NOTES

NONTAXPAYER STANDING, RELIGIOUS FAVORITISM, AND THE DISTRIBUTION OF GOVERNMENT BENEFITS: THE OUTER BOUNDS OF THE ENDORSEMENT TEST

I. INTRODUCTION

The requirement that a plaintiff show injury-in-fact to have standing in federal court has proved "particularly elusive" in the Establishment Clause context.[1] This is because "violation of the clause does not require coercion on specific individuals"[2] or other particularized harm, but rather occurs whenever government action endorses or favors one religion over another (or favors religion generally).[3] Unlike most litigated injuries, the harm that flows from an Establishment Clause violation is "inherently generalized":[4] the damage, broadly speaking, accrues to society as a whole rather than to individuals as such (although certain individuals may feel especially slighted by a given violation).[5]

Courts have laid out a fairly broad injury-in-fact rule for cases involving religious displays and similar alleged Establishment Clause violations. In brief, a plaintiff must have suffered a "personal" injury as a consequence of the claimed violation.[6] Such injury may arise where a plaintiff has had direct contact with a religious display or altered her behavior in order to avoid the display.[7] It is not clear, however, how far this rule extends. Certainly it covers religious displays on government property, as well as school prayers and government proclamations on religious subjects.[8] Some litigants, however, have sought to

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[1] Saladin v. City of Milledgeville, 812 F.2d 687, 691 (11th Cir. 1987). The Supreme Court has defined injury-in-fact as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (footnote and citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Injury-in-fact is one of three constitutional standing requirements. *Id.* at 560–61. The other two are causation and redressability. *See id.*

[2] William P. Marshall & Maripat Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at* Valley Forge, 11 HOFSTRA L. REV. 63, 84 (1982).

[3] *See* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 591 (1989) (citing Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947)).

[4] Marshall & Flood, *supra* note 2, at 84.

[5] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2–3 (1998) (arguing that the Establishment Clause operates as a structural restraint on government power rather than as a guarantor of individual rights).

[6] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982); *see also id.* at 485–86.

[7] *See infra* pp. 2003–05.

[8] *See infra* p. 2003.

extend the rule to less frequent subjects of Establishment Clause litigation, such as the denial of government benefits.[9]

One recent D.C. Circuit case, *In re Navy Chaplaincy*,[10] involved a particularly interesting twist on injury-in-fact in the Establishment Clause context. The plaintiffs, a group of Protestant Navy chaplains, claimed the Navy was operating its retirement system in a way that benefited Catholic over non-Catholic chaplains.[11] Significantly, the plaintiffs conceded that they had not themselves suffered discrimination on account of their religion.[12] Instead, they advanced the novel claim that they had suffered injury-in-fact based on their exposure to the "'message' of religious preference" the Catholic favoritism communicated.[13] Although the court ultimately concluded the plaintiffs lacked standing, the plaintiffs' theory did win the vote of Judge Rogers, who dissented on the ground that the Navy Chaplaincy's Catholic bias conveyed a message of favoritism that "cause[d] [the plaintiffs] psychological harm . . . that is cognizable under the Establishment Clause."[14]

The *Navy Chaplaincy* plaintiffs' theory of standing is significant because it would permit plaintiffs to challenge government religious discrimination against other people. Normally, under *Allen v. Wright*,[15] when the government engages in discriminatory conduct, the only parties with standing to challenge that conduct are those who have suffered actual discrimination as a result.[16] The *Navy Chaplaincy* plaintiffs' theory avoids this problem — at least in the Establishment Clause context — by characterizing religious favoritism in the distribution of government benefits as a "message" endorsing religion. Because standing under the Establishment Clause can arise solely on account of one's "contact" with a message endorsing religion,[17] if religious favoritism in the distribution of government benefits can be said to communicate a message endorsing religion, then a plaintiff would be able to assert standing to challenge such favoritism so long as she can show exposure to the message. Suffering actual discrimination would no longer be required; simple knowledge of the favoritism — that is, "exposure" to the message the favoritism conveys — would suffice.

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[9] *See infra* section III.A, pp. 2008–11.

[10] 534 F.3d 756 (D.C. Cir. 2008).

[11] *Id.* at 759.

[12] *Id.* at 760.

[13] *Id.* at 763.

[14] *Id.* at 772 (Rogers, J., dissenting).

[15] 468 U.S. 737 (1984).

[16] *Id.* at 755.

[17] *See, e.g.*, Suhre v. Haywood County, 131 F.3d 1083, 1089 (4th Cir. 1997); Foremaster v. City of St. George, 882 F.2d 1485, 1490–91 (10th Cir. 1989).

Clearly, accepting the *Navy Chaplaincy* plaintiffs' theory would have major consequences for Establishment Clause standing doctrine. For this reason, the theory warrants close examination. This Note investigates the analytical underpinnings of the effort to characterize religious favoritism in the distribution of government benefits as a "message" endorsing religion. Specifically, it focuses on the degree to which this effort conforms to established standing doctrine — whether the effort fits well with current doctrine or whether it requires twisting or even abandoning settled principles. Part II surveys Establishment Clause standing doctrine in suits involving noneconomic injuries (such as exposure to state-sponsored religious displays or other government conduct allegedly endorsing religion) and outlines the two general tests courts have fashioned to determine whether a plaintiff asserting noneconomic injury has standing under the Establishment Clause. Part III then analyzes the effort to characterize religious favoritism in the distribution of government benefits as a "message" endorsing religion in light of *Allen v. Wright*, concluding that the effort would require courts to invent artificial distinctions between religious and other forms of discrimination to avoid dramatically expanding standing to challenge government discrimination. The effort, in other words, can survive only through distorting or abandoning important aspects of current doctrine. Part IV concludes.

II. *VALLEY FORGE*, RELIGIOUS DISPLAYS, AND NONTAXPAYER ESTABLISHMENT CLAUSE STANDING

Standing in the Establishment Clause context generally arises under one of two headings. First, a plaintiff who pays federal taxes can assert "taxpayer" standing to challenge specific congressional appropriations that advantage religion.[18] Second, a plaintiff can claim "nontaxpayer" standing[19] — also called "noneconomic"[20] or "citizen"[21]

[18] Flast v. Cohen, 392 U.S. 83, 85, 88 (1968). Taxpayer standing under the Establishment Clause arises only where a federal taxpayer challenges congressional action taken pursuant to the Taxing and Spending Clause, U.S. CONST. art. I, § 8, cl. 1. *Flast*, 392 U.S. at 102–03; *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479–80 (1982) (denying taxpayer standing where the plaintiffs challenged a federal land grant from the executive branch to a religious school under a congressional statute passed pursuant to the Property Clause, U.S. CONST. art. IV, § 3, cl. 2). "[A]n incidental expenditure of tax funds in the administration of an essentially regulatory statute" does not suffice, *Flast*, 392 U.S. at 102, nor does purely discretionary spending by the Executive Branch, Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2568 (2007) (plurality opinion).

