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Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause

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INTRODUCTION

The United States Supreme Court has vacillated over the years in its fidelity to the doctrine of standing, but as of late is quite strict in enforcing this prerequisite to stating a justiciable claim.[1] For half a century, however, the Supreme Court has reduced the rigor of its standing requirements when the claim on

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1. Standing is a doctrine of justiciability derived from the "Cases" and "Controversies" provision in Article III of the Constitution. U.S. CONST. art. III, § 2, cl. 1. The doctrine has three requirements: individualized injury, a causal link between the alleged wrongdoing and the injury, and the matter is redressable by traditional judicial remedies. Clapper v. Amnesty Int'l USA, 568 U.S. ___, ___, 133 S. Ct. 1138, 1147 (2013); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). For a survey of the Court's cases on standing that cycle from strict to lax in adherence to doctrine, see Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 26–49 (2010).

the merits arises under the Establishment Clause.[2] There are two types of these reduced-rigor cases. The first type has drawn the most attention. It involves taxpayer standing where a plaintiff challenges the use of government resources said to improperly advance religion. The second type of reduced-rigor standing is where a claim is brought because of a plaintiff's "unwanted exposure" to religious expression by government.[3] The Supreme Court has sharply narrowed but not entirely done away with taxpayer standing. Not so with unwanted-exposure standing. The latter remains a common feature of contemporary litigation under the Establishment Clause and warrants closer examination.

As will be shown in Part I of this article, taxpayer standing is presently permitted only when tax monies have been extracted from a plaintiff and appropriated by a legislature as funding for a statutory program that expressly contemplates the use of the money for religion. It is thought that only in this circumstance can it plausibly be said that a taxpayer-plaintiff suffered injury in that she was coerced into contributing her money in aid of religion.

Part II takes up the Supreme Court's reduced-rigor standing when a plaintiff objects because she is personally exposed to a religious symbol or other religious expression attributable to the government. Typical of such cases is where the government has sponsored a public prayer, or constructed on public land a

2. The Establishment Clause of the First Amendment provides "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. 1.

3. Some refer to this reduced-rigor standing as "offended observer" cases. This is a mistake. *See, e.g.*, Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHNS L. REV. 407, 439–40 (2011) (noting others have used the term "offended observer," but acknowledging that an atheist caused to "feel like 'an outsider'" is distinguishable from an injury-by-exposure bystander). As shown below, the nature of the relevant harm is not emotional or psychological offense, nor is it the intensity of the offense. *See, infra*, notes 105–06, 108, 119–20, and accompanying text. Further, the successful plaintiff is more than a mere observer, but one who disagrees with her government's message. *See, infra*, notes 107–10, 124–25, and accompanying text. The term "offended observer" is a way for the governmental defendant to belittle these Establishment Clause claims and thereby gain a rhetorical advantage in an effort to have them dismissed at the outset for lack of standing.

Christian cross or monument to the Ten Commandments. These unwanted-exposure cases have been consistent over the last sixty-six years in allowing standing where a plaintiff's status as student, government official, juror, or the like has resulted in personal exposure to the government's religious message with which she disagrees. Being a mere witness to unconstitutional behavior by one's government is not normally sufficient to vest a person with standing to sue.[4] So, for example, observing the municipal police search a neighbor's home in violation of the Fourth Amendment does not vest one with standing to sue. The injury one experiences as a result of such police action is a generalized grievance shared by everyone in the municipality, and thus not one personalized as required for standing. But government-expression cases involving governmental displays of religion are treated differently. Just how it is that this "injury" of unwanted exposure to a religious message is not a grievance we all share when our government operates outside of its constitutional restraints will require some explaining by the Supreme Court. What the Court has to say on that matter will also tell us something about the unique operation of the Establishment Clause.

Part III of this article utilizes the factual record in *Salazar v. Buono*[5] to illustrate some of the subtle features of unwanted-exposure standing, and to test its boundaries. Finally, Part IV frontally takes-up what it is about the operation and meaning of the Establishment Clause that is unique. Because the Court employs the no-establishment principle much like a structural clause separating church and state, that boundary can be transgressed without anyone having suffered individualized injury-in-fact. That in turn has led the Supreme Court to respond by adopting these specialized rules of reduced-rigor standing.

4. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 756 (1984) ("Recognition of standing in such circumstances would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders.") (internal quotations omitted).

5. 559 U.S. ___, 130 S. Ct. 1803 (2010) (plurality op.).

I. TAXPAYER STANDING

The Supreme Court's long-standing rule is to disallow taxpayer standing.[6] A taxpayer as plaintiff simply lacks the individualized injury to have a personal stake in the outcome of the litigation.[7] In *Flast v. Cohen*,[8] the Supreme Court rather dramatically introduced a test for determining when a departure from the long-standing rule would be permitted and taxpayer standing allowed.[9] The double-nexus test generated in *Flast* was framed with sufficient generality to permit taxpayers to challenge a range of state and federal appropriations and tax expenditures. Nevertheless, in no instance since *Flast* has taxpayer standing ever been permitted except when the claim on the merits alleged a violation of the Establishment Clause.[10]

This narrowing of taxpayer standing to only cases invoking the requirement of church-state separation should have redoubled efforts by the Supreme Court to explain what is unique about the Establishment Clause such that taxpayer-plaintiffs

6. Frothingham v. Mellon, 262 U.S. 447 (1923) (decided along with *Massachusetts v. Mellon*). Of course, the rule does not apply to situations where the taxpayer-plaintiff is suing because she is due a tax refund or because she is the victim of an illegal tax. In such instances the taxpayer has individualized injury.

7. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343 (2006) (rejecting the notion that an allegedly improper legislative appropriation increased the plaintiff's burden of taxation as little more than a remote and indeterminate claim to an interest in the moneys of the U.S. Treasury that is shared by millions).

8. 392 U.S. 83 (1968). *Flast* held that federal taxpayers had standing to challenge provisions of the Elementary and Secondary Education Act of 1965 providing federal aid for educational equipment, as well as for classes in reading and arithmetic, to nonpublic schools most of which were religious schools. The case was then remanded to the trial court for consideration of the merits with respect to the Establishment Clause.

9. The Court in *Flast* said that to have standing a taxpayer must show two things. "First, the taxpayer must establish a logical link between the status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between the status and the precise nature of the constitutional infringement alleged." *Id*. at 102.

10. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347–49 (2006) (denying taxpayer standing in suit alleging a rights violation under the Dormant Commerce Clause); *see* Hein v. Freedom From Religion Found., 551 U.S. 587, 609–10 (2007) (plurality op.).

receive preferred treatment in lawsuits that normally would be dismissed as lacking individualized injury and, hence, no standing.[11] While that has not happened,[12] standing in *Flast* recently came under serious challenge in *Hein v. Freedom From Religion Foundation, Inc.*[13] The *Hein* plurality held that taxpayer standing did not extend to a general appropriation by Congress to fund the day-to-day operations of the Executive Office of the President, especially where the executive had broad discretion as to how those funds were spent in furtherance of the President's policy initiatives.[14] The plurality framed the issue of executive discretion as a concern for separation of powers—the judiciary not trenching upon the authority of the President—being equal to if not prior to any concern that the President was using his spending authority to improperly advance religion.[15] In addition

11. *Flast* did reference back to James Madison and defeat of the religious assessment bill in Virginia during 1784–1785. 392 U.S. at 103–04. But there was no attempt in *Flast* to tailor taxpayer standing to the facts as they happened in Virginia, detail as to how the objectionable assessment bill would have operated, and Madison's precise arguments for opposing the assessment bill.

12. Between *Flast* and *Hein*, two Supreme Court cases examined assertions of taxpayer standing where the underlying claim on the merits was brought under the Establishment Clause. The results were mixed. One case found taxpayer standing and the other did not. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Court held that taxpayers lacked standing to challenge a decision by a federal executive agency to declare certain government-owned real estate as surplus and then transfer the real estate free of charge under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, to a Christian college. *Valley Forge*, 454 U.S. at 466–69. *Flast* permitted taxpayer standing only when the taxpayer-plaintiff was challenging Congress's use of its Taxing and Spending Power, U.S. CONST. art. I, § 8, cl. 1. *Valley Forge*, 454 U.S. at 478–82. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court held that taxpayer-plaintiffs had standing to challenge a congressional social service program that provided grant funding to counseling centers promoting teen chastity, expressly requiring that religious as well as secular centers be considered. *Id.* at 618–20. The Court went on to uphold the constitutionality of the program on its face, but remanded for further proceedings with respect to "as applied" challenges. *Id.* at 600–18, 620–22.

13. 551 U.S. 587 (2007) (plurality op.).

14. *Id.* at 609–14.

15. *Id.* at 611–12; *see id.* at 615–18 (Kennedy, J., concurring) (emphasizing separation of powers); Clapper v. Amnesty Int'l USA, 568 U.S. ___, ___, 133 S. Ct. 1138, 1146–47 (2013) (emphasizing the origin of standing doctrine in separation of powers).

to not wanting the Judicial Branch to oversee discretionary spending by the Executive Branch, the *Hein* plurality insisted that taxpayer standing be allowed only when the legislative program in question expressly contemplated that the appropriated monies would go to religion.[16] But *Hein* did little to add to our knowledge of why taxpayer standing was ever proper and thus how it is that the Establishment Clause could be violated in the absence of a plaintiff with individualized injury. In particular, *Hein* made no attempt to identify the sort of specialized harms that were protected by the Establishment Clause such that a specialized rule of taxpayer standing was justified.

