

WHAT'S THE HARM? NONTAXPAYER STANDING TO CHALLENGE RELIGIOUS SYMBOLS

I. CURRENT CASE LAW	1074
A. The Supreme Court's (Limited) Guidance	1074
B. Circuit Court Precedent.....	1075
1. The Direct and Unwelcome Contact Test	1076
2. The Altered Behavior Test.....	1077
II. THE WEAK BASIS FOR THE TESTS APPLIED BY THE COURTS OF APPEALS.....	1078
III. WHAT'S THE HARM? TESTING POTENTIAL INJURY-IN-FACT THEORIES OF RELIGIOUS SYMBOL PLAINTIFFS AGAINST SUPREME COURT PRECEDENT	1082
A. Offense	1083
B. Stigma	1087
C. Involuntary Exposure to Religion.....	1090
D. Special Burdens To Avoid Religious Symbols	1091
IV. NORMATIVE AND FUNCTIONAL JUSTIFICATIONS FOR DENYING NONTAXPAYER STANDING TO CHALLENGE RELIGIOUS SYMBOLS.....	1092
A. Protecting the Separation of Powers.....	1093
B. Preventing Unwarranted and Unnecessary Judicial Intrusions into the Culture Wars	1094
V. CONCLUSION	1097

The Supreme Court's religious display cases have provoked much critical commentary.¹ Yet few scholars have focused on the antecedent jurisdictional question of what kind of injury a

1. See, e.g., NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 16, 204–05, 213–14 (2005); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 126–27 (1992).

plaintiff must show to establish nontaxpayer² Article III standing to challenge a governmental religious display or symbol³—despite a large body of circuit court case law on the issue.⁴ The Supreme Court has addressed the question only obliquely, even though two sitting Justices and the late Chief Justice Rehnquist have identified it as worthy of the Court's consideration.⁵

In most circuits, a plaintiff challenging a governmental religious symbol under the Establishment Clause need only show some variation of “direct and unwelcome contact” with the symbol to satisfy the injury-in-fact requirement of the Court's Article III standing doctrine.⁶ But most circuit courts have analyzed the issue superficially, relying on the decisions of sister circuits or focusing on what can be gleaned from the Court's few passing comments on the issue. As of yet, no court or commentator has systematically evaluated the Article III standing of plaintiffs to challenge religious symbols in light of the entire corpus of Supreme Court standing precedent and the

2. This Note only addresses nontaxpayer standing. Federal and state taxpayers ordinarily do not have standing as taxpayers to challenge government expenditures. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343, 345 (2006). Under *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968), however, state and federal taxpayers do have taxpayer standing to assert an Establishment Clause challenge against specific legislative appropriations that directly benefit religion. See also *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 608 (2007) (plurality opinion) (denying standing because the challenged Executive expenditures “were not expressly authorized or mandated by any specific congressional enactment”). After *Hein*, the future of taxpayer standing under *Flast* is uncertain. See Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 119. Under current doctrine municipal taxpayers ordinarily do have standing to challenge the misuse of municipal funds. See *Cuno*, 547 U.S. at 349; *Frothingham v. Mellon*, 262 U.S. 447, 486–87 (1923). The future vitality of municipal taxpayer standing is also uncertain. See *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, No. 06-6533, 2011 WL 475186, at *19–20 (6th Cir. Feb. 11, 2011) (Sutton, J., concurring) (arguing that the justification for municipal taxpayer standing is no longer defensible in contemporary America and in light of the Supreme Court's current standing doctrine more generally).

3. The most complete scholarly discussions to date are David Harvey, Comment, *It's Time To Make Non-Economic or Citizen Standing Take a Seat in "Religious Display" Cases*, 40 DUQ. L. REV. 313 (2002), and Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing To Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495 (1995).

4. See *infra* Part I.B.

5. See *City of Edmond v. Robinson*, 517 U.S. 1201, 1201–03 (1996) (Rehnquist, C.J., dissenting from denial of writ of certiorari) (joined by Justices Scalia and Thomas).

6. See *infra* Part I.B.

principles underlying those decisions. This Note undertakes that task and concludes that the weight of Supreme Court authority is at odds with the law in the circuit courts. Mere contact with a religious symbol, even if direct and unwelcome, produces at most psychological offense or stigmatic harm—injuries that the Court has found too abstract to give rise to standing.

But this straightforward conclusion appears to be in tension with the Court's religious endorsement test, which remains the substantive standard in religious symbol cases.⁷ Although standing and the merits are doctrinally independent,⁸ because the endorsement test protects against psychological and stigmatic injuries, it is probably unrealistic to expect lower courts to deny standing on these grounds. This is especially so given the large body of circuit court precedent that permits standing in religious symbol cases. The Supreme Court should therefore intervene to resolve the substantial inconsistency between its standing cases and the numerous circuit court decisions that permit nontaxpayer standing to challenge religious symbols.

Part I of this Note briefly sets forth the Supreme Court's limited guidance with regard to nontaxpayer standing in the religious symbol context and then summarizes the decisions of the federal courts of appeals. Part II argues that the Supreme Court precedents on which the circuit courts have relied provide a weak basis for their approaches to the question. Part III considers several possible ways of characterizing the injury alleged by religious symbol plaintiffs and evaluates each theory of injury in light of the Supreme Court's standing case law. All of the available theories of injury boil down to some version of either offense or stigmatic injury, both of which the Supreme Court has explicitly found to be insufficient to give rise to standing. Part III also addresses standing doctrine's apparent tension with the endorsement test. It argues that the Supreme Court should decide the question of nontaxpayer standing to challenge religious symbols, because even though it has emphasized that standing and the merits are distinct and unrelated inquiries, the lower courts have not ignored the substantive endorsement test standard when addressing the nontaxpayer

7. See *infra* note 83. The endorsement test expressly protects against stigmatic and psychological harm, the same injuries that standing doctrine prevents plaintiffs from asserting. See *infra* Part III.B.

8. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

standing question. Part IV suggests normative and functional arguments in support of the conclusion that religious symbol plaintiffs lack nontaxpayer standing to sue. Allowing standing based on the approaches of the circuit courts undermines the proper separation-of-powers limits on the judiciary's role, threatens the legitimacy of the federal courts, and saps the vitality from the political process. Part V concludes.

I. CURRENT CASE LAW

The elements of what the Court has termed “the irreducible constitutional minimum of standing” are familiar and well established.⁹ A plaintiff must (1) have suffered an “injury-in-fact” that is (2) causally connected to the defendant’s challenged action and (3) likely to be redressed by a favorable decision.¹⁰ Only the first of these elements—the injury-in-fact—is at issue in most religious symbol cases.

A. *The Supreme Court’s (Limited) Guidance*

The Supreme Court has thus far offered only limited guidance with regard to when, if ever, noneconomic injuries will support standing to sue under the Establishment Clause. The Court issued its clearest and most significant discussion of the issue in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*¹¹

Valley Forge involved the federal government’s gift of surplus land in Pennsylvania to a nonprofit Christian college.¹² The plaintiffs, who resided in Virginia and Maryland,¹³ learned of the transfer through a news release.¹⁴ The Supreme Court held that the plaintiffs lacked standing because they claimed nothing more than “that the Constitution has been violated . . . [and]

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

10. *Id.* at 560–61.

