., concurring).

address standing, Justice Gorsuch took the issue up in his opinion.⁸⁵ He argued that the “‘offended observer’ theory of standing has no basis in law.”⁸⁶ Justice Gorsuch observed that such a theory of standing is incongruous with the Court’s precedents in other areas and concluded that “[l]ower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to th[e Supreme] Court’s decision in *Lemon v. Kurtzman*.”⁸⁷ Given what he read as the Court’s repudiation of the *Lemon* test in *American Legion*, Justice Gorsuch concluded that “little excuse will remain for the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals should now begin to close.”⁸⁸ However, given that the other seven Justices did not address the question of standing in their opinions, it seems far more likely that the lower courts will continue to find that so-called “offended observers” have standing to bring Establishment Clause suits.⁸⁹

In many—if not most—of its Establishment Clause cases, “the Court has assumed standing under the Establishment Clause without comment and rendered decisions on the merits.”⁹⁰ When the Court does this, its decisions “evoke[] almost as much controversy with respect to the standing issues as they d[o] with respect to the merits.”⁹¹ Members of the Court have long recognized this deficiency of their Establishment Clause standing jurisprudence.⁹² Nonetheless, the Court has taken few steps to correct the problem. This has left lower courts struggling to apply the Court’s limited guidance on Establishment Clause standing.⁹³

85. *See id.*

86. *Id.*

87. *Id.* at 2100–01.

88. *Id.* at 2102.

89. The only other Justice to address standing in her opinion was Justice Ginsburg, who rejected Justice Gorsuch’s standing arguments in a brief footnote. *See id.* at 2105 n.3 (Ginsburg, J., dissenting).

90. Fallon, Jr., *supra* note 7, at 120.

91. Marshall & Flood, *supra* note 17, at 63.

92. *See, e.g., City of Edmond v. Robinson*, 517 U.S. 1201, 1201–03 (1996) (Rehnquist, C.J., dissenting).

93. *See* Spencer, *supra* note 13, at 1082–92 (documenting the various approaches taken by the lower courts).

B. *The Scholarly Treatments*

Scholars have been eager to fill the gaps in the Supreme Court's Establishment Clause standing jurisprudence. Those who have addressed the issue are nearly unanimous in the assessment that the Court's Establishment Clause standing jurisprudence is inadequate. However, they differ drastically with regard to how they think the Court should fix it. There are three general viewpoints. The first group of scholars argues that the Court should import its general standing principles into Establishment Clause cases. The second group maintains that the Court should allow standing to sue over very recent or future establishments, but not over long-standing ones. Finally, the third group contends that the Court's Establishment Clause standing jurisprudence should more closely follow the merits inquiry.

1. Establishment Clause Standing Should Follow General Standing Principles

The first group of commentators that has considered Establishment Clause standing argues that the Supreme Court should use its general standing principles in Establishment Clause cases. The basic assumption these scholars make is that the decisions in which the Court has found the plaintiffs do not have standing were reached for constitutional reasons, not prudential ones.⁹⁴ Many of these scholars appear to hope for a reduction in the number of people who have standing to bring Establishment Clause suits.⁹⁵ These authors point to the harms that the Establishment Clause protects against and argue that courts should apply traditional standing principles that require the plaintiff to show that she has been individually harmed in some tangible way.⁹⁶

94. See David Harvey, Comment, *It's Time to Make Non-Economic or Citizen Standing Take a Seat in "Religious Display" Cases*, 40 DUQ. L. REV. 313, 367 (2002). This is not a safe assumption. See Marshall & Flood, *supra* note 17, at 90 (observing that some of the Court's Establishment Clause standing cases have been "highly ambiguous" as to "whether the Court's basis in denying standing was constitutional or prudential").

95. See Harvey, *supra* note 94, at 367–70; Note, *supra* note 13, at 2012–13; Spencer, *supra* note 13, at 1092–97.

96. See Harvey, *supra* note 94, at 367.

Otherwise, “[T]here is virtually no limit to the [practices] that an imaginative plaintiff could challenge in federal court.”⁹⁷ To the proponents of this view, this is the “glaring drawback” of the Court’s current Establishment Clause standing jurisprudence.⁹⁸ Because “standing doctrine exists to *limit* judicial power,” many of the commentators who want general standing principles to apply to Establishment Clause cases believe that “[a]ny practice that has the effect of substantially broadening standing . . . butts up against the core purposes of standing doctrine.”⁹⁹

Others, noting the Court’s expansion of what qualifies as an injury-in-fact for the standing inquiry in other areas of the law, have argued for a similar expansion in Establishment Clause cases.¹⁰⁰ Commentators in this group observe that the Constitution does not create strict standing requirements on its face; indeed, “[t]he purposes of Article III are served when a federal court [is] satisfied that a genuine controversy exists and that a plaintiff has something . . . personal to gain from victory in the lawsuit.”¹⁰¹ Professor Marc Rohr notes that, in order to have standing to sue, plaintiffs in environmental suits simply have to allege that they frequent public lands and that their aesthetic experience of those lands would be harmed if the lands were despoiled in some way.¹⁰² Seizing upon that point, Professor Rohr argues that Establishment Clause plaintiffs “who assert that they are offended by governmental sponsorship of religious symbols to which they have been, and will be again, . . . exposed suffer . . . concrete personal injuries,” and should be allowed to bring suit.¹⁰³

2. Plaintiffs Should Have Standing to Challenge Future Establishments

The next group of scholars believe that plaintiffs should have standing to challenge future establishments, but not past ones. The sole

97. *Id.*

98. Note, *supra* note 13, at 2012.

99. *Id.* at 2012–13 (emphasis added).

100. See Rohr, *supra* note 81, at 529–30.

101. *Id.* at 529.

102. *Id.* at 530.

103. *Id.* at 529–30.

member of this second group, as far as I can tell, is Professor John M. Bickers. Inspired by Justice Breyer's opinion in *Van Orden v. Perry* and the Treaty of Westphalia, Professor Bickers argues that courts should grant standing to plaintiffs who challenge relatively recent establishments, but not to those opposing long-standing ones.¹⁰⁴ In *Van Orden*, Justice Breyer emphasized that he was voting to allow a Ten Commandments monument to remain on the Texas State Capitol grounds in part because it had stood for forty years without being challenged.¹⁰⁵ Professor Bickers seizes on this observation, arguing that what made the *Van Orden* monument constitutional was that it was long-standing; on the other hand, religious displays of shorter tenure are unlawful.¹⁰⁶

Professor Bickers acknowledges that “[a]s a [merits] test, allowing old things to remain and banning new things is indefensible as a matter of consistency,” but maintains that “[i]n the already-illogical area of standing, however, such a test would fit perfectly.”¹⁰⁷ Under Professor Bickers's standing standard, “one has standing to raise an Establishment Clause challenge about a future or current act of government religious speech, but not a past one.”¹⁰⁸ Under his formulation, “monuments do not continue to speak”; the plaintiff must challenge them when they are installed or, otherwise, be without standing because the harm from the monument is not ongoing.¹⁰⁹

3. Establishment Clause Standing Should Follow the Merits Inquiry

The final group of scholars has made the case that Establishment Clause standing should more closely mirror the merits claim.¹¹⁰ These

104. See Bickers, *supra* note 2, at 349–55; John M. Bickers, *Standing on Holy Ground: How Rethinking Justiciability Might Bring Peace to the Establishment Clause*, 60 CLEV. ST. L. REV. 415, 453–56 (2012).

105. *Van Orden v. Perry*, 545 U.S. 677, 702–03 (2005) (Breyer, J., concurring).

106. See Bickers, *supra* note 2, at 352; Bickers, *supra* note 104, at 456.

107. Bickers, *supra* note 2, at 352.

108. Bickers, *supra* note 104, at 456.

109. *Id.* As Mr. Cherry pointed out when editing this Article, Professor Bickers's approach to standing strongly echoes the history and tradition merits standard.

110. See Fallon, Jr., *supra* note 7, at 119–27; *id.* at 67–68 n.36 (collecting sources); Marshall & Flood, *supra* note 17, at 84–89; Mary Alexander Myers, Note, *Standing on the Edge: Standing Doctrine and the Injury Requirement at the Borders*

commentators note that the Supreme Court's current Establishment Clause standing jurisprudence is startlingly inconsistent with the cases in which the Court has reached the merits.¹¹¹ Professor Richard Fallon, for instance, has observed that “[i]n light of the straitening of taxpayer standing and the forceful rejection of standing based on psychological harm in *Valley Forge*, one might puzzle about who has suffered exactly what cognizable injury” in religious display cases.¹¹² To rectify this issue, this group of scholars believes that courts must “keep merits and standing issues simultaneously in view.”¹¹³ Professor Fallon gives the example of a plaintiff challenging governmental use of religious symbols.¹¹⁴ He analyzes these situations using the endorsement test.¹¹⁵ He says that a plaintiff should have standing to sue if she can prove that “she is a member” of a group that is “stigmatized or marginalized” by the government endorsement—exactly what she would have to prove in order to win her case on the merits.¹¹⁶

Where these scholars differ is in how they would have the courts keep the merits and standing issues in view together. For example, Professor Fallon argues for a tiered-scrutiny approach to Establishment Clause claims.¹¹⁷ He would have courts tailor the standing inquiry de-

of Establishment Clause Jurisprudence, 65 VAND. L. REV. 979, 1005–07 (2012); Ashley C. Robson, Note, *Measuring a “Spiritual Stake”: How to Determine Injury-in-Fact in Challenges to Public Displays of Religion*, 81 FORDHAM L. REV. 2901, 2940–42 (2013); Wilders, *supra* note 77, at 1210–11, 1220–22; cf. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 33–40 (1998).

111. See Fallon, Jr., *supra* note 7, at 68–69.

112. *Id.* at 69.

113. *Id.* I agree with this point. I differ with this group of scholars only with regard to how I would have courts keep standing and the merits in view simultaneously.

114. *Id.* at 125.

115. See *id.* As described more fully below in Section IV.C, the endorsement test asks whether an objective observer would take a government use of a religious symbol to be a signal to adherents of other religions (or of no religion) “that they are outsiders, not full members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

116. Fallon, Jr., *supra* note 7, at 125.

117. See *id.* at 112.

pending on the nature of the underlying claim and the degree of scrutiny it warranted.¹¹⁸ Others take a different, though related tack. Ashley Robson would require “direct and unwelcome contact” with the alleged establishment in order for the plaintiff to have standing.¹¹⁹ Mary Alexander Myers would have courts recognize that the Establishment Clause is designed to protect against “psychic injuries” and that such injuries therefore meet standing’s injury-in-fact requirement.¹²⁰ Others would expand taxpayer standing under *Flast* to better reflect the generalized nature of the harm caused by establishments.¹²¹ Regardless of how these scholars would have the courts harmonize the standing and merits inquiries, they all believe that the courts should do so.

IV. ESTABLISHMENT CLAUSE STANDARDS

The competing views of the Establishment Clause’s purpose and the opacity of the Supreme Court’s Establishment Clause standing jurisprudence complicate the analysis of any Establishment Clause case. That complication is compounded by the many merit standards the courts use in these cases.¹²² In the years since the Establishment Clause was first incorporated against the states, the Supreme Court has employed at least six different standards to decide cases involving alleged establishments. The Court regularly develops new standards, particularly when the existing standards could lead to overly harsh outcomes. Nonetheless, the Court has been reluctant to explicitly overrule any of

118. *See id.* at 119–27.

119. Robson, *supra* note 110, at 2940.

120. *See Myers, supra* note 110, at 1006–07.

121. *See Marshall & Flood, supra* note 17, at 84–85, 89; Wilders, *supra* note 77, at 1221.

