STANDING STILL: *AMERICAN LEGION* & THE LIMITS OF JUDICIAL REVIEW

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"Congress shall make no law respecting an establishment of religion . . ."
- U.S. Const. amend. I.[1]

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ABSTRACT

The Supreme Court's recent decision in *American Legion v. American Humanist Association* creates uncertainty among the lower courts about how to determine whether a display of a religious symbol on public property violates the First Amendment's Establishment Clause. Without articulating a clear test or standard, the Court held that a large, cross-shaped monument, located at the center of a busy intersection in small-town Maryland, does not violate the constitutional rights of residents who regularly encounter it.

American Legion is the latest addition to a complex and unsettled area of constitutional law. The Court has long struggled to define with precision when government action is proscribed by the Establishment Clause. Indeed, many jurists and academics have argued that the scope of current Establishment Clause protections is in tension with the Court's

† J.D., Syracuse University College of Law, 2021; B.A., State University of New York at Geneseo, 2015. Thank you to Professors Laurie Hobart and Rakesh Anand for a helpful dialogue throughout the writing of this Note. Thank you also to the editorial staff of the *Syracuse Law Review* for their hard work and dedication to publishing Volume 71.

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

traditional Article III standing requirements. Writing in concurrence in *American Legion*, Justice Gorsuch sought to remedy that tension.

Gorsuch argued that the Court should adopt a more categorical approach to Establishment Clause claims concerning religious symbols in public spaces. Challenging what many perceive to be a relaxation of traditional standing requirements in Establishment Clause claims, Gorsuch asks how merely observing a symbol that one finds offensive suffices to grant that observer standing to sue in federal court. This seemingly straightforward question is complicated by the Court's confusing and inconsistent application of standing doctrine with respect to Establishment Clause claims.

INTRODUCTION

Establishment Clause jurisprudence is notoriously murky and unsettled. Since the Constitution's ratification, the Supreme Court has articulated a broad range of views on the Clause's meaning and applicability to religious symbols in public spaces. In such cases, the Court has outlined a litany of tests for evaluating alleged constitutional violations that, taken together, illustrate the difficulty of navigating the thicket that lies between two poles of constitutional interpretation. At one pole, the Clause may be read as nothing more than a bar against the creation of a national church like the Church of England.[2] At another, the Clause may be interpreted as an outright prohibition on the presence of religion or government within the other—a "wall of separation" between church and state.[3]

No Court has found either interpretation sufficient to confront the complexities of "this extraordinarily sensitive area of constitutional law."[4] In cases concerning the constitutionality of religion in the public square, the Court has determined the proper degree of separation between the two institutions by balancing various competing interests of cosmic significance to millions of Americans. Such cases have included challenges to the presence of the Ten Commandments on government buildings,[5] the recitation of the Pledge of Allegiance in public schools,[6] and, most recently, the presence of a cross-shaped war memorial on public land.[7]

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

3. *Id.* at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)).

4. *See* Mueller v. Allen, 463 U.S. 388, 393 (1983) (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

5. *See* Van Orden v. Perry, 545 U.S. 677, 681 (2005).

6. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4–5 (2004).

7. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).

In *American Legion v. American Humanist Association*, a complex decision with several concurrences and a dissent, a plurality of the Court held that a 40-foot, 94-year-old, state-maintained, concrete cross on state-owned property was consistent with the Establishment Clause, despite the religious symbolism of its design.[8] The Court focused its inquiry on the monument's relationship with the history and traditions of the United States, noting that there is no single test for resolving constitutional challenges under the Establishment Clause.[9]

Writing in concurrence, Justice Gorsuch agreed with the plurality that history and tradition are important factors to be weighed in legitimate Establishment Clause claims, yet maintained that the Court, in this case and prior cases concerning the presence of religious symbols in public spaces, had side-stepped the crucial threshold question of whether the aggrieved party had standing to sue in the first place.[10] Restating a view long-held by prior members of the Court likewise concerned with the maintenance of the separation of powers and judicial restraint,[11] Gorsuch argued that the plaintiffs lacked standing because they had not suffered an injury-in-fact by merely observing the cross.[12] Offense, or psychological harm, is not sufficient to sustain a cause of action under the Establishment Clause, nor any other clause of the Constitution, according to Gorsuch.[13] Gorsuch urged the Court to abandon the practice of relaxing traditional standing requirements, with respect to injury, typical of Establishment Clause claims.[14] Courts should, instead, restore traditional standards of rigor to such claims, bringing them back in line with every other core constitutional right.[15]

Gorsuch's approach is an audacious departure from traditional Establishment Clause jurisprudence. This Note will expand the argument for its adoption. In the following pages, I will demonstrate that Gorsuch's approach is (1) consistent with the history and purpose of the Establishment Clause; (2) consistent with the separation of powers and Article III limitations on judicial power—namely, the "case and controversy" requirement; (3) likely to bring clarity to the Court's

8. *See id.* at 2074, 2077 (citing U.S. CONST. amend. I).

9. *See id.* at 2090 (Breyer, J., concurring) (citing *Van Orden*, 545 U.S. at 698).

10. *See id.* at 2098 (Gorsuch, J., concurring).

11. *See* Salazar v. Buono, 559 U.S. 700, 734 (2010) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998)).

12. *Am. Legion*, 139 S. Ct. at 2098 (Gorsuch, J., concurring) ("This 'offended observer' theory of standing has no basis in law.").

13. *See id.* at 2100 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974)) (first U.S. CONST. amend. I; and then citing Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 469 (1982)).

14. *See id.* at 2098 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

15. *See id.* at 2099 (citing Allen v. Wright, 468 U.S. 737, 755 (1984)).

application of the Clause; and (4) more democratic. This Note will not pretend that such an approach is perfect; rather, it seeks only to convince the reader of four contentions, listed above. Accordingly, this Note will confront, as it must, the imperfections of Gorsuch's approach, as well as the practical difficulties of its implementation, its logical force notwithstanding.