The circle connecting reduced-rigor taxpayer standing with James Madison and the history of Virginia's disestablishment, events which were in turn connected with the role of the Establishment Clause in separating church and state, was finally completed in the case of *Arizona Christian School Tuition Organization v. Winn*.[17] The Court in *Winn* denied taxpayer standing to challenge a recently adopted provision in Arizona's income tax law that provided credits to taxpayers making charitable contributions to nonprofit corporations organized for the purpose of awarding scholarships to K-12 students attending private schools, including religious schools. For purposes of taxpayer standing, *Winn* said that a taxpayer's injury remediable under the Establishment Clause must entail the "extraction and spending of tax money in aid of religion."[18] This limitation on the nature of the taxpayer-plaintiff's injury or personalized harm was attributable to the origin of the Establishment Clause in the work of James Madison and his *Memorial and Remonstrance*, a protest petition circulated in Virginia during the summer and early fall of 1785 in opposition to a bill in the state legislature proposing a religious assessment for the support of Christian clergy.[19] As the *Memorial* makes clear, for Madison it was not the

16. *Hein*, 551 U.S. at 603–09 (plurality op.).

17. 563 U.S. ___, 131 S. Ct. 1436 (2011).

18. *Id*. at 1446 (quotation marks and brackets omitted).

19. A full account of the historical events contributing to disestablishment in Virginia appears in Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J. OF L. & PUB. POLICY 51 (2009) [hereinafter Esbeck, *Protestant Dissent*]. This includes a detailed parsing of

amount of the tax, a levy which he opposed even if the assessment were "three pence only."[20] Rather than the dollar amount of the pecuniary harm, for Madison the relevant injury was that the religious tax payments were coerced and thus contrary to a principle called voluntaryism.[21] For Madison, as well as for the Baptists and Presbyterians who joined him in opposing the Virginia assessment bill,[22] as a matter of religious belief any contribution or tithe to one's church must be voluntary. It made no difference to Madison that the Virginia bill permitted each taxpayer to designate the church of his choice to receive his tax allotment via the county collector. The tax was still coercive. As *Winn* explained, because the history of this no-establishment principle limited claims by taxpayer-plaintiffs to coercive extractions of their money to be applied in aid of religion, taxpayer standing had to be denied on the facts in *Winn*. The Arizona tax credit did not involve the extraction of tax money

Madison's arguments in his *Memorial and Remonstrance*. *Id*. at 82–85, 92–98.

20. *Winn*, 131 S. Ct. at 1446 ("In Madison's view, government should not 'force a citizen to contribute three pence only of his property for the support of any one establishment.'" (quoting 2 WRITINGS OF JAMES MADISON 183, 186 (G. Hunt ed. 1901)).

21. *Id*. ("In the Memorial and Remonstrance, Madison objected to the proposed assessment on the ground that it would coerce a form of religious devotion in violation of conscience.").

22. Giving to one's church was seen as an act of religious devotion. Baptists in particular, but other Christians as well, believed such giving must be voluntary. Esbeck, *Protestant Dissent*, *supra* note 19, at 96. Baptists and other dissenters in Virginia were an essential base of political support for James Madison. CHRIS DEROSE, FOUNDING RIVALS: MADISON VS. MONROE, THE BILL OF RIGHTS, AND THE ELECTION THAT SAVED A NATION (2011). Religious dissenters first worked in support of Madison in April 1785 to re-elect him as a delegate to the Virginia legislature. *Id*. at 102–03 (the pending legislative issue being the Virginia religious assessment bill). In June 1788, when ratification of the federal Constitution was being debated in Virginia, Madison defended the document as not delegating power to the federal government to interfere with religion, work that favorably influenced the Baptists in the February 1789 election. *Id*. at 189–90, 226–27. Baptists, Lutherans, and other dissenters voted heavily for Madison in the election of February 1789, sending him to Congress where he led the effort to report out a Bill of Rights. *Id*. at 226–30, 238–40, 246–49, 258.

from the plaintiffs who filed the lawsuit. Nor was the earning of a tax credit by a charitable contributor an act of legislative spending in aid of religion.[23] Hence, there was no constitutionally cognizable injury in the sense contemplated by the principle of voluntaryism.

Winn also indicated that "extraction" and "spending" must both be present to make sense of taxpayer standing, just as both were present in the defeated Virginia assessment bill. This goes to causation, an additional requirement for standing. A taxpayer-plaintiff's tax monies must be traceable through the general treasury before being spent on religion or a religious organization. Only when there is such a causal link can it be said that there is coercion of the taxpayer-plaintiff to aid religion. The plaintiffs in *Winn* could not, of course, trace their tax payments to the religious schools.[24]

The third requirement for standing is redressability. A taxpayer-plaintiff's injury—a transgression of the principle of voluntaryism—is not redressable by an injunction against a legislative appropriation to the religious schools in question. As *Winn* pointed out, there were no such appropriations in Arizona to enjoin.[25]

From an economic perspective the distinction between a tax credit and an appropriation is a matter of mere form. Both deplete the state treasury.[26] From the perspective of the Establishment Clause, however, the plaintiffs who sued as taxpayers failed to suffer religious coercion in the sense of transgressing the principle of voluntaryism. And such coercion is

23. *Winn*, 563 U.S. at ___, 131 S. Ct. at 1446–47.

24. *Id*. at ___, 131 S. Ct. at 1447–48 (Taxpayer plaintiffs "cannot satisfy the requirements of causation and redressability. When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs.").

25. *Id*.

26. *Id*. at ___, 131 S. Ct. at 1447 ("It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit.").

the personalized harm protected by the Establishment Clause, at least as illustrated by the 1785 Virginia assessment experience. That is the historical experience the Supreme Court deemed relevant and that *Winn* read into the Establishment Clause.[27]

Notwithstanding this confining of *Flast* to Madison and the Virginia disestablishment experience, taxpayer standing after *Winn* is still reduced-rigor standing. It is still a stretch to characterize as "coercive" and thus a personalized harm, the payment by a plaintiff of a general federal tax into the U.S. Treasury, where the money is commingled with monies from millions of other sources, and then appropriated by Congress in aid of a program that expressly designates some or all of the allotted money to religion. And tracing the causal link between the points at which a plaintiff initially pays her general federal tax and the time at which Congress appropriates funds from the U.S. Treasury to religion is an abstraction. Indeed, the latter moment in time would likely not be known to the taxpayer-plaintiff, which is to say the plaintiff would not even know when the relevant injury befell her. Accordingly, *Winn* is still not fully exacting when it comes to traditional standing doctrine.

In two respects caution should be exercised so as not to over-read *Winn*. First, *Winn* does not conflate the test for taxpayer standing with the merits of a *prima facie* claim under the Establishment Clause. Even if a taxpayer-plaintiff satisfies the standing requirements of *Winn*, she may lose on the merits because the program of governmental aid satisfies the requirements of religious neutrality. Religious neutrality is where the government enacts a program of aid that: (i) has a

27. There remains one difference between the Virginia religious assessment bill, opposed by Madison in 1784–1785, and the Elementary and Secondary Education Act of 1965, at issue in *Flast*. The Virginia proposal was a special tax ear-marked for religion. When collected, the funds were kept separated by the county collector. The money was kept separate because in time it was paid over to each church according to each taxpayer's designation. *Flast* involved a general federal tax where the proceeds went to the general U.S. Treasury. So the causal link between extracting and spending begins to breakdown. But *Flast* was a case where it was known that the tax revenues appropriated under the Elementary and Secondary Education Act of 1965 were to be paid to religious schools. This was because in 1965 nearly all nonpublic schools were religious schools. *Hein*, 551 U.S. at 604 n. 3.

secular purpose; (ii) the recipients are eligible without regard to religion; and (iii) administrative care is taken so that public funds are not diverted to an explicitly religious purpose.[28] In this manner, a government's program of aid to assist private-sector providers of education, health care, and social services, has been upheld in the face of Establishment Clause challenges.[29]

Second, *Winn* does not mean that all successful claims under the Establishment Clause require a showing of coercion (identified in *Winn* with the principle of voluntaryism). In many instances a plaintiff can prevail in an Establishment Clause case without showing religious coercion.[30] All that *Winn* stands for is that an assertion of taxpayer standing requires the proper showing of coercion. But that narrowing in *Winn* is quite enough such that there will be a decline in the successful use of taxpayer standing.

II. UNWANTED-EXPOSURE STANDING

Unlike the recent narrowing of taxpayer standing, the Supreme Court's cases on unwanted-exposure standing have

28. When it comes to programs of direct financial aid, the Establishment Clause requires only that the three elements set forth in the text be satisfied. These neutrality principles were first clearly adopted by the Court in *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding federal program of special education services when students at religious and public schools are treated equally). *See* Mitchell v. Helms, 530 U.S. 793 (2000) (plurality op.) (upholding federal program providing aid to K-12 education, treating religious and public schools equally). Where the aid to religion is indirect, such as via a parental voucher or tax deduction, the neutrality principle has been the law much longer. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (school vouchers); Mueller v. Allen, 463 U.S. 388 (1983) (income tax deduction for parents of children attending schools, including religious schools).

29. *See, e.g.*, Freedom From Religion Found. v. McCallum, 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd* 324 F. 3d 880 (7th Cir. 2003) (holding that Establishment Clause did not prevent direct state aid to faith-intensive drug treatment center where a choice of secular and religious programs was available to addicts without regard to the religious character of the programs).

30. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 221–23 (1963) (Free Exercise Clause claim is predicated on a showing of coercion, whereas a claim under the Establishment Clause need not be so attended); Engel v. Vitale, 370 U.S. 421, 430 (1962) (same; noting that voluntariness of student prayer may defeat a free-exercise claim but not a violation of the no-establishment principle).

drawn little attention and remain fairly expansive. Typical of such cases is where the government places a Christmas crèche on the courthouse lawn or Congress inserts "under God" into the nation's Pledge of Allegiance. The mere observance of unconstitutional behavior by one's government does not vest an individual with standing to sue. For example, should a public school student observe a fellow student being expelled for misconduct without notice or opportunity for a hearing, she cannot sue having witnessed the Due Process Clause violation. Certain church-state cases, however, have proven to be different.

