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Fruit of the Poisonous *Lemon* Tree: How the Supreme Court Created Offended-Observer Standing, and Why It's Time for It to Go

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FRUIT OF THE POISONOUS *LEMON* TREE: HOW THE SUPREME COURT CREATED OFFENDED-OBSERVER STANDING, AND WHY IT'S TIME FOR IT TO GO

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Can individuals who observe what they consider to be offensive government speech or conduct sue to stop it? Typically not—absent additional evidence of a direct and particularized injury. Yet in one area of the law, the fundamental requirements of Article III (limiting federal standing to actual "cases" or "controversies") are relaxed: the Establishment Clause. At least ten circuits have held that the mere observation of a display containing religious content (the Ten Commandments, a cross, a menorah, and the like) on public property suffices to create an injury-in-fact that opens the doors to federal court.

This Essay addresses the continued viability of offended-observer standing after the Supreme Court's recent decision in American Legion v. American Humanist Association. *It picks up on arguments made by Justice Gorsuch—and by the Becket Fund for Religious Liberty's amicus brief, which we helped author—explaining why, with the much-criticized* Lemon *test now "shelved," it is time for courts to similarly abandon the anomalous offended-observer standing doctrine and bring Establishment Clause standing back into line with both the bedrock requirements of Article III and binding Supreme Court precedent.*

We first explore the history of offended-observer standing and show how offended-observer standing grew out of overeager efforts by courts of appeals to find an Article III injury that would allow plaintiffs to vindicate—in the religious-display context—the substantive Establishment Clause rights created by Lemon. *We then argue that it makes no sense to keep applying this relic in a post-*Lemon *world and explain why offended-observer standing is inconsistent with Supreme Court precedent, the historical meaning of Article III, and judicial prudence.*

* The authors are both counsel at the Becket Fund for Religious Liberty. The views expressed here do not necessarily reflect those of Becket or its clients.

INTRODUCTION

To bring a claim in federal court, a plaintiff must have suffered a direct, concrete, and particularized injury. This limitation on standing serves to cabin the power of the federal courts to resolve only actual "cases or controversies."[1] But in one area of constitutional law—challenges to religious displays on public property—federal courts have breezed past this limitation on their authority and granted standing to plaintiffs whose only claimed injury is that they have seen the display and felt offended by it.

As this Essay will argue, the concept of "offended-observer" standing grew out of a major doctrinal shift in the Establishment Clause created by *Lemon v. Kurtzman*.[2] As soon as *Lemon* expanded what the Establishment Clause forbade, lower courts began to expand standing doctrine to make this newly capacious prohibition enforceable in court. However, while offended-observer standing is now widely accepted in the lower courts, the Supreme Court has recently given reason to question its continued viability—by rejecting, at least in the context of religious-display cases, *Lemon* itself.[3]

Now that the Court has pulled up offended-observer standing's roots, lower courts must consider whether to replant it or let it wither on the vine. We argue that they should do the latter. The Supreme Court has never endorsed this broad conception of standing for offended observers—and on-point Supreme Court precedent rejects it. Moreover, offended-observer standing is inconsistent with the original meaning of Article III, which requires courts to be especially vigilant in policing the requirement of a concrete and particularized injury in cases involving public rights. And it is bad policy: it politicizes Establishment Clause litigation, tilts the playing field against religious expression, and undermines fundamental constitutional commitments to religious neutrality.

No court has yet had the opportunity to reconsider its offended-observer-standing precedent in a post-*Lemon* world. But the handful of cases that have addressed offended-observer adjacent standing issues after *American Legion* give reason to be optimistic that, in an appropriate case, courts will do just that. This would be all to the good—not just for Article III, but also for the health of our civic debates about representations of religion in the public square.

I. THE ESTABLISHMENT CLAUSE STANDING ANOMALY

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court

1 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).
2 403 U.S. 602 (1971).
3 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

jurisdiction to actual cases or controversies."[4] And "[o]ne element of the case-or-controversy requirement is that [plaintiffs] . . . must establish that they have standing to sue."[5] Standing "ensure[s] that federal courts do not exceed their authority" and "serves to prevent the judicial process from being used to usurp the powers of the political branches."[6] Standing thus goes to the very heart of the authority of federal courts to act, and requires a plaintiff to have, among other things, a *particularized* and *concrete* injury.[7]

By contrast, a "generalized grievance"—for example, a strong desire to have the government follow the law—is not justiciable.[8] This is true regardless of how serious (or even justified) one's indignation or feelings of offense toward perceived government misconduct might be.[9] For example, the Supreme Court has held that the parents of African American children attending public schools lacked standing to challenge the IRS's grant of tax-exempt status to racially discriminatory private schools because they were not *themselves* discriminated against.[10] Similarly, outrage and offense at the death penalty was insufficient to confer standing to challenge a death sentence when the actual defendant had forgone appeal.[11] Nor did Proposition 8 proponents have standing to defend the law they had worked hard to pass; the Supreme Court held that they lacked a "direct stake in the outcome" because their "only interest" was in having a federal court "vindicate the constitutional validity of a generally applicable California law."[12]

In most cases, then, when a plaintiff presents a generalized grievance (even if dressed up like an Article III injury), federal courts will dismiss the case for lack of standing.[13] There are good reasons for this judicial restraint:

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4 Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976) (citing Flast v. Cohen, 392 U.S. 83, 95 (1968)).

