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Standing on the Edge: Standing Doctrine and the Injury Requirement at the Borders of Establishment Clause Jurisprudence

Mary A. Myers

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I. INTRODUCTION

The very first line of the Bill of Rights provides that "Congress shall make no law respecting an establishment of religion."[1] This line, the Establishment Clause of the First Amendment, was motivated by the history of religious persecution that drove thousands of adherents of minority faiths in Europe to the New World to seek refuge to practice their own faith, free from the compulsion of state-established religion.[2] The Establishment Clause remains relevant today, and the U.S. Supreme Court has been active in hearing cases involving it.[3]

For purposes of determining standing—that is, whether an individual or organization meets certain constitutional and prudential requirements for bringing a cause of action[4]— problematic tensions exist between the theoretical underpinnings of the Establishment Clause and the Court's recent jurisprudence.[5] For the plaintiff to have standing to bring a suit, she must have suffered an actual or threatened injury that is traceable to the alleged act of the defendant and that would be redressable by a favorable decision of the courts.[6] In the Establishment Clause context, there are some easy cases where the litigant has standing. For example, in *School District of Abington Township v. Schempp*, the plaintiffs were students subject to a state law directing public school teachers to select daily Bible verses and lead the class in a recitation of the Lord's Prayer.[7] Here, there is a clear injury that is individualized (that is, that the student cannot escape the religious environment created at the school), and the harm was redressable by an injunction.[8] However, easy standing cases such as *Abington Township* are pushed into a gray area when the Court is

1. U.S. CONST. amend. I.

2. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–10 (1947) (detailing the history of the Establishment Clause).

3. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1319 (17th ed. 2010) (describing developments in Establishment Clause jurisprudence).

4. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (describing standing requirements); SULLIVAN & GUNTHER, *supra* note 3, at 43 (defining what current standing rules require).

5. *See* SULLIVAN & GUNTHER, *supra* note 3, at 1290 ("The Court's decisions over the last decade increasingly employ entirely different sets of analytical devices for distinguishing establishments."); Note, *Standing in the Mud:* Hein v. Freedom from Religion Foundation, Inc., 42 AKRON L. REV. 1277, 1287–90 (2009) (describing the series of taxpayer standing cases involving various outcomes and holdings by the Court).

6. *See Valley Forge Christian Coll.*, 454 U.S. at 472 (describing standing requirements).

7. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205–06 (1963).

8. *See id.* at 206–08 (describing the religious atmosphere that the students at the high school were subjected to on a daily basis).

uncertain of how to treat the injury produced by the Establishment Clause violation. For example, to vary *Abington Township*'s facts, if the prayer requirement offended the deep convictions of a graduate of the school as an atheist, does she have an injury sufficient for standing purposes? Or may a state resident who lives near the school, but who is childless and thus has no connection to any high school, bring a case?[9] Thus, even a slight change in the facts of an easy case can create difficult issues for the courts under current standing doctrine.

While some aspects of Establishment Clause standing are relatively clear, the jurisprudence surrounding the injury requirement is becoming murkier. If we view standing as a spectrum, only the extremes of Establishment Clause standing are clear. For example, on one end, cases such as *Abington Township* clearly meet the injury requirement for standing purposes.[10] On the other end, in cases such as *Doremus v. Board of Education*, where the litigant graduated from a public high school that later adopted a school prayer requirement, the Court has held that the plaintiff did not have a sufficient injury for standing purposes.[11] The middle ground of the spectrum presents difficulty. One issue pushing standing issues out of the easy extremes of the spectrum and into the tenuous middle ground is that of psychic or ideological harms.[12] Psychic or ideological harms are injuries based on the harm to a prospective litigant's mind, drawn from the very fact of the alleged violation itself.[13] Although purely psychic harms are putatively insufficient for standing,[14] the Court has begun to allow injuries that look like psychic or ideological harms, such as in *Van Orden v. Perry*, where the plaintiff merely walked past a statue of the

9. The question of whether a graduate of the school may bring a case was answered in *Doremus v. Board of Education*, 342 U.S. 429, 432–33 (1952), but as there have been numerous developments in standing doctrine since then, this question could be reheard by the Court.

10. *See Schempp*, 374 U.S. at 206–08 (describing the religious atmosphere that the students at the high school were subjected to on a daily basis).

11. *Doremus*, 342 U.S. at 432-33.

12. *See infra* text accompanying notes 115–21 (discussing and elaborating on the nature of the injury in *Van Orden v. Perry*).

13. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982) ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to consider standing under Art. III . . . .").

14. *Id.*

Ten Commandments several times.[15] Finding this type of harm to be sufficient for standing complicates the picture of an Establishment Clause injury. If merely walking past a statue of the Ten Commandments a few times is sufficient, it is difficult to explain why a graduate of a public high school could not challenge a prayer requirement at her alma mater. In short, the Court has begun to allow injuries that are far more psychic or ideological than actual.

Since nearly all alleged injuries in Establishment Clause cases involve some sort of psychic or ideological injury,[16] the existence of standing often depends on how the litigant draws a personal connection to the alleged violation. These personal connections often mean the difference between dismissal and adjudication. However, this critical distinction often turns on seemingly arbitrary factors such as whether the plaintiff is actively in public school or how often the plaintiff encounters religious displays on public property.[17] The courts thus focus on these personal connections between alleged violation and prospective plaintiff, rather than on the effects of government-sponsored religion.

The complex jurisprudence surrounding the nature of the injury requirement in Establishment Clause standing has created a division between which injuries suffice for standing purposes and which do not suffice.[18] Therefore, prospective litigants must struggle with determining whether their injury from an alleged Establishment Clause violation falls on the side of this tenuous line on which courts grant standing, which would affect whether their claims are heard on the merits. The uncertainty over which Establishment Clause violation "injuries" suffice for standing purposes could, and likely does, deter prospective litigants from raising claims. Since this contravenes the Framers' intent in writing the Establishment Clause, the Court should redefine and clarify which injuries are sufficient for standing

This Note analyzes the tensions within the Court's interpretation of the injury prong of standing requirements in Establishment Clause cases. This Note argues that: (1) over the last century, the Court has developed a standing doctrine that is

15. *See infra* text accompanying notes 115–21 (discussing and elaborating on the nature of the injury in *Van Orden v. Perry*).

16. Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 984 (2011).

17. See *infra* Part III (discussing the factors weighing in favor of standing and those cutting against standing).

18. *See generally Standing in the Mud*, *supra* note 5, at 1287–90 (detailing the series of cases and challenges to the taxpayer standing prohibition).

inconsistent and irrational, excluding purely psychic and ideological injuries that are rooted in Establishment Clause jurisprudence, and (2) the Court should redraw the line for standing and allow purely psychic and ideological injuries in Establishment Clause cases. Part II of this Note explores the background of the First Amendment, including the history and rationale behind the Establishment Clause, noting its evolution and modern relevance. Part II also discusses constitutional and prudential standing requirements and how those standing requirements apply to the Establishment Clause. Part III of this Note analyzes the tensions and inconsistencies between sufficient injuries and insufficient injuries under current Establishment Clause standing doctrine. Part IV of this Note argues that the Court should clarify this area of law by drawing a new bright-line rule recognizing all Establishment Clause injuries, subject to some prudential limitations. In so doing, the Court would clarify standing law and give future litigants a clearer theoretical structure within which to analyze their injuries and potential for standing.

II. THE ESTABLISHMENT CLAUSE AND MODERN STANDING LAW

A. History and Overview of the Establishment Clause

The religion clauses in the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[19] The first clause, the Establishment Clause, prohibits the government from establishing an official religion, while the second clause, the Free Exercise Clause, protects the free practice of religion or nonreligion by individuals.[20] Both clauses protect religious liberty against the power of the federal government.[21] Establishment Clause jurisprudence is rife with conflicting views of exactly what the Clause requires of the government, however.[22] The Court has often viewed the Establishment Clause as requiring a "wall of separation" between church and state, but it has also interpreted the Clause to require only

19. U.S. CONST. amend. I.

20. SULLIVAN & GUNTHER, *supra* note 3, at 1281.

21. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT, at xiv (2d ed. 1994) ("The establishment clause separates government and religion so that we can maintain civility between believers and unbelievers as well as among the several hundred denominations, sects, and cults that thrive in our nation . . . .").