Reduced rigor in the required injury-in-fact for standing has been permitted in cases challenging religious symbols or other religious speech attributable to government.[31] These unwanted-exposure cases occur when the underlying claim on the merits is that the Establishment Clause is violated because the government has taken sides in a religious matter. Such a violation can occur and yet no one suffers a personalized harm or injury. Unwanted exposure is a proxy for the missing injury-in-fact, thus allowing the courts to proceed to adjudicate the claim on the merits. A plaintiff alleging a violation of church-state boundaries can have unwanted-exposure standing if: (i) she objects because government is siding with a religion other than her own; (ii) she objects because government is siding with a religion and she subscribes to no religion; or (iii) she objects because government is siding with a religion that is hers but that the sponsorship is actually harmful to her religion. This third option can be conceptually difficult; but with a little reflection one can see how, given the nature of religion, government efforts to advance a particular religion often have a corrupting effect. Several of James Madison's arguments in his *Memorial and*

31. These cases are limited to those involving religious symbols, spoken words, written words, or other speech attributable to the government. A mere act of the government alleged to imply a "message" to third-party observers about the government's position on a matter is insufficient. In re Navy Chaplaincy, 534 F.3d 756, 764–65 (D.C. Cir. 2008) (claim by non-liturgical Protestant chaplains that others like them were discriminated against in Navy's retirement program could not assert their standing to sue based on exposure to unwanted "message" alleged to be communicated to them by discrimination against their fellow chaplains).

Remonstrance were about how religious establishment is actually harmful to religion.[32]

It is normal for the government to takes sides on all sorts of issues, including controversial ones. Government has that power. But government does not have the power to take sides on a religious question.[33] The latter is prohibited by the Establishment Clause.[34] This specialized treatment of religious disputes thereby calls for a specialized rule of standing if the objecting party is going to be able to lodge a claim under the

32. Esbeck, *Protestant Dissent*, *supra* note 19, at 83–84, 92–97. For historical arguments by James Madison concerning how establishment corrupted Christianity and the church, see *id*. at 92–94 nn.164–65, 167–76. For religious arguments by Madison concerning how no-establishment benefits churches and religion, see *id*. at 94–96 nn.178–82, 184, 187–90. For prudential arguments by Madison concerning the dangers of establishment, see *id*. at 97 nn.191–96.

33. *See, e.g.*, Rosenberger v. Rector & Visitors, 515 U.S. 819, 845–46 (1995) (university regulations that "required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief" was inconsistent with the Establishment Clause); Emp't Div. v. Smith, 494 U.S. 872, 877 (1990) ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma."); *id*. at 887 ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims. . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.") (internal citations omitted); Widmar v. Vincent, 454 U.S. 263, 269–72 nn. 6, 9 and 11 (1981) (government must avoid inquiring into the significance of certain words, practices, and events to differing religious faiths); Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (while government may speak out on controversial public issues, it must remain neutral in religious disputes); Watson v. Jones, 80 U.S. (1 Wall.) 679, 727 (1871) (there is no civil court jurisdiction to resolve disputes over religious doctrine, polity, or church discipline).

34. That government does not have the power to take sides on a religious question or dispute is a particular application of a more general rule. The rule is that no-establishment is best achieved to the degree that modern government uses its considerable powers to minimize its impact on religion. This not only helps to prevent the corruption of religion by the state, but prevents the oppression of personal choice in religious matters which can exacerbate division within the body politic along religious lines. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990)*; see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 38 (2000); Andrew Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 PEPPERDINE L. REV. 1115, 1116, 1120, 1128–29 (2013).

Establishment Clause. This is because when government takes sides in a religious matter there is often no one with a personalized injury. Consider the nontheist who when using U.S. coins and paper money observes the engraving "In God We Trust." The putative injury is similar to a generalized grievance that we all share when our government fails to operate within its constitutional restraints. As a proxy for personalized injury the Supreme Court seized upon unwanted exposure, and in this way ensures that the plaintiff would have the necessary incentive to vigorously pursue the legal and factual presentation of the dispute in an adversarial setting.

The United States Supreme Court's cases that invoke the Establishment Clause and claim unwanted exposure to government religious speech are fairly numerous—sixteen. However, in nearly all of these cases—twelve out of the sixteen—the plaintiff's standing was not challenged by the government and thus was not argued by counsel and decided by the Supreme Court. These twelve cases, therefore, are not binding precedent when it comes to what is required to bring an unwanted-exposure case as a proxy for traditional standing.[35] But the twelve are illustrative of the many ways these exposure cases arise. The four remaining cases do address unwanted-exposure standing and are sufficient to suggest broader principles. For the presentation to be complete, all sixteen cases are reviewed below in chronological order.

The first case of interest is *McCollum v. Board of Education*.[36] *McCollum* invalidated a local public school's program which allowed nearby churches to hold elective religion classes in classrooms during regular school hours. The plaintiff was a resident and taxpayer of the local school district, and "a parent whose child was then enrolled in the Champaign public schools."[37] A parent has standing in her capacity as a parent for

35. Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. ___, ___, 131 S. Ct. 1436, 1448–49 (2011) (pointing to several cases which held that where lack of standing was not raised on appeal, then the case is of no precedential value on that point).

36. 333 U.S. 203 (1948). In *McCollum*, the Supreme Court for the first time found an Establishment Clause violation.

37. *Id*. at 205. The description of plaintiff as a school district taxpayer is a matter relevant to taxpayer standing but not unwanted-exposure standing. In a

the injury caused by the unwanted exposure to her minor children. Hence, the child need not be a party. Relevant to the unwanted exposure of the plaintiff's child to the religion classes, the Court said:

> The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes.[38]

The government's challenge to plaintiff's standing was rejected without analysis in a single sentence: "A second ground for the motion to dismiss is that the appellant lacks standing to maintain the action, a ground which is also without merit."[39] Plaintiff was not personally exposed to what was taught in the religion classes, nor was her child.[40] If a parent did not give permission for her child to attend one of the religion class, the child was "not released from public school duties; they were

concurring opinion Justice Jackson added that plaintiff was an atheist. *Id*. at 234.

38. *Id*. at 209.

39. *Id*. at 206 (citing "Coleman v. Miller, 307 U.S. 433, 443, 445, 464."). *Coleman v. Miller* addressed the jurisdiction of the Supreme Court to review a lawsuit by Kansas legislators who had cast a vote against ratification of a proposed amendment to the federal Constitution. They claimed that their vote as state legislators was not properly counted by Kansas officials and that the ratification should be deemed defeated—rather than passed, as reported to Congress by Kansas officials. To that extent the legislators' claim of interest was different from that of a mere citizen of Kansas, they were found to have standing. 307 U.S. at 443, 445. We do not have a clear explanation of *Coleman*'s applicability to the question of standing in *McCollum*.

40. McCollum v. Bd. of Educ., 333 U.S. 203, 205, 209–10, 212 (1948). In a concurring opinion Justice Jackson expands on this point. He rejects standing based on plaintiff's school-age child being an observer of the release-time class but not subject to coercion to attend one of them. *Id*. at 232. Jackson goes on to write that to the extent that other students "join and he does not, it sets him apart as a dissenter, which is humiliating," that emotion cannot confer standing. "Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity whether in religion, politics, behavior or dress." *Id*. at 232–33.

required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies."[41] In this manner the compulsory education law was seen by the Court as holding non-attending students on campus pursuing their educational duties. The other students—those attending a religion class—were characterized as being released from their compulsory education requirement. As the Court saw it, standing was predicated on the local school's enforcement of the compulsory education law in a manner favoring religion. Although the plaintiff's child was not personally exposed to the religion classes, the child did have to assume a special duty to avoid such unwanted exposure—namely, remaining fully under the compulsory education law while his classmates enjoyed release time. On the merits, the on-campus release-time program was found to be in violation of the Establishment Clause.

The plaintiff in *Doremus v. Board of Education*[42] challenged teacher-led devotional Bible reading in New Jersey public schools. The Supreme Court did not reach the merits. The father of a student subject to the unwanted exercise had brought the suit, but his child subsequently graduated and thus the claim for prospective relief was mooted.[43]

Engel v. Vitale[44] was a challenge to a statewide program of daily voluntary classroom prayer in the New York public schools. The plaintiffs were "parents of ten pupils insisting that use of this official prayer in the public schools was contrary to the beliefs, religion, or religious practices of both themselves and their children."[45] The government did not challenge the standing of the plaintiffs. That is surprising because the objecting parents and their school-age children could opt-out of the prayer exercise.[46] Because of the opt-out, the plaintiffs' children could have avoided the prayer albeit undertaking some inconvenience

41. *Id*. at 209.

42. 342 U.S. 429 (1952).

43. *Id*. at 432–33. *Doremus* was also a case where standing was sought on the basis of plaintiff being a taxpayer. That too was unsuccessful. *Id*. at 433–35.

44. 370 U.S. 421 (1962).

45. *Id*. at 423.

46. *Id*. at 423 n. 2.

to do so. On the merits, the classroom prayer was found to violate the Establishment Clause.

The fact that the "observance on the part of the students is voluntary," however, did not entirely escape the Court's notice.[47] The prayer being voluntary would make a difference under the Free Exercise Clause, explained the Court, where coercion is an essential element of the *prima facie* claim.[48] But with respect to the Establishment Clause, coercion or compulsory exposure to the prayer need not be shown. This is because one of the objects of the modern Establishment Clause is to separate church and state so as to prevent injury to either or both,[49] as distinct from personal religious harm.

