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If Students Can't Sue the School Board, Who Can? Montesa v. Schwartz and the Case for a New Approach to Establishment Clause Standing

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Part I: Introduction

School boards have multiple responsibilities. They oversee the distribution of funds, determine and adjust school policies, and are supposed to care for the students in a neutral manner, without promoting religion. Therefore, it is more than a little surprising that a school board in upstate New York ordered books that "reflected traditional values and stories rooted in the Jewish tradition."[1] These books included titles such as "*Let's Go to Shul!*", and "*Why Weren't You Zisha and Other Stories*."[2] The East Ramapo School Board allegedly purchased these obviously religiously themed books and loaned them to local yeshiva students.[3]

The East Ramapo School Board also allegedly engaged in real estate practices that favored the local Orthodox community. For example, the school board closed Colton Elementary School and leased the building to the Hebrew Academy for Special Children ("HASC") and Congregation Bais Malka (a synagogue).[4] For three of the five years of the lease, the school board did not increase the rent and allowed HASC to pay the rent late.[5]

Some local residents also alleged that the school board appropriated Individuals with Disabilities Act ("IDEA") funds to favor yeshiva students.[6] The school board supposedly had an

[1] *Montesa v. Schwartz*, 836 F.3d 176, 193 (2d Cir. 2016).
[2] *Id.*
[3] *Id.*
[4] *Id.* at 192.
[5] *Id.*
[6] *Id.* at 191-92.

"unwritten agreement" with Hasidic parents that amounted to "manipulating the IDEA settlement process" and sending funds away from the district's public schools, instead funneling them towards Hasidic religious institutions."[7]

As of 2015, East Ramapo had about 32,000 children enrolled in the district's schools.[8] Of those 32,000 students, 24,000 attended private schools, mostly Jewish Orthodox yeshivas.[9] Of the nearly 8,000 students in public school, more than 80% were poor and 27% were English-language learners.[10] The school board has faced allegations of favoring the private schools.[11] While the school board decreased public school funding, it increased spending on private schools, especially on gender-segregated busing to yeshivas.[12]

The district caught the attention of the New York State Education Department (NYSED). NYSED monitored the district and recommended changes.[13] NYSED "determined that the District had failed to implement the recommended changes. As a result, NYSED withheld reimbursement, thereby costing the District millions of dollars."[14]

Current East Ramapo public school students sued the school board, alleging that the school board's actions violated the Establishment Clause of the United States Constitution.[15] The First Amendment to the U.S. Constitution states that "Congress shall make no law

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[7] *Id.*
[8] Merryl H. Tisch & David C. Sciarra, *When a School Board Victimizes Kids*, *New York Times*, (June 3, 2015) https://www.nytimes.com/2015/06/03/opinion/when-a-school-board-victimizes-kids.html.
[9] *Id.*
[10] *Id.*
[11] *See* Josh Nathan-Kazis, *East Ramapo Monitors See Progress in Orthodox-Dominated School District*, *Forward*, (January 24, 2017), http://forward.com/news/361012/east-ramapo-monitors-see-progress-in-orthodox-dominated-school-district-ask/.
[12] Tisch & Sciarra, *supra*.
[13] 836 F.3d at 192.
[14] *Id.*
[15] *Id.* at 193.

respecting an establishment of religion…"[16] Specifically, the student-plaintiffs alleged that the school board had promoted the Hasidic Jewish faith by (1) funding Hasidic schools with public monies through manipulating the IDEA settlement process to the yeshivas' advantage, (2) favoring the Hasidic institutions during the process of selling and leasing school buildings, and (3) purchasing books with religious themes with public money and lending the books to yeshivas. The plaintiffs alleged that these actions violated the Establishment Clause.[17] The student-plaintiffs sought an injunction, monetary damages, and attorneys' fees.[18]

The district court rejected the defendants' claim that the student-plaintiffs lacked standing.[19] On appeal, the Second Circuit Court of Appeals reversed the district court's decision on standing, determining that the plaintiffs had not satisfied the requirements to show standing.[20] This decision appears to be the first time that the Second Circuit directly addressed the issue of public school student standing in Establishment Clause claims that allege educational harm. It also appears that this specific issue has not been addressed in other circuits, as opposed to the more commonly addressed issues of parental standing and taxpayer standing in Establishment Clause cases. Therefore, *Montesa* is especially significant, not just in the Second Circuit, but nationally, because it sets a precedent in the Second Circuit that other circuits are likely to consider if they are confronted with similar challenges.