11. 454 U.S. 464 (1982). The Court has also decided several religious symbol cases on the merits without questioning whether the plaintiffs had standing. *See infra* Part II. Several circuit courts have attributed significant weight to these decisions, but for the reasons discussed in Part II, the Supreme Court’s silence about standing in these decisions is not nearly as significant as these circuit courts have assumed.

12. *Valley Forge*, 454 U.S. at 467–68.

13. *Id.* at 487.

14. *Id.* at 469.

fail[ed] to identify any personal injury . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees.”¹⁵ The Court accordingly devoted little of its discussion to what sort of noneconomic harm (if any) would have sufficed for standing. The only relevant suggestion appeared in a footnote, in which the Court distinguished *School District of Abington Township v. Schempp*¹⁶ from *Valley Forge*. *Valley Forge* stated that the plaintiffs in *Schempp* had standing “because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.”¹⁷ Because the Court’s holding in *Schempp* remains obscure,¹⁸ *Valley Forge* is by far the best Supreme Court authority for determining nontaxpayer standing in religious symbol cases.

B. Circuit Court Precedent

In the nearly three decades since *Valley Forge*, the courts of appeals have considered the question of nontaxpayer standing to challenge religious symbols on numerous occasions. Two basic tests have emerged from their decisions. The dominant approach requires a plaintiff to show some version of direct and unwelcome contact with the challenged symbol or display.¹⁹ A second approach requires a plaintiff to show that he altered his behavior to avoid contact with the allegedly offensive display.²⁰

15. *Id.* at 485.

16. 374 U.S. 203 (1963).

17. *Valley Forge*, 454 U.S. at 487 n.22.

18. *Schempp* held in a footnote that the plaintiffs, who challenged classroom Bible-reading and prayer, had standing because they were “directly affected by the laws and practices against which their complaints are directed.” 374 U.S. at 224 n.9. But the Court’s explanation for this conclusion is hardly illuminating. Of the four cases it cited, only one expressly mentioned standing. That case, *Doremus v. Board of Education*, 342 U.S. 429 (1952), “involved the same substantive issues” as *Schempp* but was dismissed in part “because of the appellants’ failure to establish standing as taxpayers.” *Schempp*, 374 U.S. at 224 n.9.

19. See, e.g., *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010) (granting standing based on plaintiff’s “unwelcome direct contact” with the national motto “In God We Trust” on U.S. coins and currency); *ACLU of Ky. v. Grayson Cnty.*, 591 F.3d 837, 843 (6th Cir. 2010) (holding that plaintiffs suffered injury adequate for standing by coming into “direct and unwelcome contact with a government-sponsored religious object”).

20. See, e.g., *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 792 (9th Cir. 2008) (Berzon, J., concurring) (observing that “avoidance of public land that one would otherwise visit and use is an injury that gives rise to standing”); *Gonzales v. N.*

1. *The Direct and Unwelcome Contact Test*

In most circuits, a plaintiff can establish injury-in-fact by alleging direct exposure to an offensive governmental religious object.²¹ Whether the plaintiff's contact with the object is sufficiently direct to give rise to standing depends predominantly on physical proximity. Thus, only a plaintiff who physically observes an offensive object or symbol may sue.²² Some cases have also considered additional factors to be relevant. For instance, several cases have given weight to a plaintiff's residential proximity to the challenged object, as opposed to merely personal proximity or contact.²³ Other cases have found it significant that the plaintiff had no choice but to confront the symbol or display in the course of his employment or performance of civic obligations.²⁴ Still others have emphasized the fre-

Twp. of Lake Cnty., 4 F.3d 1412, 1416 (7th Cir. 1993) (granting standing because the plaintiff "altered his behavior" by avoiding a park with a crucifix display).

21. This is the law in the Fourth Circuit, *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997); the Fifth Circuit, *Doe v. Tangipahoa Parish School Board*, 494 F.3d 494, 497 & n.3 (5th Cir. 2007) (en banc); the Sixth Circuit, *Grayson County*, 591 F.3d at 843; the Seventh Circuit, *Books v. Elkhart County*, 401 F.3d 857, 861 (7th Cir. 2005); the Ninth Circuit, *Newdow*, 598 F.3d at 642; the Tenth Circuit, *Green v. Haskell County Board of Commissioners*, 568 F.3d 784, 793 (10th Cir. 2009); the Eleventh Circuit, *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987); and the D.C. Circuit, *In re Navy Chaplaincy*, 534 F.3d 756, 763–64 (D.C. Cir. 2008).

22. See, e.g., *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1028 (10th Cir. 2008) (finding plaintiff's allegations of "direct, personal contact" with and "constant exposure" to a city symbol sufficient to confer standing (emphasis omitted)); *Tangipahoa Parish Sch. Bd.*, 494 F.3d at 497–98 (denying standing because plaintiffs offered no evidence that they attended a school board session at which a prayer like those challenged was recited); *Suhre*, 131 F.3d at 1087 (identifying "the proximity of the plaintiffs to the conduct they challenge[]" as a critical factual distinction" between cases that give rise to standing and those that do not). Cf. *Caldwell v. Caldwell*, 545 F.3d 1126, 1132–33 (9th Cir. 2008) (finding plaintiff's connection to religious content on a public university's webpage too tenuous to support standing).

23. See, e.g., *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994) (avowing that "[t]he practices of our own community may create a larger psychological wound than someplace we are just passing through"); *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1469 (7th Cir. 1988); *Saladin*, 812 F.2d at 693 (holding that plaintiffs had standing in part because "they are part of the City and are directly affronted by the presence of the allegedly offensive word on the city seal").

24. See, e.g., *Books*, 401 F.3d at 861 (concluding that "it is enough for standing purposes that a plaintiff allege that he 'must come into direct and unwelcome contact with the religious display to participate fully as [a] citizen[] . . . and to fulfill . . . legal obligations'" (alterations and omissions in original) (quoting *Books v. City of Elkhart*, 235 F.3d 292, 299 (7th Cir. 2000))); *ACLU of N.J. v. Twp. of Wall*,

quency or regularity of the plaintiff's contact.²⁵ It warrants emphasis that the overall tone of the great majority of these cases suggests that none of these additional factors are necessary. Not one of them explicitly found that the absence of any individual factor would preclude standing. Rather, most courts have relied on the presence of these factors as further support for recognizing standing.²⁶

2. *The Altered Behavior Test*

A number of circuit court cases have predicated standing on the plaintiff's alteration of his behavior to avoid the religious symbol or display.²⁷ A slight variation on this test confers standing where the plaintiff can show deprivation of his beneficial use of a public place because of the offense caused him by a religious display.²⁸ In no circuit, however, is a plaintiff required to prove altered behavior. The Seventh Circuit previously imposed such a requirement but since 1994 has also permitted plaintiffs to show injury under the direct and unwell-

246 F.3d 258, 266 (3d Cir. 2001) (opining that plaintiff would lack standing under the law of any circuit because "it is unclear whether he [observed the challenged display] to describe [it] for this litigation or whether, for example, he observed the display in the course of satisfying a civic obligation at the municipal building").