122. These sources of confusion are undoubtedly related. For instance, a person who believes that the Clause is a federalism provision is unlikely to be comfortable with the wall of separation standard or the *Lemon* test, which prohibits actions—from any government—that have the “principle or primary effect” of advancing religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Likewise, someone who believes the Clause prohibits all relationships between government and religion is unlikely to use the history and tradition test, which permits longstanding establishments. *See infra* Section IV.E.

its Establishment Clause standards.¹²³ This leads to strange results in the Court's Establishment Clause cases, in which the Justices often apply many standards, apply old standards in new contexts, or invent wholly new ones.¹²⁴ Consequently, the Court has left the lower courts with very little guidance about what standards to apply, or when to apply them.¹²⁵

The Court's failure to adopt a consistent standard matters. Circuit splits frequently arise because lower courts use different standards to resolve factually similar Establishment Clause issues.¹²⁶ It is easy to see how this could happen: when the Court fails to apply a consistent standard, lower courts are left not knowing which of the many standards to apply. This is particularly true because the Court often applies multiple standards to resolve a single case. Take for example the Court's decision in *American Legion v. American Humanist Ass'n*, the case mentioned in the Introduction that led to a bevy of opinions from the Justices.¹²⁷ Justice Alito, joined by Chief Justice Roberts and Justices Breyer and Kavanaugh, criticized the *Lemon* test and said that it

123. See, e.g., *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring in part).

124. See generally *id.*

125. See, e.g., *Gaylor v. Mnuchin*, 919 F.3d 420, 426 (7th Cir. 2019) (noting that "Establishment Clause jurisprudence incorporates a number of tests" and applying the *Lemon* and history and tradition tests). This lack of guidance is particularly concerning because, as Professors Sisk and Heise have observed, the Establishment Clause decisions by lower court judges appear to be motivated in large part by the judges' political preferences. See Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1239 (2012).

126. See *City of Edmond v. Robinson*, 517 U.S. 1201, 1201–03 (1996) (Rehnquist, C.J., dissenting); Kirsten K. Wendela, Note, *Context Is In the Eye of the Beholder: Establishment Clause Violations and the More-than-Reasonable Observer*, 80 CHI.-KENT L. REV. 981, 981 n.4 (2005) (noting circuit split over the test used to evaluate government displays of the Ten Commandments); cf. Evan Bernick, *Federalism and Separation of Powers: The Circuit Splits Are Out There—and the Court Should Resolve Them*, 16 ENGAGE 36, 38 (2015) ("While it is true that some issues benefit from percolating in the lower courts before the Supreme Court wades in, that is an insufficient explanation for the Supreme Court's refusal to resolve consequential issues that have long been ripe for review.").

127. 139 S. Ct. 2067 (2019); see *supra* note 8 and accompanying text.

should not be applied in all Establishment Clause cases.¹²⁸ In her concurring opinion, Justice Kagan said that she did not join this portion of Justice Alito's opinion because it went too far in rejecting the *Lemon* test.¹²⁹ Justice Breyer wrote separately, joined by Justice Kagan, and said that he did not read the majority opinion to adopt the history and tradition test for religious monuments.¹³⁰ Justice Kavanaugh filed a concurring opinion in which he said that the majority *had* applied the history and tradition test in this case.¹³¹ Justice Ginsburg, joined by Justice Sotomayor, filed a dissenting opinion in which she applied the endorsement test.¹³²

The Supreme Court has directed lower courts to apply *American Legion* when deciding Establishment Clause cases.¹³³ But it has not indicated which of the many standards the Justices applied in *American Legion* should govern.¹³⁴ Justice Thomas explicitly noted this flaw in his opinion concurring in the judgment, asserting that he “[r]egrettably . . . [could not] join the Court’s opinion because it does not adequately clarify the appropriate standard for Establishment Clause cases.”¹³⁵ This leaves the lower courts in the unenviable position of having to choose which of the Supreme Court’s many Establishment Clause standards to apply in any given case. This decision is all the more difficult by the fact that each of the Court’s standards has both benefits and drawbacks. This is one of the primary reasons this Article advocates for a uniform divisiveness standard: such a standard would prevent lower courts from having to choose which precedent to apply in a given case.¹³⁶ The divisiveness standard this Article advocates for in Part V seeks to build off of what the Court has done well, while mitigating the negative consequences of some of the Court’s standards. To provide necessary background for that effort, this Part discusses the many standards the Court has applied in its Establishment Clause cases,

128. *Am. Legion*, 139 S. Ct. at 2080–81.

129. *Id.* at 2094 (Kagan, J., concurring in part).

130. *Id.* at 2091 (Breyer, J., concurring).

131. *Id.* at 2092 (Kavanaugh, J., concurring).

132. *Id.* at 2105–06 (Ginsburg, J., dissenting).

133. *City of Pensacola v. Kondrat'yev*, 139 S. Ct. 2772 (2019).

134. *See, e.g., id.*

135. *Am. Legion*, 139 S. Ct. at 2098 (Thomas, J., concurring).

136. *See infra* Part V.

roughly in the order in which they were developed. It also highlights some of the positive and negative aspects of those standards.

A. *The Wall of Separation*

Thomas Jefferson first expressed the belief that the religion clauses of the Constitution “build[] a wall of separation between Church & State” in 1802.¹³⁷ More than seventy years later, the Supreme Court approvingly cited Jefferson’s wall metaphor in *Reynolds v. United States*.¹³⁸ The Court wrote that because Jefferson was “an acknowledged leader of the advocates of the [First Amendment],” his notion of the wall of separation between the government and religion could be taken “as an authoritative declaration of the scope and effect of the amendment.”¹³⁹

In *Everson v. Board of Education*, the Court again invoked Jefferson’s wall metaphor.¹⁴⁰ *Everson* involved a New Jersey school district that reimbursed parents for the cost of sending their children to school on public buses.¹⁴¹ The plaintiffs viewed this as an establishment because the reimbursements were offered to *all* parents, including those whose children attended private Catholic schools.¹⁴² Writing for the Court, Justice Hugo Black agreed.¹⁴³ He situated the drafting and

137. Letter from Thomas Jefferson, President of the U.S., to The Danbury Baptist Association (Jan. 1, 1802), in 36 THE PAPERS OF THOMAS JEFFERSON 258 (Barbara B. Oberg et al. eds., 2009).

138. 98 U.S. 145, 164 (1878). Ironically, despite the Court’s apparent support for the notion of complete government nonintervention in religious affairs, it went on to affirm the Mormon appellant’s criminal conviction for polygamy on the grounds that the religion clauses protected only “mere opinion,” and not “actions.” *Id.* at 164–67.

139. *Id.* at 164. It is not just originalists, however, who subscribe to the strict separationist view of the Establishment Clause. *E.g.*, Chemerinsky, *supra* note 37, at 2204–05.

140. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16, 18 (1947).

141. *Id.* at 3. By 1947, the Establishment Clause had already been incorporated against the states. *E.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

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

143. *Id.* at 18. Scholars have argued that Justice Black, by employing the wall of separation standard but allowing the government to prevail, hoped to use a decision favorable to Catholics to create a rule that could ultimately be used to disenfranchise

ratification of the Establishment Clause amidst the background of religious persecution that drove many colonists to the Americas.¹⁴⁴ With this history in mind, Justice Black wrote that the Establishment Clause “erected a wall between church and state.”¹⁴⁵ The “wall must be kept high and impregnable”; the Court must “not approve the slightest breach.”¹⁴⁶ The dissenting Justices agreed with this standard and objected only to the Court’s ultimate conclusion that government had not “breached” the wall.¹⁴⁷

The wall of separation test was the high watermark of disestablishmentarianism¹⁴⁸ on the Supreme Court—as shown in the following Sections, the Court’s Establishment Clause standards have become increasingly permissive of relationships between the government and religion. While some people still argue for complete separation between church and state,¹⁴⁹ the Court has shifted to increasingly permissive standards that allow at least some government interaction with religion.¹⁵⁰ There may be good policy reasons for this shift. To paraphrase Leonard Levy, dams have spillways for a reason.¹⁵¹ Allowing *some*

them. *See, e.g.*, PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 461–63 (2002).

144. *See Everson*, 330 U.S. at 8–11.

145. *Id.* at 18.

146. *Id.*

147. *Id.* at 18–19 (Jackson, J., dissenting); *id.* at 29 (Rutledge, J., dissenting) (“Neither so high nor so impregnable today as yesterday is the wall raised between church and state by . . . the First Amendment . . .”). All of the Justices, then, appeared to support the view that the purpose of the Clause was to prevent any relationship between government and religion.

148. For those unfamiliar, disestablishmentarianism is “the process by which the power of the state [is] taken out of the workings of the church.” Kris Franklin & Sarah E. Chinn, *Transsexual, Transgender, Trans: Reading Judicial Nomenclature in Title VII Cases*, 32 BERKELEY J. GENDER L. & JUST. 1, 34 n.189 (2017).

149. *See, e.g.*, Chemerinsky, *supra* note 37, at 2204–05.

150. This is why the argument by one commentator that the Court has employed “slash-and-burn jurisprudence” to destroy any relationship whatsoever between government and religion is, to put it generously, very seriously flawed. Nicholas J. Hunt, *Let Us Pray: The Case for Legislator-Led Prayer*, 54 TULSA L. REV. 49, 57 (2018).

151. *See* LEVY, *supra* note 20, at 240 (“[P]assionately separationists . . . see every exception as a disaster [The wall of separation] is not [falling] and will not, so long as it leaks just a little at the seams. If it did not leak a little, pressure on the wall might generate enough force to break it.”).

relationship between the government and religion might keep the religious minority from overtly attacking the rights of religious majorities.

B. *The Lemon Test*

The *Lemon* Test comes from *Lemon v. Kurtzman*, a case involving state aid to private religious schools.¹⁵² In determining the constitutionality of this aid, the Court said that it must “begin with consideration of the cumulative [Establishment Clause] criteria developed . . . over many years.”¹⁵³ The Court noted three factors that it traditionally considered when evaluating whether an establishment had occurred: whether the challenged statute (1) had “a secular legislative purpose,” (2) had the “principle or primary effect” of advancing or inhibiting religion, and (3) “foster[ed] ‘an excessive government entanglement with religion.’”¹⁵⁴

The *Lemon* test is perhaps the most maligned of all of the Court’s Establishment Clause standards. Justice Scalia once colorfully referred to it as a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.”¹⁵⁵ Nonetheless, the test has had tremendous staying power; it is still frequently applied to resolve disputes over alleged establishments.¹⁵⁶ For this reason, some scholars have argued that the *Lemon* test should be the sole standard by which courts decide Establishment Clause cases.¹⁵⁷ However, given the severe criticism the de-

152. 403 U.S. 602, 606–07 (1971).

153. *Id.* at 612.

154. *Id.* at 612–13 (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 674 (1970)).

155. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

156. For example, “the circuit[] [courts] continue to employ the test in the vast majority of Establishment Clause cases.” Karthik Ravishankar, *The Establishment Clause’s Hydra: The Lemon Test in the Circuit Courts*, 41 U. DAYTON L. REV. 261, 263 (2016).

157. *See id.* at 263, 300–01.

cision received from six Justices in the Court's recent decision in *American Legion v. American Humanist Ass'n*, the Court seems unlikely to adopt the *Lemon* test as its sole Establishment Clause standard.¹⁵⁸

C. Endorsement

Justice O'Connor first proposed the endorsement test in her concurring opinion in *Lynch v. Donnelly*.¹⁵⁹ According to Justice O'Connor, governments violate the Establishment Clause—specifically, the “purpose” prong of the *Lemon* test—when they “mak[e] adherence to a religion relevant in any way to a person's standing in the political community.”¹⁶⁰ Specifically, an “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹⁶¹ Endorsement, then, requires that the alleged establishment be *visible*—it must send some kind of a message, or, under the endorsement test, it does not violate the Establishment Clause.¹⁶²

The endorsement test began to take shape as an actual test in Justice O'Connor's concurring opinion in *Wallace v. Jaffree*.¹⁶³ Justice O'Connor reiterated that a government interaction with religion be-

158. See *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019) (“As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them.”); *id.* at 2092 (Kavanaugh, J., concurring) (“[T]his Court no longer applies the old test articulated in *Lemon*.”); *id.* at 2101 (Gorsuch, J., concurring in the judgment) (“*Lemon* was a misadventure.”); see also *id.* at 2094 (Kagan, J., concurring in part) (explaining that in her view Justice Alito's opinion went too far in rejecting the *Lemon* test).