5 Raines v. Byrd, 521 U.S. 811, 818 (1997) (citing *Lujan*, 504 U.S. at 561).

6 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013)).

7 *See id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

8 *See* Hollingsworth v. Perry, 570 U.S. 693, 706–07 (2013) ("Article III standing 'is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."' . . . [T]hat is not a 'particularized' interest sufficient to create a case or controversy under Article III." (first quoting Diamond v. Charles, 476 U.S. 54, 62 (1986); and then quoting *Lujan*, 504 U.S. at 560)).

9 *See id.* at 707.

10 *See* Allen v. Wright, 468 U.S. 737, 739–40, 755 (1984) (acknowledging "stigmatizing injury" caused by racial discrimination, but confirming that standing is limited to "those persons who are personally denied equal treatment" (quoting Heckler v. Mathews, 465 U.S. 728, 740 (1984))).

11 *See* Whitmore v. Arkansas, 495 U.S. 149, 151, 160 (1990) (finding that a "generalized interest of all citizens in constitutional governance" does not confer standing (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217 (1974))).

12 *Hollingsworth*, 570 U.S. at 705–06 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997)).

13 *See, e.g.*, *Lujan*, 504 U.S. at 573–74 ("[The Supreme Court has] consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and

"If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, . . . [c]ourts would start to look more like legislatures, responding to social pressures rather than remedying concrete harms . . . ."[14]

Enter the Establishment Clause. Here, federal courts have held that a citizen's offense at disagreeable government action—the quintessential generalized grievance—*can* create standing where the government action is the maintenance of a religious display on public property. Take, for example, the Eleventh Circuit's 1987 decision in *Saladin v. City of Milledgeville*.[15] The court there held that plaintiffs' offense at a "smudge" on a City seal—an illegible rendering of the word "Christianity" that had been on the seal since 1912—gave standing to sue because the plaintiffs were "forced to look at the word Christianity on official municipal papers"[16]—even if illegible.[17] The "offensive" smudge created a "'spiritual injury' . . . because the seal represents the City's endorsement of Christianity and thus makes the appellants feel like second class citizens."[18]

Bracketing the merits of the *Saladin* claims, there is little doubt that the plaintiffs' alleged injury didn't satisfy Article III. The injury wasn't concrete. Standing was based solely on the fact that plaintiffs felt "affronted by" viewing the City seal.[19] But the mere presence of an unwelcome symbol on government letterhead or property—like the existence of an unwelcome regulation, the flying of a racist flag, or the promotion of an objectionable message by the government through a public advertising campaign—does not, in and of itself, constitute a concrete injury under Article III.

Nor was the *Saladin* plaintiffs' injury particularized. The City of Milledgeville used the allegedly offensive seal on all official letters and correspondence and had even emblazoned it on the city's water tank, all city vehicles, and city uniforms.[20] Presumably every Milledgeville citizen encountered it at one point or another. But nothing in the court's analysis suggests that the plaintiffs suffered an injury different from that of any other citizen—indeed, two of the lead plaintiffs *didn't even live in the City*, but,

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laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."). *See generally* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 619–20 (2007) (Scalia, J., concurring in the judgment) ("Psychic Injury" and the idea of "conceptualizing . . . injury in fact in purely mental terms conflict[] squarely with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated.").

14 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2099 (2019) (Gorsuch, J., concurring in the judgment).

15 812 F.2d 687 (11th Cir. 1987).

16 *Id.* at 688, 692.

17 *Id.* at 691 n.6.

18 *Id.* at 692–93.

19 *Id.* at 693.

20 *Id.*

according to the court, still had standing because they "shop[ped] in Milledgeville" and one of them volunteered within "the Milledgeville Area."[21] Such an undifferentiated injury is not particularized.

In addition, there is something peculiar about the *government*-related nature of the injury in *Saladin*. That is, the feelings of offense were limited and specific to seeing the seal on city-owned property. The same symbol displayed on private property, or even on property owned by a foreign government, would not cause the injury.[22] Nor would reading the word "Christianity" in a dictionary. So, it is not just the content of the display, but the display's legal relationship to a governmental body that causes the offense, and thus the claimed injury.

While *Saladin*'s standing analysis has become typical in Establishment Clause jurisprudence, this broad conception of an injury-in-fact makes Establishment Clause jurisprudence *itself* an anomaly. In no other area of law does a plaintiff's subjective feeling of offense so easily create standing. To bring an Equal Protection Clause claim, for example, a plaintiff must personally have been subject to unequal treatment—mere feelings of offense are insufficient.[23] This leads to the bizarre result that African Americans who take offense at the presence of a confederate flag on government property lack standing while an atheist who takes offense at a cross *on that same flag* can show standing.[24] As Justice Gorsuch quipped, "[w]ho really thinks *that* could be the law?"[25]

II. OFFENDED-OBSERVER STANDING: A CREATURE OF *LEMON*

So how did we get here? The caselaw shows a connection between offended-observer standing and the Supreme Court's *Lemon v. Kurtzman* decision.[26] *Lemon* altered Establishment Clause jurisprudence by focusing courts on the perceived *effect* of government conduct on the plaintiff[27] (or, later, a reasonable observer).[28] Purporting to "glean[]" criteria from a

21 *Id.* at 689.

