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Crossing Doctrines: Conflating Standing and the Merits Under the Establishment Clause

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CROSSING DOCTRINES: CONFLATING STANDING AND THE MERITS UNDER THE ESTABLISHMENT CLAUSE

ASHUTOSH BHAGWAT*

ABSTRACT

In American Legion v. American Humanist Ass'n, the Supreme Court upheld the constitutionality of a thirty-two-foot tall Latin cross honoring soldiers killed during World War I against an Establishment Clause challenge. In a concurring opinion, Justice Gorsuch argued that the case should have been dismissed for lack of standing. He claimed that lower court decisions upholding standing for "offended observers" to challenge government religious displays are inconsistent with standing law, and were driven by the Supreme Court's holding in Lemon v. Kurtzman that government endorsement of religion violated the Establishment Clause. Since, Gorsuch concluded, a majority of the Court explicitly disowned the Lemon test in American Legion, it was now time to abandon offended observer standing as well.

In this Essay, I argue that Justice Gorsuch is correct, but for the wrong reasons. Justice Gorsuch's assertion that offended observer standing arose from the Lemon endorsement test is not supported by history. He is, however, correct that such standing is recognized only in the Establishment Clause context. The question then arises, is there something unique about substantive law in this area which justifies special standing rules. And that in turn raises the very complex question of how the "injury in fact" requirement of standing doctrine interacts with substantive law.

My conclusion is that substantive law and injury are related because Congress possesses the power to create new injuries that would not have supported common law claims, and that it regularly exercises that power in the administrative context. On the other hand, the Constitution, acting on its own, should not be read to create new forms of injury. This means that the cases recognizing standing to challenge religious display are incorrect, because they rely on the Establishment Clause alone to create injury where

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none would have been recognized under the common law. The paper concludes by exploring the implications of this conclusion for the Establishment Clause, and for other areas of law. It ends with the important insight that if standing should not have been recognized in religious display cases, then the Supreme Court was also wrong to recognize standing in its leading cases considering Equal Protection challenges to affirmative action programs.

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*[S]tanding . . . often turns on the nature and source of the claim asserted.*¹

*[T]here is absolutely no basis for making the Article III inquiry
[about standing] turn on the source of the asserted right.*²

INTRODUCTION

In *American Legion v. American Humanist Ass’n*,³ the Supreme Court upheld the constitutionality of a thirty-two-foot tall Latin cross, erected on public property in 1925 to honor soldiers killed during World War I,⁴ against an Establishment Clause challenge. The majority opinion by Justice Alito, writing for an unusual cross-ideological coalition of five Justices,⁵ relied primarily on history to uphold the cross—both the cross’s long pedigree and the specific history that, during World War I, made the cross the preeminent symbol of fallen American soldiers.⁶ As a doctrinal matter, the case will probably be remembered as the occasion when a majority of the Court finally fully interred the long-maligned three-part “test” for Establishment Clause cases announced in *Lemon v. Kurtzman*.⁷ This is because even though Justice Kagan refused to join those parts of Justice Alito’s opinion denouncing and abandoning *Lemon*,⁸ both Justice Thomas⁹ and Justice Gorsuch¹⁰ in their separate opinions concurring in the judgment unequivocally agreed that *Lemon* was incorrect, bringing to six the number

1. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

2. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

3. 139 S. Ct. 2067 (2019).

4. *Id.* at 2077.

5. The opinion was joined in whole by Chief Justice Roberts and Justices Breyer and Kavanaugh, and in most parts by Justice Kagan, supplying the fifth vote.

6. *Am. Legion*, 139 S. Ct. at 2082–87.

7. 403 U.S. 602 (1971).

8. *Am. Legion*, 139 S. Ct. at 2094 (Kagan, J., concurring in part).

9. *Id.* at 2097–98 (Thomas, J., concurring in the judgment).

10. *Id.* at 2101 (Gorsuch, J., concurring in the judgment).

of the Justices voting to abandon *Lemon*. Justice Scalia’s “ghoul” appears to finally be dead for good.¹¹

The focus of this Essay, however, is not on the holding in *American Legion*, or (directly) on the demise of *Lemon*. It is rather on the argument that Justice Gorsuch (joined by Justice Thomas) made in his opinion concurring in the judgment, that the case should have been dismissed for lack of standing rather than decided on the merits.¹² In brief, Justice Gorsuch argues that lower courts have granted standing, in cases challenging religious displays on government property, to individuals who are forced to regularly suffer “unwelcome direct contact” with such displays because those courts believed that the *Lemon* test, as interpreted in later cases, required this result.¹³ This is an anomaly because in no other area of law has the Court found “offense” alone to constitute injury-in-fact for standing purposes.¹⁴ With *Lemon* gone, he concludes, the Court can now reconcile standing in Establishment Clause cases with its broader standing doctrine.¹⁵

Justice Gorsuch’s argument, drawn from an amicus brief filed by Michael McConnell on behalf of the Becket Fund for Religious Liberty,¹⁶ is intriguing and at first fairly persuasive. He is, after all, quite correct that the Court has repeatedly rejected offense or hurt feelings alone as sufficient to establish Article III injury in other contexts.¹⁷ The ways in which Justice Gorsuch (and the Becket Fund) intertwine their standing argument with the test on the merits for Establishment Clause violations, however, raise some deep and difficult questions. Consider now the two quotes at the head of this Essay, both drawn from majority opinions by the Supreme Court in leading and often-cited standing cases (and in both of which the Court rejected standing). They are, of course, flatly contradictory. Can it be, as Justice Gorsuch argues, that a change in the substantive standard for evaluating Establishment Clause claims will also alter the universe of plaintiffs who have standing to bring such claims? Not according to Justice Scalia’s opinion in *Lujan*, but perhaps under Justice Powell’s opinion in *Warth*. So who is right? I will argue here that neither is exactly right (though the *Lujan*

11. See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (describing the *Lemon* test as “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried”).

12. *Am. Legion*, 139 S. Ct. at 2098 (Gorsuch, J., concurring in the judgment).

13. *Id.* at 2098–2101 (quoting *Am. Humanist Ass’n v. Md.-Nat’l Capital Park & Planning Comm’n*, 874 F.3d 195, 203 (4th Cir. 2017)).

14. *Id.* at 2098.

15. *Id.* at 2102.

16. Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717), 2018 WL 6819439 [hereinafter “Becket Fund Brief”].

17. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016); *Allen v. Wright*, 468 U.S. 737, 754–55 (1984), *abrogated on other grounds by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Sierra Club v. Morton*, 405 U.S. 727, 738–40 (1972).

quote, written in Justice Scalia's typically forceful language, is probably more clearly wrong than the one from *Warth*). And ultimately, I will argue that while Justice Gorsuch is probably correct that what he calls "offended observer"¹⁸ standing in religious display cases is inappropriate, it is *not* because of the recent change in substantive law. Rather, such standing was always inappropriate.

Part I summarizes current standing doctrine and discusses the relationship between substantive law and the doctrine's requirement of an "injury in fact." Part II describes the basis and current status of "offended observer" or "unwelcome direct contact" standing in religious display cases in the lower courts, including an extant circuit split on the issue, as well as Justice Gorsuch's objections to such standing in *American Legion*. Part III considers whether the Establishment Clause should be understood to create Article III standing for "offended observers" challenging religious displays, and what the consequences of denying such standing are for government religious displays. Finally, Part IV will consider the broader implications of rejecting "offended observer" standing, both for Establishment Clause litigation, and for other areas of standing law.