This case is especially important because without standing, students are barred from challenging the school boards' actions in court, even if the constitutional violation appears quite obvious. And if school boards know that the students can never even get their Establishment

[16] U.S. Const. amend. I.
[17] *Id.*
[18] *Id.* at 194.
[19] *Id.*
[20] *Id.* at 201.

Claims heard in court, there in nothing to deter rampant violations of students' constitutional rights.

This comment will discuss the reasoning of the Second Circuit in *Montesa* and argue that its reasoning was erroneous. I will discuss the history of standing jurisprudence, specifically in relation to Establishment Clause claims. Next, I will discuss the consequences of Establishment Clause standing jurisprudence, and argue that modern standing doctrine is too narrow, and must be broadened. Lastly, I will analyze standing jurisprudence in relation to *Montesa* and conclude that the Second Circuit's standing jurisprudence in Establishment Clause cases should change and be reversed.

Part II. *Montesa*'s Resoning:

The *Montesa* majority opinion began by reviewing the fundamentals of standing jurisprudence.[21] According to the Constitution, federal courts can only consider "Cases" or "Controversies."[22] In order to be considered a "Case," a plaintiffs must establish that they have standing to sue.[23] *Lujan* set forth three elements to determine whether a litigant has standing.[24] The plaintiff must show that there exists: "(1) An injury in fact; (2) A sufficient causal connection between the injury and the conduct complained of; and (3) A likelihood that the injury will be redressed by a favorable decision."[25] The injury in fact must be "concrete and particularized, and actual or imminent, not conjectural or hypothetical."[26]

[21] *Id.* at 195.
[22] *Id.*
[23] *Id.*
[24] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).
[25] 836 F.3d at 195 (internal quotation omitted).
[26] 504 U.S. at 560-61.

The majority then turned to discussing prudential standing in particular.[27] Prudential standing "encompasses the rule against the adjudication of generalized grievances, the rule prohibiting plaintiffs from asserting the rights of third parties, and the rule barring claims that fall outside 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"[28] Next, the majority discussed prudential standing in relation to the Establishment Clause.[29]

The Constitution's First Amendment states that "Congress shall make no law respecting an establishment of religion."[30] Establishment Clause claims have their own unique rules for standing because of the "particularly elusive" nature of Establishment Clause claims, which usually do not focus on concrete financial or physical harm.[31] Standing jurisprudence has developed three ways for a plaintiff to assert standing in an Establishment Clause claim: "(1) taxpayer, (2) direct harm, and (3) denial of benefits."[32]

The court then addressed the student-plaintiff's direct-exposure theory.[33] The court said that direct exposure standing exists in the following circumstances: when (1) a plaintiff is subjected to government control or constrained by a governmental "policy, regulation, or statute grounded in a 'religious' tenet or principle"; or (2) a plaintiff is personally confronted with a "government-sponsored religious expression that directly touches the plaintiff's religious or non-

[27] 836 F.2d at 195.
[28] *Id.* (internal quotation omitted).
[29] *Id.* at 195-96.
[30] U.S. Const. amend. I.
[31] 836 F. 3d at 196 (internal quotation omitted).
[32] *Id.* at 195.
[33] *Id.* at 196.

religious sensibilities." In both of those instances, the plaintiffs' interaction with or exposure to the religious part of the governmental action gives rise to the injury."[34]

The court concluded that the student-plaintiffs' claims did not fit any of these direct exposure circumstances.[35] The student-plaintiff's had claimed that they were "directly affected" by the school board's alleged unconstitutional acts because those acts resulted in direct educational harm.[36] As proof of this educational harm, the student-plaintiffs provided the following examples of ways the school board harmed the education of public school students as a result of their "unconstitutional diversion" of funds to religious institutions.

The plaintiffs alleged that the school board had significantly decreased spending on school programs considered "fundamental to the operation of the public schools," including the number of advanced classes offered, and had cut the number of teachers and guidance counselors working with students in the schools. In addition, the plaintiffs alleged that the school board "eliminated all assistant principals" and got rid of extracurricular activities, including art and music. Finally, the plaintiffs claimed that the school board eliminated the Students with Interrupted Formal Education (SIFE) program, which helped immigrant students "achieve their full potential" and prevent them from falling behind the rest of the student body. Overall, the student-plaintiffs alleged directly harmed the plaintiff's education by transferring resources, causing the student-plaintiffs to '[perform] below their peers in state-mandated academic examinations.'"[37]