22. SULLIVAN & GUNTHER, *supra* note 3, at 1275–76.

formal neutrality among religions, or between religion and nonreligion, in government action.[23]

The history of the Establishment Clause supports the "wall of separation" metaphor.[24] When the Framers drafted the Bill of Rights in the late eighteenth century, the United States was largely populated by Europeans who had emigrated to escape religious persecution because of their adherence to minority religions.[25] The Framers were concerned not only with religious persecution of minority faiths, but also with the establishment of a national faith and resulting taxation to support the national religion.[26] In 1785 and 1786, the Virginia Assembly held debates to renew Virginia's tax levy for the state's established religion.[27] James Madison and Thomas Jefferson, among others, argued against renewal.[28] Madison wrote *Memorial and Remonstrance Against Religious Assessment*, opposing renewal of the tax and arguing that it was in the best interests of the new state to recognize that religion was best separated from law and that persecution was an inevitable result of government-established faiths.[29] Members of the Virginia legislature widely accepted Madison's *Memorial and Remonstrance* and rejected the tax renewal.[30] Jefferson penned the Virginia Bill for Religious Liberty, which the Virginia legislature adopted in rejecting the tax renewal. In this environment, the legislature then passed a statute providing "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[31] Three years later, both Madison and Jefferson were key drafters of the Establishment Clause in the Bill of Rights.[32]

However, the history of the Establishment Clause can also support the idea that the government's role is only to maintain formal

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23. *Id.*

24. LEVY, *supra* note 21, at 245; *see also* Everson v. Bd. of Educ., 330 U.S. 1, 8–10 (1947) (detailing the history of the Establishment Clause).

25. *Everson*, 330 U.S. at 8–10.

26. *Id.*

27. SULLIVAN & GUNTER, *supra* note 3, at 1276.

28. *Id.*

29. JAMES MADISON, A MEMORIAL AND REMONSTRANCE, PRESENTED TO THE GENERAL ASSEMBLY OF THE STATE OF VIRGINIA, AT THEIR SESSION IN 1785, IN CONSEQUENCE OF A BILL BROUGHT INTO THAT ASSEMBLY FOR THE ESTABLISHMENT OF RELIGION BY LAW (Worcester, Mass., Thomas 1786).

30. LEVY, *supra* note 21, at 67–69.

31. *Everson*, 330 U.S. at 12–13; *see also* LEVY, *supra* note 21, at 68–69 (detailing Madison's support for Jefferson's bill for religious freedom).

32. SULLIVAN & GUNTHER, *supra* note 3, at 1277.

neutrality among religions and therefore not establish a national church.[33] Some interpretations of Madison's writings find that the Framers intended that the Establishment Clause require only formal neutrality among religions, but that the government may express a preference for religion over nonreligion.[34] This "nonpreferentialist" viewpoint has been expressed by members of the Court, though primarily in dissenting opinions, but it still carries some weight in Establishment Clause jurisprudence.[35]

While the nonpreferentialist view is somewhat grounded in history and has been relied on in numerous dissents,[36] the "wall of separation" metaphor has more support in the textual interpretation and legislative history of the First Amendment.[37] The "wall of separation" metaphor is the prevailing view in modern interpretations of the Establishment Clause.[38]

Some authors and Justices consider it an error to give heavy weight to the history of the Establishment Clause, given that the treatment of religion in modern society no longer implicates widespread concerns of religious persecution and taxation.[39] Justice Brennan's concurrence in *Abington Township* questioned the relevance of history in Establishment Clause jurisprudence, recognizing that "[o]ur religious composition makes us a vastly more diverse people than were our forefathers."[40] Nonetheless, most Establishment Clause cases draw on historical background and rationale to some extent.[41]

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33. *Id.* at 1278.

34. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) ("It seems indisputable . . . that [Madison] saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.").

35. SULLIVAN & GUNTHER, *supra* note 3, at 1278; *see also* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 877 (1986) ("The prominence and longevity of the nonpreferential aid theory is remarkable in light of the weak evidence supporting it and the quite strong evidence against it.").

36. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 854–58 (1995) (Thomas, J., concurring) (expressing support for a nonpreferentialist view); *Wallace*, 472 U.S. at 98 (1985) (Rehnquist, J., dissenting) (arguing for a nonpreferentialist view of the Establishment Clause).

37. *See* Lee v. Weisman, 505 U.S. 577, 612–16 (1992) (Souter, J., concurring) (refuting nonpreferentialist arguments by citing history of the drafting of the Establishment Clause).

38. SULLIVAN & GUNTHER, *supra* note 3, at 1247.

39. *E.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 237–38 (1963) (Brennan, J., concurring).

40. *Id.* at 240.

41. *See, e.g., Weisman*, 505 U.S. at 591–92 (1992) (citing historical background in recent Establishment Clause case).

Since 1946, the Supreme Court has incorporated the Establishment Clause such that it now applies to both federal and state actions.[42] In *Everson v. Board of Education*, the Court held that the Establishment Clause applied to a New Jersey statute that allowed public funds to be used to bus students to parochial schools as well as to public schools.[43] Although the Court found that the statute was constitutional, the Court applied the Establishment Clause to the states, drawing on two main reasons for incorporation.[44] First, the Court found that because the Free Exercise Clause was interpreted and applied broadly to the states, the Establishment Clause, as a companion to the Free Exercise Clause in the First Amendment, should be applied broadly as well.[45] Second, the Court decided that the Establishment Clause's goal of protecting civil liberties could not be achieved without applying the Establishment Clause to the states.[46]

Although the Court has incorporated the Establishment Clause against the states since 1946, some modern scholars and Justices debate whether it was correct to do so.[47] Justice Thomas, relying on some contemporary scholarship in a concurring opinion in *Zelman v. Simmons-Harris*, determined that the Establishment Clause was primarily a structural limitation on the national government.[48] Under this view, the Establishment Clause operates as a limitation on the power of the national government over the states, limiting any interference by the national government over the states with respect to establishment of religion.[49] If the Establishment Clause is understood as a structural limitation, incorporation of the

42. Everson v. Bd. of Educ., 330 U.S. 1, 14–15 (1947); *see also* Kathryn Elizabeth Komp, *Unincorporated, Unprotected: Religion in an Established State*, 58 VAND. L. REV. 301, 308 (2005) (discussing *Everson* and incorporation against the states).

43. *Everson*, 330 U.S. at 15–18.

44. *Id.*

45. *Id.* at 15.

46. *Id.* at 15–16.

47. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157–58 (1991) ("[T]he nature of the states' establishment clause right against federal dis-establishment makes it quite awkward to 'incorporate' the clause against the states via the Fourteenth Amendment."); Komp, *supra* note 42, at 303–04 (noting that "a number of judges and scholars have proposed that the Establishment Clause be unincorporated").

48. Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) ("The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government. Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question.").

49. *See* Luke Meier, *Constitutional Structure, Individual Rights, and the Pledge of Allegiance*, 5 FIRST AMEND. L. REV. 162, 163–64 (2006) ("Under the structural view of the Clause, the primary purpose of the Clause is to prevent the national government from interfering with the states' ability to establish religion as the citizens of that state may wish.").

Establishment Clause against the states is inappropriate, as the Clause was intended to limit only the national government.[50]

However, the Court in *Everson* interpreted the Establishment Clause as protecting the rights of individuals against government establishment of religion and thus applied the Clause to the states.[51] Incorporating the Establishment Clause against the states is logical when the Clause is understood as a protection of individual rights, because it would be futile to protect individual rights only against national establishment and not against state establishment.[52]

The applicable test for whether government action violates the Establishment Clause has evolved over time. The Court has employed a "coercion" analysis, inquiring whether the allegedly unconstitutional government action "coerced" individuals into some form of religion.[53] However, by the mid-twentieth century, the Court relaxed the coercion analysis, finding that "indirect coercion" and "psychological coercion" also violated the Establishment Clause.[54] In 1971, in *Lemon v. Kurtzman*, the Court attempted to impose a test for statutes that allegedly violated the Establishment Clause, finding that they would not violate the Establishment Clause if they met three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "[55] The so-called "*Lemon* test" proved problematic in application, however, and the Court consequently looked to other modes of analysis to supplement (or supplant) both the looser coercion approach and the *Lemon* test.[56] In short, the coercion analysis, even in its expanded form, was still too narrow to encompass all violations of the Establishment Clause.

Beginning in *Lynch v. Donnelly* in 1984, Justice O'Connor, in a concurring opinion, advocated an "endorsement" analysis, under

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50. *Id.* at 164 ("Incorporation would prevent exactly what the Clause was designed to protect: state establishments of religion.").