School District of Abington Township v. Schempp[50] involved consolidated cases from Philadelphia and Baltimore, both challenging daily classroom prayer and devotional Bible reading in public schools. In both instances, the religious exercises were optional.[51] In the Philadelphia case, the plaintiffs were:

> Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna [are] members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they . . . regularly attend religious services. . . . The children attend the Abington Senior High School, which is a public school operated by appellant district.[52]

Also, "Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible 'which were contrary to the religious beliefs which they held and to their familial teaching.'"[53]

In the Baltimore case, the plaintiffs were "Mrs. Madelyn Murray and her son, William J. Murray III, . . . both professed

47. *Id*. at 430.

48. *Id*.

49. *Id*. at 431–33. For more discussion concerning the unique nature of the Establishment Clause, see, *infra*, Part IV.

50. 374 U.S. 203 (1963).

51. *Id*. at 224–25.

52. *Id*. at 206.

53. *Id*. at 208.

atheists."[54] The "petition particularized the [Murrays'] atheistic beliefs and stated that the [school] rule, as practiced, violated their rights 'in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority.'"[55]

Having in mind that the exercises were voluntary, the lack of standing to challenge the religious practices under the Establishment Clause was raised by the government.[56] The Court disagreed and reasoned that plaintiffs had standing as follows:

> [T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedom are infringed. . . . The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.[57]

Schempp cited to all three prior cases.[58] Certainly the students in *Engel* and *Doremus* were directly exposed to the unwanted expression, whereas the student in *McCollum* had to forego release from compulsory education to avoid unwanted exposure. What was characterized in *Schempp* as "directly affected" by the unconstitutional practices of the government was deemed by the Court as sufficient injury for purposes of standing.

As in *Engel*, the *Schempp* Court said that it was unconcerned that plaintiffs did not prove they were victims of the government's coercion.[59] Coercion is an element of a Free Exercise Clause claim which is rights-based, but compulsion is not required to state a claim under the Establishment Clause. This is because the Establishment Clause is about policing the boundary between church and state. "[T]he Court found that the

54. *Id*. at 211.

55. *Id*. at 212.

56. *Id*. at 224 n. 9.

57. *Id*.

58. *Id*. *Doremus* never reached the issue of unwanted-exposure standing because the case had become moot.

59. *Id*. at 221, 223*; see, supra*, note 30.

'first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.'"[60] Obviously that boundary can be crossed without there being any victims with coercive injury. If there are no victims of coercion, then there is no one with traditional standing to sue. In *Schempp*, no one had traditional standing so the Court supplied standing by the proxy of unwanted exposure.

Chamberlin v. Dade County Board of Public Instruction[61] summarily struck down prayer and devotional Bible reading in the Dade County, Florida, public school district. The plaintiffs were parents of school-aged children enrolled in junior high and elementary schools in Dade County.[62] The plaintiffs' standing to raise an unwanted-exposure claim was not challenged before the Supreme Court, but standing would seem to follow from *Engel* and *Schempp*.

Stone v. Graham[63] struck down a state law requiring the posting of the Ten Commandments in all public school classrooms in Kentucky. The plaintiffs described themselves "as a Quaker, a Unitarian, a non-believer, a mother of school age children and public school teacher, two children of compulsory school age attending public schools, a Jewish Rabbi, and as taxpayers."[64] Plaintiffs' standing to raise an unwanted-exposure claim was not challenged before the Supreme Court, but once again standing would follow from *Engel* and *Schempp*.

Marsh v. Chambers[65] upheld a state legislature's practice of hiring a chaplain to offer a prayer at the beginning of each day when the legislature is in session. The plaintiff was described as "a member of the Nebraska Legislature."[66] The Court noted that

60. *Schempp*, 374 U.S. at 221.

61. 377 U.S. 402 (1964) (per curiam).

62. Chamberlin v. Dade Cnty. Bd. of Pub. Instruction, 160 So.2d 97, 98 (Fla. 1964).

63. 449 U.S. 39 (1980) (per curiam).

64. Stone v. Graham, 599 S.W.2d 157, 159 (Ky. 1980). Being a local taxpayer is relevant to taxpayer standing, but not to unwanted-exposure standing.

65. 463 U.S. 783 (1983).

66. *Id*. at 785.

the plaintiff "claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' or peer pressure."[67] While the government had challenged the plaintiff's standing in the federal circuit court,[68] it did not again press the issue before the Supreme Court.[69] Although standing was thus conceded, the Supreme Court volunteered the following: "[W]e agree that Chambers, as a member of the legislature . . . has standing to assert this claim."[70] Accordingly, by dictum we know that a person vested with the status of a legislator and regularly in the legislative chamber when the voluntary prayer takes place was sufficient proxy to have standing in this unwanted-exposure case.

Lynch v. Donnelly[71] upheld a municipal practice of displaying a nativity scene of Mary, Joseph, and the Christ child as part of a larger Christmas holiday scene in a private park. The display was located in the heart of the Pawtucket, Rhode Island, shopping district.[72] The plaintiffs were described as Pawtucket "residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself."[73] The Court's majority opinion does not discuss standing, thus it appears the government did not challenge plaintiffs' unwanted-exposure injury as giving rise to standing. If standing had been challenged, the argument would be that plaintiffs were citizens of Pawtucket and that was material to their standing, that is, plaintiffs' municipal citizenship led to their exposure to the display. As municipal citizens, plaintiffs held a status that made their unwanted exposure not only likely, but also conflicted in the sense that their government was seen as taking sides against them on a religious matter. The unwanted exposure was a proxy for the injury-in-fact required of traditional standing. On the merits, the city's maintenance of the nativity scene was found not

67. *Id*. at 792.

68. *Id*. at 785.

69. *Id*. at 786 n. 4.

70. *Id*. He was also described as a state taxpayer, a matter relevant to taxpayer standing but not unwanted-exposure standing.

71. 465 U.S. 668 (1984).

72. *Id*. at 671.

73. *Id*.

to violate the Establishment Clause.

In a now prominent concurring opinion, Justice Sandra Day O'Connor first stated her "endorsement or disapproval" test. Her test identifies an injury that is personal to certain plaintiffs that the Establishment Clause is said to prevent, namely that the Establishment Clause provides a remedy for the political alienation that minorities suffer when one's government takes a position on a religious matter.[74] Justice O'Connor goes on with what in her view is the two-part nature of the relevant injury:

> One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[75]

The "endorsement" test was thought to have possibilities for characterizing an injury that flows from one's status as a municipal citizen when the church-state matter at issue is unwanted exposure to a government's religious expression. The injury, writes Justice O'Connor, is in being an "outsider" to the body politic defined by a dominant or majority religion.[76] The injury of "political outsider" has some likeness to the unwanted-exposure incurred by a citizen when her government takes a contrary view on a religious matter. Such an injury was earlier discussed as: (i) that of a religious person whose government

74. *Id*. at 692*; see also* Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring) (In describing the harm Justice O'Connor used language like "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders" and making "religion relevant to a person's standing in the political community." *Id*. at 69.).

75. *Lynch*, 465 U.S. at 687–88.

76. *Id*.

sides with another religion; (ii) that of a nonreligious person whose government sides with a religion; or (iii) the injury of a religious person whose religion is harmed by too close an embrace by the government.[77] But Justice O'Connor fails to explain by reference to history or otherwise why political alienation is singled-out as the relevant injury. She does not say why only religious minorities are injured. She does not say why mere disagreement with the religious position taken by one's government is not sufficient harm.

Wallace v. Jaffree[78] struck down a state law requiring that public schools begin the school day with a moment of silence by students for prayer or meditation. The law was found to have a religious purpose.[79] The plaintiff challenging the law was a parent who sued on behalf of "three of his minor children; two of them were second-grade students and the third was then in kindergarten."[80] Plaintiff's standing to challenge the state law was not objected to by the government. However, standing would seem to necessarily follow from *Engel* and *Schempp*.

Edwards v. Aguillard[81] struck down a state law requiring public school science classes to teach creationism whenever evolution is taught. The law was found to have a religious purpose.[82] The plaintiffs challenging the law "included parents of children attending Louisiana public schools, Louisiana teachers, and religious leaders."[83] The Court went on to observe:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory

77. *See*, *supra*, text accompanying notes 31-32. This line of discussion is continued *infra*, notes 104–08, and accompanying text.

78. 472 U.S. 38 (1985).

79. *Id*. at 56–60.

80. *Id*. at 42.

81. 482 U.S. 578 (1987).

82. *Id*. at 586–94.

83. *Id*. at 581.

> attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.[84]

Thus the injury to plaintiffs' school-age children was the natural consequences of their status as students in the Louisiana public schools. It was probable that the government's expression contradicted beliefs held by the students, be those beliefs religious or secular, but this should have been made explicit. Once again there was no challenge before the Supreme Court to plaintiffs' standing. So we can only infer that the needed proxy for "injury" follows from *Engel* and *Schempp*.

County of Allegheny v. Greater Pittsburgh ACLU[85] involved challenges to two local governmental displays during the December holiday season. The Court struck down a nativity scene inside the county courthouse, and upheld an outdoor display of a Menorah, Christmas tree, and Liberty Banner at a different location jointly operated by the city and county. The plaintiffs challenging both displays were "the Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents" of the city and county.[86] Once again the government did not question the plaintiffs' standing before the High Court. Plaintiffs were local residents, increasing the opportunity and frequency for unwanted exposure, and thereby setting up a conflict with their local governments because plaintiffs were citizens of both the city and county. As with *Lynch* and *Edwards*, the question needed more explication by the Court.

