HOW TO RECONCILE THE ESTABLISHMENT CLAUSE AND STANDING DOCTRINE IN RELIGIOUS DISPLAY CASES WITH A NEW COERCION TEST

INTRODUCTION

The Supreme Court's Establishment Clause jurisprudence and its Article III standing doctrine have collided. The two doctrines need to be reconciled or further disruptive and inconsistent results will occur. The endorsement test,[1] which is

[1] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592-93 (1989).

applied in nontaxpayer-funded religious display cases, has created a significant problem with Article III's standing doctrine, specifically the requirement that a plaintiff establish some "injury-in-fact."[2] The endorsement harm is stigma-based, which the Court has generally held is not an Article III injury.

This comment will argue that, instead of further revising or carving out exceptions to the standing doctrine,[3] the Court should revisit its Establishment Clause jurisprudence and apply a test similar to the coercion doctrine[4] in religious display cases, which would lead to the plaintiff's satisfying the injury-in-fact requirement.

For example, a local government places a crèche on the courthouse's front lawn from December 1-December 31, and a strict separationist and religious skeptic files suit, alleging that the crèche violates the Establishment Clause. What is the "injury-in-fact" to satisfy Article III standing? Is psychological disturbance enough to establish an injury or must the injury be more concrete?

If, in the above example, the municipality purchased the crèche, then the plaintiff would have Article III standing because the Supreme Court, in *Flast v. Cohen*,[5] carved out a special "taxpayer standing." However, the problem that remains is resolving the conflict between Article III standing and the alleged Establishment Clause violation when the display was not purchased with tax revenue but instead provided by a private group.

The circuits have been faced with many religious display challenges, and the plaintiff's standing has remained a persistent and troubling question. Several circuits have held that direct contact with a display constitutes an injury sufficient to confer standing, but other circuits have said something more is needed, like altering one's behavior, to confer standing.[6] The endorsement test's stigma-based harm has resulted in the courts of appeals developing their own arbitrary interpretations of the "injury-in-

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[2] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[3] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968) (granting standing to federal taxpayers).

[4] *See generally* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992).

[5] *Flast*, 392 U.S. at 105-06.

[6] *See infra* Part III.

fact" inflicted by the religious displays. These approaches attempt to protect the injury requirement; however, this admirable goal detracts from the endorsement test's effect.

The solution to reconciling the Establishment Clause and Article III's standing doctrine is not further erosion of the latter. Standing's injury-in-fact requirement preserves the courts' role in deciding legitimate cases and controversies thus maintaining the separation of powers and prohibiting courts from arbitrarily ruling on issues that are not subject to their jurisdiction.

The answer to resolving this clash between the standing doctrine and the Court's religious display jurisprudence is reconsideration of the endorsement test. Since the endorsement test cannot be reconciled with Article III, it is likely a mistaken view of the Establishment Clause. A new approach would be the adoption and application of a coercion test similar to that applied in *School District of Abington Township v. Schempp* and *Lee v. Weisman* and Justice Kennedy's dissent in *County of Allegheny v. ACLU*.[7] The application of a coercion-like test, instead of the endorsement test, would provide clarity and consistency when nontaxpayer-funded religious displays are challenged. This test would require a higher threshold—an actual "injury-in-fact"—when a passive religious display is challenged; the mere stigmatic harm a member of the general public may suffer would not suffice to satisfy standing.

Under this test, the plaintiff must show (1) direct and unwelcome exposure to the challenged display, (2) the direct and unwelcome exposure must be persistent, which amounts to a proselytizing effect, and (3) the plaintiff must then be forced into a "choice of evils" scenario, similar to the situation in *Lee*, and thus forced to choose between more direct exposure to the proselytizing display or suffer some harm or sacrifice. This test would satisfy the standing doctrine's injury requirement with a coercion-based harm, thus restoring the appropriate balance to the Establishment Clause and Article III.

Part I of this Comment will discuss and analyze the Supreme Court's Article III standing doctrine. Part I will also examine the Court's Establishment Clause jurisprudence and the development

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[7] *See infra* Part V.

of the endorsement and coercion doctrines. Part II provides a brief summary of how courts of appeals have differed and struggled to find an Article III injury in religious display cases. Part III will expand on the importance of preserving the standing doctrine and argue that the endorsement test's stigma-based harm does not satisfy the injury requirement. Part IV will show that coercive harm is an Article III injury, and the direct and unwelcome, persistent exposure to a religious display, which forces the challenger into a choice of evils scenario, does amount to coercion, thus satisfying the injury requirement for standing. Finally, Part V will feature an application of the test announced in Part IV.

I. SUPREME COURT JURISPRUDENCE

A. The Court's Article III Standing Doctrine

1. Policy Supporting the Standing Doctrine's Preservation and Limitation

The Supreme Court's Article III standing doctrine must be satisfied before a court can proceed to the merits. The three-prong test requires the plaintiff to (1) have suffered an "injury in fact;" (2) there is a causal connection between the defendant's conduct and the plaintiff's injury; and (3) the injury will be redressed by a favorable decision.[8]

The standing doctrine serves several important purposes. First, standing preserves the separation of powers. In *Allen v. Wright*, the Court explained that "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."[9] Article III standing limits who may sue in federal court, thus minimizing the scope of claims a court may address, which may be properly within the domain of either the executive or legislative branch.[10]

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[8] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[9] 468 U.S. 737, 752 (1984).

[10] *See also* Raines v. Byrd, 521 U.S. 811, 819-20 (1997) (emphasizing that "[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."); Lewis v. Casey, 518 U.S. 343, 349 (1996) (explaining that standing keeps courts within their proper role in relation to other branches of government).

Second, standing promotes judicial efficiency by preventing lawsuits filed by plaintiffs who may only have an ideological interest in the outcome of the case.[11] By preventing, or at least limiting, who may bring suit, courts are able to better allocate their time, focus, and taxpayer dollars to cases in which a plaintiff has suffered a real injury and is seeking a remedy.[12]

Third, standing improves judicial decision making because there is an actual controversy for adjudication. In *Baker v. Carr*, the Court asked: "[h]ave the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?"[13]

Finally, standing prevents intermeddling by ensuring that those who actually suffer the injury file suit, not those who are simply trying to protect others who may not want the protection offered or, simply, just do not want to pursue the claim.[14]

2. The "Injury-In-Fact" Requirement

This comment will focus on the amorphous injury-in-fact requirement of the standing doctrine. Since the Court's articulation of Article III standing, the injury requirement has been the subject of much criticism and discussion, probably because of the Court's continued revision as to what actually constitutes an "injury."[15]

In *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Court explained, that "at an irreducible minimum,"[16] standing requires that the party who prays to the court for the redress of an injury must "show that he

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[11] *See infra* pp. 8-9.

[12] *See, e.g.*, United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring) (arguing that if federal courts' resources are diverted from their "historic role" to cases involving "public-interest suits" the courts risk limiting their effectiveness).

[13] 369 U.S. 186, 204 (1962).

[14] *See* Singleton v. Wulff, 428 U.S. 106, 113-14 (1976).

[15] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . .").