25. See, e.g., *Green*, 568 F.3d at 793–94 (plaintiff "frequently" forced to confront challenged monument (internal quotation marks omitted)); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003).

26. See, e.g., *Books*, 401 F.3d at 861–62; *Washegesic*, 33 F.3d at 682–83; *Zielke*, 845 F.2d at 1468–69.

27. See, e.g., *Harris v. City of Zion*, 927 F.2d 1401, 1405–06 (7th Cir. 1991) (holding that plaintiffs suffered cognizable injury because they "mightily str[o]ve[] to avoid any visual contact" with the city seal and thereby evinced a "willingness . . . to incur a tangible, albeit small cost that validates the existence of genuine distress and warrants the invocation of federal jurisdiction" (internal quotation marks omitted)); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (finding injury where plaintiffs "have been led to alter their behavior—to detour, at some inconvenience to themselves, around the streets they ordinarily use").

28. See, e.g., *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004) ("We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact."); *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985) (holding that plaintiff has standing to challenge sectarian government action that "impair[s] his actual use and enjoyment" of public property); *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103 (11th Cir. 1983) (per curiam) (holding plaintiffs' allegations that the presence of a large cross structure "deprived [them] of their beneficial right of use and enjoyment of a state park" sufficient to establish injury-in-fact).

come contact standard.²⁹ For years it was an open question in the Ninth Circuit whether a plaintiff needed to show altered behavior or merely direct and unwelcome contact; in 2007 the Ninth Circuit held that either showing suffices.³⁰ Of the circuits that have addressed standing in the religious symbol context, only the Second, Third, and Eighth Circuits have left open the possibility that altered behavior is necessary to establish injury-in-fact.³¹ In most circuits, therefore, a showing of altered behavior is sufficient, but not necessary, to satisfy Article III standing's injury-in-fact requirement.

II. THE WEAK BASIS FOR THE TESTS APPLIED BY THE COURTS OF APPEALS

Valley Forge contains the Court's clearest guidance with respect to nontaxpayer standing under the Establishment Clause, and that is probably why the circuit courts have relied on it heavily in developing their two basic approaches to the question. But because *Valley Forge* made no authoritative pronouncement about what noneconomic injuries, if any, suffice for standing, the courts of appeals have had to focus on its only relevant suggestion—the basis on which it distinguished *Schempp*. According to *Valley Forge*, the *Schempp* plaintiffs had

29. Compare *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988) ("The[plaintiffs] allege . . . that they are offended by [the display's] presence; but they admit that they have not altered their behavior The psychological harm that results from witnessing conduct with which one disagrees . . . is not sufficient to confer standing."), with *Doe v. Cnty. of Montgomery*, 41 F.3d 1156, 1160 (7th Cir. 1994) (rejecting the district court's conclusion "that in this circuit direct and unwelcome exposure to a religious message is merely a psychological injury unless a plaintiff . . . alters his behavior because of the religious message").

30. *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1250, 1253 (9th Cir. 2007).

31. The Second Circuit found standing where there was both direct contact and altered behavior, so it is impossible to know if altered behavior was necessary. *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 490–91 (2d Cir. 2009). In the only Third Circuit case on point, the court did not decide whether either direct contact or altered behavior will give rise to standing because it concluded the plaintiffs' allegations failed to satisfy even the laxer direct and unwelcome contact test. *ACLU of N.J. v. Twp. of Wall*, 246 F.3d 258, 265–66 (3d Cir. 2001). The Eighth Circuit has explicitly declined to decide between the two tests because in its only case directly on point it concluded that the plaintiffs satisfied both. *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1030 (8th Cir. 2004), *adopted in relevant part*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc).

standing “because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.”³² The circuit courts have read this dictum, together with the physical remoteness of the *Valley Forge* plaintiffs from the conduct they challenged, as permitting standing so long as a plaintiff directly observes unwelcome religious expression, or alters his behavior to avoid it.³³

To be sure, it is not completely implausible to read *Valley Forge*’s treatment of *Schempp* as have the circuit courts, but such a reading is neither necessary nor best. First, such a reading ignores key respects in which *Valley Forge* found *Schempp* to be distinct. *Schempp* involved “impressionable schoolchildren” who “were subjected to unwelcome religious exercises.”³⁴ These observations all suggest that *Valley Forge* understood *Schempp* as presenting the very real possibilities of state religious coercion and violation of conscience—undoubtedly cognizable injuries—that were not present in *Valley Forge*. Second, *Schempp* itself is better understood as predicating standing on some sort of coercion rather than direct observation of governmental religious expression. The parents of the schoolchildren in *Schempp* testified that the school’s religious exercises “were contrary to the religious beliefs which they held and to their familial teaching.”³⁵ Moreover, the parents testified that they did not avail themselves of their opt-out rights for fear that doing so would damage their children’s relationships with their teachers and classmates.³⁶ In other words, the parents and children alleged subtle coercion to conform to religious practices that violated their freedom of conscience. The potential harms present in

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

33. In adopting the direct and unwelcome contact test, most courts of appeals have relied predominantly on *Valley Forge*’s rationalization of *Schempp* or the identical reasoning of their sister circuits. See, e.g., *Vasquez*, 487 F.3d at 1250–53; *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1086–87 (4th Cir. 1997); *Cnty. of Montgomery*, 41 F.3d at 1159–61; *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 682–83 (6th Cir. 1994); *Foremaster v. City of St. George*, 882 F.2d 1485, 1489–90 (10th Cir. 1989); *Saladin v. City of Milledgeville*, 812 F.2d 687, 691–93 (11th Cir. 1987). The altered behavior test also originates from *Valley Forge*’s explanation of *Schempp*. See *Rabun Cnty.*, 698 F.2d at 1107.

34. *Valley Forge*, 454 U.S. at 487 n.22 (emphasis added).

35. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 208 (1963) (citation and internal quotation marks omitted).

36. *Id.* at 208 & n.3.

Schempp are different in kind than the psychological injury allegedly produced by direct and unwelcome contact with a state religious symbol. In short, *Valley Forge* and *Schempp* provide a remarkably weak foundation for the edifice of doctrine the courts of appeals have developed.

Furthermore, the tests fashioned by the circuit courts cut against *Valley Forge's* reasoning. For instance, the direct contact requirement is inconsistent with *Valley Forge's* pronouncement that "standing is not measured by the intensity of the litigant's interest."³⁷ A plaintiff who directly witnesses offensive religious expression may suffer more intense psychological discomfort than a plaintiff who witnesses the expression indirectly, but the nature of the asserted harm is the same for both. For this reason, the direct-indirect distinction also contradicts *Valley Forge's* flat rejection of psychological injuries as noncognizable.³⁸

Perhaps recognizing the weak support that *Valley Forge* provides for finding injury based on unwelcome visual contact with a governmental religious symbol, a few circuits have emphasized that the Supreme Court has decided several religious display cases without questioning the plaintiffs' standing.³⁹ This is irrelevant as a doctrinal matter because cases in which jurisdiction goes unchallenged and is assumed *sub silentio* are not binding authority for the proposition that jurisdiction is proper.⁴⁰ Just this Term, the Supreme Court reaffirmed this rule in the closely related context of an Establishment Clause suit in

37. *Valley Forge*, 454 U.S. at 486.