Lee v. Weisman[87] struck down the practice of inviting clergy to offer prayers at a public school commencement ceremony. Attendance at the ceremony was voluntary, and no penalty attached to a student who did not attend.[88] The plaintiffs challenging the practice were "Daniel Weisman, in his individual capacity as a Providence taxpayer and as [father] of Deborah," and the daughter, Deborah, a student now graduated from the

84. *Id*. at 584.
85. 492 U.S. 573 (1989) (plurality op. in part).
86. *Id*. at 587.
87. 505 U.S. 577 (1992).
88. *Id*. at 583.

middle school and enrolled in the high school where a similar prayer arrangement was conducted at its commencement.[89] Plaintiffs' standing was questioned. Being the parent of a student exposed to the government's expression, along with future exposure being likely, were sufficient for purposes of Daniel's standing. The Court said:

> We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.[90]

Once again the voluntary nature of the ceremony, hence lack of compulsion, did not make any difference so long as the claim was brought under the Establishment Clause where coercion need not be shown. On the merits, the clergy-led prayer was found to be in violation of the Establishment Clause.

Santa Fe Independent School District v. Doe[91] struck down a public school process whereby one student was elected by fellow students to offer words of inspiration (with prayer as a likely choice) over the loudspeaker before high school football games. Participation by students was voluntary. The plaintiffs challenging the prayer were "two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic."[92] The Court does not say if the exercise or the prayer's content was contrary to the faith of the plaintiffs. The government did not question the standing of the plaintiffs, but standing would seem to follow from *Engel* and *Schempp*. On the merits, the Court held that the school's voting process leading to the prayer was in violation of the Establishment Clause.

89. *Id*. at 584. Daniel Weisman was also described as a state taxpayer. Paying local taxes is a matter relevant to taxpayer standing but not unwanted-exposure standing.

90. *Id*.

91. 530 U.S. 290 (2000).

92. *Id*. at 294.

Elk Grove Unified School District v. Newdow[93] concerned a plaintiff who was denied standing to challenge the words "under God" in the Pledge of Allegiance recited by public school students, including his daughter, at the beginning of each school day. The parents had never married. Although the Pledge was optional, both the daughter and her mother, who held ultimate legal custody, wished to have the daughter recite the Pledge. Standing was denied because the father was a noncustodial parent without final say in the Pledge matter. Under these circumstances, *Newdow* held that being a parent without more was not always sufficient to have standing.[94]

Van Orden v. Perry[95] upheld the constitutionality of a monument of the Ten Commandments, one of several monuments on the grounds surrounding the Texas Capitol in Austin. The plaintiff challenging the monument was described as follows:

> Thomas Van Orden is a native Texan and a resident of Austin. At one time he was a licensed lawyer, having graduated from Southern Methodist Law School. Van Orden testified that, since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building.
>
> Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued . . . .[96]

The government did not question Van Orden's standing before the Supreme Court. As a person trained as a lawyer but without a law office or library of his own, as well as a citizen of Texas, perhaps the plaintiff was presumed to have visited public sites at the State Capitol and to have taken advantage of the free use of the state-operated law library located near the Capitol. In

93. 542 U.S. 1 (2004).

94. *Id*. at 13–18 (no standing based on a rule of prudence rather than Article III limitations)*; see*, *supra*, text accompanying note 37.

95. 545 U.S. 677 (2005) (plurality op.).

96. *Id*. at 682.

walking the Capitol grounds, not only had plaintiff been personally exposed to the monument, but as a state citizen his beliefs were at odds with the state's message. That the plaintiff was also a citizen of Austin would not logically figure into his standing. Texas, not Austin, was the speaker. However, living in Austin likely increased the frequency of his exposure to the monument.

McCreary County v. ACLU of Kentucky[97] struck down depictions of the Ten Commandments placed in display cases (arrayed with other historical documents) located in two county courthouses in Kentucky. The plaintiffs were all too briefly described as "American Civil Liberties Union of Kentucky, et al."[98] The Supreme Court explained that in both counties "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.'"[99] More helpfully, a lower court opinion wrote that in addition to the ACLU of Kentucky, plaintiffs were Lawrence Durham and Paul Lee, ACLU members.[100] From the context it appears that Durham and Lee were, respectively, residents of the two counties. Additionally, the lower court said that the state ACLU had organizational standing because it "has members in Pulaski County who would have standing for the same reason that the named plaintiffs have standing."[101]

The counties suggested in their trial brief that "the Ten Commandments were posted in order to teach Pulaski County residents about American religious history and the foundations

97. 545 U.S. 844 (2005).

98. *Id*. at 852.

99. *Id*. (citation omitted).

100. ACLU of Ky. v. Pulaski Cnty., 96 F. Supp.2d 691 (E.D. Ky. 2000).

101. *Id*. at 694. In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), the Supreme Court articulated a three-part test for when organizations have standing to sue on behalf of their members: (a) the members (or some of them) would otherwise have standing to sue in their own right; (b) the interests the organization seeks to protect are germane to the organization's own purposes; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit.

of the modern state."[102] In the federal district court the defendants questioned plaintiffs' standing because they lacked any personalized injury.[103] Having lost the issue at the trial level, the defendants did not raise lack of standing before the Supreme Court. One can infer from *McCreary County* that a county citizen who would necessarily pass by the religious display while doing routine legal transactions with her county government has the necessary status required for unwanted-exposure standing. The case does not say that personal exposure to the hallway displays actually occurred. Rather, county residency was apparently sufficient given the likelihood that if personal exposure had not already occurred it soon would. As in *Van Orden*, local citizenship led to apparent conflict between plaintiffs' beliefs and the governmental message in the two displays. After *Lynch* and *County of Allegheny*, that was sufficient for standing. But the conflict of beliefs with message should have been made explicit by the Court. The state ACLU would have no standing in its own right. Rather, the ACLU's organizational standing was derivative of that of its members by virtue of their residency in these two counties.

* * *

As seen in the foregoing cases, unwanted-exposure standing is reduced in rigor. What constitutes unwanted exposure is a proxy for the individuated injury otherwise required to have standing. Quite often individualized victims will not exist because exposure to unconstitutional conduct by the government, without more, leads only to a generalized grievance. Thus, a proxy is substituted for the missing injury enabling the courts to proceed to the merits and adjudicate these church-state claims.[104]

From the foregoing sixteen cases a few reoccurring factors

102. *ACLU of Ky*., 96 F. Supp.2d at 698.

103. *Id*. at 694–95.

104. On the merits, individualized injury is unneeded because "coercion" is not required to make out a *prima facie* claim under the Establishment Clause. *See, supra*, notes 30 and 59–60, indicating that coercion is not required. In contrast, coercion is required to state a claim under the Free Exercise Clause. *See* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (holding taxpayers lacked the requisite burden on religion to pursue free exercise claim); Central Bd. of Educ. v. Allen, 392 U.S. 236, 248–49 (1968) (same).

can be identified: (1) plaintiff's status (e.g., student, legislator, citizen) leads to the unwanted exposure; (2) whether the religious message of the plaintiff's government is contrary to plaintiff's beliefs—religious or otherwise; and (3) the frequency of the exposure. In the design of a proxy, the Supreme Court appears to have settled on a combination of the first two factors. Even a proxy has to have limits. Standing cannot become a parlor game where a wannabe plaintiff connects to a Skype-link on her laptop to view a religious display hundreds of miles away and thereby acquires unwanted-exposure standing. Lines have to be drawn so as not to require too little.

It is remarkable that in only four out of the sixteen cases reviewed in this Part II was the plaintiffs' standing questioned before the Supreme Court. The four cases are *McCollum, Schempp*, *Marsh*, and *Weisman*. These four involved plaintiffs who were public school parents, sometimes joined by their school-age children, and a state legislator. The rule drawn from *McCollum, Schempp*, *Marsh,* and *Weisman,* and to a lesser degree from the other twelve cases where lack of standing could have been raised but was not, can be stated as follows: There is unwanted-exposure standing where a plaintiff's status has led to being personally exposed to her government's religious expression, the message being one with which she disagrees, or she has had to assume a burden to avoid any such exposure.

That the government's message countermands a belief (religious or otherwise) held by the plaintiff is not much discussed by the Court.[105] The basic paradigm in these church-state cases is that the government has unconstitutionally taken sides on a religious question. Accordingly, at some level there has to be disagreement by the plaintiff with her own government's message.[106] Disagreement is perhaps implicit in the fact that the

105. The consolidated cases in *Schempp* provide an example. In one case, plaintiffs were students that were members of churches with teachings that were countermanded by the school's form of prayer and devotional Bible reading. 374 U.S. 203, 206, 208 (1963). In the other case, plaintiffs were atheists, thus it went without saying that their beliefs were at odds with the school's religious exercises. *Id*. at 211–12.

106. *See, supra*, notes 33–34, and accompanying text. To help see that disagreement is necessary, consider that in theory a plaintiff could be indifferent to the message (or even agree) but also believe that the government

plaintiff is suing, but the plaintiff's beliefs that are in contention with her government should be openly and specifically stated. Going forward, there needs to be acknowledgment by the Court that unwanted-exposure standing is conditional on a clear statement that the government's message is unwanted because it contradicts a serious belief held by the plaintiff—hence the Establishment Clause objection being that her government has taken sides against her in a religious matter.

The frequency of a plaintiff's exposure is little discussed. It is not a factor that the Court has said is essential to unwanted-exposure standing, albeit frequency does get mention as a makeweight. In some instances, frequency or regularity of exposure to the government's religious expression may be evidence that the plaintiff has the status required to have unwanted-exposure standing. Thus one would expect that a citizen of a municipality that sponsors a seasonal Christmas display will have more frequent exposure to a display on the lawn of the city hall than say the exposure of one who resides one-hundred miles away. Yet frequency of exposure is not a substitute for the needed status because repeated exposure can be contrived. For example, in preparation for the filing of a lawsuit a future plaintiff could frequent a symbol so as to incur "lots" of exposure. On the other hand, while some personal exposure is assumed, repetition of the exposure may be quite irregular even when the plaintiff is under a legal duty that led to the exposure. An illustration is where plaintiff's job responsibilities are the cause of the exposure to the religious speech. Similarly, the exposure is irregular if an employee's job description requires going past the government display just once or twice a year. Even though irregular, there ought to be standing because of the plaintiff's status as an employee whose job required the exposure. Also consider a plaintiff who is summoned for jury duty and the religious symbol must be passed by when jurors enter and leave the courthouse.[107] The exposure

is violating the Establishment Clause by sponsoring the message.