[19] Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing To Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 505 (1995).

[20] *E.g.*, Saladin v. City of Milledgeville, 812 F.2d 687, 689 n.3 (11th Cir. 1987); David Harvey, Comment, *It's Time To Make Non-Economic or Citizen Standing Take a Seat in "Religious Display" Cases*, 40 DUQ. L. REV. 313, 315 (2002).

[21] *E.g.*, *Valley Forge*, 454 U.S. at 488; *Suhre*, 131 F.3d at 1086; Harvey, *supra* note 20, at 361.

standing — on the ground that government sponsorship of religion has offended her in some direct, personal way.[22]

The contours of nontaxpayer Establishment Clause standing are ill-defined. Indeed, the requirements for such standing are more easily characterized by what does *not* suffice for standing than by what does. This is largely because the only Supreme Court case to address the issue head-on, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[23] found that the plaintiffs lacked standing. In *Valley Forge*, a group of church-state separationists in Maryland and Virginia challenged a federal land grant to a private religious college in Pennsylvania as a violation of the Establishment Clause.[24] After concluding that the plaintiffs lacked taxpayer standing because the land grant was an act of the Executive Branch, not Congress,[25] the Court held that the plaintiffs also lacked nontaxpayer standing. The plaintiffs had asserted nontaxpayer standing on the ground that the land transfer violated their "shared individuated right to a government that 'shall make no law respecting the establishment of religion.'"[26] In the Court's view, however:

> [The plaintiffs lacked standing because they] fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.[27]

Later, in a footnote, the Court observed that in order to have standing, the plaintiffs needed "to establish that one or more of [them] ha[d] suffered, or [were] threatened with, an injury *other* than their belief that the transfer violated the Constitution."[28] *Valley Forge* thus clarified that the mere belief that government conduct violates the Establish-

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[22] *See* Rohr, *supra* note 19, at 529–30.

[23] 454 U.S. 464. Of course, *Valley Forge* is not the only Supreme Court case ever to discuss nontaxpayer Establishment Clause standing. As early as 1963 the Court took up the issue in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), determining that the plaintiff schoolchildren (and their parents) had standing to challenge their public school's practice of daily Bible reading because they were "directly affected by the laws and practices against which their complaints [were] directed." *Id.* at 224 n.9. The *Schempp* Court, however, relegated this point to a footnote and did not elaborate its reasoning. It is no stretch to say that *Valley Forge* is the only Supreme Court case to address nontaxpayer Establishment Clause standing in any meaningful way.

[24] *Valley Forge*, 454 U.S. at 467–69.

[25] *Id.* at 479. The Court also noted that the statute enabling the Executive Branch action at issue had been passed pursuant to the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, not the Taxing and Spending Clause, U.S. CONST. art. I, § 8, cl. 1. *Valley Forge*, 454 U.S. at 480.

[26] *Valley Forge*, 454 U.S. at 470 (quoting Ams. United for Separation of Church & State, Inc. v. U.S. Dep't of Health, Educ. & Welfare, 619 F.2d 252, 261 (3d Cir. 1980)).

[27] *Id.* at 485–86.

[28] *Id.* at 487 n.23 (emphasis added).

ment Clause does not confer standing to challenge that conduct in federal court. *Valley Forge* did not, however, indicate what sorts of noneconomic (or nontaxpayer) injury *do* suffice for standing, aside from mandating that to qualify, an injury must be "personal."[29]

Since *Valley Forge*, a host of circuit court cases have added meat to this bare mandate. The most common have involved challenges to religious displays on public property.[30] Other frequent subjects of dispute have included prayers or other alleged religious influences in public schools[31] and government proclamations on religious subjects.[32] Of these cases, those involving religious displays are particularly instructive.[33]

A typical religious display case involves a challenge either to a city- or state-sponsored religious display (such as a holiday crèche)[34] or to a privately sponsored display on public property.[35] Because both types of displays frequently do not involve taxpayer funds, plaintiffs in such cases often must rely on nontaxpayer standing to bring suit.[36] Courts adjudicating religious display cases generally determine whether a

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[29] *Id.* at 485; *see also* Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 341 (1989) ("[*Valley Forge*] gave little content to its personal injury standard."); *cf.* Marshall & Flood, *supra* note 2, at 95 ("[T]he *Valley Forge* Court's opinion was deficient in its failure to clearly articulate the grounds for the holding.").

[30] *See* Rohr, *supra* note 19, at 497 ("[T]he 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.").

[31] *E.g.*, Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188, 191 (5th Cir. 2006) (suit challenging local school board's practice of opening board meetings with prayer); Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 278–79 (5th Cir. 1999) (suit challenging public school's voluntary clergy-counseling program).

[32] *E.g.*, Ariz. Civil Liberties Union v. Dunham, 112 F. Supp. 2d 927, 927 (D. Ariz. 2000) (suit challenging town proclamation of Bible Week); Zwerling v. Reagan, 576 F. Supp. 1373, 1373–74 (C.D. Cal. 1983) (suit challenging presidential proclamation declaring 1983 to be the "Year of the Bible").

[33] Standing in school prayer and other school religious influence cases is usually straightforward, given that such cases typically involve "impressionable schoolchildren," *Valley Forge*, 454 U.S. at 487 n.22, who "must attend" their schools, Doe v. Harland County Sch. Dist., 96 F. Supp. 2d 667, 670 (E.D. Ky. 2000). Simple school attendance, coupled with offense at the religious influence present in the school, usually suffices. *E.g.*, *Tangipahoa Parish*, 473 F.3d at 196. Cases involving government proclamations on religious subjects typically invoke doctrines from the religious display cases to determine standing. *See, e.g.*, *Dunham*, 112 F. Supp. 2d at 929–34.

[34] *E.g.*, Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679 (6th Cir. 1994) (suit challenging portrait of Jesus Christ displayed in hallway of public school); Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991) (suit challenging presence of Latin cross on city seal).

[35] *E.g.*, County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (suit challenging holiday crèche owned by local Catholic organization and displayed inside county courthouse); Freedom from Religion Found., Inc. v. Zielke, 845 F.2d 1463 (7th Cir. 1988) (suit challenging privately donated Ten Commandments monument on city parkland).

