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TILTING AT CROSSES: NONTAXPAYER STANDING TO SUE UNDER THE ESTABLISHMENT CLAUSE

Marc Rohr[†]

INTRODUCTION

Litigants seeking to enjoin violations of the Establishment Clause of the First Amendment often have little to gain personally beyond the satisfaction of having helped to enforce that constitutional principle. However, as the Supreme Court said so emphatically in its 1982 decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,[1] such an interest is insufficient to satisfy the requirement of "injury in fact" that the Court has found implicit in Article III's limitation of the federal judicial power to "cases" and "controversies."[2] When the governmental practice challenged under the Establishment Clause is one for which government funds are being (or, perhaps, have been) spent, no standing problem exists, because the litigant, as a taxpayer, can maintain that the litigant's tax payments are being unconstitutionally spent.[3] In 1968 the Supreme Court so held in *Flast v. Cohen* with respect to federal expenditures.[4] Apparently, the same principle always applied to the standing of state or local

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1. 454 U.S. 464 (1982).
2. *Id.* at 485-86.
3. Flast v. Cohen, 392 U.S. 83 (1968).
4. *Id.*

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taxpayers challenging state or local expenditures, at least in federal court.[5]

Flast carved out a major, and most welcome, exception to the longstanding rule of the 1923 *Frothingham v. Mellon* decision that federal taxpayers, as such, have no standing to challenge federal expenditures as unconstitutional.[6] *Flast*'s theoretical unpersuasiveness may thus be easily overlooked, but the fact remains that a *Flast* plaintiff realistically has nothing more to gain from a lawsuit than the satisfaction of helping to enforce the dictates of the Constitution. Prevailing in such a case, thereby foreclosing one avenue of government expenditure, is not truly likely to result in a reduced tax burden; even if it did, the amount of the resulting tax reduction would, in all probability, be so tiny that it could not possibly serve as the true motivating force behind any such lawsuit. While there is a greater chance at the local level (as opposed to the state or federal level) that a meaningful reduction in one's tax burden may be achieved through such a lawsuit, that greater chance is still a very small chance. The *Flast* rule, then, permits a litigant to have Article III standing on the basis of an ostensibly tangible injury that is in reality nothing more than a vehicle for redressing the very kind of "psychological" injury of which the majority spoke so disparagingly in *Valley Forge*.[7]

But what of the case in which a claim is made that government has violated the Establishment Clause without spending any money? Neither *Flast* nor *Valley Forge* is helpful on this issue. Justice Rehnquist, writing for the majority in *Valley Forge*, rejected the suggestion, taken seriously by the Court of Appeals for the Third Circuit, "that the Establishment Clause creates in each citizen a 'personal constitutional right' to a government that does not establish religion."[8] Rejecting the argument that the plaintiffs in *Valley Forge* had standing to

5. *See, e.g.,* Doremus v. Board of Educ., 342 U.S. 429, 433-34 (1952). A possible distinction has been suggested, however, between state taxpayer standing and municipal taxpayer standing. Taub v. Kentucky, 842 F.2d 912, 918 (6th Cir. 1988).

6. Frothingham v. Mellon, 262 U.S. 447, 486-87 (1923).

7. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485-86 (1982).

8. *Id.* at 483 (quoting Americans United for Separation of Church and State, Inc. v. United States Dep't of Health, Educ. and Welfare, 619 F.2d 252, 265 (3d Cir. 1980) (quoting *Flast,* 392 U.S. at 114 (Stewart, J., concurring))).

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challenge the conveyance of government property to a sectarian college, he wrote:

> Although [plaintiffs] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.[9]

When one seeks to challenge a governmental practice that arguably endorses religion, but which costs government no money (at least in any easily measurable way), is there a better basis for standing than mere psychological injury?

Today, the issue of standing to challenge arguable violations of the Establishment Clause in federal court arises most typically in cases in which a local government has given symbolic recognition to religion by permitting a private party to place a cross, menorah, nativity scene, or other religious statuary on public property. When no public funds are expended for this purpose, taxpayer standing is unavailable, and the question thus arises: what other injury can a plaintiff satisfactorily allege to satisfy the requirements of standing to sue in federal court?

I. THE SUPREME COURT CASES

One might expect that by now, after more than four decades of modern Establishment Clause jurisprudence at the Supreme Court level, the issue of standing would be free from doubt. In fact, the Court has provided surprisingly little guidance on the point, and virtually all of that guidance has come in the context of Establishment Clause challenges to religious activities in the public schools.

9. *Id.* at 485-86 (emphasis added). The argument for standing was weakened further by the fact that the *Valley Forge* plaintiffs did not even reside in the state in which the property was located. *Id.* at 487. The plaintiffs' theory of *taxpayer* standing was rejected as well, despite the fact that plaintiffs' challenge was to a federal administrative agency that had given federal property to a religious institution. *Id.* at 467-68. The fact that property, rather than funds, was given, along with the fact that an administrator, rather than Congress, had given it, sufficed in the eyes of the majority to distinguish the case from *Flast*. *Id.* at 479-80.

A. *The Public School Cases*

In *McCollum v. Board of Education*,[10] the Court held that a public school system could not constitutionally make its facilities available to religious groups whose teachers were allowed to hold religious classes in public school classrooms during regular school hours, even though only those children whose parents requested that they attend religious classes did so.[11] Justice Black described the plaintiff as a resident, taxpayer, and parent of a student,[12] but, while rejecting as "without merit" the school board's argument that plaintiff lacked standing to sue,[13] Justice Black provided no explanation of the precise injury suffered by the plaintiff as a result of the challenged practice. Justice Black's silence (for the majority) on this point is somewhat harder to understand in light of Justice Jackson's concurrence, in which he took some time to express his "reservations" about the result, believing it "doubtful" that the Court had jurisdiction.[14] The plaintiff's son, he observed, was not compelled to attend religious classes.[15]

> The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution . . . can be construed . . . to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground.[16]

As to taxpayer standing, Justice Jackson continued:

> In this case, however, any cost of this plan to the taxpayers is incalculable and negligible. It can be argued, perhaps, that religious classes add some wear and tear on public buildings and that they should be charged with some expense for heat and light . . . . But the cost is neither

10. 333 U.S. 203 (1948).
11. *Id.* at 211-12.
12. *Id.* at 205.
13. *Id.* at 206.
14. *Id.* at 233-34 (Jackson, J., concurring). The question arises, then, why Justice Jackson did not dissent.
15. *Id.* at 232.
16. *Id.* at 232-33.

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> substantial nor measurable, and no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan. I think it is doubtful whether the taxpayer in this case has shown any substantial property injury.[17]

Four years later, in *Doremus v. Board of Education*,[18] standing was the basis for the Court's decision to dismiss the appeal. Plaintiffs sought to invalidate a New Jersey statute "which provides for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day."[19] One of the plaintiffs was described in the complaint as " 'a citizen and taxpayer.' "[20] Justice Jackson, writing for the majority, said "it is neither conceded nor proved that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work."[21] A taxpayer suit, he went on to say, must be "a good-faith pocketbook action"; however, here "the grievance which it is sought to litigate . . . is not a direct dollars-and-cents injury but is a religious difference."[22]

Another plaintiff in *Doremus* was the parent of a student at the local high school, "where Bible reading was practiced pursuant to the Act."[23] As to this plaintiff's standing, Justice Jackson said the following:

> There is no assertion that [plaintiff's daughter] was injured or even offended [by the Bible reading] or that she was compelled to accept, approve or confess agreement with any dogma or creed or even to listen when the Scriptures were read. On the contrary, . . . any student, at his own or his parents' request, could be excused during Bible reading and . . . in this case no such excuse was asked. However, it was agreed upon argument here that this child had graduated from the public schools before this appeal was

17. *Id.* at 234.
18. 342 U.S. 429 (1952).
19. *Id.* at 430.
20. *Id.* at 431.
21. *Id.*
22. *Id.* at 434.
23. *Id.* at 432.

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> taken to this Court. Obviously no decision we could render now would protect any rights she may once have had . . . .[24]

Thus, as to this plaintiff, it appears the case had become moot. However, this disposition left many questions unanswered. For example, had a younger student been selected as the effective plaintiff, would Justice Jackson still have objected? The plaintiff in *Doremus* did not ask to be excused from the Bible reading, which seemed to count against her with respect to standing; but *had* she asked to be excused, would the Court have pointed to the absence of compulsion, and thus the absence of injury, resulting from the challenged practice? Justice Jackson also noted the absence of any allegation to the effect that she was "offended" by the practice.[25] Would, and should, such "offense" have sufficed to provide standing?

