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# RELIGIOUS LIBERTIES

## NOTHING TO STAND ON: “OFFENDED OBSERVERS” AND THE TEN COMMANDMENTS

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### I. Introduction

The Supreme Court could end many Establishment Clause disputes by enforcing Article III standing requirements on those bringing the lawsuits, who many times have no more stake in the issues than being “offended observers.” Those who oppose governmental acknowledgement of religion virtually ignore standing requirements imposed by the Constitution as pesky obstacles that only distract them from reaching the more interesting Establishment Clause issues. Yet, no federal court should reach the substantive issues unless the parties clearly have standing. For example, the Supreme Court could have resolved the two Ten Commandments cases<sup>1</sup> by ruling that all of the “offended observers” who brought the lawsuits lacked standing to come into federal court in the first place. In both instances the plaintiffs did not present an Article III “case” or “controversy”<sup>2</sup> according to the Court’s standing requirements<sup>3</sup>—they alleged indignation and nothing more.

Note how weak the plaintiffs’ standing is in these cases. In the Kentucky case, the American Civil Liberties Union filed suit on its own behalf and on behalf of its anonymous members in Kentucky who go to the courthouse to “transact civic business” such as obtaining licenses, paying taxes and registering to vote.<sup>4</sup> While at the courthouse, they “have occasion to view” the Ten Commandments display and, since they “perceive” it as an unconstitutional establishment of religion, they are “offended.”<sup>5</sup> In the Texas case, a lawyer with an expired license brought suit because he would routinely walk past a Ten Commandments monument (surrounded by sixteen other nonreligious monuments) on his way to the state law library, and seeing it offended him, he testified, “in that he is not religious.”<sup>6</sup>

This is pretty wispy stuff, yet, in its decisions, the Court never questioned whether these “offended observers” had standing to bring their suits in the first place.<sup>7</sup> Such oversights provide a loophole for every village secularist to charge into court with the ACLU and challenge governmental acknowledgements of religion, no matter how passive or benign.<sup>8</sup> These delicate plaintiffs with eggshell sensitivities—who claim deep offense at the acknowledgement of any beliefs that conflict with their own—then seek court orders censoring the religious message, as a type of “heckler’s veto.”<sup>9</sup> Of course, the government does have real obligations imposed by the Establishment Clause, but these should be enforced in federal court in lawsuits brought by actual plaintiffs suffering real, concrete harm. Not enforcing standing requirements allows lawsuits with dubious constitutional validity to clutter the federal courts. Article III standing requirements should be enforced in Establishment Clause cases just as they are in all other areas of the law.<sup>10</sup>

### II. “Concrete Harm” Provides Firm Footing for Plaintiffs

To have standing under Article III, a plaintiff must have suffered a “concrete and particularized” injury as the result of an actual or imminent invasion of a legally protected interest.<sup>11</sup> This requirement is generally strict: Even in environmental lawsuits, where the harm is naturally more dispersed, plaintiffs still must demonstrate a direct and particularized injury to their unique interest.<sup>12</sup> Second, there must be a causal connection between the injury suffered and the challenged action of the defendant.<sup>13</sup> And third, it must be likely that the injury will be redressed by a favorable judicial decision.<sup>14</sup>

These Article III standing requirements apply with equal force to Establishment Clause claims.<sup>15</sup> In *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Court rejected the idea that the Establishment Clause confers to citizens a personal constitutional right to a government that does not establish religion.<sup>16</sup> The Court also rejected a more lax standing threshold for Establishment Clause claims based either on the notion that these claims are of superior importance or that violations of the Establishment Clause typically will not cause sufficient injury to confer standing under “traditional” standing requirements.<sup>17</sup> Indeed, the Court asserted that the “assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”<sup>18</sup> Perhaps most pertinent to the recent Ten Commandments challenges, the Court held that a psychological consequence produced by observation of conduct with which one disagrees is not a personal injury sufficient to confer standing under Article III, even if it is phrased in constitutional terms.<sup>19</sup> The federal courts are not a “vehicle for the vindication of the value interest of concerned bystanders.”<sup>20</sup>