Such imperfections include (1) the reality that such a view is unlikely to command the support of a majority of the Court, as currently composed; (2) a powerful argument that injuries arising under the Establishment Clause are unique and, therefore, excepted from traditional standing requirements, due to the psychological nature of religious belief; and (3) the potential public response to a reduction in the scope of its ability to challenge the presence of religious symbols in public spaces.

This Note shall begin, in Part I, with the American founding, the origins of the Establishment Clause, and modern Establishment Clause jurisprudence, before offering an exposition on the various approaches the Court has taken to determining standing for the purposes of Establishment Clause claims. In Part II, this Note will briefly discuss *American Legion*, the case that forms the context for the key contentions advanced by this Note, before proceeding to explore the merits of Gorsuch's approach. Part III will address ancillary, non-legal, policy implications of such an approach. Finally, this Note will conclude, in Part IV, by discussing the likelihood of an adoption of such an approach.

I. HISTORY, PURPOSE, & PRECEDENT

A. The Establishment Clause

Seventeenth century England was not kind to non-adherents of the Anglican Church.[16] As has been well-chronicled by historians of the era, the earliest Anglo-Americans sought refuge from state-sanctioned religious persecution in the New World.[17] With such history in mind, the Framers of the Constitution added the Establishment Clause to the Bill of Rights to prevent the persecution of minority faiths in America, as well as the formal establishment of any national religion.[18] Indeed, James Madison, in his "Memorial and Remonstrance Against Religious Assessment," a seminal address written in opposition to the renewal of a tax intended to support an established state religion, argued that "it was in the best interests of the new state to recognize that religion was best separated from law" and that "persecution was an inevitable result of

16. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–10 (1947).
17. *See id.* at 8.
18. *See id.* at 11 (citing U.S. CONST. amend. I).

government-established faiths."[19] Shortly thereafter, Thomas Jefferson drafted the Virginia Bill for Religious Liberty, advancing similar arguments, reminiscent of the disestablishmentarianism movement in England.[20] His bill was adopted by the state government.[21] Further, the Virginia state legislature proceeded to enact a statute providing "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[22] Only a few years later, both Jefferson and Madison were "key drafters of the Establishment Clause in the Bill of Rights."[23]

Modern jurisprudential and academic discourse has centered on the proper scope of the limitations imposed by the Establishment Clause—that is, whether the Clause leaves room for government to show some preference for religion over secularism,[24] or whether it requires a more rigid demarcation, a "wall of separation" between the two institutions.[25] Today, the "wall of separation" theory is the prevailing view among scholars and jurists, though many continue to maintain a more permissive interpretation, citing the aforementioned history of aversion to formal establishment that informed the Framers' decision to include the Clause in the Bill of Rights.[26]

Over the past century, the Supreme Court's view of how to properly determine when government action violates the Establishment Clause has taken many forms. The Court began the twentieth century by focusing its analysis on whether the government had "coerced" individuals into

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19. Mary Alexander Myers, *Standing on the Edge: Standing Doctrine and the Injury Requirement at the Borders of Establishment Clause Jurisprudence*, 65 VAND. L. REV. 979, 984 (2012) (citing James Madison, Address to the General Assembly of the State of Virginia, at Their Session in 1785, in Consequence of a Bill Brought into that Assembly for the Establishment of Religion by Law: A Memorial and Remonstrance (June 20, 1785), *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163.

20. *See id.*

21. *See id.*

22. *Id.* (quoting Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947)).

23. *Id.*; *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1277 (17th ed. 2010).

24. *See, e.g.*, *id.* at 1319 (describing developments in Establishment Clause jurisprudence); Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) ("It seems indisputable . . . that [Madison] saw the Amendment as designed to prohibit the establishment of a national religion . . . He did not see it as requiring neutrality on the part of government between religion and irreligion.").

25. *See* Lee v. Weisman, 505 U.S. 577, 601 (1992) (Blackmun, J., concurring) (quoting *Everson*, 330 U.S. at 16).

26. *See* SULLIVAN & GUNTHER, *supra* note 23, at 1277.

participating in religion in some way.[27] This "coercion" analysis maintained its currency until the early 1970s, when the Court announced a new, all-encompassing test for alleged Establishment Clause violations in *Lemon v. Kurtzman*.[28] There, the Court held that government action must satisfy the following three requirements in order to pass constitutional muster: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [action] must not foster an excessive government entanglement with religion."[29] Though facially sound, the *Lemon* test proved difficult for courts to apply in practice given the challenges inherent in measuring the "effect" of government action, as well as the difficulties of determining "entanglement" and, if "entanglement" can be determined, precisely when it becomes "excessive."[30]

A few years later, in *Lynch v. Donnelly*, a case involving an Establishment Clause challenge to the presence of a nativity scene on public property, Justice O'Connor attempted to refine the Court's Establishment Clause analysis by introducing what has come to be known as the Endorsement Test.[31] Under the test, a court must examine both the objective and subjective elements of the challenged government practice; that is, courts must first inquire "whether the government's actual purpose is to endorse or disapprove of religion" and, second, "whether . . . the practice under review conveys a message of endorsement or disapproval."[32] The Endorsement Test reflects O'Connor's underlying theory of the Establishment Clause: that it was intended as a prohibition on government from "making adherence to a religion relevant in any way to a person's standing in the political community."[33] Since *Lynch v. Donnelly*, the test has frequently been applied in cases involving public displays of religious symbols.[34]

While the Court has increasingly chosen to apply the Endorsement Test to Establishment Clause claims in general, the "coercion" approach,

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27. *See id.* at 1322–25 (explaining the development of "coercion" analysis); *see also* Engel v. Vitale, 370 U.S. 421, 430–33 (1962) (citing U.S. CONST. amend. I) (employing and explaining coercion analysis).