107. *See, e.g.,* Books v. Elkhart Cnty., 401 F.3d 857, 862 (7th Cir. 2005) (plaintiff with standing because unwanted exposure was of a juror).

would be frequent for a week or two, and then drop to none at all. Even though irregular, this unwanted exposure while fulfilling a legal duty should lead to standing because of plaintiff's status as a juror. What the Court seems to be trying to avoid is standing when the exposure is self-inflicted.

The two factors that draw the most attention by the Court are personal exposure to the unwanted message and that the plaintiff is so situated such that she comes into contact with her government's message. Although these factors can be stated separately, they are intertwined by the Court as one. Thus, for example, plaintiff has status as a county citizen and is thereby exposed to a religious display maintained at the local courthouse. A plaintiff who is not a citizen of the county but who, nonetheless, is exposed to the display, should be refused the proxy of unwanted exposure and thus have no standing. Personal exposure alone is insufficient. That can be self-inflicted. Citizenship alone is insufficient. Rather, it is the status of citizenship that in turn leads to the personal exposure that permits standing.[108] It is also sensible to think that such a citizen suffers a palpable conflict when her local government promotes the religious message, whereas a non-citizen of that government residing fifty miles away would not. Disagreement with someone else's government is insufficient. Further, standing does not turn on how offended or emotionally distressed plaintiff is by the government's message. Such intensity of feeling will vary with the plaintiff and cannot be reliably measured. Keeping the proxy tightly defined affords some assurance that these Establishment Clause cases are presented in an adversarial context such that the best arguments are brought out in litigation and all relevant facts offered into evidence.

Valley Forge is not to the contrary. It was about taxpayer standing, not unwanted-exposure standing. It did not involve a religious message by the government that was alleged by

108. *See* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (citizens of two county governments); Van Orden v. Perry, 545 U.S. 677 (2005) (citizen of a state government); Cnty. of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) (citizens of city and county governments); Lynch v. Donnelly, 465 U.S. 668 (1984) (citizen of a city government).

plaintiffs to be a case of taking sides on a religious question. Rather, *Valley Forge* involved a church-state objection to the transfer of surplus government land at no cost to a religious college.

The taxpayer-plaintiffs in *Valley Forge* were dismissively said to have mere psychological injury as a result of observing conduct by government of which they disapproved.[109] This injury was characterized as a generalized grievance, not anything like the injury required by *Flast* for taxpayer standing. In *Valley Forge* the federal government was being sued for its conduct—the transfer of surplus land to a religious college—not for sponsorship of a religious message. The denial of taxpayer standing in *Valley Forge* does not mean that the Court would reject standing by a plaintiff who was suing because his status as U.S. citizen was the cause of his personal exposure to an unwanted religious message. It would be unusual, however, for the status of U.S. citizenship to be the cause of such personal exposure. An example might be a plaintiff's naturalization ceremony held at a local church which is begun with an invocational prayer.

Valley Forge must not be read to confuse two things. The sentence referencing "psychological" disagreement with the government as insufficient injury was in the context of rejecting taxpayer standing. However, psychological disagreement—or

109. With respect to the alleged church-state violation observed by plaintiff, Americans United for Separation of Church and State, Inc., and others in *Valley Forge*, Court held:

> Although [Americans United and the other plaintiffs] 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., even though the disagreement is phrased in constitutional terms. It is evident that [plaintiffs] are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

454 U.S. 464, 485–86 (1982) (holding plaintiffs lack taxpayer standing to challenge government plans to give surplus land to religious college).

something more accurately described as plaintiff's beliefs conflicting with a government's message—is a proper factor when it comes to unwanted-exposure standing.[110] A conflict between belief and message is the basis of adversity between plaintiff and her government where the basic problem is government taking sides on a religious question.

Just because an unwanted-exposure plaintiff is allowed standing to sue, that does not mean that she will prevail on the merits. In particular, care should be taken not to conflate unwanted-exposure standing with "no-endorsement," the latter being a test that goes to the merits.[111] Whether a religious symbol or other religious expression by the government violates the Establishment Clause is often a difficult assessment—one that goes to matters beyond whether plaintiff has the proxy of unwanted exposure such that she has standing to sue.[112]

110. The possibility for confusion between these two matters is illustrated by City of Edmond v. Robinson, 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 517 U.S. 1201 (1996) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.). On the merits, the circuit court held that a Latin cross on a municipal seal violated the Establishment Clause. Plaintiffs' standing had not been challenged. As Chief Justice Rehnquist observed, the only basis for plaintiffs' standing was that they were non-Christians living and working in the city. *Id*. at 1202. Three Justices would have granted certiorari on the question of standing. With reference to the *Valley Forge* passage on "psychological" injury, the Chief Justice said that "[m]ere presence in the city, without further allegations as to injury, quite clearly fails to meet the standing requirements" of the Court's cases. *Id*. That is unquestionably true, but not a full account of the facts. When the case is one of unwanted exposure, and the plaintiffs have shown both that as non-Christians their beliefs conflict with the message and that they are citizens of the municipality and thereby in disagreement with their own government, then there would be standing. *See, supra,* text accompanying notes 105–06.

111. Steven Smith suggests that relaxed standing is attributable to the Court's use of the endorsement test. Smith, *supra* note 3, at 439–40. However, the advent of the endorsement test was in *Lynch* (1984), whereas unwanted-exposure standing started at least as early as *Engel* (1962) and *Schempp* (1963).

112. *Compare Lynch*, 465 U.S. at 680–85, and Marsh v. Chambers, 463 U.S. 783, 793–94 (1983) (finding that the government's religious message did not violate the Establishment Clause), *with McCreary County*, 545 U.S. at 869–74, and Sch. Dist. of Abington Twp. v. Schempp, 373 U.S. 203, 224–25 (1963) (finding that the government's religious message did violate the Establishment Clause).

III. *SALAZAR V. BUONO* AS ILLUSTRATIVE

Here I utilize the factual record in *Salazar v. Buono*[113] to illustrate some features of unwanted-exposure standing and to test its boundaries. The underlying claim in *Salazar* was that a Latin cross in a national land preserve was allowed to remain after the cross's presence was called to the government's attention, all in violation of the Establishment Clause. Although lack of unwanted-exposure standing was raised before the Supreme Court, the government was bound to a finding of standing in the lower courts because it had not been timely appealed.[114] But that does not prevent the interesting facts of *Salazar* from being a helpful illustration.

In 1934, the Veterans of Foreign Wars erected a Latin cross on a location known as Sunrise Rock in the Mojave Desert in southeastern California.[115] This had not been authorized by the federal government, who owned the property. The cross was a memorial to members of the armed forces who died in the Great World War. In 1994, the land where the cross is located became part of the Mojave National Preserve, which is administered by the National Park Service, U.S. Department of the Interior. The Mojave National Preserve consists of 1.6 million acres of federal land in the Mojave Desert, with 86,600 acres of private land within its boundaries.

The plaintiff, Frank Buono, filed his lawsuit in March 2001 seeking a declaration that the Latin cross on government land violated the Establishment Clause, as well as an injunction ordering the cross's removal. Buono was a retired employee of the National Park Service residing in Oregon. He had retired four years earlier in 1997. When employed by the Park Service Buono had been assigned to the Mojave Preserve from January 22, 1995 to December 10, 1995. It was during this eleven-month period that Buono learned of the Latin cross and visited the site at

113. 559 U.S. __, 130 S. Ct. 1803 (2010) (plurality op.).

114. 130 S. Ct. at 1814–15 (during the first appeal the court of appeals concluded that there was standing and that holding is now binding on the government as a matter of preclusion).

115. The facts recited here are from uncontested findings of the district court. *See* Buono v. Norton, 212 F. Supp.2d 1202, 1204–07 (C.D. Cal. 2002).

Sunrise Rock. Buono first became troubled when there was a request to erect a Buddhist stupa near the cross.[116] The request was denied by Buono's superiors. At the time Buono believed it was wrong for the cross to remain while similar access was denied for the stupa.

Although now retired and living in Oregon, Buono retained an active interest in the Mojave National Preserve and visited two to four times per year. When visiting the Preserve, Buono had taken to avoiding Sunrise Rock so as not to be re-exposed to the cross, such avoidance being, in his view, a government-added burden because it meant not using Cima Road. One can see the Latin cross from the highway where Cima Road passes by Sunrise Rock. Cima Road is the most convenient road for accessing other areas of interest within the Preserve.

Buono is a Roman Catholic but testified that he did not find the Latin cross religiously injurious. Rather, he said that he objected in two respects: (i) the cross remained at Sunrise Rock while access was denied to similar displays such as the Buddhist stupa; and (ii) when the National Park Service failed to remove the cross (understood as a symbol of Christianity) from government land there was an ongoing failure to properly separate church and state.

The lower federal courts held that Buono had personalized injury such that he had standing to bring his claim alleging a violation of the Establishment Clause. The federal district court wrote:

> Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose. A practicing Roman Catholic, Buono does not find the cross itself objectionable, but stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land.[117]

First quoting with approval this passage by the district court, as well as taking note of Buono's recent avoidance of Cima Road, the Ninth Circuit Court of Appeals went on to observe that:

116. A stupa is a mound-like structure containing Buddhist relics.

117. *Buono,* 212 F. Supp.2d at 1207.

