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Measuring a “Spiritual Stake”: How to Determine Injury-in-Fact in Challenges to Public Displays of Religion

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MEASURING A “SPIRITUAL STAKE”: HOW TO DETERMINE INJURY-IN-FACT IN CHALLENGES TO PUBLIC DISPLAYS OF RELIGION

Ashley C. Robson*

This Note analyzes the unique standing problem introduced by a particular set of Establishment Clause cases: those concerning nontaxpayer-based challenges to alleged “public displays” of religious symbols. This injury-in-fact problem arises due to the nature of the specific type of harm recognized by the U.S. Supreme Court in the context of religious displays: the public endorsement of religion. Due to this unusually subjective harm, it is unclear how the courts should evaluate this threshold injury-in-fact inquiry. This Note analyzes the legal conflict arising from the attempt to remain faithful to both the traditional injury-in-fact standing requirements and the endorsement test generally applied to the merits in Establishment Clause challenges. This Note interprets Supreme Court precedent and proposes a tailored, multifactor test, articulating a specific injury-in-fact burden for public display challengers. The proposed test attempts to take into account the entirety of the unique injury. In particular, this test considers the display in context, rather than as a mere “snapshot.” This standard, while unique, is fully reconcilable with the Court’s current standing jurisprudence and addresses the various policy implications confronted by the lower courts.

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INTRODUCTION

Imagine a tourist, who happens to be an atheist, enters the National September 11 Memorial and Museum, and is shocked to see a seventeen-foot-tall cross, formed by the steel beams of the World Trade Center.¹ To her, the structure is a physical reminder of her inferior political and social status as a nonbeliever. She feels stigmatized, not by her fellow citizens, but by the government. This citizen looks to the federal court system to rectify what she believes to be a violation of her protected interest in being free from public displays of religion. However, a district court might dismiss her case because the federal system does not recognize this type of spiritual injury.

The cross-shaped steel beam recovered from the World Trade Center site after the September 11, 2001 attacks has gained substantial notoriety.²

1. This hypothetical is based on recent litigation. *See* *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, No. 11 Civ 6026 (S.D.N.Y. dismissed Mar. 28, 2013).

2. *See* Sally Jenkins, *A Long-Standing Message of Loss and Hope*, WASH. POST, Sept. 9, 2011, at A1.

American Atheists, Inc. challenged the proposed display at the Memorial as a violation of the U.S. Constitution under the Establishment Clause of the First Amendment.³ While this particular challenge has received national attention,⁴ challenges to religious displays throughout the country similarly stir up controversy on the local level.⁵

To gain access to the federal court system, plaintiffs must first prove that they have Article III standing to bring suit.⁶ A main component of this showing requires a plaintiff to allege a sufficient injury to a protected interest—a specific and personal “injury-in-fact.”⁷ This Note analyzes the unique standing problem introduced by a particular set of Establishment Clause cases: those concerning nontaxpayer-based challenges⁸ to alleged “public displays” of religious symbols.⁹ This injury-in-fact problem arises due to the nature of the specific type of harm recognized by the Supreme Court in the context of religious displays: the public endorsement of religion.¹⁰ The harm caused by the perceived endorsement of religion is an unusual type of harm, one that sends “a message to nonadherents that they are outsiders, [and] not full members of the political community.”¹¹ Due to this unusually subjective harm, it is unclear how the courts should evaluate this threshold injury-in-fact inquiry.¹²

Access to the federal courts has long been recognized as a fundamental right of all U.S. citizens.¹³ However, if the plaintiff has failed to establish Article III standing, then the case will be dismissed and the plaintiff may be left without an available alternative recourse.¹⁴ Specifically, this Note examines the different injury-in-fact standards¹⁵ adopted by the various

3. Notice of Removal at 4–5, *Am. Atheists, Inc.*, No. 11 Civ 6026 (S.D.N.Y. Aug. 26, 2011), 2011 WL 3791873; *see also* U.S. CONST., amend. I.

4. *See, e.g.*, Elissa Gootman, *Atheists Sue To Block Display of Cross-Shaped Trade Center Beam in 9/11 Museum*, N.Y. TIMES, July 29, 2011, at A20.

5. *See, e.g.*, Manny Fernandez, *In Texas, a Legal Battle Over Biblical Banners*, N.Y. TIMES, Oct. 22, 2012, at A13 (discussing the community’s reaction to a school district’s decision to ban the cheerleaders from putting Bible verses on banners at football games); Martha Groves & Jessica Garrison, *Nativity Scene Ban: “The Atheists Won on This,”* L.A. TIMES (Nov. 19, 2012, 4:36 PM), <http://latimesblogs.latimes.com/lanow/2012/11/nativity-scene-ban-the-atheists-won-on-this.html> (discussing public reaction to a district court’s decision to ban nativity and other seasonal displays in public spaces).

6. *See infra* Part I.A for a general discussion of federal standing doctrine.

7. *See infra* Part I.A.2 for a general discussion of this requisite injury.

8. *See infra* note 202 for a description of “nontaxpayer” standing.

9. *See infra* note 198 for a description of “public display” of religious symbols.

10. *See infra* Part I.B.2 for a discussion of the prevailing merits test applied in the Establishment Clause context: the endorsement test.

11. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). *See generally infra* Part I.B.

12. *See infra* Part II for the current standing jurisprudence in the public display of religious symbols context.

13. *See infra* note 24 and accompanying text for a discussion of this fundamental right.

14. *See infra* Part III.B for an analysis of the policy implications of denying standing.

15. *See infra* Part I.A for a discussion of constitutional requirements and prudential limitations concerning Article III—conferring injury-in-fact.

circuits when evaluating standing in these cases.¹⁶ The circuits impose different burdens on the plaintiff to prove injury-in-fact, varying from requiring evidence that the plaintiff “altered” his or her behavior as a result of the display,¹⁷ to merely requiring some form of “direct and unwelcome contact” with the display.¹⁸

These different approaches are especially problematic because they appear to conflict with prevailing Supreme Court precedent.¹⁹ While circuits have taken a more liberal approach to standing in these cases,²⁰ the Supreme Court’s approach to standing generally is arguably becoming more restrictive.²¹

This Note analyzes the legal conflict arising from attempts to remain faithful to *both* the traditional injury-in-fact standing requirements *and* the endorsement test generally applied to the merits in Establishment Clause challenges.²² Former Chief Justice William Rehnquist, with whom Justice Antonin Scalia and Justice Clarence Thomas joined, acknowledged the conflict, noting that the issue was of particular importance as its resolution

16. See *infra* Part II.B.

17. See, e.g., *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1467–68 (7th Cir. 1988). See generally *infra* Part II.B.2.

18. See, e.g., *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1088 (4th Cir. 1997) (holding that only direct contact is required because the altered behavior standard is “contrived” and would only serve to further alienate plaintiffs). See generally *infra* Part II.B.1.

19. See *infra* Parts II.A and III.A for analysis of the competing interpretations of the Supreme Court precedent.

20. It is important to note that the Supreme Court has not conducted a standing inquiry in a public display case.

21. See *infra* notes 66, 98, 138–42 and accompanying text.

22. It has been argued that this tension requires the Court to adopt a restrictive approach to standing, essentially repudiating the various circuit approaches. See, e.g., 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, 371 (2002) (“[A]bsent any allegations that plaintiffs have truly suffered some type of palpable injury from the plaque, reliance upon the political process, not the courts, is not only proper; it is totally consistent with our form of government.”); David Spencer, Note, *What’s the Harm? Nontaxpayer Standing To Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL’Y 1071, 1097 (2011) (“[T]he Supreme Court should intervene and reaffirm that offense and stigma are not sufficiently concrete and particularized injuries to give rise to standing.”). However, this Note argues that this restrictive interpretation relies on a flawed interpretation of language used by Justice Rehnquist in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). See *infra* notes 171–72 and accompanying text for examples of this flawed interpretation by courts and scholars alike and *infra* Part III.A for an interpretation of the relevant precedent. Cf. Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing To Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 529–30 (1995) (“Plaintiffs who assert that they are offended by governmental sponsorship of religious symbols to which they have been, and will be again, personally exposed suffer more concrete personal injuries than the geographically remote, ideologically driven plaintiffs in *Valley Forge*.”). For another alternative proposal concerning standing in these cases, see John M. Bickers, *Standing on Holy Ground: How Rethinking Justiciability Might Bring Peace to the Establishment Clause*, 60 CLEV. ST. L. REV. 415 (2012) (suggesting that “the Supreme Court . . . replace the current standing chaos with a limit to claims against current government activity”).

would help to define the proper scope of the federal power of judicial review of state actions.²³

In Part I, this Note introduces the general doctrine of standing and then documents the evolution of Supreme Court precedent concerning the Establishment Clause as it relates to challenges to perceived governmental endorsement of religion. Part II focuses on the legal conflict concerning standing in public display cases and analyzes both Supreme Court precedent and the various circuit court approaches. Part III interprets the Supreme Court precedent and proposes a tailored, multifactor test, articulating a specific injury-in-fact burden for public display challengers. The proposed test attempts to take into account the entirety of the unique injury. In particular, this test considers the display in context, rather than as a mere “snapshot.” This standard, while unique, is fully reconcilable with the Court’s current standing jurisprudence and addresses the various policy implications confronted by the lower courts.

I. FEDERAL COURT STANDING AND THE ESTABLISHMENT CLAUSE: AN OVERVIEW OF SUPREME COURT PRECEDENT

Two constitutional sources provide the definition of what constitutes the requisite injury-in-fact to confer Article III standing for a plaintiff challenging the public display of religion: (1) Article III’s “cases” or “controversies” language and (2) the Establishment Clause of the First Amendment. Part I.A first introduces the basic requirements of and the purpose behind the Court’s standing jurisprudence. Then, Part I.B discusses the various aspects of litigating alleged violations of the Establishment Clause.

A. Federal Court Standing

Access to the federal courts has long been recognized as a fundamental right of all U.S. citizens.²⁴ However, the standing inquiry functions as a

23. *City of Edmond v. Robinson*, 517 U.S. 1201, 1202 (1996) (Rehnquist, C.J., dissenting in the denial of certiorari) (discussing the split concerning “whether *Valley Forge* allowed standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs”); *see also* *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1028 (8th Cir. 2004) (“No governing precedent describes the injury in fact required to establish standing in a religious display case such as this.”), *vacated on reh’g en banc*, 419 F.3d 772 (8th Cir. 2005).

24. *See, e.g.*, *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907) (“In an organized society [the right to sue and defend in the courts] is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship”); *cf.* Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After Massachusetts and Hein*, 20 REGENT U. L. REV. 175, 197 (2008) (arguing that “the urgency of environmental concerns or the importance of the Establishment Clause do not justify transgressing the traditional bounds of Article III”).

threshold burden, restricting access into this judicial system.²⁵ First, this Note provides an overview of the Court's standing doctrine. Next, this Note analyzes a specific aspect of standing: the injury-in-fact requirement. Lastly, this Note focuses on the particular type of noneconomic injury at issue in public display challenges.

1. Overview of Standing Requirements and the Purpose of Standing

Both constitutional requirements and judicially imposed prudential considerations control access to the federal courts.²⁶ In order to confer Article III standing and invoke federal jurisdiction, the Supreme Court has interpreted Article III's "cases" or "controversies" language²⁷ to require that a plaintiff assert a (1) "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and (3) "likely to be redressed" by the relief requested.²⁸

The Court has also articulated a set of self-imposed limits, also known as prudential considerations.²⁹ These limits include, but are not limited to,³⁰ the bar against asserting a third party's rights, the requirement that a plaintiff's injury fall within the zone of interests protected by the law invoked, and the rule that prohibits the judiciary from adjudicating claims asserting generalized grievances³¹ that are more appropriately resolved by the political branches.³² While these limits are arguably more flexible than

25. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that standing is not a "mere pleading requirement[] but rather an indispensable part of the plaintiff's case").

26. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (stating that the various justiciability doctrines relate "to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government").

27. U.S. CONST. art. III, § 2, cl. 1.

28. *Allen*, 468 U.S. at 751 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). It is important to note that standing doctrine concerns more than just ensuring a "proper plaintiff." Although outside the scope of this Note, the doctrine has also been crafted to determine a proper defendant. *See generally* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012) (discussing the standing issues in the pending challenges to California's Proposition 8 and the federal Defense of Marriage Act).

29. *Allen*, 468 U.S. at 751 (1984).

30. These limitations have not been "exhaustively defined." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

31. However, one scholar has argued that the fact that a grievance is widely shared does not ensure that the political branches will respond. Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 299 (1988).

32. *Allen*, 468 U.S. at 751.

the immutable constitutional requirements,³³ they still play an extensive role in the Court's standing jurisprudence.³⁴

In satisfying both the constitutional and prudential standing requirements, the plaintiff has a legal right to judicial intervention if the court determines that enforcement of the asserted legal protection is warranted.³⁵ In order to satisfy this threshold burden, the plaintiff must plead and prove the requirements with the same "manner and degree of evidence" as is necessary to satisfy any other element of the claim.³⁶

The Supreme Court has recognized that the standing inquiry is the most important analysis in determining justiciability.³⁷ The standing inquiry has been justified as "a rough attempt" to ensure that only those individuals who have a "direct stake in the outcome" bring suit.³⁸ This personal stake is thought to enhance the adversarial process³⁹ and prevent the adjudication of certain issues that are better left to the political process.⁴⁰ Thus, this barrier not only functions to further the practical necessities of adjudication by guaranteeing that the challenger is a proper plaintiff⁴¹ but also helps to define the proper role of the federal judiciary.⁴²

33. John C. Yang, *Standing . . . In the Doorway of Justice*, 59 GEO. WASH. L. REV. 1356, 1387 (1991). For example, these prudential limitations, unlike their constitutional counterparts, may be overcome by express congressional authorization. See *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

34. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (referring to these discretionary prudential requirements as "pervasive").

35. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (framing the "essence" of the standing question in this manner).

36. *Bennett*, 520 U.S. at 167–68 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

37. *Allen*, 468 U.S. at 750; see also Yang, *supra* note 33, at 1386–87 (noting that the "larger question of justiciability" includes the standing, mootness, ripeness, finality, and exhaustion doctrines).