22 There are no reports of American Establishment Clause plaintiffs traveling overseas ever taking offense at government-owned religious displays like Notre Dame Cathedral or the *Cristo Redentor* statue in Rio de Janeiro. *But see* Freedom from Religion Found., Inc. v. Weber, 628 F. App'x 952 (9th Cir. 2015) (atheist activists objecting to statue of Christ on U.S. Forest Service land).

23 *See* Moore v. Bryant, 853 F.3d 245, 250 (5th Cir. 2017).

24 *Compare id.* at 248, 250 (holding plaintiffs did not have standing for Equal Protection challenge to Confederate emblem on state flag), *with* Briggs v. Mississippi, 331 F.3d 499, 503–08 (5th Cir. 2003) (entertaining Establishment Clause challenge to same emblem).

25 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2099 (2019) (Gorsuch, J., concurring in the judgment).

26 403 U.S. 602 (1971).

27 *See id.* at 612.

28 *See* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989).

handful of then-recent cases, it articulated a three-part test in which federal courts were required to determine whether government actions (1) had a secular purpose, (2) had a primary effect of advancing or inhibiting religion, and (3) fostered an excessive entanglement between the government and religion.[29] As applied to passive religious displays, then, *Lemon* required courts to start looking at the impact the display had on the viewer (to determine its primary effect).[30]

But *Lemon* did more than just announce a new substantive standard—it also paved the way for lower courts to adopt an expansive conception of standing for plaintiffs challenging passive religious displays. Three years before *Lemon*, the Supreme Court had suggested that Article III injuries in the Establishment Clause context depended in part on the Clause's substantive scope, holding in *Flast v. Cohen* that because the levying of taxes to support religion was "one of the specific evils feared by" the Clause's framers, federal taxpayers must have standing to challenge allegedly unconstitutional congressional expenditures.[31] Following *Lemon*, lower courts deciding religious-display cases applied parallel consequentialist reasoning, extending standing to offended observers based on the notion that under *Lemon*, religious displays that had the effect of giving offense were constitutionally suspect on the merits. A clear link was thus forged between *Lemon*'s new substantive standard and relaxed standing for display claims: as lower courts explained, "we think the requisite standing is clearly conferred by non-economic religious values when the plaintiffs *assert a litigable interest* under the Establishment [Clause]."[32]

This connection between offended-observer standing and the Establishment Clause's substantive scope only became clearer after the Supreme Court's *County of Allegheny* decision. There the Court held that the Clause's "essential principle" is that the government cannot "appear[]" to be

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29 *Lemon*, 403 U.S. at 612–13.

30 *See* Allen v. Morton, 495 F.2d 65, 73 (D.C. Cir. 1973) ("We do not dispute that the creche is an obvious religious symbol, nor do we consider lightly the testimony of plaintiff's witnesses *concerning its effect upon them.*" (emphasis added)); Hall v. Bradshaw, 630 F.2d 1018, 1020 (4th Cir. 1980) (making a similar point).

31 392 U.S. 83, 101–04 (1968). *Flast* and other taxpayer-standing doctrines have attracted withering criticism in the intervening decades, for many of the same reasons this Essay criticizes offended-observer standing. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 633–37 (2007) (Scalia, J., concurring in the judgment) (calling on the Court to overrule *Flast*); *cf.* Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278, 284–87 (6th Cir. 2009) (discussing the "city-state distinction" in the Court's taxpayer standing doctrine). But our criticism of offended-observer standing here does not depend on whether *Flast* was right or wrong. Even if *Flast* was right to link standing with the substantive litigable interests protected by the Establishment Clause, that provides no justification for extending Article III standing *beyond* those interests, as offended-observer standing post-*Lemon* would. This Essay thus puts *Flast* and taxpayer standing to one side to focus solely on the harms created by offended-observer standing.

32 Anderson v. Salt Lake City Corp., 475 F.2d 29, 31 (10th Cir. 1973) (emphasis added).

"tak[ing] a position on questions of religious belief or . . . 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[33] Under this new framing (dubbed the endorsement test), standing's distinct role as a separate check on Establishment Clause claims eroded further. As the Fourth Circuit in *Suhre v. Haywood County* observed, "the standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer."[34] Indeed, lower court articulations of the standing test began to sound suspiciously similar to the *Lemon* and endorsement merits analysis: "The injury that gives standing to plaintiffs in these cases is that caused by *unwelcome direct contact with a religious display that appears to be endorsed by the state*."[35] Having created a right to be free from feelings of offense caused by the perceived governmental endorsement of religion, courts felt compelled to ensure there was standing to enforce it. The widespread adoption of offended-observer standing can thus be traced to *Lemon*'s expansion of what the Establishment Clause allegedly forbade.