38. See *id.* at 485 (finding no standing where plaintiff "fail[s] to identify any personal injury . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees").

39. See *In re Navy Chaplaincy*, 534 F.3d 756, 763–64 (D.C. Cir. 2008); *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1088 (4th Cir. 1997) ("The best proof of our reading of *Valley Forge* lies in the actions of the Supreme Court itself."); *Murray v. City of Austin*, 947 F.2d 147, 151–52 (5th Cir. 1991) (giving "considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases"); see also *Newdow v. Roberts*, 603 F.3d 1002, 1014 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (finding the "prospect extremely unlikely" that "the Supreme Court repeatedly overlooked a major standing problem and decided a plethora of highly controversial and divisive Establishment Clause cases unnecessarily and inappropriately").

40. See, e.g., *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("[T]his Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." (citations omitted)); see also *Navy Chaplaincy*, 534 F.3d at 764.

which the plaintiffs asserted taxpayer standing⁴¹ under *Flast v. Cohen*.⁴² But for lower courts attempting to predict how the Court would decide a jurisdictional question, it seems reasonable to attach some weight to merits rulings by the Supreme Court that do not even raise a question about jurisdiction. After all, federal courts have limited jurisdiction under the Constitution and are obliged to raise jurisdictional defects—including the lack of a party’s standing—*sua sponte*.⁴³

Nevertheless, there are several reasons not to make as much of the Court’s silence about standing in its religious display cases as have these courts of appeals. First, in only one of the Court’s four religious display cases from the past three decades did the lower courts clearly find standing based on the plaintiff’s direct and unwelcome contact with the display.⁴⁴ In the other three, the lower court opinions either expressly found municipal taxpayer standing⁴⁵ or did not address standing but plausibly can be read as predicating standing on the plaintiffs’ municipal taxpayer status.⁴⁶ Moreover, in *Van Orden v. Perry*⁴⁷

41. See *Ariz. Christian Sch. Tuition Org. v. Winn*, No. 09-987, slip op. at 17–18 (U.S. Apr. 4, 2011). In a passage particularly pertinent to standing in religious symbol cases, the Court gave the following justification for applying the rule against *sub silentio* jurisdictional holdings: “Because standing in Establishment Clause cases can be shown in various ways, it is far from clear that any nonbinding *sub silentio* holdings in the cases respondents cite would have depended on *Flast*.” *Id.* Similarly, in all but one of the Court’s religious display cases, the plaintiffs may have depended on a theory of standing other than direct contact with the allegedly offensive display. See *infra* notes 44–46 and accompanying text.

42. 392 U.S. 83 (1968).

43. See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam).

44. The district court in *Van Orden v. Perry*, 545 U.S. 677 (2005), found standing because the plaintiff’s allegedly frequent and offensive contact with the Ten Commandments monument clearly satisfied “the very liberal interpretation” of standing followed by the courts of appeals in general, and the Fifth Circuit in particular. *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002).

45. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the First Circuit concluded that the plaintiffs had standing exclusively because they were municipal taxpayers. *Donnelly v. Lynch*, 691 F.2d 1029, 1030–32 (1st Cir. 1982).

46. The lower courts in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), did not consider the plaintiffs’ standing, but the cases are factually consistent with the supposition that the plaintiffs had standing as municipal taxpayers. See *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 441–42 (6th Cir. 2003) (observing that the defendant counties “erected” the challenged displays); *ACLU, Greater Pittsburgh Chapter, v. Cnty. of Allegheny*, 842 F.2d 655, 656–57 (3d Cir. 1988) (not-

each Justice had good reason not to question the plaintiff's standing. Handed down the same day, *Van Orden* and *McCreary County v. ACLU of Kentucky*⁴⁸ produced two five-to-four decisions, reached opposite results, and featured a total of ten separate opinions and a fractured majority in *Van Orden*.⁴⁹ Had any individual Justice found standing to be lacking, the result would have been even messier. Second, attributing substantial weight to the Court's silence ignores the views of the three sitting Justices who have stated on record that noneconomic standing to challenge religious symbols presents a serious question under the Court's precedents.⁵⁰ Third, even if the Court's silence might provide some additional reason for a court of appeals not to upset settled circuit doctrine, it should not significantly influence the circuits yet to decide the standing issue and should carry no weight were the Supreme Court to consider the question. Because the Court has provided so little direction concerning non-taxpayer standing to challenge religious symbols, the best sources of authority are its standing cases more generally.

III. WHAT'S THE HARM? TESTING POTENTIAL INJURY-IN-FACT THEORIES OF RELIGIOUS SYMBOL PLAINTIFFS AGAINST SUPREME COURT PRECEDENT

The lower courts have struggled to articulate the harm occasioned by direct observation of a religious symbol.⁵¹ This Part considers potential ways of characterizing the harm and concludes that each fails to demonstrate an injury-in-fact under the decisions of the Supreme Court.

ing that plaintiffs challenged the "expenditure of public funds," including a county-supplied "dolly and minimal aid to transport [the religious display] to and from the courthouse basement" and decorations annually "purchased at public expense").

47. 545 U.S. 677 (2005).

48. 545 U.S. 844 (2005).

49. See Edith Brown Clement, *Public Displays of Affection . . . for God: Religious Monuments After McCreary and Van Orden*, 32 HARV. J.L. & PUB. POL'Y 231, 232–33 (2009).

50. See *City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., dissenting from denial of certiorari) (joined by Justices Scalia and Thomas); *ACLU of N.J. v. Twp. of Wall*, 246 F.3d 258, 265–66 (3d Cir. 2001) (Alito, J.).

51. See *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1085 (4th Cir. 1997) ("It has been repeatedly noted that 'the concept of injury for standing purposes is particularly elusive in Establishment Clause cases.'" (quoting *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991))).

A. *Offense*

It is most natural to characterize the injury asserted by religious symbol plaintiffs as a harm of offense. But what exactly offends these plaintiffs? For some it is the conviction that any mixture of government and religion is inappropriate and unconstitutional. For example, in *Salazar v. Buono*—the recent case involving the display of a cross in the Mojave Desert—the plaintiff did “not find the cross itself objectionable but instead [took] offense at the presence of a religious symbol on federal land.”⁵² For other plaintiffs, the offense lies in the particular religious message they perceive the government to be promoting. The plaintiff in *Van Orden*, for instance, believed the presence of the Ten Commandments monument on the State Capitol grounds “symbolizes a state policy to favor the Jewish and Christian religions over other religions and over non-believers” and found that “policy . . . to be personally offensive.”⁵³

Neither of these harms to the sensibilities comes close to qualifying as a cognizable injury under current Supreme Court precedent. Offense based on the belief that the government is violating the Establishment Clause, as the *Buono* plaintiff essentially alleged, certainly fails to qualify. The Supreme Court has consistently held that a plaintiff does not have a concrete and individualized interest merely in ensuring that the government complies with the law.⁵⁴ Offense at the message the plaintiff perceives the government to be conveying, as alleged in *Van Orden*, fares no better. To allege such offense is either to say that one feels stigmatized—a form of injury that will be addressed below in Part III.B—or just another way to state one’s ideological objection to the challenged policy or action. This

52. *Salazar v. Buono*, 130 S. Ct. 1803, 1814 (2010). The Court did not have occasion to 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. *Id.* at 1814–15.