Justice Douglas, joined by Justices Reed and Burton, dissented.[26] Local taxpayers, he contended, "if they were right in their contentions on the merits, . . . would establish that their public schools were being deflected from the educational program for which the taxes were raised. That seems to me to be an adequate interest for the maintenance of this suit by all the taxpayers."[27]

Soon after *Doremus* came the Court's decision in the well-known "released time" case, *Zorach v. Clauson*.[28] The plaintiff, identified as a parent and a taxpayer, challenged the practice of releasing children from public schools in New York City so that they could attend religious training.[29] The nature of the personalized injury to the plaintiff (or his child) was not apparent, and the majority opinion by Justice Douglas did nothing to clarify the point.[30] In a footnote, Justice Douglas stated without elaboration that jurisdiction was not a problem, distinguishing *Doremus* without useful explication, except to point out that the children of the *Zorach* plaintiffs were still attending the New York City schools, whereas the *Doremus*

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24. *Id.* at 432-33.
25. *Id.* at 432.
26. *Id.* at 435.
27. *Id.*
28. 343 U.S. 306 (1952).
29. *Id.* at 308-09.
30. Standing, of course, is always a less urgent consideration, as a practical matter, when the Court upholds the state practice, as it did here. *Id.* at 315.

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plaintiff had graduated from her school.[31] Once again, the Court left questions unanswered. Might the reader infer that those students who, like plaintiff's child, did not leave school early were somehow "coerced" by the program? Both Justice Frankfurter and Justice Jackson referred to this notion in their dissenting opinions, but neither employed it in connection with the issue of standing.[32]

Even in the landmark school prayer decision, *Engel v. Vitale*,[33] in which the parents of public school students objected to the saying of a nondenominational prayer, the Court did not address standing. The following year, in *School District v. Schempp,* the "Bible reading" case generally considered a close relation of *Engel,*[34] Justice Clark addressed the issue of standing in a footnote, stating:

> The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain. Compare *Doremus v. Board of Education,* which involved the same substantive issues presented here. The appeal was there dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers.[35]

Thus, in *Schempp*, plaintiffs had standing because the students were directly affected. But how, exactly, were they affected? According to the challenged Pennsylvania law, any child would be excused from the Bible reading and recitation of the Lord's Prayer upon parental request.[36] On the merits, Justice Clark, citing *Engel,* asserted that the excusal provision provided no defense to an Establishment Clause challenge.[37] In *Engel*, Justice Black, writing for the majority, had indeed taken the position that the voluntary nature of the school prayer was no defense, explaining:

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31. *Id.* at 309 n.4.
32. *See id.* at 321-22 (Frankfurter, J., dissenting); *id.* at 323 (Jackson, J., dissenting).
33. 370 U.S. 421 (1962).
34. 374 U.S. 203 (1963).
35. *Id.* at 224 n.9 (citations omitted).
36. *Id.* at 205.
37. *Id.* at 224-25.

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial 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.[38]

It would not seem unreasonable to conclude, then, that in the view of the Supreme Court of the early 1960s, public school students who preferred not to listen to a religious prayer, or to a reading of passages from the Bible, were being "indirectly coerced" to do so. It also seems reasonable to conclude that such indirect coercion—unwanted exposure to religion by virtue of state action, even in the absence of official compulsion—constituted the manner in which those students were "directly affected" for purposes of standing.

The Supreme Court decided many Establishment Clause cases between 1963 and 1980, but most of them involved the provision of public financial assistance to religious schools, and thus raised no issue of standing.[39] In 1980, in *Stone v. Graham*,[40] the Court decided another case involving religious symbolism in the public school classroom, but said nothing about standing in its per curiam opinion. The plaintiffs challenged the posting of a copy of the Ten Commandments on a wall in each public school classroom in Kentucky.[41] The Court struck down the practice as violative of the Establishment Clause.[42] Even Justice Rehnquist, in dissent, said nothing about standing, or about the nature of the plaintiffs.[43] Did the Justices assume that state funds had been expended to post the forbidden documents, or did they deem

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38. Engel v. Vitale, 370 U.S. 421, 430-31 (1962).

39. *See, e.g.,* Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).

40. 449 U.S. 39 (1980).

41. *Id.*

42. *Id.* at 42-43.

43. *See id.* at 43-47 (Rehnquist, J., dissenting).

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it sufficient that some students would be forced, contrary to their wishes, to view this religious display in a public school?

Writing for the majority in *Valley Forge* two years later, Rehnquist distinguished the public school setting, fairly characterizing the standing decision in *Schempp*: "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."[44]

Although it did not cite *Schempp*, the Court in *Lee v. Weisman*[45] appeared to rely implicitly on similar reasoning, observing simply that the student whose parent was aggrieved by the utterance of a prayer at her middle school graduation was now enrolled in high school and thus likely to encounter a similar prayer at another graduation ceremony.[46]

In another school-related Establishment Clause case recently decided by the Supreme Court, the plaintiffs' standing was explained, in a footnote, as hinging on the plaintiffs' status as state taxpayers.[47] Nothing was said concerning the basis for standing, however, in the "moment of silence" case[48] or the "creation science" case.[49]

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44. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 487 n.22 (1982).

45. 112 S. Ct. 2649 (1992).

46. *Id.* at 2653. In making that observation, the Court indicated that it was, for that reason, "unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us." *Id.* Comparing *Lee* to *Schempp*, it may be instructive to note that it is not clear that all of the students whose interests were considered in *Lee* could readily be described as "impressionable schoolchildren"—the phrase used by Justice Rehnquist in *Valley Forge* to explain the basis of standing in *Schempp*. It is true that Justice Kennedy's majority opinion in *Lee* rested most heavily on a theory of "coercion." *Id.* at 2655-61. Even the dissenting Justices, who rejected the suggestion that high school students were being coerced to participate in the prayers, did not suggest that the plaintiffs lacked standing. *Id.* at 2680-85 (Scalia, J., dissenting).

47. Board of Educ. v. Grumet, 114 S. Ct. 2481, 2487 n.2 (1994). The standing of the plaintiffs is explained in *Grumet v. Board of Educ.*, 592 N.Y.S.2d 123, 126 (N.Y. App. Div. 1992). *See also* Marsh v. Chambers, 463 U.S. 783, 786 n.4 (1983) (involving the recitation of prayers in a state legislature).

48. *See* Wallace v. Jaffree, 472 U.S. 38 (1985).

49. *See* Edwards v. Aguillard, 482 U.S. 578 (1987).

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B. The Religious Symbol Cases

In the first "creche" case to reach the Supreme Court, *Lynch v. Donnelly*,[50] the First Circuit Court of Appeals held that the plaintiffs, as city residents, had standing as taxpayers to challenge the city's maintenance of a creche, despite the very small amount of money involved (about $20 a year) in erecting and dismantling it. In *County of Allegheny v. ACLU*,[51] a case involving governmental maintenance of both a creche and a menorah, neither the Supreme Court nor the Third Circuit Court of Appeals addressed the issue of standing.[52] The following factual observations from the court of appeals opinion, however, may be considered relevant to the point:

> The creche, though stored in the basement of the courthouse, is the property of the Holy Name Society of the Diocese of Pittsburgh . . . . Though it is erected, arranged and disassembled each year by the moderator of the Holy Name Society, the county supplies a dolly and minimal aid to transport it to and from the courthouse basement. While the county provides no special security or illumination for the display, its Bureau of Cultural Programs decorates the creche with . . . poinsettia plants and evergreen trees purchased at public expense. The county also displays wreaths purchased through county funds.
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> . . . .
>
> The menorah, which was purchased by Chabad, is put in place at the time of . . . Chanukah. . . . The display, which includes the tree and its ornaments, the platform, the sign and the menorah, is installed by city employees.[53]

The court left unclear whether it simply assumed that, as in *Lynch*, the plaintiff-residents had standing as taxpayers, despite these minimal public expenditures.

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50. 465 U.S. 668 (1984) (leaving untouched the Court of Appeals' determination that the plaintiffs had standing), *rev'g* 691 F.2d 1029 (1st Cir. 1982).

51. 492 U.S. 573 (1989), *aff'g in part and rev'g in part* 842 F.2d 655 (3d Cir. 1988). In this case, as in many of the cases cited in this Article, at least one of the plaintiffs was an association. 842 F.2d at 656. It is well established that an association has standing to sue, on behalf of its members, if at least one of its members would have standing to sue. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 432 (1977); Warth v. Seldin, 422 U.S. 490, 511 (1975).

52. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); ACLU v. County of Allegheny, 842 F.2d 655 (3d Cir. 1988).

53. *Allegheny,* 842 F.2d at 657-58.

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Thus, the Supreme Court Establishment Clause decisions have left us with the following understandings: (1) a taxpayer has standing to challenge an expenditure as violative of the Establishment Clause, apparently with no threshold in terms of the size of the expenditure; (2) being subjected, in the first instance, to a school-sponsored prayer, or its equivalent, at least while in a public school classroom, gives rise to sufficient injury to satisfy the requirements of standing; (3) the Court has not, in the past decade, appeared to be very concerned about the possibility that a nontaxpayer Establishment Clause plaintiff has not suffered the kind of individualized harm needed to support standing; and (4) at least as recently as 1982 in *Valley Forge*, the Court was sufficiently concerned that it found standing lacking in a situation in which a contrary holding would have been far less surprising and disturbing.

II. STANDING IN THE LOWER FEDERAL COURTS

What, then, have the lower federal courts done in this regard since that unfortunate decision in 1982? Overall, the judicial environment has been relatively hospitable for Establishment Clause plaintiffs, but the matter is not free of difficulty.