Justice Gorsuch recognized this link between the *Lemon* test and offended-observer standing in *American Legion*, citing an *amicus* brief filed on behalf of our firm, the Becket Fund.[36] Professor Ashutosh Bhagwat, however, has recently questioned this connection, noting that in *Allen v. Hickel* the D.C. Circuit found offended-observer-like standing to challenge a religious display in a case in 1970—"before even *Lemon* had been decided!"[37] But *Allen* is a curious cite to disprove the historical connection between offended-observer standing and *Lemon*: the *Allen* court both cited favorably the standing analysis in the district court's decision in *Lemon*,[38] and anticipated *Lemon*'s merits

33 County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

34 131 F.3d 1083, 1086 (4th Cir. 1997).

35 *Id.* (emphasis added); *see also, e.g.*, Moss v. Spartanburg Cty. Sch. Dist. Seven, 683 F.3d 599, 607 (4th Cir. 2012) ("Feelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders,* not full members of the political community.'" (quoting McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005))); Deal v. Mercer Cty. Bd. of Educ., 911 F.3d 183, 188 (4th Cir. 2018) ("This is so because Establishment Clause injuries are often 'spiritual and value-laden, rather than tangible and economic.'" (quoting *Moss*, 683 F.3d at 605)); Moore v. Bryant, 853 F.3d 245, 250 (5th Cir. 2017) ("The Establishment Clause prohibits the Government from endorsing a religion . . . . Accordingly, Establishment Clause injury can occur when a person encounters the Government's endorsement of religion.").

36 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2099–2101 (2019) (Gorsuch, J., concurring in the judgment) (citing Br. of Becket Fund for Religious Liberty as Amicus Curiae).

37 Ashutosh Bhagwat, *Crossing Doctrines: Conflating Standing and the Merits Under the Establishment Clause*, WASH. U. L. REV. (forthcoming 2020) (manuscript at 12).

38 Allen v. Hickel, 424 F.2d 944, 947 n.6 (D.C. Cir. 1970) (citing Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969)). The D.C. Circuit reserved judgment as to whether, under *Flast v. Cohen*, plaintiffs had shown taxpayer standing, grounding its standing analysis in the

analysis by focusing on the crèche's "effect" and "purpose" in articulating the substantive Establishment Clause standard.[39] If anything, then, *Allen* seems to strengthen the connection between *Lemon*'s flawed merits analysis and offended-observer standing.

Regardless, the search for a chronological confounding example misapprehends our argument; *even if* a broad conception of standing had bubbled up in a circuit or two prior to *Lemon*, *Lemon* is the reason offended-observer standing has survived and spread. Professor Bhagwat agrees, conceding that "there is undoubtedly truth to Justice Gorsuch's assertion that there is a link between the substantive law of the Establishment Clause, and the willingness of the lower courts to grant standing based on direct contact with religious displays."[40] Half-baked ideas often appear in lower court opinions; only a few become the entrenched law of the land. The reason offended-observer standing has become ubiquitous—as the lower court decisions themselves tell us—is *Lemon*.

III. OFFENDED-OBSERVER STANDING: A CASUALTY OF *AMERICAN LEGION*

If it is true that the offended-observer anomaly is rooted in *Lemon*, what does this mean for the doctrine now that the Supreme Court in *American Legion* has discarded *Lemon* in religious-display cases? Simple. It means, as Justice Gorsuch has argued, that "rather than enmeshing themselves" in the merits of divisive disputes brought by offended observers over religious displays, post-*American Legion* courts can—and should—simply dismiss those suits for lack of standing.[41]

American Legion marked a decisive break from *Lemon* in the context of religious displays. There, the Court considered the constitutionality of a forty-foot-tall Latin cross on public land erected in 1925 to commemorate local citizens killed while fighting in World War I.[42] The lower courts had applied *Lemon*, holding that because the cross is the "preeminent symbol of Christianity," a reasonable observer would view it as "endorsing" religion.[43] But the Supreme Court reversed.[44] Recognizing that removing longstanding monuments may "strike many as aggressively hostile to religion," the Court articulated a "strong presumption of constitutionality" for "established,

plaintiffs' feelings of offense: "We need not reach a determination of that argument in the present case, however, since we conclude that plaintiffs have standing to raise the crèche issue in the federal courts apart from the expenditures of public funds entailed." *Id.* at 946.

39 *Id.* at 947–50.

40 Bhagwat, *supra* note 37 (manuscript at 12).

41 *Am. Legion*, 139 S. Ct. at 2103 (Gorsuch, J., concurring in the judgment).

42 *Id.* at 2074.

43 Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 206, 210–12 (4th Cir. 2017), *rev'd sub nom. Am. Legion*, 139 S. Ct. 2067 (2019).