28. *See* 403 U.S. 602, 612 (1971).

29. *Id.* at 612–13 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

30. SULLIVAN & GUNTHER, *supra* note 23, at 1319.

31. *See* 465 U.S. 668, 688 (O'Connor, J., concurring).

32. *Id.* at 690.

33. *Id.* at 687.

34. *See* Cnty. of Allegheny v. Am. C.L. Union, 492 U.S. 573, 594 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J. concurring)); Salazar v. Buono, 559 U.S. 700, 742 (2010) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J. concurring)).

as well as the *Lemon* test, remain at its disposal. That is, the Court has not adopted a single test for Establishment Clause claims.[35]

B. The Establishment Clause & Standing

Before a court can reach the merits of a claim, however, it must first determine whether the aggrieved party has standing to bring an action in federal court. The standing requirement is a threshold inquiry, grounded in Article III, which limits courts to hearing only "cases" and "controversies."[36] As Justice Powell put it, the "[r]elaxation of standing requirements is directly related to the expansion of judicial power."[37]

To have standing, a party must demonstrate that (1) they suffered an injury-in-fact, (2) the defendant caused such injury, and (3) their injury is redressable by a favorable verdict.[38] In addition to these constitutional requirements, the Supreme Court has developed several additional, prudential requirements. For example, a plaintiff can raise only their own legal rights and interests, not the rights and interests of third parties.[39] Further, a plaintiff's injury must be actual or imminent, as well as concrete and particularized.[40] Generalized grievances will not suffice. Nor, generally, will "psychological injuries" that result from observing

35. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090 (2019) (Breyer, J. concurring) (quoting Van Orden v. Perry, 545 U.S. 677, 698 (2005)).

36. U.S. CONST. art. III, § 2, cl. 1 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

37. U.S. v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

38. *See* Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone, Realtors v. Bellwood, 441 U.S. 91, 99 (1979)) (citing U.S. CONST. art. III, § 2, cl. 1).

39. *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 188 (1973) (citing Crossen v. Breckenridge, 446 F.2d 833, 839–40 (6th Cir. 1971)) (doctors have standing to challenge abortion statute since it operates directly against them, and they should not have to await criminal prosecution to challenge it); Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976) (citing *Bolton*, 410 U.S. at 188) (same); Craig v. Boren, 429 U.S. 190, 192–97 (1976) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)) (licensed beer distributor could contest sex discriminatory alcohol laws because it operated on him, he suffered injury in fact, and was "obvious claimant" to raise issue); Carey v. Population Servs. Int'l, 431 U.S. 678, 682–84 (1977) (citing *Craig*, 429 U.S. at 192–97) (vendor of contraceptives had standing to bring action to challenge law limiting distribution).

40. *See Valley Forge Christian Coll*., 454 U.S. at 475 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)) (citing U.S. CONST. art. III).

conduct with which one disagrees.[41] The Court has repeatedly emphasized the importance of the injury requirement, explicitly holding that it should not be relaxed even in suits against the government involving explicitly constitutional considerations.[42]

This threshold requirement, as traditionally and consistently defined by the Court across a wide range of constitutional challenges, is in undeniable tension with modern Establishment Clause standing jurisprudence. Today, courts regularly find standing in Establishment Clause "cases" that allege psychological injuries. In most circuits, a plaintiff can meet the injury requirement merely by alleging "unwanted exposure" to a religious symbol the plaintiff finds offensive.[43] That is, a plaintiff who physically observes an offensive religious object on public property may ask a federal court to issue an injunction to have it taken out of their sight.

For example, in *Salazar v. Buono*, the Court addressed the display of a cross in the Mojave Desert.[44] There, the plaintiff alleged "offense at the presence of a religious symbol on federal land."[45] The cross was erected in 1934 to memorialize members of the armed forces who died in World War I.[46] The memorial had not been originally authorized by the federal government.[47] Rather, it was located on land that eventually became part of the Mojave National Preserve, administered by the National Park Service, under the U.S. Department of the Interior.[48] The

41. *Id*. at 485 ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error . . .").

42. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577–78 (1992) (quoting Stark v. Wickard, 321 U.S. 288, 309–10 (1944) (citing U.S. CONST. art. III).

43. *See, e.g*., Suhre v. Haywood Cnty., 131 F.3d 1083, 1086 (4th Cir. 1997); Doe v. Tangipahoa Par. Sch. Bd., 494 F.3d 494, 497 & n.3 (5th Cir. 2007) (en banc); Books v. Elkhart Cnty., 401 F.3d 857, 861–62 (7th Cir. 2005) (citing Books v. City of Elkhart, 235 F.3d 292, 297, 300–01 (7th Cir. 2000)); Newdow v. Lefevre, 598 F.3d 638, 642 (9th Cir. 2010); Green v. Haskell Cnty. Bd. of Comm'rs, 568 F.3d 784, 793 (10th Cir. 2009) (quoting O'Connor v. Washburn Univ., 416 F.3d 1216, 1223 (10th Cir. 2005)) (citing Foremaster v. City of St. George, 882 F.2d 1485, 1490–91 (10th Cir. 1989)); Saladin v. City of Milledgeville, 812 F.2d 687, 692 (11th Cir. 1987) (citing ACLU v. Rabun Cnty. Chamber of Commerce, Inc., 698 F.2d 1098, 1107–08 (11th Cir. 1983)); Chaplaincy of Full Gospel Churches v. U.S. Navy, 534 F.3d 756, 763–64 (D.C. Cir. 2008) (citing Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 302 (D.C. Cir. 2006)).

44. 559 U.S. 700, 705 (2010).