[34] *Id.* at 197.
[35] *Id.* at 198.
[36] *Id.*
[37] *Id.*

The court rejected the argument that educational harm as a result of unconstitutional actions qualified as direct harm. The court reasoned that the students were not directly exposed to an overtly religious law or a law with an religious message that impeded their education, nor were the public school students exposed to religious messages or themes sponsored by the government.[38] The court concluded that the educational harm was only incidental to the school board's actions.[39] Additionally, the court noted that no appeals court has ever recognized the student-plaintiff's theory of direct exposure.[40] Without citing evidence, the court also stated that the educational harm the student-plaintiffs alleged was the result of a school system that was completely underfunded, and that there was an insufficient causal connection between the underfunding of the public schools and the alleged constitutional violations.[41] The court also said that despite being actual students the student-plaintiffs' injury was "common to all individuals" affected by the school district's budget.[42]

Part III. Standing Jurisprudence

A. Establishment Clause Standing in General: An Overview

The modern standard for determining questions of standing was outlined by the Supreme Court in *Lujan*.[43] The issue in Lujan was whether an environmental group had standing to challenge the enforcement of environmental regulations.[44] The group's members claimed that

[38] *Id.*
[39] *See id.* at 199.
[40] *Id.*
[41] *See* i*d.*
[42] *Id.* at 200.
[43] 504 U.S. at 560-61.
[44] *Id.* at 558-59.

the possibility of no longer being able to travel abroad and observe endangered animals satisfied the injury requirement of sanding doctrine.[45] The majority rejected the environmental group's claim that its members would suffer "actual or imminent injury" as a result of the way the regulations were enforced, which possibly could lead to a faster extinction of certain animal species.[46] Additionally, where there is actual harm, standing clearly exists, but the exact extent of the harm remains to be determined at trial.[47] The Supreme Court concluded that the environmental group did not have standing because the claims of injury were too attenuated.[48]

The Supreme Court has also addressed the unique rules of standing in Establishment Clause challenges.[49] According to the current framework, plaintiffs may demonstrate standing based on (1) the establishment of religion causing direct harm, for example, a mandatory prayer program in a public school classroom; or (2) if the plaintiffs allege that they have "incurred a cost or been denied a benefit on account of their religion," such as claimed discrimination in tax benefits; or (3) taxpayer standing.[50]

But the rules for demonstrating standing in Establishment Clause cases were not always this demanding. In 1982, the Supreme Court held, for the first time since 1952, that the plaintiff did not have standing to bring an Establishment Clause claim.[51] In *Valley Forge Christian College*, the Supreme Court held that the plaintiffs did not have standing to challenge the conveyance of land by the government to a religious institution.[52] The Supreme Court said that

[45] *Id.* at 563-64.
[46] *Id.* at 564.
[47] *Id.*
[48] *Id.* at 578.
[49] 836 F.3d at 195
[50] *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129-30 (2011).
[51] William P. Marshall & Maripat Flood, *Article: Establishment Clause Standing: The Not Very Revolutionary Decision At Valley Forge*, 11 Hofstra L. Rev. 63, 66 (1982).
[52] *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 468 (1982).

the plaintiffs had not identified any personal injury inflicted "*as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[53] The Court added that "[the plaintiffs'] claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court," and that federal courts are not "ombudsmen of the general welfare."[54]

In its holding, the Supreme Court overturned the Court of Appeals, which had determined that the plaintiffs did have standing.[55] According to the Supreme Court, the Court of Appeals had erred "out of the conviction that enforcement of the Establishment Clause demands special exceptions" from the standing requirement of a concrete injury.[56] The Supreme Court rejected the Court of Appeal's reasoning that there should be unique rules for Establishment Clause standing, and said that the mere assumption that if the present plaintiffs did not have standing, "no one would have standing," is not a reason to confer standing where there is none.[57] The Court was unwilling to accept the premise that if there were people who had been directly injured, they would have joined the suit, and that in the absence of people who had been directly injured, others must sue to remedy the violation.[58]

[53] *Id.* at 485.
[54] *Id.* at 487.
[55] *Id.* at 488.
[56] *Id.*
[57] *Id.* at 489.
[58] *Id.*

B. Taxpayer Standing

Valley Forge effectively limited *Flast v. Cohen*, an earlier decision related to standing in Establishment Clause cases, which addressed the issue of taxpayer standing.[59] In *Flast*, the Supreme Court held that taxpayers only had standing to challenge federal expenditures as violations of the Establishment Clause in certain situations.[60] The Court said that the "nexus" of taxpayer standing has two components.[61] First, the taxpayer must demonstrate a "logical link" between his or her taxpayer status and the law being challenged.[62] The legislative action being challenged must fall under the taxing and spending clause of Art. I, § 8, of the Constitution," not "incidental expenditure" of taxes in an "essentially regulatory statute."[63] Second, the taxpayer must demonstrate a link between his or her taxpayer status and the "precise nature of the constitutional infringement alleged."[64] This requirement means that taxpayers must establish that the challenged statute "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power," not just that the statute "is generally beyond the powers delegated to Congress by Art. I, § 8."[65] According to the Court, this framework guarantees that the taxpayer will have a real stake in the litigation and be a constitutionally proper party to the litigation.[66]