[16] *Id.* at 472.

personally has suffered some actual or threatened injury."[17] Here, the Court was faced with a challenge to the conveyance of government surplus property to a Christian college, which the respondents learned about via a news release.[18]

The Court concluded that the respondents' only claim was that the First Amendment's Establishment Clause had been violated, and they failed to identify any injury suffered because of the alleged violation.[19] The only injury was the "psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms."[20]

The Court expanded upon its *Valley Forge* explanation in *City of Los Angeles v. Lyons*.[21] Adolph Lyons filed suit to enjoin the Los Angeles Police Department's future use of chokeholds when law enforcement officers were not threatened with death or serious bodily harm.[22] The Court noted that "[a]bstract injury is not enough" to qualify as an injury for Article III standing.[23] Moreover, the Court explained, "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical."[24] The Court concluded that Lyons failed to satisfy the standing requirements to seek an injunction because his request was contingent on the likelihood he would suffer some future injury from law enforcements' use of

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[17] *Id.* (quoting Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979)).

[18] *Id.* at 468-69.

[19] *Id.* at 485. The Court also determined that the respondents failed to satisfy both prongs of the test for taxpayer standing, which would have granted respondents standing. *Id.* at 479-80.

[20] *Id.* at 485-86.

[21] 461 U.S. 95 (1983).

[22] *Id.* at 98. Lyons had been stopped for a vehicle code violation, and, without provocation, the defendant officers applied a "chokehold" on Lyons, rendering him unconscious. *Id.* at 97-98. Lyons also sought damages against the officers and City, but the Court focused primarily on his request for a preliminary and permanent injunction against the City. *Id.* at 98.

[23] *Id.* at 101.

[24] *Id.* at 101-02 (internal quotations omitted). *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (noting that the injury requirement to satisfy Article III standing must be "concrete and particularized"); McConnell v. Fed. Election Comm'n , 540 U.S. 93, 225 (2003) (commenting that plaintiff's alleged injury must be "concrete").

chokeholds,[25] i.e., the future injury was not real and immediate, but conjectural and hypothetical.

3. The Court's Prohibition of Generalized Grievances

The Supreme Court has consistently held that a "generalized grievance" does not does not confer Article III standing. The Court defined a generalized grievance as: "when the asserted harm is . . . shared in substantially equal measure by all or a large class of citizens . . . ."[26] This principle prohibits suits brought by plaintiffs who are simply citizens concerned with having the government follow the law.

The bar against generalized grievances was originally deemed "prudential," not constitutional;[27] however, in *Lujan*, the Court concluded that the bar on citizen standing was constitutional.[28] In an opinion by Justice Scalia, the Court denied plaintiffs' invocation of statutory authority, which permitted plaintiffs to enjoin the United States government when it allegedly violated a provision of the Endangered Species Act.[29] Instead, the Court held that the bar on standing is constitutional—when the claim is a generalized grievance—and a product of Article III;[30] therefore, Congress cannot authorize standing for citizen suits through statute.

The Court did, however, carve out an exception to the bar on citizen suits in *Flast v. Cohen*.[31] The Court, in an opinion by Chief Justice Warren, said that taxpayer standing is contingent upon a "logical nexus" between the plaintiff's status and the plaintiff's claim, which is to be adjudicated.[32] To satisfy taxpayer standing, there must be (1) "a logical link between [the plaintiff's status as a

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[25] *Lyons*, 461 U.S. at 105. The Court further explained that an "equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again . . . ." *Id.* at 111.

[26] Warth v. Seldin, 422 U.S. 490, 499 (1975). These generalized grievance claims are also known as "citizen suits."

[27] *Id.* at 498.

[28] *Lujan*, 504 U.S. at 576-78.

[29] *Id.* at 571-72 (citing 16 U.S.C. §1540(g)).

[30] *Id*. at 576.

[31] 392 U.S. 83 (1968). The *Flast* Court held that a taxpayer had standing to argue that parochial schools, which received federal subsidies, violated the First Amendment's Establishment Clause. *Id.* at 103.

[32] *Id.* at 102.

federal taxpayer] and the type of legislative enactment attacked,"[33] and (2) "the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged."[34]

4. Stigmatic Harm Is Not An Article III Injury

One year after *Lujan*, in *Allen v. Wright*, the Court was faced with a nation-wide class action suit, alleging that the Internal Revenue Service had failed to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools.[35] The plaintiffs argued that they were directly harmed by the financial aid to the private schools; however, the Court held this injury—a stigmatized injury—caused by racial discrimination did not amount to an Article III injury.[36] Justice O'Connor, writing for the Court, explained: "If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school."[37] Furthermore, if the Court recognized stigmatic injuries as sufficient to constitute standing, the courts would be "no more than a vehicle for the vindication of the value interests of concerned bystanders."[38]

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[33] *Id.* Chief Justice Warren further explained that the expenditures could only be challenged under the Constitution's taxing and spending clause, and a taxpayer-plaintiff could not challenge "incidental expenditure[s]" of tax funds that were required in the administration of a regulatory statute. *Id.*

[34] *Id.* This prong to establish taxpayer standing requires a plaintiff to allege (1) there has been a constitutional violation and (2) this allegation must be more than Congress exceeding its constitutional powers. *Id.* at 102-03.

[35] 468 U.S. 737, 739-40 (1984).

[36] *Id.* at 755. The Court noted that suits based on racial discrimination accord a basis for standing when the challenger has been personally denied equal treatment. *Id. See also* David Spencer, *What's The Harm? Nontaxpayer Standing To Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL'Y 1071, 1073 (2011) (concluding that the endorsement harm does not reconcile with Article III, and the Supreme Court should reaffirm that the stigmatized harm is not sufficient for standing); *but cf.* Thomas Healy , *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 422 (2007) (arguing that the Court has not entirely excluded stigmatic harm for the basis of standing, and stigma should be a basis for Article III standing).

[37] *Allen*, 468 U.S. at 755-56.

[38] *Id.* at 756 (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

B. The Court's Establishment Clause Jurisprudence

This section will outline the Court's adoption of the endorsement test for nontaxpayer-funded religious display challenges, and the Court's coercion doctrine, which it applied in cases involving challenges to prayer at public schools and other school-sponsored events.

1. The Endorsement Test Adopted For Government Displays

The Court's first step toward the endorsement test occurred in *Lynch v. Donnelly*.[39] *Lynch* involved a challenge to a Christmas display, which was located in a shopping district in the city of Pawtucket, Rhode Island.[40] The display featured many figures and decorations traditionally associated with the Christmas season; however, the display also contained a crèche which was central to the plaintiff's challenge.[41]

In an opinion by Chief Justice Burger, the Court rejected the respondents' claim that the crèche violated the Establishment Clause.[42] First, the Court disagreed with the district court's finding that the display had no secular purpose and concluded that the district court erred in focusing solely on the crèche at issue when it should have considered the crèche in the context of the Christmas season.[43] The Court, upon further analysis, said there was "insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some

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[39] 465 U.S. 668 (1984).

[40] *Id.* at 671. A local nonprofit organization owned the park where the display was erected. *Id.*

[41] *Id.* The display was also comprised of a Santa Claus house, candy-striped poles, a Christmas tree, carolers, colored lights, and a sign that read "SEASONS GREETINGS." *Id.* For standing purposes, the First Circuit Court of Appeals determined that the City of Pawtucket used some tax revenue to maintain the crèche. 691 F.2d 1029, 1030 (1st Cir. 1982). The First Circuit concluded that a municipal taxpayer, as opposed to a federal taxpayer, did have proper standing to seek injunctive relief against the City. *Id.* at 1031.

[42] *Lynch*, 465 U.S. at 685. Chief Justice Burger, before proceeding to the merits of the case, commented that, "In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Id.* at 672. The Court further emphasizes the many examples of the government's acknowledgment of the United States' religious heritages as well as the government's continued sponsorship of that heritage. *Id.* at 677.