I. STANDING AND SUBSTANCE

Though standing doctrine has its roots in decisions going back to the 1930s,¹⁹ the modern doctrine began to emerge in Justice Douglas's 1970 opinion in *Ass'n of Data Processing Services Organizations v. Camp*²⁰ interpreting the Administrative Procedure Act. Over the subsequent two decades or so, the Supreme Court formalized the doctrine, holding that to establish standing, a "plaintiff²¹ must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."²² These requirements, the Court has said, are constitutional and derive from the language of Article III limiting the jurisdiction of federal courts to "cases" and "controversies."²³ As such, standing is nonwaivable and jurisdictional. One consequence of this analysis, however, is that standing is not constitutionally required in tribunals other than Article III federal courts, such as administrative tribunals and (crucially, as we shall see²⁴) state courts.

18. *Am. Legion*, 139 S. Ct. at 2098 (Gorsuch, J., concurring in the judgment).

19. *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341–45 (1936) (Brandeis, J., concurring).

20. 397 U.S. 150 (1970).

21. And also, we later learned, defendants appealing adverse judgments. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

22. *Allen*, 468 U.S. at 751.

23. *Id.* at 750–51.

24. *See infra* notes 118–119 and accompanying text.

The three elements of standing (injury, causation, and redressability) are now well established and have been elucidated in a huge number of cases. Regarding the injury (or as later cases would have it, “injury in fact”) requirement in particular, the *Lujan* Court clarified that the injury must be “concrete and particularized” as well as “actual or imminent.”²⁵ More recently, we have learned that plaintiffs may not “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm.”²⁶ In other regards, however, the Court has notably failed to define what precisely constitutes a requisite “injury.”

One area where the Court has been particularly unclear is the relationship between cognizable injuries and the underlying substantive law under which a claim has been brought. Ironically, the case in which the Court has considered (and muddled) this question most thoroughly is *Lujan*. The second opening quote above, from *Lujan*, suggests that there should be no relationship at all between injury and substantive law. Just two pages later, however, Justice Scalia’s majority opinion acknowledges that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.”²⁷ And in an important and influential concurring opinion in *Lujan*, Justice Kennedy made the point that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”²⁸ Thus clearly the *Lujan* Court is acknowledging *some* connection between standing and substance, but is quite unclear on what that is.

The Court returned to this question a few years later, in *Federal Election Commission v. Akins*.²⁹ In that case, a group of voters sued the Federal Election Commission, seeking an order requiring the FEC to regulate the American Israeli Political Action Committee (AIPAC) as a “political committee,” which would have required AIPAC to disclose substantial information about itself.³⁰ The Commission refused, and the plaintiffs sought judicial review. The Court only addressed the standing issue in the case: whether the plaintiffs’ inability to obtain information that would assist them to evaluate candidates for political office constituted injury in fact. The majority held that it did because the plaintiffs’ desire for the information was “concrete,” and Congress, “intending to protect voters such as [plaintiffs] from suffering the kind of injury here at issue, intended to authorize this kind of suit.”³¹

25. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

26. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013).

27. *Lujan*, 504 U.S. at 578.

28. *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

29. 524 U.S. 11 (1998).

30. *Id.* at 16, 21.

31. *Id.* at 20.

The Court recently wrestled with this same dilemma in *Spokeo v. Robins*, in which an individual brought suit under the Fair Credit Reporting Act against a “people search engine” which reported substantial inaccurate information about the plaintiff.³² The issue the Court faced was whether the reporting of inaccurate information alone established standing. Quoting the two statements from *Lujan* regarding congressional authority, the Court noted that Congress has a special role to play in recognizing and elevating to cognizable status “intangible” injuries.³³ Nonetheless, the Court concluded that the plaintiff, Robins, could not establish a “concrete” injury merely by showing that Spokeo spread false information about him; he also had to show that that information caused him “harm.”³⁴ The Court did not, however, define what “harm” meant, or why Congress could not create a right, in itself, for individuals not to have falsehoods spread about them.³⁵ The uncertainty in the Court’s jurisprudence in this area thus persists.

Before proceeding to the specific issue of standing analysis in religious display cases, it is useful to briefly consider three relatively early standing cases that are relevant to that analysis. The first two, decided on the same day in 1974, concern standing to enforce structural constitutional provisions. In *Schlesinger v. Reservists Committee to Stop the War*,³⁶ a group of reserve military officers sued to enforce the Incompatibility Clause of the Constitution, which forbids members of Congress from “holding any Office under the United States.”³⁷ Their claim was that the reserve military commissions held by some members of Congress violated this clause. The Court dismissed for lack of standing, holding that plaintiffs, suing in their capacity as citizens, had not suffered any concrete injury as a consequence of the alleged Incompatibility Clause violation, other than to their abstract desire to have the government comply with the Constitution.³⁸ Importantly, the Court rejected the argument (accepted by the District Court) that the Incompatibility Clause itself was designed to protect against the injury plaintiffs alleged, holding that this was insufficient to create concrete injury.³⁹ And it further dismissed the District Court’s concern that if plaintiffs lacked standing then no one would be able to enforce the Incompatibility Clause, on the grounds that “[o]ur system of government leaves many crucial decisions to the political processes.”⁴⁰

32. 136 S. Ct. 1540, 1546 (2016).

33. *Id.* at 1549.

34. *Id.* at 1550.

35. *Id.*

36. 418 U.S. 208 (1974).

37. *Id.* at 209–10 (quoting U.S. CONST. art. I, § 6, cl. 2).

38. *Id.* at 222–23.

39. *Id.* at 224.

40. *Id.* at 227.

*United States v. Richardson*⁴¹ raised a distinct and more difficult issue than *Schlesinger*. There, a taxpayer brought suit challenging a statutory provision which permitted the CIA to refuse to disclose its detailed expenditures, on the grounds that this practice violated the Accounts Clause of the Constitution.⁴² The Court again denied standing, finding that there was no “logical nexus” between Richardson’s identity as a taxpayer and his desire to obtain information about CIA spending.⁴³ The “logical nexus” test derived from the Court’s decision in *Flast v. Cohen*,⁴⁴ where the Court *did* recognize taxpayer standing to challenge legislative appropriations as violating the Establishment Clause. *Flast* remains the only instance where the Court has recognized taxpayer standing, another example of Establishment Clause exceptionalism in the standing area. Finally, as in *Schlesinger*, the Court specifically noted that the fact that its holding meant no one could sue to enforce the Accounts Clause was irrelevant, because that simply meant that “the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”⁴⁵

There are two points about *Richardson* that are worthy of further attention. First, note that under the *Richardson* and *Flast* “logical nexus” test, determination of standing does require some attention to the substantive issue in the case. However, it does not merge the analysis completely—perhaps because *Flast* was creating a deliberately narrow exception to the general rule rejecting taxpayer standing. Indeed, in an influential concurring opinion in *Richardson* Justice Powell specifically criticized this aspect of *Flast*, and proposed to abandon it (albeit he would have adhered to the specific holding in *Flast* on *stare decisis* grounds).⁴⁶ Second, there is an obvious tension between *Richardson* and *Akins*, in that both cases involved citizens suing to obtain information of general, political relevance, yet the Court found standing in *Akins*, but not *Richardson*. The *Akins* Court reconciled the cases on the grounds that *Richardson* involved enforcement of a structural constitutional provision, while in *Akins* Congress had specifically granted voters a right to the information at issue.⁴⁷ We will come back to the significance of this holding later.⁴⁸

The third significant case, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,⁴⁹ involved the Establishment

41. 418 U.S. 166 (1974).