51. Komp, *supra* note 42, at 308.

52. Meier, *supra* note 49, at 164.

53. *See* SULLIVAN & GUNTHER, *supra* note 3, at 1322–25 (explaining the development of "coercion" analysis); *see also* Engel v. Vitale, 370 U.S. 421, 430–33 (1962) (employing and explaining coercion analysis).

54. *See* SULLIVAN & GUNTHER, *supra* note 3, at 1319 (discussing the importance of the Court's influential test for Establishment Clause violations set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

55. *Lemon*, 403 U.S. at 612–13.

56. *See* SULLIVAN & GUNTHER, *supra* note 3, at 1348, 1350 (giving examples of the "endorsement" analysis).

which a government action would violate the Establishment Clause if the government appeared to favor a religion such that non-adherents felt like outsiders who were "not full members of the political community."[57] Following *Lynch*, Justice O'Connor continued to advocate the endorsement approach as a broader test that would encompass valid Establishment Clause claims that the coercion approach could not properly analyze.[58] In *Allegheny County v. American Civil Liberties Union*, the Court adopted this endorsement analysis with respect to a holiday display on the steps of a county courthouse[59] and has continued to use the endorsement approach with respect to public religious displays.[60] The coercion analysis retains some viability, however, as the Court continues to apply it in Establishment Clause cases involving schools and students.[61] Although the Court has moved toward the endorsement analysis, it still has not adopted a single test for Establishment Clause violations.[62] The different analyses in Establishment Clause jurisprudence impact the way that the Court has interpreted standing in this area.

B. Overview of Standing Law

A litigant must have standing to bring any cause of action in an American court.[63] Standing is a threshold inquiry, involving constitutional and prudential considerations, to determine whether a litigant meets certain requirements before the court ever hears the

57. Lynch v. Donnelly, 465 U.S. 668, 687 (O'Connor, J., concurring).

58. *See, e.g.*, Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989) ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence.").

59. *Id.* at 594 ("Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

60. *See generally* SULLIVAN & GUNTHER, supra note 3, at 1348–53 (describing subsequent applications of the endorsement approach).

61. *See* SULLIVAN & GUNTHER, *supra* note 3, at 1352.

62. *See id.* at 1348–53 (describing the current use of both endorsement and coercion analyses). These differing approaches to determining whether government action violates the Establishment Clause have been further complicated by the diversity of actions that may violate the Clause. *See id.* at 1318–19.

63. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982); *Standing in the Mud*, *supra* note 5, at 1279 ("Plaintiff standing is but one of several essential elements needed for a case to be justiciable.").

merits of the case.[64] The standing requirements significantly limit the power of the judiciary. The constitutional standing requirement is primarily drawn from Article III of the Constitution, which states that "judicial power" is limited to hearing only "cases" and "controversies."[65] To meet the constitutional standing requirement, a litigant must show (1) that an actual or threatened injury exists, (2) that the behavior or conduct of the defendant caused the injury, and (3) that a favorable decision by the court could redress the injury.[66]

Even if a litigant meets the constitutional standing requirement, the litigant must also survive the prudential limits the Court has imposed on federal judicial power.[67] First, a litigant must raise his own legal rights and interests and "cannot rest his claim to relief on the legal rights or interests of third parties."[68] Second, the federal courts will not hear cases where the injury, although actual and concrete, is neither particularized nor individualized.[69] The Court considers these so-called "generalized grievances" asbetter addressed by one of the other branches of government.[70] Third, the litigant's complaint must be within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[71]

Standing requirements implicate important constitutional limitations on judicial power that delineate aspects of the separation

64. *Valley Forge Christian Coll.*, 454 U.S. at 471 ("Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.' . . . The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.").

65. *Id.* at 471–72; *see also* U.S. CONST. art. III, §2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

66. *Valley Forge Christian Coll.*, 454 U.S. at 472; *Standing in the Mud*, *supra* note 5, at 1279.

67. *Valley Forge Christian Coll.*, 454 U.S. at 474–75.

68. Warth v. Sedlin, 422 U.S. 490, 499 (1975).

69. *See Valley Forge Christian Coll.*, 454 U.S. at 475.

70. *See* SULLIVAN & GUNTHER, *supra* note 3, at 44, 46 (discussing the boundaries of the generalized-grievances limit and explaining the separation of powers rationale as applied to standing).

71. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

of powers doctrine.[72] By limiting the power of the judiciary to hear only cases consistent with the constitutional and prudential requirements, the standing doctrine restricts the judiciary to adjudicating "those disputes which confine . . . courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."[73] Standing requirements are vital when a federal court hears a case involving the constitutionality of an act or policy of the legislative or executive branch.[74] In these cases, the standing requirements ensure that the court is not issuing advisory opinions or stepping into a role constitutionally reserved for the executive or legislature.[75] Therefore, the standing requirements are an essential element of the separation of powers doctrine, and standing jurisprudence involves substantial limits that the Court has placed on itself.[76]

Since the 1970s, the Court has further developed standing requirements with respect to groups and organizations.[77] In *Sierra Club v. Morton*, the Court found that organizations meet standing requirements when one or more of their members meet the standing requirements individually.[78] Therefore, after *Sierra Club*, ideological or policy-based organizations, with more resources than most individuals, have standing to raise claims on behalf of their members.

The Court has also more carefully refined what the injury element requires. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the Court held that a "psychological injury," alleged under the Establishment Clause, is not a sufficient injury for standing purposes when the injury results from

72. *Valley Forge Christian Coll.*, 454 U.S. at 471 ("The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts.").

73. Flast v. Cohen, 392 U.S. 83, 97 (1968).

74. *See Valley Forge Christian Coll.*, 454 U.S. at 473.

75. *See* SULLIVAN & GUNTHER, *supra* note 3, at 41–47 (discussing standing requirements and jurisprudence). Constitutional and prudential standing requirements are related in the sense that they impose limits on the Court's ability to hear certain cases, but are also quite different. Constitutional standing requirements and related jurisprudence are grounded in Article III of the Constitution, while prudential standing requirements and related jurisprudence are grounded in other elements of constitutional jurisprudence, such as the separation of powers doctrine. *See id.* at 43.

76. *See Valley Forge Christian Coll.*, 454 U.S. at 473–75.

77. *See* SULLIVAN & GUNTHER, *supra* note 3, at 41.

78. Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

observing conduct with which one disagrees.[79] In *Lujan v. Defenders of Wildlife*, the Court reiterated the importance of the actual-and-individualized-injury requirement, holding that it could not relax the generalized-grievance prudential limitation on injury even in suits against the government involving constitutional considerations.[80]

However, the Court has recognized one important exception to the prohibition on generalized grievances.[81] In *Frothingham v. Mellon,* the Court established the general rule against taxpayer standing, holding that a litigant, who bases his complaint on his status as a citizen and taxpayer and who suffers no other injury aside from the use of his taxes for some allegedly illegal, invalid, or unconstitutional purpose, does not plead a sufficiently individualized injury.[82] However, the Court has recognized one exception to this general prohibition against taxpayer standing. In *Flast v. Cohen*, the Court found that a litigant who raises a particular cause of action under the Establishment Clause may base his injury on his status as a taxpayer.[83] The Court in *Flast* developed a two-prong test to determine whether a litigant properly fell within the delineated exception to the bar on taxpayer standing.[84] First, "the taxpayer must establish a logical link between that status and the type of legislative enactment attacked"[85] and thus, "will have proper standing to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution."[86]

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79. *Valley Forge Christian Coll.*, 454 U.S. at 485 ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by conduct with which one disagrees. That is not an injury sufficient to consider standing under Art. III . . . .") (emphasis in original).

80. Lujan v. Defenders of Wildlife, 504 U.S. 555, 577–78 (1992). The Court in *Lujan* also rejected a so-called "procedural injury"—that is, that any individual, regardless of whether he had a discrete injury, could assert that an agency failed to follow correct procedure pursuant to a policy and has standing merely by virtue of being a citizen and suing pursuant to a particular statute. *Id.* at 571–73.

81. *See* Flast v. Cohen, 392 U.S. 83, 102–03 (1968) (finding that there was a limited exception to the general rule against taxpayer standing).

82. Frothingham v. Mellon, 262 U.S. 447, 480, 487–89 (1923).

83. *Flast*, 392 U.S. at 106 ("We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8 . . . . [W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.").

84. *Id.* at 102–03.

85. *Id.* at 102.