38. *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972); *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

39. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (noting that "concrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

40. A main purpose behind standing is to further the separation of powers doctrine. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (stating that standing doctrine "prevents courts of law from undertaking tasks assigned to the political branches"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569–60 (1992); *Flast*, 392 U.S. at 95; see also *United States v. Richardson* 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("The public confidence essential to the [judiciary] and the vitality critical to the [representative branches] may well erode if [the judiciary] do[es] not exercise self-restraint in the utilization of our power to negative the actions of the other branches.").

41. See sources cited *supra* note 38 and accompanying text for discussion of the "personal stake" necessary to be deemed a "proper plaintiff."

42. Although outside the scope of this Note, the proper role of the judiciary has long been disputed. See, e.g., Ivan E. Bodensteiner, *The Role of Federal Judges: Their Duty To Enforce the Constitutional Rights of Individuals When the Other Branches of Government Default*, 18 VAL. U. L. REV. 1, 1 (1983) ("At least since *Marbury v. Madison* in 1803 the proper role of the federal judiciary has been debated."). A leading commentator has argued that the Supreme Court initially crafted the standing doctrine into a discrete body of law "to insulate progressive and New Deal legislation from frequent judicial attack." Cass R.

Due to these concerns, the Court has relied on standing to help ensure that executive or legislative acts are only declared unconstitutional when challenged by parties with sufficient interests at stake.⁴³ These considerations can even lead the Court to recognize a cognizable injury, while simultaneously declining to exercise its judicial review over the controversy.⁴⁴ In determining whether a plaintiff has asserted a sufficient interest in challenging government action, the Court must factor competing concerns into its analysis. The Court often balances its role in protecting individual liberty from the “excesses or oversights of democratic processes” against its ability to gather the necessary information and make the appropriate compromises.⁴⁵ These competing considerations all inform standing analysis, but the inquiry is not a “mechanical exercise.”⁴⁶ In particular, this standing inquiry becomes inevitably more complicated when plaintiffs seek to protect intangible and noneconomic interests that are politically controversial.⁴⁷

2. Traditional Injury-in-Fact Analysis

This Note focuses on the injury-in-fact standing inquiry. The Supreme Court has articulated three elements necessary to establish injury-in-fact.⁴⁸ The injury must be (1) “an invasion of a legally protected interest”⁴⁹ that is (2) “concrete and particularized”⁵⁰ and (3) “actual or imminent,” rather than “‘conjectural’ or ‘hypothetical.’”⁵¹ This injury-in-fact inquiry is often the

Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 179 (1992). *But cf.* Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985) (arguing that the proper view of standing is as a doctrine that focuses on the plaintiff’s stake in the outcome of the controversy, rather than these separation of powers concerns).

43. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (citing *Richardson*, 418 U.S. at 188 (Powell, J., concurring)); *Blair v. United States*, 250 U.S. 273, 279 (1919).

44. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12–13 (2004) (denying federal standing, citing a desire not to interfere with family relations, which are typically structured by state law).

45. 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.4, at 176 (3d ed. 2008).

46. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

47. *See Frissell v. Rizzo*, 597 F.2d 840, 845 (3d Cir. 1979) (noting that less tangible injuries “will necessarily turn on a court’s view of the sensitivity of the constitutional values in dispute”); *see also* 13A WRIGHT ET AL., *supra* note 45, § 3531.4, at 174 (“If the competing values asserted seem particularly sensitive, an injury that is thought slight may seem insufficient to justify decision.”). *See infra* Part I.A.3 for a discussion of the heightened scrutiny accorded to noneconomic injuries.

48. Sunstein, *supra* note 42, at 198–99.

49. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *See infra* Part I.B.1 for a discussion of the interests protected by the Establishment Clause.

50. *Lujan*, 504 U.S. at 560. The *Lujan* court noted that a “particularized” injury is one which “affect[s] the plaintiff in a personal and individual way.” *Id.* at 560 n.1. *See infra* Part I.A.3.a for a discussion of particularized injury-in-fact.

51. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citing *City of L.A. v. Lyons*, 461 U.S. 95, 101–02 (1983)). *See infra* Part I.A.3.b for a discussion of specific and imminent injury-in-fact.

focus of the Court’s standing analysis.⁵² In practice, “injury” has evolved into a term of art with a flexible meaning, making the concept, at times, difficult to define.⁵³

The Supreme Court has expressly recognized that the standing inquiry is inextricably related to “the nature and source” of the claim.⁵⁴ In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,⁵⁵ Justice Rehnquist acknowledged “that the concept [of standing] cannot be reduced to a one-sentence or one-paragraph definition,” as evidenced by the lack of consistency in its application.⁵⁶ One scholar has argued that, due to this inconsistency, the standing inquiry should be focused on “the meaning of the specific statutory or constitutional provision upon which the plaintiff relies rather than a disembodied and abstract application of general principles of standing law.”⁵⁷

However, this imprecision can lead to impermissibly conflating an evaluation of the alleged injury with a determination of whether or not to recognize the alleged interest injured.⁵⁸ This conflation allows for the incorporation of normative judgments into a purportedly objective analysis.⁵⁹ One scholar has noted that by “classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts.”⁶⁰

52. See *Cone Corp. v. Fla. Dep’t of Transp.*, 921 F.2d 1190, 1204 (11th Cir. 1991), (“Although each of these concepts [injury, causation, and redressability] may blend into the others, the most important is the injury requirement.”).

53. See *Frissell v. Rizzo*, 597 F.2d 840, 845 (3d Cir. 1979) (“Injury in fact, after all, is not mentioned in Art. III, and case or controversy is surely not a self-defining category.”); 13A WRIGHT ET AL., *supra* note 45, § 3531.4, at 148.

54. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). For example, a court may deny standing to an individual who argues that an official has violated his right to privacy by conducting a too-rigorous inspection of his packages while he was attempting to smuggle drugs. 13A WRIGHT ET AL., *supra* note 45, § 3531.4, at 158 n.15.

55. 454 U.S. 464 (1982). See *infra* notes 169–74 and accompanying text for further discussion of this case.

56. *Valley Forge*, 454 U.S. at 475.

57. *Fletcher*, *supra* note 35, at 239.

58. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (“The ‘legal interest’ test goes to the merits. The question of standing is different.”); *Dean v. Blumenthal*, 577 F.3d 60, 66 n.4 (2d Cir. 2009) (finding that the district court had “erroneously conflated the requirement for an injury-in-fact with the constitutional validity of [the plaintiff]’s claim” (citation omitted)).

59. See *Wilderness Soc’y v. Kane Cnty.*, 581 F.3d 1198, 1212 (10th Cir. 2009) (“[T]he phrase ‘legally protected interest’ provides ‘ample opportunity for mischief should a court be bent on denying the reality of a sufficient injury-in-fact.’” (citation omitted)), *vacated on reh’g en banc*, 632 F.3d 1162 (10th Cir. 2011); cf. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 264 (1990) (“The factors relevant to the case determination exist on a continuum, and the Court must unavoidably make choices about where on the continuum a line should be drawn. . . . The Court must make distinctions of degree, not of kind.”).

60. Sunstein, *supra* note 42, at 188–89 (“But in every case, the person who brings a lawsuit believes that she has indeed suffered an injury in fact. . . . When we deny these claims, we are making a judgment based not on any fact, but instead on an inquiry into what should count as a judicially cognizable injury.”).

These concerns are rarely implicated in claims grounded on the alleged infringement of a traditionally recognized property interest.⁶¹ For example, when an individual is seeking damages as a remedy, the legal right “is often assumed without discussion.”⁶² However, cognizable injuries are not limited to these traditional interests.⁶³

In the past, the Court recognized that the injury required to establish standing was minimal,⁶⁴ but this threshold has arguably been raised.⁶⁵ Thus, some scholars have argued that as the injury-in-fact requirement has been refined, it has also become more restrictive.⁶⁶

3. Noneconomic Injury-in-Fact and Heightened Scrutiny

It is well established that standing may be grounded on noneconomic injury.⁶⁷ This Note focuses on the noneconomic harm associated with the perceived endorsement of religion: when nonadherents feel relegated to second-class citizenship.⁶⁸ It has been accepted that noneconomic interests

61. Often, standing is not even addressed in judicial opinions. See 13A WRIGHT ET AL., *supra* note 45, § 3531.4, at 146–47.

62. *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (“Monetary harm is a classic form of injury-in-fact.” (citing *Adams v. Watson*, 10 F.3d 915, 920–25 & n.13 (1st Cir. 1993))); *cf.* *Schutz v. Thorne*, 415 F.3d 1128, 1133 (10th Cir. 2005) (finding that a higher hunting license fee charged to nonresidents as compared to residents was a sufficient injury to a nonresident challenging the implementing statute).

63. See *infra* Part I.A.3 for further discussion of noneconomic interests.

64. For example, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), the Court held that “a specific and perceptible harm that distinguished [the plaintiffs] from other citizens” was sufficient injury at the pleadings stage. *Id.* at 689 (emphasis added). The *SCRAP* Court rejected the government’s argument that standing should be limited to those “significantly” affected by the challenged actions. *Id.* at 689 n.14 (“‘Injury in fact’ . . . serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.”). The Court went on to cite a scholarly work that argued that “an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.” *Id.* (citing Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

65. For example, in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Court distinguished the *SCRAP* decision, which represented the “outer limit” of standing law and noted that *SCRAP* explicitly stated that an injury sufficient to survive a motion to dismiss may not be sufficient to be vindicated on the merits. *Id.* at 159 (noting that, on the merits, the plaintiff must prove this “perceptible” harm to be an “immediate” harm); see also *Lujan v. Nat’l Wildlife Fed’n (Lujan I)*, 497 U.S. 871, 889 (1990) (similarly distinguishing *SCRAP*’s “expansive expression” on procedural grounds).

66. See, e.g., Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1062 (2009) (noting that “in some areas the Roberts Court does appear to have reduced access to the courts”); Krista L. DeWitt, Note, *The Revival of Standing As a Limitation to Litigation: Will Standing Cause More Cases To Fall?*, 31 AM. J. TRIAL ADVOC. 601, 601 (2008) (outlining the apparent “resurfac[ing]” of standing); see also *supra* note 22 and accompanying text; *infra* notes 98, 138–42 and accompanying text.

67. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982).

68. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring); *cf. infra* note 74 (discussing voting interests in terms of second-class citizenship). See *infra* Part I.B.1 for a discussion of the specific interests protected by the Establishment Clause.

that can satisfy the injury-in-fact requirement “may reflect ‘aesthetic, conservational, and recreational’” values.⁶⁹ Claims based on environmental law⁷⁰ and election law⁷¹ often encompass these types of interests. Additional noneconomic injuries include injury to individual reputation⁷² and privacy.⁷³

Another type of noneconomic harm accepted by the Court is stigmatic injury, which is often asserted in the civil rights context.⁷⁴ In *Allen v. Wright*,⁷⁵ the Supreme Court noted that although the specific injury asserted in the instant case was too abstract, “stigmatic injury” could be cognizable.⁷⁶ In subsequent decisions, the Court has made use of stigmatic harm in certain contexts.⁷⁷

69. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (quoting *Scenic Hudson Preservation Conference v. Fed. Power Comm’n*, 354 F.2d 608, 616 (2d Cir. 1965)).

70. The noneconomic interests to be recognized as legally cognizable include “aesthetic and recreational values.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992) (“Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”).

71. *See* *FEC v. Akins*, 524 U.S. 11, 24–25 (1998) (finding informational injury-in-fact caused by the lack of disclosure requirements, with plaintiffs’ stating that knowing which candidates the American Israel Public Affairs Committee (AIPAC) supported would affect their individual votes).

72. *See* *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) (holding that plaintiff’s allegation that a disputed congressional act “harmed his reputation by embodying a congressional determination that he is a child abuser and a danger to his own daughter” was sufficient injury to confer Article III standing); *see also* *ACORN v. United States*, 618 F.3d 125, 133–35 (2d Cir. 2010) (relying on *Foretich*).

73. Privacy interests are often alleged as an injury in Fourth Amendment illegal search and seizure cases. *See, e.g.*, *True v. Nebraska*, 612 F.3d 676, 679 (8th Cir. 2010); *Lewis v. Tripp*, 604 F.3d 1221, 1224 n.1 (10th Cir. 2010). Actions challenging employment procedures that require employees to disclose large amounts of personal information have also been sufficient to confer Article III standing. *See, e.g.*, *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997). Information-gathering practices, particularly in the medical field, also have been held to sufficiently trigger privacy interests. *See, e.g.*, *Citizens for Health v. Leavitt*, 428 F.3d 167, 176 n.9 (3d Cir. 2005).

74. *See generally* Akhil Reed Amar & Jed Rubenfeld, *A Dialogue*, 115 *YALE L.J.* 2015 (2006) (discussing the relationship between voting rights and second-class citizenship); *cf. supra* note 68 and accompanying text (discussing the harm associated with endorsement in terms of political status and second-class citizenship).

75. 486 U.S. 737 (1984).

76. *Id.* at 755 (holding that, in order to confer standing, the stigma attached to racial discrimination must be “suffered as a direct result of having personally been denied equal treatment”).

77. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (noting that stigma is not “trivial” in determining the merits); *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (noting that discrimination can cause noneconomic injury “by stigmatizing members of the disfavored group as ‘innately inferior’ and therefore as less worthy participants in the political community” (citations omitted)); *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring) (noting that the plaintiffs suffered from a “lifelong penalty and stigma”); *see also* Dan M. Kahan et al., “*They Saw A Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 *STAN. L. REV.* 851, 895 (2012) (“An individual who comes to see behavior important to his cultural group as detrimental to society risks estrangement from

However, as the alleged injury becomes less tangible and more subjective, the court's injury-in-fact inquiry must be more thorough.⁷⁸ Even after a court recognizes a noneconomic interest as cognizable, the plaintiff must still show that this alleged injury is particular and personal,⁷⁹ as well as specific and imminent.⁸⁰

a. Particularized and Personalized Injury

One concern regarding noneconomic injury is that it is often widely shared and may not be personal to the plaintiff. Although the Supreme Court has expressly rejected the argument that a widely shared injury is per se insufficient to confer Article III standing,⁸¹ the Court has expressly barred standing based on a federal "citizen suit" provision, where the only interest asserted was "harm to his and every citizen's interest in proper application of the Constitution and laws."⁸² In cases where the harm asserted is widely shared, the Court has sought proof that the plaintiff truly has a personal stake in the controversy by showing a particularized and personal injury.⁸³

For example, in *Sierra Club v. Morton*,⁸⁴ an organization challenged the construction of a proposed ski resort and recreation area in a national game refuge and forest.⁸⁵ The organization alleged that the development would have a detrimental impact on the park and impair future enjoyment of the

those on whom he depends for material and emotional support."). *See generally* Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417 (2007) (arguing that the Supreme Court has never ruled out the use of stigmatic harm as sufficient injury and that this type of injury is in fact sufficiently concrete).