The *Flast* decision is difficult to understand, since the taxpayers practically alleged a generalized grievance.[67] It appears that to get around that issue in this case, the Supreme Court

[59] Nancy C. Staudt, Article: Modeling Standing, 79 N.Y.U.L. Rev. 612, 628 (2004).
[60] *Flast v. Cohen*, 392 U.S. 83, 103 (1968).
[61] *Id* at 102.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *See* Carl H. Esbeck, Essay: What The Hein Decision Can Tell Us About The Roberts Court And The Establishment Clause, 78 Miss. L.J. 199, 209 (2008).

"adopted a legal fiction," that "every taxpayer has an individualized interest, vested in the Establishment Clause understood as a power-denying restraint on congressional appropriations being directed in aid of religion.[68] Even the Supreme Court has acknowledged its embrace of this "legal fiction." In *Hein v. Freedom from Religion Found.*, Justice Alito mentioned this legal fiction when discussing whether the taxpayer-plaintiffs in the case had standing: "In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm. And if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."[69] The Court's adoption of this legal fiction allowed it "to reach the merits in the absence of a complainant suffering specific 'injury in fact' or actual harm."[70]

C. Parental Standing

Another much-litigated question is the issue of parental standing in Establishment Clause cases. The Second Circuit addressed this issue in a 1992 case, *Sullivan v. Syracuse Housing Authority*. The plaintiff in that case was a father asserting the third-party interests of his son.[71] Specifically, the father alleged that the Syracuse Housing Authority had violated the Establishment Clause by allowing a Christian organization to operate out of a community center in a housing development.[72] The father alleged that the Christian organization had exposed his son to religious ideas that made the father "concerned because his son is preoccupied by thoughts

[68] Id.
[69] *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 592 (2007); Esbeck, *supra*, at 210.
[70] Esbeck, *supra*, at 211.
[71] *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101, 1107 (2d Cir. 1992).
[72] *Id.* at 1105.

of heaven and hell and sin."[73] The Second Circuit overturned the district court's ruling that the father had no standing to sue on behalf of his son because the father had not proven any "actual injury" and "had done nothing more than assert his 'mere tenancy in a building in which religious activities occurred, and had alleged no injury beyond the 'psychological consequence presumably produced by observation of conduct with which one disagrees.'"[74]

Rejecting the district court's reasoning, the Second Circuit held that the plaintiff had established "with sufficient clarity a claim that he has been deprived of his right to use and enjoy the community center, as well as a claim that a religion has been established in a place functionally analogous to Sullivan's own home."[75] The court considered the record that stated that the plaintiff found the establishment of religion in a place "functionally analogous to [plaintiff's] own home," and that in the court's view, the plaintiff was not a "simple bystander."[76]

Additionally, the court said that a plaintiff "may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause," and so the alleged harm does not have to be economic.[77] The court also considered the plaintiff's claim that he was injured by his son's unwanted exposure to religion, and held that in that sense he was not merely claiming injury on behalf of a third party (his son), but rather had standing to challenge an injury to himself.[78] Additionally, the court also noted that standing is a threshold issue, and when considering it, courts should accept the plaintiff's factual claims, and not judge the case on its merits.[79]

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[73] *Id.*
[74] *Id.* (internal quotations omitted).
[75] *Id.* at 1108.
[76] *Id.*
[77] *Id.* at 1107.
[78] *Id.* at 1109.
[79] *Id.* at 1106-1108.

D. Psychological Injury as Direct Harm

Aside from a parent alleging direct injury as a result of a child's exposure to religion, there are other instances where courts seem to move beyond the strict interpretation of direct harm. There are multiple cases where courts have held that alleged psychological harm qualifies as direct harm for standing purposes.[80] In *ACLU v. Ohio Found., Inc.*, the Sixth Circuit held that "the mere presence of a poster displaying the Ten Commandments demonstrated sufficient 'psychological injury in fact' to create standing."[81] The Sixth Circuit cited a 1994 case in which it said that psychological injury may suffice when the injury from the contact is direct and more than a vicarious claim.[82] When Catholics and a Catholic advocacy group sued the city of San Francisco, alleging that a city resolution denouncing the Catholic Church violated the Establishment Clause, the Ninth Circuit held that the plaintiffs did have standing.[83] The court said that psychological harm "constitute[s] concrete harm where the 'psychological consequence' is produced by government condemnation of one's own religion or endorsement of another's in one's own community."[84]

[80] *See ACLU of Ohio Found., Inc. v. Deweese*, 633 F.3d 484, (6th Cir. 2011); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994); *Catholic League for Religious & Civ. Rights v. City & County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2009).
[81] 633 F.3d at 489 n.3 (internal quotations omitted).
[82] 33 F.3d at 682.
[83] 624 F.3d at 1046-48.
[84] *Id.* at 1052.