44 *Am. Legion*, 139 S. Ct. at 2090.

religiously expressive" symbols, which the *American Legion* plaintiffs could not rebut.[45]

In doing so, the Justices implicitly jettisoned *Lemon*.[46] And although *American Legion*'s rejection of *Lemon* was diffused over three different opinions, post-*American Legion* courts have gotten the message. Two courts of appeals have decided religious display cases since *American Legion*.[47] In both, the courts reached the merits and upheld the displays under the *American Legion* presumption.[48] And in both, the courts concluded, in no uncertain terms, that "*Lemon* is dead, . . . at least with respect to cases involving religious displays and monuments."[49]

After *American Legion*, then, the reason lower courts stretched ordinary standing principles to accommodate offended-observer standing—*Lemon*—no longer exists. And if *Lemon* no longer abides, courts should apply ordinary principles of standing to religious display cases. Indeed, Justice Gorsuch's concurring opinion in *American Legion*, joined by Justice Thomas, drew precisely this conclusion. The *American Legion* plaintiffs were classic offended observers—local residents whose sole alleged injury was that they had driven by the cross and were offended by it.[50] Justices Gorsuch and Thomas would therefore have also reversed and remanded with instructions to dismiss the case for lack of jurisdiction, on the ground that offense alone does not "qualif[y] as a 'concrete and particularized' injury sufficient to confer standing."[51]

In light of *American Legion*, lower courts should do exactly that. "With *Lemon* now shelved, little excuse . . . remain[s] for the anomaly of offended observer standing."[52] Meanwhile, there are many reasons to reject it.

A. Precedent

First, doing so would reconcile lower courts' standing jurisprudence with Supreme Court precedent. As already explained, the Supreme Court has rejected, across numerous contexts, the notion that mere psychological

45 *Id.* at 2084–85.

46 *See id.* at 2081–82, n.16 (plurality opinion); *id.* at 2097 (Thomas, J., concurring in the judgment); *id.* at 2101–02 (Gorsuch, J., concurring in the judgment).

47 *See* Kondrat'yev v. City of Pensacola, 949 F.3d 1319, 1322 (11th Cir. 2020); Freedom from Religion Found., Inc. v. County of Lehigh, 933 F.3d 275, 281 (3d Cir. 2019).

48 *Kondrat'yev*, 949 F.3d at 1334; *Lehigh*, 933 F.3d at 285.

49 *Kondrat'yev*, 949 F.3d at 1326; *see Lehigh*, 933 F.3d at 281 ("*American Legion* confirms that *Lemon* does not apply to 'religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies.'" (citing *Am. Legion*, 139 S. Ct. at 2081)).

50 *See* Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 203–04 (4th Cir. 2017), *rev'd sub nom. Am. Legion*, 139 S. Ct. 2067 (2019) (noting that the individual plaintiffs had standing because of their "direct contact with the Cross" and that the Association had derivative standing from the "unwelcome contact with the Cross" experienced by its members).

51 *Am. Legion*, 139 S. Ct. at 2098 (Gorsuch, J., concurring in the judgment).

52 *Id.* at 2102 (Gorsuch, J., concurring in the judgment).

dismay at government action could constitute a cognizable Article III injury. But it has also done so specifically under the Establishment Clause. In its 1982 decision in *Valley Forge*, the Court rejected standing for individuals upset by the transfer of federal property to a religious college.[53] Its reason: "[T]he psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III."[54]

Following *Valley Forge*, lower courts strained to reconcile the decision with their felt need to find standing for the religious-display plaintiffs whom the *Lemon* test said should often succeed on the merits. But *American Legion* has now removed that impetus for distinguishing *Valley Forge*. And in any event, the distinctions were never persuasive.

For example, many lower courts incorporated into offended-observer standing a requirement that the plaintiff have had "direct and unwelcome contact" with the display, which, they said, distinguished those plaintiffs from the plaintiffs in *Valley Forge*, who had only learned of the transfer through a news release.[55] But whether offense is incurred from in-person or remote viewing, it is still just offense, and the point of *Valley Forge* is that "psychological consequence[s]" are not concrete enough injuries to support Article III standing.[56]

Lower courts and offended observers also pointed out that the Supreme Court reached the merits of several religious-display cases, without questioning the plaintiffs' standing. But of course, it is well-settled that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."[57] And in any event, careful review of these decisions indicates that jurisdiction in most could have been based on something other than typical offended-observer standing.[58]

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53 *See* Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 489 (1982).

54 *Id.* at 485.

55 *E.g.*, ACLU of Ohio Found., Inc. v. Ashbrook, 375 F.3d 484, 489, 489 n.3 (6th Cir. 2004).

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

57 Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011).

58 *American Legion* included, the Court has reached the merits of seven passive-display cases. In two, the lower courts relied (either explicitly or implicitly) on "municipal taxpayer standing"—that is, not on the plaintiffs' offense at observing the display but on their status as taxpayers objecting to the use of government funds to maintain it. *See* Donnelly v. Lynch, 691 F.2d 1029, 1031–32 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984); ACLU, Greater Pittsburgh Chapter v. County of Allegheny, 842 F.2d 655, 657 (3d Cir. 1988), *aff'd in part and rev'd in part*, 492 U.S. 573 (1989). In a third, an individual involved in the genesis of the case (though ultimately not a plaintiff) had asked to build his own display and been denied—arguably providing him standing under a disparate-legal-treatment theory. Buono v. Norton, 212 F. Supp. 2d 1202, 1206 (C.D. Cal. 2002); *see* Salazar v. Buono, 559 U.S. 700 (2010) (ruling on the Establishment Clause issue at a later stage of the litigation). And a fourth involved a Ten Commandments display in a public-school classroom—a context in