78. *See supra* note 47 and accompanying text.

79. *See infra* Part I.A.3.a.

80. *See infra* Part I.A.3.b.

81. *See* *FEC v. Akins*, 524 U.S. 11, 24 (1998) ("[T]he fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes."); *cf.* *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").

82. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) ("The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."). Drawing from the separation of powers doctrine, some argue that this type of suit infringes on the executive branch's "unitary" power of enforcement. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 595 (1994). *But see* Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 634 (1989).

83. *See, e.g., City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)). This issue of personal injury in a widely shared harm is often litigated in the civil rights context, including cases claiming impermissible discrimination. *See supra* notes 76–77 and accompanying text.

84. 405 U.S. 727 (1972).

85. *Id.* at 729–30.

area.⁸⁶ While the Court acknowledged that “[a]esthetic and environmental well-being . . . are important ingredients of the quality of life in our society,”⁸⁷ it nevertheless held that the organization failed to establish sufficient injury-in-fact.

Although the organization asserted a cognizable interest in protecting the environment, the Court reasoned that the organization itself was not personally injured.⁸⁸ The Court pointed out that the organization failed to show any direct effect on the activities of it or its members that the challenged development would cause.⁸⁹

The dissenting Justices in *Sierra Club*, however, argued that “an imaginative expansion of our traditional concepts of standing” was necessary in order to ensure that organizations such as these had access to the federal courts to litigate these cognizable environmental issues.⁹⁰ Justice Harry Blackmun urged that “[t]his incursion upon tradition need not be very extensive.”⁹¹ However, Justice Blackmun would only have required that the plaintiff assert “a provable, sincere, dedicated, and established status.”⁹²

Similarly, Justice William O. Douglas’s dissenting opinion articulated another “imaginative”⁹³ alternative to standing.⁹⁴ Justice Douglas compared the Court’s willingness to grant legal personality to ships and corporations and argued that this should be extended to natural elements.⁹⁵ This specific approach to environmental standing would grant standing to those who have a “meaningful relation” to and knowledge of the affected

86. *Id.* at 734.

87. *Id.*

88. *Id.* at 735. The Court noted that “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved.’” *Id.* at 739.

89. *Id.* at 735; *see also* *Lujan v. Nat’l Wildlife Fed’n* (Lujan I), 497 U.S. 871, 889 (1990) (finding that the plaintiff lacked standing because alleging that one “uses *unspecified* portions of an immense tract of territory, on some portions of which mining activity has occurred or *probably will* occur by virtue of the [challenged] governmental action” is not a cognizable injury (emphasis added)). *But cf.* *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183–84 (2000) (holding that the plaintiffs’ “reasonable concerns” about pollution “directly affected [their] recreational, aesthetic, and economic interests”). For a discussion of a different type of challenge to a proposed development, see *infra* notes 107–14 and accompanying text (discussing “neighborhood standing”).

90. *Sierra Club*, 405 U.S. at 757 (Blackmun, J., dissenting). Justice Brennan, *id.* at 755 (Brennan, J., dissenting), and Justice Douglas, *id.* at 741 (Douglas, J., dissenting), articulated agreement with Justice Blackmun.

91. *Id.* at 757–58 (Blackmun, J., dissenting) (“We need not fear that Pandora’s box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation.”).

92. *Id.*

93. *Id.* (noting Justice Douglas’s opinion).

94. *Id.* at 744–45 (Douglas, J., dissenting).

95. *Id.* at 742–43.

entity's "values."⁹⁶ This approach recognized that "the voice of the existing beneficiaries of these environmental wonders should be heard."⁹⁷ However, the Court has failed to adopt any of the alternatives articulated by the dissenting *Sierra Club* Justices.⁹⁸

The Supreme Court again addressed its concern with generalized, rather than particularized and personal, noneconomic injury in *United States v. Richardson*,⁹⁹ where it denied standing to a plaintiff seeking information concerning CIA expenditures.¹⁰⁰ The claimant alleged that without the information, he would be unable to "intelligently follow" the actions of the political branches, and he would thus be unable to exercise properly his duty to vote in upcoming elections.¹⁰¹ In his opinion for the Court, Chief Justice Warren E. Burger reasoned that such harm, even if cognizable, was a mere generalized grievance as "the impact on him is plainly undifferentiated and 'common to all members of the public.'"¹⁰²

Again in *United States v. Hays*,¹⁰³ the Supreme Court denied standing to a group of voters challenging a Louisiana redistricting scheme.¹⁰⁴ The Court employed "particularized" harm precedent and reasoned that a plaintiff was required to show specific evidence that the scheme had impermissibly excluded him or her from the district.¹⁰⁵ However, the Court noted that a voter who actually resided inside a challenged district could potentially make the requisite showing of "individualized harm."¹⁰⁶

Similar to this recognition of "district standing" in *Hays*, lower courts had previously granted standing to an entire neighborhood in a variety of circumstances.¹⁰⁷ Some circuits have conferred "neighborhood standing"

96. *Id.* at 743, 752. According to Justice Douglas, "[t]hose who hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many." *Id.* at 744–45.

97. *Id.* at 750.

98. See *infra* Part I.A.3.b for a more recent example of the Court's failure to adopt an alternative standing standard in the environmental context in *Lujan*, 504 U.S. 555, 561 (1992).

99. 418 U.S. 166 (1974).

100. *Id.* at 174–75.

101. *Id.* at 176.

102. *Id.* at 176–77 (citing *Ex parte Levitt*, 302 U.S. 633, 634 (1937)); *Laird v. Tatum*, 408 U.S. 1, 13 (1972). In *Schlesinger v. Reservists Committee To Stop the War*, 418 U.S. 208 (1974), a companion case to *Richardson*, Chief Justice Burger similarly denied standing to plaintiffs who claimed that armed forces reserve membership by members of Congress was in violation of the Incompatibility Clause. *Id.* at 209–10. The Court held that a generalized interest in the proper application of the Constitution was "too abstract to constitute a 'case or controversy' appropriate for judicial resolution." *Id.* at 227. See *infra* Part I.A.3.b for further discussion of the specificity necessary to prove concrete injury in a "citizen suit" claim.

103. 515 U.S. 737 (1995).

104. *Id.* at 743–45.

105. *Id.* at 745–46.

106. *Id.* at 744–45.

107. 13A WRIGHT ET AL., *supra* note 45, § 3531.4, at 177–81; *cf.* *Beauharnais v. Illinois*, 343 U.S. 250, 258 (1952) (extending libel exception to free speech to remarks "directed at designated collectivities" rather than specific individuals).

on neighborhood members challenging the building of a new hotel,¹⁰⁸ a low-income housing project,¹⁰⁹ a new high-rise apartment building,¹¹⁰ and a housing development for the elderly and disabled.¹¹¹ Besides challenging real estate developments, neighborhoods have been found to have standing to challenge allegedly inadequate police protection.¹¹² The Supreme Court has also recognized “neighborhood standing” in the context of racial segregation.¹¹³ However, the Court has since made it clear that the concept is limited to “relatively compact neighborhood[s].”¹¹⁴

Despite the requirement of particularized injury and the bar against generalized grievances, the Court in *FEC v. Akins*¹¹⁵ held that a group of voters did in fact have standing to bring suit.¹¹⁶ The plaintiffs sought judicial review of the FEC’s decision not to classify the American Israel Public Affairs Committee (AIPAC) as a “political committee.”¹¹⁷ This decision freed the organization from disclosure requirements concerning membership, contributions, and expenditures under the Federal Election Campaign Act of 1971 (FECA).¹¹⁸ The plaintiffs alleged that knowing which candidates AIPAC supported would affect their individual votes, and therefore sought to have the organization subject to these disclosure requirements.¹¹⁹

108. *Soc’y Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 175–78 (3d Cir. 2000) (alleging injuries that included traffic, pollution, and noise that would “detrimentally impact the ambiance of their historic neighborhood” and their ability to use and enjoy the area (internal quotation marks omitted)).

109. *Alschuler v. Dep’t of Hous. & Urban Dev.*, 686 F.2d 472, 476–77 (7th Cir. 1982) (alleging that the project would harm to their neighborhood by “creating an imbalance in the minority and low-income population,” that would lead to an increase in crime, strain community resources, and decrease property value and the “special environmental, recreational, cultural, historical and aesthetic qualities” of the area).

110. *S. E. Lake View Neighbors v. Dep’t of Hous. & Urban Dev.*, 685 F.2d 1027, 1034–35 (7th Cir. 1982) (alleging injuries that included traffic and parking congestion, noise and air pollution, population density, and violent crime).

111. *Kirby v. U.S. Dep’t of Hous. & Urban Dev.*, 675 F.2d 60, 64 (3d Cir. 1982) (alleging that the development would “attract numerous nonresidents of the Project who would not otherwise come to the area” and decrease property values).

112. *Neighborhood Action Coal. v. City of Canton*, 882 F.2d 1012, 1016–17 (6th Cir. 1989) (indicating that the injuries alleged included slow police response to calls, the deterioration of the neighborhood, a decrease in property values, a business that openly sells alcohol to minors, and “the presence of unsavory individuals around their homes”).

113. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111–14 (1979) (alleging violations by real estate brokerage firms that were depriving plaintiff village residents—as defined in terms of city blocks in a suburban neighborhood, rather than apartment buildings—of “social and professional benefits of living in an integrated society”).

114. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377 (1982) (citation omitted).

115. 524 U.S. 11 (1998).

116. *Id.* at 29.

117. *Id.* at 13.

118. *Id.*

119. *Id.* at 21.

The Court first addressed—and dismissed—various grounds challenging the group’s standing,¹²⁰ before rejecting the notion that a widely shared injury is per se insufficient to confer standing.¹²¹ While acknowledging that it is often the case that an abstract interest is widely shared,¹²² the Court emphasized that if a widely shared interest is “sufficiently concrete and specific,” it may satisfy the injury-in-fact requirement.¹²³ Thus, the *Akins* Court found that the alleged injury was not a generalized grievance because the “informational injury” was “directly related to voting, the most basic of political rights” and was, therefore, sufficient to permit Congress to authorize the judiciary to confer Article III standing.¹²⁴

b. Specific and Imminent Noneconomic Injury

Besides a showing of personal injury,¹²⁵ the Supreme Court also requires a plaintiff to show *specifically* when and where¹²⁶ the injury has occurred or will occur. In *Lujan v. Defenders of Wildlife*,¹²⁷ the Court denied standing to an environmental interest group.¹²⁸ The Court found that the plaintiff organization failed to assert sufficiently imminent injury as none of the members alleged that they had any immediate plans to return to Sri Lanka, the affected area.¹²⁹ In his opinion for the Court, Justice Scalia found that Plaintiffs’ affidavits failed to allege sufficient injury as the claims did not specifically allege *when* they would personally suffer the claimed injury.¹³⁰

120. First, the Court held that the injury asserted fell within the “zone of interests” that Congress intended to protect when enacting FECA. *Id.* at 20. The Court also distinguished *Richardson*, 418 U.S. 166 (1974), relying, inter alia, on the fact that the instant case was grounded on “voter standing” rather than “taxpayer standing.” *Akins*, 524 U.S. at 22.

121. *See supra* note 81 and accompanying text.

122. *Akins*, 524 U.S. at 24. The Court gave various examples of widely shared and abstract harms. *Id.* at 23–24 (citing *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 303 (1940) (injury to the “common concern for obedience to law”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–78 (1992)).

123. *Id.* at 24–25.

124. *Id.* The Court did note, however, that the widely shared nature of the harm was the “strongest argument” against conferring standing. *Id.* at 23. *See infra* note 330 and accompanying text for analysis of the Court’s reasoning.

125. *See supra* Part I.A.3.a.

126. *See supra* note 89 for a discussion of *Lujan I* and its analysis of the requisite specificity of the place of injury.

127. 504 U.S. 555 (1992).

128. *Id.* at 578. The organization sought to prevent government action that could “increas[e] the rate of extinction of endangered and threatened species,” that the plaintiffs wished to observe. *Id.* at 562 (internal quotation marks omitted).

129. *Id.* at 563–64.

130. *Id.* In his analysis, Justice Scalia noted that although one of the affidavits cited an intention to go back to Sri Lanka, in a later deposition, it was noted that the affiant did not know when she would return to Sri Lanka, as a Civil War was currently being fought there. *Id.* (“Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the same day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”).

In his concurring opinion, Justice Anthony Kennedy noted that requiring the plaintiffs to buy airline tickets might seem “trivial.”¹³¹ However, he clarified that this concern was not an issue in the instant case as it was not unreasonable to doubt that the plaintiffs visited the relevant sites regularly.¹³² Voicing a similar concern in his concurrence, Justice John Paul Stevens noted that the “imminence” of an injury should not be measured according to when the plaintiff would directly suffer due to the environmental harm.¹³³ Rather, Justice Stevens would determine imminent injury more generally, considering the probability and timing of the threatened harm.¹³⁴

However, in his dissent, Justice Blackmun, with whom Justice Sandra Day O’Connor joined, lamented the Court’s “slash-and-burn expedition through the law of environmental standing.”¹³⁵ Quoting *Marbury v. Madison*,¹³⁶ Justice Blackmun urged that ““the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.””¹³⁷

Because of this apparently heightened pleading requirement, scholars have argued that *Lujan* represents a more restrictive approach to standing.¹³⁸ Specifically, a leading commentator has argued that the *Lujan* court turned the permissive limitation against generalized grievances into an immutable constitutional requirement.¹³⁹ While the *Akins* Court rejected a per se ban on widely shared injury,¹⁴⁰ particularly in the context of congressional authorization, the *Lujan* opinion appears to place a limit on the scope of congressional authority to enact “citizen suit” provisions¹⁴¹ to create causes of action.¹⁴²

131. *Id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment). Justice Blackmun, in his dissent, also noted that there existed no “substantial barrier” preventing a plaintiff from buying an airline ticket. *Id.* at 592 (Blackmun, J., dissenting).