[43] *Id.* at 679-80.

kind of subtle governmental advocacy of a particular religious message."[44]

Second, there was no substantial or impermissible benefit to religion because of the crèche's inclusion in the display.[45] The Court, in distinguishing prior cases and responding to the dissent, said, assuming *arguendo*, that although there may be some subtle benefit to religion, it was "indirect, remote, or incidental."[46] Finally, the Court reversed the court of appeals holding and concluded that there was no evidence of excessive government entanglement with religion.[47]

Although the Court held that the crèche at issue did not violate the Establishment Clause, it was Justice O'Connor's concurrence that paved the way for the Court's later adoption of the endorsement test. In her concurrence, Justice O'Connor outlined two ways in which the government may violate the Establishment Clause.[48] First, if there is excessive entanglement with religious institution[49] and, second, the government's endorsement or disapproval of religion.[50] According to Justice O'Connor, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[51]

Justice O'Connor concluded that the crèche, because of the particular context in which it appeared, i.e., its physical setting, did not violate the Establishment Clause.[52] The display did not

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[44] *Id.* at 680.

[45] *Id.* at 682.

[46] *Id.* at 683.

[47] *Id.* at 684-85. The Court found no evidence of the city's interaction, or discussion, with church officials regarding the display's design or content. *Id.* Moreover, over its forty-year history, there had never been any issue with crèche's inclusion in the display, however, this did not stop the district court from holding that some government entanglement existed. *Id.* at 684. The Court noted "[a] litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement." *Id.* at 684-85.

[48] *Id.* at 687 (O'Connor, J., concurring).

[49] *Id.* at 687-88 (O'Connor, J., concurring). This entanglement can occur in several ways, including interfering with the independence of religious institutions, providing certain benefits to religious institutions that may not be granted to other groups, and creating religious-divided political groups. *Id.* (O'Connor, J., concurring).

[50] *Id.* at 688 (O'Connor, J., concurring).

[51] *Id.* (O'Connor, J., concurring).

[52] *Id.* at 692 (O'Connor, J., concurring). The crèche's display was more of an "acknowledgement" of religion than "endorsement" and on the same wavelength as the

amount to an endorsement of Christianity because the crèche was accompanied by other secular symbols, which "changes what viewers may fairly understand to be the purpose of the display" and "negates any message of endorsement" of "the Christian beliefs represented by the crèche."[53]

Five years after *Lynch*, the Court held that a crèche on display in a county courthouse violated the Establishment Clause in *County of Allegheny v. ACLU*. [54] Before addressing the merits, Justice Blackmun, writing for a divided 5-4 Court, quoted Justice O'Connor's *Lynch* concurrence, explaining that the Establishment Clause, at the bare minimum prohibits government from "making adherence to a religion relevant in any way to a person's standing in the political community."[55] The Court then proceeded to criticize the *Lynch* majority for its unclear rationale and its lack of guidance for subsequent religious display cases[56] and instead chose to adopt the "sound analytical framework for evaluating governmental use of religious symbols" provided in Justice O'Connor's *Lynch* concurrence.[57] The Court, therefore, was faced with determining whether the crèche on display in the county courthouse, in that "particular physical setting[ ]," endorsed or disapproved of religious beliefs.[58]

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government's use of "In God We Trust," the government's declaration of public holidays corresponding with religious events or ceremonies, and legislative prayer. *Id.* at 692-93 (O'Connor, J., concurring).

[53] *Id.* at 692 (O'Connor, J., concurring). Also, the fact that there was not a history of political divisiveness concerning the display added to Justice O'Connor's conclusion that the city did not run afoul of the Establishment Clause. *Id.* (O'Connor, J., concurring).

[54] 492 U.S. 573, 578-79 (1989). This case also concerns the display of a menorah next to a Christmas tree at a separate government building, but, since the Court held that this display did not violate the Establishment Clause, this comment will not examine it. The crèche was on display from November 26 to January 9. *Id.* at 580. For eight years, the county had allowed a local Roman Catholic group to erect the crèche in the "most public part of the courthouse [near the] Grand Staircase." *Id.* at 579. During early December, the county placed poinsettias and decorated evergreen trees adjacent to the display; a plaque stating "This Display Donated by the Holy Name Society" was also featured next to the crèche. *Id.* at 580.

[55] *Id.* at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

[56] *Id.* Justice Blackmun posits that although the crèche in *Lynch* was held to be no more of an endorsement than other religious-affiliated endorsements of the past, which the Court had sustained, the *Lynch* majority failed to provide any framework for determining the permissibility or impermissibility of an endorsement. *Id.* He continues his criticism of the *Lynch* majority's failure to explain how or why that government's display of the crèche was only "indirect, remote and incidental." *Id.* (quoting *Lynch*, 465 U.S. at 683).

[57] *Id.* at 595; *see supra* notes 48-53 and accompanying text.

[58] *Id*. at 597.

The Court concluded that, unlike in *Lynch*, nothing detracted from the crèche's religious message,[59] and "No viewer could reasonably think [the crèche occupied the county courthouse] without the support and approval of the government."[60] Therefore, the Court held that the crèche—featured in this particular context—sent an "unmistakable message"[61] that the County of Allegheny supported and promoted Christianity through the crèche's religious message, thus violating the Establishment Clause.[62]

In his dissent, which received a total of four votes,[63] Justice Kennedy draws upon the history of our government's "accommodation, acknowledgment, and support of religion" and argues that an infringement on religious liberty, absent some government coercion—via a passive or symbolic display—is minimal.[64] Kennedy argues that "the Establishment Clause permits the government some latitude in recognizing and accommodating the central role religion plays in our society."[65] He posits that a less sensitive approach to our nation's religious heritage "would border on latent hostility toward religion, as it would require government . . . to acknowledge only the secular, to the exclusion and so to the detriment of the religious."[66]

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[59] *Id.* at 598. The Court reasoned that the poinsettia arrangement surrounding the crèche was not similar to the secular figures present in *Lynch*; in fact, the floral arrangement did not detract from the crèche's religious message but, instead, drew attention to it. *Id.* at 598-99.

[60] *Id.* at 599-600.

[61] *Id.* at 600.

[62] *Id.* at 600-01. The Court rejected the argument that the sign acknowledging the crèche's ownership by a religious organization acted as a disclaimer for any possible government endorsement. *Id.* at 600. Moreover, according the Court, the sign further enhanced the government's endorsement of religion because the Establishment Clause prohibits a government from lending support to a particular religious message. *Id.* at 601.

[63] Chief Justice Rehnquist and Justices Scalia and White joined Kennedy's dissent. *Id.* at 655 (Kennedy, J., dissenting).

[64] *Cnty. of Allegheny*, 492 U.S at 657, 662 (Kennedy, J., dissenting).

[65] *Id.* at 657 (Kennedy, J., dissenting).

[66] *Id.* (Kennedy, J., dissenting).

2. The Coercion Doctrine Rejected In Government Displays But Adopted Elsewhere

The Supreme Court's coercion doctrine can find its roots in the school prayer cases.[67] First, in *Engel*, the Court held that a nondenominational prayer recited at the beginning of each school day violated the Establishment Clause.[68] The Court also concluded that even though the students' participation in the prayer was putatively voluntary, it did not "free [the practice] from the limitations of the Establishment Clause"[69] due to the presence of subtle coercive pressure.