42. U.S. CONST. art. I, § 9, cl. 7 (“[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

43. *Richardson*, 418 U.S. at 174–75.

44. 392 U.S. 83 (1968).

45. *Richardson*, 418 U.S. at 179.

46. *Id.* at 180–81 (Powell, J., concurring).

47. *FEC v. Akins*, 524 U.S. 11, 21–23 (1998).

48. See *infra* notes 101–104 and accompanying text.

49. 454 U.S. 464 (1982).

Clause. The plaintiffs, relying on *Flast v. Cohen*, challenged the transfer of real property from the federal government to a religious college.⁵⁰ The Court denied standing, limiting *Flast* to challenges to legislative appropriations of money, not property transfers that have no direct effect on government taxing or spending,⁵¹ and finding that plaintiffs could point to no concrete, personalized injury necessary to establish citizen standing.⁵² In so holding, the Court reaffirmed that constitutional provisions, including the Establishment Clause, do not create a “personal constitutional right” to a government that complies with the Constitution.⁵³ The Court closed its analysis by quoting *Schlesinger* for the principle that “[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”⁵⁴

In short, some aspects of standing law, such as the basic three-element test, as well as the principle that the lack of any other available plaintiffs is not a reason to recognize standing for a particular plaintiff, are by now extremely well established. Other aspects of the doctrine, however, notably the relationship between the definition of a cognizable injury and underlying, substantive law, remain very much in flux. In closing it should be noted that on the latter question, neither extreme solution can be correct, given current law. It cannot be that the very existence of a legal requirement creates a right to that requirement being enforced, such that denial of such a “right” constitutes injury in fact, because in such a world standing doctrine does no work separate from the merits. All legal violations would produce plaintiffs with standing; yet in cases like *Schlesinger* and *Richardson*, the Court denied standing even though the plaintiffs’ claims on the merits were very strong. And there are of course innumerable cases where litigants clearly have standing because they are subjected to coercive regulations, but lose on the merits in challenging such regulations. On the other hand, it cannot be that there is no connection between substantive law and injury, because that would leave unexplained the vast increase in the scope of litigation and litigable injuries under the administrative state. Cases like *Akins* and dozens of others involving litigation of administrative statutes, as well as the various dicta in *Lujan*, clearly establish that Congress has *some*

50. *Id.* at 478–79.

51. *Id.* at 480. The Court has subsequently limited *Flast* even further, rejecting taxpayer standing to challenge executive branch funding decisions in *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007), and to challenge tax credits granted to religious entities in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011).

52. *Valley Forge*, 454 U.S. at 485–86.

53. *Id.* at 483 (quoting *Ams. United for Separation of Church & State, Inc. v. U.S. Dep’t of Health, Educ. & Welfare*, 619 F.2d 252, 265 (3d Cir. 1980)).

54. *Id.* at 489 (alteration in original) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

authority to make actionable injuries that would not have supported a common law lawsuit.

Indeed, in the constitutional realm, the Supreme Court's affirmative action jurisprudence clearly links standing and the merits. In its 1978 *Bakke* decision, for example, the Court held that Bakke had standing to challenge an affirmative action program at a public medical school even though he could not demonstrate that he would have been admitted to the medical school absent the program.⁵⁵ The Court's explanation was that Bakke's injury could be found "in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race."⁵⁶ Following up on this, in *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*,⁵⁷ the Court permitted a contractors' association to challenge a minority set-aside program for government contracts despite its inability to show that the program had actually deprived any member of the association of a contract. Again, the Court's logic was that in this situation, the relevant injury in fact was "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."⁵⁸ The results in these cases, finding injury simply in denial of "equal treatment" with no tangible loss, is simply inconceivable outside the Equal Protection sphere. Indeed, in *Lujan* itself the Court specifically held that denial of procedure alone, absent an underlying concrete injury, did not satisfy Article III.⁵⁹ It is hard to see what the difference is between being denied the ability to participate equally in an admissions or contracting *process*, and the denial of process in *Lujan*, unless the Equal Protection Clause itself is understood to grant citizens a right to be treated equally, such that denial of that right alone constitutes injury in fact.

II. ENDORSEMENT AND OFFENDED OBSERVERS

Returning now to the problem of religious displays, as Justice Gorsuch notes in his concurrence in the *American Legion* case, the plaintiffs challenging the cross monument claimed injury because they "regularly" came into "direct contact" with the cross in their personal lives.⁶⁰ As he also correctly notes, this "direct contact" theory of standing, which Justice

55. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978).

56. *Id.*

57. 508 U.S. 656 (1993).

58. *Id.* at 666.

59. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–78 (1992).

60. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring in the judgment) (quoting *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 203 (4th Cir. 2017)).

Gorsuch labels “offended observer” standing,⁶¹ has been widely accepted in the lower courts.⁶² In a much-cited opinion by Judge Wilkinson, the Fourth Circuit nicely explains the theory behind such standing.⁶³ The plaintiff in that case, Richard Suhre, was challenging a Ten Commandments display in a local courthouse, which Suhre regularly came into unwanted contact with because of his litigious nature.⁶⁴ The court reversed the District Court’s dismissal of the litigation on standing grounds, finding that Suhre’s contact with the display did cause him injury in fact. The opinion begins by noting that “the standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer,”⁶⁵ which are likely to implicate the “spiritual, value-laden beliefs of the plaintiffs” rather than tangible harm.⁶⁶ With respect to religious display cases in particular, Judge Wilkinson explains that the relevant injury is caused by “unwelcome direct contact with a religious display that appears to be endorsed by the state.”⁶⁷ Wilkinson traces this principle to the Supreme Court’s leading 1963 decision in *School District of Abington Township v. Schempp* in which the Court held that school children and their parents had standing to challenge Bible readings in public schools because they were “directly affected” by the readings (and ultimately, of course, held that such readings violate the Establishment Clause).⁶⁸ And importantly, the *Suhre* opinion clarifies that the source of such standing is not abstract “offense” (*pace* Justice Gorsuch), but rather being made to feel a religious outsider when such endorsement occurs within one’s own community, and especially in public facilities.⁶⁹

In his analysis, Judge Wilkinson drew on an Establishment Clause/standing case from the Eleventh Circuit written by another highly respected judge, Frank M. Johnson. In *Saladin v. City of Milledgeville* the plaintiffs were challenging a city seal containing the word “Christianity.”⁷⁰ Here too, the court held that plaintiffs’ “direct contact” with the seal made them “feel like second class citizens,” and that this was enough to create injury in fact.⁷¹ Judge Wilkinson’s “direct contact” approach, followed by

61. *Id.* at 2098. Carl Esbeck has argued, somewhat convincingly, that the theory is better labeled “unwanted exposure” standing. Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 CHARLESTON L. REV. 607 (2013).