The Supreme Court awoke to the need to enforce standing requirements in Establishment Clause cases in *Elk Grove Unified School District v. Newdow*, ruling that Mr. Newdow lacked standing to challenge the phrase “under God” in the Pledge of Allegiance recited by his daughter every day at school.<sup>21</sup> Only his daughter, as the person subjected to allegedly unwelcome state-sponsored religious exercise,<sup>22</sup> or her legal custodial parent would have standing to challenge the practice. Mr. Newdow’s offense that his daughter was directed to recite the pledge daily was not sufficient injury to grant standing.<sup>23</sup>

### III. Jurisdictional Quagmire

The circuit courts, however, are not following *Elk Grove*<sup>24</sup> and *Valley Forge*,<sup>25</sup> and the Supreme Court has only added to the problem by ignoring standing in the recent Ten Commandments cases. Some circuits have held that direct contact with an offensive display is a sufficient injury to

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confer standing,<sup>26</sup> while others have indicated that standing requires something more than contact.<sup>27</sup> In the “offensive contact” jurisdictions, the courts have effectively adopted a non-existent Establishment Clause exception of “proximate standing;” plaintiffs need not suffer actual injury because merely being *near* the alleged establishment is enough to grant Article III standing.<sup>28</sup> Such “nearby” standing is no better exemplified than in the Court’s Ten Commandments decisions, where each plaintiff’s “injury” consisted solely of having occasion to pass by the “offensive” display.<sup>29</sup> This relaxed standard flies in the face of *Valley Forge*’s holding that there is no “sliding scale” of standing.<sup>30</sup>

Also, no standing exists, generally, for “enhanced” offended observers, who have changed their behavior to avoid the disagreeable message. These plaintiffs’ self-imposed cost, which can be even a tiny detour attributable to the “offense,” merely “validates the existence of genuine distress” for courts that grant standing to these “enhanced” offended observers.<sup>31</sup> They then declare this supposedly heightened degree of offense (which is still just offense and not injury) sufficient for standing.

The plaintiffs in these cases do no more than allege the endorsement buzzwords: that the display in question makes them feel like “outsiders” who are not “full members of the political community.”<sup>32</sup> Incredibly, courts treat the alleged feelings as proof of injury enough for standing, despite the fact that no government action has altered anyone’s political standing, full participation in citizenship, or inclusion in the community.<sup>33</sup> “No one loses the right to vote, the freedom to speak, or any other state or federal right if he or she does not happen to share the religious ideas that such practices appear to approve.”<sup>34</sup>

These courts erroneously rely on *School District of Abington Township v. Schempp*<sup>35</sup> in their decisions, attempting to stretch a parallel between a law that required school children to begin their day with Bible reading and prayer and passing by a passive display of a religious text or symbol in the public arena.<sup>36</sup> But the Supreme Court has already rejected this far-fetched comparison: “The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.”<sup>37</sup> In other words, courts should be careful not to conflate the threshold standing question with the ultimate substantive question, as the circuits have been doing in the offended observer cases.

For example, Michael Newdow had no standing to challenge the reciting of prayers at the President’s Inauguration in January 2005 merely because he wanted to attend the event, but a Secret Service agent who is an atheist and is ordered to guard the President during that event would have standing to challenge the prayers. The Secret Service agent would have concrete harm for standing purposes; Michael Newdow as a mere attendee would not. Although

the Secret Service agent would have standing to bring his challenge, he should lose his substantive Establishment Clause claim challenging the constitutionality of the prayers in light of such cases such as *Marsh v. Chambers*, which upheld the practice of chaplains praying before state legislative sessions.<sup>38</sup>

The plaintiff’s standing can only rest on a concrete injury—whether a government action does or does not violate the Establishment Clause is a separate question that is only reached once standing has been satisfied.<sup>39</sup> Even if a court ignores the Article III problem, *Schempp* is still not an appropriate comparison. *Schempp* had a concrete injury because the law required that suggestible, captive schoolchildren be led in daily religious exercises;<sup>40</sup> an adult choosing to walk past a passive Ten Commandments display is not required, coerced, or even encouraged to read the display, much less agree with its tenets.