45. *Id.* at 711. The Court did not decide whether Buono's offense constituted a cognizable injury because Buono had standing to enforce an injunction he had obtained against the cross in previous litigation. *See id.* at 710–12 (citing Buono v. Norton, 364 F. Supp. 2d 1175, 1182 n.8 (C.D. Cal. 2005)).

46. *See id.* (citing Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(e), 117 Stat. 1054 (2004)).

47. *See id.* at 705.

48. *See id.* at 706 (citing 16 U.S.C. §§ 410aaa-41, 46 (2021)).

plaintiff was a retired Park Service employee who frequently visited the Mojave National Preserve and alleged offense at the sight of the cross.[49] The Court declined to address the plaintiff's standing to bring his initial claim, deciding the case on the merits.[50]

Similarly, in *Van Orden v. Perry*, the Court decided, on the merits, a plaintiff's challenge to the presence of a large stone monument of the Ten Commandments on the premises of a state building.[51] There, the Court noted, in its explication of the nature of the plaintiff's injury, that the plaintiff had repeatedly "encountered" the Ten Commandments monument during his frequent visits to the Capitol grounds.[52] Relatedly, in *McCreary County v. American Civil Liberties Union of Kentucky*, the Court addressed a plaintiff's challenge to the presence of a copy of the Ten Commandments, posted in a public space owned by the government, along with other entirely secular documents.[53] The Court decided the case on the merits.[54] That is, mere observation of a religious object sufficed to grant the plaintiff standing to sue. The Court's choice to decide each case on the merits shows the Court believed each plaintiff's observation of the religious displays and resulting psychological harm sufficed to grant the plaintiff standing to sue.[55]

Such a theory of the injury requirement, or standing in general, is irreconcilable with the Court's traditional standing requirements. As the Court itself has recognized, "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is framed in constitutional terms."[56]

This relaxation occurs only in cases involving religious symbols in public spaces. That is, where religious symbols are not involved, many Establishment Clause cases clearly establish a plaintiff's standing within traditional constitutional constraints, further highlighting the Court's anomalous treatment of religious symbol cases. In *School District of Abington Township v. Schempp*, for example, students were required by state law to recite the Lord's prayer in school.[57] There, the students were

49. *See Salazar*, 559 U.S. at 707.

50. *Id.* at 713.

51. *See* 545 U.S. 677, 682 (2005) (first citing 42 U.S.C.S. § 1983 (2021)).

52. *Id.* at 682.

53. *See* 545 U.S. 844, 850 (2005) (citing U.S. CONST. amend. I).

54. *See id.* at 881.

55. *See Van Orden*, 545 U.S. at 694; *see also McCreary Cnty*., 545 U.S. at 851–54 (citing 42 U.S.C. § 1983 (2021)).

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

57. *See* 374 U.S. 203, 205–06 (1963).

unable to escape the explicitly religious environment, created by law, creating a clearly cognizable injury-in-fact.[58] The injury lay not in the offense caused by, or the students' disapproval of, the Lord's prayer, but the coercive nature of the challenged governmental practice. Relatedly, in *Town of Greece v. Galloway*, the Court addressed a local governmental practice of opening each town meeting with legislative prayer, directed at local residents present at the meetings.[59] That is, if town residents wanted to participate in local government, they could not do so without being forced to participate in or listen to the prayer.[60] The Court decided the case on the merits, finding the injury requirement satisfied.[61]

Similarly, in *Flast v. Cohen*, the Court recognized that a plaintiff may suffer cognizable injury for the purposes of the Establishment Clause, based on their status as a taxpayer.[62] While citizens may not ordinarily base constitutional complaints on their status as a taxpayer, who suffers no other injury aside from the use of his or her taxes toward some allegedly unconstitutional end,[63] a plaintiff who raises a particular complaint under the Establishment Clause is permitted to do so.[64] Under *Flast*, a plaintiff must first "establish a logical link between [their taxpayer status] and the type of legislative enactment attacked," and thus, "will be a proper party [with standing] to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I. Sec. 8, of the Constitution."[65] Second, "the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged," by showing "that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[66] If a plaintiff meets both requirements, they may bring an Establishment Clause claim based on their status as a taxpayer.

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

59. *See* 572 U.S. 565, 569–70 (2014).

60. *See id.* at 565.

61. *See id.*

62. *See* 392 U.S. 83, 105–06 (1968) ("We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8 . . . [w]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.").

63. *See* Massachusetts v. Mellon, 262 U.S. 447, 480, 487–89 (1923).

64. *See Flast*, 392 U.S. at 106.

65. *Id.* at 102.

66. *Id.* at 102–03.

That is, while the Court has recognized various forms of injury that are consistent with traditional standing requirements, the Court's approach to standing in Establishment Clause cases concerning religious symbols in public spaces is directly at odds with the Court's standing jurisprudence as traditionally defined and applied. The Court has repeatedly held that, outside the context of the Establishment Clause, psychological injuries that allege no more than offense are insufficient to establish a litigant's standing.[67] In fact, before *American Legion*, the most recent case in which the Court fully confronted this incongruence was *Salazar v. Buono*. As stated, the case, like *American Legion*, concerned the presence of a massive cross on public land.[68]

Concurring in the Court's decision to allow the cross to remain where it was, Justice Scalia opined that the plaintiff, who alleged in his complaint that he was "deeply offended by the display of a Latin cross on government-owned property," lacked "Article III standing to pursue the relief [sought]."[69] Justice Scalia argued that the plaintiff failed "to allege any actual or imminent injury" in his challenge to the presence of the cross,[70] noting that Article III's case-or-controversy requirement is not merely a prerequisite to relief, but, crucially, "a restraint on judicial power."[71] That is, a citizen's mere offense at the sight of a religious symbol is not sufficient to grant standing for the purposes of the Establishment Clause, nor any other clause of the Constitution.