Justice Black, writing for the majority, commented that an Establishment Clause violation may be triggered without government coercion, simply by enacting a law that establishes an official religion; however, he clarifies his argument, "[w]hen the . . . support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[70]

Second, in *Schempp*, the Court held that a Pennsylvania law, which required Bible readings at the beginning of each school day but allowed a student to be excused from the classroom during the readings, violated the Establishment Clause.[71] Writing for the Court, Justice Clark applied a coercive analysis test to find that the school's religious practices violated the Establishment Clause.[72] The Court concluded that the Establishment Clause prohibits certain statutory religious activities at a public school, which, by law, the students were required to attend.[73] Again, like in *Engel*, the fact that a student could be excused from participation in the exercises upon parental request "furnishes no

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[67] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp, v. Schempp, 374 U.S. 203 (1963).

[68] *Engel*, 370 U.S. at 430.

[69] *Id.*

[70] *Id.* at 431.

[71] *Schempp*, 374 U.S. at 205.

[72] *Id.* at 223.

[73] *Id.* These particular activities were conducted in school buildings, involved faculty supervision, and, on occasion, faculty participation. *Id.*

defense to a claim of unconstitutionality under the Establishment Clause."[74]

Almost thirty years after the *Engel* and *Schempp* Courts struck down government-sponsored prayer in public schools, the Court, in *Lee v. Weisman*, held unconstitutional the practice of a nonsectarian prayer at a secondary school graduation.[75] In an opinion authored by Justice Kennedy, the Court concluded that the government's involvement with the religious activity amounted to "a state-sponsored and state-directed religious exercise in a public school."[76] Although attendance at the graduation ceremony was not mandatory,[77] the Court determined that the prayer exercise carried with it "a particular risk of indirect coercion"[78] and "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure."[79]

The Court found that coercive pressure existed in the form of peer and public pressure to attend the graduation ceremony.[80] Therefore, if a student, who disagreed with the prayer and its substance, succumbed to this pressure[81] and decided to attend the ceremony, their act of standing and remaining silent during the prayer could signify compliance and thus acceptance of the view being expressed.[82] This violated the Establishment Clause, and states cannot place primary and secondary students in this type of coercive scenario.[83]

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[74] *Id.* at 225.

[75] 505 U.S. 577, 584-87 (1992).

[76] *Id.* at 587.

[77] *Id.* at 583.

[78] *Id.* at 592. Kennedy noted that the issue of indirect coercion might be present in other contexts and proceeds to cite his dissent in *County of Allegheny*. *Id.*

[79] *Id.*

[80] *Id.* at 593.

[81] *Id.* Although the pressure may be indirect and subtle, it can amount to real and overt compulsion.

[82] *Id.* Justice Kennedy reasons that a teenager could have the reasonable perception "she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real." *Id.* The student in this case was faced in a "choice of evils" scenario: attend the graduation and comply with the prayer exercise or miss out on an incredibly important event and, possibly, face some backlash from fellow students. *Id*. at 595.

[83] *Id.* at 593. Here, the state essentially compelled attendance at the graduation ceremony and thus participation in the religious exercise. *Id.* at 598. Justice Kennedy concluded the Court's opinion with an echo to his dissent in County of Allegheny and provided that the Court's decision in the present case does not render every state action, which may implicate religion in some way, invalid even if only a few citizens may find it offensive. *Id.* at 597. Moreover, he added that

II. THE COURTS OF APPEALS' STRUGGLE TO RECONCILE THE ENDORSEMENT TEST AND THE "INJURY-IN-FACT" REQUIREMENT

This section will show how several courts of appeals have addressed the injury requirement in religious display challenges. Their various definitions of what qualifies as an injury for Article III standing demonstrates the lower courts' difficulty in reconciling the endorsement test with the injury requirement. These courts want to allow litigants who have a successful endorsement harm to litigate their claims, but some of the courts also recognize the crucial need to remain faithful to the boundaries and interpretation of Article III standing.

A. The Fourth and Tenth Circuits: Direct Contact

In *Suhre v. Haywood County*, the Fourth Circuit reversed a district court's denial of standing in a challenge to the presence of the Ten Commandments in a North Carolina courtroom.[84] Chief Judge Wilkinson wrote "the spiritual, value-laden beliefs of the plaintiffs are most often directly affected" when there is an alleged violation of the Establishment Clause.[85] The court distinguished the case at bar from the facts in *Valley Forge* and held that the challenger did not have to alter his behavior to receive standing, instead direct contact with the Ten Commandments was enough to satisfy standing's injury requirement.[86]

In *Foremaster v. City of St. George*, the Tenth Circuit was faced with a challenge to the city's logo, which featured a local Mormon temple.[87] The challenger alleged that he was offended, intimidated, and affected by the temple's presence on the city seal.[88] The court found that the challenger had "direct personal

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"offense alone does not in every case show a violation" of the Establishment Clause. *Id.* Finally, he writes, "A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id.* at 598.

[84] 131 F.3d 1083, 1084 (4th Cir. 1997). The district court found that the plaintiff's claim that he felt unwelcome in the courtroom during his prior criminal proceeding failed to allege a sufficient injury in fact. Suhre v. Haywood Cnty., No. 1:94CV179, 1997 U.S. Dist. LEXIS 5013 at *16-17, 25 (W.D.N.C. Mar. 18, 1997). The district court concluded that the precedent set in *Valley Forge* required a plaintiff to demonstrate more than unwelcome contact with the display. *Id.* at *18.

[85] *Suhre*, 131 F.3d at 1086 (internal citation omitted).

[86] *Id.* at 1089. The Fourth Circuit declined to follow the Seventh Circuit's requirement that a challenger alter their behavior in some way. *Id.* at 1087-88.

[87] 882 F.2d 1485, 1486 (10th Cir. 1989).

[88] *Id.* at 1490-91.

contact" with the alleged violation; therefore, the Tenth Circuit granted standing and claimed that this did not run afoul of the standards set forth in *Valley Forge*.[89]

B. The Seventh Circuit: Change In Behavior

The Seventh Circuit found that there was standing to challenge the display of a cross on the roof of a city's fire department building in *ACLU v. City of St. Charles*.[90] The court acknowledged that the plaintiffs simply not liking the display on public property was not enough to satisfy the injury requirement.[91] However, the court held that the plaintiffs had altered their behavior in an attempt to avoid the display, so this was enough to confer an injury for standing purposes.[92]

Two years earlier, the Seventh Circuit was faced with whether plaintiffs had standing to challenge a Ten Commandments display in a local park in *Freedom From Religion Foundation, Inc. v. Zielke*.[93] The court held that the appellants failed to satisfy the injury requirement for Article III standing because they did not alter their behavior, and their only injury was psychological harm, which the *Valley Forge* Court held was not sufficient to confer standing.[94]

In *Books v. City of Elkhart*, the Seventh Circuit carved out another injury that would constitute standing: a plaintiff is forced to view the challenged display that she wishes to avoid but cannot because she was required to attend the forum where the display was located.[95] In this case, the court was faced with a challenge to a Ten Commandments display at a municipal building.[96] The court concluded that the challengers were not required to alter

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[89] *Id.* at 1491.

[90] 794 F.2d 265, 267-69 (7th Cir. 1986). The court commented that municipal taxpayer standing was not at issue because any electricity supplied to illuminate the cross was *de minimis*. *Id.* at 267-68.

[91] *Id.* at 268.

[92] *Id.*

[93] 845 F.2d 1463, 1465 (7th Cir. 1988). The monument was donated to the park by the Fraternal Order of Eagles, which the city accepted. *Id.* at 1465-66. Also, although the city owned the park, it did not attend to the monument's maintenance. *Id.* at 1466.

[94] *Id.* at 1468.

[95] 235 F.3d 292, 301 (7th Cir. 2000).