Valley Forge already decided the permissibility of offended-observer standing many years ago—with a resounding no. Now that *American Legion* has cleared away any rationale for evading *Valley Forge*, lower courts should apply it as written: an observer's dismay at seeing a religious display, whatever the "intensity" or "fervor," is not enough to invoke the authority of federal courts.[59]

B. Original Meaning

Second, rejecting offended-observer standing would help to realign Establishment Clause standing not only with Supreme Court precedent but also with the original meaning of Article III. Standing is a largely judge-developed doctrine and was designed to effectuate Article III's textual limitation on the "judicial power" to "Cases" and "Controversies."[60] At the time of the Founding, whether a dispute constituted a justiciable case or controversy "depend[ed]" on whether it involved a public or private right.[61] Plaintiffs seeking to vindicate "private rights"—"rights 'belonging to individuals, considered as individuals'"—generally needed to allege nothing more than the violation itself to be able to press their claims in court, because the violation would inherently work an individualized injury.[62] Meanwhile, plaintiffs seeking to vindicate "public rights"—"rights that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity'"[63]—had to do more to provoke judicial intervention: they had to show some "special damage[,] . . . different in kind from that" suffered by the rest of the community.[64]

Suits under the Establishment Clause are on the public-rights side of this divide. Unlike, say, the Fifth Amendment's guarantee to every "person" a right against self-incrimination,[65] the Establishment Clause does not vest in individuals, as individuals, a right running against particular government actions. Rather, like the constitutional provisions allocating power between

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which the Court has been especially sensitive to religious symbolism on a coercion-like theory that students are an impressionable, captive audience. *See* Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam). Thus, of the Court's seven display cases, standing in at least four can be explained on other grounds.

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

60 U.S. CONST., art. III, § 2; *see, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). *See generally* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (discussing the constitutional nature of standing).

61 Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1623 (2020) (Thomas, J., concurring) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring)).

62 *Spokeo*, 136 S. Ct. at 1551–52 (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2).

63 *Id.* at 1551 (Thomas, J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

64 Woolhandler & Nelson, *supra* note 60, at 702 (quoting Commonwealth v. Webb, 27 Va. 726 (6 Rand.) 726, 729 (1828)).

65 U.S. CONST. amend. V.

the federal and state governments (federalism) and between the different branches of the federal government (separation of powers), the Establishment Clause is a "structural restraint": it identifies an entire field of actions ("laws respecting an establishment of religion") that the government cannot take, regardless of the impact on anyone in particular.[66]

The Clause thus reflects a "duty owed to the entire body politic"—a public right.[67] Under a historical understanding of Article III, then, Establishment Clause plaintiffs must show some concrete harm, particular to them rather than shared by all other members of the body politic, that results from the challenged action. And again, as *Valley Forge* and Justice Gorsuch's *American Legion* opinion explain, psychological offense resulting merely from seeing that action does not qualify.

The characterization of the Establishment Clause as protecting the rights of the "entire body politic" has been advanced most prominently by Professor Carl Esbeck, but he comes to a different conclusion on offended-observer standing from that advanced in this Essay.[68] Professor Esbeck agrees that because the Establishment Clause is a "structural," rather than an individual-rights, provision, some violations would not cause concrete harm to individuals in a way that would satisfy the ordinary meaning of a case or controversy.[69] But Professor Esbeck has argued that, precisely for this reason, courts may be justified in applying standing requirements with "reduced rigor" in Establishment Clause cases, to ensure some private parties will have standing to bring them.[70]

But of course, as the Supreme Court has repeatedly reaffirmed, even if it is true "no one would have standing" to challenge an action under ordinary standing principles, that "is not a reason to" manipulate those principles to find it.[71] And indeed, if it is true Article III's text requires public-rights plaintiffs to show a concrete and particularized injury, then the Supreme Court *cannot* discard that rule simply to accommodate offended observers. Article III is itself a structural provision, granting only limited power to the federal judiciary—and as Professor Esbeck himself acknowledges, it is "intrinsic" to government by "written constitution . . . that the powers delegated to, and withheld from, government remain fixed or constant."[72] Accordingly, Establishment Clause claimants—like others asserting public

66 U.S. CONST. amend. I; *see* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 476 (2002) (arguing that the Supreme Court has consistently "treated the Establishment Clause as a structural restraint on governmental power") [hereinafter Esbeck, *Establishment Clause*].

67 Esbeck, *Establishment Clause*, *supra* note 66, at 455.

68 *Id.*

69 *See* Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 CHARLESTON L. REV. 607, 609 (2013).

70 *See id.* at 648–51.

71 Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1623 (2020) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)).

72 Esbeck, *Establishment Clause*, *supra* note 66, at 465.

rights—must show particularized and distinct injury. Offended observers do not satisfy this Article III requirement.

C. Policy

Third, rejecting offended-observer standing would advance two key policy goals at the heart of the First Amendment: reducing "religiously based divisiveness"[73] and promoting religious neutrality.[74] Before offended-observer standing, disputes over religious displays were treated as political questions—to be debated by the public or considered by the legislature.[75] But by granting any person who saw and disliked a display the ability to sue over it, offended-observer standing dragged this debate out of the public square and into the courtroom. Federal judges were now tasked with determining which holiday displays included a sufficient number of secular components, whether the placement of a menorah alongside a Christmas tree was sufficient to obviate the appearance of government support for religion, and which crosses or Ten Commandments on public land had to go.[76] And whichever "side" won in court would take that victory as a validation of its views on religion more generally—meaning that these lawsuits have frequently been more divisive than the underlying symbols themselves (which, in many cases, had existed peacefully for decades without incident).