[36] *Cf.* Rohr, *supra* note 19, at 497.

plaintiff has alleged the type of "personal" injury required for nontaxpayer Establishment Clause standing by applying one of two basic tests.[37] The first focuses on the plaintiff's "contact" with the challenged display and grants standing if a plaintiff's contact with the display was sufficiently "direct."[38] Relevant considerations include how regularly the plaintiff comes into contact with the display,[39] how close to the display the plaintiff lives or works,[40] and whether the plaintiff is a member of the "community" in which the display is located.[41] Each of these variations rests on the general idea that a person who has close, continuing contact with an offensive display suffers a "personal" injury as a result of that contact.[42]

The second test focuses on the plaintiff's response to the challenged display and grants standing where a plaintiff claims to have altered her behavior to avoid coming into contact with the display.[43] Under this test, it is the plaintiff's efforts to *avoid* contact with the display that count.[44] Theoretically, standing could lie even if the plaintiff has never actually seen the display, so long as the plaintiff claims she "mightily strives"[45] to avoid all contact with it.[46] Courts occasionally employ a slight variation of this test, asking whether the display impaired the plaintiff's use of the property on which the display is located,[47] but the idea is much the same: a plaintiff who changes her be-

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[37] *See Dunham*, 112 F. Supp. 2d at 929–30 (identifying the two tests).

[38] *See, e.g.*, Suhre v. Haywood County, 131 F.3d 1083, 1089 (4th Cir. 1997) ("[D]irect contact with a religious display is sufficient . . . for purposes of standing."); Foremaster v. City of St. George, 882 F.2d 1485, 1490–91 (10th Cir. 1989) (finding standing where plaintiff challenging inclusion of local Mormon temple on city seal alleged "direct, personal contact," *id.* at 1490, with the seal).

[39] *E.g.*, Saladin v. City of Milledgeville, 812 F.2d 687, 692 (11th Cir. 1987); Hawley v. City of Cleveland, 773 F.2d 736, 740 (6th Cir. 1985).

[40] *See, e.g.*, *Suhre*, 131 F.3d at 1086; *Zielke*, 845 F.2d at 1469.

[41] *E.g.*, *Suhre*, 131 F.3d at 1087.

[42] *See id.* at 1089; *Saladin*, 812 F.2d at 693.

[43] *See* Harris v. City of Zion, 927 F.2d 1401, 1405–06 (7th Cir. 1991) (finding that the plaintiffs' efforts to avoid contact with city seal containing Latin cross constituted a "tangible, albeit small cost that validates the existence of genuine distress and warrants the invocation of federal jurisdiction," *id.* at 1406 (citing ACLU of Ill. v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986))); *City of St. Charles*, 794 F.2d at 268 (granting standing on grounds that the plaintiffs claimed to "have been led to alter their behavior — to detour, at some inconvenience to themselves, around the streets they ordinarily use" — in order to avoid the challenged display).

[44] *See Harris*, 927 F.2d at 1406; *City of St. Charles*, 794 F.2d at 268.

[45] *Harris*, 927 F.2d at 1405.

[46] *See* ACLU of Ga. v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1107 n.17 (11th Cir. 1983) ("[W]e 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. Each plaintiff found his option to use the Georgia state public parklands restricted, upon learning of the cross . . . .").

[47] *E.g.*, Hawley v. City of Cleveland, 773 F.2d 736, 740 (6th Cir. 1985) ("[A] plaintiff challenging sectarian use of public property for impairing his actual use and enjoyment of that property has standing to challenge the impermissible activity."); *Rabun County*, 698 F.2d at 1105 ("[A]n ef-

havior because of an offensive religious display suffers the type of "personal injury" *Valley Forge* requires for standing.[48]

The religious display cases thus serve to flesh out *Valley Forge*'s requirement that a plaintiff asserting nontaxpayer Establishment Clause standing identify a "personal" injury suffered as a consequence of the challenged government conduct. Such an injury arises where a plaintiff alleges "direct contact" with the challenged conduct, as well as where a plaintiff claims to have altered her behavior in order to avoid the conduct.

III. NONTAXPAYER ESTABLISHMENT CLAUSE STANDING AND RELIGIOUS FAVORITISM IN THE DISTRIBUTION OF GOVERNMENT BENEFITS

That the most common cases on nontaxpayer Establishment Clause standing post–*Valley Forge* involve either religious displays, school prayers, or government proclamations on religious subjects is significant, for two reasons. First, these cases constitute only a subclass of Establishment Clause cases. The government can violate the Establishment Clause not only through spoken words or visual messages, but also through distributing benefits in ways that favor some religious groups over other religious groups, or that favor religion in general.[49] Second, and relatedly, the substantive question in almost all of these cases has been whether the messages the prayers or displays conveyed impermissibly endorsed religion, not whether the prayers or displays conveyed messages to begin with.

This second consideration becomes particularly significant in light of the first because the endorsement test — the current standard for Establishment Clause challenges[50] — can only apply where govern-

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fect on an individual's use and enjoyment of public land is a sufficient noneconomic injury to confer standing to challenge governmental actions.").

48 *See City of St. Charles*, 794 F.2d at 268; *Rabun County*, 698 F.2d at 1107–08.

49 *See* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 591 (1989) ("The 'establishment of religion' clause of the First Amendment means [that] . . . [n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." (quoting Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)) (internal quotation mark omitted)); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (plurality opinion) ("[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it 'provides unjustifiable awards of assistance to religious organizations' . . . ." (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment))).

50 The endorsement test became the controlling standard for Establishment Clause cases at least as early as *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573. *See id.* at 593–94. More recent Supreme Court cases have adopted the test without controversy. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530

ment conduct has communicated a message. The endorsement test holds that the government violates the Establishment Clause when it "sends a message to nonadherents [of the favored religion] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[51] Although the government may speak either by "word or deed,"[52] the test only bars government conduct that communicates a "message" endorsing (or disapproving of) religion:

> What is crucial is that a government practice not have the effect of communicating a *message* of government endorsement or disapproval of religion. It is *only* practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.[53]

In other words, the presence of some message that arguably endorses (or disapproves of) religion is a prerequisite to the endorsement test.

To be sure, most Establishment Clause cases involve situations where the communication of a message is a given, as when a public school teacher leads her class in reading Bible verses[54] or a county judge displays the Ten Commandments in his courtroom.[55] Whether a message has in fact been conveyed, however, is not always so clear-cut. Certainly the largest category of cases where the conveyance of a message is debatable are those involving alleged religious favoritism in the distribution of government benefits.[56] In these cases, any message communicated is wholly incidental to the discriminatory distribution; the government accomplishes its purposes in disbursing the resources — aiding the favored group(s) — even if no one recognizes the disbursements are inequitable.[57] Of course, plaintiffs claiming religious

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U.S. 290 (2000); *see also* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 698 (2002) ("[I]t appears today that every member of the Court has now accepted the [endorsement] test.").