Some federal judges have sounded the alarm against the lax standards of standing for “offended observer” plaintiffs bringing Establishment Clause cases. Judge Guy of the Sixth Circuit has been disturbed that courts would recognize the so-called “injury” suffered by offended observers.<sup>41</sup> Judge Easterbrook of the Seventh Circuit has addressed this issue at some length.<sup>42</sup> He points out that *Valley Forge* requires courts to distinguish between injured and ideological plaintiffs, despite the line of circuit court decisions that have attempted to reduce *Valley Forge* to a “hollow shell.”<sup>43</sup> He further notes:

If because no one is injured there is no controversy, then the Constitution demands that the court dismiss the suit. There is no exception for subjects that as a result cannot be raised at all . . . If there is no case, then there is no occasion for deciding a constitutional question, and we should not mourn or struggle against this allocation of governmental powers.<sup>44</sup>

The First Circuit recently followed this reasoning (that is, followed the law) and dismissed an offended observer’s suit concerning a city’s holiday display policy, holding that “although [the plaintiff was] offended by the Policy, she has sustained no injury in fact.”<sup>45</sup>

Other areas of constitutional law do not allow plaintiffs with this sort of weak standing to file lawsuits in federal court. For example, when the government compels citizens to express its own political message, offended individuals are exempted from the exercise; the message is not itself declared unconstitutional because someone disagrees with it.<sup>46</sup> Although constitutional protections may exist for those compelled to express state-sponsored ideas, no protection exists on offensiveness grounds for those who merely observe the governmental expression in question.<sup>47</sup> When parents have religious objections to the content of their child’s school curriculum, the courts have held that mere offensive exposure to ideas that are contrary to one’s religious beliefs

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is not actionable.<sup>48</sup> A parent's recourse is to the political process of the school board, just as the political system is the proper place for offended observers of the Ten Commandments to take their complaints.

Consider also current equal protection doctrine: Racial minorities who feel stigmatized by government action but have suffered no concrete harm in addition to the psychological affront have no standing to bring a constitutional claim.<sup>49</sup> For example, parents who sued to enforce the government's non-discrimination policy regarding tax exemption for private schools on the basis that illegal government complicity in discrimination stigmatized them were denied standing because they did not indicate that their children had ever or would ever apply to a private school.<sup>50</sup> The Court recognized that the stigmatizing injury caused by racial discrimination is "one of the most serious consequences of discriminatory government action"<sup>51</sup> and the government was quite possibly not obeying or enforcing the law. But the Supreme Court denied standing even to those worthy plaintiffs because only persons suffering particularized harm have standing to challenge discriminatory governmental actions in such cases.<sup>52</sup> The gravity of the substantive issue in these cases was not allowed to affect the threshold question of whether the plaintiffs had standing, and it should be no different in "offended observer" cases.

Outside of the Establishment Clause arena, "offended observers" have no standing to challenge the government's messages.<sup>53</sup> Governmental messages to support the war in Iraq or to stop smoking or to "buy savings bonds," etc. may be deeply offensive to many people, but they do not give standing for offended observers to bring lawsuits to censor the message. Memorials dedicated to the Unknown Child, which offend abortion advocates, survive court challenges.<sup>54</sup> Also, the Maryland State House exhibits a statue of Chief Justice Roger Taney, author of the *Dred Scott* decision, and that display certainly has the potential to seriously offend an onlooker, especially an African-American citizen of Maryland. Such an individual, although legitimately aggrieved, would have no legal recourse to remove the statue, and neither should a person who passes a Ten Commandments monument on public property. Lack of a judicial remedy does not silence these citizens, however: both can assert their views by appealing to the political process in a variety of ways.<sup>55</sup> "When the government expresses views in public debates, all are as free as they were before; that these views may offend some and persuade others is a political rather than a constitutional problem."<sup>56</sup>

In the same way, the Ten Commandments do not cause observers concrete injury, no matter how much they dislike or disagree with the display. And without concrete injury, Article III cannot be satisfied<sup>57</sup>—the Constitution refuses to give every concerned bystander a free pass into court.<sup>58</sup> Certainly, all speech has potential to offend, but insult without injury is not enough to create a case or controversy.<sup>59</sup>

#### IV. Establishment Clause Quicksand

Allowing "offended observers" to file Establishment Clause challenges violates the principle upheld in the heckler's veto cases,<sup>60</sup> that speech should not be restricted based on a hostile reaction from the listeners. This principle applies to religious speech as well, with the Court refusing to use Establishment Clause jurisprudence as a "modified heckler's veto."<sup>61</sup> While the government is not a private speaker, the analogy is still apt, as Justice O'Connor has noted: "Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."<sup>62</sup>