A. *Applying Settled Principles*

To some extent, the courts have acted predictably, by denying or upholding standing in cases in which, given Supreme Court precedent, the courts could hardly have done otherwise. The lower courts have denied standing when plaintiffs have been able to identify nothing more than principle as a "personal stake." For example, in *Flora v. White*,[54] the Eighth Circuit Court of Appeals found that atheists lacked standing to challenge an Arkansas constitutional provision barring anyone who denied " 'the being of a God' " from holding public office or testifying in court when the plaintiffs alleged nothing more than adverse psychological consequences resulting from the existence of the law.[55] *Valley Forge* compelled that result, as well as similar results in *Americans United for Separation of Church & State v. Reagan*,[56] in which the Third Circuit Court of Appeals found

54. 692 F.2d 53 (8th Cir. 1982).
55. *Id.* at 54.
56. 786 F.2d 194 (3d Cir.), *cert. denied*, 479 U.S. 914 (1986).

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that plaintiffs had no standing to challenge the President's extension of diplomatic recognition to the Vatican, and *Allen v. Consolidated City of Jacksonville*,[57] in which the Eleventh Circuit Court of Appeals rejected plaintiff's standing to challenge a city resolution urging a day of voluntary prayer as part of a "war on drugs."[58]

Conversely, courts have upheld taxpayer standing in a number of Establishment Clause cases,[59] including one involving a challenge to a Hawaii statute declaring Good Friday to be a state holiday.[60] Where the facts have permitted fine distinctions of the *Valley Forge* kind, however, taxpayer standing has been rejected.[61]

B. *The Public School Cases*

In cases involving Establishment Clause challenges to school-sponsored religious activities or symbols, the courts apparently never perceive standing to be a problem. The few courts that have addressed the point in published opinions have largely relied upon the Supreme Court's brief comment on standing in the *Schempp* case.[62] Other courts, most often in cases involving

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57. 719 F. Supp. 1532 (M.D. Fla.), *aff'g without opinion* 880 F.2d 420 (11th Cir. 1989).

58. To say that these results are "correct," is not, of course, to say that they are desirable.

59. Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988); Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985); Helms v. Cody, 856 F. Supp. 1102 (E.D. La. 1994); Birdine v. Moreland, 579 F. Supp. 412 (N.D. Ga. 1983); Americans United for Separation of Church and State, Inc. v. School Dist., 546 F. Supp. 1071 (W.D. Mich. 1982), *aff'd sub nom.,* School Dist. v. Ball, 473 U.S. 373 (1985).

60. Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 3027 (1992). Taxpayer standing was predicated on the fact that state and municipal tax revenues funded a paid holiday for government employees. *Id.* at 771.

61. *See* Phelps v. Reagan, 812 F.2d 1293 (10th Cir. 1987); Fordyce v. Frohnmayer, 763 F. Supp. 654 (D.D.C. 1991); *see also* United States Catholic Conference v. Baker, 885 F.2d 1020 (2d Cir. 1989), *cert. denied,* 495 U.S. 918 (1990); Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1059 (1988).

62. *See* Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 683 (7th Cir. 1994) (holding that plaintiffs had standing to challenge supplemental reading program); Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 441 (7th Cir. 1992) (holding that plaintiffs had standing to challenge Pledge of Allegiance); Bell v. Little Axe Indep. Sch. Dist. No. 70, 766 F.2d 1391, 1398 (10th Cir. 1985) (holding that plaintiffs had standing to challenge religious meetings at school); Ingebretsen v. Jackson Pub. Sch. Dist., 864 F. Supp. 1473, 1483 (S.D. Miss. 1994) (holding that plaintiffs had standing to challenge state statute that permitted public school students to initiate prayer at public school events); Spacco v. Bridgewater Sch. Dept., 722 F. Supp. 834, 838 (D. Mass. 1989) (holding that plaintiffs had standing to

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religious benedictions and invocations at graduation ceremonies,[63] have addressed the merits of the Establishment Clause challenge in opinions containing no discussion of standing whatsoever.[64] The fact that the Supreme Court displayed no concern about standing in *Lee v. Weisman*,[65] the graduation prayer case decided in 1992, reinforces the notion that students always have standing to bring Establishment Clause challenges to school-related religious activities.

It is worth recalling, at this point, Justice Rehnquist's characterization in *Valley Forge* of the prototypical *Schempp*-type situation as one involving "impressionable schoolchildren" who were subject to "unwelcome religious exercises."[66] The absence of any concern about standing in *Lee* suggests that either high school students remain sufficiently impressionable, or that the presence of impressionable schoolchildren is not really essential when a plaintiff is exposed to unwelcome religious exercises. For purposes of Article III standing, the latter suggestion is infinitely preferable. It should be noted, as well, that there is no suggestion in *Lee*, or in any of the graduation prayer cases, that in order to have standing, the plaintiff must allege that the plaintiff is unwilling to attend graduation because of the prayers.[67] Indeed,

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challenge public classroom in facility leased from Roman Catholic Church); *see also* Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1164 n.4 (7th Cir. 1993), *rev'g* 766 F. Supp. 696, 701-02 (N.D. Ind. 1991) (containing a minimal discussion of public school students' standing to challenge a policy permitting religious organizations to distribute religious literature in public classrooms).

63. *See* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *vacated and remanded*, 112 S. Ct. 3020, *aff'd on reconsideration*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993); Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989); Stein v. Plainwell Community Schs., 822 F.2d 1406 (6th Cir. 1987); Adler v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994); Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991); Graham v. Central Community Sch. Dist., 608 F. Supp. 531 (S.D. Iowa 1985).

64. Sherman v. Community Consol. Sch. Dist. No. 21, 8 F.3d 1160 (7th Cir. 1993) (distribution of religious literature at school by private organization); Metzl v. Leininger, 850 F. Supp. 740 (N.D. Ill. 1994) (Good Friday as a school holiday); Joki v. Board of Educ., 745 F. Supp. 823 (N.D.N.Y. 1990) (display of religious painting in high school auditorium); Doe v. Shenandoah County Sch. Bd., 737 F. Supp. 913 (W.D. Va. 1990) (religious classes near public school).

65. 112 S. Ct. 2649 (1992). Nor did the lower courts raise that issue. Weisman v. Lee, 908 F.2d 1090 (1st Cir.), *aff'g* 728 F. Supp. 68 (D.R.I. 1990).

66. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 487 n.22 (1982).

67. Important to Justice Kennedy's reasoning in *Lee*, of course, was his belief that, for high school and middle school graduates, declining to attend graduation ceremonies is not a meaningful option. 112 S. Ct. at 2659.

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in the only reported lower court decision on graduation prayer in which the matter of standing was addressed, *Albright v. Board of Education*, the court observed only that "all of the plaintiffs desire to attend the graduation ceremonies and would be offended by prayer in that setting."[68] Nothing more should be required.

C. *The Holiday Symbol Cases*

Discussions of standing have also been absent from most of the post-*Lynch* decisions involving challenges to municipally sponsored nativity scenes or menorahs,[69] undoubtedly a reflection of the Supreme Court's apparent lack of concern about standing in *Lynch* and *Allegheny*.[70] But, again, the lower court opinions in *Lynch* and *Allegheny* suggested, explicitly or implicitly, that the plaintiffs there had standing as taxpayers despite the very small amount of public funds actually expended on the holiday displays. Yet in many of these holiday symbol cases in which the issue of standing apparently was not raised, the facts suggest an *absence* of the public funding necessary to confer taxpayer standing.[71]

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68. Albright v. Board of Educ., 765 F. Supp. 682, 685 n.5 (D. Utah 1991). See also Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679 (6th Cir. 1994), discussed *infra* at notes 118-21, employing similar reasoning in another case that arose in a public school setting, but which involved the hanging of a religious painting in a high school corridor.

69. *See* Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); Mather v. Village of Mundelein, 864 F.2d 1291 (7th Cir. 1989); American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987); ACLU v. City of Birmingham, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986); Smith v. Lindstrom, 699 F. Supp. 549 (W.D. Va. 1988), *aff'd sub nom.*, Smith v. County of Albemarle, 895 F.2d 953 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990); Libin v. Town of Greenwich, 625 F. Supp. 393 (D. Conn. 1985); Burelle v. City of Nashua, 599 F. Supp. 792 (D.N.H. 1984). In *Kaplan*, the issue of standing was raised, but sidestepped, by the district court. Kaplan v. City of Burlington, 700 F. Supp. 1315, 1321-22 n.8 (D. Vt. 1988). In *Doe v. City of Clawson*, the standing issue was acknowledged, but unexplained, in an uninformative footnote. 915 F.2d 244, 245 n.1 (6th Cir. 1990).

70. *See supra* notes 53-57 and accompanying text.