Rejecting standing for offended observers—rather than deciding display cases on the merits—would lower the temperature on these disputes. It would remove the prize of judicial validation from the equation, thus likely also reducing the number of disputes themselves. And it would send any remaining disputes to the political branches—the branches specifically designed for the airing of issues that affect the general citizenry and better able to broker compromise.

Discarding offended-observer standing would also better foster neutrality toward religion. Opponents of religious displays often argue that a religion-neutral public square is one devoid of religion. But this would be true only if the government did not participate in public culture through symbolic displays at all. In the real world, the government is a "cultural force of seismic proportions," acting in the cultural sphere not only by erecting all

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73 Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment).

74 *See, e.g.*, County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 627 (O'Connor, J., concurring).

75 The Establishment Clause was not incorporated against the states until 1947, in *Everson v. Board of Educators of Ewing Township.*, 330 U.S. 1, 15 (1947), and there are no indications of any earlier display cases brought against the federal government. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 680 (2002) ("When in 1947 the Court turned its attention to the Establishment Clause, it acted as if it had a blank slate upon which to write.").

76 *See, e.g.*, Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 18–20 (2011) (Thomas, J., dissenting from denial of certiorari) (collecting cases).

kinds of displays but also by proclaiming holidays, subsidizing the arts, and fostering cultural education through public schools.[77] In this world, the most "neutral" public square "is not a secular blank slate" but one that "conform[s], in general, to the public culture as it has developed over time," which is "a mixture of the secular and the religious."[78]

Offended-observer standing skews this balance by causing governments to tear down perfectly constitutional displays to avoid the very real risk of costly litigation. If a religious display can be challenged at any time by almost anyone, risk-averse government attorneys—fearful of attorneys' fees—will often judge the threat to the public fisc too great to justify a prolonged legal battle, even if the symbol might ultimately be upheld. The ever-looming threat of litigation presented by offended-observer standing thus itself coerces governments to remove religious symbolism at the first hint of a controversy,[79] artificially distorting the public square and giving the disgruntled a heckler's veto on religious memorials and displays.[80]

Accepting offended-observer standing's demise would by no means end Establishment Clause litigation. It would just mean that plaintiffs challenging passive religious displays would have to show—like all other plaintiffs—some cognizable harm beyond observation and feelings of offense. For example, they could try to show they were "personally denied equal treatment" based on religion—an indisputably concrete, particularized injury that already supports standing in many Establishment Clause cases.[81] Or, they could show they were forced to participate in government-sponsored religious exercises—the type of injury that supports standing in cases challenging, for example, school prayer.[82] Or, they could challenge allegedly unconstitutional expenditures of government funds in their capacity as taxpayers within the bounds of the Supreme Court's taxpayer standing cases.[83] What they cannot do is punch their ticket into court simply by seeing a religious display and alleging feelings of offense. Dismay at government action can "be sincere,

77 KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA 128 (2005).

78 Michael W. McConnell, *No More (Old) Symbol Cases*, CATO SUP. CT. REV., 2018–19, at 91, 101.

79 *See, e.g.*, Erin Edgemon, *'Blessed are the Peacemakers' Decals Removed from Alabama Patrol Cars*, MONTGOMERY REAL-TIME NEWS, (Mar. 6, 2019) ("[A]fter speaking to a local attorney and the county's insurance carrier it was determined a lawsuit over the decals would be too expensive."), https://perma.cc/YYW6-2GPV.

80 *See, e.g.*, Saladin v. City of Milledgeville, 812 F.2d 687, 689 (11th Cir. 1987) (noting that while the initial litigation was pending, the City voluntarily removed its "seal from all city vehicles, uniforms, and the water tank").

81 Allen v. Wright, 468 U.S. 737, 755 (1984) (quoting Heckler v. Mathews, 465 U.S. 728, 739–40 (1984)); *see, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5–8 (1989) (plurality).

82 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224 n.9 (1963).

83 *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 134–41 (2011) (explaining the narrow exception to the Court's general prohibition against taxpayer standing).

sometimes well taken, even wise," but the venue for airing such feelings is the legislature, not the courts.[84]

IV. *AMERICAN LEGION*'S EARLY RECEPTION IN THE LOWER COURTS

Fortunately, there's some indication in the post-*American Legion* caselaw that offended-observer standing may be ripe for revisiting. No court has yet had the opportunity to consider the doctrine's continued viability afresh, but courts and lower-court judges have signaled that it may be time to do so. And we expect the number of cases challenging offended-observer standing to grow as defendants become more familiar with the doctrine's flaws and recognize that there may soon be a judicial appetite to address this issue at the Supreme Court.[85]