Despite being aware of the danger, this is precisely what the courts have done by giving "offended observers" standing. Once these hecklers are allowed in court, their opinions override those of the rest of the population, including our duly elected representatives in the government.<sup>63</sup> Granting anti-religious observers veto power to drive all religious references from the public square replaces a "sense of proportion and fit with uncompromising rigidity at a costly price to the values of the First Amendment."<sup>64</sup>

One of these First Amendment values, indeed its "bedrock," is that the expression of an idea cannot be prohibited solely because it may offend.<sup>65</sup> The First Amendment fully expects that citizens will confront disagreeable ideas and that a robust democracy will refuse to insulate its citizens from views that they disagree with or even find inflammatory.<sup>66</sup> For example, in the free speech case *Texas v. Johnson*, the Court held that a statute prohibiting the desecration of the American flag was unconstitutional because protecting onlookers from psychic harm did not rise to a level of compelling state interest.<sup>67</sup> In fact, the Court concluded that the Constitution *prevents* the state from protecting individuals from offense in such situations.<sup>68</sup> This line of reasoning is inconsistent<sup>69</sup> with the contention from modern Establishment Clause jurisprudence that the Constitution protects observers from a feeling of alienation created by observing something with which they disagree.<sup>70</sup> While the speech clause cases minimize the importance of protecting citizens from offense, current religion clause jurisprudence "suggests that the protection of persons from offense may rise to a constitutional requirement."<sup>71</sup> As a result, the heckler's veto is alive and well in Establishment Clause jurisprudence.

#### V. Conclusion

While Article III's standing requirements, as explicated by the Court through the years, provide firm footing for injured plaintiffs, modern Establishment Clause jurisprudence has turned a blind eye to these requirements and headed into the jurisdictional quagmire of "offended observers." The *McCreary County* and *Van Orden* Ten Commandments cases fall into that category of cases where actual injury, and therefore standing to bring suit, is conspicuously absent. The plaintiffs alleged only offense, therefore their cases should have been dismissed for lack of standing instead of adding two more contradictory holdings to modern religion

clause jurisprudence. If the courts continue to manufacture their own footing for standing in “offended observer” cases, the meaning, protections, and liberties of the Establishment Clause will soon disappear into the quicksand.

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## Footnotes

<sup>1</sup> *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

<sup>2</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>3</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>4</sup> Complaint ¶ 15, *ACLU v. McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507); Complaint ¶ 15, *ACLU v. Pulaski County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509).

<sup>5</sup> *Id.* at ¶ 19.

<sup>6</sup> *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at \*2 (W.D. Tex. Oct. 2, 2002).

<sup>7</sup> *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (However, three of the Justices have previously questioned whether mere exposure to a religious display or symbol that offends one’s beliefs is sufficient to confer standing.); *City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., with whom Scalia, J. and Thomas, J. join, dissenting from denial of cert.).

<sup>8</sup> Recall, for example, atheist Michael Newdow’s lawsuit to prevent pastors from praying at President Bush’s inauguration. *Newdow v. Bush*, 89 Fed. Appx. 624 (2004).

<sup>9</sup> *Elk Grove United Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2321 (2004) (O’Connor, J., concurring).

<sup>10</sup> *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (holding that the standing requirements are the same and not lessened in Establishment Clause cases).

<sup>11</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>12</sup> *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc.*, 528 U.S. 167, 183 (2000) (stating that plaintiffs allege injury in fact when they demonstrate that they uniquely are persons for whom the aesthetic and recreational values of the affected area will be lessened by the challenged activity, as opposed to citizens with a general interest in a clean environment); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990) (“general averments” and “conclusory allegations” are inadequate when there is no showing that particular acres out of thousands were affected by the challenged activity).

<sup>13</sup> *Lujan*, 504 U.S. at 560.

<sup>14</sup> *Id.* at 561.

<sup>15</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of*

*Church & State, Inc.*, 454 U.S. 464, 472 (1982).

<sup>16</sup> *Id.* at 483.