62. *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring in the judgment).

63. *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997).

64. *Id.* at 1084–85.

65. *Id.* at 1086.

66. *Id.* (quoting *ACLU of Ga. v. Rabun Cty. Chamber of Commerce*, 698 F.2d 1098, 1102 (11th Cir. 1983)).

67. *Id.*

68. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

69. *Suhre*, 131 F.3d at 1086–87.

70. *Saladin v. City of Milledgeville*, 812 F.2d 687, 688–89 (11th Cir. 1987).

71. *Id.* at 692–93.

the lower court in *American Legion*, thus was not an aberration. To the contrary, to this day most of the circuit courts of appeals continue to recognize standing in Establishment Clause cases based on direct contact with religious displays.⁷²

This is not to say that the circuits are unanimous in how they apply standing doctrine in these cases. In the *Suhre* litigation, Judge Wilkinson also noted that there is an ongoing circuit split over the exact requirements of “direct contact” standing. Some circuits require that plaintiffs encountering unwelcome religious displays change their conduct or behavior to avoid such displays.⁷³ As the *Suhre* court also notes, however, the majority of circuits to consider this question have rejected such a requirement, holding that unwanted, direct contact alone is sufficient to establish standing (a position that the *Suhre* court also adopted, concluding that to make putative plaintiffs give up access to public facilities to establish standing would add “‘insult’ to the existing ‘injury’ requirement.”)⁷⁴ This circuit split, which continues to exist, has been widely reported and described in the academic commentary.⁷⁵ Ultimately, however, it does not bear directly on the primary concern of this Essay, which is whether “direct contact” standing is consistent with Article III.⁷⁶

Let us now return to Justice Gorsuch and *American Legion*. Much of Justice Gorsuch’s opinion argues that outside of the Establishment Clause context, offense at government conduct alone has consistently been held insufficient to establish injury in fact because such a theory would permit any government action to be challenged by any citizen.⁷⁷ In this he is of course correct, as illustrated by *Schlesinger* and *Richardson*. He also argues

72. See, e.g., *Barber v. Bryant*, 860 F.3d 345, 353–54 (5th Cir. 2017); *Am. Humanist Ass’n v. Douglas Cty. Sch. Dist. Re-1*, 859 F.3d 1243 (10th Cir. 2017); *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 479 (3d Cir. 2016); *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015); *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023–24 (8th Cir. 2012); *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429–30 (6th Cir. 2011); *Newdow v. Lefevre*, 598 F.3d 638, 642–43 (9th Cir. 2010); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1279–80 (11th Cir. 2008); *Books v. Elkhart County*, 401 F.3d 857, 861 (7th Cir. 2005).

73. *Suhre*, 131 F.3d at 1087 (citing *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1468 (7th Cir. 1988)).

74. *Id.* at 1087–88.

75. See, e.g., David S. Hill, Note, *City of Edmond v. Robinson: The Coercion-Standing Test—A New Approach to Religious Symbols Under the Establishment Clause?*, 2000 UTAH L. REV. 643, 657 nn.134–35; Daniel J. Austin, Comment, *How to Reconcile the Establishment Clause and Standing Doctrine in Religious Display Cases with a New Coercion Test*, 83 MISS. L.J. 605, 620–22 (2014); 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, 321–23 (2002).

76. In Part III, we will consider whether, if direct contact alone is insufficient to establish injury, adding the element of changed behavior might be. The answer, in brief, is no. See *infra* notes 107–112 and accompanying text.

77. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2098–2100 (Gorsuch, J., concurring in the judgment).

that what he calls “offended observer,” but lower courts call “direct contact,” standing is unique to the Establishment Clause, and inconsistent with the broader standing doctrine.⁷⁸ This assertion is more contestable. Indeed, Judge Wilkinson specifically rejected the latter argument on the grounds that the outsider status created by government endorsement of religion does not constitute mere “offense.”⁷⁹ Regardless, whether or not Justice Gorsuch is correct to label this form of standing an illegitimate type of Establishment Clause exceptionalism is the subject of Part III, which we can table.⁸⁰ For now what should interest us is *why* Justice Gorsuch believes this unquestionably unusual, and in his view illegitimate, form of standing came to be recognized.

According to Justice Gorsuch, the guilty party was *Lemon v. Kurtzman* (or rather, the Supreme Court itself, in creating the now-discredited *Lemon* test).⁸¹ *Lemon* held that in order to comply with the Establishment Clause, government action “must have a secular . . . purpose . . . [I]ts principal or primary effect must be one that neither advances nor inhibits religion, . . . [and it] must not foster ‘an excessive government entanglement with religion.’”⁸² Later cases, Justice Gorsuch accurately notes, interpreted *Lemon* to condemn government conduct that a “reasonable observer” would see as “endorsing” religion.⁸³ This, Justice Gorsuch argues, led lower courts to conclude that endorsement alone must permit a reasonable observer to sue.⁸⁴

Is Judge Gorsuch justified in tying direct-contact standing to *Lemon* and the endorsement test? It is true that in Judge Wilkinson’s 1997 *Suhre* opinion the court does tie the injury caused by direct contact to government endorsement,⁸⁵ and in a 2017 Fifth Circuit opinion (not involving a religious display) the court explicitly tied direct-contact standing in Establishment Clause cases to the endorsement test.⁸⁶ These in fact are the two citations

78. *Id.* at 2100–01, 2103.

79. *See supra* note 69 and accompanying text. Jessie Hill has described the harm at issue in such cases as “expressive harm,” and analogized it to the harm created by racial segregation. Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313, 1329–30 (1999). My own view is that *de jure* racial segregation, because it directly impinges on the physical liberty of individuals, fits more easily into traditional common law definitions of injury.

80. As noted earlier, the form of taxpayer standing recognized in *Flast v. Cohen* undoubtedly is a form of Establishment Clause exceptionalism in standing doctrine, somewhat strengthening Justice Gorsuch’s claim.

81. *Am. Legion*, 139 S. Ct. at 2101.

82. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970)).

83. *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring in the judgment) (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 620–21 (1989) (opinion of Blackmun, J.); *id.* at 631 (O’Connor, J., concurring in part and concurring in the judgment)).

84. *Id.*

85. *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997).

86. *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017).

that Justice Gorsuch (and Michael McConnell's Becket Fund brief that he was relying upon) provides for that proposition.⁸⁷ The problem is that Justice Gorsuch's timeline does not quite work. The *Lemon* test in its original form seems to have no connection to direct-contact standing. The "endorsement" reading of *Lemon*, under which the first two prongs ask whether the challenged government action had the purpose or effect of endorsing religion, first appeared in 1984 in Justice O'Connor's concurring opinion (for herself alone) in *Lynch v. Donnelly*,⁸⁸ in which the Court upheld the inclusion of a crèche as part of a Christmas display on public property. It was not adopted by a majority of the Court until five years later, however, in the 1989 *County of Allegheny* decision.⁸⁹ Yet Judge Johnson's crucial decision recognizing "direct contact" standing in *Saladin* was issued in 1987, two years before *County of Allegheny*. And *Saladin* in turn relied upon the Eleventh Circuit's earlier *Rabun* decision from 1983—i.e., before the endorsement test had even been articulated. *Rabun* struck down a large lighted cross in a state park, and found standing based on plaintiffs' physical contact with the cross which affected their ability to use the park.⁹⁰ And as *Rabun* in turn recognizes, the D.C. Circuit had in fact found standing to challenge a religious display as early as 1970, before even *Lemon* had been decided!⁹¹ Obviously, the standing story is more complex than the simple causality from *Lemon* to endorsement to "offended observer" standing claimed by Justice Gorsuch.