71. *See, e.g.*, *Burelle*, 599 F. Supp. at 797 ("[P]ublic monies are not used for such display . . . ."). In *Kaplan*, a menorah case, the facts do not address the matter of public funding, but the menorah belonged to a private organization that was permitted to place it in a municipal park. 891 F.2d at 1025-26. In *American Jewish Congress v. City of Chicago*, the court made clear that the only expenditure of public funds linked to the nativity scene display was "a nominal amount of public funds . . . expended on the electricity required to illuminate the scene." 827 F.2d at 122. This left unanswered the question of whether such a minimal expenditure was sufficient to

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In some of these cases, moreover, the courts have included descriptions of the plaintiffs' "psychological" injuries, while continuing to say nothing explicitly about standing.[72] Thus, for example, the district court in *Mather v. Village of Mundelein* offered these facts, with no indication of their legal significance:

> Ms. Mather testified that the creche in front of the Village Hall angers and upsets her and that the nativity scene gives her a sense of inferiority. She feels that by the display the Village of Mundelein endorses Christianity . . . and views her religion as far less important than the Christian religion. . . . Although Ms. Mather avoids the Village Hall as often as possible during the Christmas season, it is impossible for her to ignore the display completely because she frequently transacts business at the post office across the street from the Village Hall.[73]

In *Kaplan v. City of Burlington*, the Court of Appeals for the Second Circuit simply observed that the plaintiffs were "residents of the area who have been exposed to the menorah in the course of their daily activities. Each believes deeply in the principle of separation of church and state, and claims to have suffered mental anguish when confronted with this alleged violation of that principle."[74] How these observations did, or should, bear upon the analysis of standing was left completely unaddressed.

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confer standing. In *Mather*, the district court described the relevant municipal expenditures as "minimal," and described them in detail, yet said nothing explicitly about standing. 699 F. Supp. 1300, 1302 (N.D. Ill. 1988), *rev'd*, 864 F.2d 1291 (7th Cir. 1989). In *Smith*, one of the few creche cases in which standing was discussed, the court relied, quite summarily and unpersuasively, upon the Supreme Court creche cases, despite the court's acknowledgment that no county funds had been expended for the creche in this case. *See* 895 F.2d at 955. Only in *ACLU v. City of Birmingham*, among the cases presently under discussion, was it made clear (in the opinion of the district court) that substantial public funding was involved. *See* 588 F. Supp. 1337, 1338 (E.D. Mich. 1984), *aff'd*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986).

72. *See, e.g., Kaplan*, 891 F.2d at 1027; *Mather*, 699 F. Supp. at 1303.

73. 699 F. Supp. at 1303.

74. 891 F.2d at 1027; *see also Burelle*, 599 F. Supp. at 794. See also *ACLU v. Mississippi State Gen. Servs. Admin.* involving a challenge to the placement of a Latin cross on a state office building during the Christmas season. Despite its passing observation that the cost of illuminating the cross was borne "primarily by the State," the court went on to uphold standing purely on the basis of the fact that the cross was visible to the plaintiffs, who were residents of the city in which the building was situated. 652 F. Supp. 380, 382 (S.D. Miss. 1987).

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D. Other Religious Symbols

Several courts have addressed the standing issue in the context of non-economic bases for Establishment Clause challenges to actions by local governments—usually in cases involving public sponsorship of religious symbols. In the great majority of these decisions, standing has been upheld. The question that emerges from this body of case law, however, is this: To have standing to sue in a case of this kind, must plaintiffs allege that they have altered their behavior so as to avoid coming into contact with the offending religious symbol? At least some of the decisions suggest an affirmative answer to that inquiry.

The first of the post-*Valley Forge* standing cases remains one of the most influential. *ACLU v. Rabun County Chamber of Commerce, Inc.*[75] involved a challenge to the placement of an illuminated Latin cross, by a private organization acting with state approval, on an eighty-five foot structure within a state park. The cross, which had been illuminated for two and a half to four hours a night, "not only floods the two [nearby] camping areas with light, but is visible for several miles from the major highways which traverse the mountains."[76] The court undertook an extensive consideration of the standing issue and ruled in favor of the plaintiffs. The key facts pertaining to the plaintiffs were these:

> Each of the individual plaintiffs testified unequivocally at trial that they would not use Black Rock Mountain State Park so long as the cross remained there. More particularly, two of the individual plaintiffs testified that they were campers. . . . [They] further testified that they would not camp in Black Rock Mountain State Park because of the cross.[77]

While heeding *Valley Forge*, the court also noted more helpful Supreme Court precedent, which included not only *Schempp* but additionally an important pair of decisions, *Sierra Club v.*

75. 698 F.2d 1098 (11th Cir. 1983).
76. *Id.* at 1101 & n.1.
77. *Id.* at 1103-04. The court also made clear that taxpayer standing was not an available theory in this case since the cross cost the public no money to maintain and the appellees did not rely on taxpayer standing. *Id.* at 1106 n.14.

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Morton[78] and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[79] both of which support the proposition that standing can rest upon loss of use and enjoyment of public land. The *Rabun County* defendants argued that, as in *Valley Forge*, the plaintiffs here lived far from the site of their displeasure,[80] thus making *Valley Forge* the most comparable precedent.[81] They also complained that only one of the plaintiffs had ever even seen the cross prior to filing suit.[82] But the court declined to deny standing on either of these bases:

> In describing the plaintiffs in *Valley Forge*, the Court highlighted the total lack of connection between the plaintiffs and the subject matter of the action. By contrast, the plaintiffs in this case are residents of Georgia who make use of public parks which are maintained by the State of Georgia; these factors thus provide the necessary connection, which was missing in *Valley Forge*, between the plaintiffs and the subject matter of the action.[83]

The court then proceeded to make these prescient remarks:

> Although the underlying motivations of the plaintiffs in [*Valley Forge, Schempp*, and the present case] can be described as either a spiritual belief or a commitment to separation of church and state, the plaintiffs in the instant case have demonstrated an individualized injury, other than a mere psychological reaction, which they have suffered "as a consequence" of the challenged action . . . . In explaining why the plaintiffs in [*Schempp*] had demonstrated a sufficient injury in fact, the Supreme Court in *Valley Forge* specifically emphasized the dilemma facing the plaintiffs: the schoolchildren were "subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." No less can be said of the plaintiffs in the instant case.[84]

78. 405 U.S. 727 (1972).
79. 412 U.S. 669 (1973).
80. *Rabun County*, 698 F.2d at 1107.
81. *Id.*
82. *Id.*
83. *Id.* In a footnote, the court added: "Similarly, we can conceive of no rational basis for requiring the plaintiffs to view in person the subject matter of the action prior to filing the suit." *Id.* at 1107 n.17.
84. *Id.* at 1107-08 (citation omitted).

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The camper plaintiffs had made the perfect allegations relative to standing: they testified that they avoided the state park because they did not wish to see the cross, although one plaintiff still could see it from his summer cabin at another location.[85] But what if they had not altered their behavior, but rather had camped and hiked near the cross despite their displeasure with it? Would it not still be true that they were being subjected to an "unwelcome religious exercise" of sorts, and would they not still be distinguishable from the physically remote plaintiffs of *Valley Forge*? Interestingly, one of the *Rabun County* plaintiffs also testified that he "regularly travels" on a nearby highway on his way to his church's conference center and that "the cross is clearly visible at night from both the highway and the conference center."[86] But the court did not require this plaintiff to allege that he avoided either the highway or the conference center, apparently because, in the court's words, he "has little choice but to continually view the cross and suffer from the spiritual harm to which he testified."[87] One is entitled to wonder why this plaintiff had any less choice to be on the highway or at his conference center than to be camping in Black Rock Mountain State Park. Perhaps the court was implicitly saying that failure to allege avoidance of the offending symbol will only be excused when the court deems that failure to be reasonable; if so, the parameters of this unarticulated doctrine will be difficult to discern. The fact remains, however, that, with respect to this plaintiff, the court apparently viewed a pure "unwelcome exposure" injury as sufficient.

Essentially in accord with *Rabun County*, and equally influential, is Judge Posner's opinion for the Seventh Circuit Court of Appeals in *ACLU v. City of St. Charles*.[88] Here the challenge was to the presence of an illuminated cross rising some seventy-five feet above street level as part of a larger municipal Christmas display.[89] Plaintiffs, residents of the city, alleged that they "were so offended by the lighted cross that they departed from their accustomed routes of travel to avoid seeing it."[90]

85. *Id.* at 1108 & n.18.
86. *Id.* at 1103 n.9.
87. *Id.* at 1108.
88. 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986).
89. *Id.* at 267.
90. *Id.* Taxpayer standing was unavailable because none of the expenses relative to the cross were paid with public funds. *Id.* at 267-68.

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Those allegations, of course, were sufficient to satisfy the requirements of standing.[91] In so holding, Judge Posner did not say unequivocally that allegations of avoidance were essential to standing; rather, he stated:

> Maybe it ought to make a difference if (as here) a plaintiff is complaining about the unlawful establishment of a religion by the city, town, or state in which he lives, rather than about such an establishment elsewhere; he might be intensely distressed to find himself living in a jurisdiction that had an established church. But there is no need to get into degrees of distress, because distress is not the only injury that the individual plaintiffs in this case claim to have suffered. They say they have been led to alter their behavior . . . . The cost in this case is no doubt slight, but . . . the willingness of plaintiffs . . . to incur a tangible if small cost serves to validate, at least to some extent, the existence of genuine distress and indignation, and to distinguish the plaintiffs from other objectors to the alleged establishment of religion by St. Charles.[92]

Relying in part on *Schempp*, he suggested that the Supreme Court's decision in that case rested on "the practical recognition that if the injury, tenuous though it be, suffered by the involuntary audience for a display alleged to constitute an establishment of religion does not confer standing to sue, there will be no judicial remedy against establishments of religion that do not depend on public funds."[93]

These words evince an appropriate sensitivity to the potential for needlessly restrictive applications of the case or controversy requirement of Article III. Yet it may be questioned why so much persuasive force needed to be summoned in the context of such an easy case. Surely a plaintiff who had altered his route of travel to avoid seeing a municipally sponsored cross had standing to challenge it. The real question, not posed by this fact pattern,

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91. *Id.* at 268.