<sup>17</sup> *Id.* at 488.

<sup>18</sup> *Id.* at 489 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 166, 227 (1974)).

<sup>19</sup> *Id.* at 485–86.

<sup>20</sup> *Id.* at 473 (quoting *United States v. Students Challenging Regulatory Agency Procedure*, 412 U.S. 669, 687 (1973)).

<sup>21</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2311 (2004).

<sup>22</sup> *Valley Forge*, 454 U.S. at 487 n.22 (discussing *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963)).

<sup>23</sup> *Elk Grove*, 124 S. Ct. at 2311-12.

<sup>24</sup> Chief Justice Rehnquist stated that the majority used standing in that case as a way to avoid reaching the merits of the constitutional claim about the Pledge of Allegiance. *See id.* at 28 (Rehnquist, C.J., concurring). Whatever the motives of the justices in the majority, Michael Newdow, as the noncustodial parent, did have serious standing problems with his lawsuit challenging the content of his daughter’s education that he did not control and direct. The Supreme Court could have used standing to resolve the Ten Commandments cases as well.

<sup>25</sup> David Harvey, *It’s Time to Make Non-Economic or Citizen Standing Take A Seat in “Religious Display” Cases*, 40 DUQ. L. REV. 313, 320–21 (2002) (courts now assume standing when a complaint is grounded in the Establishment Clause rather than basing it on any palpable injury suffered by the plaintiff).

<sup>26</sup> *See, e.g., Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001); *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989).

<sup>27</sup> *See, e.g., ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001); *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), cert. denied, 512 U.S. 1220 (1994); *Sullivan v. Syracuse Housing Auth.*, 962 F.2d 1101 (2d Cir. 1992); *Fordyce v. Frohnmayer*, 763 F. Supp. 654 (D.C. Cir. 1991).

<sup>28</sup> Lawrence Gene Sager, *State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 969–70 (1985).

<sup>29</sup> *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at \*2 (W.D. Tex. Oct. 2, 2002); Complaint ¶ 19, *ACLU v. McCreary County*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (Case No. 99-507); Complaint ¶ 19, *ACLU v. Pulaski County*, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (Case No. 99-509).

<sup>30</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) (Moreover, some courts have adopted a separate Establishment Clause standing doctrine that directly contradicts *Valley Forge*.) *See Suhre v. Haywood County*, 131 F.3d 1083 (1997) (holding that Establishment Clause plaintiffs do not bear the same heavy burden to prove standing). They claim to have a license to lower the bar because “the concept of injury for standing

purposes is particularly elusive in Establishment Clause cases.” Saladin v. Milledgeville, 812 F.2d 687, 691 (1987).

<sup>31</sup> Harris v. City of Zion, 927 F.2d 1401, 1406 (1991).

<sup>32</sup> Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

<sup>33</sup> Brief of Amici Curiae Conservative Legal Defense and Educ. Fund et al. at 23–24, McCreary County v. ACLU, 125 S.Ct. 2722 (2005).

<sup>34</sup> Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusion: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 307 (1987).

<sup>35</sup> Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

<sup>36</sup> See, e.g., Suhre v. Haywood County, 131 F.3d 1083, 1086 (1997) (erroneously stating that contact with religious symbolism was the injury sufficient for standing in Schempp).

<sup>37</sup> Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 487 n.22 (1982).

<sup>38</sup> 463 U.S. 783 (1983).

<sup>39</sup> *Valley Forge* at 489. (“case and controversies” are not merely convenient vehicles for correcting constitutional errors that may be dispensed with when they become obstacles to that endeavor—such a philosophy does not become any more palatable when the underlying merits concern the Establishment Clause).

<sup>40</sup> Sch. Dist. of Abington Township, 374 U.S. at 205–208.

<sup>41</sup> Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 684–685 (6th Cir. 1994) (Guy, J., concurring).

<sup>42</sup> Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005) (Easterbrook, J. concurring); *Zion*, 927 F.2d 1401 (7th Cir. 1991) (Easterbrook, J., dissenting).

<sup>43</sup> *Books*, 401 F.3d at 871 (Easterbrook, J., dissenting).

<sup>44</sup> *Harris*, 927 F.2d at 1422 (Easterbrook, J., dissenting).