Nonetheless, there is clearly truth to Justice Gorsuch's assertion that there is a link between the substantive law of the Establishment Clause, and the willingness of the lower courts to grant standing based on direct contact with religious displays (with or without a requirement of additional actions by plaintiffs). In *Lynch*, Justice O'Connor explicitly tied her newly minted "endorsement" test to the concern that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community."⁹² Building on this, in finding standing Judge Johnson's *Saladin* opinion undoubtedly does rely upon the idea that "the City's endorsement of Christianity . . . makes the appellants feel like second class citizens."⁹³ And the en banc Ninth Circuit has gone even further, finding standing to challenge a San Francisco Board of Supervisors' resolution

87. *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring in the judgment); Becket Fund Brief, *supra* note 16, at 32–33.

88. 465 U.S. 668, 688–690 (1984) (O'Connor, J., concurring).

89. *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). This portion of Justice Blackmun's opinion was joined by a majority of the Court.

90. *ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1105–08 (11th Cir. 1983) (per curiam).

91. *Id.* at 1105 (citing *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970)).

92. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

93. *Saladin v. City of Milledgeville*, 812 F.2d 687, 692–93 (11th Cir. 1987).

condemning the actions of the Catholic Church without any evidence of “direct contact” on the part of the plaintiff, because “the psychological consequence [of the Board’s adoption of the resolution] was exclusion or denigration on a religious basis within the political community.”⁹⁴

Justice Gorsuch is also clearly correct that the form of “outsider status” standing recognized in the “direct contact” cases is unique to the Establishment Clause. In particular, the result reached in the Ninth Circuit case just described is simply inconceivable outside the Establishment Clause context. After all, the government speaks on nonreligious issues all the time in ways that can make significant portions of the population feel like outsiders; indeed, that seems to be the main function of President Trump’s Twitter account, which the White House has stated is “official.”⁹⁵ Yet no one believes that this creates standing for victims to challenge that speech. Finally, in the *Moore v. Bryant* case cited by Justice Gorsuch,⁹⁶ the court relied upon the different purposes of the Establishment Clause and the Equal Protection Clause to deny standing to a lawyer who was challenging the inclusion of the Confederate battle flag in the Mississippi state flag.⁹⁷ In particular, the court distinguished the Establishment Clause “direct contact” standing cases because the “Establishment Clause prohibits the Government from endorsing a religion . . . [but] the gravamen of an equal protection claim is differential government treatment, not differential government messaging.”⁹⁸

In short, whatever the relationship between the *Lemon* or endorsement tests and direct-contact standing, there is no question that the lower court decisions recognizing such standing rely upon their substantive understanding of the demands of the Establishment Clause. We now turn to the question of whether this reliance is consistent with the broader scope of Article III standing doctrine.

III. CREATING INJURY

Based on the discussion so far, it seems clear that the theory behind the many decisions recognizing direct-contact standing is that even though in general feelings of hurt or exclusion do not constitute “injury in fact” for standing purposes, the Establishment Clause does make such injuries

94. Catholic League for Religious and Civil Rights v. City & County of San Francisco, 624 F.3d 1043, 1052 (9th Cir. 2010) (en banc).

95. Elizabeth Landers, *White House: Trump’s Tweets Are ‘Official Statements,’* CNN (June 6, 2017, 4:37 PM), <https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html> [<https://perma.cc/5AL4-9X8M>].

96. See *supra* note 86 and accompanying text.

97. *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017).

98. *Id.* (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

actionable because its very purpose is to prevent religious divisiveness and the political exclusion of non-adherents to the state's favored religion. As we noted, the Court has long recognized some link between standing and substantive law.⁹⁹ Furthermore, in the *Lujan* case itself—the primary citation for the contrary position—the majority recognized that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.”¹⁰⁰ Justice Kennedy's arguably-controlling concurring opinion in that case went even further, stating that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”¹⁰¹ These pronouncements, coming from a decision that is arguably the most hostile to standing in modern history, clearly recognize some ability for substantive law to create injuries not recognized traditionally by common law courts. They thus provide some support for direct-contact standing.

But now a pause is necessary, because if substantive law always is sufficient to create injury then, as noted earlier, the law of standing disappears and cases like *Schlesinger*, *Richardson*, and *Valley Forge* (to say nothing of dozens of other cases denying standing despite strong claims on the merits) must be wrong. Perhaps the answer is that while substantive law can create injury, there is still a minimum level of “concreteness” required, so that purely general, ideological injury will not suffice. Such a principle can explain *Schlesinger* and *Valley Forge*, because in both cases the plaintiffs were not in any way directly and personally confronted or affected by the allegedly unconstitutional government conduct. But it cannot explain *Richardson*, in which the plaintiffs personally sought specific information that was of undoubted value to them. And it cannot explain how *Richardson* can be reconciled with *Akins*, where a desire to obtain information was recognized as injury in fact.

The answer to this conundrum can be found in *Akins* itself. Perhaps, as *Akins* strongly suggests, the substantive law that can recognize/create new injuries must stem from Congress (and perhaps state legislatures), not the Constitution itself. In the era of the administrative state, in which statutes and regulations authorized by statutes do enormous amounts of work that would have been inconceivable in the pre-modern era, it makes sense for Congress to also have the power to make actionable injuries that flow from

99. See *supra* note 1 and accompanying text.

100. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

101. *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

violations of this new legal regime.¹⁰² Such a power is a rational element of Congress's authority to make laws that are "necessary and proper for carrying into Execution the foregoing Powers [granted to Congress], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹⁰³ Indeed, without such a power much of modern administrative litigation since the 1960s is inexplicable.¹⁰⁴

The Constitution, however, is arguably different. When the Constitution was drafted and adopted from 1787 to 1789, when the First Amendment was proposed and ratified from 1789 to 1791, and when the Fourteenth Amendment was proposed and ratified from 1865 to 1868, the legal background was radically different from today. Courts were common law courts, and civil litigation was overwhelmingly common law litigation. And thus the kinds of interests asserted in civil litigation were interests protected by the common law. Constitutional issues, when they arose (which was rarely), were typically litigated as defenses to or elements of common law claims.¹⁰⁵ From this background, it seems reasonable to assume that the Constitution itself does not create injuries or judicially enforceable legal rights; it rather provides substantive law to be applied when a more traditional legal claim is adjudicated.

If this is true, then the cases recognizing direct-contact standing to bring Establishment Clause challenges are clearly incorrectly decided. As discussed extensively in the first two Parts of this Essay, in no other context do courts treat offense, feelings of exclusion, or unwelcome contact alone as sufficient to create injury. And certainly the common law would not have recognized any such actionable right. Perhaps Congress, under its Section 5 power to "enforce" the Fourteenth Amendment, could create such an injury

102. I set aside the fraught question, arguably underlying the dispute in *Lujan*, of whether there are any limits on Congress's power in this regard, because while of great interest, it is not relevant to the primary issue I address.