51 Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see also McCreary County*, 545 U.S. at 860 (adopting this language in a majority opinion); *Santa Fe*, 530 U.S. at 309–10 (same).

52 *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

53 *Id.* at 692 (emphases added).

54 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

55 Suhre v. Haywood County, 131 F.3d 1083 (4th Cir. 1997).

56 *E.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (Establishment Clause challenge to state tax exemption for religious periodicals); Wolfman v. Walter, 433 U.S. 229 (1977) (Establishment Clause challenge to, inter alia, state funding for parochial school textbooks, testing services, and field trip transportation); *In re* Navy Chaplaincy, 534 F.3d 756 (D.C. Cir. 2008) (Establishment Clause challenge to alleged Catholic favoritism in the operation of the Navy Chaplaincy's retirement program).

57 *See* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 523 (2002) ("Most government action that alienates or offends people because it is seen as approving or endorsing religion is not the product of a deliberate government effort to be pejorative to-

favoritism in government benefits distribution will sometimes have federal taxpayer standing, to the extent the challenged distributions involve specific congressional appropriations under the Taxing and Spending Clause.[58] Taxpayer standing, however, is not always available.[59] Where a plaintiff wishes to challenge religious favoritism in the distribution of government benefits as a violation of the Establishment Clause and the source of the benefits is something other than congressional action under the Taxing and Spending Clause, nontaxpayer standing provides the only leg to stand on.[60]

Consequently, some plaintiffs have sought to apply *Valley Forge*'s progeny to suits challenging alleged religious favoritism in government benefits distribution by arguing that the alleged favoritism sends the same message as a religious display or school prayer: nonadherents of the favored group(s) are not full members of the political community.[61] Although policy arguments may be advanced for and against extending nontaxpayer Establishment Clause standing in this way,[62] these arguments are ultimately beside the point; for, as will be shown, the Supreme Court *already* foreclosed the project in *Allen v. Wright*.[63] Whether it is possible to have the sort of "direct contact" with a denial of benefits to a third party that one can have with a religious display makes no difference when standing to challenge government discrimination against third parties is impossible to begin with. Unless religious discrimination is in principle different from, or somehow more stigmatizing than, racial discrimination — the sort of discrimination at

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ward those who are aggrieved. Rather, it results from the adoption of well meaning, legitimate, and sometimes even successful attempts to improve the conditions of society.").

[58] *See* Flast v. Cohen, 392 U.S. 83, 91–106 (1968).

[59] *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2565–68 (2007) (plurality opinion) (no taxpayer standing where plaintiff challenged agency's use of federal money to fund conferences to promote President George W. Bush's "faith-based initiatives" program); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 482 (1982) (no taxpayer standing where plaintiffs claimed federal land transfer to private religious school violated Establishment Clause); *Navy Chaplaincy*, 534 F.3d at 760–61 (no taxpayer standing where Protestant Navy chaplains challenged Navy retirement program's alleged favoritism toward Catholic chaplains).

[60] This result, of course, assumes that a plaintiff seeking to challenge alleged religious favoritism in the distribution of government benefits has not herself been discriminated against or denied any benefit because of her religious affiliation. If the opposite were true, standing clearly would lie on account of her having suffered personal religious discrimination. *See, e.g.*, *Navy Chaplaincy*, 534 F.3d at 760 ("If plaintiffs had alleged that the Navy discriminated against them on account of their religion, plaintiffs would have alleged a concrete and particularized harm sufficient to constitute injury-in-fact for standing purposes."). The following discussion thus applies only to situations where a plaintiff challenges government discrimination against (or in favor of) *other* individuals on account of their religious affiliation, on the ground that the discrimination conveyed a message endorsing the favored religion(s).

[61] *See infra* section III.A, pp. 2008–11.

[62] *See infra* section III.B, pp. 2011–13.

[63] *See infra* section III.C, pp. 2013–19.

issue in *Allen*[64] — *Allen*'s prohibition governs religious as well as racial discrimination.

A. The Effort To Characterize Religious Favoritism in the Distribution of Government Benefits as a "Message" Endorsing Religion

Recent case law reveals an effort among some Establishment Clause plaintiffs to characterize religious favoritism in the distribution of government benefits as a "message" endorsing religion. Early seeds of this effort may be found in *Texas Monthly, Inc. v. Bullock*,[65] a 1989 Supreme Court decision. In *Texas Monthly*, the publisher of a monthly general interest magazine challenged as a violation of the Establishment Clause a Texas state sales tax exemption that applied only to religious periodicals.[66] A three-Justice plurality led by Justice Brennan concluded that the exemption violated the Establishment Clause because it was a "subsidy" directed "exclusively to religious organizations" that "[could not] but 'conve[y] a message of endorsement' to slighted members of the community."[67] Although the plurality's view did not command a majority of the Court, a number of lower courts picked up on it, holding in a range of cases that religious favoritism in the distribution of government benefits had communicated a message endorsing religion.

For example, a Tenth Circuit case, *Foremaster v. City of St. George*,[68] held that a Utah city's electricity subsidy to a local Mormon temple "conveyed a message of City support for the LDS faith" in violation of the Establishment Clause because "[t]he City gave no other church such a subsidy."[69] Similarly, in *Appeal of Springmoor, Inc.*,[70] the North Carolina Supreme Court found that a nursing home property tax exemption that applied only to nursing homes operated by religious or Masonic organizations violated the Establishment Clause, again because the "subsidy" applied only to religious (or Masonic) groups.[71] Although a number of cases adopting the *Texas Monthly* plurality's view were later reversed,[72] *Texas Monthly* and its progeny have established a clear line of precedent for the proposition that reli-

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64 *See* Allen v. Wright, 468 U.S. 737, 743–45 (1984).

65 489 U.S. 1 (1989).

66 *Id.* at 5–6 (plurality opinion).

67 *Id.* at 15.

68 882 F.2d 1485 (10th Cir. 1989).

69 *Id.* at 1489.

70 498 S.E.2d 177 (N.C. 1998).

71 *Id.* at 183–84.

72 *See, e.g.*, Steele v. Indus. Dev. Bd., 117 F. Supp. 2d 693 (M.D. Tenn. 2000), *rev'd*, 301 F.3d 401 (6th Cir. 2002); Cohen v. City of Des Plaines, 742 F. Supp. 458 (N.D. Ill. 1990), *rev'd*, 8 F.3d 484 (7th Cir. 1993).

gious favoritism in the distribution of government benefits conveys a "message" endorsing religion.