An Eleventh Circuit decision has most squarely addressed the issue after *American Legion*. In *Kondrat'yev v. City of Pensacola*, plaintiffs who viewed a cross in a public park and felt "offended" and "excluded" sued seeking its removal.[86] The panel found itself bound by pre-*American Legion* offended-observer precedent to find these allegations sufficient for standing.[87] Two of the three panelists joined in a separate concurrence written by Judge Newsom, however, that aligned with Justice Gorsuch's *American Legion* opinion in arguing that the offended-observer precedent was "just plain wrong" and urged the full Eleventh Circuit to revisit it.[88]

Two Sixth Circuit opinions—these outside the display context—have also invoked Justice Gorsuch's *American Legion* opinion. In *Brintley v. Aeroquip Credit Union*, the Sixth Circuit denied standing to a plaintiff who alleged a "dignitary injury" after she was unable to use certain websites inaccessible to the blind.[89] Citing Justice Gorsuch's *American Legion* concurrence, the court explained—in language as applicable to offended observers as to the Americans with Disabilities Act plaintiff there—that "[m]ere indignation and mere affront are not sufficiently particularized injuries under Article III."[90] Likewise in *Buchholz v. Meyer Njus Tanick, PA*, the Sixth Circuit denied standing to a plaintiff whose claimed injury was "anxiety" resulting from letters from a debt collector that were allegedly misleading and therefore

84 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the judgment).

85 *See, e.g.*, Woodring v. Jackson County, No. 4:18-cv-00243, 2020 WL 2085057, at *9 (S.D. Ind. Apr. 30, 2020) (defendants preserving for appeal offended-observer standing arguments based on *American Legion*); Satanic Temple v. City of Scottsdale, No. CV18-00621, 2020 WL 587882, at *1 (D. Ariz. Feb. 6, 2020) (contesting plaintiff's standing to challenge legislative prayer practice).

86 949 F.3d 1319, 1324 (11th Cir. 2020).

87 *Id.* at 1323–25.

88 *Id.* at 1334–38 (Newsom, J., concurring).

89 936 F.3d 489, 491–95 (6th Cir. 2019).

90 *Id.* at 494.

unlawful under the Federal Debt Collection Practices Act.[91] Concurring separately, Judge Murphy explained that "mental distress" is an insufficiently concrete injury when a claim, under the Founding-era distinction discussed above, seeks to vindicate public rights.[92] And, citing Justice Gorsuch, Judge Murphy identified "[t]he offense for those who come across public monuments with a religious cast" as an example of a claim that might fail for that reason.[93]

But perhaps the most striking post-*American Legion* decision relevant to offended-observer standing didn't mention the doctrine, or *American Legion*, at all. In *McMahon v. Fenves*, the Fifth Circuit denied standing to plaintiffs who sought to challenge on free speech grounds the removal of Confederate monuments from a city park.[94] The court did not doubt that the plaintiffs—descendants of Confederate veterans, one of whom was a local resident—"care[d] deeply" about the monuments.[95] But it dismissed the case for lack of standing anyway, because "offense" at the removal of a monument is a "psychological injury" not sufficiently concrete and particularized to create Article III standing.[96] And even though the plaintiffs alleged familial ties to the specific individuals who had donated the monuments, this went to the "magnitude of Plaintiffs'" alleged injury, not its "nature."[97] The court thus concluded that, whatever its degree, the plaintiffs' injury was at bottom mere "indignation" at government conduct with which they disagreed—and that injury was too "generalized" to support standing.[98]

This reasoning makes good sense; and it would have made equally good sense had *McMahon* been about the retention of a religious monument rather than the removal of a secular one.

CONCLUSION

Chesterton said that you should not tear down a fence unless you know why it was built in the first place. That wise principle poses no obstacle to scrapping offended-observer standing. The history shows precisely why lower courts built the doctrine of offended-observer standing—to tailor standing to the Establishment Clause's expanded substantive prohibitions as interpreted by the *Lemon* test. But in *American Legion*, the Supreme Court brought the *Lemon* era—at least for display cases—to a close. So, the only rationale supporting offended-observer standing no longer abides.

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91 946 F.3d 855, 863–67 (6th Cir. 2020).
92 *Id.* at 872–73 (Murphy, J., concurring).
93 *Id.* at 873.
94 946 F.3d 266, 268–70 (5th Cir. 2020).
95 *Id.* at 271.
96 *Id.* at 271–72.
97 *Id.* at 271.
98 *Id.* at 271–72.

Meanwhile there are many reasons to reject that doctrine. In no other area of constitutional law are plaintiffs able to challenge government action merely because they have seen it and disagree with it. And entertaining such claims takes courts out of their proper province—providing a forum for particular plaintiffs to seek a remedy for particular harms—and into the province of the political branches: allowing the citizenry as a whole to weigh in on the proper objects of government action. Offended-observer standing has also degraded the broader culture, turning productive debates about representations of religion in the public square into zero-sum courtroom battles and nixing constitutionally appropriate displays through its *in terrorem* effect on risk averse government officials.

Fortunately, there is reason to think this doctrine may be waning. In *American Legion*, Justice Gorsuch instructed lower courts that they should, going forward, dismiss offended-observer cases for lack of standing. And in the short post-*American Legion* era, Justice Gorsuch's opinion has already found traction. Lower courts should take the next opportunity to depart from their offended-observer precedent and reconcile standing to challenge passive religious displays with the bedrock requirements of Article III.