103. U.S. CONST. art. I, § 8, cl. 18.

104. Examples include the statutory right of radio and television audience members to challenge the Federal Communications Commission's licensing decisions, *see* *Office of Comm'n of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), and rights of those who enjoy the environment to challenge projects that would degrade it. *See, e.g.,* *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("We do not question that this type of harm [aesthetic injury] may amount to an 'injury in fact' sufficient to lay the basis for standing . . ."); *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965). Indeed, in *Lujan* itself Justice Scalia commented that "[o]f course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for [the] purpose of standing." *Lujan*, 504 U.S. at 562–63 (emphasis added). Yet the inability to view endangered animals one does not own, like the other interests described above, surely were not interests protected at the common law.

105. *See, e.g.,* *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (resolving constitutionality of Missouri Compromise in actions for assault); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (resolving Contracts Clause issue raised in an action for trover).

or right, at least against state and local governments.¹⁰⁶ But if it has not done so, the Establishment Clause on its own cannot make actionable an injury that would not traditionally have been recognized as such.

This principle, if accepted, might also explain why some courts of appeals do not permit standing based purely on direct contact with religious displays, but also require proof that plaintiffs altered their behavior to avoid the offending display.¹⁰⁷ Such additional steps arguably infringe on traditional liberty interests in a way that direct contact alone does not. After all, surely the common law would have treated as injury a citizen's physical exclusion from public property open to the public at large.¹⁰⁸ The difficulty is that in *Clapper v. Amnesty International U.S.A.*,¹⁰⁹ the Court rejected essentially this argument. It held that absent an underlying injury in fact, actions that plaintiffs voluntarily take to avoid perceived (but nonactionable) harm do not constitute injury for standing purposes.¹¹⁰ The reason, the Court stated, was that "[plaintiffs] cannot manufacture standing merely by inflicting harm on themselves If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure" ¹¹¹ And this must be correct. Just as Richardson could not have "manufactured" standing for himself by exerting efforts to obtain information about the CIA's expenditures (which in fact he did do¹¹²), so plaintiffs cannot create standing by voluntarily avoiding a display that does not itself cause them cognizable injury (it would, of course, be a different matter if a plaintiff were legally excluded from government property or legally compelled to observe the offending display).

Finally, we are confronted with the argument that if direct-contact plaintiffs do not have standing to challenge religious displays then no one will have standing, making them effectively immune from constitutional review. This argument was made by Justice Ginsburg in her dissent in *American Legion*—though she did so by conflating standing and the merits.¹¹³ It was made by an amicus brief on behalf of Law Professors in

106. U.S. CONST. amend. XIV, § 5. The reason, of course, is that the Establishment Clause applies against the states and their components only because it has been "incorporated" into the Due Process Clause of the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

107. See *supra* note 73 and accompanying text.

108. Whether such exclusion would have been found invalid is another matter. See *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895) (Holmes, J.).

109. 568 U.S. 398 (2013).

110. *Id.* at 416.

111. *Id.*

112. *United States v. Richardson*, 418 U.S. 166, 168 (1974).

113. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2105 n.3 (2019) (Ginsburg, J., dissenting) (arguing that if Justice Gorsuch's standing argument was accepted, then statements by Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, recognizing that *some* religious displays are unconstitutional "were out of line . . . for no one . . . should be heard to complain about such a thing").

American Legion, authored by Chris Lund (and cited by Justice Ginsburg).¹¹⁴ And it has been made by a number of scholars in defense of current standing rules.¹¹⁵ There is, however, an obvious response to this. In *Schlesinger*, *Richardson*, and *Valley Forge*, the Court pointed out that “[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”¹¹⁶ The reason, as the *Richardson* Court explained, is that the lack of plaintiffs with standing simply means that “the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”¹¹⁷

The implications of the above analysis are clear. Because of a lack of plaintiffs with standing, government religious displays (at least outside the school context¹¹⁸) are not generally subject to *federal judicial* scrutiny under the Establishment Clause. One possibility is that such disputes might be resolved primarily in state courts, who are after all not bound to Article III standing rules. This, however, strikes me as a relatively unlikely outcome in most instances. For one thing, even though not bound by Article III many state courts do follow some version of standing rules, often modeled upon the Article III rules created by the Supreme Court.¹¹⁹ In addition, for the reasons famously identified by Chief Justice Marshall and Burt Neuborne, there are reasons to think that state court judges, especially in states where government-sponsored religious displays are common, are likely to be hostile to federal constitutional claims against such displays.¹²⁰

As a consequence, in practice absent plaintiffs with Article III standing disputes over government religious displays will usually be relegated to what Larry Kramer has called “popular constitutionalism,”¹²¹ and what Steven D. Smith, speaking specifically about standing and the

114. Brief for Law Professors as Amici Curiae Supporting Respondents at 6–7, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717), 2019 WL 582080, at *6–7 [hereinafter “Law Professors Brief”].

115. See, e.g., John M. Bickers, *Standing on Holy Ground: How Rethinking Justiciability Might Bring Peace to the Establishment Clause*, 60 CLEV. ST. L. REV. 415, 446 (2012); Esbeck, *supra* note 61, at 618–19, 624, 647–48; Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, BYU L. REV. 115, 119 (2008); Merav Bennett, Comment, *Standing for Statues, but Not for Statutes? An Argument for Purely Sigmatic Harm Standing Under the Establishment Clause*, 86 U. CHI. L. REV. 1563, 1576 (2019).

116. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 489 (1982) (alteration in original) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)); *Richardson*, 418 U.S. at 179.

117. *Richardson*, 418 U.S. at 179.

118. The question of why the school context might make a difference is explored in Part IV.

119. Calvin Massey, *Standing in State Courts, State Law, and Federal Review*, 53 DUQ. L. REV. 401, 402–04 (2015).

120. *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

121. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

Establishment Clause, calls the “soft constitution.”¹²² Enforcement of the Establishment Clause in this context (though by no means all contexts, as discussed in Part IV) would be left primarily to constitutional politics, in which participants can and should consider constitutional values, but ultimately resolve the disputed issues through compromise and some geographic variation.¹²³ It might be remembered in this regard that Madison’s famous Memorial and Remonstrance opposing taxation to support religion, which deeply influenced the *Flast* Court’s decision to find taxpayer standing under the Establishment Clause,¹²⁴ was addressed to the Virginia legislature, not to the courts.¹²⁵

Indeed, there is an argument to be made that the Establishment Clause questions are particularly well-suited to political resolution because as any number of scholars have pointed out, the Establishment Clause is primarily a structural provision rather than one, such as the Free Exercise or Free Speech Clauses, intended to protect individuals’ rights.¹²⁶ This is precisely why Establishment Clause violations often do not yield plaintiffs with standing; but it is also why leaving these issues to the political process is not the end of the world.¹²⁷ Furthermore, Justice Gorsuch makes the fair argument that given the sheer number of government religious displays that exist throughout our country, there is something to be said for rescuing the federal judiciary from this maelstrom.¹²⁸ This is not to say, of course, that structural provisions are never subject to judicial enforcement. When a plaintiff with injury in fact and standing does exist, structural provisions such as the Appointments Clause¹²⁹ and the Article I, Section 7 requirements of bicameralism and presentment¹³⁰ can of course be litigated. And so with the Establishment Clause. But it does mean that as with all structural provisions, not all disputes will necessarily produce a proper plaintiff.