159. 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring).

160. *Id.* at 687, 691.

161. *Id.* at 688.

162. See Note, *supra* note 13, at 2006–07 (“[R]eligious favoritism in the distribution of government benefits . . . accomplishes its purpose in disbursing the resources—aiding the favored group(s)—even if no one recognizes the disbursements are inequitable.”).

163. See 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

came impermissible when it sent a message endorsing a particular religious view.¹⁶⁴ To determine whether that was happening, she said courts should ask “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion].”¹⁶⁵ This was the shape of the test when it was adopted by the majority in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*.¹⁶⁶ In the years since *County of Allegheny*, the test has had staying power: members of the Court invoke it so often that some scholars have argued that if the Court ever decides to outright overrule the *Lemon* test, endorsement would be a strong candidate to replace it.¹⁶⁷

D. Coercion

The Court applies its “coercion” test almost exclusively in cases involving schoolchildren.¹⁶⁸ Of course, government action that coerces

164. *Id.* at 76. Justice Powell agreed with this sentiment. *See id.* at 62 (Powell, J., concurring).

165. *Id.* at 76 (O’Connor, J., concurring). Critics of the endorsement test have argued that Justice O’Connor’s “‘reasonable person’ . . . is actually a ‘reasonable Christian,’” which is problematic because the standard “is unstated, unrecognized, and favors the privileged group.” Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 *UCLA L. REV.* 1545, 1573–74 (2010).

166. 492 U.S. 573, 596–97 (1989).

167. *See* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 *J.L. & POL.* 499, 506–08 (2002). *But see* James Y. Xi, Essay, *Judge Gorsuch and the Establishment Clause*, 69 *STAN. L. REV. ONLINE* 125, 129 (2017), <https://www.stanfordlawreview.org/online/spotlight-establishment-clause/> (“[Q]uite clearly, Judge Gorsuch is unlikely to think that the government violates the Establishment Clause by merely endorsing religion. Indeed . . . Judge Gorsuch [has] expressly questioned the utility of the endorsement test.”). Justice Gorsuch’s opinions as a member of the Court bear out the skepticism that he would adopt the endorsement test. *See Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring) (arguing that the endorsement test simply does not work as a standard). However, even though some current Justices are skeptical of the endorsement test, it continues to be applied by other members of the Court. *See id.* at 2106–07 (Ginsburg, J., dissenting).

168. Some Justices have used the coercion test in other contexts. For example, in *County of Allegheny v. ACLU*, Justice Kennedy wrote an opinion in which he opined that it was permissible for a local government to display a crèche on the courthouse

a citizen into supporting a particular religion (or religion or irreligion generally) would be an establishment in any context.¹⁶⁹ But in cases involving children, the Court goes even further, applying a test that identifies coercion in government actions that would certainly be permissible if they were directed at adults. *Lee v. Weisman* is an illustrative case.¹⁷⁰ There, the plaintiffs challenged the constitutionality of inviting chaplains to deliver nonsectarian invocations and benedictions at public school graduation ceremonies.¹⁷¹ The graduation ceremonies at issue were entirely voluntary for students.¹⁷² The students would stand for the Pledge of Allegiance and then remain standing while the chaplain delivered the prayers.¹⁷³ The prayers took no more than two minutes to deliver.¹⁷⁴

Nonetheless, the Court found the prayers coercive.¹⁷⁵ The Court first established the government's extensive involvement in the content of the prayers, including its decision to have a prayer, its selection of the chaplain, and its requirements that the prayer be nonsectarian.¹⁷⁶ "It is beyond dispute," the Court observed, "that, at a minimum, the

steps. *County of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part and dissenting in part). To Justice Kennedy, the display was not an establishment because:

No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

Id. The Court as a whole, however, has never adopted the standard in this context.

169. See *Lee v. Weisman*, 505 U.S. 577, 640–41 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." (emphasis omitted)).

170. *Id.* at 577 (majority opinion).

171. *Id.* at 581–82.

172. *Id.* at 583.

173. *Id.*

174. See *id.*

175. *Id.* at 598–99.

176. *Id.* at 587–88.

Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”¹⁷⁷ Concerns about government coercion are particularly salient in schools, where government interaction with religion “places public pressure, as well as peer pressure, on attending students to” participate in religious exercises they disagree with.¹⁷⁸ “[T]he State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.”¹⁷⁹ For these reasons, the court held the graduation prayers unconstitutional.¹⁸⁰

Critics of the coercion test complain that the government actions the test proscribes do not look like true coercion.¹⁸¹ However, these critics fail to recognize that this is the wisdom of the test—however inaptly it may be named. The test makes sense because it recognizes that children may be particularly susceptible to religious pressure, especially when it comes from authority figures.¹⁸² Examples are abundant. The five-year-old who was quite convinced that she could be sent to the principal’s office at school if she did not include the words “under God” when she recited the Pledge of Allegiance.¹⁸³ The public high school student whose classmates shouted “under God” at her during the Pledge because she objected to a prayer banner that was hung in her school.¹⁸⁴ The students that were beaten because other students believed their families opposed school-sanctioned prayer at school

177. *Id.* at 587.

178. *Id.* at 593; *see also* *Engel v. Vitale*, 370 U.S. 421, 430–33 (1962) (identifying coercion as a particular concern of the Establishment Clause, and implying that the New York State Board of Regents’ prayer program was coercive).

179. *Lee*, 505 U.S. at 593.

180. *Id.* at 598–99.

181. *See id.* at 640–41 (Scalia, J., dissenting); Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1646–59 (2006).

182. *See Lee*, 505 U.S. at 593 (majority opinion) (“Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”).

183. Chemerinsky, *supra* note 37, at 2207–08.

184. David Niose, *The Dangerous Fallacy of Ceremonial Deism*, PSYCHOL. TODAY (May 24, 2012), <https://www.psychologytoday.com/us/blog/our-humanity-naturally/201205/the-dangerous-fallacy-ceremonial-deism>.

events.¹⁸⁵ The coercion test—applied in the school setting—recognizes that children are fundamentally different from adults; they face different pressures than adults do and respond to them differently as well.¹⁸⁶

E. History and Tradition

The history and tradition test is highly permissive; it allows the government to have a relationship of some kind with religion, so long as there is a long history and tradition of similar relationships. So far, the Court has only applied the history and tradition test in cases involving legislative prayer.¹⁸⁷ In the first such case, *Marsh v. Chambers*, the Court was asked to determine whether the Nebraska legislature's practice of opening each day with a prayer delivered by a chaplain (whose salary was paid by the state) was constitutional.¹⁸⁸ The suit was brought by a member of the legislature, who sought an injunction against the prayers.¹⁸⁹ The Eighth Circuit held that the prayers violated all three prongs of the *Lemon* test: the purpose and effect of the prayers was to promote religion, and using state funds to pay the chaplain "led to entanglement."¹⁹⁰

The Supreme Court reversed. It held that because "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country,"

185. See Horwitz, *supra* note 24, at 495.

186. See Marianna Moss, *How Are Reasonable Children Coerced? The Difficulty of Applying the Establishment Clause to Minors*, 10 U.C. DAVIS J. JUV. L & POL'Y 379, 424–27 (2006). One of the strengths of the divisiveness standard this Article advocates is that it is context dependent. Much like the coercion test, it gives courts the freedom to adapt to the circumstances of the cases in front of them. See *infra* Section V.B.3.

187. This is despite the fact that the Court has ruled in other contexts that legislative involvement with prayer is a telltale sign of an Establishment Clause violation. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 429 (1962) ("By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers . . . [which] lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.").

188. 463 U.S. 783, 784 (1983).

189. *Id.* at 785.

190. *Id.* at 785–86 (citing *Chambers v. Marsh*, 675 F.2d 228, 233 (8th Cir. 1982)).

the practice was constitutionally permissible.¹⁹¹ While “historical patterns [standing alone] cannot justify” government behavior that violates the Constitution, the Court said that in this instance “historical evidence shed[] light . . . on what the draftsmen intended the Establishment Clause to mean.”¹⁹² The Court relied in particular on the practices of the First Congress, which approved the text of the First Amendment a mere three days after it appropriated funds to pay the salaries of legislative chaplains.¹⁹³ The practice of opening legislative sessions with prayer has, the Court noted, continued unabated in Congress and most state legislatures since that time.¹⁹⁴ Because legislative prayer had such a long history, the Court ruled that it was constitutional.¹⁹⁵

The Court recently reaffirmed and expanded the history and tradition test *Town of Greece v. Galloway*, a 2014 case in which plaintiffs challenged a town board’s practice of opening its meetings with prayers delivered by volunteer chaplains.¹⁹⁶ The volunteer chaplains were almost exclusively Christian; their prayers were often explicitly sectarian.¹⁹⁷ Nonetheless, the Court held that opening legislative sessions with sectarian prayer was not an Establishment Clause violation because it was supported by history and tradition.¹⁹⁸ Such prayers, the Court held, “still serve to solemnize” the opening of legislative sessions, so they serve an important secular purpose.¹⁹⁹ Moreover, requir-

191. *Id.* at 786.

192. *Id.* at 790. In other words, the Court was explicitly drawing a connection between the standard it employed and what it viewed as the purpose of the Establishment Clause.

193. *Id.* at 788.

194. *Id.* at 788–89.

195. *Id.* at 795. Scholars have noted that the history and tradition test, while superficially straightforward, actually “established a fine line between reverence to history and faithfulness to the First Amendment, which requires courts to look to historical practices to establish the Framers’ intent, without relying solely on those practices.” John Gavin, Comment, *Praying for Clarity: Lund, Bormuth, and the Split Over Legislator-Led Prayer*, 59 B.C. L. REV. E. SUPP. 104, 112 (2018).

196. 572 U.S. 565, 569–71 (2014).

197. *See id.* at 571–72; *see also* Barry Lynn, *Dissecting Marsh and Town of Greece: A Comparative Analysis*, 15 RUTGERS J.L. & RELIGION 498, 499, 502 (2014).

198. *Galloway*, 572 U.S. at 578–79.

199. *Id.* at 583.

ing legislative prayers to be nonsectarian would actually force the government into a *greater* relationship with religion, the Court wrote, because legislators would need “to act as supervisors and censors of religious speech.”²⁰⁰ Because there was a long history and tradition of opening local, state, and federal legislative sessions with (sometimes sectarian) prayer, the town board’s prayer practice was constitutional.²⁰¹

In the wake of *Galloway*, it is unclear how far the history and tradition test extends. At the end of its 2017 term, the Court declined to resolve a split between the Fourth and Sixth Circuits over whether legislator-led prayer (as opposed to legislative prayer led by a chaplain) is constitutional.²⁰² The Court recently decided a case in which the United States asked it to extend the history and tradition test to religious war memorials.²⁰³ In that case, *American Legion v. American Humanist Ass’n*, the Court considered whether a thirty-two-foot tall World War I memorial—shaped like a cross, located on government property, and maintained by government funds—violated the Establishment Clause.²⁰⁴ The monument, known as the “Peace Cross,” was erected in 1925 to honor the forty-nine men from Prince George’s County, Maryland, who perished during World War I.²⁰⁵

200. *Id.* at 581.

201. *Id.* at 569–70.