Part IV. Analysis of *Montesa*

A. The Second Circuit Should Have Determined That Educational Harm is Direct Harm

Based on current standing jurisprudence, the majority in *Montesa* erred in its application of precedent and its finding that the students in *Montesa* did not have standing to sue the school board. The court mistakenly determined that the educational harm that the students alleged was not direct enough to constitute injury sufficient for standing. Based on the psychological cases like *ACLU of Ohio, Inc.* and *Catholic League for Religious & Civ.* Rights, the alleged harm to the Ramapo students should have been held as being sufficiently direct. If psychological harm as a result of the state actor endorsing a religion is considered sufficient harm for standing, educational harm as a result of funding schemes that purposely aid only certain religious schools at the expense of public schools certainly is direct harm. It is not difficult to conclude that such funding schemes constitute a state actor endorsing a specific religion, so the school board's funding of religious institutions and studies certainly qualifies as "endorsement of another's [religion] in one's own community."[85]

The majority also ignored the issue of parental standing. It cited *Sullivan* only to outline the basics of standing, but did not discuss the facts of *Sullivan* or distinguish it from *Montesa*.[86] It is difficult to see how a child's exposure to religion gives someone else (the parent) standing to sue, but students themselves do not have standing when their education is allegedly harmed. This conundrum is especially so when one considers the Second Circuit's characterization of the facts in *Sullivan*, and its acceptance that "[b]y acting pursuant to and enforcing the *religious*

[85] *Id.*
[86] *See* 836 F.3d at 196-97.

policy complained of herein, the defendant is denying the plaintiff's use and enjoyment of public housing facilities."[87] That is analogous to *Montesa*, because the school board's alleged endorsement of religious activities denied the student-plaintiffs adequate funding in their public schools.

And while it is true that daily exposure in a classroom to a display of the Ten Commandments may be a more overt symbol of government endorsement of religion, the alleged funneling of public funds away from public schools and towards religious activities is more harmful to children's futures. As the court said in *Sullivan*, at the pleading stage, the factual allegations should be viewed in the light most favorable to the plaintiff.[88] Therefore, the court should have accepted, for standing analysis purposes only, that the school board acted unconstitutionally. In that case, the harm would have to have been to the public school students, and the educational harm of inadequately funded schools to them was quite concrete, much more so than psychological injury.

The majority simply took too narrow a view of injury in this case because it chose to apply a strict view of injury in fact and direct harm. In dissent, Judge Reiss took issue with this narrow view of standing and said he would view the plaintiff's claims as "broader than the majority's formulation," and opined that the "Establishment Clause does not require 'direct exposure' to the unconstitutional establishment of religion."[89] Rather, the dissent would have concluded that the students were "directly affected" by the defendant's alleged violations of the Establishment Clause."[90] The plaintiffs could prove this causal link by producing "budgetary

[87] 962 F.2d at 1105 (emphasis in original).
[88] 962 F.2d at 1106-08.
[89] 836 F.2d at 201 (Reiss, J. Dissenting).
[90] *Id.* (internal quotations omitted).

records and academic test scores a direct causal link between defendants' alleged diversion of District funds and the academic harm they suffer."[91] Accepting this premise does not require much imagination. Students are directly affected when less money is spent on their education as a result of it purposely being spent on religious schools and activities directly related to religious education.

In the dissent's view, the majority also failed to properly analyze the case in light of its stage in the litigation. At the pleadings stage, the standings requirements should be "neither stringent nor inflexible."[92] The main inquiry should have been if the claim "fall[s] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[93]

It is a generally accepted principle that with better education comes improved opportunities.[94] The school board's alleged underfunding of East Ramapo's public schools could potentially impact many students' futures beyond their actual schooling in East Ramapo. One can easily draw a direct line from the alleged unconstitutional spending on religious schools to educational harm to the public school students. The plaintiffs' attorney described the alleged harm to a local news website as "depriving public school children of a sound-basis education and an opportunity for achievement and a quality education."[95] And that harm sounds quite concrete and direct.