In each of these cases, however, the court concluded that the alleged religious favoritism communicated a message endorsing religion in deciding the merits of the case, not in determining whether the plaintiff had standing.[73] That is, the question in each of these cases was whether the alleged favoritism communicated a message endorsing religion, not whether whatever message the favoritism conveyed caused the plaintiffs injury-in-fact. In 2008, a group of plaintiffs did squarely present the question of whether religious favoritism in the distribution of government benefits conveys a message of endorsement that causes injury-in-fact to members of the nonfavored group(s). The case was *In re Navy Chaplaincy*.[74] Although the plaintiffs did not prevail,[75] they did win the vote of Judge Rogers, who dissented from the panel's dismissal for lack of standing.[76]

As mentioned above, *Navy Chaplaincy* concerned a challenge by Protestant Navy chaplains to alleged Catholic favoritism in the Navy's retirement system.[77] According to the plaintiffs, the Catholic favoritism "conveyed" a "'message' of religious preference" to which the plaintiffs, as chaplains, had been "subjected."[78] This message, the plaintiffs asserted, "ma[de] them feel like second-class citizens within the Navy Chaplaincy even [though] they themselves ha[d] not suffered discrimination."[79]

The majority in *Navy Chaplaincy* found that the plaintiffs lacked standing,[80] rejecting the plaintiffs' effort to analogize their situation to that of plaintiffs in religious display and school prayer cases who had standing on account of contact with government-endorsed "religious message[s]."[81] Rather, the majority found the plaintiffs "more akin" to the *Valley Forge* plaintiffs,[82] to whom the Supreme Court had denied standing because the plaintiffs had "failed to identify any personal injury . . . other than the psychological consequence presumably produced by *observation of conduct* with which one disagrees."[83] The ma-

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[73] *See, e.g.*, *Foremaster*, 882 F.2d at 1489.

[74] *See supra* p. 2000.

[75] *See In re* Navy Chaplaincy, 534 F.3d 756, 765 (D.C. Cir. 2008).

[76] *Id.* at 772 (Rogers, J., dissenting). When the plaintiffs later petitioned for rehearing en banc, Judge Brown joined Judge Rogers in voting to grant the petition for rehearing. *In re* Navy Chaplaincy, No. 07-5359 (D.C. Cir. Nov. 17, 2008) (order denying petition for en banc review).

[77] *Navy Chaplaincy*, 534 F.3d at 759.

[78] *Id.* at 763.

[79] *Id.*

[80] *Id.* at 760–61.

[81] *Id.* at 764.

[82] *Id.*

[83] *Id.* (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485 (1982)) (internal quotation mark omitted).

jority concluded its analysis with the following rule: "When plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases."[84]

Judge Rogers's dissent, in contrast, accepted the plaintiffs' effort to characterize the Navy's Catholic favoritism as a message endorsing religion, declaring that the plaintiffs deserved standing on account of their exposure to the Navy retirement program's "message of denominational preference."[85] According to the dissent, the plaintiffs, as Navy chaplains, had been "direct[ly] expos[ed]" to the Navy retirement program's "preference for Catholics," which "convey[ed] to them the message" that as nonadherents of the favored denomination they were "outsiders, not full members of the . . . community.'"[86] Exposure to such a message, in the dissent's view, caused the plaintiffs "psychological harm . . . that is cognizable under the Establishment Clause."[87]

To date, *Navy Chaplaincy* is the only case in which a judge has adopted the position that religious favoritism in the distribution of government benefits communicates a "message" endorsing religion that causes injury-in-fact to nonadherents of the favored group(s). The position's logic, however, traces directly back to the *Texas Monthly* plurality, and at least two opinions from the past decade suggest sympathy for the position. Recent scholarship also supports the view that courts should have broad power to hear Establishment Clause claims.[88]

The first case from the past decade suggesting sympathy for the *Navy Chaplaincy* plaintiffs' theory is *Barnes-Wallace v. City of San Diego*,[89] a 2008 Ninth Circuit decision. In *Barnes-Wallace*, the court granted standing to a group of lesbian and agnostic parents challenging a heavily discounted city park lease to a local Boy Scouts council as a violation of the Establishment Clause, because the Boy Scouts' "publicly expressed disapproval" of lesbians and agnostics deterred the

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[84] *Id.* at 764–65.

[85] *Id.* at 767 (Rogers, J., dissenting).

[86] *Id.* at 771–72 (omission in original) (quoting McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005)) (internal quotation marks omitted).

[87] *Id.* at 772. For a critical appraisal of the *Navy Chaplaincy* dissent, see Recent Case, *In re* Navy Chaplaincy, 534 F.3d 756 (D.C. Cir. 2008), 122 HARV. L. REV. 1953, 1957–60 (2009).

[88] *See, e.g.*, Esbeck, *supra* note 5, at 5–6; Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 130 (2009); *see also* Dana S. Treister, Note, *Standing To Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689, 712 (1994).

[89] 530 F.3d 776 (9th Cir.), *reh'g en banc denied*, 551 F.3d 891 (9th Cir. 2008).

plaintiffs from using the park.[90] Although not a strict analog to *Navy Chaplaincy*, *Barnes-Wallace* is notable because the court predicated standing on the plaintiffs' feelings of exclusion flowing from preferential distribution of government benefits.[91] In *Navy Chaplaincy* the benefits were offered only to those of a particular religious affiliation; in *Barnes-Wallace* the benefits were offered to a group that openly excluded those who shared the plaintiffs' sexual orientation or religious beliefs.

The second case, *Arizona Civil Liberties Union v. Dunham*,[92] granted standing to a group of Arizona residents challenging their city's proclamation of "Bible Week" as a violation of the Establishment Clause.[93] Although the proclamation clearly constituted a "message" in the traditional sense, the case is significant because it held that the plaintiffs' awareness of the proclamation "via news reports" constituted sufficient contact with the message for them to allege injury-in-fact.[94] That the plaintiffs had not actually read or heard the proclamation did not matter. *Dunham* thus stands for the proposition that a plaintiff does not actually need to have seen or heard a message allegedly endorsing religion to have standing under the Establishment Clause to challenge the message. Simple knowledge of the message suffices. This principle is essential to efforts to characterize religious favoritism in the distribution of government benefits as a message of endorsement that causes injury-in-fact, since the putative "message" in such cases can be neither seen nor heard,[95] but only intuited.

B. Competing Policy Considerations

To be sure, permitting plaintiffs to characterize religious favoritism in government benefits distribution as a message endorsing religion carries certain benefits. First, and most obviously, by broadening standing to include any interested party who learns of the favoritism — not just those personally discriminated against — characterizing religious favoritism in benefits distribution as a message endorsing religion enables easier policing of the boundary between church and

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[90] *Id.* at 784; *see also id.* at 784–86.