132. *Id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment).

133. *Id.* at 583 (Stevens, J., concurring in the judgment).

134. *Id.*

135. *Id.* at 606 (Blackmun, J., dissenting). This reflects similar concerns raised by the dissenting Justices, including Justice Blackmun, in *Sierra Club*. See *supra* notes 90–97 and accompanying text.

136. 5 U.S. (1 Cranch) 137, 163 (1803).

137. *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting); see also *supra* note 24 and accompanying text (discussing how access to the court system is a fundamental right).

138. Sunstein, *supra* note 42, at 226–27 (“Before *Lujan*, requiring people to obtain a plane ticket or to make firm plans to visit the habitat of endangered species might well have been unnecessarily formalistic. Now such actions are apparently required.”). See *supra* notes 22–66 for arguments that there is a larger trend toward more restrictive standing.

139. Sunstein, *supra* note 42, at 200–01. But see David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205, 223 (2001) (arguing that subsequent cases “eroded” *Lujan*’s “robust interpretation of the ban on generalized grievances”).

140. See *supra* note 81 and accompanying text.

141. See *supra* note 82 and accompanying text.

142. *Lujan*, 504 U.S. at 573 (rejecting the argument that the injury-in-fact requirement is automatically “satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law”). But cf. *id.* at 580 (Kennedy, J., concurring) (“Congress has the power to define

B. Litigating the Establishment Clause

The Establishment Clause¹⁴³ protects a uniquely subjective spiritual and value-laden interest.¹⁴⁴ The Supreme Court has recognized that “[a] person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause.”¹⁴⁵

The Establishment Clause functions not merely to bar government-endorsed religion¹⁴⁶ but also to maximize religious liberty.¹⁴⁷ The concept of the separation of church and state, first introduced into the vernacular by Thomas Jefferson,¹⁴⁸ has been interpreted both as a “wall” requiring “separation for its own sake” and as a mechanism ensuring “religious liberty and equality.”¹⁴⁹

This liberty encompasses not only the freedom to actively participate in any religion but also to ensure that adherence to religion is not made “relevant in any way to a person’s standing in the political community.”¹⁵⁰

injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . .”).

143. The Establishment Clause of the First Amendment states: “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I. The Establishment Clause has been incorporated against the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

144. *See, e.g., McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 883 (2005) (O’Connor, J., concurring) (noting that the Framers had a special “respect for religion’s special role in society”); *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1086 (4th Cir. 1997). *But see* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 677 (2002) (arguing that religious minorities are no more “special” than other minority groups).

145. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)).

146. *See Flast v. Cohen*, 392 U.S. 83, 103–04 (1968) (“The concern of [James] Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.” (discussing 2 WRITINGS OF JAMES MADISON 183, 186 (Hunt ed. 1901))).

147. *See McCreary*, 545 U.S. at 860 (“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O’Connor, J., concurring) (stating that the Religion Clauses’ “common purpose is to secure religious liberty.” (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962))).

148. Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html> (“I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”).

149. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 218–22 (2012) (“The proper touchstones [of Establishment Clause jurisprudence] are religious liberty and equality, not separation In short, the watchword is not ‘separate’—but ‘equal.’”).

150. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring). The *Lynch* court dealt with a challenge to a public Christmas-themed display of religion. *Id.* at 671. *See infra* notes 204–10 for a more in-depth discussion of this case.

This precludes the government from aiding a single religion, aiding all religions, preferring one religion over another, becoming involved—either directly or indirectly—in the activities of religious organizations, or punishing any individual from “professing religious beliefs or disbeliefs.”¹⁵¹

1. Interests Protected by the Establishment Clause

It has been noted that “[a] paramount purpose of the Establishment Clause is to protect . . . a person from being made to feel like an outsider in matters of faith, and a stranger in the political community.”¹⁵² Due to the unique nature of this harm, Establishment Clause challenges, along with other First Amendment claims, usually allege noneconomic injuries.¹⁵³

In her concurring opinion in *Lynch v. Donnelly*,¹⁵⁴ Justice O’Connor characterized the unusual type of harm caused by the perceived endorsement of religion through a public display as the consequence of sending “a message to nonadherents that they are outsiders [and] not full members of the political community.”¹⁵⁵ The Supreme Court has referred to this harm to an individual’s political status as social stigma.¹⁵⁶

Although outside of the scope of this Note, other Establishment Clause challenges include challenges to prayer in public schools,¹⁵⁷ the exclusion or inclusion of evolution or creationism in the public school curriculum,¹⁵⁸ and the use of taxpayer dollars to support religious purposes.¹⁵⁹ Some

151. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

152. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting) (citing *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring)).

153. *See, e.g., Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) (“[T]he Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature.”); *see also* 13A WRIGHT ET AL., *supra* note 45, § 3531.4, at 197–204.

154. 465 U.S. 668 (1984).

155. *Id.* at 688 (O’Connor, J., concurring).

156. *See, e.g., Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 290 (1963) (reasoning that students would “continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request”); *see also supra* notes 76–77 and accompanying text.

157. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 40, 56 (1985) (invalidating an Alabama statute authorizing a daily period of silence in public schools for meditation or voluntary prayer).

158. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 592–94 (1987) (invalidating a Louisiana law requiring that creation science be taught in public schools, along with evolution); *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) (invalidating an Arkansas statute that prohibited the teaching of human evolution in the public schools). *See generally* David R. Bauer, Note, *Resolving the Controversy over “Teaching the Controversy”: The Constitutionality of Teaching Intelligent Design in Public Schools*, 75 *FORDHAM L. REV* 1019 (2006) (detailing the relevant jurisprudence).

159. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 88 (1968) (holding that federal taxpayers had standing to sue to prevent such expenditures on the grounds that such expenditures were prohibited by Establishment Clause).

Establishment Clause claims focus on an inquiry into the purpose¹⁶⁰ behind the challenged activity, while others focus on the nature of the personal harm asserted by the challenger.¹⁶¹

In *Flast v. Cohen*,¹⁶² the Supreme Court created an exception to the generally recognized bar against taxpayer standing.¹⁶³ The Court held that a plaintiff's status as a federal taxpayer could be sufficient to confer Article III standing if a "logical nexus" existed (1) between the taxpayer's "status and the type of legislative enactment attacked"¹⁶⁴ and (2) between the claimant's taxpayer "status and the precise nature of the constitutional infringement alleged."¹⁶⁵ In carving out the exception, former Chief Justice Earl Warren emphasized both the purposes behind standing doctrine¹⁶⁶ and the particular economic interests protected by the Establishment Clause.¹⁶⁷

However, the Supreme Court has gone on to narrowly limit the *Flast* exception.¹⁶⁸ The Court first reinterpreted this expectation in *Valley Forge*.¹⁶⁹ There, the Court first distinguished *Flast* and denied the plaintiffs taxpayer standing.¹⁷⁰ Next, Justice Rehnquist's analysis incorporated the Court's generalized grievances precedent, stating that the plaintiffs "fail to identify any personal injury suffered by them *as a*

160. See, e.g., *Edwards*, 482 U.S. at 592 (invalidating a Louisiana law requiring that creation science be taught in public schools, along with evolution, because its "primary purpose" was specifically to advance a particular religion); *Wallace*, 472 U.S. at 56 (invalidating an Alabama statute authorizing a daily period of silence in public schools for meditation or voluntary prayer because it was an endorsement of religion lacking "any clearly secular purpose").

161. For example, plaintiffs challenging the specific use of public funds assert an economic-based interest. This inquiry focuses not on the spending's purpose but on the spending's effect on the taxpayer. See, e.g., *Flast*, 392 U.S. at 106 ("The taxpayer's allegation in such cases would be that *his* tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." (emphasis added)).

162. 393 U.S. 83 (1968).

163. *Id.* at 101; cf. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (finding no taxpayer standing because the interest asserted was comparatively "minute and indeterminable" and that future tax injury was "remote, fluctuating, and uncertain"). See generally Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1268–72 (2012) (detailing the traditional bar against federal taxpayer standing and the narrow exception for Establishment Clause cases).

164. *Flast*, 392 U.S. at 102.

165. *Id.* at 102–03.

166. *Id.* at 94–95.

167. *Id.* at 103–04.

168. Compare *id.* (recognizing a taxpayer standing exception under the Establishment Clause), with *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447–48 (2011) (limiting the *Flast* exception to government expenditures, distinguishing such spending from the challenged tax credits), and *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 603 (2007) (limiting the *Flast* exception to expenditures "made pursuant to an express congressional mandate and a specific congressional appropriation" and holding the exception inapplicable to expenditures of executive branch funding of faith-based initiatives).

169. 454 U.S. 464, 480 (1982).

170. *Id.* at 479 ("*Flast* limited taxpayer standing to challenges directed 'only [at] exercises of congressional power.'").

consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.”¹⁷¹ Justice Rehnquist reasoned that this “psychological consequence” was not a cognizable injury.¹⁷²

Unlike the challenges that focus on the purpose behind the legislation,¹⁷³ this analysis expressly turned on the insufficient effect the activity had on the challengers.¹⁷⁴ Post *Valley Forge* the Court has continued to limit the reach of the *Flast* exception.¹⁷⁵ However, as Justice Elena Kagan recently noted in her dissent in *Arizona Christian School Tuition Org. v. Winn*,¹⁷⁶ this narrow interpretation effectively “diminish[es] the Establishment Clause’s force and meaning.”¹⁷⁷ This is particularly problematic if one considers “[t]he very purpose of a Bill of Rights” to be “withdraw[ing] certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”¹⁷⁸

2. The Endorsement Test and the Merits of Establishment Clause Claims

Although this Note does not address the merits determination in Establishment Clause cases, the nature of the prevailing merits test—the endorsement test¹⁷⁹—is an essential consideration when crafting an injury

171. *Id.* at 485–86.

172. *Id.* This language has been cited by courts and scholars alike to stand for the proposition that a spiritual disagreement with a display is not a sufficient injury. *See supra* note 22 and accompanying text; *infra* note 303 and accompanying text. However, “[o]ne has to read the whole *Valley Forge* sentence quoted, and not stop at ‘psychological consequence,’ to understand it.” Catholic League for Religious & Civil Rights v. San Francisco, 624 F.3d 1043, 1052 (9th Cir. 2010); Freedom from Religion Found., Inc. v. Saccone, 1:12-CV-536, 2012 WL 4497544 (M.D. Pa. Oct. 1, 2012) (“[A] ‘psychological consequence’ fails to establish standing when it is born merely of disagreement with government conduct, but it does constitute a concrete harm when it is produced by ‘government condemnation of one’s own religion or endorsement of another’s *in one’s own community*.’”).

173. *See supra* note 160 and accompanying text.

174. *See supra* note 172 and accompanying text.

175. *See supra* note 172 and accompanying text.

176. 131 S. Ct. 1436 (2011).

177. *Id.* at 1451 (Kagan, J., dissenting) (“Sometimes, no one other than taxpayers has suffered the injury necessary to challenge government sponsorship of religion.”). *See* William P. Marshall & Gene R. Nichol, Jr., *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215 (arguing that *Winn* not only limits taxpayer standing, but also undermines Establishment Clause jurisprudence more generally); *cf.* Steven K. Green, *The Slow, Tragic Demise of Standing in Establishment Clause Challenges*, AM. CONST. SOC’Y FOR LAW & POL’Y: ISSUE BRIEF, 1–2 (Sept. 22, 2011), http://www.acslaw.org/sites/default/files/Green_-_Establishment_Clause.pdf (“[C]ourts will effectively be throwing Establishment Clause questions . . . to the politically elected branches Political expediency, rather than constitutional fealty, will become the rule of law . . .”).

178. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

179. The endorsement test was first articulated in Justice O’Connor’s concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984), and was adopted by the Court in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989). However,

standard for public display standing.¹⁸⁰ Courts and scholars alike have criticized the test.¹⁸¹ However, it still remains good law¹⁸² and is the prevailing standard applied to the merits in “public display” cases.¹⁸³

According to the test, a court must examine (1) what the City “intended to communicate in displaying” the symbol, and (2) “what message the

the *Lynch* majority conducted a contextual analysis of the entire Christmas season, rather than focusing exclusively on the religious component of the nativity scene at issue. *Lynch*, 465 U.S. at 679–80; *see also* *Cutter v. Wilkinson*, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring) (approving the Court’s decision not to apply the existing and “discredited” *Lemon* test). *See infra* note 184 for a description of the *Lemon* test.

180. For further discussion of the alleged tension between standing doctrine and the endorsement test, *see infra* Parts II and III.A.2.

181. *See, e.g.*, Petition for Writ of Certiorari at 19–20, *Davenport v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (No. 10-1297), 2011 WL 1540434 (“Over the past three decades, five Justices—Justices Kennedy, Scalia, Thomas, and White, and Chief Justice Rehnquist—have expressly called for rejecting the endorsement test as ‘flawed in its fundamentals and unworkable in practice.’ . . . Moreover, three additional Justices—Chief Justice Roberts and Justices Breyer and Alito—have expressed doubts about whether it is the proper test to apply.” (internal citations omitted)); *see also* *Van Orden v. Perry*, 545 U.S. 677, 685–86 (2005) (plurality opinion) (citing inconsistent application of the test); E. Duncan Getchell, Jr. & Michael H. Brady, *How the Constitutions of the Thirty-Seven States in Effect When the Fourteenth Amendment Was Adopted Demonstrate That the Governmental Endorsement Test in Establishment Clause Jurisprudence Is Contrary to American History and Tradition*, 17 TEX. REV. L. & POL. 125, 184 (2012) (arguing that, at the time of incorporation, “nonestablishment values [did not] include[] a psychological component of preventing offense caused by the endorsement or accommodation of religion” and, therefore, the endorsement test “must be regarded not merely as ahistorical but as antihistorical”); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 276 (1987) (arguing that the analytic framework behind the test is flawed and serves to “create serious difficulties in application—difficulties that . . . only serve to aggravate existing doctrinal confusion”); *cf.* Abner S. Greene, *The Apparent Consistency of Religion Clause Doctrine*, 21 WASH. U. J.L. & POL’Y 225, 260 (2006) (The development of the endorsement test “has revealed that the focus on whether the government benefits or burdens religion as part of a larger class or, rather, in a targeted fashion, does not properly grasp the way in which the doctrine treats religion as distinctive, at least for Establishment Clause purposes.”).