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[91] *Id.* at 204.
[92] *Id.* at 202.
[93] *Id.*
[94] *See id.* at 204.
[95] Janie Rosman, *Hoping for a Jury Trial: Lawsuit against East Ramapo School District continues*, *Rockland Cty. Times* (July 16, 2015), http://www.rocklandtimes.com/2015/07/16/hoping-for-a-jury-trial-lawsuit-against-east-ramapo-school-district-continues/.

The dissent also noted that the majority failed to address a major detail: The student-plaintiffs alleged an injury, educational harm, which cannot be claimed by the general public and taxpayers.[96] It is not just anyone who can claim this harm; it is specific to these public school students in East Ramapo. The students are the only people who can allege the harm, and therefore are in the best position to sue.

B. Modern Standing Doctrine is Flawed and too Narrow

But it is perhaps not surprising that the *Montesa* decision seems inconsistent with precedent. There is tension built into Establishment Clause standing jurisprudence, because of the difficulty in defining harm in some Establishment Clause cases as concrete. It is confusing that psychological injury from mere exposure to religion can be concrete enough for standing, but the educational harm in *Montesa* does not qualify as sufficiently concrete.

In the words of one expert, "the law of standing is at best confusing and at worst a serious impediment to fair and just outcomes."[97] Put in other words, standing doctrine has always been inconsistent and not just in Establishment Clause cases[98] For example, some scholars claim that the Court has been rigorously demanding in its standing standard in environmental cases, even though individual injury is not at the heart of many environmental claims."[99] Standing doctrine has even been called a "Rorschach test for federal courts."[100]

[96] 836 F.3d at 204 (Reiss, J. Dissenting).
[97] Staudt, *supra*, at 613.
[98] David M. Driesen, Article: Standing For Nothing: The Paradox Of Demanding Concrete Context For Formalist Adjudication, 89 Cornell L. Rev. 808, 876 (2004).
[99] *Id.*
[100] Daniel E. Ho and Erica L. Ross, Article: Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006, 62 Stan. L. Rev. 591, 594 (2010).

Because standing jurisprudence in these cases is so confusing and "incoherent," judges end up relying on their own viewpoints to determine who has standing in court.[101] The inconsistency in the results of standing cases "leads to suspicion that decisions on standing in close cases may be guided more by the courts' instincts toward the merits than by an independent determination of the parties' eligibility to invoke jurisdiction."[102] It is quite possible that case are determined by judges' political opinions than by legal doctrine.[103] This conclusion is not difficult to reach when "liberals generally favored broad standing while conservatives were for narrower approaches: conservatives favored standing for banks while liberals usually did not, and the votes were reversed when it came to standing for prisoners, employees, and environmentalists."[104]

There is also a strong case to be made for the premise that judges sometimes just use standing as an excuse to not rule on the merits of a case.[105] One scholar says that liberal Justices historically have applied a more "relaxed approach" to increase access for plaintiffs attempting to champion progressive laws and causes, whereas conservatives follow stricter standing rules "to keep out ACLU types" but then relax the standing standard for businesses and other plaintiffs that conservatives would like to be successful.[106] This reality especially disadvantages plaintiff groups that may not be particularly popular, especially if they are suing a politically powerful individual or entity. Even if the plaintiff could satisfy many judges' application of standing

[101] Staudt, *supra*, at 615.
[102] Marc C. Rahdert, Article: Forks Taken And Roads Not Taken: Standing To Challenge Faith-Based Spending, 32 Cardozo L. Rev. 1009, 1015-16 (2011).
[103] Thomas D. Rowe, Jr., Essay: All Rise! Standing In Judge Betty Fletcher's Court, 85 Wash. L. Rev. 19, 21 (2010).
[104] Rowe, *supra*, at 22.
[105] Maxwell L. Stearns, Citizen Suits And The Future Of Standing In The 21st Century: From Lujan To Laidlaw And Beyond: From Lujan To Laidlaw: A Preliminary Model Of Environmental Standing, 11 Duke Envtl. L. & Pol'y F. 321, 323 (2001).
[106] Robert J. Pushaw, Jr., Article: Limiting Article III Standing To "Accidental" Plaintiffs: Lessons From Environmental And Animal Law Cases, 45 Ga. L. Rev. 1, 4 (2010).

doctrine, the plaintiff may be out of luck just because content of the claim makes it difficult for the case to even be heard on the merits.