53. *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002). *See also, e.g.*, *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1251 (9th Cir. 2007) (finding injury-in-fact based on plaintiff’s belief that removal of the image of a cross from the county seal “convey[ed] an anti-Christian message” that made him “feel aggrieved”); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (holding plaintiffs suffered cognizable injury by observing a Ten Commandments monument that contained “religious views” they did not share and “consider[ed] . . . offensive”).

54. *See, e.g.*, *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992).

will not do, for the Court has consistently denied standing to purely ideological plaintiffs.⁵⁵

To be sure, the Court has not perfectly enforced its prohibition against ideological plaintiffs. Most prominently, in *Flast v. Cohen*⁵⁶ the Court allowed taxpayer standing even though a favorable ruling would have done nothing to reduce the plaintiff's tax liability.⁵⁷ But in its recent decision in *Hein v. Freedom from Religion Foundation, Inc.*,⁵⁸ the Court read *Flast* so narrowly that it appears to retain little if any precedential value.⁵⁹ Moreover, it seems clear that none of the Justices are prepared to defend *Flast* as properly conferring standing on ideological plaintiffs. Even the dissenters in *Hein*, who accepted *Flast*'s framework, rationalized its injury holding in terms of infringement of conscience, not ideological offense.⁶⁰ In *Hein*, Justice Scalia explained most vividly why the *Flast* framework is an extreme outlier compared to the Court's ordinary bar against ideological plaintiffs. Justice Scalia distinguished between "Wallet Injury"—the only sort of injury that makes sense in a *taxpayer* action—and "Psychic Injury," which he argued was the only plausible explanation for *Flast*.⁶¹ He observed that the Court has "never explained why Psychic Injury, however limited, is cognizable under Article III."⁶² Because Justice Scalia believed *Flast* to be incompatible with Article III, he would

55. See, e.g., *Lujan*, 504 U.S. at 564 (denying standing because plaintiffs could not show "actual or imminent" personal injury and therefore alleged only ideological disagreement (internal quotation omitted)); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (denying standing where plaintiff alleges only "the psychological consequence presumably produced by observation of conduct with which one disagrees"); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (plaintiffs must show some sort of injury—if only a "trifle"—beyond their ideological disagreement with a governmental action); *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) (finding no standing because plaintiffs failed to allege that the asserted aesthetic harm would affect them personally).

56. 392 U.S. 83 (1968).

57. *Id.* at 105–06.

58. 551 U.S. 587 (2007).

59. See *id.* at 609–10; *id.* at 636 (Scalia, J., concurring in the judgment) (describing the status of *Flast* after *Hein* as "weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive").

60. *Id.* at 638 (Souter, J., dissenting).

61. *Id.* at 619, 623 (Scalia, J., concurring in the judgment).

62. *Id.* at 620.

have overruled it.⁶³ Thus, with the possible exception of *Flast*'s limited provision of taxpayer standing, the Court has routinely refused to grant standing to purely ideological plaintiffs.

To understand the radical nature of the approach of most lower courts to injury-in-fact in the religious symbol context, it is useful to consider the consequences of extending that approach to its logical limit. If a plaintiff has standing to challenge a religious symbol solely because of his offense at the religious (or antireligious) message he believes it conveys, there is no principled reason to limit such challenges to government symbols or displays. All sorts of government actions—perhaps all government actions—convey a message that some citizen or group of citizens will find offensive. As Judge Easterbrook colorfully explained in his dissent from a 2005 decision that granted standing to a plaintiff offended by a Ten Commandments display:

What the display may do is give offense Yet Themis may offend Christians (and all icons offend Muslims), the military's ads offend religious pacifists, and the message in *Rust* [*v. Sullivan*] supports one religious perspective on human life while deprecating others. . . . Public policies and arguments pro and con about them often give offense, as do curricular choices in public schools.⁶⁴

Were offense a sufficient injury to give rise to standing, Judge Easterbrook concluded, "there would be universal standing: anyone could contest any public policy or action he disliked."⁶⁵

This is not an idle concern. Just last year, in a closely divided en banc decision, the Ninth Circuit granted standing to several Catholic plaintiffs based on their offense at a nonbinding county resolution that denounced the Catholic Church for directing its adoption agencies not to place children in homosexual households.⁶⁶ The majority relied almost entirely on the logic of previous circuit decisions that conferred standing based on contact with an offensive religious symbol.⁶⁷ It rea-

63. *Id.* at 637.

64. *Books v. Elkhart Cnty.*, 401 F.3d 857, 870 (7th Cir. 2005) (Easterbrook, J., dissenting) (citations omitted).

65. *Id.*

66. *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1046–48 (9th Cir. 2010) (en banc).

67. *Id.* at 1050–51.

soned that “[t]here is no principled basis for assiduously addressing that discomfort, yet treating as trivial the discomfort of those whose religion is condemned by their government.”⁶⁸ Although the dissent rejected this analogy on the ground that religious display plaintiffs allege injury that is more direct and personal than that alleged by the *Catholic League* plaintiffs,⁶⁹ this distinction is unconvincing because both ultimately claim offense at the religious message conveyed by the government. If the lower courts apply their religious symbol standing precedents in a logically consistent manner, they will inevitably begin to find standing in cases like *Catholic League*.

The result in *Catholic League* may not seem undesirable to some. Its facts are striking. The government rarely denounces a specific religion. The plaintiffs’ offense in *Catholic League* is understandable, and may run even deeper than that of a typical religious symbol plaintiff.⁷⁰ But unless standing is made to turn on the degree of a plaintiff’s offense—surely a practically unmanageable and constitutionally dubious approach⁷¹—one cannot accept *Catholic League*’s holding without extending standing to all plaintiffs offended by the government’s actions.

Indeed, *Catholic League* is not the only case to consider extending the logic of the lower courts’ religious symbol standing precedents to the messages conveyed by other types of governmental action. Several Protestant Navy chaplains recently argued in precisely this manner in the D.C. Circuit to support their standing to challenge the alleged pro-Catholic bias of the Navy Chaplaincy’s retirement system.⁷² The three-judge panel rejected the plaintiffs’ analogy to religious display cases,⁷³ but Judge Rogers agreed with the plaintiffs in her dissent.⁷⁴ Al-

68. *Id.* at 1052 n.33.

69. *Id.* at 1066 (Graber, J., dissenting on the issue of jurisdiction but concurring in the judgment).