182. In denying certiorari, the Supreme Court recently had the opportunity to replace the endorsement test. *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011); *see also* Petition for Writ of Certiorari, *supra* note 181, at 19 (“This case presents an ideal vehicle for the Court to set aside the endorsement test and adopt the coercion test instead.”); Mark Strasser, *The Endorsement Test Is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273 (2013); *cf.* B. Jessie Hill, *(Dis)owning Religious Speech*, 20 GEO. MASON L. REV. 361, 366–67 (2013) (arguing, *inter alia*, that although the endorsement test has been “temporarily marginalized,” it is preferable to other alternatives).

183. *See, e.g.*, *Allegheny*, 492 U.S. at 593–94 (employing the endorsement test); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1032 (10th Cir. 2008) (employing a hybrid *Lemon*/endorsement test); *Modrovich v. Allegheny Cnty.*, 385 F.3d 397, 406 (3d Cir. 2004) (applying both the *Lemon* test and the endorsement test, although the court found “the endorsement test to be the appropriate standard by which to scrutinize” the symbol). *But see Van Orden*, 545 U.S. at 686 (declining to apply the *Lemon* test and instead analyzing “the nature of the monument” in the context of “our Nation’s history”); *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008) (declining to apply the *Lemon* test or the endorsement test, following *Van Orden*).

city’s display actually conveyed.”¹⁸⁴ When applying this test, the court must consider “both the subjective and the objective components of the message.”¹⁸⁵ Often, under the purpose prong of the test, “an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter’s heart of hearts.”¹⁸⁶ These externally verifiable “facts” include the text, legislative history, and implementation of the disputed action.¹⁸⁷

Under the effect prong, the inquiry into the effect of the display is measured against a “reasonable observer” standard.¹⁸⁸ The Court must determine whether such an observer would view the challenged action as a symbol of the government’s “disapproval of his or her particular religious choices.”¹⁸⁹ It is important to stress that the endorsement test is not about the perceptions of particular individuals and their “discomfort” caused by viewing religious symbols.¹⁹⁰ Rather, the Test seeks to determine whether the government has actually “inject[ed] religion into the political life of the citizenry,” either by acts of favoritism or by a disregard for the obvious effect on the reasonable observer.¹⁹¹

In another concurring opinion, Justice O’Connor elaborated that “the ‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.”¹⁹²

184. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring). Justice O’Connor compared this endorsement test to the “purpose and effect prongs,” *id.*, of the test previously articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test required that a state statute, policy, or action (1) “have a secular legislative *purpose*,” (2) with “its principal or primary *effect*” being “one that neither advances nor inhibits religion,” and (3) that does “not foster ‘an excessive government entanglement with religion.’” *Id.* at 612–13 (emphasis added) (citation omitted). Due to this similarity, many lower courts employ a “hybrid” *Lemon*/endorsement test in these cases. *See, e.g., Weinbaum*, 541 F.3d at 1032.

185. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring). Justice O’Connor noted that when “the audience is large, as it always is when government ‘speaks’ by word or deed, some portion of the audience will inevitably receive a message determined by the ‘objective’ content of the statement, and some portion will inevitably receive the intended message.” *Id.*

186. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (O’Connor, J., concurring in the judgment) (citing *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O’Connor, J., concurring in the judgment)).

187. *Id.*; *Edwards v. Aguillard*, 482 U.S. 578, 594–95 (1987) (The inquiry looks to the “plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute, . . . and the specific sequence of events leading to [its] passage.”).

188. *Allegheny*, 492 U.S. at 620.

189. *Id.* at 631.

190. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (plurality opinion).

191. *Id.*

192. *Allegheny*, 492 U.S. at 630 (O’Connor, J., concurring in part and concurring in the judgment); *see also Pinette*, 515 U.S. at 778 (O’Connor, J., concurring in part and concurring in the judgment) (reiterating the use of history as an important factor when evaluating endorsement). *But see id.* at 807–08 n.14 (Stevens, J., dissenting) (“I would not find this argument convincing, because it assumes that all reasonable viewers know all about the history of [the display]—a highly unlikely supposition.”). *See infra* Part III and text

This evaluation may consider any secular purpose(s) currently served by the display, especially if the monument has lost much of its religious significance.¹⁹³

The Court has noted that Establishment Clause challenges often require a detailed and fact-specific contextual inquiry.¹⁹⁴ As each case presents a different contextual framework, the Court does not always conduct an inquiry into the government's purpose and may instead rely solely on the objective effect of the challenged action.¹⁹⁵ Accordingly, the Court has been reluctant to confine its Establishment Clause jurisprudence to any single test.¹⁹⁶ Therefore, the requisite injury-in-fact necessary to have a viable Establishment Clause challenge remains undefined as the Court has yet to articulate any bright-line rules concerning what constitutes a violation.¹⁹⁷

II. STANDING IN "PUBLIC DISPLAY" OF RELIGION CASES: CIRCUIT COURT CONFUSION IN THE FACE OF SUPREME COURT SILENCE

Challenges to alleged "public displays" of religion,¹⁹⁸ a subsection of Establishment Clause cases, raise a distinct problem for federal standing doctrine, particularly for the injury-in-fact requirement.¹⁹⁹ Specifically, this

accompanying notes 355–56 for a discussion on the evaluation of history in the standing context.

193. *Allegheny*, 492 U.S. at 630–31 (O'Connor, J., concurring in part and concurring in the judgment).

194. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 867–68 (2005) ("[U]nder the Establishment Clause detail is key."); *Allegheny*, 492 U.S. at 595 (opinion of Blackmun, J.) ("[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears." (internal quotation marks omitted)).

195. Most notably, the Court avoided an inquiry into purpose when rejecting a challenge to a Ten Commandments monument. *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (plurality opinion); see *infra* note 227 and accompanying text.

196. See, e.g., *Bauchman v. W. High Sch.*, 132 F.3d 542, 550 (10th Cir. 1997) ("[The] Supreme Court repeatedly has recognized there can be no precise Establishment Clause test capable of ready application, and therefore has resisted confining such sensitive analyses to 'any single test or criterion.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984))).

197. Compare *McCreary*, 545 U.S. at 850–51 (finding a Ten Commandments wall hanging to be impermissible), with *Van Orden*, 545 U.S. at 692 (finding a Ten Commandments monument to be permissible).

198. "Public display of religion" cases—also known as "passive monument" cases—often concern the display of religious symbols and/or text on public land. See, e.g., *McCreary*, 545 U.S. at 851 (concerning large, framed copies of an abridged version the Ten Commandments in the county courthouse); *Van Orden*, 545 U.S. at 681 (concerning a very large monument inscribed with the text of the Ten Commandments, located between the Texas State Capitol and the state's supreme court building); *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 759 (1995) (plurality opinion) (concerning a large, unattended Latin cross on a public square adjacent to the courthouse); *Allegheny*, 492 U.S. at 578 (concerning a freestanding display of a nativity scene on the main staircase of a county courthouse and a Chanukah menorah placed next to a Christmas tree in the city-county building); *Lynch*, 465 U.S. at 671 (concerning a Christmas display on public land consisting of, among other things, a Santa Claus, a Christmas tree, and a crèche).

199. *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 490 (2d Cir. 2009) ("Lower courts are left to find a threshold for injury and determine somewhat arbitrarily whether that threshold

Note analyzes the apparent tension that arises when trying to reconcile the constitutional standing requirement of “injury-in-fact” with the prevailing merits standard, the endorsement test. Part II.A first lays out the Supreme Court’s guidance concerning public display cases. Part II.B of this Note then discusses the different approaches adopted by the various circuits.

A. Public Display Cases and the Supreme Court’s Silence on Standing

The Supreme Court has heard a few public display challenges²⁰⁰ but has yet to address the issue of standing in a public display case.²⁰¹ Nevertheless, these cases are particularly important as some lower courts have interpreted the Court’s silence on the standing question as an implicit endorsement of nontaxpayer²⁰² standing in public display cases.²⁰³

In *Lynch v. Donnelly*, the Court heard a challenge to a Christmas display on public land.²⁰⁴ The display consisted entirely of items owned by the city of Pawtucket, Rhode Island, and included a Santa Claus figurine, a Christmas tree, carolers, and a crèche (also referred to as a nativity scene).²⁰⁵ The Court held that, notwithstanding the religious significance of the nativity scene, the city did not violate the Establishment Clause.²⁰⁶ The *Lynch* Court, however, did not conduct a standing inquiry.²⁰⁷

has been reached [T]here is uncertainty concerning how to apply the injury in fact requirement in the Establishment Clause context.”).

200. See *supra* note 198 for a list of the Court’s public display cases heard by the Supreme Court.

201. Some scholars speculate that this silence is representative of the Court’s desire to rethink Establishment Clause jurisprudence, including standing. See, e.g., Douglas W. Kmiec, *Standing Still—Did the Roberts Court Narrow, but Not Overrule, Flast To Allow Time To Re-think Establishment Clause Jurisprudence?*, 35 PEPP. L. REV. 509, 509 (2008); Mark C. Rahdert, *Court Reform and Breathing Space Under the Establishment Clause*, 87 CHI.-KENT L. REV. 835, 841 (2012).

202. Nontaxpayer standing refers to claims based on a noneconomic interest. In an Establishment Clause challenge, this also references an evaluation of standing outside the *Flast* exception.

203. See *infra* notes 263–67 and accompanying text. However, it is important to note that failure to address a jurisdictional issue does *not* constitute binding precedent. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011) (“When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.”); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

204. 465 U.S. 668 (1984).

205. *Id.* at 671.

206. *Id.* at 687. See *supra* note 179 for a discussion of the Court’s reasoning.

207. The district court had granted municipal taxpayer standing to the plaintiffs. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1162 (D.R.I. 1981), *aff’d*, 691 F.2d 1029 (1st Cir. 1982), *rev’d*, 465 U.S. 668 (1984). The First Circuit affirmed. *Donnelly v. Lynch*, 691 F.2d 1029, 1032 (1st Cir. 1982), *rev’d*, 465 U.S. 668 (1984). The issue of municipal taxpayer standing is outside the scope of this Note. However, plaintiffs have not been relying on taxpayer status as grounds for conferring standing. See, e.g., *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 n.6 (8th Cir. 2012) (“Although [Plaintiff] was at one point asserting taxpayer standing it appears to have abandoned this theory below . . .”).

The more lasting effect of the *Lynch* case, however, came from Justice O'Connor's concurring opinion, which articulated the endorsement test.²⁰⁸ This test focuses on the harm associated with being made to feel that one has "outsider" status in one's own community.²⁰⁹ Moreover, in his dissent, Justice William J. Brennan Jr., with whom Justices Thurgood Marshall, Blackmun and Stevens joined, referred to the plaintiffs' alleged exclusion as "an insult and an injury" that should not be permitted under the Establishment Clause.²¹⁰

Similarly, in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*,²¹¹ the Court issued a split merits determination in a public display case but did not question the lower court's grant of standing.²¹² The case concerned freestanding displays of a nativity scene on the main staircase of a county courthouse and a Chanukah menorah placed next to a Christmas tree in the city-county building.²¹³ The Court found the nativity scene to be impermissible,²¹⁴ but the menorah and Christmas tree display to be permissible.²¹⁵

The *Allegheny* Court did not conduct a standing inquiry. However, the Third Circuit²¹⁶ had noted that the district judge had stated that "[t]here must be more substantial injury than mere offense that is felt inwardly."²¹⁷ Reversing the district court's merits determination, the Third Circuit held that both of the disputed symbols did in fact violate the Establishment Clause—without conducting its own standing inquiry.²¹⁸

In *Capitol Square Review & Advisory Board v. Pinette*,²¹⁹ the Supreme Court upheld Ohio's decision to permit a private party, the Ku Klux Klan, to display an unattended Latin cross on the grounds of the state capitol.²²⁰ Neither the lower courts nor the Supreme Court, conducted a standing

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

209. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

210. *Id.* at 709 (Brennan, J., dissenting) ("To be so excluded on religious grounds by one's elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause.").

211. 492 U.S. 573 (1989).

212. *Id.* at 621.

213. *Id.* at 578.

214. *Id.* at 598 (distinguishing this crèche from the crèche in *Lynch*, as "nothing in the context of th[is] display detracts from the crèche's religious message," as the crèche stood alone as a separate display).

215. *Id.* at 612–13, 620. The Court noted that the "overall holiday setting" did not, in itself, make the display permissible, as government endorsement of any religion(s) is impermissible. *Id.* at 614–15. However, the context of the holiday display had the effect of celebrating the secular, rather than the religious, aspects of the holidays. *Id.* at 615.

216. *ACLU, Greater Pittsburgh Chapter v. Cnty. of Allegheny*, 842 F.2d 655 (3d Cir. 1988), *aff'd in part, rev'd in part*, 492 U.S. 573 (1989).

217. *Id.* at 658.

218. *Id.* at 662–63.

219. 515 U.S. 753 (1995).

220. *Id.* at 770 (plurality opinion).

inquiry. However, the district court did find that the plaintiffs would suffer irreparable injury in the absence of a preliminary injunction.²²¹

In his opinion announcing the judgment of the Court, Justice Scalia stated that “[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms.”²²² However, in his dissent, Justice Stevens focused on the effect of the display and stated that he would not permit the display, as these perceptions of endorsement were impermissible under the Establishment Clause.²²³

In *Van Orden v. Perry*,²²⁴ the Court held that the disputed symbol did not violate the Establishment Clause.²²⁵ The challenged display consisted of a very large monument inscribed with the text of the Ten Commandments, located between the Texas State Capitol and the state’s supreme court building.²²⁶ The *Van Orden* Court avoided conducting an explicit inquiry into governmental purpose, instead focusing on the monument’s current “dual significance.”²²⁷

Though the Supreme Court did not conduct a standing inquiry,²²⁸ the district court—in an unreported opinion—found that the plaintiff’s frequent and unwelcome contact with the disputed symbol, which he found offensive, satisfied the injury-in-fact requirement.²²⁹ The district court noted, however, that standing was conferred due to the “very liberal interpretation” of standing in Establishment Clause cases taken by courts.²³⁰

In *McCreary County v. ACLU of Kentucky*,²³¹ the Supreme Court affirmed the lower courts’ enforcement of a preliminary injunction preventing the county from displaying large, framed copies of an abridged version of the Ten Commandments in the county courthouse.²³² The Court affirmed the preliminary injunction, finding support in evidence showing

221. *Pinette v. Capitol Square Review & Advisory Bd.*, 844 F. Supp. 1182, 1184 (S.D. Ohio 1993), *aff’d*, 30 F.3d 675 (6th Cir. 1994), *aff’d*, 515 U.S. 753 (1995).