> Buono is, in other words, unable to "freely us[e]" the area of the Preserve around the cross because of the government's allegedly unconstitutional actions. . . . We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact. . . . Such inhibition constitutes "personal injury suffered . . . *as a consequence* of the alleged constitutional error," beyond simply "the psychological consequence presumably produced by observation of conduct with which one disagrees."[118]

Buono testified that as a Catholic he suffered no religious injury at seeing the cross. He did not claim that the cross was contrary to Catholic teaching.[119] Nor did he claim that the Latin cross, as a symbol of Christianity, was debased through its appropriation by the government for patriotic purposes.[120] That left two possibilities for Buono's injury-in-fact: (1) harm because others cannot erect their symbols in the same general area where the

118. Buono v. Norton, 371 F.3d 543, 547 (9th Cir. 2004) (citations omitted). Subsequent proceedings involving the merits of the Establishment Clause claim appear at *Buono v. Norton*, 364 F. Supp.2d 1175 (C.D. Cal. 2005), and *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008).

119. It is not essential for unwanted-exposure standing that the government's religious message be in conflict with a religious belief of Buono. *See, supra*, notes 105–06 and accompanying text. But it is essential that there be some sort of conflict with Buono's beliefs whether secular or religious, because the paradigm here is government unconstitutionally taking sides on a religious matter.

120. As discussed in the text accompanying notes 33–34, *supra*, the heart of the Establishment Clause violation here is government taking sides in a religious matter. The third of the three ways in which government can take sides is where an individual's religion is harmed by too close an embrace of her religion by the government. This can take the form of the government appropriating religious symbols and employing them to legitimate actions of the State or simply to unify the people behind the State. But for religion to be used in this way will ultimately harm plaintiff's religion. This corrupts religion, as many statesmen such as James Madison noted during the founding period. *See, supra*, note 32 (citing to arguments by Madison). And such corruption has been noted by Justices on the Supreme Court as one of the harms to be prevented by the Establishment Clause. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 725 (1984) (Brennan, J., dissenting) (noting how government's use of Christmas nativity scene "mut[es] the religious content"); *id*. at 727 (Blackmun, J., dissenting) ("The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed.").

cross is located; and (2) harm that the cross, understood as a Christian symbol, stands on government property contrary to Buono's beliefs concerning the demands of church-state separation. From the Ninth Circuit's statement quoted above, the circuit court—while noting both of these two harms as Buono's injury-in-fact so as to have standing—relied principally on the second. Moreover, the circuit court found this harm sufficiently weighty such that Buono had taken the step of avoiding Cima Road and thereby incurring additional travel burdens as he explored the Mojave National Preserve.

Buono lacks third-party standing to complain that others are denied access to Sunrise Rock such that they might erect their own symbols.[121] For example, to the extent that Buono alleged harm on behalf of the Buddhist who sought to erect a stupa, that is a third-party claim for which Buono lacks standing.[122]

Buono's church-state claim of injury-in-fact is more involved. Buono's alleged injuries were: (1) unwanted exposure to the cross because of the government's failure to meet its duty of church-state separation which required, in his view, removal of the cross from government land; and (2) self-restricted use of Cima Road to avoid his being re-exposed to the cross each time he travels by Sunrise Rock. The first allegation is a generalized grievance like that of any individual who is disappointed by his nation's lack of vigilance in rooting out church-state violations. Buono alleged that there was a violation of the Establishment Clause, but he alleged nothing else. Adding that he was "deeply offended," without more, changes nothing. And Buono's second allegation of injury-in-fact was one of self-restricted use of Cima Road *because of* his alleged harm in viewing the cross. The second alleged

121. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 510 (1975) (summarizing those limited instances when third-party standing is permitted, none of which apply here).

122. Such an averment attempts to state a free speech claim that equal access is being denied in a limited public forum, not a claim under the Establishment Clause about religious speech attributable to the government. *Cf.* City of Pleasant Grove, Utah v. Summum, 555 U.S. 460 (2009). The government declining access for the stupa likely had nothing to do with its symbolic message. Given that this was a land preserve, it is likely that the National Park Service sought to not create a public forum of any sort.

harm (avoiding exposure) thereby logically collapses into the first (actual exposure).[123]

Buono's circumstances were different from that of the parents and their school-age children exposed to unwanted prayer and devotional Bible reading in *Abington School District v. Schempp*:[124]

> "The parties [in *Schempp*] are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed." . . . .The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause—for as *Doremus* [*v. Board of Education*, 342 U.S. 429 (1952)] demonstrated, that is insufficient—but because impressionable schoolchildren were subject to unwelcome religious exercises or were forced to assume special burdens to avoid them.[125]

The students suffered more than being deeply offended by what they believed to be a violation of the Establishment Clause. The Supreme Court's unwanted-exposure precedents require that plaintiffs' status causes them to be personally exposed to the religious expression of the offending government, or else forced to assume a special burden to avoid such exposure. In *Schempp*, the plaintiffs' circumstance of compulsory school attendance was such that their status as students brought them into personal exposure to the unwelcomed prayer and biblical devotions, or else forced them to assume special burdens to avoid the exercises.

Buono's claim of an ongoing injury was that he would suffer unwanted exposure if he traveled to observe the cross, or he was "forced to assume special burdens to avoid" being re-exposed to what he deemed a church-state violation. However, Buono's status did not subject him to personal exposure to the cross. He was a retired employee of the National Park Service residing in

123. Clapper v. Amnesty Int'l USA, 568 U.S. ___, ___, 133 S. Ct. 1138, 1151 (2013) (plaintiffs' contention that they have standing because they proceeded to incur certain costs in response to the risk of harm was unavailing because the underlying risk was speculative as well as self-inflicted).

124. 374 U.S. 203 (1963).

125. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 487 n. 22 (1982).

Oregon. Buono's frequent visits to the Preserve were at his own free will. It would be different if Buono were currently employed by the Park Service and his job duties required that he travel Cima Road past Sunrise Rock. Buono was no doubt sincere in his being aggrieved that the federal government was violating the Establishment Clause. But this was a mere generalized grievance.

Frank Buono's status does not fit the Supreme Court's proxy for unwanted-exposure cases. He had no responsibilities or rights as a local or state citizen, such as in *McCreary County* and *Van Orden*, causing him to visit Sunrise Rock. If we assume Buono was a U.S. citizen that too would be of no avail as nothing about his federal citizenship caused him to visit the Latin cross. He held no status as a student, like in *Schempp*, which required his presence at the site of the Latin cross, nor was he like the legislator in *Marsh* needing to be present in chambers to properly perform the duties of his elected office. Assuming Buono paid the admission fee to enter the Mojave National Preserve, certainly he had a legal right to be present at Sunrise Rock, but his presence there was not a legal duty. Any exposure to the cross would be self-inflicted.

Buono's circumstance is different only in degree from that of a citizen of the Peoples' Republic of China who, as a resident alien with a five-year visa to reside and attend university in Massachusetts, takes a road trip to southeastern California and pays the admission fee to enter the Mojave Preserve and happens to see the Latin cross from his automobile as he drives by Sunrise Rock. This is one of those instances where if Buono has Article III standing, then the entire population of people within the jurisdiction of the United States (citizen or alien) has standing based on a chance exposure to the cross during an automobile ride. That would make the unwanted-exposure proxy require personal exposure and nothing more. None of the Court's sixteen cases set out in Part II are nearly so expansive.

IV. THE ESTABLISHMENT CLAUSE AS A STRUCTURAL RESTRAINT IS RESPONSIBLE FOR REDUCED-RIGOR STANDING

In cases involving unwanted exposure to religious symbols or other religious speech fairly attributable to the government, we have seen that plaintiffs often fail to meet the usual "case" or "controversy" requirements for standing. In such cases—as well as cases involving taxpayer standing—the Supreme Court has allowed reduced-rigor standing so as to ease the path to reaching the merits.[126] Why has it done so?

The Court's modern view of the Establishment Clause was instituted sixty-six years ago with its decision in *Everson v. Board of Education of the Township of Ewing*.[127] Because both the Free Exercise and Establishment Clauses are pro-religious freedom,[128] the question arose as to how the two clauses were to

126. Sometimes a claimant under the Establishment Clause does have individualized injury that meets all of the normal requirements for standing. But this is the exception, not the rule. These personalized harms run from economic loss, to inability to qualify for public office, to restrictions on academic inquiry. Consider the department store in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 707 (1985) (increased employment regulation resulting in economic harm), the tavern in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 118 (1982) (denial of a liquor license resulting in economic harm), the public school teacher desirous of expanding the science curriculum in *Epperson v. Arkansas*, 393 U.S. 97, 100 (1968) (hindrances to academic inquiry resulting in criminal charges and loss of job as injury), the forced taking of a theistic oath by a freethinking atheist in *Torcaso v. Watkins*, 367 U.S. 488 (1961) (inability to qualify for public office as injury), shuttering one's business on Sunday in *McGowan v. Maryland*, 366 U.S. 420, 422, 430–31(1961) (economic harm to retail stores and criminal fines imposed on their employees), and closing one's retail store on Sunday in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592 (1961) (lost business as economic harm).

127. 330 U.S. 1 (1947). *Everson* incorporated the Establishment Clause making it applicable to state and local governments. *Id*. at 14–15.

128. Just like the First Amendment is pro-freedom of speech and pro-freedom of the press, the First Amendment is also pro-freedom of religion. However, being pro-freedom of religious is markedly different from being pro-religion. The latter is prohibited by the modern Establishment Clause, thereby maintaining the requisite government neutrality. But the First Amendment is pro-religious freedom. Moreover, this is as true of the Establishment Clause as it is of the Free Exercise Clause. While commonplace to some, others will be surprised to have the Establishment Clause portrayed as pro-religious freedom.

be distinguished. The Court's answer came fifteen years later in *Engel v. Vitale*[129] and was reaffirmed a year later in *School District of Abington Township v. Schempp*.[130] As the *Engel* Court said:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish any official religion whether those laws operate directly to coerce nonobserving individuals or not.[131]

The Court went on to explain that the reason coercion is not an element of a *prima facie* claim is that the Establishment Clause is first and foremost about the separation of church and state.[132] Disestablishment deregulated religion, to the dual purpose of protecting both church and state.[133] Separation between these two centers of authority is not due to any hostility to religion. Rather, it is to protect both the autonomy of the

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They mistakenly think the Religion Clauses at odds. For discussion as to why it is impossible for the two clauses to be in tension, see Carl H. Esbeck, *"Play in the Joints between The Religion Clauses" and Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331 (2006).