70. *See id.* at 1050 n.20 (majority opinion) (“A symbol such as a crèche on the city hall lawn is ambiguous. It may mean that the government endorses Christianity, or it may mean that the government merely wishes to show respect and friendship for Christianity. The resolution at issue, like a symbol, conveys a message, but unlike a symbol, the message is unambiguous.”).

71. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) (“[S]tanding is not measured by the intensity of the litigant’s interest.”).

72. *See In re Navy Chaplaincy*, 534 F.3d 756, 762–63 (D.C. Cir. 2008).

73. *Id.* at 764–65.

74. *Id.* at 766–68 (Rogers, J., dissenting).

though the majority formally distinguished the religious display cases on the grounds that there “the Government was actively and directly communicating a religious message,” the majority tellingly went on to suggest that its real reason for denying standing was its (entirely reasonable) fear of the consequences of endorsing such a broad theory of injury-in-fact.⁷⁵ Even more strikingly, the majority acknowledged the “surface logic” of the plaintiffs’ analogy to the religious display cases, but refused to accept it because it recognized that doing so would “wedge open the courthouse doors to a wide range of plaintiffs . . . who were previously barred by bedrock standing requirements.”⁷⁶ The majority was correct about both the logic of the plaintiffs’ analogy and the incompatibility of their injury-in-fact theory with well-established standing doctrine. It did not avail itself, however, of the one logical solution that is completely consistent with Supreme Court precedent: refusing to follow the circuit courts’ religious display cases because they are themselves out of line with Article III. The Navy chaplains’ offense is just as real as that of religious symbol plaintiffs, but neither offense qualifies as an injury-in-fact under the Supreme Court’s precedents.

B. *Stigma*

Besides offense, stigma is the other obvious way to characterize the harm alleged by religious symbol plaintiffs. The two theories of harm are closely related. Plaintiffs frequently allege that the same governmental religious message that offends them also conveys a message to others that they are an inferior class of citizens because of their religion or irreligion. For instance, one plaintiff averred that her town’s Nativity display made her “feel less welcome in the community, less accepted and tainted in some way.”⁷⁷ Another group of plaintiffs alleged that the appearance of the word “Christianity” on their city’s seal “denigrated” them, “made them feel like second class citi-

75. *Id.* at 764 (majority opinion) (“Under plaintiffs’ theory, every government action that allegedly violates the Establishment Clause could be re-characterized as a governmental *message* promoting religion.”).

76. *Id.* at 765.

77. *ACLU of N.J. v. Twp. of Wall*, 246 F.3d 258, 265 (3d Cir. 2001).

zens," and "enforce[d] the idea that Christianity is the litmus test for true citizenship" in their city.⁷⁸

But predicating standing on the alleged stigma suffered by religious symbol plaintiffs directly contradicts the plain holding of a canonical Supreme Court standing precedent. In *Allen v. Wright*⁷⁹ the Court held that "abstract stigmatic injur[ies]" are "not judicially cognizable."⁸⁰ The only exception to this categorical bar is for allegedly stigmatized plaintiffs who also "'are personally denied equal treatment' by the challenged discriminatory conduct."⁸¹ This exception quite clearly does not apply to religious symbol plaintiffs.

This analysis is simple and straightforward, however, only until one takes into account the substantive Establishment Clause standard that governs most religious symbol cases. Since its adoption by a majority of the Court in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,⁸² the endorsement test has been the touchstone for religious display and symbol cases.⁸³ The core harm that the test guards against is stigma.⁸⁴ As originally articulated by Justice O'Connor, endorsement violates the Establishment Clause because it "sends a message to nonadherents that they are outsiders, not full members of the political community."⁸⁵ Endorsement also impermissibly "make[s an individual's] religion relevant, in reality or public perception, to [his] status in the political community."⁸⁶ There is at least an intuitive tension between a rule of standing that bars all claims based solely on stigmatic injury and a substantive constitutional guarantee that, according to several Su-

78. *Saladin v. City of Milledgeville*, 812 F.2d 687, 689, 693 n.9 (11th Cir. 1987).

79. 468 U.S. 737 (1984).

80. *Id.* at 755.

81. *Id.* (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)).

82. 492 U.S. 573, 597 (1989).

83. See *The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 179, 219 (2010) ("For the last two decades, the endorsement test has been the touchstone inquiry in Establishment Clause challenges.").

84. Although the endorsement test certainly also protects against the accompanying offense felt by the purportedly stigmatized individual, the focus is on objective rather than subjective harm—that is, whether a reasonable observer, not whether the plaintiff, would perceive a message of endorsement. See *Cnty. of Allegheny*, 492 U.S. at 620.

85. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

86. *Id.* at 692.

preme Court decisions, is aimed at protecting individuals from the stigma caused by certain governmental messages.⁸⁷

Whether this tension is legally significant depends on one's view of the relationship between standing and the merits of a claim. For those who believe that standing and the merits are indistinguishable, the scope of substantive protection afforded by the Establishment Clause is exceedingly relevant.⁸⁸ On this view, the apparent tension between the endorsement test and *Allen* only further illustrates the error of the requirement that plaintiffs make a separate showing of injury-in-fact. But the problem with this view is that it remains entirely at odds with settled Supreme Court standing doctrine. The Court has repeatedly held that standing is a jurisdictional requirement⁸⁹ and that it must assure itself of a plaintiff's standing before proceeding to decide the merits of his claim.⁹⁰ Moreover, the Court has explicitly rejected the notion that the requirements for standing modulate based on the importance or meaning of the constitutional right asserted.⁹¹ As a formal doctrinal matter, therefore, the interests protected by the endorsement test are of no consequence in evaluating standing.

Notwithstanding the formal independence of standing from the merits, it is difficult to read the lower courts' religious sym-

87. See Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 436–38 (2007) (arguing that the Court's religious display cases undermine *Allen*'s conclusion that stigmatic harms are non-cognizable).

88. Several scholars have famously argued that standing should turn on the meaning of the statutory or constitutional provision relied upon and not any independent injury-in-fact requirement. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166–67 (1992).

89. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

90. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) ("We have 'an obligation to assure ourselves' of litigants' standing under Article III" (quoting *Friends of Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000))); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)) (internal quotation marks omitted)).

91. E.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) (stating that there is no "hierarchy of constitutional values or . . . complementary 'sliding scale' of standing"); *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (stating that standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated").

bol standing decisions without sensing the Supreme Court's merits decisions lurking in the background. The considerable weight that several courts have attributed to the Supreme Court's silence about standing in its religious display cases⁹² quite possibly reflects an intuition about the surface tension between Establishment Clause doctrine and standing law. To put it rather bluntly, something seems just plain odd about closing the courthouse door for lack of standing when the harm asserted is the harm against which the substantive law is designed to protect. For this reason, it is likely unrealistic to expect the lower courts, without direction from higher authority, to bring their religious symbol standing cases in line with the overall body of Supreme Court standing doctrine.⁹³ But surely something is amiss when a whole body of lower court standing doctrine is predicated on offensive and stigmatic injuries—injuries that the Court has unmistakably held to be too immaterial and inchoate to support standing. In all likelihood, only the Supreme Court can—and it should—bring consistency to this area of the law.