92. *Id.* (citations omitted).

93. *Id.* The Supreme Court has made clear, of course, that the mere fact that virtually no one would have standing to bring a particular challenge does not lead to the conclusion that the requirements of standing must therefore be suspended. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489 (1982) (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)). Judge Posner surely did not mean by his remarks in *St. Charles* to contradict that well-established principle.

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is whether a plaintiff would have standing even had he not altered his behavior to avoid the cross. Judge Posner implied, when he spoke of incurring a "tangible if small cost" in order to "validate . . . the existence of genuine distress,"[94] that this hypothetical plaintiff would not have standing. But can one seriously doubt the distress felt by one who has filed an Establishment Clause lawsuit of this kind? Clearly, the requirements of Article III standing are not satisfied by the mere willingness to sue, but one may nonetheless question whether Judge Posner's theory of "validation by avoidance" is truly necessary.

In most of the cases following *Rabun County* and *St. Charles* that involved nontaxpayer challenges to the placement of three-dimensional religious symbols on public property (outside the context of holiday displays), the plaintiffs have alleged alteration of their behavior so as to avoid seeing these symbols, and standing has accordingly been upheld.[95] In one such case, *Mendelson v. City of St. Cloud*,[96] plaintiff's extensive efforts to avoid seeing a municipally sponsored cross were deemed sufficient, despite the court's finding that he could not reasonably avoid seeing it.[97] In none of these cases did the court make it clear that allegations of avoidance were necessary to standing; they simply held that such allegations were sufficient.

A few courts, addressing the question of standing without a detailed exploration of pertinent facts, have upheld standing on

94. *St. Charles*, 794 F.2d at 268.

95. Gonzales v. North Township of Lake County, 4 F.3d 1412, 1416-17 (7th Cir. 1993) (cross in park); Ellis v. City of La Mesa, 990 F.2d 1518, 1523 (9th Cir. 1993) (crosses in parks); Doe v. Small, 934 F.2d 743, 749 n.8 (7th Cir. 1991) (religious paintings in park), *aff'g* 726 F. Supp. 713 (N.D. Ill. 1989), *rev'd*, 964 F.2d 611 (7th Cir. 1992) (en banc); Hewitt v. Joyner, 940 F.2d 1561, 1564 (9th Cir. 1991) (religious statues in park), *cert. denied*, 112 S. Ct. 969 (1992); Americans United for Separation of Church and State v. City of Grand Rapids, 784 F. Supp. 403, 407 (W.D. Mich. 1990) (menorah in plaza), *rev'd*, 980 F.2d 1538 (6th Cir. 1992); Jewish War Veterans v. United States, 695 F. Supp. 3, 9-10 (D.D.C. 1988) (cross at military base). See also *Doe v. Village of Crestwood* involving a challenge to the celebration of a Roman Catholic mass at a municipal festival; plaintiff alleged that he would stay away from the festival while the mass was being held. 917 F.2d 1476, 1478 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992). Only in *Hewitt* and *Jewish War Veterans* was there any indication that taxpayer standing was also available. *See Hewitt*, 705 F. Supp. at 1446; *Jewish War Veterans*, 695 F. Supp. at 10-11. In only one reported decision of this kind, *Carpenter v. City and County of San Francisco*, was there no discussion of standing and no description of the plaintiffs. 803 F. Supp. 337 (N.D. Cal. 1992).

96. 719 F. Supp. 1065 (M.D. Fla. 1989).

97. *Id.* at 1067-68.

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an "impairment of use" rationale, with no indication as to whether any plaintiff did or did not alter his behavior to avoid contact with the offending religious symbol.[98] Each of these courts relied in part upon the *Rabun County* holding, but with no explicit recognition of the allegations of avoidance upon which that decision appeared to rest. It is impossible to tell whether "interference with use" implied efforts to avoid the religious symbol, or whether no such efforts were deemed necessary.[99]

One case of this kind that comes close to implicitly rejecting the "avoidance" requirement is *ACLU v. City of Long Branch*.[100] In that case, a challenge was made to a city's authorization of the creation of an "eruv" on public property.[101] An eruv is an unbroken delineation of an area, established in accordance with Jewish law and created primarily by linking telephone poles and

98. Kreisner v. City of San Diego, 1 F.3d 775, 778 n.1 (9th Cir. 1993) (upholding standing to challenge religious display in public park "based on his allegation that the challenged display interferes with his right to use" the park); Hawley v. City of Cleveland, 773 F.2d 736, 739-40 (6th Cir. 1985) (upholding standing to challenge lease of public airport space to church for use as a chapel because "plaintiffs claim impairment of their beneficial use of a public facility which they frequently use"), *cert. denied*, 475 U.S. 1047 (1986); Greater Houston Chapter of ACLU v. Eckels, 589 F. Supp. 222, 225 n.2 (S.D. Tex. 1984) (upholding standing to challenge crosses and Star of David in public park on the basis of "prior rulings", and citing *Rabun County* with respect to "denial of the beneficial use and enjoyment of a public park"), *appeal dismissed*, 755 F.2d 426 (5th Cir.), *cert. denied*, 474 U.S. 980 (1985). The court in *Kreisner* stated that it need not decide the question of taxpayer standing. 1 F.3d at 778 n.1. The court in *Hawley* found that "a question of material fact" existed concerning taxpayer standing, but denied defendant's motion to dismiss on the basis of its finding of non-economic injury. 773 F.2d at 742.

99. A particularly unsatisfying opinion of this genre is *ACLU v. Wilkinson*, in which Kentucky residents and taxpayers challenged the state's "construction and use of a structure resembling a biblical-age stable" on public grounds. 701 F. Supp. 1296, 1298 (E.D. Ky. 1988). Taxpayer standing appears to have been an available theory, and the plaintiffs were not described in any other way. *See id.* at 1303. The court noted that the offending structure, positioned as it was amidst Christmas decorations, "would be virtually impossible to avoid," but said nothing about whether or not any plaintiff tried to avoid it. *Id.* Apparently blending different theories of standing, the court concluded: "It is indisputable that the plaintiffs are state taxpayers, that the state has expended its tax funds to erect and maintain the creche, and that the plaintiffs would be 'force[d] . . . to assume special burdens to avoid' confronting the unwelcome religious display." *Id.* The Sixth Circuit Court of Appeals affirmed, devoting an uninformative paragraph to the standing issue and resting largely on its earlier decision in *Hawley*. ACLU v. Wilkinson, 895 F.2d 1098, 1102 (6th Cir. 1990). There is no reported evidence, in any event, that the Sixth Circuit would require a plaintiff to allege avoidance.

100. 670 F. Supp. 1293 (D.N.J. 1987). See also ACLU v. Mississippi State Gen. Servs. Admin., 652 F. Supp. 380 (S.D. Miss. 1987) briefly discussed at *supra* note 74.

101. 670 F. Supp. at 1294.

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fences with wires,[102] its purpose being to allow observant Jews to carry or push objects from place to place within the area during the Sabbath.[103] The city had assisted in the creation of the eruv by installing some additional poles and fencing.[104] The court held that the plaintiffs, as residents of the city, had standing to sue, explaining its decision in these words:

> Their allegations that their access to the park and/or to particular parts of the park has been impeded as well as their aesthetic objections to the poles and the fence are palpable injuries different from "the psychological consequence presumably produced by observation of conduct with which one disagrees." We find that the ACLU on behalf of its Long Branch members and Ms. Jacoby have alleged sufficient aesthetic and environmental injuries to have standing to sue.[105]

That reasoning appears to be sound and seems equally applicable to each of the cases in which a plaintiff alleged that he regularly observed a religious symbol and found it to be displeasing.

In contrast, *Freedom From Religion Foundation, Inc. v. Zielke*,[106] is the only reported appellate decision in which standing to challenge municipal sponsorship of a religious symbol was denied because the plaintiffs failed to allege any efforts to avoid the offending symbol.[107] The case was decided by the Seventh Circuit Court of Appeals in reliance upon its earlier *St. Charles* decision and the Supreme Court's decision in *Valley Forge*. The challenge was to the placement of a privately donated monument of the Ten Commandments in a city park located near the city's business district.[108] A description of the monument may be helpful:

> The monument resembles a tombstone, and contains an English translation of one version of the Ten Commandments. It is about five feet, four inches high, thirty-three inches wide and ten inches deep; the monument is located eight feet from the sidewalk that surrounds the park,

102. *Id.* at 1295-96.
103. *Id.*
104. *Id.*
105. *Id.* at 1294 (quoting *Valley Forge,* 454 U.S. at 485) (citations omitted).
106. 845 F.2d 1463 (7th Cir. 1988).
107. *Id.* at 1468.
108. *Id.* at 1465-66.