202. *See* *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2565–67 (2018) (Thomas, J., dissenting). *Compare* *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017) (en banc) (holding legislator-led prayer constitutional), *with* *Lund v. Rowan Cty.*, 863 F.3d 268, 275 (4th Cir. 2017) (en banc) (holding legislator-led prayer unconstitutional). There is currently a second circuit split over whether it is constitutional to open school board meetings with prayer. *Compare* *Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1137–38 (9th Cir. 2018) (per curiam) (holding the practice unconstitutional), *with* *Am. Humanist Ass’n v. McCarthy*, 851 F.3d 521, 523 (5th Cir. 2017) (holding the practice constitutional).

203. *See* Transcript of Oral Argument at 32–33, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (Nos. 17-1717, 18-18).

204. 139 S. Ct. 2067 (2019). For a photograph of the memorial, known as the Bladensburg “Peace Cross,” see Kelly Shackelford, *Ruling Threatens Md. ‘Peace Cross’ and Other Veterans Memorials*, *BALT. SUN* (Jan. 2, 2019, 9:05 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0103-peace-cross-20190102-story.html>.

205. *Am. Legion*, 139 S. Ct. at 2074.

A seven-Justice majority ruled that although the cross is “undoubtedly a Christian symbol,” it did not violate the Establishment Clause.²⁰⁶ The majority gave three justifications for this position.²⁰⁷ First, it noted that in the wake of World War I, crosses became a common symbol used to honor the War dead.²⁰⁸ In this context, the Court said, crosses “took on an added secular meaning when used in World War I memorials.”²⁰⁹ Second, the Court wrote that “with the passage of time, [the Peace Cross] has acquired historical importance” because “[i]t reminds the people of Bladensburg and surrounding areas of the deeds of their predecessors and of the sacrifices they made in a war fought in the name of democracy.”²¹⁰ Finally, the Court held that “it is surely relevant that the monument commemorates the death of particular individuals.”²¹¹ This aspect of the memorial was important to the Court because a monument that did not “signify what death meant for those who are memorialized” could feel “incomplete.”²¹² To the Court, it was wholly appropriate that the Peace Cross reflect what the sacrifice meant to those soldiers who died, the loved ones they left behind, and their greater community.²¹³

Although the Court never explicitly invoked the history and tradition test in reaching its conclusion in *American Legion*, the three key reasons for its decision—that crosses serve a secular purpose in this context, that there is a long history of crosses being used in this manner, and that the cross at issue memorialized specific people—sound an awful lot like the rationalizations for the test. In both *Marsh* and *Galloway*, the Court upheld the legislative prayers for similar reasons. In those cases, the legislative prayers were acceptable at least in part be-

206. *Id.* at 2090.

207. *See id.* at 2089–90.

208. *Id.* at 2089.

209. *Id.*

210. *Id.*

211. *Id.* at 2090.

212. *Id.*

213. *Id.*

cause they served the secular purpose of solemnizing legislative sessions, there was a long history of prayer being used in this manner, and the prayers were specifically directed to the legislators.²¹⁴

Seizing on these similarities, Justice Kavanaugh wrote a concurring opinion in *American Legion*, in which he maintained that the majority had “applie[d] a history and tradition test in examining and upholding the constitutionality of the Bladensburg Cross.”²¹⁵ However, in his concurring opinion, Justice Breyer, joined by Justice Kagan, wrote that he interpreted the opinion of the Court much more narrowly.²¹⁶ To his mind, the Court did not adopt a history and tradition test.²¹⁷ Instead, it merely decided that, based on the context of *this* monument, the cross did not violate the Establishment Clause.²¹⁸ However, “[a] newer memorial, erected under different circumstances, would not necessarily be permissible,” because it could not be justified by history and tradition alone.²¹⁹ Given the lack of clarity over whether it has expanded the history and tradition test to other Establishment Clause contexts, the Court will almost certainly have to take this issue up again in short order.²²⁰

F. Legal Judgment

To call legal judgment one of the Court’s standards is a bit generous. Justice Breyer is the only member of the Court to have used it

214. See *Town of Greece v. Galloway*, 572 U.S. 565, 582–84 (2014); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

215. *Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring).

216. *Id.* at 2091 (Breyer, J., concurring).

217. *Id.*

218. *Id.*

219. *Id.*

220. At least one lower court has already upheld a government use of a religious symbol on the basis that the use is longstanding. In *Freedom from Religion Foundation, Inc. v. County of Lehigh*, a unanimous three-judge panel of the Third Circuit held that a county was allowed to have a cross as a part of its seal. 933 F.3d 275, 278 (3d Cir. 2019). The panel based its ruling on the Supreme Court’s decision in *American Legion*, noting that the county’s seal was adopted almost seventy-five years ago and therefore was presumed constitutional, unless shown to be otherwise. *Id.* at 282–83.

in resolving a case.²²¹ Moreover, even he does not see it as a standard, so much as a “substitute” for the Court’s many standards—he believes that courts should resolve Establishment Clause issues on a case-by-case basis.²²² Nonetheless, it is worth briefly considering because it is the basis for Justice Breyer’s controlling opinion in *Van Orden v. Perry*,²²³ an important Establishment Clause case, and because some lower courts have used it to justify their Establishment Clause decisions.²²⁴

The legal judgment test was born out of Justice Breyer’s concern about how courts should resolve “difficult borderline [Establishment Clause] cases.”²²⁵ To Justice Breyer’s mind, such cases will always exist, so long as “the relation between government and religion is one of separation, but not of mutual hostility and suspicion.”²²⁶ So long as there is *some* relationship between government and religion, courts will

221. See *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring). Justice Thomas is the only other Justice to invoke the legal judgment test; he did so to illustrate the need “to provide clarity to an Establishment Clause jurisprudence in shambles.” *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994, 994, 1000 (2011) (Thomas, J., dissenting).

222. See *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring).

223. See *id.*; see also *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))).

224. See *Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011) (“Under *Van Orden*, we are required to exercise our legal judgment to determine whether the Memorial is at odds with the underlying purposes of the First Amendment’s Religion Clauses.”); *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 402 (4th Cir. 2005) (“The history of our nation, coupled with repeated dicta from the Court respecting the constitutionality of the Pledge guides our exercise of that legal judgment in this case.”); *Ark Encounter, LLC v. Parkinson*, 152 F. Supp. 3d 880, 895 (E.D. Ky. 2016) (“In light of this caution [that we use our legal judgment], it is worthwhile to keep in mind the overall purpose of the First Amendment when applying the relevant standards.”); *Am. Humanist Ass’n v. Md.-Nat’l Capital Park & Planning Comm’n*, 147 F. Supp. 3d 373, 388 (D. Md. 2015) (“Here, for many of the same reasons discussed in the application of the *Lemon* test, the Monument does not violate the Establishment Clause under *Van Orden*’s legal judgment test.”), *rev’d*, 874 F.3d 195 (4th Cir. 2017), *rev’d and remanded*, 139 S. Ct. 2067 (2019).

225. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

226. *Id.*

not be able to police alleged establishments by mechanically applying a uniform standard.²²⁷ The solution, Justice Breyer said, was for judges to apply “legal judgment”—judgment that “reflect[s] and remain[s] faithful to the underlying purposes of the [Religion] Clauses,” while also “tak[ing] account of context and consequences measured in light of those purposes.”²²⁸ Judges should look at the Court’s prior Establishment Clause tests as “useful guideposts” for guiding their decisions but should not feel bound by them in close cases.²²⁹

While Justice Breyer is correct that the Court frequently appears to use its prior standards as mere “useful guideposts,” there is no indication that by doing so they intend to embrace his legal judgment standard. Indeed, it seems highly unlikely that they will do so. Although Justice Breyer reprised the legal judgment standard in a recent case,²³⁰ no other Justice has adopted it. Nonetheless, in his Establishment Clause opinions, Justice Breyer “maintain[s] that there is no single formula for resolving Establishment Clause challenges” and that “[t]he Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve.”²³¹

227. See *id.* at 699–700.

228. *Id.* at 700. As Mr. Greer aptly pointed out during the editing of this Article, the Court’s decision in *American Legion*, with its focus on the specific context of the Bladensburg Peace Cross, could be read to adopt Justice Breyer’s legal judgment approach—albeit not explicitly. See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2089–90 (2019); *id.* at 2091 (Breyer, J., concurring).

229. See *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring).

230. *Town of Greece v. Galloway*, 572 U.S. 565, 615 (2014) (Breyer, J., dissenting) (“Having applied my legal judgment to the relevant facts, . . . I would affirm the judgment of the Court of Appeals that Greece’s prayer practice violated the Establishment Clause.”).

231. *Am. Legion*, 139 S. Ct. at 2090–91 (Breyer, J., concurring). Justice Breyer is quite right. That is why this Article advocates a unified divisiveness standard, which would align with the Framers’ generally accepted intent to prevent religious divisiveness. See *infra* notes 233–34.

G. Divisiveness

Divisiveness, like legal judgement, is not a standard the Court has adopted to resolve its Establishment Clause cases.²³² However, for the past several decades, many Justices (and sometimes even the Court itself) have recognized that divisiveness is the harm the religion clauses were designed to prevent.²³³ Scholars tend to at least agree that the purpose of the Establishment Clause was to prevent religious divisiveness, even when they disagree as to whether the Founders intended the Clause to be a federalism provision or a protection of individual rights.²³⁴ Litigants, too, have acknowledged the role that divisiveness

232. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (“[O]ffense alone does not in every case show a violation [of the Establishment Clause].”). Some lower courts, on the other hand, have incorporated divisiveness into their analyses of whether alleged establishments are unlawful. In Massachusetts, for example, divisiveness is one of the factors considered by courts determining whether an alleged establishment violates the state constitution. See *Caplan v. Acton*, 92 N.E.3d 691, 717 (2018) (Kafker, J., concurring).

233. See *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting) (“The Clauses reflect the Framers’ vision of an American Nation free of the religious strife that had long plagued the nations of Europe. [T]he Framers . . . undeniably intended an interpretation of the Religion Clauses that would implement this basic First Amendment objective. In part for this reason, the Court’s 20th-century Establishment Clause cases . . . focused directly upon social conflict, potentially created when government becomes involved in religio[n] . . .” (citations omitted)); *Lee v. Weisman*, 505 U.S. 577, 607 (1992) (Blackmun, J., concurring) (“Only ‘anguish, hardship and bitter strife’ result ‘when zealous religious groups struggle with one another to obtain the Government’s stamp of approval.’” (quoting *Engel v. Vitale*, 370 U.S. 421, 429 (1962))); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 795 (1973) (“One factor of recurring significance . . . is the potentially divisive political effect of an aid program.”); *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (“[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (“The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all . . .”). Justice Breyer in particular has faced criticism for how central divisiveness is to his Establishment Clause analysis. See, e.g., Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1, 3–4 (2005).

234. See, e.g., Robert L. Cord, *Church-State Separation: Restoring the “No Preference” Doctrine of the First Amendment*, in *THE FIRST AMENDMENT: THE*

plays in the Establishment Clause analysis.²³⁵ As such, many of the standards proposed by the Justices seem designed to mitigate or prevent altogether the divisiveness caused by alleged establishments.²³⁶ However, the current standards do *not* ask whether the alleged establishment actually caused divisiveness. But if divisiveness is such an issue, why not create a standard that measures it directly?

There appear to be two concerns with this strategy. The first is the issue of how divisiveness would be measured. In the words of Dean Chemerinsky, “[d]ivisiveness is an empirical question, but one for which measurement would never be possible”,²³⁷ Justice O’Connor similarly wrote that “[g]uessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise.”²³⁸ The other concern is that plaintiffs opposed to an alleged establishment could manufacture divisiveness either before their lawsuit, or as a result of it.²³⁹ The feeling, apparently, is that plaintiffs should not be able to artificially create the conditions by which they can win the lawsuit.