C. *Involuntary Exposure to Religion*

Most circuits require that the plaintiff's contact with the symbol be unwelcome as well as direct. A few courts have also emphasized that a particular plaintiff had to come into contact with a symbol either to fulfill civic obligations or as a result of his employment.⁹⁴ Yet involuntary exposure requirements do nothing to redeem a naked "direct personal contact" test from its absolute incompatibility with the Supreme Court's standing precedents because they do not alter the nature of the alleged harm. At most the requirements help ensure that those entitled to sue have suffered a greater degree of stigma or offense than those who lack standing.⁹⁵ But as the Court has made crystal

92. See *supra* note 39.

93. This is not to say that in a future religious symbol standing case a lower court should not follow Supreme Court standing doctrine instead of one of the tests fashioned by the courts of appeals. As this Note argues, that would be the correct legal analysis under existing law. The First and Third Circuits could most easily follow this approach because, unlike the other circuits, they have not yet published binding circuit precedent on the issue.

94. See *supra* note 24.

95. This proposition is rather dubious, especially with regard to offense. It is likely that those who "roam the country in search of governmental wrongdoing"

clear, what counts for purposes of injury-in-fact is the nature of the injury alleged, not its intensity.⁹⁶

D. Special Burdens To Avoid Religious Symbols

The last kind of nontaxpayer harm that some plaintiffs have alleged is a forced alteration in their behavior to avoid the allegedly offensive religious symbol. The alleged injury consists either in the cost incurred to take a less convenient travel route to avoid the symbol or in the plaintiff's constructive deprivation of the use of a public place.⁹⁷ Economic harms and deprivation of the beneficial use of public places easily qualify as cognizable injuries, unlike the offensive and stigmatic harms alleged by most religious symbol plaintiffs. But the altered behavior test sidesteps one standing hurdle only to run up against another. Because the plaintiffs in these cases freely choose to incur additional expenses or avoid the relevant public places, they cannot plausibly assert that the alleged government misconduct has caused their injury. The Court has held that plaintiffs cannot establish causation for purposes of standing when their injury "results from the independent action of some third party."⁹⁸ Plaintiffs who freely take burdens upon themselves cannot, *a fortiori*, satisfy the causation element of the Court's Article III standing doctrine.

In practice, there is little if any meaningful difference between the altered behavior test and the direct and unwelcome contact test. The altered behavior test merely imposes an artificial and likely trivial procedural requirement on a would-be religious symbol plaintiff. Before bringing suit to remedy his

experience deeper offense when they find it than those who involuntarily come into contact with it. *Valley Forge*, 454 U.S. at 487. *But see* *Washegesic v. Bloomington Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994) ("The practices of our own community may create a larger psychological wound than someplace we are just passing through."). Regardless of the correct answer to the empirical question, the important point is that the nature of the harm is still psychological—as the *Washegesic* court candidly admitted—and therefore insufficient to confer standing.

96. *See* *Valley Forge*, 454 U.S. at 486 ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."); *see also* *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987) ("There is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury." (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973))).

97. *See supra* Part I.B.2.

98. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976).

psychic angst, the prospective plaintiff must choose a different travel route or convince himself that but for the symbol or display he finds offensive he would use the public place where it is displayed more often.⁹⁹ In short, the altered behavior test still permits almost anyone to manufacture standing. As the Fourth Circuit has observed, “[a]n avoidance requirement . . . has a contrived quality.”¹⁰⁰ Tellingly, one court of appeals rationalized the altered behavior test on the ground that “the willingness of plaintiffs . . . to incur a tangible if small cost serves to validate, at least to some extent, the existence of genuine distress and indignation.”¹⁰¹ This rationale for a change-in-behavior requirement concedes quite frankly that a plaintiff’s real injury is his offense. In any event, plaintiffs who allege that their injury consists in their altered behavior cannot demonstrate the causal connection required for standing.

IV. NORMATIVE AND FUNCTIONAL JUSTIFICATIONS FOR DENYING NONTAXPAYER STANDING TO CHALLENGE RELIGIOUS SYMBOLS

Although the approaches of the lower courts to religious symbol standing are irreconcilable with the Court’s standing precedent, this is not necessarily a sufficient reason to overturn this body of circuit court precedent. The Court could conclude, for whatever reason, that these lower court decisions are more faithful to the original understanding of Article III (or perhaps the Establishment Clause, were the Court to retreat from its current position that injury-in-fact is a constitutional threshold that does not fluctuate with the nature or importance of the substantive right being asserted). It is therefore appropriate to suggest briefly why the theoretical underpinnings of the Court’s standing cases are constitutionally correct and socially desirable, especially when considered in light of religious symbol cases.

99. See *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) (stating that plaintiffs testified they were unwilling to camp at a nearby state park because of the presence of a large cross at the park).

100. *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1088 (4th Cir. 1997).

101. *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986).

A. *Protecting the Separation of Powers*

It is now commonplace—though it has not always been so¹⁰²—to acknowledge standing doctrine’s basis as being in the separation of powers.¹⁰³ It is also commonplace to acknowledge standing doctrine’s imprecision.¹⁰⁴ But its conceptual difficulty in no way diminishes its importance. Indeed, the Court has repeatedly remarked that “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”¹⁰⁵

In essence the law of standing confines courts to their traditional role of reviewing the actions of the democratic branches only when necessary to resolve a specific dispute involving an individual’s legal rights.¹⁰⁶ This is the theory of judicial review that the Court adopted in *Marbury v. Madison*.¹⁰⁷ In the sentence immediately following his famous pronouncement about the province and duty of the judiciary, Chief Justice Marshall wrote, “[t]hose who apply the rule to *particular* cases, must of *necessity* expound and interpret that rule.”¹⁰⁸

Given the importance of standing doctrine for limiting the judiciary to its proper role within the separation of powers, the Supreme Court should carefully review a body of lower court case law that takes a significantly more expansive approach to standing than warranted by Supreme Court precedent. The circuit courts’ religious symbol standing cases have much in common with *Flast*’s excessively permissive approach to stand-

102. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890–93 (1983).

103. E.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

104. See *id.* at 750 (describing standing as “an idea, which is more than an intuition but less than a rigorous and explicit theory” (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring))); *id.* at 751 (“[S]tanding doctrine incorporates concepts concededly not susceptible of precise definition.”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (admitting the Court has not defined “the concept of ‘Art. III standing’ . . . with complete consistency”).

105. *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

106. See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality opinion); Scalia, *supra* note 102, at 894.

107. 5 U.S. (1 Cranch) 137 (1803).