[91] *See id.* at 784–85. Although standing ultimately rested on the plaintiffs' "personal interest" in the leased property, *id.* at 786, the court emphasized that the plaintiffs' "emotional injuries [we]re stronger . . . because they belong[ed] to the very groups excluded and disapproved of by the Boy Scouts," *id.* at 784.

[92] 112 F. Supp. 2d 927 (D. Ariz. 2000).

[93] *See id.* at 934.

[94] *See id.* at 933.

[95] Unless, that is, one characterizes the physical actions involved in distributing benefits — the actual mailing of checks or leasing of property at discounted rates, for example — as the message endorsing religion, rather than the policy decisions underlying the distributions.

state.[96] Second, and relatedly, extending standing in this way ensures that *someone* will always stand able (and ready) to challenge government religious favoritism. Even if the alleged favoritism has caused no actual disadvantage, or if none of the parties who have suffered discrimination wishes to bring suit, some interested party likely will have standing to challenge the favoritism. This result helps to ensure both that religious favoritism in the distribution of government benefits does not go unchallenged and, in turn, that the separation of church and state remains sufficiently intact.[97] In this sense, the *Navy Chaplaincy* plaintiffs' standing theory offers an important, heretofore unutilized avenue for ensuring that the government heeds the Establishment Clause's commands.

Yet the most obvious benefit of permitting plaintiffs to characterize religious favoritism in the distribution of government benefits as a message endorsing religion — broadening standing to challenge purported Establishment Clause violations — is also its most glaring drawback. As the Supreme Court has long recognized, standing doctrine exists to *limit* judicial power,[98] both for constitutional and for pragmatic reasons.[99] On the constitutional level, standing requirements safeguard the federal separation of powers by checking the judiciary's power to invalidate the acts of other branches[100] and dissuading parties from using courts to "[v]indicat[e] the public interest," a role better left to Congress and the President.[101] They thus ensure a "proper — and properly limited — role of the courts in a democratic society."[102] On the more pragmatic side, standing requirements also improve judicial decisionmaking by restricting courts to cases whose plaintiffs have a sufficiently "personal stake in the outcome . . . as to assure that concrete adverseness which sharpens the presentation of issues [and] illuminat[es] . . . difficult . . . questions."[103] Any practice

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[96] *See, e.g.*, Horwitz, *supra* note 88, at 130 ("[B]road standing is necessary to curb 'official action that undermines the integrity of religion.' . . . [C]itizens should have broad rights to enforce the fundamental principle that church and state should be maintained within their own separate jurisdictions." (quoting Esbeck, *supra* note 5, at 40)).

[97] *See* Esbeck, *supra* note 5, at 5 (arguing that courts apply relaxed standing rules in Establishment Clause cases "lest laws putatively unconstitutional [be] . . . insusceptible to challenge in the courts"); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 130 (2001) ("The possibility that the structural limitations of the Constitution [such as the Establishment Clause] may go unenforced leaves us with an extremely uncomfortable feeling.").

[98] *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 820 (1997); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Warth v. Seldin, 422 U.S. 490, 498 (1975).

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

[100] *See* Allen v. Wright, 468 U.S. 737, 752 (1984); *Valley Forge*, 454 U.S. at 472–74.

[101] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (emphasis omitted).

[102] *Warth*, 422 U.S. at 498.

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

that has the effect of substantially broadening standing, then, butts up against the core purposes of standing doctrine.

C. Allen v. Wright *and the True Nature of the Injury*

Reasonable minds can differ on the comparative importance of vigorously policing church-state boundaries and keeping judicial power within proper bounds. Established standing doctrine, however, indicates that where a plaintiff seeks to vindicate the Establishment Clause by challenging religious favoritism in the distribution of government benefits to which she herself has not been denied equal access, the Constitution comes down on the side of judicial restraint. Under *Allen v. Wright*, a plaintiff who alleges discriminatory government conduct but does not claim that she personally has been discriminated against lacks Article III standing.[104] Yet this is the precise scenario that arises when a plaintiff claims nontaxpayer Establishment Clause standing to challenge religious favoritism in the distribution of government benefits. Debates about how or whether rules governing standing in religious display or school prayer cases should apply to allegations of religious favoritism in government benefits distribution thus miss the point, for *Allen* forecloses the inquiry at the outset.[105]

Allen concerned a class action by parents of African American children attending public schools in school districts undergoing desegregation.[106] The plaintiffs claimed the IRS had granted tax-exempt status to a number of racially discriminatory private schools in violation of its own internal regulations.[107] Notably, however, none of the plaintiffs alleged that their children had suffered actual discrimination on account of the schools' racially discriminatory practices; none claimed "that their children ha[d] ever applied or would ever apply to any private school."[108] Instead, the plaintiffs claimed injury based on "the mere fact of Government financial aid to discriminatory private

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[104] *Allen*, 468 U.S. at 755. Note that this bar applies only to suits alleging noneconomic injury. *See id.* Where a plaintiff claims injury as a taxpayer or on some other economic ground, different rules apply. *See* sources cited *supra* notes 58–60.

[105] *Navy Chaplaincy* featured a particularly pointed debate over whether the standing principles from the religious display and school prayer cases should apply to suits challenging religious favoritism in benefits distribution. The majority said no, *see In re* Navy Chaplaincy, 534 F.3d 756, 765 (D.C. Cir. 2008); the dissent said yes, *see id.* at 767 (Rogers, J., dissenting). For an analysis of this debate, and a critique of the dissent's effort to limit the scope of its position by restricting standing to members of the "community" in which the favoritism occurred, see Recent Case, *supra* note 87.

[106] *Allen*, 468 U.S. at 743.

[107] *Id.* at 744–45.

[108] *Id.* at 746.

schools."[109] Interpreting this as a claim of "stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race,"[110] the Court denied standing because "such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct."[111] The Court justified its holding on prudential grounds:

> If the abstract stigmatic injury [alleged] were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. . . . A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders."[112]

Thus, even though the *Allen* plaintiffs may have felt like lesser citizens because the federal government granted tax-exempt status to schools that would have refused to admit their children (had their children applied), they lacked standing because they could assert no injury beyond this feeling of denigration.

Consider the parallels between a plaintiff claiming injury on account of the "message" conveyed by religious favoritism in the distribution of government benefits and the plaintiffs in *Allen*. When a plaintiff claims that religious favoritism in government benefits distribution conveyed a message endorsing religion, what she is really saying is that (to use the words of the endorsement test itself) the discriminatory distribution "sen[t] a message to nonadherents [of the favored religion]" — including the plaintiff herself[113] — "that they are outsid-

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[109] *Id.* at 752. The plaintiffs also alleged injury based on the hindrance the tax exemptions posed to efforts to desegregate public schools, *id.* at 752–53, but this claim is not relevant to the current discussion.