86. *Id.*

Second, "the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged," by showing "that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[87] When a litigant satisfies both prongs of the *Flast* test, he has standing to bring a case based on his status as a taxpayer.[88]

Since *Flast*, the Court has narrowly construed this exception and has applied it only to cases under the Establishment Clause.[89] The Court has refused to extend the exception to Establishment Clause violations by the executive branch, even when the executive branch issues policies pursuant to congressional allocations of monies.[90] The Court has also refused to extend the exception to conveyances of property by state governments, as well as to legislative or regulatory activities not based on the congressional taxing and spending power.[91] *Flast* is, therefore, strictly limited to its facts, and the Court appears reluctant to extend it.[92] Nevertheless, it is significant that this exception exists, however narrow, and that the Court has recognized that there is something unique about the Establishment Clause in the standing context. Still, litigants must meet the other constitutional and prudential standing requirements.

C. The Current State of Establishment Clause Standing: A Complex Picture

The current state of Establishment Clause standing jurisprudence is complex and unclear. The facts and outcomes of

87. *Id.* at 102–03.

88. *Id.*

89. *See* SULLIVAN & GUNTHER, *supra* note 3, at 44 (detailing subsequent cases that challenged the limits of the *Flast* exception).

90. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 609 (2007) (plurality opinion) (holding no standing existed to challenge faith-based policies of the executive branch based on taxpayer standing).

91. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 481–82 (1982) (holding the *Flast* exception inapplicable to a state in-kind transfer of property to a religious institution).

92. Meier, *supra* note 49, at 179; *see also* SULLIVAN & GUNTHER, *supra* note 3, at 44 (detailing cases challenging *Flast*). However, courts have found that taxpayer standing is sufficient in some instances. A municipal taxpayer is allowed standing based on his taxpayer status, since it is understood that an individual's interest in a municipality's coffers is more significant than in the federal system. *See* Meier, *supra* note 49, at 177–78. State taxpayer standing is more rarely allowed, but has been sufficient in multiple cases. *See id.*

Establishment Clause cases vary, reaching issues such as school prayer, municipal and state religious displays, and financial aid to private schools.[93] The Court has heard cases on nearly all of these issues in the past decade, and standing continues to be a troublesome issue for litigants.[94] Litigants seeking to bring a suit for a violation of the Establishment Clause must decide how to frame the alleged injury, how to connect the litigant to the alleged Establishment Clause violation, and how to frame an injury that might be purely psychic or ideological.

Currently, Establishment Clause standing doctrine requires that the plaintiff allege some type of injury, and, although courts interpret this injury requirement to comport with traditional standing doctrine, it is the *nature* of the injury alleged that is in question. The Court has held that a student attending a public school may challenge a school prayer requirement,[95] but if that student has graduated from the public school, then the student no longer has standing to challenge the school prayer requirement.[96] While this makes sense under normal standing rules, other aspects of Establishment Clause standing complicate the standing doctrine. For example, in a school prayer context, a litigant who never attended public schools but who paid taxes might have standing to allege an Establishment Clause violation if the facts met the two prongs of the *Flast* exception.[97] In this hypothetical, the litigant is alleging an injury that is neither particular nor individualized; his only connection to the alleged violation is through his status as a federal taxpayer. How can this financial injury constitute a type of harm within the same constitutional injury category as the more concrete injury where a student is forced to pray in public school?

Other cases outside the Establishment Clause context complicate this already murky picture of standing. Although the Court has recognized that injuries resulting from Establishment Clause violations are unique,[98] the Court has also held that outside the Establishment Clause context, psychological injuries with slight or

93. *See* SULLIVAN & GUNTHER, *supra* note 3, at 1318–19 (introducing a variety of claims under the Establishment Clause).

94. *See Hein*, 551 U.S. at 609; McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 851 (2005); Van Orden v. Perry, 545 U.S. 677, 682 (2005).

95. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 207–12 (1963).

96. Doremus v. Bd. of Educ., 342 U.S. 429, 432 (1952).

97. *See* Flast v. Cohen, 392 U.S. 83, 102–03 (1968).

98. *See id.* at 103–04, 106 (carving out an exception to the prohibition against taxpayer standing for the Establishment Clause due to the unique background of the Clause).

tenuous connections to alleged constitutional violations are not sufficient injuries for standing purposes.[99] The general stance against purely psychic or ideological injuries is in tension with *Flast* and current Establishment Clause standing jurisprudence. In *Van Orden v. Perry*, the Court found that a litigant who merely passed by a statue of the Ten Commandments on the grounds of the Texas State Capitol had standing; apparently, his injury was sufficient.[100] Yet, in *Valley Forge Christian College*, the Court held that a "psychological consequence" was not sufficient for standing purposes; some more concrete harm was required.[101] As the Court has moved from using the more narrow "coercion" analysis in Establishment Clause cases to the broader "endorsement" approach, the manner in which it frames Establishment Clause injuries has also become more unclear and inconsistent with existing jurisprudence.[102]

What is clear is that Establishment Clause standing can be viewed as following a continuum, where cases with a clearly sufficient injury such as *Abington Township* are at one end and cases with insufficient injuries such as *Doremus* are at the other.[103] In the middle of this continuum, the Court has attempted to delineate between injuries that are sufficient and injuries that are insufficient because they are too psychic or ideological. This Note explores the tensions and inconsistencies between cases falling on either side of this unclear line of standing.

III. THE COURT'S ATTEMPTS TO "ESTABLISH" A LINE FOR ESTABLISHMENT CLAUSE STANDING DOCTRINE

Supreme Court precedent on Establishment Clause standing draws formalistic distinctions between what qualifies as a sufficient injury for standing purposes and what does not.[104] A close look at these cases shows that in attempting to delineate this boundary, the

99. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218–19 (1974) (denying citizen-taxpayer standing to litigants challenging the Reserve status of Members of Congress under the Incompatibility Clause); United States v. Richardson, 418 U.S. 166, 205 (1974) (denying citizen-taxpayer standing to a litigant challenging the expenditures of the Central Intelligence Agency under the Accounting Clause).

100. *See* Van Orden v. Perry, 545 U.S. 677, 691–92 (2005).

101. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485–86 (1982) (plurality opinion).

102. *See supra* Part II.A (detailing cases applying the coercion and endorsement analyses).

103. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 207–212 (1963); Doremus v. Bd. of Educ., 342 U.S. 429, 434–35 (1952).

104. *See supra* Part II.C.

Court has created inconsistencies and has relied upon conflicting Establishment Clause rationales. The cases that involve more psychic or ideological injuries are sometimes found sufficient by the Court for standing purposes, but more often, the Court finds them insufficient.[105] This Part addresses both those cases where litigants had standing and those cases where litigants were denied standing and then evaluates the distinction the Court has attempted to draw.

A. Sufficient Injuries for Standing Under Current Doctrine

Recently, the Court has allowed standing in several cases that allege an injury that is somewhat psychic and ideological. Some of the most notable examples have been in the context of public religious displays.[106] In these cases, a state or municipality erects or permits an organization to erect some type of religious display.[107] In *McCreary County v. American Civil Liberties Union of Kentucky*, the American Civil Liberties Union ("ACLU") sued two counties in Kentucky for posting a copy of the Ten Commandments in their respective courthouses.[108] The McCreary County Courthouse initially had a lone copy of the Ten Commandments posted in a public area. However, after the filing of an earlier Establishment Clause suit, McCreary County officials hung copies of other historic documents such as the Magna Carta and the Declaration of Independence around the copy of the Ten Commandments.[109] The Court did not explicitly address the issue of standing, but there is evidence that it concluded the plaintiff met at least the constitutional requirements for standing because it ruled on the merits. In the majority opinion, for instance, Justice Souter took care to note that the Ten Commandments were posted in "a very high traffic area"[110] and that the display was "readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote."[111] These statements gesture toward some harm or injury suffered by the plaintiff.

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105. *See supra* Part II.C.

106. *See* SULLIVAN & GUNTHER, *supra* note 3, at 1340–65 (discussing case law applying the Establishment Clause to public religious displays).

107. *E.g.*, Capital Square Review Bd. v. Pinette, 515 U.S. 753, 758 (1995); Lynch v. Donnelly, 465 U.S. 668, 671 (1984); *see* SULLIVAN & GUNTHER, *supra* note 3, at 1342.

108. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 851–52 (2005).

109. *Id.* at 851–56.

110. *Id.* at 851.

111. *Id.* at 852.