[96] *Id.* at 294.

their behavior to suffer an injury in fact because they could not avoid the display.[97]

C. The Ninth and Eleventh Circuits: Avoidance

In *Ellis v. City of La Mesa*, the Ninth Circuit addressed the presence of large Latin crosses in a city and county park.[98] The court found that the challengers had taken particular steps to avoid coming into contact with the crosses[99] and held that the plaintiffs' injuries were "his or her not being able to freely use public areas."[100]

In *ACLU v. Rabun County Chamber of Commerce, Inc.*, the Eleventh Circuit held that the challengers' decision not to camp in a public park because of an illuminated Latin cross constituted an injury in fact.[101] Here, the court relied on *Schempp*[102] to reach its decision that the plaintiffs "were forced to assume special burdens" to avoid the display.[103]

III. PUBLIC POLICY SUPPORTS PRESERVING ARTICLE III STANDING & ENDORSEMENT'S STIGMA-BASED HARM IS NOT AN ARTICLE III INJURY

A. Article III Standing Should Not Be Altered Further Because It Is Essential To Proper Adjudication

The Supreme Court said in *Valley Forge*, "[W]e know of no principled basis on which to create a hierarchy of constitutional values or a complementary sliding scale of standing which might permit respondents to invoke the judicial power of the United States."[104] This shows that the Court will not grant a plaintiff standing solely because of the constitutional provision or

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[97] *Id.* at 300-01.

[98] 990 F.2d 1518, 1520 (9th Cir. 1993).

[99] *Id.* at 1523.

[100] *Id.* The Ninth Circuit appears to hold that the challengers simply not wanting to come into contact with the display is sufficient for standing.

[101] 698 F.2d 1098, 1108 (11th Cir. 1983).

[102] *See supra* notes 71-74 and accompanying text.

[103] *Rabun Cnty.*, 698 F.2d at 1107.

[104] Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 484 (1982) (internal citation omitted).

amendment at issue. It further supports the argument that relaxing standing would not be a wise decision.

The Supreme Court's requirements for Article III standing must be met for a federal court to proceed to the merits, and since these requirements are the result of the Court's interpretation of Article III, they are constitutional restrictions that cannot be altered or overridden by statute. Although some commentators have argued that standing should be abandoned and based simply on the merits of a plaintiff's claim[105] or that the injury requirement should be further altered,[106] these claims are misguided.

The standing doctrine serves several important functions: it preserves the separation of powers; it serves judicial efficiency; it improves judicial decision making by ensuring that the plaintiff has a legitimate concern in the outcome of the dispute; and it ensures that plaintiffs will not become intermeddlers with the rights of others.[107]

1. The Standing Doctrine Maintains the Separation of Powers

First, standing promotes the separation of powers.[108] The importance of preserving the separation of powers among the judiciary and the other two branches of our federal system is paramount. Standing inquiries are particularly rigorous before reaching the merits of a case when it would force a court to deem whether an action taken by another branch of the government was unconstitutional.[109]

Granting the courts power to adjudicate cases where there is no injury, and thus no standing, would result in the fear Alexander Hamilton tried to alleviate in *Federalist No. 78*: the judiciary *would* become the superior branch of the federal government.[110] Relaxing the standing doctrine, particularly the injury requirement, would jeopardize the separation of powers by

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[105] *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

[106] *See, e.g.*, Ashley C. Robson, *Measuring A "Spiritual Stake": How To Determine Injury-In-Fact In Challenges To Public Displays Of Religion*, 81 FORDHAM L. REV. 2901, 2940 (2013).

[107] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3 (6th ed. 2012).

[108] *See supra* Part I; *see generally* Warth v. Seldin, 422 U.S. 490, 498 (1975).

[109] Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

[110] THE FEDERALIST NO. 78 (Alexander Hamilton).

expanding the federal courts' role and altering the judiciary's proper place in our democracy.[111] Courts would assume the role of an all-powerful tribunal that could render decisions on legislative and executive acts when no real injury has occurred, thus heavily tilting the scale of power to the courts instead of maintaining the Founders' vision of appropriate checks and balances. Furthermore, since the Court has rejected the argument that if it does not allow a particular plaintiff to sue, then no one would have standing to sue, is further evidence that the subject is better left to Congress.[112]

2. The Standing Doctrine Provides Judicial Efficiency

Second, standing helps prevent a flood of lawsuits from those who only have an ideological stake in the outcome thus serving judicial efficiency.[113] Preventing those who only have an ideological interest in the outcome of the case also supports the other two prongs of standing.[114] If an individual with only an ideological interest in the case was granted standing, a court could not satisfy the second and third prongs of standing. The ideological plaintiff's harm could not be causally traced to the defendant's conduct because that plaintiff never suffered an injury. Also, since the ideological plaintiff did not suffer any injury, then the court cannot redress the harm.

Standing's role also limits the amount of cases that reach a court and preserves the judiciary's political capital.[115] Since the injury requirement serves as an efficient filter for complaints, it cuts out some cases from an already overwhelmed judicial docket. A less congested judicial docket can help conserve tax dollars and provide more time for courts to adjudicate claims that actually satisfy *all three* prongs of the standing doctrine.

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[111] CHEMERINSKY, *supra* note 107, at § 2.3.1.

[112] United States v. Richardson, 418 U.S. 166, 179 (1974).

[113] CHEMERINSKY, *supra* note 107, at § 2.3.1; *see, e.g.*, *Richardson*, 418 U.S. at 192 (1974) (Powell, J., concurring).

[114] *See supra* note 8 and accompanying text.

[115] CHEMERINSKY, *supra* note 107, at §2.3.1.

3. The Standing Doctrine Enhances Judicial Decision Making

Third, standing improves judicial decision making by ensuring that the plaintiff has a legitimate concern in the outcome of the case.[116] The Court announced in *Baker v. Carr* that a personal stake in the outcome of the case is required to sharpen the presentation of issues involving a constitutional question.[117] This language suggests that through satisfying the standing doctrine, the parties better present courts with vigorous advocacy because they have a legitimate personal stake in the outcome of the case, particularly where a court may be faced with a difficult and novel constitutional question.

4. The Standing Doctrine Prevents Intermeddling

Finally, imagine you have suffered an injury that is causally linked to the defendant's conduct, and the injury can be redressed by a favorable court decision. You have a legitimate claim because you have satisfied Article III's standing doctrine, but, for whatever reason, you decide not to file a complaint. However, a vigorous advocate, who wishes to help those like you whom have suffered this particular injury, files suit on your behalf. You are thus dragged into a public dispute, overwhelmed with media attention, and your time significantly occupied from having to testify at trial. It is tough to imagine, right? That is where standing, again, serves such an important role in the judicial system. It prohibits intermeddling by those trying to protect the rights of others who, for whatever reason, do not want the protection.[118]

B. The Endorsement Harm Does Not Comport With The Court's Injury-In-Fact Jurisprudence

The policy reasons for preserving the standing doctrine are clear, but the endorsement test only further blurs the lines as to what satisfies the standing doctrine's injury requirement. According to the Court in *County of Allegheny*, the display sends a message to non-adherents that they are outsiders and not full

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[116] *Id.*

[117] Baker v. Carr, 369 U.S. 186, 204 (1962).

[118] CHEMERINSKY, *supra* note 107, at § 2.3.1.

members of the political community, and this constitutes an injury.[119] This conclusion, however, runs afoul of the Court's Article III standing jurisprudence, particularly the Court's holding in *Allen* that a stigmatized injury does not constitute an Article III injury.