222. *Pinette*, 515 U.S. at 770 (plurality opinion).

223. *Id.* at 798 (Stevens, J., dissenting) (“Some might have perceived it as a message of love, others as a message of hate, still others as a message of exclusion—a statehouse sign calling powerfully to mind their outsider status.”).

224. 545 U.S. 677 (2005).

225. *Id.* at 692.

226. *Id.* at 681.

227. *Id.* at 691–92; *see also* Andrew D. Cohen, Note, *How The Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 *FORDHAM L. REV.* 605, 629 (2010) (noting that although the Court usually requires a “detailed inquiry into the legislative purpose of an enactment to seek out an objectively true secular purpose,” it avoided such an inquiry in *Van Orden*).

228. *But see Van Orden*, 545 U.S. at 694 (Thomas, J., concurring) (noting that “[t]he only injury to [the plaintiff] is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library”).

229. *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002), *aff’d*, 351 F.3d 173 (5th Cir. 2003), *aff’d*, 545 U.S. 677 (2005).

230. *Id.*

231. 545 U.S. 844 (2005).

232. *Id.* at 851–55.

that the counties' purpose was to "emphasize and celebrate the Commandments' religious message," in violation of the First Amendment.²³³

While the *McCreary* Court did not conduct a standing inquiry, the district court did address the issue.²³⁴ The district court considered the fact that the display was easily visible in the county courthouse.²³⁵ The district court also noted that the symbol was observed in the place where the plaintiffs and other citizens go to conduct civic business, including obtaining and renewing driver's licenses and permits, registering cars, paying local taxes, and registering to vote.²³⁶ The district court found that the plaintiffs had standing as they unavoidably encountered the symbol each time they were required to enter the courthouse.²³⁷

The "effect" of the display on the challenger tends to play a greater role in evaluating endorsement in public display cases, as compared to other types of Establishment Clause challenges, which focus more on the "purpose" behind the challenged activity.²³⁸ This relatively unique merits application, combined with the lack of guidance by the Court, has created some disparity among the circuits.

B. Circuit Court Analysis of Public Display Standing

Circuit courts have noted that injury-in-fact is "particularly elusive" in Establishment Clause cases.²³⁹ When faced with these public display cases, the circuits have adopted different standards by which to determine sufficient injury-in-fact. Many of the circuits have tailored standing doctrine in order to acknowledge the kind of injuries these plaintiffs are

233. *Id.* at 869. This is a rare example of a display case focusing on purpose, rather than solely on effect. However the Court did reference endorsement test language, noting that "[t]he reasonable observer could only think" that this was indeed the counties' purpose. *Cf. infra* note 238 and accompanying text.

234. *ACLU of Ky. v. McCreary Cnty.*, 96 F. Supp. 2d 679, 682–83 (E.D. Ky. 2000).

235. *Id.* at 684.

236. *Id.* It is important to note that the Supreme Court quoted this language in its recitation of the facts. *McCreary*, 545 U.S. at 852.

237. *McCreary*, 96 F. Supp. 2d at 682. This reasoning mirrors the current doctrine in the Seventh Circuit. *See infra* Part II.B.3.

238. *Compare Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) ("The effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.'"), with *Edwards v. Aguillard*, 482 U.S. 578, 592 (1987) (invalidating a Louisiana law requiring that creation science be taught in public schools, along with evolution, because its "primary purpose" was specifically to advance a particular religion). A rare example of a public display case being formally analyzed under the purpose prong is *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005). However, this opinion also utilized the endorsement test's effect language. *Id.* at 869 ("The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message."); *see supra* note 233.

239. *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1085 (4th Cir. 1997) (quoting *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)); *see also* *Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012); *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987).

likely to suffer.²⁴⁰ These injuries include, but are not limited to, feeling like an “outsider” in the community as a result of the display.²⁴¹

The Fourth Circuit,²⁴² the Sixth Circuit,²⁴³ the Eighth Circuit,²⁴⁴ the Ninth Circuit,²⁴⁵ and the Tenth Circuit²⁴⁶ have each expressly adopted a “direct and unwelcome contact” standard to address this unique injury, although, in application, these standards rely on various factors.²⁴⁷ Alternatively, the Seventh Circuit has implemented a more restrictive test, requiring a showing of “altered behavior” to prove sufficiently concrete injury.²⁴⁸ Other circuits have made use of this altered behavior test although no other circuit has adopted it expressly.²⁴⁹

1. The “Direct and Unwelcome Contact” Standard

In adopting a “direct and unwelcome contact” standard, circuits rely on the proposition that noneconomic and intangible injury may be sufficient to

240. See, e.g., *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) (quoting *Suhre*, 131 F.3d at 1086), cert. denied, 133 S. Ct. 623 (2012); see also *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) (“[T]he Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature.”); *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1102 (11th Cir. 1983) (“In the context of an Establishment Clause claim, the difficulties of applying principles of standing are enhanced by the reality that included among the various motivations for pursuing such a claim are the spiritual, value-laden beliefs of the plaintiffs.”).

241. *Moss*, 683 F.3d at 607; see also *McCreary*, 545 U.S. at 860 (“By showing a purpose to favor religion, the government sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members” (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)) (internal quotation marks omitted)); *supra* note 155 and accompanying text.

242. See *Suhre*, 131 F.3d at 1088 (holding that only direct contact is required because the altered behavior standard is “contrived” and would only serve to further alienate plaintiffs); see also *Moss*, 683 F.3d at 606 (requiring direct contact and relying on stigmatization, but also looking to altered behavior, outside of the public display context).

243. See *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011) (holding that direct and unwelcome contact is sufficient).

244. See *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012).

245. See *Vasquez*, 487 F.3d at 1253 (“[S]piritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or antireligious) symbol is a legally cognizable injury and suffices to confer Article III standing.”); see also *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010) (“That [the plaintiff’s] encounters with the [symbol] are common to all Americans does not defeat his standing, because [the plaintiff] has alleged a concrete, particularized, and personal injury resulting from his frequent, unwelcome contact with the [the symbol].” (citing *Vasquez*, 487 F.3d at 1253)).

246. See *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010) (holding that “direct and unwelcome contact” is sufficient and that altered behavior is sufficient, but not necessary).

247. See *infra* Part II.B.1.

248. *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1468 (7th Cir. 1988).

249. See, e.g., *Cooper v. U.S. Postal Serv.*, 577 F.3d 479 (2d Cir. 2009) (finding altered behavior, but not articulating whether feeling stigmatized would have been sufficient); see also *Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003) (conferring standing based on two plaintiffs who altered their behavior, but expressly not inquiring into the individual standing of the named plaintiff who did not alter his behavior).

make an Establishment Clause claim justiciable.²⁵⁰ In theory, this test requires only direct and unwelcome contact with the challenged display. In practice, however, the circuits discuss varying factors.

Most importantly, these circuits rely on direct contact with the alleged symbol.²⁵¹ To determine that a plaintiff has had sufficiently direct contact with the alleged symbol, some courts have relied on the proximity of the plaintiffs to the challenged conduct as a crucial consideration.²⁵² Another factor that courts have looked to is the location of the alleged symbol, specifically whether it is located within or near a public facility.²⁵³ Yet another factor employed is the extent of the allegedly direct and unwelcome contact, requiring that the contact be “frequent and regular, not sporadic and remote.”²⁵⁴

When applying the standard, the court must ensure that the injury is not a mere generalized grievance.²⁵⁵ Often, the court will also distinguish the Supreme Court’s language from *Valley Forge* that denied standing to plaintiffs who “fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.”²⁵⁶ Although *Valley Forge* did not deal with any public display,²⁵⁷ some circuits have distinguished the case, noting that the *Valley Forge* plaintiffs were denied recovery as they had no personal contact with

250. *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1085–86 (4th Cir. 1997) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982)); *Vasquez*, 487 F.3d at 1250 (citing *Suhre*, 131 F.3d at 1085–86).

251. *See ACLU-NJ v. Twp. of Wall*, 246 F.3d 258 (3d Cir. 2001) (denying standing because plaintiff had failed to establish direct contact, but not clarifying what would have been sufficient); *cf. Catholic League for Religious & Civil Rights v. San Francisco*, 624 F.3d 1043, 1082 n.33 (9th Cir. 2010) (“The ‘contact’ that matters is [not eye contact, rather it is contact] in the mind—[the] acquisition of the knowledge that the government endorses (or condemns) a religion.”).

252. *Suhre*, 131 F.3d at 1087; *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486–87 (1982) (noting that the plaintiffs reside in states different from the location of the challenged conduct); *Vasquez*, 487 F.3d at 1251 (stating that the plaintiff had “held himself out as a member of the community where the [symbol] [wa]s located.”).

253. *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004) (The “inability to unreservedly use public land suffices as injury-in-fact.”); *Suhre*, 131 F.3d at 1087 (noting that even if the plaintiff continues to use the facility, his or her “use of the facility may be compromised by repeated contact” with the alleged symbol).

254. *Vasquez*, 487 F.3d at 1250, 1252 (holding that “frequent regular contact with an allegedly offensive religious symbol—or, in this case, an allegedly offensive *anti*-religious symbol—can give rise to a legally cognizable injury”).

255. *Suhre*, 131 F.3d at 1089 (“[D]irect contact with the display sets a plaintiff apart from the general public and shows that his grievance is not shared in substantially equal measure by all or a large class of citizens.” (citations and internal quotation marks omitted)).

256. *Valley Forge*, 454 U.S. at 485.

257. In fact, the *Valley Forge* opinion focused on reinterpreting the *Flast* exception and dealt with the transfer of government property to a religious organization, without financial payment. *Id.* at 468–69. *See supra* notes 169–74 for further discussion of the case.

the alleged establishment of religion and, therefore, the harm was not sufficiently particular to the plaintiffs.²⁵⁸

While acknowledging that a restrictive rule of standing may preclude both meritorious and nonmeritorious claims alike,²⁵⁹ courts must still balance this implication against the primary purposes behind the standing doctrine.²⁶⁰ Particularly in these cases, the judiciary may not “transform[] courtrooms into forums for the airing of abstract debates.”²⁶¹ Even under the direct and unwelcome contact test, a plaintiff’s contact with the symbol may be “too tenuous, indirect, or abstract to give rise to Article III standing.”²⁶²

Most of the circuits that have adopted the direct and unwelcome contact test have indirectly relied on Supreme Court precedent in public display cases that did not conduct a standing inquiry.²⁶³ For example, in *Suhre v. Haywood County*,²⁶⁴ the Fourth Circuit reasoned that “[a]bsent Supreme Court direction, we are unwilling to craft a rule of standing for religious display cases that would effectively add ‘insult’ to the existing ‘injury’ requirement.”²⁶⁵ Furthermore, in response to the “altered behavior” test,²⁶⁶ the *Suhre* court noted that the Supreme Court had never required Establishment Clause plaintiffs to take affirmative steps to avoid contact with the challenged displays.²⁶⁷

258. *Suhre*, 131 F.3d at 1086; see also *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 n.1 (6th Cir. 2011) (“[W]e do not take the Supreme Court’s decision in [*Valley Forge*] to stand for the proposition that psychological injury can *never* be a sufficient basis for the conferral of Article III Standing.” (citation omitted)); *Buono*, 371 F.3d at 547 (“*Valley Forge* nowhere suggests that plaintiffs lacked standing because their offense at the property transfer was grounded in ideological, rather than religious, beliefs.”); Rohr, *supra* note 22, at 529–30.

259. *Suhre*, 131 F.3d at 1091.

260. See *supra* Part I.A.1.

261. *Suhre*, 131 F.3d at 1091.

262. *Vasquez*, 487 F.3d at 1251 (finding that the plaintiff had “alleged more than ‘a mere abstract objection’” (citation omitted)).

263. See *Newdow v. Roberts*, 603 F.3d 1002, 1014 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (finding it to be “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”); *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991) (finding standing based on the plaintiff’s allegations that the city’s use of a religious symbol offended him, relying heavily on “the fact that standing has not been an issue in the Supreme Court in similar cases,” but not articulating its own inquiry).

264. 131 F.3d 1083 (4th Cir. 1997).

265. *Id.* at 1088.

266. See *infra* Part II.B.3.

267. *Id.* Similarly, the Eighth Circuit noted that in *Van Orden v. Perry*, 545 U.S. 677 (2005), “no [Supreme Court] Justice questioned Van Orden’s standing.” *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 n.8 (8th Cir. 2012). However, the Eighth Circuit did recognize that “[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.” *Id.*; cf. *supra* note 203 and accompanying text.

2. The Eighth Circuit's Particular Application of the "Direct and Unwelcome Contact" Standard

The most recent decision to conduct a standing inquiry in a public display case was the Eighth Circuit in *Red River Freethinkers v. City of Fargo*.²⁶⁸ After conducting a detailed inquiry into the history of the controversy, the Eighth Circuit expressly held that "direct, offensive, and alienating contact" with the display was sufficient to satisfy injury-in-fact.²⁶⁹ At issue was a Ten Commandments monument, located on an open, grassy area on property that belongs to Fargo, North Dakota (the City).²⁷⁰ The Fraternal Order of Eagles, a nonreligious civic organization donated the monument to the city in 1958.²⁷¹ The monument had sat, without legal challenge, in its current location since 1961.²⁷²

In 2002, a group of Fargo residents, all of whom were members of the Red River Freethinkers—a nonprofit corporation that promotes atheism and agnosticism—sued the city in district court.²⁷³ Instead of filing an appeal after their case was dismissed, the plaintiffs adopted a new strategy, and the Freethinkers offered to donate its own monument to the city.²⁷⁴ The Freethinkers also made it known to the City Attorney that if the city removed the Ten Commandments to a private location, then the new monument would no longer be necessary.²⁷⁵ The City Commission decided to donate the monument to a private entity.²⁷⁶

As a result, a number of citizens circulated a petition.²⁷⁷ After receiving the 5,265-signature petition, the Commission reversed its earlier decision to

268. 679 F.3d 1015 (8th Cir. 2012).