As explained in far greater detail in Part V, neither of these justifications for avoiding a divisiveness standard is persuasive. Measuring relative divisiveness is difficult; measuring whether it exists at all is not. And since the primary goal of the Establishment Clause is to prevent religious strife, *any* divisiveness caused in the community by an alleged establishment should be sufficient to make that establishment unlawful. Moreover, concerns over plaintiffs “manufacturing” divisiveness by opposing alleged establishments are overblown. A

ESTABLISHMENT OF RELIGION CLAUSE: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 56, 58–59 (Alan Brownstein ed., 2008); Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1684 (1969); Laycock, *supra* note 55, at 922–23.

235. See Transcript of Oral Argument at 16–17, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (Nos. 17-1717, 18-18).

236. See, e.g., *Sch. Dist. of Abington*, 374 U.S. at 305 (Goldberg, J., concurring) (“The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all . . .”).

237. Chemerinsky, *supra* note 233, at 4.

238. *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring).

239. See, e.g., *id.* (“[T]he existence of the litigation, as this case illustrates, itself may affect the political response to the government practice.”).

government relationship with religion should be unconstitutional precisely *because* it could cause divisiveness. It is nonsensical to prevent citizens from challenging an illegal government action for the very reason that action is illegal. It is the establishments, not the plaintiffs, that cause the divisiveness. Plaintiffs therefore cannot “manufacture” divisiveness, they can only bring it to the forefront of the public consciousness.

V. A NEW STANDARD: DIVISIVENESS

As the preceding Parts have demonstrated, the Supreme Court’s Establishment Clause jurisprudence is indeed “in disarray.”²⁴⁰ There is disagreement about what the purpose of the Clause is, who has standing to bring suit in the first place, and what standards should be used to resolve establishment disputes. These issues could largely be resolved if the Court adopted a standard for all of its Establishment Clause cases that focuses on the divisiveness caused by the alleged establishment. Such a standard would comport with most people’s understandings of the purpose of the Establishment Clause. It would greatly ease the difficulties attendant in determining who has standing to sue under the Clause. And it would also provide clarity to lower court judges and litigants because it would replace the multitude of standards currently in place with a single, easy-to-understand one.

A. *The Proposed Standard*

The proposed divisiveness standard is straightforward. It is derived largely from Justice Breyer’s opinion in *Van Orden v. Perry*. Under the standard, the plaintiff would be required to prove that the alleged establishment caused political divisiveness in her community. The divisiveness would need to be genuine, and although it would not have to be grand in scale, it would have to be serious in nature. It would not, however, need to come from the *response* to the plaintiff’s efforts to eliminate an alleged establishment. The efforts themselves could be enough to cause a showing of divisiveness. The scope of the community (and hence the relative divisiveness required) would be defined by

240. *Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting).

the level of government whose actions are being challenged. For instance, a single family's public objections to a school district's policy of having a student deliver a prayer at a public-school football game would be sufficient to qualify that practice as an establishment. However, divisiveness would need to be far more widespread before the federal law mandating that the words "under God" be included in the Pledge of Allegiance would be struck down as unconstitutional.²⁴¹

Of course, as Justice Breyer recognized, the lack of divisiveness in a particular case may not be due to broad acceptance of a government relationship with religion, but instead "due to a climate of intimidation."²⁴² In cases such as those, rather than require the plaintiff to show that the alleged establishment caused division in her community, she would merely have to show that it so intimidated reasonable members of the community that they did not feel safe challenging the government action publicly. If the plaintiff is able to establish the climate of intimidation, the alleged establishment should become even more suspect than if it merely caused divisiveness. Accordingly, the threshold number of impacted people should also be lower than it would need to be in a case involving simple divisiveness. In this way, the standard will protect people who initially tried to resolve their concerns about an alleged establishment through the political process but were forced to stop due to community backlash.

B. How It Works, and Why It's a Good Idea

The divisiveness standard would be beneficial because it would help resolve all three challenges with the Court's Establishment Clause jurisprudence. First, it would comport with most people's understanding of the Establishment Clause as a protection of individual rights and help lower courts avoid the purpose issue in some cases because it

241. Another alternative would be to allow "as applied" challenges to establishments that caused divisiveness. So, while the fact that the Pledge caused robust protests in a single school district might not be sufficient to have it struck down nationally, it could be banned in that particular school district. Currently, though, there are no as applied challenges to alleged establishments, only facial ones.

242. *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring); *see also* Horwitz, *supra* note 24, at 493–96 (describing one particularly severe example of intimidation).

serves as a quasi-exhaustion requirement. Next, it would help the courts develop a meaningful Establishment Clause standing doctrine, which would allow well-positioned litigants to robustly enforce the Clause. Finally, it would create a uniform standard that would more closely follow the underlying function of the Establishment Clause—preventing religious divisiveness.

1. Avoiding Purpose Through Quasi-Exhaustion

As discussed in Part II, there is broad disagreement over what the precise purpose of the Establishment Clause is. This disagreement leads to enormous frustration from people, such as Justice Thomas, who do not believe the Court's Establishment Clause jurisprudence reflects the true purpose of the Clause.²⁴³ It is not just judges who bemoan Establishment Clause cases that do not go their way; antidisestablishmentarian²⁴⁴ community members, too, often vigorously complain that courts misapprehend the purpose of the Clause when they find that it has been violated.²⁴⁵ Justice Breyer, in particular, has seemed sensitive to these frustrations, observing that “absolutism,” when it comes to the Establishment Clause, could “promote the kind of social conflict the . . . Clause seeks to avoid.”²⁴⁶ The divisiveness standard should help alleviate some of this frustration. While it is impossible to create a single standard that will satisfy everyone's conceptions of the Establishment Clause's purpose, the divisiveness standard

243. See *supra* Section II.A.1.

244. “Antidisestablishmentarianism is a . . . movement that seeks to maintain an established church.” *Establishment*, 1 BOUVIER LAW DICTIONARY (2012).

245. See, e.g., Abby Goodnough, *Student Faces Town's Wrath in Protest Against a Prayer*, N.Y. TIMES (Jan. 26, 2012), <https://www.nytimes.com/2012/01/27/us/rhode-island-city-enraged-over-school-prayer-law-suit.html>.

246. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring); see also Alan Brownstein, *Choosing Among Non-Negotiated Surrender, Negotiated Protection of Liberty and Equality, or Learning and Earning Empathy*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 11, 14 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) (“[N]o dialogue or compromise in this area is possible without each side acknowledging the legitimacy of the experience and fears of the other side. The unwillingness to do so ends any attempt at meaningful discussion.”).

does the next best thing: in some cases, it will keep the decision about what purpose the Clause serves out of the hands of judges altogether. This is because the divisiveness standard operates as a sort of quasi-exhaustion requirement.²⁴⁷ The standard therefore allows—at least in some cases—individual communities to decide what the purpose of the Clause is, rather than having meaning imposed on them by judges.

The divisiveness standard operates as a quasi-exhaustion requirement because it obliges the plaintiff to prove that the alleged establishment has caused some *political* harm to her community in order to have standing. That political divisiveness cannot come solely from the suit itself, although political divisiveness caused by the lawsuit could certainly be used towards the merits of the claim. The standard requires the plaintiff to demonstrate divisiveness to meet the initial standing threshold, so there must be some effort to resolve disputes over alleged establishments through a means *other* than the court system.

Why require disestablishmentarians to attempt to resolve their concerns outside of court before letting them sue? Because addressing problematic relationships between the government and religion using non-legal means sometimes works. For example, the chaplain in *Marsh v. Chambers*, the case discussed above in Section IV.E in which the Court upheld the Nebraska state legislature’s practice of opening its legislative sessions with a prayer, originally delivered explicitly Christian invocations.²⁴⁸ However, when a Jewish lawmaker approached the chaplain about it, the chaplain agreed to deliver only non-denominational prayers.²⁴⁹ For a state-salaried chaplain to deliver explicitly Christian prayers would at a minimum be constitutionally sus-

247. In many other areas of the law, plaintiffs are not allowed to bring suit in court until they have exhausted their administrative remedies. *See, e.g.*, U.S. DEP’T OF JUSTICE, JUSTICE MANUAL: CIVIL RESOURCE MANUAL § 34 (2018), <https://www.justice.gov/jm/civil-resource-manual-34-exhaustion-administrative-remedies>.

248. 463 U.S. 783, 793 n.14 (1983).

249. *Id.* For some scholars, the chaplain’s alteration of his prayer is what distinguishes *Marsh v. Chambers* from *Town of Greece v. Galloway*, in which eighty-five percent of the prayers delivered by the volunteer chaplains were explicitly Christian. *See* Lynn, *supra* note 197, at 499, 502.

pect, regardless of the longstanding history and tradition of such prayers.²⁵⁰ The Jewish lawmaker could certainly have filed suit to challenge the practice. Instead, the lawmaker raised his concerns to the chaplain, who changed his behavior so that the lawmaker would no longer feel uncomfortable.²⁵¹

This is precisely the kind of behavior that we should seek to encourage—and the kind of result we should want to see—when religion seeps into the public sphere.²⁵² It resolves the issue of the alleged establishment to everyone’s satisfaction and keeps the courts out of a controversial issue. Critically, by keeping the case out of court entirely, solutions of this nature do not force the courts to wrestle with what the purpose of the Establishment Clause is. Instead, citizens and their government can come together to decide what an appropriate relationship between government and religion looks like in their community.

Of course, most Establishment Clause plaintiffs do not have the social capital of a state legislator.²⁵³ What if, instead of a legislator, the person who objects to the nature of the prayer is a citizen who attends legislative sessions a few days a week as a means of staying busy in her retirement? What if a resident of a mid-sized city opposes the crèche the city puts up in front of city hall each December? What if the parents of a child in elementary school oppose the inclusion of the word “God” in the Pledge of Allegiance? A legislator is a relatively powerful person, and a legislature is a relatively small community. If a legislator objects to the legislature’s prayer practices, people will listen. Most disestablishmentarians, on the other hand, have less power and object to the practices of much larger communities. How might they go about exhausting their political remedies?

250. *But cf.* *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2013) (“To hold that invocations must be nonsectarian would . . . involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.”).

251. *Marsh*, 463 U.S. at 793 n.14.

252. Some scholars have argued that such religious toleration—or at least religious coexistence—is common in the United States. *See* Andrew Koppelman, *The Joys of Mutual Contempt*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND*, *supra* note 246, at 112, 112–13.

253. I am grateful to Professor Grove for pointing this out and suggesting that I shore up this portion of my argument.

Although there may be slightly different options available in each individual case, this Article argues that disestablishmentarians should all take the same four general steps.²⁵⁴ First, they should reach out directly to the person in charge of the government entity they believe is violating the law.²⁵⁵ This could be the speaker or the president of the legislature, the mayor or the manager of the city, or the superintendent of the school district. The communication could be delivered in person or in writing. In either case, it should clearly convey what practice the citizen objects to, why they object to it, and how the government can remedy the situation. Second, the objector could prepare a petition with signatures from her fellow citizens, demanding that the government change or do away with its allegedly unconstitutional practice. Third, the objector could begin publicly advocating for change. This might include publishing editorials, talking to the press, and speaking at government meetings. Lastly, the objector could begin protesting the government practice. This could take many forms: protestors could organize letter-writing campaigns, picket government meetings or legislative sessions, or hold rallies near the site of the alleged establishment.

Disestablishmentarians need not necessarily take these steps in order and may do several of them simultaneously. For instance, an objector may not wish to meet with the superintendent of her child's school district until after she has put together a petition with signatures from other like-minded parents. She may find that it is easier to gather those signatures after she has spoken at school board meetings and written an editorial in the local paper. The point is not to complete any of the described steps in a particular order. Indeed, objectors may not even need to complete all of the steps before divisiveness rears its ugly head.²⁵⁶ But a disestablishmentarian who completes all of these steps can be fairly said to have exhausted her political remedies and can proceed to court to challenge the alleged establishment.