Such a view lay dormant until the Court's decision in *American Legion*, where Justice Gorsuch sought to reconcile the tension between modern Establishment Clause standing doctrine and Article III standing requirements as traditionally applied. Such reconciliation is sorely needed.

II. STANDING STILL: INJURY & INSTITUTIONS

This Part outlines the Court's decision in *American Legion* and discusses the merits of the approach advocated by Justice Gorsuch in his concurrence, in which he identifies the source of the disparity between

67. *See id*. at 103–04 (carving out an exception to the prohibition against taxpayer standing for the Establishment Clause due to the unique background of the Clause); *see also, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974) (denying citizen-taxpayer standing to litigants challenging the Reserve status of Members of Congress under the Incompatibility Clause); U.S. v. Richardson, 418 U.S. 166, 179 (1974) (denying citizen-taxpayer standing to a litigant challenging the expenditures of the Central Intelligence Agency under the Accounting Clause).

68. *See* Salazar v. Buono, 559 U.S. 700, 705–06 (2010).

69. *Id*. at 703, 732.

70. *Id*. at 731–32.

71. *Id*. at 734 (citing *Summers*, 555 U.S. at 492–93).

the Court's approach to standing in Establishment Clause cases involving the presence of religious symbols in public spaces and standing as traditionally defined.

A. American Legion v. American Humanist Association

Bladensburg is a small town located along the western border of Maryland; approximately nine miles from D.C.[72] Prior to the Court's decision in *American Legion*, the town was perhaps best known as the site of major battle during the War of 1812, in which a sitting president rode into battle for the first and only time in American history.[73] In a striking coincidence, that president, James Madison, would, again, feature prominently in the history of Bladensburg, but, this time, in a dispute over the Clause he, and others, included in the Constitution to prevent the persecution of minority faiths and foster a pluralistic society in which people of all beliefs could live together in harmony.

At the center of a busy three-way intersection, a large Latin cross towers above a mostly rural landscape below.[74] The "Peace Cross," as it is commonly called, was erected in 1925 to commemorate the sacrifice of 49 men from Prince George's County, the county in which Bladensburg sits, during World War I.[75] The cross's design was meant to mirror the rows of white crosses used in the cemeteries of fallen soldiers in Europe.[76] The monument was commissioned by local citizens and completed with the support of the American Legion, a private veterans' group.[77] In 1961, the Maryland-National Capital Park and Planning Commission ("Commission"), a state entity, took ownership of the cross and the land on which it sits "in order to preserve the monument and address traffic safety concerns," due to the commercial development of the surrounding region.[78] The cross has been owned and maintained with state funds ever since.[79]

In 2012, the American Humanist Association (AHA) sued the Commission, alleging that the cross's presence on public land and the Commission's maintenance of it violated the Establishment Clause of the Constitution.[80] The AHA sought declaratory and injunctive relief,

72. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089–90 (2019).

73. *See* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 904 (2007).

74. *See Am. Legion*, 139 S. Ct. at 2078.

75. *See id.* at 2068.

76. *See id.*

77. *See id.*

78. *Id*. at 2078.

79. *See Am. Legion*, 139 S. Ct. at 2078.

80. *See id.*

requiring "removal or demolition of the cross, or removal of the arms from the cross to form a non-religious slab or obelisk."[81] Shortly thereafter, the American Legion intervened in the lawsuit to defend the cross.[82]

Procedurally, the District Court for the District of Maryland found the cross constitutional under the *Lemon* test, granting summary judgment for the Commission and the American Legion.[83] The Court of Appeals for the Fourth Circuit reversed, again applying the *Lemon* test, holding that the cross failed *Lemon*'s "effects" prong because "a reasonable observer would view the Commission's ownership and maintenance of the monument as an endorsement of Christianity," emphasizing the monument's "inherent religious meaning."[84] The Commission and the American Legion petitioned for certiorari, and the Supreme Court granted their petitions.[85]

The Court reversed the decision of the Fourth Circuit but did so without relying upon the *Lemon* test.[86] Instead, the Court recognized the litany of cases that have either "expressly declined to apply the test" or "simply ignored it."[87] The Court then proceeded to evaluate the case with a "presumption of constitutionality for longstanding monuments, symbols, and practices."[88] That is, the Court set aside *Lemon* and focused its inquiry on the cross's place within American history and tradition.

After a discussion of the symbolism of the cross and the Establishment Clause's relationship to such symbols, Justice Alito, joined by Chief Justice Roberts and Justices Breyer, Kagan, and Kavanaugh, distinguished between "retaining established, religiously expressive monuments, symbols, and practices" and "erecting or adopting new ones," and concluded that the "passage of time gives rise to a strong presumption of constitutionality" for established symbols.[89]

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81. *Id.* (citing Am. Humanist Ass'n v. Maryland-Nat'l Cap. Park & Plan. Comm'n, 874 F.3d 195, 202 n.7 (4th Cir. 2017).

82. *See id.*

83. *See id.*

84. *Am. Legion*, 139 S. Ct. at 2079 (citing *Am. Humanist Ass'n*, 874 F.3d at 206–07).

85. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 451 (2018).

86. *Am. Legion*, 139 S. Ct. at 2093.

87. *Id.* at 2080; *see generally, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Cutter v. Wilkinson, 544 U.S. 709 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); Hosanna Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Town of Greece v. Galloway, 572 U.S. 565 (2014); Trump v. Hawaii, 138 S. Ct. 2392 (2018).

88. *Am. Legion*, 139 S. Ct. at 2082.

89. *Id.* at 2085.

With this decision, the Court signaled to lower courts that the *Lemon* test has worn out its welcome and should no longer be applied to cases concerning religious monuments and symbols in public spaces, like the Peace Cross.[90] It declined, however, to formulate an explicit test for such cases, illustrating the difficulties that attend their adjudication. Enter Justice Gorsuch.