269. *Id.* at 1024.

270. *Id.* at 1017.

271. *Id.*

272. *Id.*

273. *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D.N.D. 2005). The Red River Freethinkers association itself was not a named plaintiff in this action. After comparing other "passive monument" cases, the *Twombly* court granted the city's motion for summary judgment and dismissed the case on the merits. *Id.* at 988–89 (conducting a "contextual inquiry," examining the "circumstances surrounding" the placement of the monument and "the physical setting" of the monument and concluding that the monument did not violate the Establishment Clause (quoting *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring))).

274. *Red River*, 679 F.3d at 1018. The proposed monument was to be inscribed with a quote from the Treaty of Tripoli of 1797: "THE GOVERNMENT OF THE UNITED STATES OF AMERICA IS NOT, IN ANY SENSE FOUNDED ON THE CHRISTIAN RELIGION . . . PRESENTED . . . IN RECOGNITION OF THE FIRST AMENDMENT RIGHT OF EVERY AMERICAN TO BELIEVE, OR NOT BELIEVE, IN ANY GOD." *Id.* The Freethinkers requested that its "sister monument" be placed near the Ten Commandments monument, in the hope that the new monument would "downplay the Christian message" of the monument. *Id.*

275. *Id.* at 1018–19. The City Attorney advised the City Commission to decline the Freethinkers' donation and then to move the Ten Commandments monument to a private location, as "the option with the least risk and greatest potential for cost-avoidance." *Id.* at 1019.

276. *Id.*

277. The petition proposed to add an ordinance to the municipal code which, if enacted, would prevent "[a] marker or monument on City of Fargo property for 40 or more years"

donate the monument to a private entity.²⁷⁸ A month later, the Commission adopted a policy to no longer accept any additional monuments to be placed on the site.²⁷⁹

As a result, the Freethinkers filed a lawsuit on behalf of its members.²⁸⁰ The Freethinkers now alleged that the adoption of the ordinance and the refusal to accept the “sister monument” by the Commission violated the Establishment Clause.²⁸¹ The district court held that the Freethinkers lacked standing and dismissed the complaint.²⁸² The Eighth Circuit reversed the district court’s dismissal, finding that the Freethinkers had standing to bring suit.²⁸³

The *Red River* circuit court expressly held that “direct, offensive, and alienating contact” with the display was sufficient injury to confer standing.²⁸⁴ Citing *Lujan*,²⁸⁵ the court found the Freethinkers’ injuries to be “actual and imminent,” “personal” to its members, and “concrete.”²⁸⁶ The Eighth Circuit concluded that there was “no doubt” that these injuries were sufficient.²⁸⁷ The court emphasized that the city had displayed the monument for fifty years, “with no end in sight,” and that this left the members—who lived in and around the city²⁸⁸—to “feel isolated and unwelcome.”²⁸⁹ While acknowledging that these injuries were “largely emotional,” the Court reasoned that “[t]o the extent that emotional harms differ from other, more readily quantifiable harms, that difference lacks

from being removed from its current location. *Id.* The Ten Commandments monument was the only monument to which this proposed ordinance would apply. *Id.* at 1019 n.2.

278. *Id.* at 1019–20. Later that month, the Commission unanimously adopted the proposed ordinance. *Id.* at 1020.

279. *Id.* Other circuits have decided cases with similar fact patterns. For example, in *ACLU of Ohio Foundation, Inc. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011), the Sixth Circuit heard a public display case concerning a framed text containing the Ten Commandments in a courtroom. In *DeWeese*, the courtroom had previously been ordered by the Sixth Circuit to remove a framed text of the Ten Commandments as a violation of the Establishment Clause. *Id.* at 426. Plaintiffs again brought suit to remove this different version. *Id.*

280. *Red River Freethinkers v. City of Fargo*, 749 F. Supp. 2d 940 (D.N.D. 2010), *rev’d and remanded*, 679 F.3d 1015 (8th Cir. 2012).

281. *Id.* at 945.

282. *Id.* at 942. The magistrate’s report found that the original suit filed by the individual members (*Twombly*) had preclusive effect and that the Freethinker’s allegations were conclusory. *Id.* at 946, 949–50.

283. First, the court cited to its prior decision in *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004), which acknowledged the circuit split concerning requisite injury in “passive monument” cases. *Red River*, 679 F.3d at 1023 (comparing a “more demanding test” with “the prevailing view requir[ing] only direct and unwelcome personal contact with the alleged establishment of religion”). Because the plaintiffs in *City of Plattsmouth* had satisfied the “more demanding test” that was required in some circuits, the court did not need to expressly adopt either test. *Id.* at 1023.

284. *Id.* at 1024.

285. See *supra* notes 127–37 and accompanying text for discussion of the *Lujan* case.

286. *Red River*, 679 F.3d at 1023–24.

287. *Id.*

288. *Id.*

289. *Id.* at 1024.

expression in Article III's case-or-controversy requirement."²⁹⁰ In completing its standing inquiry, the Eighth Circuit found that the alleged injuries were a "direct consequence of the city's allegedly unlawful conduct"²⁹¹ and that there was "no doubt . . . that removal of the monument from public property would remedy the alleged injury."²⁹²

In so holding, the court noted, "it is plausible that a government might, by subsequent action, transform a formerly permissible display into an impermissible one."²⁹³ On the other hand, the Eighth Circuit also recognized that "a government might possibly avoid an Establishment Clause violation by encouraging observers to consider a monument's 'secular message' or 'context [in] history.'"²⁹⁴ Having concluded that the Freethinkers had standing to bring suit, the court then remanded the case to be litigated on the merits.²⁹⁵ Thus, the Eighth Circuit's analysis focused solely on the issue of standing.²⁹⁶

3. The "Altered Behavior" Standard

In contrast to the direct and unwelcome contact standard, the Seventh Circuit, in *Freedom from Religion Foundation, Inc. v. Zielke*,²⁹⁷ held that a showing of "altered behavior" was necessary to establish injury and confer Article III standing.²⁹⁸ The *Zielke* challenge concerned a Ten Commandments monument displayed in a park owned by the City of La Crosse, Wisconsin.²⁹⁹ A La Crosse resident—a named plaintiff—and a

290. *Id.* (citing U.S. CONST. art. III, § 2, cl. 1).

291. *Id.* In this causation analysis, the court rejected the magistrate's finding that the allegations were conclusory. *Id.* at 1025 ("The Supreme Court has never held that a plaintiff must plead and prove a religious motivation on the part of the government as a necessary element of an Establishment Clause claim.").

292. *Id.* at 1026. Here, the court again rejected the magistrate's reasoning and found that the removal of the monument was not precluded by the earlier *Twombly* decision as the city's post-*Twombly* actions gave rise to an entirely new issue: "[w]hether the City's actions post-*Twombly* transformed the Ten Commandments monument from a permissible display into an impermissible violation of the Establishment Clause." *Id.* This type of inquiry into the history of the monument is similar to the purpose holding in *McCreary*. See *supra* note 233.

293. *Red River*, 679 F.3d at 1027 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)).

294. *Id.* (citing *Van Orden v. Perry*, 545 U.S. 677, 701–02 (2005) (Breyer, J., concurring)).

295. *Id.* at 1028.

296. See *id.*; see also *id.* at 1023 ("The standing inquiry is not . . . an assessment of the merits of a plaintiff's claim.").

297. 845 F.2d 1463 (7th Cir. 1988).

298. *Id.* at 1467; cf. *Lewis v. Casey*, 518 U.S. 343, 351–52 (1996) (holding that, in order to establish relevant actual injury as a result of inability to receive adequate legal assistance, an inmate must also demonstrate that this actually "hindered his efforts to pursue a legal claim").

299. *Zielke*, 845 F.2d at 1465–66. Notably, the monument was donated by the Fraternal Order of Eagles, as was the monument in *Red River*. *Id.* at 1465 n.1 (noting that the group "was engaged in a national project of donating similar monuments of the Ten Commandments to cities and towns across the United States").

group called the Freedom from Religion Foundation complained to the La Crosse Common Council but, after a public hearing, the city decided to not take any action concerning the monument.³⁰⁰ The plaintiffs then brought suit, but the district court dismissed the case on the ground that the plaintiffs lacked standing.³⁰¹

Upholding this dismissal, the Seventh Circuit cited *Valley Forge*,³⁰² and reasoned that “[t]he psychological harm that results from witnessing conduct with which one disagrees” was not sufficient injury.³⁰³ The circuit court rejected the plaintiffs’ argument that “the display is a rebuke to their religious beliefs and that they are offended by its presence,” and precluded a grant of standing as the plaintiffs had not altered their behavior as a result of the monument.³⁰⁴ The court also rejected other arguments for standing, including the evidence of the “severity” of injury as shown through the complaints to the La Crosse Common Council,³⁰⁵ the fact that a named plaintiff’s home was located in proximity to the park,³⁰⁶ and a municipal taxpayer claim.³⁰⁷

While *Zielke* is still good law,³⁰⁸ the Seventh Circuit has softened this altered behavior requirement by creating an exception that allows plaintiffs to establish standing without a showing of altered behavior when the unwelcome contact occurs while performing a civic duty or fulfilling a legal obligation.³⁰⁹ However, the circuit maintains that “hurt feelings differ from legal injury” and that “[t]he ‘value interests of concerned bystanders’ do not support standing to sue.”³¹⁰ As noted previously, other circuits have also made use of the altered behavior test, although no other circuit has

300. *Id.* at 1466.

301. *Id.*

302. *See supra* notes 169–74 and accompanying text for a discussion of the case.

303. *Zielke*, 845 F.2d at 1467. This interpretation of *Valley Forge* has also been relied on in scholarship advocating for a more restrictive test. *See supra* notes 22 and 172.

304. *Zielke*, 845 F.2d at 1467–68. *But cf.* *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1088–89 (4th Cir. 1997) (asserting that the altered behavior standard is “contrived,” would only serve to further alienate plaintiffs, and could trigger mootness doctrine application).

305. *Zielke*, 845 F.2d at 1468 n.3.

306. *Id.* at 1468–69. The circuit found that although the named plaintiff lived in La Crosse, she had failed to prove how close she lived to the park and whether the monument was visible during her normal routine. *Id.*

307. *Id.* at 1469–70.

308. *See, e.g.*, *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (citing *Zielke* favorably); *Gonzales v. N. Twp. of Lake Cnty.*, 4 F.3d 1412, 1416 (7th Cir. 1993) (conferring standing based on altered behavior); *cf.* *Harris v. City of Zion*, 927 F.2d 1401, 1405 (7th Cir. 1991) (conferring standing because plaintiff “mightily strives to avoid any visual contact” with the display).

309. *See Books v. Elkhart Cnty.*, 401 F.3d 857, 861 (7th Cir. 2005) (holding that “direct and unwelcome contact” is sufficient injury when contact occurs while attempting to “participate fully as [a] citizen[]” (citing *Doe v. Cnty. of Montgomery*, 41 F.3d 1156, 1159 (7th Cir. 1994))).

310. *Freedom from Religion*, 641 F.3d at 807 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). Chief Judge Frank H. Easterbrook has been a particularly strong supporter of this viewpoint. *See, e.g.*, *Books*, 401 F.3d at 870 (Easterbrook, C.J., dissenting) (alleging “dismay at seeing the Ten Commandments” is not a concrete injury, “otherwise there would be universal standing: anyone could contest any public policy or action he disliked.”).

expressly adopted a showing of altered behavior as a necessary prerequisite to standing.³¹¹

III. RESOLUTION

The “spiritual stake”³¹² asserted under the Establishment Clause creates a unique problem for general standing jurisprudence. This Note argues that challenges to the public display of religious symbols require a specifically tailored interpretation of injury-in-fact to ensure that meritorious claims have access to the federal court system. In Part III.A.1, this Note argues that the Supreme Court has recognized that traditional standing doctrine is not applicable to Establishment Clause claims. In Part III.A.2, this Note then identifies the endorsement test as the source of the conflict that prevents the courts from applying general standing doctrine. Part III.B then analyzes the relevance of history in a public display standing inquiry. Finally, Part III.C articulates an injury-in-fact standard for specific use in public display cases.

A. Resolving Supreme Court Precedent on Standing and the Establishment Clause

The Supreme Court has long acknowledged access to the federal court system as a fundamental right.³¹³ However, the standing doctrine acts as a gatekeeper, restricting access and limiting the jurisdiction of the federal judiciary.³¹⁴ This doctrine serves an important role, performing both theoretical³¹⁵ and practical³¹⁶ functions. However, while separation of powers concerns and the debate over the proper role of the federal judiciary pervade any discussion of standing,³¹⁷ these issues are not the primary concern in this particular context. There is usually negligible, if any, concrete government action in these cases. Rather, the endorsement test conceptualized the harm as one of perception. Therefore, these challenges do not generally take the form of judicial review of government action. Instead, the challenge is a direct charge to the court to fulfill its primary role: interpreting the Constitution.³¹⁸

Under this particular framework, the main function of standing in these cases is to ensure that the challenger is a “proper plaintiff.”³¹⁹ This Note argues that the Supreme Court has implicitly recognized that the endorsement test requires a specific interpretation of injury-in-fact in order to determine a proper plaintiff. Furthermore, this interpretation, while

311. *See supra* note 249 and accompanying text.

312. *See supra* note 145 and accompanying text. *See generally* Part I.B.1.

313. *See supra* notes 24, 137 and accompanying text.

314. *See supra* note 26 and accompanying text.

315. *See supra* note 42 and accompanying text.

316. *See supra* text accompanying note 41.

317. *See supra* notes 38–42 and accompanying text.

318. *See supra* text accompanying note 178.

319. *See supra* text accompanying notes 38, 41; *cf. supra* text accompanying note 92.

unique, is fully reconcilable with the Court’s general standing jurisprudence.