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> and is clearly visible from the sidewalk. At night the monument is lighted from [a nearby] roof. . . . Aside from a few park benches, the monument is the only man-made structure in the park. Although the City of La Crosse owns and maintains Cameron Park, the city did not buy the monument nor does it expend funds on the monument's maintenance.[109]

The district court dismissed the complaint for lack of standing, and the court of appeals affirmed. The plaintiffs' problem was simply put:

> The appellants concede that they did not alter their behavior in any manner as a result of the Ten Commandments monument; they allege only that they have suffered "a rebuke to [their] religious beliefs respecting religion by virtue of being subjected to a governmental endorsement of unequivocally religious precepts. . . ." But this is exactly the type of psychological harm that the Supreme Court has held cannot confer standing on an aggrieved party.[110]

But the case was not exactly like *Valley Forge* because at least one of the plaintiffs in this case, Phyllis Grams, was a resident of the City of La Crosse who had certainly seen and been offended by the religious monument.[111] To this contention, the court responded as follows:

> Although Grams lives in the City of La Crosse, the appellants did not demonstrate that she lives anywhere near Cameron Park, that the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park. The appellants also failed to establish that Grams suffered any injury simply because of her close proximity to the monument. Although in some circumstances proximity to the offending conduct may suffice to confer standing, Grams failed to prove her proximity to the allegedly unconstitutional display.[112]

The court seemed to suggest that in order to be a proper plaintiff in this kind of litigation, one must take steps to avoid coming into contact with a religious display, one must encounter

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109. *Id.* at 1466.
110. *Id.* at 1468 (citation omitted).
111. *Id.* at 1469.
112. *Id.*

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that display as part of one's "normal routine," or (perhaps) one must reside in fairly close proximity to that display. If the court meant, as it implied, that normal routine exposure will serve as an adequate substitute for "avoidance," then that is good news for Establishment Clause plaintiffs. (This begs the question of whether the court would permit a plaintiff who does not satisfy the normal routine requirement to nonetheless allege avoidance. Or can one only legitimately avoid what one would encounter in one's normal routine?) The important question, however, becomes: Why should it be necessary, in order to have standing, for a plaintiff who has been and will continue to be directly and personally offended by a religious display to encounter that display as part of her normal routine? That does not appear to have been required of the camper-plaintiffs found to have standing in *Rabun County*, or the hiker-plaintiffs found to have standing in countless environmental lawsuits decided since *Sierra Club v. Morton*.[113]

The Supreme Court has recently reiterated that a plaintiff's injury must be " 'actual or imminent, not "conjectural" or "hypothetical." ' "[114] In *Lujan v. Defenders of Wildlife*,[115] standing to challenge administrative action allegedly threatening to certain species of animals abroad was found lacking when the plaintiffs testified only that they had visited the affected foreign countries in the past and "inten[ded] to return" in the future.[116] This "profession of an 'inten[t] to return' to the places they had visited before," asserted Justice Scalia, was "simply not enough. Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will

113. 405 U.S. 727 (1972). Although the Court held in *Sierra Club* that the plaintiff's allegations were insufficient to support standing, its discussion provided the basis for numerous later decisions at the lower court level upholding standing on the basis of allegations of ongoing enjoyment of public lands. *Id.* at 734-35; *e.g.*, Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993); Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 71 (3rd Cir. 1990); Humane Soc'y v. Hodel, 840 F.2d 45, 51-52 (D.C. Cir. 1988); *see also* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 231 n.4 (1986) (finding a sufficient "injury in fact" when whale watching was allegedly impaired by whale harvesting).

114. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

115. *Id.*

116. *Id.* at 2138. For an assessment and critique of the *Lujan* decision, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). *See also* Resources Limited, Inc. v. Robertson, 35 F.3d 1300, 1303 (9th Cir. 1993).

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be—do not support a finding of the 'actual or imminent' injury that our cases require."[117]

Clearly, then, standing cannot be predicated upon prior exposure to a troubling phenomenon, even when coupled with the uncertain and speculative prospect of repeated exposure. Yet surely a level of exposure falling somewhat short of normal routine may yet be sufficiently "actual" to lift the injury out of the realm of the conjectural or hypothetical. For all that appears from the court's opinion in *Zielke*, Ms. Grams may well have been an inadequate plaintiff, but it is far from clear why she should not have had standing to sue if she were a regular, even if infrequent, visitor to the park.

A decision in keeping with this analysis is that of the Sixth Circuit Court of Appeals in *Washegesic v. Bloomingdale Public Schools*,[118] in which a high school student challenged the hanging of a donated portrait of Jesus Christ in a school corridor.[119] By the time the case was heard on appeal, the plaintiff-student had graduated.[120] However, the court held that the case was not thereby rendered moot and that the plaintiff had standing to challenge the presence of the portrait despite his status as a nonstudent. The court explained:

> [T]he portrait of Jesus affects students and non-students alike. . . . [Plaintiff] still visits the school and will confront the portrait whenever he is in the hall. His girlfriend is a student, and he attends sporting events, dances and other social functions in the gym and at the school.
>
> . . . A member of the PTA or a member of the public would have standing if she attended events in the gymnasium and took the portrait as a serious insult to her religious sensibilities.
>
> . . . .
>
> . . . Here, . . . plaintiff has continuing direct contact with the object at issue. His grievance is not remote, vicarious or generalized as in *Valley Forge*.[121]

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117. *Lujan,* 112 S. Ct. at 2138 (emphasis added).
118. 33 F.3d 679 (6th Cir. 1994).
119. *Id.* at 681.
120. *Id.*
121. *Id.* at 681-83 (citations omitted).

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E. The Courthouse Cases

The conflict in the case law is also reflected in the handful of cases involving challenges to religious symbols or practices in state courthouses. In the earliest such reported decision, which invalidated a state judge's daily practice of opening each session in his courtroom with a nondenominational religious prayer, the issue of standing was not discussed by either the district court or the court of appeals.[122] The district court described the individual plaintiffs as "attorneys licensed to practice in Judge Constangy's court"[123] and went on to observe that "[e]ach individual plaintiff has been present for at least one recitation of Judge Constangy's court-opening prayer."[124] Avoidance of the judge's courtroom would presumably be impossible, as a practical matter, for at least some of these plaintiffs. Recognizing that fact, perhaps, neither the district court nor the court of appeals appears to have required the plaintiffs to make any allegations concerning avoidance of the judicial prayer. This result is consistent with the school prayer cases in that personal exposure to unwelcome religious exercises is sufficient to confer standing.

But in *Doe v. County of Montgomery*,[125] a federal district court within the Seventh Circuit followed *Zielke* and *St. Charles* in holding that allegations of altered behavior were required for the plaintiffs to have standing to challenge the presence of a sign bearing the message "The World Needs God" above the main entrance to the Montgomery County Courthouse.[126] Two of the plaintiffs were residents of Montgomery County who alleged, *inter alia*, that they wished to avoid the sign but must enter the courthouse in order to visit the offices of various public agencies and to attend public meetings.[127] The third plaintiff, an attorney who resided in a different county, alleged that he "will

122. North Carolina Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991), *aff'g* 751 F. Supp. 552 (W.D.N.C. 1990), *cert. denied*, 112 S. Ct. 3027 (1992).
123. 751 F. Supp. at 553.
124. *Id.* If this observation was intended to confirm that the plaintiffs had standing, it is actually suspect in the absence of any allegations that these individuals would again appear in Judge Constangy's courtroom. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).
125. 848 F. Supp. 832 (C.D. Ill. 1994).
126. *Id.* at 833.
127. *Id.*

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not represent clients whose cases would be heard in the Montgomery County Courthouse."[128]

Given the Seventh Circuit precedents, the result was predictable; standing was lacking because the plaintiffs "have not pled or otherwise indicated that they have been forced to assume any special burden or altered their behavior because of the sign."[129] With respect to the attorney-plaintiff, the court said that "though [he] alleges that he presently will not represent clients whose cases would be heard in the Montgomery County Courthouse, there is no indication that he has actually turned down any client because of the sign. . . . The hypothetical loss of a potential client . . . is not sufficient to confer standing."[130]

Contrast that ruling with the decision of a federal district court within the Eleventh Circuit, in *Harvey v. Cobb County*,[131] involving a challenge to the presence, in an alcove in a county courthouse building, of a framed panel containing the Ten Commandments and "the Great Commandment."[132] With respect to standing, Judge Shoob said this:

> Plaintiff Harvey's law practice in Cobb County requires him to enter the State Court Building and, because of the location of the panel, brings him into direct contact with the panel. As [*Schempp*] and two subsequent Eleventh Circuit cases make clear, this "unwelcome" direct contact with the offensive object is enough to establish injury for purposes of standing.
>
> . . . .

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128. *Id.*

129. *Id.* at 835.

130. *Doe,* 838 F. Supp. at 835 (citations omitted). A panel of the Seventh Circuit Court of Appeals recently reversed the district court's decision in *Doe* with respect to the standing of the plaintiffs who were residents of Montgomery County. Doe v. County of Montgomery, 41 F.3d 1156 (7th Cir. 1994). According to Judge Bauer, the allegations by these plaintiffs "of direct and unwelcome exposure to a religious message cannot be distinguished from the 'injuries' of other plaintiffs who have had standing to bring claims under the Establishment Clause." *Id.* at 1159. Judge Bauer relied on *Lee, Shempp,* and other Supreme Court cases in this area in which plaintiffs "did not assume 'special burdens' or alter their behavior because of religious conduct, yet they had standing to raise their constitutional challenges." *Id.* at 1160. He purported to distinguish such prior Seventh Circuit decisions as *Zielke* and *Harris v. City of Zion,* discussed *infra* at notes 161-74. *Id.* at 1160-61. With respect to the attorney-plaintiff, however, the Court of Appeals affirmed the denial of standing, finding Mr. Stein's allegations of injury to be unduly speculative. *Id.* at 1162.