B. Justice Gorsuch's Concurrence

Concurring in the judgment, Justice Gorsuch traced the Court's flouting of traditional Article III standing requirements for Establishment Clause claims to, surprise, the *Lemon* test, which, as stated, inquires whether a "reasonable observer" would perceive government action as communicating an endorsement of religion.[91] If the Establishment Clause proscribes any government action a reasonable observer would view as an endorsement of religion, then such an observer must, naturally, be able to sue.[92]

Gorsuch proceeds to cite the myriad problems courts have had with *Lemon* and notes, with approval, the plurality's disapproval of it. Agreeing with the Court's determination that "what matters . . . is whether [a] challenged practice fits 'within the tradition' of this country," not whether such a practice satisfies some "artificial and indeterminate three-part test," Gorsuch takes the Court's new, historically sensitive approach to its logical conclusion.[93] He asks "[h]ow old must a monument, symbol, or practice be to qualify" for the Court's newly articulated presumption of constitutionality for established religious symbols?[94] Indeed, Justice Breyer notes in his own concurrence that he remains uncertain whether the Court's focus on history and tradition will allow relatively new monuments to be challenged.[95] Gorsuch is similarly worried that newer monuments, of similar religious import, may be vulnerable to constitutional attack, citing "the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust" and "the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror[.]"[96] To resolve this issue, Gorsuch would search not for the proper age of a particular symbol, but rather for the symbol's "compliance with ageless principles,"

90. *Id.* at 2081–82.
91. *See id.* at 2100–01.
92. *Id.* at 2101.
93. *Am. Legion*, 139 S. Ct. at 2102.
94. *Id.*
95. *Id.* at 2091.
96. *See id.* at 2102.

"consistent with our nation's traditions," with respect to legitimate Establishment Clause claims.[97]

But what does a legitimate Establishment Clause claim look like? Not like the one brought by the American Humanist Association. By way of analogy to other constitutional protections, Gorsuch illustrates the absurdity of the theory of standing employed by the Court, enabled by *Lemon*. "Imagine," Gorsuch writes, "if a bystander disturbed by a police stop tried to sue under the Fourth Amendment."[98] Similarly, "suppose an advocacy organization whose members were distressed by a State's decision to deny someone else a civil jury trial sought to complain under the Seventh Amendment," or, alternatively, "a religious group upset about the application of the death penalty . . . su[ing] to stop it."[99] Such cases would be rapidly dismissed for lack of concrete, individualized injuries. Gorsuch continues by citing the well-established justifications for deeming such issues non-justiciable:

> If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to other branches of government. Courts would start to look more like legislatures, responding to social pressures rather than remedying concrete harms, in the process supplanting the right of the people and their elected representatives to govern themselves.[100]

Gorsuch proceeds to cite circumstances more sympathetic than those experienced by the members of the American Humanist Association, in which the Court dismissed suits for lack of standing.[101] In one such case, parents of African-American schoolchildren were unable to sue to compel the Internal Revenue Service to deny tax-exempt status to schools that discriminated on the basis of race.[102] The Court held that

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97. *Id.* at 2102.

98. *Am. Legion*, 139 S. Ct. at 2098.

99. *Id.* at 2098–99.

100. *Id.* at 2099 (first citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches"); then citing Warth v. Seldin, 422 U.S. 490, 500 (1975) ("without standing requirements 'courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions'"); and then citing Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 635–36 (2007) ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction")).

101. *Id.* at 2099.

102. *See id.* (citing Allen v. Wright, 468 U.S. 737, 737 (1984)).

standing extends only "to those persons who are personally denied equal treatment by the challenged discriminatory conduct."[103] Placing the Court's reasoning there beside the American Humanist Association's standing theory in *American Legion* results in the following "utterly unjustifiable" outcome: "An African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause."[104]

Allowing standing for mere offense cannot be squared with the Court's longstanding teachings about the limits of Article III, according to Gorsuch. With *Lemon* "shelved," Gorsuch predicts that the "gaping hole it tore in standing doctrine" will begin to close.[105] Such a trend will not mean that "colorable Establishment Clause violations" will lack for "proper plaintiffs."[106] Even those who fear an excessive intermingling of government and religion, as a result of the Court's return to traditional Article III standing requirements, will still be able to seek relief, if they suffer concrete and individualized injury. That is, "a public school student compelled to recite a prayer will still have standing to sue."[107] In the face of genuine coercion or discrimination, plaintiffs will be afforded every opportunity to assert their constitutionally protected rights. "Abandoning offended observer standing," that is, "will mean only a return to the usual demands of Article III, requiring a real controversy with real impact on real persons[.]"[108]

Indeed, should the Court continue the current practice of relaxing traditional Article III standing requirements for such claims, it is difficult to imagine who would not have standing to challenge a similar monument or religious symbol in a public area. If members of the American Humanist Association have standing, then the entire population of people within the jurisdiction of the United States would have standing based on their exposure to the symbol "during an automobile ride."[109] Such an expansive theory of standing cannot be squared with traditional constraints. Were offense sufficient to give rise to standing, Judge Easterbrook of the Seventh Circuit has observed, "there would be

103. *Am. Legion*, 139 S. Ct. at 2099 (citing *Wright*, 468 U.S. at 755).

104. *Id.*

105. *Id.* at 2102.

106. *Id.* at 2102.

107. *See id.* (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, at 224, n.9 (1963)).

108. *Am. Legion*, 139 S. Ct. at 2103.

109. Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 CHARLESTON L. REV. 607, 643 (2013).

universal standing: anyone could contest any public policy or action he disliked."[110]

C. Other Perspectives

How, then, can such a permissive theory of standing be justified? The answer may lie with *Lemon*, as Gorsuch believes. Alternatively, as Carl H. Esbeck has argued, the Court's treatment of religious disputes requires "a specialized rule of standing if the objecting party is going to be able to lodge a claim under the Establishment Clause," due to the fact that "when government takes sides in a religious matter there is often no one with a personalized injury."[111] For example, the atheist who observes the engraving "In God We Trust" upon U.S. coins and paper money experiences an injury similar to "a generalized grievance that we all share when our government fails to operate within its constitutional constraints."[112] That is, the Court employs offense or unwanted exposure "as a proxy for personalized injury" in order to "ensure[] that the plaintiff would have the necessary incentive to vigorously pursue the legal and factual presentation of the dispute in an adversarial setting."[113] Whether such an objection should amount to a constitutional "dispute," for the purposes of Article III, however, is not at all clear, given the absolute dearth of such reasoning in any other domain.

Alternatively, Mary Alexander Myers has argued that the basic nature of Establishment Clause injuries is the cause of the Court's inconsistency, in that such injuries will nearly always involve psychological or ideological harm due to the psychological nature of religious belief.[114] Establishment Clause injures are unique, in that it would be "difficult to imagine an alleged violation under the Establishment Clause that would not offend a litigant's ideology or beliefs, yet still motivate him to bring a claim."[115] Still, the mere fact that psychological offense is a necessary element of an Establishment Clause claim does not mean it ought to be sufficient. In *every other* context, the Constitution requires more.

Moreover, even if one grants that Establishment Clause claims are somewhat unique in nature, the Court still must grapple with the difficult question of how much offense is enough to count as cognizable injury—a question with no obvious answer. The Court's line-drawing will be, and

110. Books v. Elkhart Cnty., 401 F.3d 857, 870 (7th Cir. 2005) (Easterbrook, J., dissenting).
111. Esbeck, *supra* note 109, at 618–19.
112. *Id.* at 619.
113. *Id.*
114. Myers, *supra* note 19, at 1001.
115. *Id.*

has always been, arbitrary and subject to the intuition of whomever occupies five of the nine seats on the Court. "In essence, a litigant's standing rests on the arbitrary factor of how many times she walked past a religious display or some other personal connection to the [alleged] violation, even when the crux of her injury lies in the psychic or ideological harm that she felt from the very existence of the religious display in a government setting."[116] This theory of standing makes no sense and is impossible to square with traditional standing doctrine. Faced with this tension and incongruence, the Court would appear to have two choices: (1) continue to allow generalized, unmeasurable, purely psychological grievances, in defiance of Article III, yet in compliance with Establishment Clause jurisprudence, post-*Lemon*; or (2) with *Lemon* on its last legs, so to speak, bring Establishment Clause claims involving religious symbols in public spaces squarely back in line with every other core constitutional right, settling a complex, unsettled, and "extraordinarily sensitive area of constitutional law" once and for all.[117]

Further, it is perhaps obvious to note that granting an offended observer standing does nothing to preclude a court from rejecting a plaintiff's claim on the merits. Still, enabling regular legal disputes concerning religious symbols poses risks to the Court's legitimacy in the eyes of the general public, insofar as the current state of Establishment Clause "'doctrine [is] in such chaos' that lower courts have been 'free to reach almost any result in almost any case.'"[118]

III. STANDING, SOCIETY, & CULTURE

One cannot watch the news today without being reminded of the rising tide of political polarization in America. We live in a divided time, where organized religion is in decline,[119] fewer people attend worship services,[120] more people identify as non-religious,[121] and political figures of each major party reliably make overtures to believers and non-believers alike.[122] This is the cultural landscape in which the

116. *Id*. at 1004.

117. *See* Mueller v. Allen, 463 U.S. 388, 393 (1983).

118. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (quoting Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119 (1992)).

119. Frank Newport, *Why Are Americans Losing Confidence in Organized Religion?*, GALLUP (July 16, 2019), https://news.gallup.com/opinion/polling-matters/260738/why-americans-losing-confidence-organized-religion.aspx.

120. *Id*.

121. *Id*.

122. *See* Samuel Kimbriel, *Christianity is Political. But America's Politically Active Christians Seem to be Forgetting That.*, WASH. POST (Nov. 21, 2017, 6:00 AM), https://www.washingtonpost.com/news/posteverything/wp/2017/11/21/christianity-is-

Establishment Clause decisions of the nation's highest court occur. As one scholar put it:

> The justices are the oracles and umpires of American culture. If they say a religious symbol must be dismantled, this is a victory for atheists, agnostics, and other dissenters from the religious mainstream. If the justices say a religious symbol is consistent with the American constitutional tradition, this is a victory for the believers. It is not so much the crosses, nativity scenes, menorahs, and Ten Commandments that get the juices of sectarian tension flowing; it is the prospect of Supreme Court affirmation of one's side in the culture conflict, and—better yet—defeat for the other side.[123]

Any proposed change to the Court's disposition toward Establishment Clause cases ought to consider whether the proposed change risks inflaming the religious-secular culture war in which we find ourselves. To be sure, judicial decision-making should be grounded in the Constitution, not politics. Still, any full consideration of the merits of a particular jurisprudential frame must include a word or two on the potential political and cultural impact of its adoption.

Gorsuch's approach would, as stated, raise the standards of admission to the federal courts with respect to Establishment Clause claims involving the presence of religious symbols in public spaces. Such an approach would be fully consistent with the requirements of Article III, but members of the American public of a secularist persuasion may not see it in quite the same way. Such citizens may view the Court's restriction of "endorsement type" claims as judicial activism,[124] an attempt by the Court to exclude from consideration legitimate objections to breaches in what ought to be an ironclad wall of separation between church and state. If such a view gains traction or acceptance among the broader electorate—and it may, given contemporary attitudes toward religion—politicians may be tempted to exploit it. Politicians may begin promising "separationist" judges to the high court and Courts of Appeals,

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political-but-americas-politically-active-christians-seem-to-be-forgetting-that/; *see also* Daniel Libit, *Atheists Keep Faith with Obama*, POLITICO (June 9, 2009, 4:22 AM), https://www.politico.com/story/2009/06/atheists-keep-faith-with-obama-023488.