Although the majority in *McCreary County* did not directly address standing, it is clear that, at a minimum, the plaintiff's injury involved having to walk by a display of the Ten Commandments and being exposed to the religious display in a government setting.[112] Justice Souter emphasized the plaintiff's connection to the religious display, implicitly justifying the Court's finding of a sufficient injury by noting that the display was located in an area of the courthouse that the plaintiff presumably could not avoid.[113] However, no other aspect of the Court's opinion addressed the injury question, allowing the inference that the plaintiff's sole injury was having to be exposed to the religious display each time he entered the McCreary County Courthouse and that such harm alone is sufficient.[114]

The Court followed a similar approach in *Van Orden v. Perry*, which it decided during the same session as *McCreary County*.[115] In *Van Orden*, the plaintiff alleged that the Texas legislature violated the Establishment Clause by allowing a sizable stone monument of the Ten Commandments to stand on the grounds of its capitol building.[116] This monument stood between the capitol building and supreme court building, amongst sixteen other stone monuments and twenty-one other historical markers on the grounds.[117] Like Justice Souter's opinion in *McCreary County*, Chief Justice Rehnquist's majority opinion in *Van Orden* failed to address explicitly the question of standing or the specific injury alleged by the plaintiff, but the Court must have concluded that the plaintiff met the constitutional requirements for standing.[118] The opinion implicitly recognized the plaintiff's relation to the statue, noting that "he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds."[119]

The Court in *Van Orden* implicitly recognized that the plaintiff's injury of walking by the statue on a semiregular basis was

112. *See id.* at 851–54; *see also* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (holding that organizations could bring a suit, as long as one or more of their members represented the claim brought).

113. *See McCreary Cnty.*, 545 U.S. at 851–52.

114. *See generally id.* Also absent from the Court's opinion is any statement that the plaintiff took offense to the posting of the Ten Commandments; yet, considering the fact that the suit was initiated, such ideological harm or offense can be inferred.

115. Van Orden v. Perry, 545 U.S. 677, 682 (2005).

116. *Id.* at 681–82.

117. *Id.* at 681.

118. *See generally id.* at 682–83.

119. *Id.* at 682.

sufficient for standing purposes.[120] Like the plaintiff in *McCreary County*, the plaintiff in *Van Orden* experienced some type of psychic or ideological offense to the Ten Commandments statue, even though the statue was located among numerous others on the capitol grounds.[121] In both *Van Orden* and *McCreary County*, the personal offense and ideological injury are only implicitly acknowledged by the Court, and the Court only briefly notes that the respective plaintiffs have some type of connection to the allegedly offensive religious displays.[122]

Another context in which the Court allows standing for the Establishment Clause is the area of taxpayer standing.[123] As explained in Part II.B, the only exception to the general prohibition against citizen-taxpayer standing is when an alleged Establishment Clause violation fits the narrow two-prong test from *Flast v. Cohen*.[124] The general citizen-taxpayer prohibition relies on the prudential limit on generalized grievances; this limit is invoked when a litigant can plead some injury, but the injury is too widespread and generalized to be sufficient for standing purposes.[125] One of the reasons the Court invoked in *Flast* for carving out such an exception was that the Framers of the Bill of Rights shared the concern that the "taxing and spending power would be used to favor one religion over another or to support religion in general."[126] In deciding *Flast* and affirming it in later cases such as *Bowen v. Kendrick*, the Court has recognized that the Establishment Clause warrants an exception to the general prohibition against taxpayer standing and that there is some type of harm for which creating such an unprecedented and unique exception is justified.[127]

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120. *See generally id.*

121. *Id.* at 681–82; *supra* notes 108–20 and accompanying text.

122. *See generally* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 852 (2005) ("In each county, the hallway display was 'readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote.' "); *Van Orden*, 545 U.S. at 682 ("Van Orden testified that, since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds.").

123. Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

124. Meier, *supra* note 49, at 179. *See also* SULLIVAN & GUNTHER, *supra* note 3, at 44 (detailing cases challenging *Flast*).

125. SULLIVAN & GUNTHER, *supra* note 3, at 43–44.

126. *Id.* at 102–03.

127. *See id.*; *see also* Bowen v. Kendrick, 487 U.S. 589, 618–20, 622 (1988) (finding that litigants had taxpayer standing under the *Flast* exception where litigants challenged federal grants under the Adolescent Family Life Act).

However, *Flast* is not without its own tensions and problems.[128] Since its inception, the Court has narrowly construed *Flast* and held it to its facts, indicating the Court's reluctance to expand this exception even to other aspects of Establishment Clause jurisprudence, which arguably implicate the same type of injury as the *Flast* exception.[129] Yet, although the Court has had numerous opportunities to overrule *Flast*, the exception stands, acting as an implicit recognition that the nature of the injury in an Establishment Clause context is unique and deserving of such an exception.[130]

The public-religious-display cases and *Flast*-exception cases push the boundaries the Court has drawn for Establishment Clause standing. *McCreary County* and *Van Orden* relied on the mere fact that the plaintiffs had some fleeting connection with the displays in question; these decisions drew largely on the fact that the plaintiffs had to view the religious monuments, even though both displays involved the Ten Commandments in a setting with numerous other secular displays.[131] Yet the real crux of the injuries in *McCreary County* and *Van Orden* is not that the plaintiffs came into contact with the displays, but that the displays offended the plaintiffs and caused them ideological or psychic injury.[132] *Flast* and *Bowen* involve similar logic, in that the Court draws formalistic distinctions in the area of taxpayer standing, yet continues to recognize that the Establishment Clause protects a unique right that warrants an exception to the general prohibition against taxpayer standing.[133]

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128. *See* SULLIVAN & GUNTHER, *supra* note 3, at 44.

129. Meier, *supra* note 49, at 179; *see also* SULLIVAN & GUNTHER, *supra* note 3, at 44 (detailing cases challenging *Flast*).

130. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 471, 479, 482 (1982) (holding the *Flast* exception inapplicable to a state in-kind transfer of property to a religious institution). In *Hein v. Freedom from Religion Foundation, Inc.*, two Justices advocated overruling the *Flast* exception entirely. 551 U.S. 587, 609 (2007) (Scalia, J., concurring) ("[W]hat experience has shown is that *Flast*'s lack of a logical theoretical underpinning has rendered our taxpayer-standing doctrine such a jurisprudential disaster that our appellate judges do not know what to make of it . . . . I can think of few cases less warranting of *stare decisis* respect. It is time—it is past time—to call an end. *Flast* should be overruled.")

131. *See generally* Van Orden v. Perry, 545 U.S. 677, 681–82 (2005); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 851–52 (2005).

132. *See generally Van Orden*, 545 U.S. 681–82; *McCreary Cnty.*, 545 U.S. at 851–53; Sherry, *supra* note 16, at 985 ("[E]very injury caused directly by a violation of the Religion Clauses is, at bottom, psychological.").

133. Bowen v. Kendrick, 487 U.S. 589, 622 (1988); Flast v. Cohen, 392 U.S. 83, 106 (1968).

B. Insufficient Injuries for Standing Under Current Doctrine

As noted above, the Court has attempted to draw a line between the cases in which a more psychic or ideological injury is sufficient and those in which it is not. In general, the litigants who are denied standing allege the same type of ideological harm as those litigants who are granted standing; however, one distinguishing factor is that the litigants denied standing often have less of a personal connection to the alleged Establishment Clause violation.

In *Doremus v. Board of Education*, the plaintiff challenged a New Jersey statute that required a school official to read five verses of the Old Testament to students daily, without discussing the verses.[134] As the parent of a student who had recently graduated from a New Jersey high school, the plaintiff opposed the reading of the Bible verses.[135] The Court, in an opinion written by Justice Jackson, held the plaintiff lacked standing.[136] The majority reasoned that because the plaintiff's child had already graduated from high school, the plaintiff lacked a sufficient connection to the alleged harm.[137] In short, because the plaintiff in *Doremus* could allege only that the state policy caused her a psychic or ideological injury, that harm was insufficient to confer standing.[138]

It is worth looking at the similarities between the alleged injury in *Doremus* and those in *McCreary County* and *Van Orden*. In all three cases, the plaintiffs allege very similar Establishment Clause violations, that is, that the government has engaged in conduct that constitutes a government-sponsored establishment of religion.[139] That the religious conduct occurred is what results in injury to all three

134. Doremus v. Bd. of Educ., 342 U.S. 429, 430–32 (1952).

135. *Id.* The posture of a parent raising a claim on behalf of his or her child, a public school student, is common in Establishment Clause jurisprudence and is acceptable for standing purposes. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17–18 (2004) (where standing was ultimately denied because of the lack of custody of the litigant's daughter); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 207–12, 226–27 (1963) (where a parent successfully raised an Establishment Clause violation on behalf of his child).