122. See generally Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN’S L. REV. 407 (2011).

123. *Id.* at 410–11, 420–22.

124. See *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968).

125. James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0163> [https://perma.cc/A37B-95SH].

126. See, e.g., Esbeck, *supra* note 61, at 647–48; Lupu & Tuttle, *supra* note 115, at 133–34; William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 374 (1991); William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 231–32, 231 n.115.

127. For an argument to this effect discussing the *American Legion* case, see Richard Garnett, *Symposium: The End of a Walking Dead Doctrine?*, SCOTUSBLOG (Dec. 11, 2018, 1:03 PM), <https://www.scotusblog.com/2018/12/symposium-the-end-of-a-walking-dead-doctrine/> [https://perma.cc/85XV-LK6S].

128. See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the judgment).

129. See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

130. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

Another equally important conclusion, however, also flows from the above analysis separating the standing and merits questions regarding the Establishment Clause. The fact that no plaintiff exists to challenge a religious display does *not* mean, or even imply, that the display is constitutional. To the contrary, it might well violate the Establishment Clause, and elected and other officials, pursuant to their oath to uphold the Constitution, have a clear and unambiguous obligation to consider whether that is so (as of course do state court judges, if they are willing to hear litigation over these issues). And if those officials conclude that the display is unconstitutional, it is their legal and personal obligation, pursuant to their oath to uphold the Constitution, to take the display down.

A brief word on substance. The only substantive reading of the Establishment Clause that would find *all* religious displays to be constitutional would be to require legal coercion as a necessary element of an Establishment Clause violation, as Justice Thomas proposes in *American Legion* and elsewhere.¹³¹ This is certainly not the place to get into the endless disputes over the “endorsement” versus “coercion” versus “historical” approaches to the Establishment Clause. Suffice to say that the Supreme Court rejected Justice Thomas’s proposition as early as 1962 in its first school prayer case, *Engel v. Vitale*,¹³² for the obvious reason that making legal coercion the Establishment Clause “test” makes it duplicative of the Free Exercise Clause.¹³³ Justice Thomas’s argument, that because historical establishments generally did include an element of coercion, coercion is a necessary element of an establishment,¹³⁴ is a non sequitur. It might also be pointed out that Michael McConnell, who did as much as anyone to bring the coercion argument to public attention,¹³⁵ did *not* argue for a coercion test in his Becket Fund amicus brief in *American Legion*, but rather advocated a “historical approach.”¹³⁶ And to put the icing on the cake, even Justice Kennedy, who wrote the original, leading opinion advocating a coercion test for the Establishment Clause (in a dissent for four Justices in *County of Allegheny*),¹³⁷ conceded in that case that the Establishment “Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.”¹³⁸ And more recently he repeated that concession,

131. *Am. Legion*, 139 S. Ct. at 2096–97 (Thomas, J., concurring in the judgment).

132. 370 U.S. 421, 430–31 (1962).

133. See Lupu & Tuttle, *supra* note 115, at 135.

134. *Am. Legion*, 139 S. Ct. at 2096 (Thomas, J., concurring in the judgment).

135. See generally Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

136. Becket Fund Brief, *supra* note 16, at 7–29.

137. *County of Allegheny v. ACLU*, 492 U.S. 573, 659–61 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

138. *Id.* at 661.

this time joined by Chief Justice Roberts and Justice Alito.¹³⁹ Yet it is hard to see how such a cross would create *legal* coercion. Thus a true legal-coercion-only approach to Establishment does not appear to have many advocates on the Court or elsewhere, aside from Justice Thomas.

Of course, the argument presented here suggests that even if Justice Kennedy's Latin cross is unconstitutional, there is no way for a federal court to adjudicate that point. That appears to be true, and the constitutional cost of standing doctrine. It might be pointed out, however, that if a small, religiously homogeneous city did erect a permanent Latin cross on its city hall but no one within the city objected, then too there would be no plaintiff available, even under a direct contact theory, to challenge the cross. But it would remain just as unconstitutional.

IV. IMPLICATIONS BEYOND RELIGIOUS DISPLAYS

If the argument made in the previous section is accepted, what are the implications for judicial enforcement of the Establishment Clause, or more broadly of the Constitution, outside the context of religious displays? And in particular, does denial of standing in religious display cases spell the demise of the Court's foundational school prayer cases—*Engel v. Vitale*¹⁴⁰ and *School District of Abington Township v. Schempp*¹⁴¹—as argued by the Law Professors' amicus brief?¹⁴² Justice Gorsuch's answer is that it would not, because the students in those cases were “compelled to recite a prayer.”¹⁴³ And the Becket Fund brief similarly argues, quoting *Valley Forge*, that these cases are unaffected because the students who sued were “coercively ‘subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.’”¹⁴⁴ This, however, moves a little too fast. First of all, at first cut it is hard to see the difference between a prayer or Bible passage read at one, and a religious display thrust upon one, and in particular why the former is “coercive” while the latter is not. Furthermore, as the Law Professors Brief noted, in both those cases students were permitted to excuse themselves from the readings.¹⁴⁵ And finally, as also noted in the Law Professors Brief, in both those cases the Court specifically

139. *Salazar v. Buono*, 559 U.S. 700, 715 (2010) (plurality opinion).

140. 370 U.S. 421 (1962).

141. 374 U.S. 203 (1963).

142. See Law Professors Brief, *supra* note 114, at 8–9.

143. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2102 (Gorsuch, J., concurring in the judgment).

144. Becket Fund Brief, *supra* note 16, at 33 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982)).

145. Law Professors Brief, *supra* note 114, at 8 (citing *Schempp*, 374 U.S. at 207; *Engel*, 370 U.S. at 423 n.2).

noted that unlike with the Free Exercise Clause, coercion is *not* a necessary element of an Establishment Clause violation.¹⁴⁶

Nonetheless, there are good reasons to believe that standing was proper in the school prayer cases. The key insight is that coercion, even if not a necessary element of an Establishment Clause violation, is surely sufficient to establish injury in fact. To begin with, it should be noted that in *Schempp* (unlike *Engel*) the Court did specifically address standing in a footnote, concluding that the schoolchildren and their parents had standing because they were “directly affected by the laws and practices against which their complaints are directed.”¹⁴⁷ Indeed, in the *Suhre* case Judge Wilkinson cited this passage in *Schempp* as supporting direct-contact standing.¹⁴⁸ But that is not a necessary reading of the rather obscure “directly affected” language of *Schempp*. For starters, it takes no leap of imagination to recognize that public schools are uniquely coercive environments, both because the state compels attendance at schools and because students are children who are especially susceptible to both peer pressure, and pressure from school officials, including teachers, that the State has placed in authority over them.¹⁴⁹ Indeed, in the Court’s most important modern school prayer case, *Lee v. Weisman*, the Court specifically relied upon the existence of “subtle coercive pressure” and “indirect coercion” on students to strike down state-sponsored prayers at middle and high school graduations.¹⁵⁰ Once a realistic, fact-based approach to coercive pressure is taken, there seems no barrier to treating that coercion as injury in fact, sufficient to accord standing to challenge religious indoctrination of students at public school events.¹⁵¹ Nor is it an answer to argue that coercion did not exist because students could excuse themselves from participation in school prayers. For one thing, given the realities of coercive pressure to conform in school settings, for many students the option to excuse themselves is surely illusory. Furthermore, it is simply not true that no injury exists if a plaintiff, by taking involuntary steps, can avoid that injury. As the *Valley Forge* Court put it, injury existed in *Schempp* because plaintiffs “were forced to assume special burdens to avoid” it.¹⁵² In either case—exposure to coercive prayers, or coerced actions to avoid the initial coercion—injury exists. Indeed, the Court relied upon precisely this reasoning in rejecting the argument in the graduation prayer

146. *Id.* at 8–9 (citing *Schempp*, 374 U.S. at 223; *Engel*, 370 U.S. at 430).