The problems with standing jurisprudence are "particularly vivid" in relation to Establishment Clause cases.[107] These difficulties are evident in the wildly inconsistent results in Establishment Clause standing cases.[108] Sometimes the court rejects Establishment Clause challenges because of a lack of standing. Sometimes, it "loosens the knots" of standing doctrine to allow challenges to actions that otherwise are difficult to resolve, and at times the court treats these cases as special, "calling for unique (and more generous) standing rules." And at other times, the court treats Establishment Clause standing questions with the same inconsistent approach it applies to other cases.[109]

Possibly the biggest question one is left with after reviewing Establishment Clause standing jurisprudence is how can there be a violation of the Establishment Clause with no injury?[110] For example legislative appropriations may contradict the rule of no-establishment-like the federal education funding of religious schools at issue in *Flast*- "yet there is no individual or organization with 'injury in fact,' and thus no one with traditional standing to sue."[111] If the Establishment Clause is considered such a foundational part of American government, the Constitution, and our national conscience, it seems incredulous that alleged blatant Establishment Clause violations can occur but no one can claim injury sufficient for standing.

[107] Rahdert, supra, at 1017.
[108] *Id.* at 1017-18.
[109] *Id.* at 1018.
[110] Esbeck, *supra*, at 213.
[111] *Id.* at 215.

If there is a violation, standing doctrine should be broad enough that someone can sue for a remedy. Historically, the "injury in fact" requirement is "of relatively recent vintage" and was not part of standing doctrine until 1970.[112] The origins of legal standing doctrine are considered a basic question not easily answered by scholars.[113] This mystery is especially magnified by some legal historians' argument that current standing rules have "little or no foundation" in the framing period or the time soon after the Constitution was ratified.[114] The injury in fact requirement was not even part of English practices.[115] And the lack of a historical injury in fact requirement is in addition to standing doctrine in general being a "twentieth century judicial creation," as the relative recentness of the standing cases demonstrate.[116] Over the last sixty or so years, standing doctrine has been influenced by "the pragmatic realities of contemporary litigation than by any quest for determination of the Framers' original intention."[117] One theory of how standing doctrine developed is that around the turn of the century, judges needed a way to trim a growing caseload.[118] One way of managing the caseload was to introduce stricter standing rules that had not been previously applied.[119]The malleability of standing doctrines demonstrates that the doctrine lacks a firm constitutional foundation.[120]

Still, one should not argue that we do away with standing jurisprudence, particularly the injury in fact requirement, altogether. After all, at this point the doctrine of stare decisis backs up current standing doctrine.[121]

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[112] Kathleen M. Sullivan & Noah Feldman, *Constitutional Law*, 48 (2016, 19th ed., Foundation Press).
[113] Ho and Ross, *supra*, at 601.
[114] Stearns, *supra*, at 322.
[115] I*d.* (internal quotation omitted).
[116] Rahdert, *supra*, at 1014.
[117] *Id.* at 1015.
[118] Ho and Ross, *supra*, at 604-605.
[119] See *id.*
[120] Pushaw, *supra*, at 8.
[121] Driesen, *supra*, at 877.

But the standing doctrine should be broad enough to provide relief to those who have been injured, and "lead to more liberal treatment of injury, which might include less use of heightened pleading requirements to screen out injured plaintiffs and more generous application of the doctrine that a court should view a plaintiff's challenged allegations of injury in the light most favorable to the plaintiff on summary judgment. Lowering these barriers to presentation of facts might increase the flow of concrete experience into the courtroom and therefore might do more to improve concreteness than the standing doctrine ever did."[122] Such a change would help prevent the Establishment Clause from becoming meaningless in certain contexts.

Some argue that a strict application of the current standing jurisprudence "helps assure vigorous argument."[123] But this premise is flawed. As Justice Scalia has argued, an ideological plaintiff with absolutely no injury may strongly believe in something and therefore argue the case vigorously, perhaps even more so than someone injured.[124] Additionally, the fact that plaintiffs argue vigorously that they do have standing and go through that litigation speaks to their commitment to the litigation.

The possibility of the Establishment Clause becoming meaningless in certain contexts (because it would be difficult to show sufficient harm) is especially real in the school context. In that context, like in *Montesa*, students may have real grievances. They may allege obvious and purposeful violations. Yet somehow they have not been injured enough for some courts like the Second Circuit.

[122] *Id.* at 878.
[123] Driesen, *supra*, at 871.
[124] *Id.*

If students themselves do not have standing to challenge the school board, who does? According to the majority, the answer seems to be no one. And that answer means students are effectively powerless in the courts. American jurisprudence must change, and the circuit courts should adapt the broader view of standing applied in psychological harm cases to cases like *Montesa*. Such a shift would have real effects in the classroom, because students would be empowered to challenge school board decisions that harm the students. That new reality may deter school boards' violations.