1. The Endorsement Harm Is Not An Article III Injury

In *City of Los Angeles v. Lyons*, the Court said, "The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical."[120] In later cases, the Court has further explained that the injury complained of must be "concrete."[121] Moreover, an ideological interest does not constitute an injury for standing purposes.[122] Cases like *Lyons*, *Lujan*, and *Valley Forge* point towards requiring a concrete, quantifiable, and legitimate injury to satisfy standing.

In a passive religious display case, what is the harm? Is the encounter with the display a real injury that is not conjectural or hypothetical? How significant is the alleged mental anguish suffered by those who challenge a religious display? Can the mere few seconds, minutes, or days of exposure to the display really lead to an injury that comports with the Court's definition of an Article III injury?

At its core, the endorsement harm is merely a stigmatic harm, which the Court held in *Allen v. Wright* does not constitute an Article III injury; therefore, the challengers lacks standing.[123] The *Allen* Court explicitly closed the door on a stigma-based Article III injury; however the *County of Allegheny* Court inadvertently pried open a metaphorical crack to allow the stigmatized challenger Article III standing, which has caused, as

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[119] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 595 (1989).

[120] City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (internal citations omitted).

[121] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225 (2003).

[122] Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 486 (1982); Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

[123] Allen v. Wright, 468 U.S. 737, 756 (1984). *See supra* notes 35-38 and accompanying text.

mentioned above in Part II, confusion and inconsistency in the lower courts.

The religious display challenger has suffered the injury of feeling like an "outsider" in the political community,[124] which is plainly stigma-based. Therefore, the Court's adoption of the endorsement test—and accompanying endorsement "harm"—runs completely afoul of the Court's Article III standing doctrine jurisprudence.[125]

2. The Endorsement Harm Has Created Confusion And Resulted In Arbitrary Interpretations At The Circuit Level

The endorsement test has created confusion and inconsistency when courts are faced with a plaintiff satisfying the injury requirement in nontaxpayer-funded religious display cases.[126] While some courts of appeals simply proceed to the merits once a challenger has established that she has had some direct contact with the display, other courts of appeals are on the proper track and have looked for a more concrete injury to satisfy standing.

The Fourth and Tenth Circuit's approach—direct contact is sufficient to satisfy an injury in fact—clearly does not square with the Court's interpretation of standing's injury requirement. The Fourth Circuit in *Suhre*[127] went so far as to say that "the spiritual, value-laden beliefs of the plaintiffs are often most directly affected"[128] when there is an alleged Establishment Clause violation. Although this particular plaintiff's beliefs may have been affected by the presence of the Ten Commandments in the courtroom, it does not amount to a real, immediate injury; it is simply conjectural and hypothetical—and a stigmatized injury.

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[124] *See supra* notes 51, 54-62 and accompanying text.

[125] Furthermore, the endorsement harm is similar to the harm alleged in generalized grievances, which the Court has said does not confer standing. The challengers may be strict separationists and totally irate over the government's alleged Establishment Clause violation, but this is not an Article III injury.

[126] *See supra* Part II. Even before the Court's holding in *County of Allegheny*, courts of appeals struggled with defining what exactly was the sustained injury when a religious display was challenged under the Establishment Clause.

[127] Suhre v. Haywood Cnty., 131 F.3d 1083 (4th Cir. 1997); *see supra* notes 84-86 and accompanying text.

[128] *Suhre*, 131 F.3d at 1086 (internal citation omitted); *see supra* note 85 and accompanying text.

Taking this language to its logical conclusion would be devastating. For example, assume John Doe, a devout agnostic, insists on challenging the constitutionality of "In God We Trust" on United States currency. We can concede that his deep, value-laden beliefs may be affected, and, according to the Fourth Circuit, his direct contact with United States currency and the resulting offense to his beliefs would be an Article III injury. Basically, any citizen that could successfully argue that their beliefs were affected by an alleged Establishment Clause violation would have standing to sue. If this sounds similar to a generalized grievance, you are probably right.[129]

The Seventh Circuit's requirement that the challenger alter their behavior to establish an injury is on the right track toward finding an injury in fact, but it still leaves more to be desired.[130] This "altered behavior" approach to avoid the offensive display seems to be focusing on the coercive nature the display has on its viewers; after all, it has coerced a viewer to change their behavior. However, the injury here, although it may be concrete and real because the challenger altered her behavior, it is still *de minimis* at the most and not an injury at all in the least.

For example, assume a crèche is erected on the front lawn of a city courthouse, and a viewer is so offended by it that they choose to alter their route to work. This alteration of behavior will likely only be a few more turns around town in an attempt to avoid the crèche, so what is the injury? Well, it could be spending a couple of extra minutes on the road and maybe a few more dollars at the gas pump, but again this falls short of the injury requirement. Something more is still needed.

The Seventh Circuit's holding in *Books* incorporates what appears to be a coercion-like effect, which may result from the direct and unwelcome exposure to the display.[131] If an individual directly and continually comes into contact with the display but cannot avoid it, the exposure could have some sort of proselytizing

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[129] When examining the Tenth Circuit's holding in *Foremaster*, it is just as baffling as the Fourth Circuit's analysis of the injury in *Suhre*. The Tenth Circuit's finding of an injury when the plaintiff claimed he was offended, intimidated, and affected by the display on the city seal, again, does not make sense under the Court's standing doctrine interpretation. *See supra* notes 87-89 and accompanying text.

[130] *See supra* notes 90-94 and accompanying text.

[131] *Supra* notes 95-97 and accompanying text.

effect, similar to Justice Kennedy's "Latin cross" language in his *County of Allegheny* dissent.[132] This approach is on the right track to establishing an Article III injury.

IV. COERCION-BASED HARM IS AN ARTICLE III INJURY AND A COERCION-LIKE TEST FOR RELIGIOUS DISPLAYS WOULD RECONCILE THE STANDING DOCTRINE AND ESTABLISHMENT CLAUSE

A. Coercion Harm is an Article III Injury

Since further alteration of the standing doctrine would only create more problems within our judicial framework, it follows that the Court has taken the wrong approach and applied an incorrect test in religious display challenges.[133] The endorsement test's stigmatic harm has created confusion, inconsistency, and arbitrary injury interpretations; therefore, a different test should be applied when courts are faced with religious display complaints. Since coercion-based harm constitutes an Article III injury, the adoption and application of a coercion-like test similar to the holding in *Schempp,* that was argued for in Justice Kennedy's dissent in *County of Allegheny* and further defined in *Lee*, provides the solution to reconciling Article III's injury requirement and the Court's religious display jurisprudence.

In *Schempp*, Justice Clark concluded that the Establishment Clause prohibits certain statutory religious activities at a public school, which, by law, the students were required to attend.[134] Since the students were required to go to school and be a part of the mandatory religious exercises, it follows, therefore, that their participation was coerced, thus violating the Establishment Clause.

Justice Kennedy's *County of Allegheny* dissent—which received a total of four votes in the split 5-4 decision—builds upon some of the language in *Schempp* and provides a strong argument against the *County of Allegheny* Court's adoption of an endorsement test for religious display cases. He contends that

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[132] *Infra* note 140 and accompanying text.

[133] This is not to say that the Court's test for taxpayer standing is incorrect. Analysis of the Court's taxpayer standing is outside the scope of this paper.