147. *Schempp*, 374 U.S. at 224 n.9.

148. *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997).

149. *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (discussing coercive setting of schools, in the course of striking down a law requiring the teaching of creationism, if evolution is taught).

150. *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

151. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (relying on coercion to strike down student-led prayers at high school football games).

152. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982).

case that coercion was lacking because attendance at graduations is voluntary.¹⁵³

The coercion principle alone, if defined realistically, explains then why standing poses no barrier to challenging religious exercises in public schools. But while coercion explains why students have standing in these cases, it does not explain why in *Schempp* the Court said that *parents* also had standing (aside from their ability to sue on behalf of their children). There are, however, good reasons to believe that religious indoctrination in public schools injures parents directly. To understand why, it is important to bear in mind that since the 1920s, the Court has recognized a substantive right on the part of parents to exercise control over the education and upbringing of their children.¹⁵⁴ In one of those cases, a religious order which operated private, religious schools successfully challenged an Oregon law requiring attendance at public schools on the grounds that the law “conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training.”¹⁵⁵ The clear implication of this holding is that parents suffer a cognizable injury in fact when the State deprives them of control over their children’s education, especially their moral and religious education.

To recognize such an injury does not, of course, mean that parents will succeed in challenging every state action that controls their children’s education. The very existence of mandatory school attendance laws, and mandatory state educational standards, belies that. But that question goes to the merits, not standing. On the merits, then, it is surely constitutional for the state to insist that schools, public and private, teach arithmetic. But it seems equally obvious that on the merits, government cannot mandate (or prohibit, in private schools) religious indoctrination of students.

Another important consequence follows from this reasoning, which is that unlike passive religious displays generally, religious displays in public *schools*, such as the Ten Commandments display in public school classrooms challenged in *Stone v. Graham*,¹⁵⁶ may well generate standing to challenge them. The reason is not only because such displays impose coercive pressure on students to conform (though they surely do), but even more so because such displays indoctrinate students on an ongoing basis, which clearly injures parents by depriving them of control over their children’s religious education. The question then becomes whether a display

153. *Lee*, 505 U.S. at 595–96; see also *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312.

154. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (invalidating law requiring children to attend public schools rather than private ones); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating law banning teaching of modern foreign languages in public and private schools).

155. *Pierce*, 268 U.S. at 532.

156. 449 U.S. 39 (1980) (per curiam).

on the merits violates the Establishment Clause, an issue beyond the scope of this paper.

Indeed, moving beyond the context of public schools, there is no reason to believe that rejection of direct-contact standing in religious display cases will necessarily have much impact on Establishment Clause litigation more generally. For one thing, while schools are the archetypal example of inherently coercive atmospheres, they are not unique in that respect. The legislative prayers directed at members of the public that the Court upheld in *Town of Greece v. Galloway*,¹⁵⁷ for example, surely created a similarly coercive environment, especially because some members of the audience would have been seeking special dispensations from the very government officials leading the prayers. In addition, cases involving selective benefits favoring or excluding religious actors could still be litigated by those denied the benefit.¹⁵⁸ Rejection of direct-contact standing also has no implications for the form of taxpayer standing recognized by the Court in Establishment Clause cases in *Flast v. Cohen*.¹⁵⁹ Therefore, since most modern Establishment Clause cases are litigated based on one of these theories, they would remain unaffected by the demise of direct-contact standing.

There is, however, one area where acceptance of the argument presented in this Essay would have a dramatic, limiting effect on standing—but it does not involve the Establishment Clause. Rather, it is Equal Protection, and in particular the Court’s generous rules regarding standing for plaintiffs challenging affirmative action programs. The argument why is simple enough. Recall that in cases such as *Bakke* and *Northeastern Florida Chapter of Associated General Contractors*, the Court granted standing to challenge affirmative action programs despite the fact that the plaintiffs in those cases were unable to demonstrate that the programs caused them tangible loss, because it concluded that the Equal Protection Clause made “the denial of equal treatment” a cognizable injury for standing purposes.¹⁶⁰ If, however, we accept the argument made in Part III above (and necessary to reject direct-contact standing) that only statutes can create new injuries, not the Constitution standing alone, then the Court’s analysis in these cases is unsupportable. Plaintiffs challenging affirmative action programs, no less than other plaintiffs, must be able to show something beyond the purely procedural, ideological injuries they alleged—they must show *concrete*

157. 572 U.S. 565 (2014).

158. See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (striking down on Free Exercise grounds state program barring religious schools from a program granting benefits to schools generally); *Tex. Monthly v. Bullock*, 489 U.S. 1 (1989) (striking down a law exempting religious publications from a sales tax).

159. 392 U.S. 83 (1968); see *supra* note 44 and accompanying text.

160. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); see also *supra* Part I.

loss. And that in turn means that both of those cases should have been dismissed on justiciability grounds. In short, if the Court is inclined in the future to accept Justice Gorsuch's invitation to reject direct-contact standing in religious display cases, if it is to be intellectually consistent it must also reject "denial of equal treatment" standing in affirmative action cases.

CONCLUSION

Standing is a complex and sometimes seemingly self-contradictory body of law. There is also no doubt that the Supreme Court sometimes manipulates standing to reach questions it otherwise could not,¹⁶¹ or avoid questions it would rather not confront.¹⁶² Nonetheless, the modern Court has insisted that standing does constitute a body of constitutional law distinct from substantive areas such as the Establishment and Equal Protection Clauses. And that in turn must mean that the key concept underlying standing—injury in fact—has some meaning distinct from the merits question in a case. In particular, if we accept standing as a distinct body of constitutional law and injury as a distinct concept from the merits, it then follows that courts will sometimes be unable to address even gross constitutional violations, thereby relegating those issues to constitutional politics. In this Essay I have argued that the constitutionality of government religious displays, at least outside of the context of public schools, is an example of such an issue. It should be emphasized, however, that it is far from the only one. Indeed, the Essay concludes with another example of an area of limited judicial authority—affirmative action—with a very different political valence. Yet no Justice that I am aware of has argued for or against finding standing in both religious display and affirmative action cases. As constitutional *law*, it seems fair to insist that standing doctrine conform generally to basic rule-of-law values,¹⁶³ so that when judges deploy standing doctrine they do so consistently, no matter whose ox is being gored. Whether in our hyperpartisan era the judiciary is capable of doing so is of course another question.

161. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

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

163. See generally Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).