[110] *Id.* at 754.

[111] *Id.* at 755 (quoting Heckler v. Mathews, 465 U.S. 728, 739–40 (1984)). The Court took pains to distinguish *Heckler v. Mathews*, 465 U.S. 728, where the plaintiff had standing to challenge a discriminatory denial of benefits even though he stood to receive no compensation if he won his claim, *see id.* at 737, and thus arguably suffered only a "stigmatizing" harm, *id.* at 739, because the plaintiff in *Heckler* had been "*personally* subject[ed] to discriminatory treatment." *Allen*, 468 U.S. at 757 n.22 (emphasis added).

[112] *Allen*, 468 U.S. at 755–56 (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973)).

[113] Under *Valley Forge*, where government action does not implicate taxpayer standing, a plaintiff alleging an Establishment Clause violation *must* be a nonadherent of the allegedly favored religion. This is because the only conceivable injury an *adherent* of a favored religion can identify (again, assuming taxpayer standing is not a possibility) is her belief that the government action violated the Establishment Clause, and *Valley Forge* explicitly held that the mere belief that government action violated the Constitution is insufficient grounds for standing. *See* Valley Forge

ers, not full members of the political community."[114] The plaintiff, in other words, is claiming that the religious favoritism stigmatized members of her religious group as outsiders and denigrated their standing in the political community.

It is difficult to see how this differs in any meaningful way from the injury the *Allen* plaintiffs alleged. The injury in both cases is stigmatic and flows from government discrimination against others on the basis of characteristics the plaintiffs possess. The only difference, it would seem, is that the alleged discrimination where a plaintiff claims religious favoritism in the distribution of government benefits is religious, not racial. *Allen*'s rule, however, is not limited to racial discrimination. The rule itself contains no language confining its use to instances of racial discrimination and has been applied in a wide variety of cases, including Establishment Clause cases.[115] Further, the Supreme Court has endorsed the view that neutrality under the Establishment Clause "requires an equal protection mode of analysis."[116] *Allen* was an equal protection case;[117] suits challenging religious favoritism in government benefits distribution as a violation of the Establishment Clause rest on the claim that the government has acted in a manner partial to religion. Application of *Allen*'s rule to such cases seems straightforward.

That religious discrimination implicates an additional interest not present in racial discrimination cases — guarding against state establishment of religion — also should make no difference. A denial of a benefit does not somehow become more injurious to those who share the characteristic that formed the basis of the denial merely because the denial implicates church-state concerns. And if the interest in ensuring proper separation of church and state is itself an insufficient basis for standing,[118] it is difficult to see how adding this interest to another interest that is itself insufficient grounds for standing — that

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Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 487 n.23 (1982).

114 Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

115 *See, e.g.*, *In re* U.S. Catholic Conference, 885 F.2d 1020, 1024–25 (2d Cir. 1989) (challenge by abortion rights supporters to the Catholic Church's tax-exempt status); Kurtz v. Baker, 829 F.2d 1133, 1141 (D.C. Cir. 1987) (Establishment Clause challenge to congressional chaplains' refusal to invite nontheists to offer secular remarks during period reserved for morning prayer); Ams. United for Separation of Church & State v. Reagan, 786 F.2d 194, 200–01 (3d Cir. 1986) (challenge to President Reagan's institution of diplomatic relations with the Vatican); Mehdi v. U.S. Postal Serv., 988 F. Supp. 721, 730–31 (S.D.N.Y. 1997) (Sotomayor, J.) (unsuccessful challenge to U.S. Postal Service's refusal to display Muslim religious symbols alongside Christmas and Hanukkah symbols in post office buildings).

116 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

117 *See Allen*, 468 U.S. at 755.

118 *See Valley Forge*, 454 U.S. at 487 n.23.

is, the interest in avoiding the stigma caused by government discrimination against others on the basis of characteristics one possesses — somehow provides enough of a foundation for standing. There is thus no way around the roadblock to standing that *Allen* poses for plaintiffs seeking to characterize religious favoritism in the distribution of government benefits as a message endorsing religion, aside from a questionable distinction between race and religion as grounds for denial of government benefits.[119]

Taking this last point one step further exposes the essential problem with the effort to extend nontaxpayer Establishment Clause standing to cases involving religious favoritism in the distribution of government benefits: to characterize religious favoritism in government benefits distribution as a "message" endorsing religion is to obfuscate the true nature of the injury. The true injury, as *Allen* makes clear, is the denial of the benefit,[120] not the message the denial conveys to

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[119] A 1989 D.C. Circuit case, *Women's Equity Action League v. Cavazos* (*WEAL*), 879 F.2d 880 (D.C. Cir. 1989), might seem to offer a way around *Allen* for plaintiffs who work, attend, or otherwise associate with the organization in which they claim the discrimination is occurring. Like *Allen*, *WEAL* concerned a challenge to federal funding of institutions allegedly violating federal antidiscrimination laws. *Id.* at 884–85. The *WEAL* court, however, distinguished *Allen* on the ground that the *WEAL* plaintiffs "assert[ed] that they . . . [were] enrolled or employed in educational institutions that engage in proscribed discrimination." *Id.* at 884. In the *WEAL* court's view, "[t]he fact that the *Allen* plaintiffs neither attended nor sought to attend the private schools in question proved fatal to their claim of stigmatic injury. . . . The *Allen* Court . . . excluded the bystander, but preserved court access for persons claiming direct exposure to government-aided facilities that engage in proscribed discrimination." *Id.* at 885 (citing *Allen*, 468 U.S. at 762). Although this language may seem to offer a way around *Allen* for plaintiffs alleging religious favoritism in the distribution of government benefits to fellow employees, schoolmates, or affinity group members, *WEAL*'s exception only covers plaintiffs who are or were themselves "intended beneficiaries" of the challenged disbursements. *See id.* at 886. Thus, mere membership in the organization in which the discrimination is occurring is not enough for standing; rather, a plaintiff must also show that she herself received or should have received a portion of the funds being disbursed in the discriminatory fashion. *WEAL* consequently confines *Allen*'s rule only slightly. Some meaningful stake in the benefits at issue must still be shown. Another possible way around *Allen*'s rule might be to limit standing to challenge religious discrimination in government benefits distribution to those who reside in or are otherwise members of the "community" in which the discrimination has occurred. This method would avoid expanding standing to challenge government religious discrimination too broadly, and indeed is the very position Judge Rogers endorsed in her *Navy Chaplaincy* dissent. *See In re* Navy Chaplaincy, 534 F.3d 756, 768 (D.C. Cir. 2008) (Rogers, J., dissenting). As explained elsewhere, however, this limiting principle suffers significant analytical weaknesses, *see* Recent Case, *supra* note 87, at 1957–60, and it also stumbles in the face of *Allen*'s own facts. In *Allen*, the plaintiffs claimed the IRS was offering tax exemptions to racially discriminatory schools "*in their communities*." *Allen*, 468 U.S. at 743–44 (emphasis added). That the plaintiffs alleged local discrimination did not sway the Court's conclusion that the plaintiffs lacked Article III standing. *See id.* at 752–53. Here again, the only way around *Allen* is a questionable distinction between racial and religious discrimination.