This is not to say that in every instance people who wish to challenge an alleged establishment must seek political recourse before they

254. These are roughly the steps taken by the disestablishmentarians in *Santa Fe Independent School District v. Doe*. See Horwitz, *supra* note 24, at 493–96.

255. Alternatively, the protestor could go directly to the person responsible for the alleged establishment, as the legislator in *Marsh* did. 463 U.S. at 793 n.14.

256. See *infra* notes 314–21.

go to court. The divisiveness standard operates only as a *quasi*-exhaustion requirement for a reason. In certain circumstances, it would not be feasible for would-be plaintiffs to initially challenge an establishment by any means other than filing a lawsuit. These situations demonstrate how the quasi-exhaustion nature of the divisiveness standard works to protect plaintiffs in multiple ways. First, it does not require disestablishmentarians who face a climate of intimidation in their community to brave that climate to challenge an establishment. Instead, they can file a lawsuit. Of course, Establishment Clause lawsuits themselves can often engender a great deal of divisiveness.²⁵⁷ But courts have broad authority to protect litigants. For instance, they can allow plaintiffs to proceed anonymously and can vigorously guard that anonymity.²⁵⁸

The anonymity courts can afford plaintiffs goes to the second way in which the quasi-exhaustion nature of the divisiveness standard protects plaintiffs: it does not require them to prove that the political divisiveness caused by the alleged establishment has harmed them as individuals; they merely need to demonstrate that it has harmed their community. In this way, plaintiffs can proceed with true anonymity; they do not need to “out” themselves by showing how the divisiveness caused by the alleged establishment personally harmed them. This feature is particularly useful in cases where the initial attempts to resolve the establishment through the political process caused such great divisiveness that it is not safe or practicable for a would-be plaintiff to openly challenge the government’s action.²⁵⁹

The divisiveness standard is not perfect. It cannot resolve the current tension over what the purpose of the Establishment Clause is. Those who believe the Clause is a federalism provision will be unhappy

257. See Horwitz, *supra* note 24, at 493–96 (detailing the divisiveness at play for the parties involved in the case of *Santa Fe Independent School District v. Doe*); see also Goodnough, *supra* note 245; Niose, *supra* note 184.

258. See Horwitz, *supra* note 24, at 495–96. These protections of anonymity are incredibly important, which is why bills such as the one proposed by Missouri State Representative Hardy Billington, which would require Establishment Clause plaintiffs suing in state court to use their actual names to prosecute the suit, could seriously compromise the rights of religious minorities. See H.R. 728, 100th Gen. Assemb., Reg. Sess. (Mo. 2019).

259. See, e.g., Horwitz, *supra* note 24, at 493–96.

because it allows plaintiffs to challenge many establishments by state and local governments. Those who believe it is a structural limitation will be unhappy because, although the standard will “lead to a robust application of the Establishment Clause,”²⁶⁰ some relationships between government and religion will surely slip through the cracks—there are simply some relationships between government and religion that will not cause divisiveness in some communities.²⁶¹ But the divisiveness standard will satisfy the majority belief about the Clause—that it protects the rights of individuals—because it will allow individual citizens to sue when an establishment has caused harm to them and their community. Additionally, by serving as a quasi-exhaustion requirement, the standard will keep at least some establishment disputes out of court, eliminating the need for judges to wrestle with these difficult issues at all. Finally, when suits do come to court, the divisiveness standard will protect the rights and safety of plaintiffs. No standard will reflect the full diversity of views about the purpose of the Establishment Clause. The divisiveness standard, at least, comes as close as possible.

2. Uniform Standing

Many of the solutions developed by other scholars get a great deal right on how to improve the Supreme Court’s Establishment Clause standing jurisprudence. Professor Bickers’s assertion that Justice Breyer’s opinion in *Van Orden v. Perry* has enormous value as a

260. Chemerinsky, *supra* note 233, at 4.

261. Of course, it is difficult to provide specific examples of these non-divisive relationships because people who are comfortable with their governments’ relationships with religion do not file lawsuits. Yet, just because these relationships are not in the public eye does not mean they do not exist. For instance, most American school children recite the Pledge of Allegiance—which includes the words “under God”—every morning. Given the relative dearth of lawsuits challenging the constitutionality of the Pledge, we can presume that in most communities this is an acceptable relationship between the government and religion.

blueprint for a sensible Establishment Clause standing doctrine is correct.²⁶² In large part the scholars who argue that there should be greater alignment between the standing and merits inquiries in Establishment Clause cases are also right on the money. However, this solution does not work perfectly under current Establishment Clause doctrine because many of the Court's standards do not require the plaintiff to demonstrate that she was personally harmed. Consider the two most frequently invoked standards, the *Lemon* test and the endorsement test.

Under the *Lemon* test, the court must consider whether the challenged statute (1) has a secular purpose, (2) has the "principle or primary effect" of advancing or inhibiting religion, and (3) excessively entangles the government with religion.²⁶³ On its face, then, the *Lemon* test does not require the plaintiff to prove that she was personally harmed by the government action. The endorsement test operates in a similar manner. Under that test, the plaintiff must demonstrate that an objective observer would view the government action as an endorsement of a particular religious viewpoint.²⁶⁴ Under this test, the plaintiff need not prove that *she* feels like an outsider because of the government's actions regarding religion. Both of the most frequently invoked tests, then, do not require the plaintiff to prove a *personal* injury in order to win on the merits. Indeed, she need not show any injury at all. Under both standards, it is enough that the government action has the *potential* to cause an injury to the broader community.

This would make a great deal of sense if the Establishment Clause were a structural limitation on the powers of government.²⁶⁵ In structural constitutional law, it is common for plaintiffs to have to prove a personal injury to have standing. But once the court reaches the merits of the case, the personal injury suffered by the plaintiff is no

262. I differ from Professor Bickers in that I draw more from Justice Breyer's observations about divisiveness, and he focuses more on Justice Breyer's old/new distinction. Compare *supra* Section V.A., with Bickers, *supra* note 2, at 349–55, and Bickers, *supra* note 104, at 454–56.

263. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted).

264. See *supra* Section IV.C.

265. I am immensely grateful for Professor Grove's feedback throughout this Article, but her comments were particularly helpful in aiding me to clarify my thinking on this point.

longer relevant.²⁶⁶ For instance, in *Youngstown Sheet & Tube Co. v. Sawyer*, the steel companies had standing to challenge President Truman's executive order because the federal government was taking over their steel factories.²⁶⁷ But when it reached the merits of the case, the Supreme Court focused only on whether the executive order exceeded President Truman's constitutional authority.²⁶⁸ Similarly, in *United States v. Lopez*, the defendant, Mr. Lopez, had standing to challenge the Gun-Free School Zones Act because he was being prosecuted under it, but on the merits of the case, the Court focused only on whether the Act exceeded the scope of Congress's Commerce Clause authority.²⁶⁹ The Supreme Court's Establishment Clause cases go even further down this road; they generally require the plaintiff to prove no personal injury whatsoever before the Court reaches the merits of the claim.²⁷⁰

However, the majority view is that the Establishment Clause is not a structural provision; rather, it creates an individual right.²⁷¹ Requiring the plaintiff in a structural constitutional case to prove both her personal injury and the structural violation makes sense. We want the plaintiff to have been hurt in some way to ensure that the case is properly litigated: the adversarial process works best when both parties have skin in the game.²⁷² Requiring the plaintiff to prove something different when the court reaches the merits of the structural violation also makes sense. In a structural constitutional case, the government did something wrong *independent* of the harm it caused to the plaintiff. In *Youngstown*, President Truman did not violate the Constitution because he ordered the Secretary of Commerce to seize some steel mills.²⁷³ He violated the Constitution because he did not have the constitutional *authority* to order the Secretary of Commerce to seize some steel mills.²⁷⁴

266. See *infra* notes 267–70.

267. 343 U.S. 579, 582–84 (1952).

268. See *id.* at 635–38 (Jackson, J., concurring).

269. See 514 U.S. 549, 551, 563–64 (1995).

270. See *supra* Section IV.A.

271. See *supra* Section II.B.

272. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973).

273. *Youngstown*, 343 U.S. at 583–89.

274. *Id.* at 638–40 (Jackson, J., concurring).

On the other hand, when a government violates a citizen's individual rights, the harm suffered by the citizen and the government's violation of the Constitution are the same thing. The Supreme Court's Fourth Amendment standing jurisprudence illustrates this point. The Fourth Amendment protects people from "unreasonable searches and seizures."²⁷⁵ However, the Supreme Court has said that a criminal defendant does not have standing to challenge a violation of someone else's Fourth Amendment rights.²⁷⁶ For instance, in the seminal case of *Rakas v. Illinois*, the Supreme Court emphasized that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."²⁷⁷ The Court held in *Rakas* that passengers in a car "which they neither owned nor leased" could not challenge the constitutionality of an officer's search of the car because Fourth Amendment rights are personal in nature.²⁷⁸ The search of the car may have been unconstitutional, but because *their* Fourth Amendment rights had not been violated, the defendants could not challenge the constitutionality of the search.²⁷⁹ To paraphrase Justice Cardozo, when it comes to personal rights, proof of constitutional violations in the air will not do.²⁸⁰

Unfortunately for the clarity of constitutional doctrine, the Court does not apply this same standing injury-merits injury nexus for every individual right. For instance, when it comes to the First Amendment right to freedom of expression, the Court has allowed people whose constitutional rights were not violated to challenge a government restriction on speech on the basis that it is overbroad and could capture

275. U.S. CONST. amend. IV.

276. See *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978); see also Hillary L. Kody, *Standing to Challenge Familial Searches of Commercial DNA Databases*, 61 WM. & MARY L. REV. 287, 302–06 (2019) (discussing the Court's Fourth Amendment standing jurisprudence).

277. *Rakas*, 439 U.S. at 133–34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

278. *Id.* at 140.

279. See *id.* at 139–40; see also *United States v. Padilla*, 508 U.S. 77, 81 (1993) (per curiam) ("It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure.").

280. See *Martin v. Herzog*, 126 N.E. 814, 816 (N.Y. 1920).

some protected speech.²⁸¹ In *Broadrick v. Oklahoma*, the plaintiffs (who lost on the merits) were allowed to challenge a state statute that restricted the political activities of civil servants on the basis that the statute *could* proscribe some protected First Amendment activity—*not* on the basis that their own activity was protected.²⁸² In these cases, the relationship between the standing and merits inquiries—“I have standing because I have been hurt in X way, and the government violated the Constitution because it did Y”—looks much like the standing-merits relationship in structural constitutional cases.²⁸³

To some extent, this is what the relationship between standing and the merits looks like in Establishment Clause cases as well.²⁸⁴ Although the Court has often ignored the question of standing in Establishment Clause cases, the decisions it has rendered on the merits have focused almost entirely on the government’s conduct and not on the way in which that conduct violated the plaintiff’s rights.²⁸⁵ This explains why the Court spends so little time addressing the harms suffered by Establishment clause plaintiffs: there is little need to address the plaintiff’s harm in depth if she does not need to prove it to win on the merits. Unfortunately, this leaves lower courts and litigants with very little guidance as to what harms are sufficient to allow a plaintiff to invoke the court’s jurisdiction. Moreover, it makes little sense if—as is the general understanding—the Establishment Clause protects individual rights. Because the Clause protects an individual’s right to be free from establishments, the government cannot violate it in the abstract. It can only violate it with relation to individual citizens. Accordingly, we would expect the Court’s inquiry, even when it does not explicitly consider whether the plaintiff has standing, to focus on her injury in some measure of depth because her injury and the constitutional violation are the same thing.

The divisiveness standard reflects this understanding. It requires the plaintiff to show that there has been a concrete harm to her

281. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 611–15 (1973).