123. Michael W. McConnell, *No More (Old) Symbol Cases*, 6 CATO SUP. CT. REV. 91, 92 (2019).

124. *See* Marci A. Hamilton, *The Supreme Court Dramatically Narrows the Establishment Clause in* American Legion v. American Humanist Association, JUSTIA: VERDICT (June 21, 2019), https://verdict.justia.com/2019/06/21/the-supreme-court-dramatically-narrows-the-establishment-clause-in-american-legion-v-american-humanist-association (The Court's restrictions on endorsement types "is what proves that the agenda of a majority of the justices is to empower religion, diminish the separation of church and state, and to tear down barriers to religious power."); *see generally* Matt Ford, *Neil Gorsuch Scorns the "Offended" Atheists*, NEW REPUBLIC (June 20, 2019), https://newrepublic.com/article/154263/neil-gorsuch-scorns-offended-atheists-humanists-christian-cross-supreme-court-case.

judges with the spine to restore a broader, stronger conception of individual rights under the Establishment Clause. Confirmation hearings may become even more raucous and divisive than they already are, and American politics may descend further into partisan rancor, bringing the damaged remains of the ideal of an independent judiciary along with it.

Were Gorsuch's approach adopted, one must be prepared for such an outcome and think carefully about whether it would be worth it. That said, were Gorsuch's approach properly communicated and understood, increased politicization of the Court may be avoided. By raising standing requirements to their ordinary level, the Court does nothing to preclude would-be plaintiffs from pursuing political solutions to offense caused by the presence of religious symbols in public spaces, nor does it preclude state or local governments from proscribing government action that may be perceived as communicating an endorsement of religion.[125]

Further, advocates of allowing traditional standing requirements to remain suspended might consider the potential, however unlikely, consequences of continuing the status quo. The Court's continued acceptance of mere offense as injury for the purposes of Establishment Clause claims may offer an easy vehicle for believers and non-believers alike to challenge the presence of religious symbols they do not like. In today's America, in which Christianity remains a culturally dominant, majority faith, citizens of minority faiths or no religious affiliation may find offense as an avenue for standing particularly appealing.[126] However, current trends indicate that America is rapidly becoming more pluralistic and more diverse, in nearly every sense of the word.[127] As minority faiths proliferate and majority faiths recede, state and federal governments may legitimately choose to recognize other faiths in various ways. Were such government action to occur, current Establishment Clause protections risk becoming a kind of heckler's veto for the religiously intolerant.

Either way, it is beyond dispute that Gorsuch's approach would, if adopted, enable the presence of more religious symbols in public spaces, not fewer. As a matter of law, such an approach is wholly consistent with traditional constitutional standing requirements. As a matter of policy, such an approach may provoke a wide variety of reactions and precipitate an increase in political strife. If nothing else, such an approach may invite

125. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019).

126. *Religious Landscape Study*, PEW RES. CTR. (last visited May 29, 2021), https://www.pewforum.org/religious-landscape-study/.

127. *See* D'Vera Cohn, *10 Demographic Trends Shaping the U.S. and the World in 2016*, PEW RSCH. CTR. (Mar. 31, 2016), https://www.pewresearch.org/fact-tank/2016/03/31/10-demographic-trends-that-are-shaping-the-u-s-and-the-world/.

Americans to think more deeply about the role of religion in our society and, should it continue its decline, the impact of its absence.

CONCLUSION

Despite the logical force of Gorsuch's argument, it is unlikely to command the support of a majority of the Court as currently composed. Assuming arguendo that the following jurists share Gorsuch's preference for maintaining traditional constitutional constraints, Chief Justice Roberts and Justices Alito and Kavanaugh have demonstrated their reluctance to overturn established precedent in accordance with their shared adherence to stare decisis. Justices Breyer, Kagan, and Sotomayor are similarly unlikely to sign on to such a rapid reduction in the scope of the Establishment Clause's current protections. The Court, notably, omits any discussion of Gorsuch's concurrence from its opinion, perhaps signaling a full confrontation of it may be more trouble than it's worth. Only Justice Ginsburg's dissent mentions it, and then only in a footnote.[128] Justice Thomas was the only member of the Court to join it.[129] And even if newly confirmed Justice Barrett shares Gorsuch's view, one vote appears unlikely to make a meaningful difference.

Setting aside for a moment the difficulty of crafting an Establishment Clause opinion that a majority of the Court's members feel comfortable joining, Gorsuch's approach deserves to be taken seriously on its own terms. This Note has endeavored to do so. Still, where one comes out on the question with which this Note is concerned remains, like much of constitutional law, a matter of which of the following fundamental American values one embraces more: either (1) limitations on the power of the judiciary to order our society or (2) a broad conception of individual rights and a judiciary equipped with broad power to define their scope. This Note embraces the former, at some expense to the latter.

Nevertheless, if American jurisprudence is ever to make sense of the Establishment Clause and move toward clarity, consistency, and predictability—the cornerstones of any functional legal system—Gorsuch's concurrence offers a way to do so. On the other hand, should the Court continue to apply flexible, shaky, undefined standards to cases like *American Legion*, whether to preserve unity on the Court or allow the American public greater access to federal adjudication of their disputes, believers and non-believers alike will continue to fumble around

128. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2105 n.4 (2019) (Ginsburg, J., dissenting). Justice Ginsburg expressed dismay toward Justice Gorsuch's willingness to depart from Establishment Clause precedent—namely, *Lemon* and its progeny. *Id.*

129. *Id.* at 2098.

in the dark in search of the parameters of constitutionally permissible cultural practice in a country that purports to promote religious freedom and penalize religious persecution. Each group deserves a clear answer.