108. *Id.* at 177 (emphasis added).

ing. *Flast* reflects a flexible view of standing that relaxes standing requirements to allow for the enforcement of constitutional interests that the Court thinks are sufficiently important.¹⁰⁹ The Court has since repudiated that view¹¹⁰ and recognized that *Flast* inappropriately discounted the separation of powers values served by standing doctrine.¹¹¹ The Court has also limited *Flast* almost literally to its facts,¹¹² in part because of fears that, if extended to its logical limit, *Flast* would inject the judiciary into all manner of policy decisions by elected officials, perhaps even forcing it to assume the role of editing presidential speeches for content.¹¹³ Likewise, the lower courts' religious symbol standing cases, if extended to their logical limit, would pose equally troubling separation of powers concerns.¹¹⁴

B. *Preventing Unwarranted and Unnecessary Judicial Intrusions into the Culture Wars*

There are also functional reasons to reject the approach the courts of appeals have taken in religious symbol standing cases. Two stand out. The first relates to the legitimacy of the federal courts, and the second to the vitality of the political process. Justice Powell's concurrence in *United States v. Richardson*¹¹⁵ well articulates both reasons:

[R]epeated and essentially head-on confrontations between the lifetenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.¹¹⁶

Then-Judge Scalia raised essentially the same concern in what has become a classic essay. He warned that disregarding prin-

109. See Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1151 (1977).

110. See *supra* Part III.A.

111. See *Hein*, 551 U.S. at 635–36 (Scalia, J., concurring in the judgment).

112. See *id.* at 609–10 (plurality opinion).

113. *Id.* at 610–11.

114. See *supra* Part III.A.

115. 418 U.S. 166 (1974) (Powell, J., concurring).

116. *Id.* at 188.

principles of standing would produce “an overjudicialization of the processes of self-governance.”¹¹⁷

So why is the legitimacy or “public confidence essential to” the judiciary eroded by too relaxed a view of standing? The answer is that courts perform only certain functions well, typically those functions that they have exercised since the Founding. Justice Powell’s *Richardson* concurrence again makes the point brilliantly:

The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous, general supervision of the operations of government, that has maintained public esteem for the federal courts¹¹⁸

Religious symbol cases cast the courts in precisely the sort of general supervisory role that Justice Powell argues can damage their legitimacy.

One need look no further than the Court’s religious display decisions to see the wisdom of Justice Powell’s admonition. The Court’s 1984 decision in *Lynch v. Donnelly*¹¹⁹ invited ridicule from commentators, who quickly dubbed its apparent requirement that the state temper the religious elements of a display with secular symbols the “three plastic reindeer rule.”¹²⁰ *Lynch* left the Court open to substantive criticism from both sides: the government could still erect a religious display but only at the price of watering it down to such a degree that it would lose all meaning to serious religious adherents. Likewise, the Court’s more recent religious display decisions have not restored public confidence that the Court is engaged in principled and reasoned decisionmaking to protect the legal rights of individuals or minorities. The Court’s split-the-baby approach in *Van Orden* and *McCreary County* yielded such a contextualized, and therefore unworkable, standard for future cases¹²¹ that it is likely the Court will have to make another foray into the culture wars sometime soon.

117. Scalia, *supra* note 102, at 881.

118. *Richardson*, 418 U.S. at 192.

119. 465 U.S. 668 (1984).

120. See FELDMAN, *supra* note 1, at 205.

121. See Clement, *supra* note 49, at 232–33.

Besides damaging the Court's legitimacy, the Court's religious display cases sap the political process of its vitality. Because decisions about religious displays are symbolically delicate, fact-sensitive, and value-laden,¹²² they are not readily susceptible to resolution by any legal formula. Instead, these sorts of decisions are best made by politically accountable public officials who have both the institutional capacity and the political incentive to work out compromises that take account of the diverse concerns of the local community.¹²³ When the judiciary assumes this role and intervenes in disputes over symbols, it fosters pernicious ideas about how to resolve public grievances in a democratic society. It encourages citizens to think of civic complaints in terms of legal and constitutional rights instead of policy disagreements and to take every important public grievance to court instead of the political arena. Courts play the crucial counter-majoritarian role of protecting the concrete legal rights of individuals and minorities, but they should not play the role of reviewing every important policy decision simply because an

122. See Kate Stone Lombardi, *Decorate Schools for Holidays—but with What?*, N.Y. TIMES, Dec. 17, 2006, <http://www.nytimes.com/2006/12/17/nyregion/nyregionspecial2/17wecol.html>.

123. Professors Lupu and Tuttle argue that although it may have been prudent thirty years ago for courts to leave religious symbol decisions to local public officials, it would now be imprudent for courts to find such cases nonjusticiable after having repeatedly decided them on the merits. See Lupu & Tuttle, *supra* note 2, at 163–64. They argue that because “the terms of substantive constitutional debate have been determined,” dismissing such cases for want of standing “may well lead to bitterness and recrimination, rather than to a constitutional discourse appropriately leavened by local conditions and political flexibility.” *Id.* at 164. But this sort of consequentialist argument should not bear on a court's interpretation of Article III, and in any event Professors Lupu and Tuttle overstate their worry. The unstated assumption in this warning seems to be a sense that the Court is on the brink of erecting justiciability barriers to any and all Establishment Clause suits. But this is an exaggeration. Many Establishment Clause cases about government messages arise in contexts in which standing is not contested because the alleged injury is coercion, not offense or stigma. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 598–99 (1992). Moreover, plaintiffs might establish Article III standing as taxpayers. See *supra* note 2. Finally, state courts are available to enforce substantive Establishment Clause law, and in some circumstances the Supreme Court could still exercise appellate jurisdiction over decisions by the states' highest courts. See *Asarco Inc. v. Kadish*, 490 U.S. 605, 617–18 (1989) (finding standing based on petitioners' alleged injury caused by state-court decree regardless of whether the plaintiffs would have had standing to file their initial suit in federal court); see also William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 280–82 (1990) (discussing *Asarco's* doctrinal ramifications).

individual or group of citizens dislikes the outcome produced by the political process. This view of the role of courts is precisely what then-Judge Scalia warned would lead to “an overjudicialization of the processes of self-governance.”¹²⁴

It may be that disputes about religious symbols are an inevitable result of the polarization of modern American society, but it is not inevitable that the courts get involved. Indeed, at least with regard to nontaxpayer plaintiffs, it is not warranted by our constitutional structure, which in part through the doctrine of standing aims to preserve “the proper—and properly limited—role of the courts in a democratic society.”¹²⁵

V. CONCLUSION

Although a long line of circuit court cases have conferred standing based on direct and unwelcome contact with a religious symbol, this theory of Article III injury is incompatible with the Supreme Court’s standing doctrine. Yet because of this large body of circuit court precedent, it seems improbable—though certainly not unimaginable—that the lower courts will correct these erroneous decisions. This is especially so because many observers would likely find it odd for a plaintiff’s injury to be insufficient for standing when that same injury is the perceived evil against which the endorsement test—the substantive standard for religious symbol cases—is directed. Because the lower courts are unlikely to change course on their own initiative, the Supreme Court should intervene and reaffirm that offense and stigma are not sufficiently concrete and particularized injuries to give rise to standing. Such standing rules are not mere procedural technicalities, but are essential to confining the judiciary to its constitutionally authorized role.

David Spencer

124. Scalia, *supra* note 102, at 881.

125. Warth v. Seldin, 422 U.S. 490, 498 (1975).