282. See *id.* at 615–16.

283. See *supra* notes 267–70.

284. See Esbeck, *supra* note 40, at 456–58.

285. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 422–24, 430–32 (1962) (holding that New York state violated the Establishment Clause because it authored a school prayer, not because individual students were hurt by the prayer).

and her community—the divisiveness caused by the alleged establishment. Of course, this is not a wholly personal harm, as is generally required for a plaintiff to have standing.²⁸⁶ As discussed above, though, the Court’s current jurisprudence in this area requires the plaintiff to prove no harm at all in order to have standing or to win on the merits.²⁸⁷ Thus, divisiveness serves as a middle ground between the Court’s general standing jurisprudence, which requires a personalized harm, and its Establishment Clause jurisprudence, which currently requires no harm. This accords with the most common perception of the Establishment Clause’s purpose as a protection of individual rights.²⁸⁸ The plaintiff has standing to sue because the government has violated her right to be free from divisive establishments. In the same vein, the government has violated the Establishment Clause because it violated the plaintiff’s right to be free from divisive establishments.

Moreover, using the divisiveness standard to help articulate the harm requirement for standing in Establishment Clause cases should allay concerns about expanding standing too far.²⁸⁹ As discussed in detail below, the divisiveness requirement does not encourage plaintiffs to manufacture litigation.²⁹⁰ Indeed, it may eliminate the need for litigation at all if concerns about alleged establishments can be resolved through the political process.²⁹¹ Additionally, because the divisiveness standard requires the plaintiff to demonstrate that there was harm to *her* community, it prevents plaintiffs from suing because they are unhappy about an alleged establishment with which they have no interaction.

This geographic restriction aligns with the Supreme Court’s general standing principles. Even as the Court has drastically expanded what qualifies as a cognizable injury-in-fact for the purposes of standing to sue, it has always enforced some geographic limitations on who

286. See *Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

287. See *supra* notes 263–64 and accompanying text.

288. See *supra* Section II.B; cf. *Marshall & Flood*, *supra* note 17, at 84–89 (characterizing Establishment Clause standing as being predicated upon the harm to an individual when her community establishes a religion).

289. See *Harvey*, *supra* note 94, at 367.

290. See *infra* notes 313–30 and accompanying text.

291. See *supra* notes 248–52 and accompanying text.

has standing.²⁹² These principles are cross-disciplinary; the Court has enforced them in voting rights cases, environmental cases, and Establishment Clause cases.²⁹³ Indeed, these geographic concerns go to the core of the Court's decision in *Valley Forge*. There, the Court took special note of the fact that the plaintiffs lived far from the alleged establishment and used this as the basis for their conclusion that the plaintiffs had suffered no "injury other than their belief that the transfer violated the Constitution."²⁹⁴ Similar concerns color, for example, the opinions on the merits in *Van Orden v. Perry*, in which the Justices repeatedly noted that the plaintiff was required to walk past the Ten Commandments monument if he wished to visit the Texas Supreme Court's law library.²⁹⁵

The divisiveness standard does away with these concerns. Although the plaintiff need not show that the alleged establishment harmed *her*, she must show that it harmed *her community*. Thus, no matter how controversial a village-sponsored crèche in Painted Post, New York, may be, a resident of Palo Alto, California, will not have standing to challenge it. The geographic restriction preserves the courts' interest in ensuring a truly adversarial process via which the best arguments are made on each side.²⁹⁶ It also makes sense as a policy matter. Although the United States is blessed with incredible religious diversity, it "often is less like a religious melting pot and more like a bowl of oatmeal: it's lumpy."²⁹⁷ It is highly likely that the residents of Painted Post view the appropriate relationship between government and religion very differently than the resident of Palo Alto.

292. See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 809–12 (2009) (describing this phenomenon).

293. *Id.* at 810–11; see also Sunstein, *supra* note 19, at 205. Similar principles apply in Fourth Amendment cases. While the Court has "trend[ed] toward a more expansive understanding of expectation of privacy" which "may support challenges for many defendants," it continues to require those invoking the Fourth Amendment to have a *personal* privacy interest in order to have standing. Kody, *supra* note 276, at 305–06.

294. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.23 (1982).

295. See generally *Van Orden v. Perry*, 545 U.S. 677 (2005).

296. See *supra* notes 60–62 and accompanying text.

297. Horwitz, *supra* note 24, at 503.

Given the deep uncertainty about what the purpose of the Establishment Clause is,²⁹⁸ it makes little sense to allow outsiders to challenge alleged establishments that have not upset people who actually live in the community.²⁹⁹ By “[t]aking geographic location into account,” the divisiveness standard “reflect[s] the reality that circumstances in one geographic location are different than in another.”³⁰⁰

Adopting a divisiveness standard would allow the courts to develop a sensible standing doctrine for Establishment Clause cases. Because the standard requires that the plaintiff prove there has been some harm to her community, courts will be able to evaluate the standing injury-in-fact requirement in the same way they evaluate the injury on the merits. No more will the plaintiff have to prove she personally has been injured to invoke the courts’ jurisdiction but not to win her case. This clarity will likely lead to greater enforcement of the Establishment Clause. After all, the current “uncertainty over which Establishment Clause violation ‘injuries’ suffice for standing purposes could, and likely does, deter prospective litigants from raising claims.”³⁰¹ Finally, the geographic restrictions inherent in the divisiveness standard will impose meaningful restrictions on who can bring suit to challenge an alleged establishment, which will ensure that only the people best situated to bring suit will be able to do so.

3. Uniform Standard

Currently, divisiveness is not one of the standards used by the Supreme Court to resolve Establishment Clause cases.³⁰² However, as

298. See *supra* Part II.

299. This is not to suggest that communities—or attitudes—are static. As both change over time, it may well be that what was once a permissible relationship between government and religion has now become, in the eyes of at least some community members, an unconstitutional establishment. The divisiveness standard does not preclude such a shift; it merely requires it to come from within the relevant community itself and not be a function of shifting *national* attitudes.

300. John R. Bobka, Note, *Defining “Unduly”: Resolving Inherent Textual Ambiguity in the IMO’s Ballast Water Management Convention*, 60 WM. & MARY L. REV. 267, 293 (2018).

301. Myers, *supra* note 110, at 982.

302. See *supra* Section III.G.

many Justices (and even, on occasion, the Court itself) have recognized, many of the standards the Court *has* adopted have the purpose of minimizing religious divisiveness.³⁰³ In the view of those Justices, the Court has had two reasons to avoid adopting divisiveness as its sole Establishment Clause standard: divisiveness could be difficult to measure, and if divisiveness were the standard, plaintiffs could be encouraged to manufacture it.³⁰⁴ Neither of these objections is convincing.

First, while divisiveness may be difficult to measure, it is not difficult to observe.³⁰⁵ It could be seen in either the disestablishmentarian's efforts to have the alleged establishment removed or in the community's reactions to those efforts. Taking the reactions first, the four-step disestablishmentarian process described above in Section V.B.1 roughly follows the course taken by the objectors in *Santa Fe Independent School District v. Doe*.³⁰⁶ When those objectors told the school district's superintendent that they opposed school-sponsored prayer at high school football games, he warned them that they might be physically attacked if they made their position publicly known.³⁰⁷ When the objectors picketed a football game, fans entering the stadium shouted curses at them, told them they were going to hell, and shoved them.³⁰⁸ When the protestors complained to the police, the officers did not intervene, instead telling the protestors to push the fans back.³⁰⁹ This type of reaction, from the superintendent, the fans, or the police officers, would be sufficient to show that an alleged establishment was divisive. Other reactions would suffice as well. A plaintiff who could show that she was threatened while gathering signatures for her petition, or was loudly booed while presenting her position at a town board meeting, would have sufficiently proved divisiveness.

303. See *supra* note 233 and accompanying text.

304. See *supra* notes 237–39 and accompanying text.

305. See Chemerinsky, *supra* note 233, at 4; cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be [hard-core pornography] But I know it when I see it.”).

306. See Horwitz, *supra* note 24, at 493–96.

307. *Id.* at 494.

308. *Id.*

309. *Id.*

However, would-be plaintiffs need not rely on the reactions of their community to demonstrate that an alleged establishment is divisive. This is because the standard focuses on whether the alleged establishment itself caused division, not whether the plaintiff's attempts to remedy it did so.³¹⁰ If a plaintiff goes through all four steps needed to exhaust her political remedies, then she will have satisfied the requirements to show that the alleged establishment is divisive (depending, of course, on the nature of the alleged establishment and the scope of the relevant community). If an alleged establishment causes citizens to speak to their elected representatives, talk to their fellow citizens about signing a petition, advocate in the press and in government meetings, and picket or rally in protest, and it still has not been changed, it is divisive.

Additionally, divisiveness is either present, or it is not. Courts need not enter into a complex balancing test in an attempt to determine whether removing the alleged establishment would be more divisive than keeping it.³¹¹ If we accept that religious divisiveness is truly the harm the Founding Fathers sought to protect against with the Establishment Clause, then it does not matter if removing an establishment would cause greater divisiveness in the community than keeping it. The Establishment Clause does not prohibit a relationship between government and religion unless prevention would upset people. It prevents that relationship *because* it has the potential to upset people.³¹² Under the divisiveness standard, then, courts would not be obligated to weigh the relative divisiveness caused by keeping or removing an establishment. Instead, they would merely have to note whether the alleged establishment had caused divisiveness. If so, then it would be unconstitutional.

Second, the divisiveness standard would not create any incentive for plaintiffs to manufacture division in order to get into court. Although our current system purportedly does not encourage religious minorities to manufacture divisiveness, division is still clearly present

310. *See supra* Section V.A.

311. *But see* Chemerinsky, *supra* note 233, at 3–4.

312. *Cf.* Chemerinsky, *supra* note 37, at 2213.

in many Establishment Clause cases.³¹³ For instance, consider the experience of the children of religious minorities in Santa Fe, Texas, while *Santa Fe Independent School District v. Doe* was being litigated. In an attempt to find out who the Doe plaintiffs were, teachers, counselors, school administrators, and members of the community took to spying on potential plaintiffs, trying to catch them in the act of meeting with their attorneys.³¹⁴ When the district court judge ordered the inquisitors to stop and threatened harsh sanctions if they did not, schoolchildren took over the project.³¹⁵ They passed a petition around to their classmates, asking them if they were Christians, and whether they supported prayer in the schools.³¹⁶ Children suspected of supporting the lawsuit were beaten.³¹⁷

Jessica Ahlquist, a high school student “who became the target of threats and bullying when she objected to a prayer banner in her high school,” had a similar experience even more recently.³¹⁸ After she succeeded in her lawsuit against the school district, a state legislator took to the radio to call her “an evil little thing.”³¹⁹ She received online death threats and had to be escorted around school by police officers.³²⁰ Things got so bad that a flower shop owner refused to deliver an order of roses to her out of fear that doing so could put his own safety at risk.³²¹ Nor were these reactions a function of a less inclusive, bygone era in American history; all of this happened in 2012,³²² in Rhode Island.³²³

No reasonable plaintiff would ever “manufacture” conditions such as these to get into court. Moreover, no would-be plaintiff would

313. Indeed, divisiveness may be underreported in many cases because a plaintiff is not required to prove it in order to make her case. See FED. R. EVID. 402 (“Irrelevant evidence is not admissible.”).