1. General Standing Doctrine Is Inapplicable to Establishment Clause Plaintiffs

The Supreme Court’s Establishment Clause jurisprudence reflects an understanding that these challenges require a specific injury-in-fact standard. This was initially reflected by the creation of the *Flast* exception to federal taxpayer standing.³²⁰ The *Flast* exception was created out of necessity, as “[s]ometimes, no one other than taxpayers has suffered the injury necessary to challenge government sponsorship of religion.”³²¹ However, the Court has since stripped the exception of most of its practical function.³²² This narrow reinterpretation of *Flast* is often cited as evidence of a general trend toward a more restrictive interpretation of Article III standing, particularly within the Establishment Clause context.³²³

Despite these restrictions, the Court has continued to hear public display challenges.³²⁴ By reaching the merits, the Court has validated that the Constitution protects spiritual interests. However, the Court has passed, sub silentio, on the standing issue in each case.³²⁵ As many lower courts have acknowledged,³²⁶ this reflects an implicit understanding—even if it is not binding precedent³²⁷—that general standing doctrine cannot be applied when evaluating this specific type of injury-in-fact.³²⁸

2. Reconciling the Endorsement Test with Prevailing Standing Jurisprudence

When the Court recognizes a new cognizable interest, it necessarily evaluates the sufficiency of the harm to the asserted interest in light of the purpose behind the source of the protection.³²⁹ For example, the *Akins* Court appeared to conflate the importance of the right at stake—the right to vote—with the determination of whether there is sufficient injury.³³⁰ While Article III standing is a separate and distinct inquiry from a finding on the merits,³³¹ the endorsement test³³² is, in part, predicated on the impact and

320. *See supra* notes 159, 161–67 and accompanying text.

321. *See supra* note 177.

322. *See supra* notes 168–70 and accompanying text.

323. *See supra* notes 22, 66, 98, 138–42 and accompanying text. *See infra* Part III.A.2 for analysis of the implications associated with this arguable trend.

324. *See supra* Part II.A; *cf. supra* note 201 and accompanying text.

325. *See supra* Part II.A.

326. *See supra* notes 230, 263–67 and accompanying text.

327. *See supra* note 203 and accompanying text.

328. *Cf. supra* note 201 and accompanying text.

329. *See supra* note 54 and accompanying text.

330. *See supra* note 124 and accompanying text.

331. *See supra* notes 58–60 and accompanying text.

332. *See generally supra* Part I.B.2.

extent of psychological harm caused by feeling stigmatized by one's own government.³³³

This spiritual harm, unlike other types of cognizable noneconomic injuries,³³⁴ is inherently subjective and difficult to define objectively. This harm is unquantifiable, unlike a property-based harm, and not visible, unlike a physical harm.³³⁵ However, standing doctrine does not limit access to the federal courts to those plaintiffs seeking to remedy easily identifiable harms.³³⁶ The many noneconomic interests that the Court has explicitly deemed constitutionally cognizable³³⁷ evidence a broad understanding of the general nature of harm. Most importantly, the Court has expressly recognized stigmatic harm.³³⁸ Cognizable injuries also include harm to an individual's recreational activities or aesthetic taste.³³⁹

Furthermore, the requirements of injury-in-fact, particularly the requirement of particularized and personal injury, are nuanced and complex. For instance, the Court has held that a widely shared harm is not per se insufficient.³⁴⁰ The Court has also gone so far as to recognize personal injury where a particular harm is shared by an entire district³⁴¹ or neighborhood.³⁴²

However, the *Valley Forge* court expressly stated that “the psychological consequence presumably produced by observation of conduct with which one disagrees” alone is insufficient to confer standing.³⁴³ Courts and scholars alike have used this language to suggest that the subjective “consequence” produced by the perception of government endorsement is an insufficient injury.³⁴⁴ However, this interpretation misapplies the case law. First, *Valley Forge* was not a public symbol case. Instead, the Court was rejecting the negligible interest in the disputed taxpayer dollars as insufficient to confer standing. Second, this application further misinterprets the nature of the specific harm evaluated under the endorsement test. The harm is not predicated solely on the fact that the challenger was offended. Rather, the harm is caused by the perceived source of this “psychological consequence”: the government.³⁴⁵

The Court's noneconomic standing precedent has required objectively verifiable showings of harm. The *Lujan* court's denial of standing—partially grounded on the fact that the plaintiff had failed to adequately show *when* she would personally and directly suffer the alleged harm—best

333. *Cf. supra* text accompanying note 57. *See generally supra* Part I.B.2.

334. *See generally supra* Part I.A.3.

335. *Cf. supra* notes 61–62 and accompanying text.

336. *Cf. supra* text accompanying note 63.

337. *See supra* Part I.A.3.

338. *See supra* notes 74–77 and accompanying text.

339. *See supra* note 69 and accompanying text.

340. *See supra* note 81 and accompanying text.

341. *See supra* note 106 and accompanying text.

342. *See supra* note 107 and accompanying text.

343. *See supra* text accompanying note 171.

344. *See supra* notes 22, 172, 303 and accompanying text; *cf. supra* note 310.

345. *See supra* note 172 and accompanying text.

illustrates this interpretation.³⁴⁶ The *Lujan* decision is frequently cited as support for the trend toward more restrictive standing.³⁴⁷

However, spiritual harm is internal, rather than external, and is therefore fundamentally different from the environmental harm asserted in *Lujan*. The *Lujan* plaintiff alleged personal harm arising from the inability to observe the affected wildlife.³⁴⁸ Thus, if the wildlife was indeed affected—an objectively verifiable fact—and the plaintiff could show that she was personally prevented from observing this wildlife, she may have proven a sufficiently particularized injury-in-fact.³⁴⁹

The endorsement test, on the other hand, conceptualizes the harm in terms of perception. The harm does not arise from the display itself, but from the perceived governmental endorsement of the religion. It follows that the existence of the display alone, unlike the affected wildlife, is insufficient to help verify the personal harm. The externality—the display—is merely the means of endorsement, rather than the direct source of the harm. In fact, Justice O’Connor expressly noted that the court must consider both “the subjective and the objective components of the message” when applying the endorsement test.³⁵⁰ As conceptualized, the harm is verifiable only through the plaintiff’s own testimony: *When I look at the challenged display, I perceive that the government has relegated me, a nonadherent, to an inferior political status as a second-class citizen.*

B. Policy Implications: Red River and the Relevance of History

This Note argues that the history of the display is relevant to the court’s injury-in-fact analysis and incorporates the Eighth Circuit’s recent holding in its proposed test. In *Red River*, the Eighth Circuit’s standing ruling included an exhaustive analysis of the history surrounding the controversy and the effect this history had on the total injury suffered by the plaintiffs.³⁵¹ While adopting the direct and unwelcome contact standard that had been previously adopted by various sister circuits, the Eighth Circuit paid particular attention to this history, not in a merits determination, but in its standing inquiry.³⁵² The Court did not limit its evaluation of injury-in-fact to the “psychological consequence” that resulted from the challenger’s direct and unwelcome contact with the display itself. Rather, the Court also incorporated the harm suffered due to the actions of the Commission.³⁵³

This approach is in line with the Supreme Court’s precedent and Justice O’Connor’s articulation of the endorsement test. The Court has repeatedly

346. *See supra* notes 129–30 and accompanying text.

347. *See supra* notes 98, 138–42 and accompanying text.

348. *See supra* note 128 and accompanying text.

349. *Cf. supra* notes 129–32 and accompanying text.

350. *See supra* note 185 and accompanying text.

351. *See generally supra* Part II.B.2.

352. *See supra* notes 293–96 and accompanying text.

353. *See supra* notes 278–79, 293 and accompanying text.

conducted a “contextual inquiry” in its merits determination for public display challenges, whether or not under the express framework of the endorsement test.³⁵⁴ Furthermore, Justice O’Connor articulated that “the ‘history and ubiquity’ of a practice is relevant” to the determination of whether the “reasonable observer” would perceive the display as a governmental endorsement of religion.³⁵⁵ Although Justice Stevens disagreed,³⁵⁶ Justice O’Connor appeared to conceptualize the observation not as a snapshot viewed by a reasonable and impartial third party but as an observation of a reasonable observer in the position to interpret the display with multiple sources of information and impressions.³⁵⁷

The challengers in *Red River* attempted, and failed, to compromise with the local government.³⁵⁸ Each of the events that followed the original litigation—including the petition,³⁵⁹ the adoption of the new protective ordinance,³⁶⁰ and the policy precluding new donations³⁶¹—added to the magnitude of the injury suffered by the members. By considering only generally recognized forms of injury, plaintiffs with true injuries and potentially meritorious challenges may be left with no available recourse.

C. A New Test for Standing in Public Display Challenges

This Note advocates for a multifactor test that embraces most of the circuit decisions, while also ensuring that Article III standing remains a meaningful threshold inquiry required to gain access to the federal court system. Under the proposed test, direct and unwelcome contact will presumably be a necessary prerequisite to standing, as it is required to show particularized and specific injury. However, this requirement may be waived in the event a challenger has not come into direct contact with the display because he or she actively avoided such contact. In this case, the imminence of the injury should be subject to heightened scrutiny and the challenger must sufficiently prove active avoidance.³⁶²

The other factors, which are to be considered in relation to one another, include membership in the affected community, the frequency of contact with the display (or the frequency of active avoidance of the display), and the location and reputation of the display. Additionally, this Note specifically endorses the Eighth Circuit’s analysis under the direct and unwelcome contact standard and advocates that an inquiry into the history of the specific monument is relevant, and sometimes necessary, to determine injury-in-fact.

354. *See supra* notes 179, 194–95, 273 and accompanying text; *cf. supra* note 182 and accompanying text.

355. *See supra* note 192 and accompanying text.

356. *See supra* note 192 and accompanying text.

357. *Cf. supra* note 185 and accompanying text.

358. *See supra* Part II.B.2.

359. *See supra* note 277 and accompanying text.

360. *See supra* note 278 and accompanying text.

361. *See supra* note 279 and accompanying text.

362. *Cf. supra* notes 133–34 and accompanying text.

When the challenger is a member of the community, it is likely that there will be a sufficient showing of injury. A reasonable community member would very likely have specific knowledge of the display, including its origination and any role the local government may have played in its maintenance. This maintenance extends beyond financial contributions. It may also include instances where the government chose not to act on previous objections or failed to allow other displays to be included.³⁶³ Community members would include not only residents but also those with a strong connection to and knowledge of the community, such as those who come into contact with the display in the regular course of employment and personal activities. When dealing with relatively small communities, the history surrounding the controversy and the purpose behind the challenged government action are relevant to the injury, as these can intensify the harm associated with feeling relegated to second-class citizenship. In a small community, this background information would likely be known to the "reasonable observer"³⁶⁴ and would affect the magnitude of this observer's spiritual reaction.

The effect of the "direct and unwelcome contact" by a community member would differ significantly from the one-time contact by a casual observer. A nonmember will often have no specific knowledge of the history of the display. However, "frequent and regular, [rather than] sporadic and remote," contact,³⁶⁵ even without specific knowledge, may be sufficient when combined with the presence of other factors.

It will be more difficult for an individual who has no real connection to the community and does not frequently come into contact with the display to allege injury other than "the psychological consequence presumably produced by observation of conduct with which one disagrees."³⁶⁶ Additional factors that may compensate for this lack of connection with the community and infrequent contact with the display may include the reputation and the physical location of the display. A particularly well-known display may cause a more significant injury to a one-time observer than he or she would suffer from multiple observations of a lesser-known display.³⁶⁷ Similarly, the injury suffered from the one-time contact with a display located inside a government building could be greater than multiple contacts with a display that, while technically on public land, is located in front of a row of private businesses.

Although not an absolute bar to standing, an injury resulting from a single contact should be subject to a higher burden of proof. A single contact, like the purchase of an airline ticket,³⁶⁸ can be too easily satisfied, thus rendering the important standing inquiry meaningless. On the other

363. *Cf. supra* Part II.B.2.

364. *See supra* note 188 and accompanying text.

365. *See supra* note 254 and accompanying text.

366. *See supra* notes 171–72 and accompanying text.

367. *See supra* note 2 and accompanying text.

368. *See supra* notes 131, 138 and accompanying text.

hand, a showing of altered behavior may be relevant, but it is not required as it is arbitrary and similarly manipulable. A showing of altered behavior, however, may allow standing in a case where the challenger has not come into direct contact with the display as he or she actively avoided such contact.

As the law stands, the Supreme Court evaluates a challenged display in light of the contextual circumstances.³⁶⁹ In order for meritorious claimants to access the federal courts, the threshold inquiry into the challenger's injury must take into account the various sources of harm that are recognized in this merits determination. This seemingly liberal application of injury-in-fact to public display cases, however, does not conflate the standing inquiry with a merits determination, nor does it strip the doctrine of its important function.

While a challenger may have indeed suffered an acute injury due to his or her personal perception of endorsement, the court may still uphold the display. The endorsement test does not hinge on one challenger's injury but on the perception of the "reasonable observer" in light of the relevant circumstances. For example, despite its comprehensive standing ruling, the Eighth Circuit remanded the *Red River* case to the district court for a determination on the merits.³⁷⁰

Besides being distinct from the merits, this specific standard is also supported by the Court's prevailing standing jurisprudence and furthers the purposes behind the standing doctrine. This standard ensures that the challenger has a sufficient "spiritual stake" in the controversy without closing the doors to the federal court system.

CONCLUSION

So long as the endorsement test remains the prevailing merits standard applied in public display cases, a more flexible definition of injury-in-fact—crafted specifically for these cases—is necessary in order to further both the purposes behind the standing doctrine and the interests protected under the Establishment Clause. This Note advocates a version of the direct and unwelcome contact standard, similar to that employed by the Eighth Circuit in *Red River*.

This flexible standard would not require the plaintiffs in *American Atheists, Inc. v. Port Authority of New York & New Jersey*³⁷¹—the case alluded to in the introduction—to live or work in lower Manhattan, or to either frequent the 9/11 Memorial on a regular basis or avoid it altogether to prove altered behavior. Instead, an individual whose knowledge of the cross's history precluded a desire to visit the 9/11 Memorial would have standing to seek redress for this particularized and imminent injury. While it is outside the scope of this Note to predict the eventual resolution of this

369. See *supra* notes 179, 194–95, 273 and accompanying text.

370. See *supra* notes 295–96 and accompanying text.

371. No. 11 Civ 6026 (S.D.N.Y. dismissed Mar. 28, 2013).

case, the judiciary first needs jurisdiction to evaluate and define this pervasive constitutional issue.