[134] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963).

there must be some coercion to constitute a violation of the Establishment Clause. First, Justice Kennedy comments that "[g]overnment policies of accommodation, acknowledgment and support for religion are an accepted part of [the United States'] political and cultural heritage."[135]

Second, although "[s]peech may coerce in some circumstances, . . . [it] does not justify a ban on all government recognition of religion."[136] Justice Kennedy does, however, concede that coercion may occur, in extreme cases, through symbolic recognition or accommodation.[137] In this instance, he concludes that the government did not use its "power to coerce" to further the interests of Christianity.[138] Furthermore, the government's alleged recognition or accommodation was passive and symbolic, so "any intangible benefit to religion is unlikely to present a realistic risk of establishment."[139]

Third, although Justice Kennedy concedes that the Establishment Clause forbids a city to erect a large, permanent Latin cross on a the roof of a government building,[140] "[n]oncovercive government action within the realm of flexible accommodation or passive acknowledgement of existing symbols does not violate the Establishment Clause . . . ."[141] He continues that the crèche at issue in no way compelled or coerced anyone to participate in any religious ceremony or activity.[142]

To summarize Justice Kennedy's *County of Allegheny* dissent, the crèche's presence was not an attempt by the government to try

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[135] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., dissenting). Support for his argument is found in *Marsh v. Chambers*. 463 U.S. 783, 792 (1983) (upholding prayer at the beginning of legislative sessions).

[136] *Allegheny*, 492 U.S. at 661 (Kennedy, J., dissenting).

[137] *Id.* (Kennedy, J., dissenting). Justice Kennedy does concede that a continued, imposing religious display "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* (Kennedy, J., dissenting).

[138] *Id.* at 664 (Kennedy, J., dissenting). Kennedy points out that the government did not contribute a significant amount of tax revenue to further the cause of Christianity. *Id.* (Kennedy, J., dissenting). Furthermore, the passive crèche display presented no realistic risk to proselytize or establish a religion. *Id.* (Kennedy, J., dissenting).

[139] *Id.* at 662 (Kennedy, J., dissenting). "Some endorsement is inherent in these reasonable accommodations, yet the Establishment Clause does not forbid them." *Id.* at 672 (Kennedy, J., dissenting).

[140] *Id.* at 661 (Kennedy, J., dissenting).

[141] *Id.* at 662-63 (Kennedy, J., dissenting).

[142] *Id.* at 664 (Kennedy, J., dissenting).

and coerce members of the community to accept Christianity's beliefs through aggressive proselytizing; the display was nothing more than an acknowledgment of our nation's heritage.

In an opinion by Justice Kennedy, the Court in *Lee v. Weisman* held that a nonsectarian prayer at a high school graduation violated the Establishment Clause, and the option to not attend the ceremony did not excuse the practice as being coercive.[143] The Court concluded that the subtle and indirect peer pressure on attending the ceremony, regardless of the option to not attend, places a student in the dilemma of participating or protesting, and "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[144]

In these cases, *Schempp* and *Lee*, which involve some coercion on the part of the state, there is an Article III injury. Coercion-based harm is not a stigmatic injury. This coercive harm—the result from aggressive attempts to proselytize either through a permanent religious display or the coercive school programs—is much closer to the real, direct, and particularized injury required by Article III's standing doctrine. When *Lee*'s coercion doctrine is added to the language of *Schempp* and Justice Kennedy's *County of Allegheny* dissent, the result is a test that would reconcile Article III and the Establishment Clause in religious display cases.

B. The Direct, Persistent, Unwelcome, and "Choice of Evils" Test Reconciles the Standing Doctrine and Establishment Clause

The adoption of a coercive test to non-taxpayer funded religious display challenges makes sense and is supported by Supreme Court jurisprudence. The test is comprised of the coercion language in *Lee* and *Schempp* and Justice Kennedy's emphasis on coercion in his *County of Allegheny* dissent. If a plaintiff can successfully allege the three prongs of the following test, then there is some coercion—a constitutional injury—and therefore, there is Article III standing.

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[143] Lee v. Weisman, 505 U.S. 577, 596 (1992).

[144] *Id.* at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

First, the plaintiff must have some direct and unwelcome exposure to the challenged display. To satisfy direct exposure, a potential plaintiff must physically view the display. Direct exposure prohibits a citizen of another state from reading about the display in a newspaper and filing a complaint.[145]

The direct exposure to the display must also be unwelcome. The display must be featured on its own and not among secular objects or figures. Assuming there is direct and unwelcome exposure, it would be deemed to interfere with the viewer's religious autonomy. If, for example, the crèche is featured in the same context as it was in *Lynch*,[146] although there may be direct exposure, it is not unwelcome, thus there is no Article III injury. Also, if the plaintiff is a Christian and strict separationist, for example, her direct exposure is not unwelcome because she cannot challenge a crèche display because, after all, it comports with her religion.

Second, the plaintiff's direct and unwelcome exposure to the challenged display must be persistent. This builds upon Justice Kennedy's permanent Latin cross language in his *County of Allegheny* dissent. If a city government erected a large Latin cross on the rooftop of a government building, which was to remain indefinitely, this would certainly satisfy the persistent requirement. This permanent display would result in the government's aggressive attempt to proselytize on the behalf of a particular religion. However, a display that is only present for a short, fixed duration during the holiday season would not satisfy persistent exposure. For example, if we assume the challengers in *County of Allegheny* had direct and unwelcome exposure to the crèche, the display would not be challengeable under the persistent prong of this test because it was only present during the short holiday season.

Finally, if an individual has direct, unwelcome, and persistent exposure to a religious display and is forced to make the decision to either continue to confront the display or suffer some

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[145] This is similar to the facts in *Valley Forge* where the challengers read about the property conveyance in a news release. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 469 (1982); *see supra* notes 16-20 and accompanying text. Merely reading about the display in a magazine or newspaper would not amount to direct exposure to amount to any coercive nature.

[146] *See supra* notes 39-47 and accompanying text.

kind of quantifiable harm or make some sacrifice to avoid further exposure, then there is some coercion. The final prong of this coercion test is a "choice of evils" scenario similar to the one faced by the students in *Schempp* and *Lee*.[147] They were forced to make a decision: participate/attend or suffer some sort of likely consequences, whether it be in the form of social ostracism or general disdain from fellow students. This coercion harm is not a stigmatic injury but a sufficient Article III injury

To summarize, if the courts applied this test in challenges to religious displays, then Article III and the Establishment Clause would be reconciled. This test, while not perfect, does provide a "golden mean" between two schools of thought. On one side of the spectrum there are courts of appeals that require only direct contact with the religious display to satisfy standing's injury requirement.[148] This approach, as explained above, does not comport with the Court's interpretation and definition of what constitutes an Article III injury. On the opposite side of the spectrum, there are some commentators who concede there may be a violation of a civil liberty through the government's violation of the Establishment Clause, but nonetheless argue that *no one* has standing to challenge the display because of a very strict reading of the Court's Article III injury definition.[149] The above coercion test attempts to reconcile two constitutional doctrines and provide the appropriate balance so that one is not sacrificed on behalf of the other.

V. APPLYING THE DIRECT, UNWELCOME, PERSISTENT, AND "CHOICE OF EVILS" TEST

Justice Kennedy's dissent in *County of Allegheny*, as well the Court's coercion-based doctrine, provides the foundation for the above test. It builds upon the notion that "it would be difficult indeed to establish a religion without some measure of more or

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[147] *See supra* notes 71-83 and accompanying text.

[148] *See supra* Part II.

[149] *See, e.g.*, David Harvey, *It's Time To Make Non-Economic or Citizen Standing Take a Seat in "Religious Display" Cases*, 40 DUQ. L. REV. 313, 370-71 (2002); *Cf.* Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 618 (2007) (Scalia, J., concurring) (arguing that taxpayer standing is irreconcilable with Article III's standing doctrine).

less subtle coercion . . . ."[150] The adoption of the previously described test in Part IV, which is applied in the following paragraphs, to religious display challenges would find an injury that comports with the standing doctrine and reconciles Article III and the Establishment Clause.