314. Horwitz, *supra* note 24, at 495.

315. *See id.*

316. *Id.*

317. *See id.*

318. Niose, *supra* note 184.

319. Goodnough, *supra* note 245.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

have to. She would merely have to avail herself of the political process, and the divisiveness would find her. This is not to deny that using divisiveness as a standard “[w]ould lead to a robust application of the Establishment Clause.”³²⁴ As Dean Chemerinsky has correctly noted, it would.³²⁵ Any standard that allows a greater number of plaintiffs to bring suit undoubtedly “increase[s] the likelihood that enforcement actions will occur.”³²⁶ Indeed, critics of a divisiveness standard have identified this as its greatest deficiency, arguing that the standard could risk “imposing an unjust and unprecedented suspension of democracy, and imposing Plaintiffs’ wishes by judicial fiat.”³²⁷ The concern has also been characterized as a danger that religious minorities would implement a sort of “heckler’s veto” by manufacturing political divisiveness to exert their religious viewpoints upon majorities.³²⁸ The heckler’s veto, a concept imported from free speech law and scholarship, is generally considered a bad thing.³²⁹ However, as Dean Chemerinsky has discussed, “any lawsuit that stops the government from doing something that the majority wants can be labeled a ‘heckler’s veto,’” but the Establishment Clause is *designed* to allow religious minorities to police the relationship between religious majorities and the government.³³⁰

324. Chemerinsky, *supra* note 233, at 4.

325. *See id.*

326. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 667 (2006); *see also* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1492–93 (2013) (discussing this concept in the Establishment Clause context).

327. *See* *Incantalupo v. Lawrence Union Free Sch. Dist.*, 652 F. Supp. 2d 314, 328 (E.D.N.Y. 2009); *see also* Harvey, *supra* note 94, at 368 (“[A] plaintiff who avers that he plans to purposefully walk by the display in the future is nothing more than an attempt to manufacture an alleged injury.”); *cf.* STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 156 (1999).

328. *See* Gerard V. Bradley, *Religion at a Public University*, 49 WM. & MARY L. REV. 2217, 2240 (2008).

329. *See* Noah C. Chauvin, *Policing the Heckler’s Veto: Toward a Heightened Duty of Speech Protection on College Campuses*, 52 CREIGHTON L. REV. 29, 33–35, 54 (2018); *see also* Bradley, *supra* note 328, at 2237–41; Chemerinsky, *supra* note 37, at 2213.

330. Chemerinsky, *supra* note 37, at 2213. This is also the response to commentators, such as Stanley Fish, who argue that forbidding any relationship between

This all makes it desirable to encourage religious minorities to pursue political action before filing a lawsuit. By doing so, these disestablishmentarians are not “manufacturing” divisiveness; they are merely exposing it. The discomfort the religious majority feels when they perceive that their religion is under attack pales in comparison with the discomfort that an establishment causes to religious minorities. Religious minorities should not be denied the opportunity to speak publicly against the majority’s public relationship with religion just because it makes the religious majority uncomfortable to hear such advocacy. As the Court has recognized, this discomfort is precisely the reason the Framers created the Establishment Clause in the first place: they wanted to avoid the tremendous strife caused by any relationship between government and religion.³³¹ Adopting divisiveness as the uniform Establishment Clause standard would accomplish this goal.

A recent controversy over memorials to fallen soldiers in Belle Plaine, Minnesota, illustrates this point.³³² The city had allowed a resident to erect “Joe,” a monument of a soldier kneeling in front of a cross, in a local public park as a means of honoring fallen soldiers.³³³ The Freedom From Religion Foundation protested that the monument was an establishment, and the city ordered it taken down.³³⁴ This sparked “weeks of vehement protests,” and the city decided to change course.³³⁵ Rather than take the monument down, they decided to allow

the government and religion, even in the context of public schools, is just as antithetical to First Amendment values as *requiring* some relationship between government and religion. See FISH, *supra* note 327, at 156. The First Amendment doesn’t just protect “freedom to.” It also, in certain contexts, protects “freedom from.”

331. See *supra* notes 232–33 and accompanying text.

332. See Katy Read, *Satanic Temple Sues Belle Plaine over Withdrawn Permission for Monument*, STAR TRIB. (Apr. 28, 2019, 5:26 PM), <http://www.startribune.com/satanic-temple-sues-belle-plaine-over-withdrawn-permission-for-monument/509164882/>.

333. *Id.*; see also Grace Webb, *Satanic Temple Sues City of Belle Plaine Amid U.S. Government Legitimization*, BELLE PLAINE HERALD (May 1, 2019), http://www.belleplaineherald.com/news/satanic-temple-sues-city-of-belle-plaine-amid-u-s/article_b248d008-6c0c-11e9-a626-d3c124f70bd1.html.

334. Webb, *supra* note 333.

335. Read, *supra* note 332.

other religious groups to erect temporary memorials to fallen veterans.³³⁶ The Satanic Temple, which does not self-identify as a church, applied for and received a permit from the city to erect a monument.³³⁷ This prompted even more protests.³³⁸ “[E]xasperated city officials decided” that no monuments would be allowed in the park; they revoked the Satanic Temple’s permit and ordered Joe removed.³³⁹ Malcolm Jarry, one of the Satanic Temple’s co-founders, complained that the protests were being used to justify “depriving [the Temple] of their . . . rights.”³⁴⁰

What this comment misses is that the Temple is not the only entity involved that has religious rights. The Temple has the right to freely exercise its religion,³⁴¹ but the entire community has a right to be free from religious establishments.³⁴² Both the Temple and the citizen who erected Joe violated this right when they placed (or attempted to place) religiously motivated statues in the public park, sparking strong negative reactions. Neither the Freedom From Religion Foundation nor the citizens who objected to the Temple’s monument could be fairly said to be manufacturing divisiveness. The decision to remove Joe sparked “vehement protests,” but so did the decision to place the Temple’s monument in the park.³⁴³

336. *See id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* One of the Temple’s lawyers, Bruce Fein, made a similar claim, arguing that the city “can’t . . . suppress speech just because hecklers didn’t like it.” *Salem-Based Satanic Temple Sues Minn. City for Blocking Proposed Monument*, BOS. GLOBE (Apr. 28, 2019, 6:59 PM), <https://www.bostonglobe.com/news/nation/2019/04/28/salem-based-satanic-temple-sues-minn-city-for-blocking-proposed-monument/amA4but6sx1OzFixFGMz2J/story.html>.

341. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”) Although the Temple denies that it is a religion, it has been designated as a tax-exempt church by the Internal Revenue Service. Read, *supra* note 332. Moreover, it is difficult to deny the religious significance of Satan. Naming an organization after him—regardless of the subjective goals of the organization—is an objective signal of religiosity.

342. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

343. Read, *supra* note 332.

The protests about the removal of Joe, then, were not protests in favor of an abstract relationship between religion and the government. Instead, they were about the government maintaining a relationship with a particular *kind* of religion. This is precisely the harm the Establishment Clause is designed to prevent under virtually any conception of the Clause.³⁴⁴ The protestors did not create these conditions; they merely revealed that the conditions existed. Because there were protests on all sides of the issue, no group is entirely blameless for the divisiveness. But neither did any group *manufacture* it—it was there all along. The government of Belle Plaine responded appropriately to this division by removing all monuments from the park, thus avoiding a divisive establishment altogether.

Any divisiveness is enough to make a relationship between government and religion unconstitutional. Plaintiffs have no incentive to manufacture divisiveness; given the very real danger it can cause them, they should try to minimize divisiveness wherever possible. Therefore, neither of these objections to the divisiveness standard holds water. As discussed above in Sections V.B.1 and V.B.2, the divisiveness standard could also serve to quell disagreement about the purpose of the Establishment Clause and lead to an adjustment in the Court's standing doctrine that better reflects the Clause as a protection of individual rights. Accordingly, the Court should adopt divisiveness as its sole Establishment Clause standard.

VI. CONCLUSION

Now more than ever, it is critical that we have clear, fair standards for judges to apply when deciding Establishment Clause cases. Christian activists and legislators are in the process of enacting “Project Blitz,” a campaign designed “to overwhelm state legislatures with bills based on centrally manufactured legislation” geared towards protecting what they term “religious freedom.”³⁴⁵ The campaign is designed to

344. See *supra* Part II.

345. Katherine Stewart, *A Christian Nationalist Blitz*, N.Y. TIMES (May 26, 2018), <https://www.nytimes.com/2018/05/26/opinion/project-blitz-christian-nationalists.html>; see also Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 28, 2019, 5:21 AM), <https://twitter.com/realDonaldTrump/status/1089876055224184833> (“Nu-

take place in three stages.³⁴⁶ During the first stage, activists hope to enact laws that “recognize the place of Christian principles in our nation’s history and heritage.”³⁴⁷ Next, the activists plan to pass measures that “focus . . . on our country’s Judeo-Christian heritage,” such as a “Proclamation Recognizing Christian Heritage Week,” or a “Proclamation Recognizing the Year of the Bible.”³⁴⁸ Finally, they seek to enact laws that enshrine conservative Christian values, such as “defin[ing] public policies of the state in favor of biblical values concerning marriage and sexuality.”³⁴⁹ Although the advocates are still only in the “first phase” of their campaign,³⁵⁰ as of May 2018 “more than 70 bills before state legislatures appear[ed] to be based on Project Blitz templates or have similar objectives.”³⁵¹ Regardless of one’s views of the propriety, necessity, or legality of such measures,³⁵² they will doubtless encounter strong opposition—including, no doubt, lawsuits challenging those measures that become law.³⁵³

merous states introducing Bible Literacy classes, giving students the option of studying the Bible. Starting to make a turn back? Great!”). *See generally* CONG. PRAYER CAUCUS FOUND., REPORT AND ANALYSIS ON RELIGIOUS FREEDOM MEASURES IMPACTING PRAYER AND FAITH IN AMERICA (2017), <https://drive.google.com/file/d/0BwfCh32HsC3UYmV0NUp5cXZjT28/view>; Jonathan Merritt, *Teaching the Bible in Public Schools Is a Bad Idea—For Christians*, THE ATLANTIC (Jan. 30, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/bible-literacy-bills-could-backfire-on-conservatives/581593/>.

346. CONG. PRAYER CAUCUS FOUND., *supra* note 345, at 4–7.

347. *Id.* at 4.

348. *Id.* at 5–6.

349. *Id.* at 6.

350. Don Byrd, *Top Ten Religious Liberty Stories of 2018*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY (Dec. 21, 2018), <https://bjconline.org/top-ten-religious-liberty-stories-of-2018-122018/>.

351. Stewart, *supra* note 345.

352. I would argue that most of the measures are not proper, necessary, or legal, but that is a different paper.

353. There is reason to believe that this is not necessarily a bad thing, provided courts reach the merits of these suits. The more opportunities plaintiffs have to challenge alleged establishments, the more opportunities judges have to learn to recognize establishments, craft effective remedies, and reach good rules. *See* Huq, *supra* note 326, at 1492. If it were not for the human costs suffered by those who must live through these attempts at establishment, Project Blitz could seem like a good thing for disestablishmentarians.

To ensure uniformity and fairness in these cases—and indeed, in all Establishment Clause litigation—the Supreme Court needs to create a clear standard for the courts to apply. Religious divisiveness should be that standard.³⁵⁴ It fairly balances the interests of religious majorities and minorities while protecting against the harm the Founders sought to prevent with the Establishment Clause. Moreover, a shift to a uniform divisiveness standard would allow the development of a more meaningful Establishment Clause standing doctrine. Because the divisiveness standard requires the plaintiff to prove that the challenged action caused some harm in her community, courts would be able to quickly dispose of non-meritorious claims on standing grounds. A divisiveness standard for Establishment Clause cases would therefore better reflect the purpose of the Clause, resolve many of the uncertainties in the current Establishment Clause standing doctrine, and would provide fairer and more uniform results for all litigants.

354. Notably, the architects of Project Blitz concede that their proposed legislation is open to “the . . . charge that advocates are being divisive because they are favoring Christianity or Judaism over other religions.” CONG. PRAYER CAUCUS FOUND., *supra* note 345, at 5. They even implicitly acknowledge that the courts may be the only place that religious minorities aggrieved by these laws can obtain relief (that is, that these laws do not raise questions that can be resolved in the political arena): “[T]hese [divisiveness] arguments often do not play well among members of the general public and *are not usually detrimental in elections.*” *Id.* (emphasis added).