136. *Doremus*, 342 U.S. at 431, 435–36 ("Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute.").

137. *Id.* at 432–33.

138. *Id.* at 435.

139. *See id.* at 430–31 (challenging a New Jersey statute providing for the reading of Old Testament verses at the beginning of the public school day); *see also* Van Orden v. Perry, 545 U.S. 677, 682 (2005) (challenging a statue of the Ten Commandments on the grounds of the Texas State Capitol); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 850 (2005) (challenging a framed poster of the Ten Commandments in a Kentucky courthouse).

plaintiffs.[140] However, the Court's precedent suggests there is a line between the injuries in *McCreary County* and *Van Orden* and the injury in *Doremus*.[141] The line largely depends on how the prospective litigant shows a personal connection to the alleged violation.[142] From this perspective, Establishment Clause standing depends on how the prospective litigant can demonstrate a connection to the alleged violation, not on how the alleged violation actually injured the litigant. In short, the dividing line is not based on the actual effect of the violation, but rather on more arbitrary facts such as how many times the plaintiff has encountered a religious display on government property or whether the plaintiff has graduated from public school by the time she or her parent files a lawsuit.[143]

The Court has also denied standing due to insufficient injury in numerous cases involving taxpayer standing that seem quite analogous to *Flast*.[144] The jurisprudence surrounding *Flast* has been inconsistent and highly formalistic.[145] *Flast* originally justified the exception to taxpayer standing on the grounds that the Framers feared that the "taxing and spending power would be used to favor one religion over another or to support religion in general."[146] However, on the occasions when litigants have tried to expand the *Flast* exception to new sets of facts, the Court has refused to expand it, even when the *Flast* facts and the new facts are functionally analogous.[147] In *Valley*

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140. *See Doremus*, 342 U.S. at 432; *see also Van Orden*, 545 U.S. at 682; *McCreary Cnty*, 545 U.S. at 851–52.

141. *See generally McCreary Cnty.*, 545 U.S. at 852 ("In each county, the hallway display was 'readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote.") (citations omitted); *Van Orden*, 545 U.S. at 682 ("Van Orden testified that, since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds.").

142. *See supra* Part III.

143. *Compare Van Orden*, 545 U.S. at 682 (allowing standing where litigant walked past statue of the Ten Commandments on grounds of the Texas Capitol), *with Doremus*, 342 U.S. at 432 (denying standing to a public school graduate who challenged prayer in public school).

144. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 471, 479 (1982) (holding the *Flast* exception inapplicable to a state in-kind transfer of property to a religious institution); *see* United States v. Richardson, 418 U.S. 166, 168, 180 (1974) (denying citizen-taxpayer standing to litigant challenging the expenditures of the Central Intelligence Agency under the Accounting Clause); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209–10 (1974) (denying citizen-taxpayer standing to litigants challenging the Reserve status of Members of Congress under the Incompatibility Clause).

145. *See* SULLIVAN & GUNTHER, *supra* note 3, at 44 (detailing subsequent cases that challenged the limits of the *Flast* exception).

146. Flast v. Cohen, 392 U.S. 83, 103 (1968).

147. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 609 (2007) (holding that the *Flast* exception did not apply to discretionary executive expenditures); *Valley Forge*

Forge Christian College v. Americans for the Separation of Church and State, Americans for the Separation of Church and State alleged a violation of the Establishment Clause when the State of Pennsylvania transferred property to Valley Forge Christian College, a religious institution.[148] The plaintiffs argued that they suffered an injury by the very fact that the state had transferred the land to the college and that, alternatively, the Court should use *Flast* to grant them standing based on their status as taxpayers.[149] The Court refused to find standing, holding that the plaintiffs' "psychological injury" was insufficient to confer standing and that the plaintiffs' argument for taxpayer standing did not fit into the *Flast* exception, because the state transferred the property to the defendant, and thus the transfer was not under Congress's taxing and spending powers.[150] The Court's decision in *Valley Forge Christian College* restricted the grounds for Establishment Clause standing by ruling out both psychological injuries and expanded grounds for taxpayer standing.

The Court in *Valley Forge Christian College* may have failed to take into account the basic nature of Establishment Clause injuries, which nearly always involves psychic or ideological harm.[151] Indeed, it is difficult to imagine an alleged violation under the Establishment Clause that would not offend a litigant's ideology or beliefs, yet would still motivate him to bring a claim.[152] Standing cases in non-Establishment-Clause contexts have held that psychic or ideological injuries are insufficient;[153] however, *Flast* and the "wall of separation" rationale for the Establishment Clause support the argument that the nature of the harm here is different and unique.[154] The fact that all

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Christian Coll., 454 U.S. at 471, 479 (holding the *Flast* exception inapplicable to a state in-kind transfer of property to a religious institution); SULLIVAN & GUNTHER, *supra* note 3, at 44 (detailing subsequent cases that challenged the limits of the *Flast* exception).

148. 454 U.S. at 468–69.

149. *Id.*

150. *Id.* at 480, 485.

151. Sherry, *supra* note 16, at 985.

152. *Id.*

153. *Valley Forge Christian Coll.*, 454 U.S. at 485 ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . .").

154. Flast v. Cohen, 392 U.S. 83, 115 (1968) (Fortas, J., concurring) ("In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens [than the proscription against government-sponsored religion]."); *see* Sherry, *supra* note 16, at 985 ("The *Flast* Court, in crafting a separate standing

Establishment Clause injuries involve ideology or belief, but that such injury alone is usually insufficient for standing purposes, is deeply inconsistent and creates significant tension in standing jurisprudence.

In 2007, this tension came to a head in the Court's plurality opinion in *Hein v. Freedom from Religion Foundation*.[155] In *Hein*, the plaintiffs sought to challenge President George W. Bush's Faith-Based Initiatives program, alleging that Congress had allocated federal funds to the executive, which then distributed the funds in a manner that violated the Establishment Clause.[156] A plurality decision of the Court in *Hein* denied standing to the plaintiffs, explaining that because the funds were distributed by the executive branch rather than by Congress, the *Flast* exception did not apply.[157] Because the plaintiffs could allege no other injury aside from one that was inherently psychological, the Court held that the plaintiffs did not have standing to bring the case.[158]

Hein highlights the arbitrary nature of Establishment Clause standing jurisprudence. The facts in *Hein* were functionally the same as those in *Flast* and *Bowen*, where Congress allocated funds that were used in a manner allegedly in violation of the Establishment Clause.[159] However, the Court drew a line between *Hein* and *Flast* based on the mere fact that in *Hein*, plaintiffs challenged executive discretionary spending of monies allocated by Congress under the taxing and spending power, whereas in *Flast*, Congress itself directly allocated the funds under the taxing and spending power.[160] This line-drawing is based on the language in *Flast*, which emphasizes the Framers' concern that Congress might use its taxation powers to support religion. However, the Court failed to take into account the weighty history supporting the purpose of the Establishment Clause as a "wall of separation" between church and state. This interpretation of the Clause would support granting standing for ideological or psychic injuries.[161] Furthermore, the Court created

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doctrine for Establishment Clause cases, accommodated the unique nature of all Establishment Clause injuries, even if it did not fully recognize what it was doing.").

155. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 592, 597 (2007).

156. *Id.* at 593–95.

157. *Id.* at 609.

158. *See id.* at 599, 608.

159. *Id.* at 593–94. *See generally* Bowen v. Kendrick, 487 U.S. 589, 593, 622 (1988); *Flast*, 392 U.S. at 85–86, 104.

160. *Compare Hein*, 551 U.S. at 593–600, *with Flast*, 392 U.S. at 103.