<sup>45</sup> *Osediacz v. City of Cranston*, No. 04-2673, 2005 WL 1575628, at \*6 (1st Cir. July 6, 2005).

<sup>46</sup> See *Wooley v. Maynard*, 430 U.S. 705 (1977) (Jehovah’s Witness could not be forced to display state’s “Live Free or Die” motto on his license plate, but the Court did not prevent the state from displaying that or other disagreeable messages); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (allowing objecting students to opt out of the mandatory flag salute, but the Court did not require that the salute be terminated).

<sup>47</sup> William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 359 (1991).

<sup>48</sup> *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1984).

<sup>49</sup> E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U.L. REV. 1183, 1222 (1994).

<sup>50</sup> *Allen v. Wright*, 468 U.S. 737, 746 (1984).

<sup>51</sup> *Id.* at 755.

<sup>52</sup> *Id.*; see also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that plaintiff had no standing to challenge a club’s racially discriminatory membership policies because he had never applied for membership and was denied service as a guest only).

<sup>53</sup> See *Wallace*, *supra* note 50, at 1222.

<sup>54</sup> See generally *Fausto v. Diamond*, 589 F. Supp. 451 (D.R.I. 1984) (holding the display, maintenance, and preservation of a memorial to the Unknown Child does not violate the Establishment Clause).

<sup>55</sup> Brief of Amici Curiae Focus on the Family at 26, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

<sup>56</sup> *Am. Jewish Congress v. City of Chicago*, 827 F.2d 210, 133 (Easterbrook, J., dissenting).

<sup>57</sup> The Court has not wavered from *Valley Forge*’s “irreducible minimum” for standing in the two decades since that decision. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (the three standing requirements are “an essential and unchanging part of Article III’s case-or-controversy requirement” and “a key factor in dividing the power of government between the courts and the two political branches.”).

<sup>58</sup> The Court has emphasized the fundamental importance of the standing requirements to the entire framework of our constitutional form of government. See *id.*; *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (“constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992) (“the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (standing inquiry “serves to identify those disputes which are appropriately resolved through the judicial process”).

<sup>59</sup> *Am. Jewish Congress*, 827 F.2d at 134 (Easterbrook, J., dissenting).

<sup>60</sup> See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

<sup>61</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

<sup>62</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. at 2321 (2004) (O’Connor, J., concurring).

<sup>63</sup> This may be because the endorsement test itself is a function of perceptions and feelings, *Wallace*, *supra* note 50, at 1221 (“Since the purpose of the endorsement inquiry is to protect the sensibilities of nonadherents, establishment is formulated as a function of personal perceptions or feelings rather than as an abuse of government power.”), or because observers are not held to an appropriate reasonableness standard, *Elk Grove*, 124 S. Ct. at 2322 (O’Connor, J., concurring) (“[T]he reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation’s cultural landscape.”); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (“The reasonable observer does not look upon religion with a jaundiced eye, and religious speech need not yield to those who do . . . We [recognize] a new threat to religious speech in the concept of the ‘Ignoramus’s Veto.’ The Ignoramus’s Veto lies in the hands of those determined to

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see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed”). Certainly, this reasonable person would be aware of the history of our Nation’s laws and its religious heritage and would recognize that these, not a legal preference for a religious sect, are represented in a display of the Ten Commandments.

<sup>64</sup> Van Orden v. Perry, 351 F.3d 173, 182 (5th Cir. 2003), *aff’d*, 125 S.Ct. 2854 (2005).

<sup>65</sup> Texas v. Johnson, 491 U.S. 397, 414 (1989).

<sup>66</sup> *Elk Grove*, 124 S.Ct. at 2327 (O’Connor, J., concurring).

<sup>67</sup> *Johnson*, 491 U.S. at 408–10.

<sup>68</sup> *Id.*

<sup>69</sup> This inconsistency is not accounted for by the identity of the speaker; that is, it does not matter that in one case the speaker is a private individual and in the other the speaker is the government. As has been demonstrated above, the government may speak in countless offensive messages or take sides in numerous debates, all without rising to the level of unconstitutionality.

<sup>70</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (endorsement test is concerned that nonadherants may feel like “outsiders”).

<sup>71</sup> William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 *IND. L.J.* 351, 376 (1991).