129. 370 U.S. 421 (1962).

130. 374 U.S. 203, 221, 223 (1963).

131. 370 U.S. at 430.

132. *Id*. at 425–36.

133. *See, e.g.*, *id*. at 421, 431–35 (1962), where the Court said:

> [The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "'unhallowed perversion" by a civil magistrate.
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> . . . .
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> . . . These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. . . . It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

churches and to prevent division within the body politic that comes from government taking sides on a religious question.

It thus developed in the post-*Everson* Court that the Free Exercise Clause was confined to addressing those situations where a religious practice or observance had come under state coercion. Without evidence of coercion, the free exercise claim failed on the merits.[134] As such, the Free Exercise Clause is a rights-based claim. It runs in favor of religious individuals, including any religious groups that they might form.[135]

The Establishment Clause operates quite differently. It runs against the government, limiting sovereign power over certain subject matters, namely, "law[s] respecting an establishment of religion."[136] An individual claimant need not show religious harm or personalized injury to win a claim under the Establishment Clause.[137] This came about because—unlike free exercise which is rights-based—the Court's modern Establishment Clause is about setting apart a separate sphere for religious autonomy.[138]

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134. *See* Harris v. McRae, 448 U.S. 297, 320 (1980) (free exercise claim failed because there was no showing of compulsion of religious belief); Tilton v. Richardson, 403 U.S. 672, 689 (1973) (plurality op.) (coercion required to state free exercise claim); Bd. of Educ. v. Allen, 392 U.S. 236, 248–49 (1968) (same).

135. To state a claim that involved coercion with respect to a religious practice did not mean that every free exercise claim would be successful. And after the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), fewer free exercise claims do succeed.

136. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). A more summary statement of the evidence that this Court has applied the Establishment Clause as if it were structural in nature, as well as how such a view explains not only this Court's special standing rules with respect to no-establishment but other validations as well, *see* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. OF L. & POLITICS 445, 453–71 (2002).

137. *See, supra,* notes 30, 59–60.

138. Borrowing from Justice Frankfurter, Justice Brennan in dissent describes the restraint on governmental power imposed by the Establishment Clause in this manner:

> [T]he Establishment Clause "withdr[aws] from the sphere of legitimate legislative concern and competence a specific, but comprehensive area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief." That the Constitution sets this realm of thought and feeling apart from the pressures and antagonisms of government is one of it supreme achievements.

When that desired boundary between church and state has been crossed, the harm or injury might be religious or it might be nonreligious. As the Supreme Court said in *McGowan v. Maryland:*[139]

> If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion, then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.[140]

For the state to improperly support or advance religion can result in harm other than religious harm, e.g., the loss in *McGowan* was economic.[141] Indeed, a church-state violation can result in instances where no one has individualized injury and hence no one has conventional standing to sue. This will look much like a generalized grievance where there is no standing.[142]

The modern Supreme Court's work to keep these two centers of authority, church and state, rightly ordered has caused the Establishment Clause to operate in many respects like the structural clauses of the Constitution which separate the powers of the three federal branches. Just as some violations of separation of powers can occur with no one being personally harmed, much the same occurs when there is a putative violation of the modern Establishment Clause but no one with injury-in-

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Lynch v. Donnelly, 465 U.S. 668, 726 (1984) (quoting from *McGowan v. Maryland*).

139. 366 U.S. 420 (1961).

140. *Id*. at 430.

141. *See*, *supra*, note 126 (collecting Establishment Clause cases where the individualized injury was other than religious harm).

142. A trio of "generalized grievances" cases is represented by *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (plaintiff states a colorable violation of structural clause in the Constitution but no one with individualized injury, hence no one has standing to sue), *United States v. Richardson*, 418 U.S. 166 (1974) (same), and *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam) (same).

fact. The archetypal case before the Court was *Flast v. Cohen*,[143] and the Court responded by permitting limited federal taxpayer standing. The proxy of taxpayer with injury-in-fact permitted the post-*Flast* Court to reach the merits of some no-establishment claims that would otherwise be nonjusticiable because no one had the individuated injury to acquire standing. That line of cases has evolved to *Hein* and *Winn*.[144]

The other line of these cases is where plaintiffs claim injury due to unwanted exposure to religious speech by government, but who do not suffer the coercion that would normally be associated with the individualized injury required for standing. Early on, as we saw in Part II, the most common case was a public school student exposed to voluntary religion classes, prayer, or biblical devotions. Because the exposure was voluntary, there was no coercion (which should not be mistaken with peer pressure) and hence no free exercise claim. The Court's response was to reduce the rigor of the injury-in-fact to allow standing to sue so long as the plaintiff invoked the Establishment Clause. Like *Flast*, this necessarily required a proxy for the missing injury. As shown by the cases in Part II, the Court has required a plaintiff with a status that led to her personal exposure to the message with which she disagrees. That included not just students and legislators, but also citizens suing their local municipality or county. In both the instance of taxpayer and of unwanted-exposure standing, creating a proxy for the needed "injury" permitted the Supreme Court to reach the merits of an Establishment Clause claim.

CONCLUSION

Since handing down its first unwanted-exposure decision in *McCollum* in 1948, the Supreme Court has continued to permit reduced rigor in the injury-in-fact requirement for standing. Nevertheless, the plaintiffs in these cases do need to be attentive to two matters. First, plaintiffs need to clearly state their beliefs,

143. 392 U.S. 83 (1968)*; see* text accompanying notes 8–10, *supra* (discussing *Flast*).

144. *See* text accompanying notes 13–30, *supra* (discussing *Hein* and *Winn*).

religious or otherwise, that are in disagreement with the government's religious message. It is not the intensity of the plaintiffs' "offense" or the degree of "psychological" upset.[145] It is sufficient to show a mere disagreement between plaintiffs' beliefs and the government's message. At bottom, these church-state cases are about the government taking sides on a religious matter, and plaintiffs' injury is that she and her government have a different view on the religious matter.

Second, the government must have caused the alleged constitutional wrongdoing. Plaintiffs thus must hold a status which led to exposure to the government's religious message. Exposure without more is insufficient, as is a high frequency of exposure. Such a status is easy to grasp when it involves students in a public school, as well as with respect to jurors and public employees who have legal duties that result in the unwanted exposure. The government as causative agent of the wrong can become confused when plaintiffs' status entails citizenship. To date there are no cases in the High Court where U.S. citizenship has led to unwanted-exposure standing. There are several cases, however, where being a citizen of a local municipality or county has led to standing, provided that plaintiff's citizenship is in the local government that is the source of the unwanted religious message. A citizen of a nearby municipality or county does not have an adversarial relationship with the defendant-government. Thus the plaintiff is adverse only when it is her own city or county that has caused the message.

The "injury" in these unwanted-exposure cases is nearly non-Hohfeldian.[146] There is no tort, no breach of contract or economic

145. *See*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 486 (1982) ("It is evident that [plaintiffs] are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").

146. Claims that are not personal to an individual or association of individuals are referred to as non-Hohfeldian. *See, e.g.*, *Flast*, 392 U.S. at 119 n. 5 (Harlan, J., dissenting). The term comes from a venerable article setting forth several types of legal rights. *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

loss, no injury to real or personal property. There is no violation of a statutory or constitutional right. There is, however, disagreement over the content of the message. There is also a putative violation of the Establishment Clause, which is regarded by the Court not as rights-based, but like a structural violation of the Constitution. The Establishment Clause negates any jurisdiction of the government in "mak[ing] . . . law respecting an establishment of religion." When this desired boundary between church and state becomes in some respect crossed, there is often no one with individualized injury, hence, no individual with the injury-in-fact to have traditional standing.

At this juncture, the Supreme Court faced a decision. It could have said that because of the absence of a case or controversy in the conventional sense, there was no standing under Article III of the U.S. Constitution. That path would have led to under-enforcement of the Establishment Clause.[147] First in *McCollum*, and later in *Engel*, *Schempp*, and so on, the Supreme Court took a different path. It created a proxy for injury-in-fact and thereby allowed the civil courts to reach the merits in these unwanted-exposure lawsuits. A roughly parallel path was taken by the Court with respect to taxpayer standing. The rest is sixty-six years of history, from *McCollum* to *Schempp* and *Marsh* to *Weisman* with respect to unwanted-exposure standing, and from *Flast* to *Winn* with respect to taxpayer standing. It remains to be seen if the Supreme Court attempts to retreat from unwanted-exposure standing, as it has with taxpayer standing. At present, no push in that direction has caught on in the federal courts. Any forthcoming cutback in reduced-rigor standing would mean that no-establishment principles will go unexamined or under-enforced. That prospect ought to be received with some concern because the principles of church-state separation protect religion from being exploited in service of the government's own ambitions. The political branches will sometimes use religion in a

147. It must be acknowledged that the Supreme Court's reduced-rigor standing is in tension with another of the Court's oft-repeated teachings, namely, under the assumption that if plaintiffs have no standing to sue, no one would have standing, is not a reason to find standing. Clapper v. Amnesty Int'l USA, 568 U.S. ___, ___, 133 S. Ct. 1138, 1154 (2013) (collecting cases).

manner that mixes God and Country,[148] and that cannot but compromise religion and debase its symbols.

148. Conservative Christians can be their own enemy with respect to public symbols "because their habits have so led them to confuse America with God's salvation." STANLEY HAUERWAS, IN GOOD COMPANY: THE CHURCH AS POLIS 55-56 (1997).