161. *Flast*, 392 U.S. at 103–04; *see also* SULLIVAN & GUNTHER, *supra* note 3, at 1293–96 (detailing the "wall of separation" metaphor in Establishment Clause substantive law).

additional inconsistencies in *Hein* with respect to *Flast*.[162] Scholars have suggested that in restricting *Flast* to its facts in *Hein*, the Court has "stealth[ily] overrul[ed]" *Flast*.[163] While the truth of this argument remains to be seen, the Court's ruling and dicta in *Hein* have further complicated Establishment Clause jurisprudence.[164]

The Court has also continued to draw formalistic distinctions in the taxpayer standing context. In *Arizona Christian School Tuition Organization v. Winn*, the Court denied standing to a group of Arizona taxpayers challenging the part of the Arizona tax code that allowed taxpayers to receive tax credits for permissive contributions to school tuition organizations, some of which were religious.[165] Applying *Flast*, the Court reasoned that the tax credit at issue was not analogous to the governmental expenditures required in *Flast*, noting that "awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences."[166] In light of *Hein* and *Winn*, the Court will likely continue to restrict the *Flast* exception to its facts and reject functional arguments attempting to expand this exception to other instances of taxpayer standing.[167]

C. The Line the Court Has Drawn with Respect to Injuries

The Court's jurisprudence has produced a line defining which injuries suffice for standing purposes and which do not. On the side of sufficient injuries, there are cases with very little actual injury; the mere fact of walking past a religious display several times was found

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162. *See* Sherry, *supra* note 16, at 979–84 (discussing inconsistencies created by the Court in *Hein* in Establishment Clause and standing jurisprudence); *Standing in the Mud*, *supra* note 5, at 1303 (arguing that *Hein* created an extra requirement to the *Flast* exception to the prohibition against taxpayer standing).

163. *E.g.*, Sherry, *supra* note 16, at 980–81.

164. *See id.* at 984 ("[T]he decision in Hein represents a failure of human understanding."); 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, 167 (2008) ("What seems evident is that Hein has narrowed the needle of justiciability on which so much Establishment Clause doctrine rests.").

165. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440–41, 1449 (2011).

166. *Id.* at 1447. This argument largely fails to take into account that the very nature of tax credit allows taxpayers to save money based on their religious beliefs.

167. *See* Steven K. Green, *The Slow, Tragic Demise of Standing in Establishment Clause Challenges*, AM. CONSTITUTION SOC'Y 6–13 (Sept. 2011), http://www.acslaw.org/sites/default/files/Green_-_Establishment_Clause.pdf.

to be sufficient in both *McCreary County* and *Van Orden*.[168] In both of those cases, the Court noted that the plaintiff had come into contact with the religious display on several occasions, allowing the inference that the plaintiff's personal encounter with the display, in addition to his psychic or ideological offense taken to the display, was a sufficient injury.[169] Also on this side of the standing line are cases with facts that meet the *Flast* exception exactly.[170]

On the side of insufficient injuries are cases such as *Doremus* and *Valley Forge Christian College*, in which the Court denied the plaintiffs standing because their injuries were purely psychic or ideological.[171] In essence, a litigant's standing rests on the arbitrary factor of how many times she walked past a religious display or some other personal connection to the violation, even when the crux of her injury lies in the psychic or ideological harm that she felt from the very existence of the religious display in a government setting. Also on this side of the line are taxpayer-litigant cases that are often functionally similar to *Flast*, but are still denied standing under the Court's current doctrine.[172] Therefore, the line that the Court has drawn in this area of standing law also rests on the arbitrary and largely formalistic factor of whether a prospective litigant's injury meets the *Flast* exception exactly.[173]

Establishment Clause violations produce a unique harm, and the nature of that harm creates tension and theoretical inconsistencies when the Court attempts to reconcile this unique injury with traditional standing doctrine.[174] The body of law in the area of Establishment Clause standing, particularly with respect to the injury requirement, is complex. The nature of Establishment Clause violations produces an injury that is largely psychic or ideological, yet current case law fails to encompass claims that are purely psychic or

168. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 682 (2005); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 851–52 (2005). This "observer" status is usually sufficient for standing purposes when the litigant has some personal connection to the alleged violation. Lupu & Tuttle, *supra* note 164, at 158 ("Except for disputes arising in public schools, standing in government display cases often rests entirely on 'observer' status.").

169. *See generally Van Orden*, 545 U.S. 677; *McCreary Cnty.*, 545 U.S. at 851–52.

170. *See* Lupu & Tuttle, *supra* note 164, at 146, 152–55 (discussing the limits of the *Flast* exception in *Hein*).

171. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 486–87 (1982) (holding the *Flast* exception inapplicable to a state in-kind transfer of property to a religious institution); Doremus v. Bd. of Educ., 342 U.S. 429, 432 (1952).

172. *Doremus*, 342 U.S. at 433; *see also Valley Forge Christian Coll.*, 454 U.S. at 478 (holding the *Flast* exception inapplicable to a state in-kind transfer of property to a religious institution).

173. *Valley Forge Christian Coll.*, 454 U.S. at 478–81.

174. *See supra* Part III and accompanying notes.

ideological. Therefore, prospective litigants seeking to bring Establishment Clause claims based largely on a psychic or ideological harm could be deterred from raising meritorious claims by this unclear and complex area of law.

IV. ESTABLISHING A CLEAR STANDARD FOR ESTABLISHMENT CLAUSE STANDING

The Court should clarify this area of the law by drawing a new bright-line rule that recognizes all Establishment Clause injuries, whether or not they are psychic or ideological, subject to some prudential limitations. This rule would acknowledge that psychic injuries are cognizable injuries within the case or controversy requirement of Article III, but that psychic injuries should sometimes be rejected based on prudential concerns. The prudential reasons cited for the ban on psychic injuries in standing jurisprudence are not implicated in Establishment Clause cases because of the unique nature of the harm resulting from these alleged violations. Thus, the Court should allow psychic injuries as sufficient for standing purposes in the Establishment Clause context. The Court should maintain its prohibition against all other psychic injuries, based on the prudential reasons that the Court has invoked for this prohibition.

A. A Bright-Line Rule Allowing Psychic Injuries in Establishment Clause Cases

Although the Supreme Court has held that purely psychic injuries do not fall within the case or controversy requirement of Article III,[175] the Court should reconsider the question of whether psychic injuries are constitutionally sufficient to confer standing.[176] The Court should reason that psychic injuries fit within the constitutional case or controversy requirement, but that courts should prohibit them for prudential reasons. Because the Court has held that taxpayer standing can be sufficient, even when there is not a

175. *Valley Forge Christian Coll.*, 454 U.S. at 485 ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . .").

176. *See* Sherry, *supra* note 16, at 985 ("[E]very injury caused directly by a violation of the Religion Clauses is, at bottom, psychological.").

traditional injury-in-fact,[177] the Court should hold that psychic injuries do indeed fall within the Article III case or controversy requirement. However, the Court should recognize that prudential limitations on standing support a general ban on psychic injuries conferring standing. As the Court has recognized in prior standing jurisprudence, psychic injuries are limited by the prudential consideration of generalized grievances, which are insufficient injuries because they are too abstract and widely shared by others.[178] The Court has also found that psychic injuries lack "concrete adverseness which sharpens the presentation of issues."[179] Generally, these prudential considerations reinforce the Court's rejection of psychic injuries as sufficient for standing purposes.[180]

However, Establishment Clause cases involve unique harms that inevitably are psychic injuries.[181] As demonstrated by Part III of this Note, Establishment Clause standing jurisprudence is inconsistent as to the question of what injury suffices for standing purposes.[182] In numerous cases, the Court has adjudicated claims based on the plaintiff's observer status of religious displays and has predicated standing on the observer's alleged personal connection to the religious display in question.[183] In others, the Court has recognized a narrow exception to taxpayer standing based on the unique historical and constitutional status of the Establishment Clause.[184] Both lines of cases are in essence legal fictions, addressing attenuated observer or taxpayer connections to the harm, rather than the psychic injuries at stake. Regardless, in all Establishment Clause cases, the psychic injury is the real harm at issue.

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177. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (allowing taxpayer standing when the litigant meets a narrow exception to the general prohibition against taxpayer standing).

178. *Valley Forge Christian Coll.*, 454 U.S. at 488–90.

179. *Id.* at 486 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

180. *Id.* at 488–90.

181. Sherry, *supra* note 16, at 985.

182. *See supra* Part III and accompanying notes.

183. *See generally* Van Orden v. Perry, 545 U.S. 677, 682 (2005); McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 869 (2005). In *Valley Forge Christian College*, the Court eschewed this type of "observer" standing. 454 U.S. at 485 ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . .").

184. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 102–04 (allowing taxpayer standing based on a narrow two-prong exception to the general prohibition against taxpayer standing).