131. 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd,* 15 F.3d 1097 (11th Cir.), *cert. denied,* 114 S. Ct. 2138 (1994).

132. *Id.* at 670.

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> . . . [P]laintiff Harvey comes into direct contact with the alleged offensive conduct, and Harvey's standing to bring this action is not predicated on avoidance of the conduct or assumption of a special burden. . . . Harvey is not required to change his life—to cease practice in the State Court of Cobb County or to avoid the panel while in the State Court Building—to establish injury for purposes of standing. Here it is enough that Harvey's job on occasion brings him into direct contact with the panel, and this sets Harvey apart from the general public and shows that his grievance is not "shared in substantially equal measure by all or a large class of citizens."[133]

For the reasons stated earlier, the ruling in *Harvey* is quite consistent with the requirements of Article III. While the injury alleged by the attorney-plaintiff in *Doe v. County of Montgomery* may well have been unduly speculative, given the fact that he was based in a county other than that in which the offending courthouse was located, an allegation that he appeared in that courthouse on a regular basis, if true, should have sufficed.

F. The City Seal Cases

The standing issue often arises in one remaining and potentially tricky context: Establishment Clause challenges to city seals, logos, or insignia—typically visible on municipal stationery and police cars—which contain religious symbols among their design elements. How, exactly, would one avoid contact with such religious symbolism or otherwise alter one's behavior, if such were required?

In fact, such "alteration" has been alleged, albeit somewhat unclearly, and has provided the predicate for standing in at least one case. *Ellis v. City of La Mesa*[134] involved, in part, a challenge to a city insignia that depicted "a cross atop the highest of several hills, in the center of the design."[135] The insignia appeared on police vehicles, on the shoulder patches of various city personnel, and in official literature distributed by the

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133. *Id.* at 674-75 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)) (citations omitted). The court also found that a second plaintiff had standing to sue as a taxpayer. *Id.* at 675-76.

134. 990 F.2d 1518 (9th Cir. 1993).

135. *Id.* at 1521-22.

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city.[136] Plaintiff Ellis, a resident of La Mesa, attested, in the words of the district court, "that lest the cross on the insignia offend business clients or embarrass himself, he has in the past declined to invite business clients to his home when, but for the presence of the cross on the insignia, he would have invited them."[137] Presumably, Mr. Ellis did not want his business clients to see the La Mesa insignia on city police cars. "However small it may be," said the district court, "this impediment to plaintiff's livelihood generates a stake in the disposition of the La Mesa cross," which satisfied the requirements of standing.[138] The Ninth Circuit Court of Appeals approved of that reasoning,[139] but did not make clear that such behavior modification was necessary to plaintiff's standing.

Although it reached the same result, the Court of Appeals for the Eleventh Circuit (which had produced the seminal *Rabun County* decision) took a significantly less demanding and more realistic approach in *Saladin v. City of Milledgeville*.[140] At issue was a city seal that appeared on city stationery, on the doors of some city vehicles, on the shoulder patches of some city uniforms, and on a city water tank.[141] In the center of the seal, among other things, was a banner that bore the words "Liberty" and "Christianity."[142] In a preliminary order, the district court held that the plaintiffs, who were local residents, had standing to challenge the use of the seal on the water tower and city vehicles, but no standing to challenge its use on city stationery and in embossing official documents.[143] The city thereupon informed the court that it would limit the seal to the latter uses. A month later, the court held that the plaintiffs lacked standing to challenge the use of the seal on city stationery and in embossing official documents.[144] It was in that posture that the case reached the appellate court, which held that the plaintiffs did have standing.[145]

136. *Id.* at 1522.
137. Murphy v. City of La Mesa, 782 F. Supp. 1420, 1425 (S.D. Cal. 1991).
138. *Id.* at 1426.
139. 990 F.2d at 1523.
140. 812 F.2d 687 (11th Cir. 1987).
141. *Id.* at 688.
142. *Id.* at 689.
143. *Id.*
144. *Id.*
145. *Id.* at 693-94.

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Remarkably, the lower court found that the word "Christianity" was illegible when used on city stationery or to emboss official documents and thus agreed with the city's argument that the plaintiffs could not be injured by the offending word if they could not read it.[146] The court of appeals disagreed:

> When these particular appellants see the smudge on the seal, they know that the smudge is the word "Christianity", regardless of whether they can actually read the word. The fact remains that the word "Christianity" with all of its connotations is part of the official city seal, and these appellants are reminded of that fact every time they are confronted with the city seal—smudged or not smudged.[147]

But what exactly was the plaintiffs' injury? Answering this key query, the Eleventh Circuit panel began by recalling its earlier decision in *Rabun County*, retrospectively characterizing one of the plaintiffs' injuries therein as a "spiritual injury," because he "operated a summer camp which looked out on the cross and was consequently forced to view the cross continually while on the summer camp grounds."[148] The present case was seen as comparable:

> The injury alleged by the appellants here is similar to the type of injury in *Rabun*, except that in this case the appellants are forced to look at the word Christianity on official municipal papers rather than at a lighted cross on a hillside in a state park. As the Supreme Court made clear in [*Schempp*], a non-economic injury which results from a party's being subjected to unwelcome religious statements can support a standing claim . . . .
>
> Here, like *Rabun* and *Schempp* (and unlike *Valley Forge*), the appellants come into direct contact with the offensive conduct. The affidavits . . . establish that at least three of the plaintiffs regularly receive correspondence on city stationery bearing the seal . . . .
>
> The plaintiffs here, unlike the plaintiffs in *Valley Forge*, clearly have more than an abstract interest in seeing that the City of Milledgeville observes the Constitution: they are part

146. *Id.* at 689-90.
147. *Id.* at 692.
148. *Id.*

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> of the City and are directly affronted by the presence of the allegedly offensive word on the city seal.[149]

The court's reasoning in *Saladin* was expressly embraced by the Court of Appeals for the Tenth Circuit in *Foremaster v. City of St. George*.[150] That case involved a challenge to a city logo that, in part, depicted the local Mormon temple.[151] The logo was displayed "on a plaque in the main foyer of City Hall, on two directional signs near the public parking lot of the building, and on about . . . two-thirds of [the city's] vehicles."[152] Although the plaintiff no longer resided within the city, he continued to work there and according to his affidavit he was "directly confronted by the logo on a daily basis."[153] Reviewing the case law, the court perceived a conflict among the circuits, which it described in this way:

> The Seventh Circuit requires that a plaintiff allege that a municipality's action offends him and that he has altered his behavior as a consequence of it.
>
> In contrast, the Sixth and Eleventh Circuits find standing based on an allegation of direct personal contact with the offensive action alone.[154]

The court chose to adopt the latter approach, and concluded that Foremaster's "direct personal contact with offensive municipal conduct" satisfied the requirements of standing.[155]

Murray v. City of Austin,[156] decided by the Fifth Circuit Court of Appeals, held to the same effect. A Christian cross was included in the city insignia, which was used on city vehicles, uniforms, stationery, monthly utility bills, and on or in many municipal buildings and recreation centers.[157] Murray stated in his affidavit that he lives and works in Austin, and that "he personally confronts the insignia in 'many locations around the City,' " as well as on utility bills and other correspondence

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149. *Id.* at 692-93 (citations omitted). The court also stated that, in view of its ruling on non-economic standing, it was unnecessary to address the matter of taxpayer standing, which the plaintiffs had also raised. *Id.* at 689 n.3.
150. 882 F.2d 1485 (10th Cir. 1989), *cert. denied,* 495 U.S. 910 (1990).
151. *Id.* at 1486.
152. *Id.*
153. *Id.* at 1491.
154. *Id.* at 1490 (citations omitted).
155. *Id.* at 1491.
156. 947 F.2d 147 (5th Cir. 1991), *cert. denied,* 112 S. Ct. 3028 (1992).
157. *Id.* at 150.