Some may say that from a policy perspective, it is not necessary for students to be able to sue school boards to meaningfully affect change. It is okay that no one may haves standing to challenge a school board, because it is possible that "some constitutional provisions be subject only to political, not legal enforcement[.]"[125] After all, their parents and communities can vote, right? But it is not enough that some students have parents who can vote for school board members they feel will protect the students' rights; not all parents vote, and children's constitutional rights should not depend on their parents' votes. This insulates school boards from consequences of any violations, and may encourage them to continue unconstitutional practices, since there is no fear of being checked by the courts.

Of course, it is difficult to ignore another reason why the courts may be reluctant to involve themselves in cases like *Montesa*: These cases are politically charged and touch on issues such as religion, race, and class. There is technically a political and democratic solution, because there are school board elections, so why involve the courts? But that attitude ignores the political and social realities in places like East Ramapo. As the demographic makeup of

[125] *Id.* at 53.

communities like East Ramapo continue to undergo dramatic and fast change, the rights of the people in the minority in these neighborhoods are at risk of being neglected by the electoral process, and must instead be protected by the courts.

The plaintiffs in *Montesa* have a "substantial" case, and one expert says that he would not be surprised if they appeal the Second Circuit's decision. If the Supreme Court were to grant certiorari, it would be a momentous chance to broaden standing jurisprudence and overturn the Second Circuit's decision in *Montesa*. However, the current conservative majority on the Court might make that outcome unlikely, as currently, conservatives are more likely to not grant standing.[126]

Part V. Conclusion

The Second Circuit erred in deciding that the student-plaintiffs in *Montesa* did not have standing to sue the school board. The majority took too narrow a view of standing in this case, and ignored its own circuit's precedent, such as *Sullivan*, as well as cases from other circuits that allowed for a more flexible view of injury in fact and direct harm.[127] Instead, the court should have followed the reasoning laid out in the dissent, which noted that it is not difficult to characterize the educational harm alleged by the students as injury sufficient for standing.[128]

Standing doctrine should not be so narrow that plaintiffs affected by a blatant constitutional violation do not have standing to sue. Because if they cannot sue, who can? And if the answer is no one, the courts slam the door on students who wish to challenge their school

[126] Ho and Ross, *supra*, at 596.
[127] *See* 836 F.3d at 196-97.
[128] 836 F.3d at 202.

board. That has grave consequences, because school boards know that they can continue funding non-public schools and religious institutions in an allegedly unconstitutional manner. The Second Circuit effectively insulated the East Ramapo School Board from student lawsuits, and the school board therefore has absolutely no incentive to take care of its public schools.

There is an especially strong need for standing doctrine to be broader in the Establishment Clause context, because of the possibility that Establishment Clause cases often deal with allegations having to do with non-concrete injury, such as psychological injury, or a case like *Montesa*, where the students were not actually exposed to religion in the classroom.[129] Yet, while some circuits have affirmed standing in some of the psychological harm cases, public school students were denied standing in a case that alleged harm more concrete than psychological injury. Those rulings are only some example of the wild inconsistencies inherent in modern standing jurisprudence, and a result of standing often being used by judges to deny controversial cases that they do not want to decide on the merit.[130]

But deciding cases, no matter how controversial, is the job of the judiciary. And when the judiciary uses standing doctrine to dismiss controversial cases with merit brought by plaintiffs alleging injury, the judiciary does not do its job. This problem is especially apparent when the plaintiffs represent politically disadvantaged groups or groups with unpopular positions. And in *Montesa*, the student-plaintiffs cannot even remedy their situation at the next school board elections, because, as children, they cannot vote. And the rights of children should not be subject to counting on their parents to vote.

[129] *See* 836 F. 3d at 196 (internal quotation omitted).
[130] Rowe, *supra*, at 21.

On the question of who can sue the school board in *Montesa*, the Second Circuit answered: No one. But I am not satisfied with that answer, and neither should the courts. Rather, the circuit courts should follow the broader, more forgiving view of standing doctrine outlined in the *Montesa* dissent. The standing requirements are a relatively modern invention by the courts, so it would not be particularly shocking to relax the standards to allow people who have been injured to seek redress.

It is highly unlikely that the current conservative Supreme Court majority would overturn *Montesa*, but that does not put the issue of Establishment Clause standing to rest. It is possible that as more scholars advocate for a broader view of standing, especially in the Establishment Clause context, more cases will be heard by the Circuit Courts. Those cases may force the Supreme Court to address this issue at some point in the future, and one can only speculate as to the makeup of the court when that time comes, and how it would rule. But if the Supreme Court does reconsider Establishment Clause standing, it should allow for a looser application then the Second Circuit used in *Montesa*, because when we ask who can sue the school board, the answer must be the students.