Further, a widely shared psychic injury can still be deeply personal and individualized.[185] Based on its nature in the Establishment Clause context, a psychic injury is a personal offense and harm done to one's mind.[186] This type of individualized psychic injury does not implicate the concerns that the prudential limitation against generalized grievances is intended to guard against. As discussed in Part III, the Court has drawn arbitrary lines dictating which injuries are sufficient for standing, when all alleged injuries in this context are in fact psychic at the core.[187] Thus, because Establishment Clause psychic injuries do not implicate the concerns of the generalized-grievances limitation and because such psychic injuries are involved in every Establishment Clause claim, the Court should allow these psychic injuries in the Establishment Clause standing context, free of prudential limitations.

B. The Utility and Consistency of a Bright-Line Rule in the Establishment Clause Context

This bright-line rule, allowing psychic injuries for Establishment Clause cases, would (1) resolve the current tension within the Establishment Clause doctrine; (2) correspond with the Court's trend toward using the endorsement analysis; and (3) make the prevailing interpretation of injury more consistent with the history and rationale of the Establishment Clause.

This bright-line rule would eliminate the legal fiction of injury created by observer-of-religious-display cases, such as *Van Orden*, and taxpayer standing cases, such as *Flast*, by properly focusing on the psychic injury and not on attenuated connections to the harm.[188] Additionally, this bright-line rule would eliminate the dependence on a plaintiff's personal connection to an alleged violation as a basis for granting standing, because all litigants who allege a psychic injury would be granted standing by the courts, regardless of how many times they observed the alleged violation.[189] A bright-line rule would reduce judicial discretion in determining whether the prospective litigant's personal connection to the alleged violation is sufficient and would therefore reconcile existing tensions and inconsistencies

185. Sherry, *supra* note 16, at 985.

186. *Id.*

187. *See id.* ("[E]very injury caused directly by a violation of the Religion Clauses is, at bottom, psychological."); *supra* Part III.

188. *See generally Van Orden*, 545 U.S. at 682; *Flast*, 392 U.S. at 102–04.

189. *Van Orden*, 545 U.S. at 682.

regarding the injury requirement in Establishment Clause standing doctrine.[190] Additionally, the Court has struggled with *Flast* for years, and despite numerous opportunities to overrule the exception, the Court has simply limited it to its facts.[191] Recognizing a psychic or ideological injury as a sufficient harm for standing purposes would eliminate the need for taxpayer standing in an Establishment Clause context, since the allegation of a psychic injury would be itself sufficient.

A bright-line rule allowing standing for all psychic and ideological injuries is also consistent with the Court's recent trend toward an endorsement analysis when examining Establishment Clause claims.[192] Because standing is linked to substantive law when defining an injury, the Court's trend toward using an endorsement analysis supports the recognition of purely psychic or ideological injuries for standing purposes.[193] The endorsement analysis generally focuses on whether the government has impermissibly endorsed religion.[194] Because the harm flowing from the government's endorsement of religion is necessarily widespread and psychic, it makes sense to adopt standing rules consistent with the Court's substantive approach.[195] Indeed, the Court analyzed *Van Orden* and *McCreary County*, both of which involved somewhat ideological injuries with more arbitrary personal connections to the alleged Establishment Clause violations, under an endorsement approach.[196] A bright-line rule permitting these psychic and ideological injuries would therefore be most consistent with the Court's recent trend toward endorsement analysis. Further, this consistency with the substantive law would allow courts to grant standing to and then dismiss on the merits cases in which the litigants alleged psychic

190. Reducing judicial discretion in the Establishment Clause standing context would also reduce the potential for judicial value judgments that exist under the current approach to Establishment Clause standing. *See* Sherry, *supra* note 16, at 983 (discussing the Court's treatment of *Salazar v. Buono*, 130 S. Ct. 1803 (2010), a religious display case involving a large wooden cross, in which Justice Scalia "denied that the cross was a Christian symbol").

191. SULLIVAN & GUNTHER, *supra* note 3, at 44 (detailing subsequent cases that challenged the limits of the *Flast* exception).

192. *See, e.g.*, Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989) ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.").

193. *See id.*

194. *Id.*

195. *See* SULLIVAN & GUNTHER, *supra* note 3, at 1319–23.

196. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 682, 712 (2005); McCreary Cnty. v. ACLU of Ky., 545 U.S. 833, 851, 883 (2005).

injury but lacked sufficient harm under substantive law. Dismissing cases on the merits rather than on standing grounds would buttress an important aspect of our democratic framework. Allowing litigants to allege psychic injuries that are later dismissed on the merits, rather than on standing grounds, would be an important recognition of a citizen's right to challenge government establishment of religion. This consistency would further prevent a flood of cases in the federal courts, since courts could dismiss cases on the merits, rather than on standing grounds.[197]

The Clause's history and the more prevalent "wall of separation" rationale likewise support a bright-line rule allowing Establishment Clause standing based on psychic and ideological injuries. While the Framers thought about the Establishment Clause against a history of religious persecution in Europe, key Framers such as Thomas Jefferson and James Madison recognized that government establishment of religion affected one's mind as well as one's life and liberty.[198] In *Everson v. Board of Education*, Justice Black's majority opinion noted that the Framers, and James Madison in particular, drafted the Establishment Clause with the belief that "the best interest of a society required that the *minds* of men always be wholly free."[199] Indeed, the emphasis on the intrusion of government establishment of religion into the minds of individuals was an underlying principle of the Establishment Clause and thus supports a bright-line rule allowing standing for psychic injuries in this context.

V. CONCLUSION

Standing law concerning Establishment Clause claims has become a murky and complex body of cases in which the Court has blurred the line between what constitutes a sufficient injury and what does not.[200] Recent cases have allowed a litigant to allege a psychic or ideological injury, as long as the litigant also alleges some, at times arbitrary, personal connection to the alleged Establishment Clause

197. JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1993) (discussing the reasons for and disagreements about the "crisis of volume" in the federal courts).

198. LEVY, *supra* note 21, at 245. *See generally* MADISON, *supra* note 29.

199. Everson v. Bd. of Educ., 330 U.S. 1, 12 (1947) (emphasis added); *see also* LEVY, *supra* note 21, at 129 (detailing Madison's support for Jefferson's bill for religious freedom).

200. *See supra* Part III and accompanying notes.

violation.[201] These cases have contributed to the tensions and inconsistencies in Establishment Clause standing doctrine. In addition, the Court continues to restrict, yet uphold, the *Flast* exception to the general prohibition against taxpayer standing, further complicating this body of law.[202] The Court's recent jurisprudence has made it difficult for litigants to determine whether they have a sufficient injury to raise an Establishment Clause claim. Due to the nature and rationale of the Establishment Clause and the Court's recent jurisprudential trends, the Court should allow purely psychic or ideological injuries in this context to satisfy the injury requirement of standing law.

By adopting a bright-line rule that purely psychic and ideological injuries will satisfy the injury requirement for standing under the Establishment Clause, the Court could resolve current tensions in standing law. By eliminating the need for courts to determine a personal connection between the prospective litigant and the alleged violation, all a litigant would need to do is allege a psychic or ideological injury to have a sufficient injury for Establishment Clause standing purposes.[203] This bright-line rule would also eliminate the need for litigants to base their claims on the *Flast* exception and would thus eradicate the need for an exception to the general prohibition against taxpayer standing.[204] The Court should therefore adopt a bright-line rule allowing psychic and ideological injuries and finally clarify and reconcile the injury requirement of standing doctrine under the Establishment Clause.

Mary Alexander Myers[*]

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201. *See, e.g.*, *Van Orden*, 545 U.S. at 682; McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 844 (2005).

202. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 609 (2007); Valley Forge Christian Coll. v. Arms. United for Separation of Church & State, Inc., 454 U.S. 464, 478–81 (1982); SULLIVAN & GUNTHER, *supra* note 3, at 44 (detailing subsequent cases that challenged the limits of the *Flast* exception).

203. For two factual scenarios that would be denied standing under the current doctrine and would be granted standing under the proposed bright-line rule, *see Hein*, 551 U.S. at 593–96; *Valley Forge Christian Coll.*, 454 U.S. at 466–69.

204. *See generally* Flast v. Cohen, 392 U.S. 83, 104 (1986).

* Candidate for Doctor of Jurisprudence, May 2012, Vanderbilt University Law School. I am grateful to the editors and staff of the VANDERBILT LAW REVIEW for their suggestions and editing assistance. I would like to thank Professor Suzanna Sherry for helping me develop my topic and refine my analysis. I am also so grateful to my mother and sister for their love and support.