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received from the city.[158] The court found these allegations sufficient.[159]

In yet another city seal case, *Harris v. City of Zion*, the Seventh Circuit Court of Appeals, which to date has spoken to the issue at hand more than any of its sister circuits, demonstrated that disagreement over standing requirements in this setting has not disappeared.[160] The decision dealt with challenges to two different city seals, each of which contained a Latin cross among its design elements.[161] In each case, the seal was displayed on city vehicles, police shoulder patches, city stationery, and vehicle stickers placed on vehicles operated by city residents, as well as in the city council's chambers.[162] One city also displayed the seal on residents' garbage sacks;[163] the other city's logo appeared on street signs and on a water tower.[164] The plaintiffs, undoubtedly taking their cues from the earlier Seventh Circuit decisions in *St. Charles* and *Zielke*, each alleged that he "mightily strives" to avoid visual contact with his respective city's seal by altering travel routes.[165] That approach worked. Echoing *St. Charles*, the court stated, again, that "[i]t is the willingness of the plaintiffs to incur a tangible, albeit small cost that validates the existence of genuine distress and warrants

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158. *Id.*

159. *Id.* at 151. "In so ruling," said the court, "we attach considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases, such as [*Lynch* and *County of Allegheny*]." *Id.* (citations omitted). A federal appellate decision in which standing apparently was not an issue is *Friedman v. Board of County Commissioners,* which involved a county seal containing a Latin cross that was used in much the same ways as was the insignia in *Murray*. Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir. 1985), *cert. denied,* 476 U.S. 1169 (1986). The district court had held that the plaintiffs had standing to sue, but its minimal, pre-*Valley Forge* reasoning bore re-examination by the appellate court. *See* Johnson v. Board of County Comm'rs, 528 F. Supp. 919, 920 (D.N.M. 1981).

160. 927 F.2d 1401 (7th Cir. 1991), *cert. denied,* 112 S. Ct. 3054 (1992).

161. *Id.* at 1402-03.

162. *Id.* at 1403.

163. *Id.*

164. *Id.* at 1404.

165. *Id.* at 1405. Plaintiff Harris alleged that he altered his route of travel to avoid the offending water tower. *Id.* Plaintiff Kuhn alleged in his complaint that he often avoided " 'using the route to the downtown area of Rolling Meadows . . . where the seal of the City of Rolling Meadows is most prominently displayed.' " *Id.* at 1408 n.7. Each plaintiff also claimed injury by virtue of being required to personally display the seal on his vehicle in the form of a vehicle tax sticker, but the court did not address this arguably alternative basis for standing. Finally, the court noted that taxpayer standing had not been claimed. *Id.* at 1405 & n.4.

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the invocation of federal jurisdiction."[166] While no injuries had yet been proven, only facially adequate allegations of injury were necessary to survive a motion to dismiss on the basis of lack of standing.[167]

But Judge Easterbrook dissented. Excerpts from his opinion are worth quoting at length:

> Plaintiffs say that they must go out of their way to avoid seeing religious symbols. . . . Standing sometimes depends on an "identifiable trifle". Claims about detours are about as trifling as one can produce. They sidle up against the line drawn by [*Valley Forge*], which holds that offense taken at the government's complicity in religion does not create standing. If offense is not enough, why is a detour attributable to that offense enough? The answer cannot be, as my colleagues say, that the willingness to take a detour "validates the existence of genuine distress"; Valley Forge tells us that dismay does not establish standing, and therefore new and better ways to prove its existence cannot create standing. St. Charles holds instead that the detour narrows the class of plaintiffs and scope of dispute. If that is its function then we must ensure, when the plaintiffs' claims are challenged, that they have changed their daily constitutionals, that we are indeed dealing with injured rather than ideological plaintiffs. Both cities contested the plaintiffs' claims, yet the district court decided the cases without resolving these disputes.[168]
>
> . . . .
>
> Failure of proof is not the only problem. I doubt that the allegations establish standing even if they can be proved. The cities put their seals on vehicle stickers, garbage bags, public buildings and cars, and public documents. Plaintiffs object to

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166. *Id.* at 1406.

167. *Id.; see also id.* at 1407-08; *cf.* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136-37 (1992) (discussing burden of proof at summary judgment stage). In response to the dissenting argument that the key allegations supporting standing had not been proven, the majority in *Harris* concluded that the cities "simply failed to challenge the factual allegations of injury that Kuhn and Harris declared in their affidavits." Therefore, summary judgment in favor of the plaintiffs was appropriate. *Harris,* 927 F.2d at 1407.

168. *Harris,* 927 F.2d at 1419-20 (Easterbrook, J., dissenting) (citations omitted). Judge Easterbrook proceeded to suggest that, rather than rearranging his life to avoid contact with the offending city seal, plaintiff Harris had been recruited as a plaintiff, and moved into the city for the purpose of suing. "This looks like a put-up job," he remarked. *Id.* at 1420.

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> all of these, but most of these uses do not lead to an alteration in conduct. . . . Harris contends that he avoids looking at the [vehicle tax] sticker, but this is hardly a detrimental alteration in conduct. . . . Even this tiny inconvenience could be eliminated. Someone with a simple self-help remedy for his problem suffers no "injury in fact." . . . Wooley v. Maynard allows plaintiffs to cut out or cover up the objectionable portions of the seals. . . . At all events, our plaintiffs lack standing to stop *other* persons from having or using the seals.[169]

Judge Easterbrook perceived additional standing problems with respect to public uses of the seal, even if plaintiffs could properly be understood to have alleged avoidance of these public displays:

> [A]llegations of this kind, if proven, challenge only the *display* of the seal in a particular place, not its composition. St. Charles allowed the plaintiff to object to a particular, visible cross; we did not say that because the city erected a 35-foot, lighted cross in public, the plaintiff could obtain an order forbidding, say, a crucifix on the mayor's desk. The constitutional injury could be eliminated . . . by removing the seals from the water tower and other public places.[170]

The plaintiffs, then, in Judge Easterbrook's eyes, "have at most an entitlement to the obliteration of the symbols that cause detours."[171] Clearly, Judge Easterbrook would require, at a minimum, credible allegations of avoidance of a religious symbol in order to have standing to challenge it.

The majority responded to the dissent at some length, contending that the injuries alleged in this case were probably even greater than those suffered in *St. Charles* and *Doe v. Village of Crestwood*, because the injuries here were suffered on an ongoing basis.[172] The rigid implications of *Zielke* were not

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169. *Id.* at 1421 (citations omitted). *Wooley v. Maynard* held that a state law requiring resident automobile owners to display the state motto on their license plates violated the First Amendment. 430 U.S. 705 (1977).

170. 927 F.2d at 1422.

171. *Id.*

172. *See* ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir.), *cert. denied,* 479 U.S. 961 (1986); Doe v. Village of Crestwood, 917 F.2d 1476 (7th Cir. 1990), *cert. denied,* 112 S. Ct. 3025 (1992); *see supra* note 95. *Crestwood* was yet another Seventh Circuit decision, which upheld standing to challenge the holding of a Roman Catholic mass as part of a municipally sponsored Italian festival. In *Harris,* the majority

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repudiated, however; standing was absent in *Zielke* because the plaintiffs "never argued that they changed their behavior."[173]

CONCLUSION

In the decade subsequent to the Supreme Court's sobering decision in *Valley Forge*, the federal courts have, with few exceptions, found that plaintiffs challenging the constitutionality of governmental sponsorship or use of religious symbols have standing to bring those challenges. In a great many, and perhaps most, of those instances, plaintiffs have alleged that they have in some way altered their behavior in an effort to avoid contact with the offending religious symbol. The seminal cases of this kind (from the Seventh and Eleventh Circuits) suggested that such allegations were necessary, and such allegations have consistently led to rulings in favor of standing. The Eleventh Circuit—along with the Tenth, and perhaps the Fifth—has subsequently indicated that allegations of avoidance are not required, and that a showing of unwelcome personal exposure to the offensive symbol will suffice. The United States Supreme Court has essentially ignored the question of standing in Establishment Clause cases of this kind, and most lower federal courts, even when deciding such cases, have likewise yet to commit themselves to one or the other of these two approaches to the standing issue.

There is no good reason to adopt the position taken by the Court of Appeals for the Seventh Circuit, and even less reason to maintain that position as tenaciously as does Judge Easterbrook of that court. The purposes of Article III are served when a federal court can be satisfied that a genuine controversy exists and that a plaintiff has something more personal to gain from victory in the lawsuit than the mere ideological or psychological satisfaction of upholding the Constitution.[174] Plaintiffs who assert that they are offended by governmental sponsorship of

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characterized the injury in *Crestwood* as "simply that John Doe, a resident of the Village of Crestwood, could not enjoy the use of a beer garden for a few hours one afternoon each year. Hardly the kind of injury that would lead to a change in the very pattern of one's life." 927 F.2d at 1408 (citation omitted).

173. *Harris*, 927 F.2d at 1409. The Seventh Circuit has subsequently promulgated a far more reasonable decision on Establishment Clause standing in *Doe v. County of Montgomery*. 41 F.3d 1156 (7th Cir. 1994). *See* discussion *supra* note 133.

174. Warth v. Seldin, 422 U.S. 490, 498-99 (1975).

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religious symbols to which they have been, and will be again, personally exposed suffer more concrete personal injuries than the geographically remote, ideologically driven plaintiffs in *Valley Forge*. In fact, every such plaintiff suffers a more concrete personal injury than those who, under *Flast v. Cohen*, are permitted to sue on the basis of the spurious assumption that they are affected as taxpayers by expenditures that violate the Establishment Clause. Students and their parents are consistently allowed to challenge religious practices in the public schools, with no avoidance requirement, simply because they are unwillingly exposed to such practices. Furthermore, plaintiffs in environmental cases who allege that they go upon public lands, and who allege aesthetic injury by virtue of despoliation of such lands, are routinely permitted to sue in federal court for those reasons alone. These rulings are sensible, and they should be consistently followed in Establishment Clause cases involving non-economic injuries.

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