A. Direct, but Not Unwelcome Exposure

John Smith moved to the small town of Blackacre in June 2013. He runs a small gift shop on the outskirts of town. Every December, Blackacre erects a crèche on the courthouse lawn, flanked by a Santa Claus figure, several reindeer, and two Christmas trees decorated with garland and ornaments. The town removes the crèche the first Monday after January 1. The town did not pay for the crèche (it was donated by a local church) or expend any tax dollars to maintain the display.

One day in mid-December, John is reading the local newspaper and sees a picture of the display. He has only seen the display on one other occasion when he ventured into town to meet a friend for lunch. John is an agnostic and is incensed that the city would violate the Establishment Clause in such a gross way, so he decides to file suit.

John satisfies the direct exposure prong listed in Part IV because he physically encountered the display. If John lived two states over from Blackacre and only read about the display in a newspaper,[151] his claim would, of course, fail under the direct exposure prong. However, under the unwelcome exposure prong of the test listed in Part IV, John's claim would fail. Since the two decorated Christmas trees, Santa figure, and reindeer accompany the crèche, he does not satisfy the unwelcome exposure prong because of the presence of secular symbols with the crèche.

B. Direct and Unwelcome Exposure, but Not Persistent

Assume the same facts as above but the secular symbols are not present and John's business requires him to make a weekly trip to the city and see the crèche each trip. He files suit alleging

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[150] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., dissenting).

[151] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 469 (1982).

that the display violates the Establishment Clause. John satisfies the direct and unwelcome prong of the test, but the exposure is not persistent because the display is only present for a mere four to five weeks. Assuming, *arguendo*, that John had direct and unwelcome exposure to the display and was forced into a choice of evils scenario, as required by the final part of the test, his claim would still fail. Any proselytizing effect cannot manifest itself in such a short span of time.

C. Direct, Unwelcome, and Persistent Exposure, but No Choice of Evils

Jane Doe works as a paralegal in the town of Blackacre where she has lived for several years. As a paralegal, she spends a significant amount of time at the county courthouse filing documents for her employer. For many years, the Blackacre courthouse has proudly displayed a copy of the Ten Commandments in the back hallway of the courthouse, which is just across from the courthouse's rear entrance. Any person who passes through this entrance is more than likely to see the display. Jane has always used this entrance to go to the clerk's office, not the courthouse's front door.

She is a strict separationist and is finally fed up with having to encounter the display several times a week and decides to file suit, alleging that the Ten Commandments display violates the Establishment Clause. While Jane's exposure is direct, unwelcome, and persistent, she has not been forced into a choice of evils scenario; she could simply use the other entrance to the courthouse and not have to view the painting. If a challenger, like Jane in this scenario, can take reasonable measures to avoid the display, then—even though her exposure may be direct, unwelcome, and persistent—she fails the final prong of the test because she could easily avoid the display.

D. Satisfying the Test: Direct, Unwelcome, Persistent Exposure and a "Choice of Evils"

Assume the same facts in the above example but the Blackacre courthouse only has one entrance and the display is directly across from the clerk's office; therefore, any person

wishing to do business in the clerk's office will likely see it. After years of working as a paralegal and many, many trips to the clerk's office, Jane cannot take any more exposure to the Ten Commandments display; its proselytizing effect is too much for her.

One morning at work, her boss asks her to file something in the clerk's office. Jane refuses, citing her disapproval of the display and her direct, unwelcome, and persistent exposure to it every time she visits the clerk's office. Her boss, confused and slightly upset, files the documents herself. The next day, Jane's boss asks her to deliver some more documents to the clerk's office, but Jane refuses. Jane's boss gives her an ultimatum: do her job and go to the courthouse as asked or you are terminated. Jane, who is incredibly stubborn but wants to keep her job, acquiesces and makes yet another trip to the courthouse and sees the display.

The next day Jane files suit in Blackacre's federal district court, alleging that the display violates the Establishment Clause, and the direct, unwelcome, persistent exposure has forced her to either lose her job or keep confronting the Ten Commandments display. In this example, Jane would have successfully alleged an Establishment Clause violation under the prescribed test. The ultimatum, either keep her job or continued exposure to the display, satisfies the choice of evils prong of this test. Like the students in *Lee* and *Schempp*, Jane is forced to make the decision between further exposure to the religious display or suffer some sort of injury. Since she can successfully allege the display has violated the Establishment Clause because of the coercion that has occurred, she also satisfies standing's injury requirement; her injury is coercion-based and not stigmatic.

E. The Test's Effect on Religious Display Challenges

Although this test makes it more difficult to challenge a religious display, it places Article III's standing doctrine and the Court's Establishment Clause jurisprudence on equal footing. A coercion-based approach, unlike the younger endorsement test, has roots in Supreme Court jurisprudence, beginning with the seminal Establishment Clause cases that addressed prayer in public schools. Moreover, Justice Kennedy's dissent, arguing for a coercion-based approach to religious display challenges, received

four votes when the Court considered *County of Allegheny*,[152] so the adoption of a coercion test, like the one this Comment suggests, would not be a radical idea.

The members of the Court have changed since the adoption of the endorsement test; however, the current composition is one that, if faced with a challenge to a religious display, could conceivably overturn the endorsement test approach and opt for a coercion test.[153] One constitutional doctrine cannot be sacrificed or revised away at the expense of another, and adopting a test like the one provided in this Comment will help eliminate the confusion in trying to find and satisfy standing's injury requirement.

CONCLUSION

The Court's endorsement test was adopted by a 5-4 vote in a controversial case and has ultimately caused more constitutional problems than it has solved. The alleged harm does not comport with the Court's Article III standing doctrine jurisprudence; the endorsement harm is merely a stigma-based injury, which the Court has held does not constitute an Article III injury. The solution, however, is not further erosion of the standing doctrine because it serves several crucial roles in the judiciary system, especially preserving the all-important separation of powers.

Courts of appeal have reached different conclusions on what actually constitutes an injury in religious display challenges. Is it direct contact with the display, altered behavior, or something else? These varied approaches are an attempt to protect the standing doctrine, but they also dismantle the basis of the endorsement test.

Since coercive harm, based on an attempt to proselytize is an Article III injury, the application of a coercion test to religious displays challenged under the Establishment Clause would reconcile these conflicting doctrines. This test requires direct, unwelcome, and persistent exposure to the display, which forces

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[152] 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting).

[153] Justice Scalia is the only remaining member that joined Justice Kennedy's *County of Allegheny* dissent. Assuming that Justices Scalia and Kennedy still favor a coercion-based test, they would likely find three other votes from Chief Justice Roberts and Justices Thomas and Alito to form a majority that would overrule *County of Allegheny*.

the viewer into a "choice of evils" scenario where she either has to continue confronting the proselytizing display or suffer some harm or sacrifice.

Although this coercion-like test limits those who could have previously challenged a religious display on Establishment Clause grounds, this test will provide clarity and consistency in the lower courts. Furthermore, and most importantly, the coercion-based harm that results from exposure to the religious display is, unlike the stigmatic endorsement harm, an Article III injury.

There is not a hierarchy within the Constitution; the Establishment Clause is not on a higher tier than Article III; one constitutional provision's purpose and meaning cannot be sacrificed at the expense of another. The goal of this Comment is to restore the balance between the Establishment Clause and Article III's standing doctrine.

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