[120] *See Allen*, 468 U.S. at 755; *see also Kurtz*, 829 F.2d at 1141 ("It is thus the denial of a benefit, whether economic or not, that is a basis for standing.").

"concerned bystanders."[121] This principle holds true even where concerned bystanders possess the characteristic — such as religious affiliation — that formed the basis of the alleged discrimination.[122] Where a plaintiff claims that religious favoritism in the distribution of government benefits communicates a message endorsing religion, she claims that the favoritism injures not just those denied the benefit, but also those who learn of the favoritism and thus endure the "message" of endorsement the favoritism communicates. The injury, in other words, no longer lies solely in the denial itself, but also in the denial's impact on those who learn of the denial but themselves suffer no actual discrimination.[123]

On the one hand, this approach is quite clever. Assume that a would-be plaintiff wishes to challenge what she perceives to be religious favoritism in the distribution of government benefits but has not suffered actual discrimination herself. Normally, *Allen* would pose a clear bar to standing for the plaintiff.[124] By characterizing the favoritism as a message endorsing religion, however, the plaintiff can invoke the endorsement test, which has no personal discrimination requirement and instead permits standing based entirely on exposure to a government message purportedly endorsing religion.[125] Characterizing the favoritism as a message endorsing religion thus offers the plaintiff a way to skirt the *Allen* rule and bring her claim on alternative grounds.

On the other hand, this approach is too clever by half. If religious favoritism in the distribution of government benefits does indeed convey a "message" to members of nonfavored groups that is cognizable for standing purposes, it is difficult to see how a similar result would not also have to follow for other forms of discrimination. For instance, if religious favoritism in the distribution of government benefits conveys a message endorsing the favored religious group, then it would seem that racial discrimination in government benefits distribution must similarly convey a message "endorsing" the favored racial group. And if standing for nonfavored groups lies in the former instance, then it must surely also lie in the latter. Surely the message that one is an "outsider[], not [a] full member[] of the political community"[126] because

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[121] *Allen*, 468 U.S. at 756 (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973)) (internal quotation mark omitted).

[122] *See id.* at 755.

[123] *See, e.g.*, *Navy Chaplaincy*, 534 F.3d at 763 (suit challenging alleged favoritism on the ground that the favoritism made the plaintiffs "feel like second-class citizens within the Navy Chaplaincy even if they themselves have not suffered discrimination on account of their religion").

[124] *See Allen*, 468 U.S. at 755.

[125] *See* Vasquez v. L.A. County, 487 F.3d 1246, 1251 (9th Cir. 2007); Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997).

[126] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

of one's race is not somehow less injurious than the message that one is an outsider because of one's religion. For many, race is just as central to self-identity as religion;[127] indeed, race may be *more* central because it is immutable. Moreover, the scars that remain from our nation's sad history of excluding racial minorities from full political participation are surely at least as deep as those that remain from past instances of religious exclusion, and very likely a good deal deeper. The only way, then, to extend nontaxpayer Establishment Clause standing to suits involving religious favoritism in the distribution of government benefits without destroying the *Allen* rule and dramatically expanding standing to challenge alleged government discrimination[128] is to accept the wholly untenable position that government discrimination on the basis of religion somehow conveys a "message" that government discrimination on other grounds does not.[129]

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[127] *See* Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 121 n.11 (1997) ("[R]ace and religion occupy places of similar importance because both greatly affect an individual's self-identity.").

[128] As discussed above, *Allen*'s rule exists to prevent a situation where any member of a group against which the government has allegedly discriminated can challenge the discrimination in court. *See Allen*, 468 U.S. at 755–56. Interestingly, Professor Thomas Healy argues that overruling *Allen* would not in practice trigger a significant increase in litigation, suggesting that the prudential concerns that motivated the *Allen* decision were overwrought. Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 472–74 (2007). Professor Healy, however, bases his analysis on hypothetical challenges to *criminal* laws, arguing that persons who engage in criminal activity would be unlikely to challenge the laws prohibiting their behavior on the ground that those laws "stigmatize" them. *See id.* at 473. Thus, whatever the ultimate merits of Professor Healy's claims, they lack force in the Establishment Clause setting, where the challenged government action is a program or policy allegedly favoring religion, not a proscription on private behavior.

[129] Of course, one could point out that arbitrary lines abound in standing doctrine — especially Establishment Clause standing doctrine, *e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 470 (1982) (taxpayer Establishment Clause standing available to challenge congressional action under the Taxing and Spending Clause but not the Property Clause) — and that arguing against a particular standing theory on the ground that the theory would require arbitrary line-drawing is therefore a bit odd. True enough. At least three considerations, however, counsel against drawing *this particular* arbitrary line between racial and religious discrimination. First, there is reason to believe this line would not only be arbitrary, but also pernicious. To carve out a special exception to *Allen* for religious discrimination would arguably be to suggest that religious discrimination is somehow *worse* than racial discrimination, or at least that the message religious discrimination conveys causes greater harm to bystanders than the message racial discrimination conveys. For the reasons provided in the body text, this is a position courts should adopt with extreme caution. Second, concerns that absent seemingly arbitrary exceptions situations might arise in which no plaintiff would have standing to vindicate the Establishment Clause, *see* Esbeck, *supra* note 5, at 33–40, do not apply to cases where a plaintiff challenges alleged religious discrimination against a third party. In such cases, there is by definition always a party who has suffered the sort of traditional, individualized injury that clearly suffices for Article III standing. *See* Recent Case, *supra* note 87, at 1960. Third, that courts in the past have drawn arbitrary lines is not an argument that courts should continue drawing arbitrary lines. Arbitrary decisionmaking damages judicial legitimacy, *see* sources cited *infra* note 131, and the courts have come under particular attack for their inconsistency and unfaithfulness to precedent in Establishment Clause standing cases. *See, e.g.*, Harvey, *supra* note 20, at 316–17;

Superimposing the endorsement test onto cases involving alleged religious favoritism in government benefits distribution would thus force courts to choose between dramatically expanding standing or inventing artificial distinctions. The former option would undermine the separation of powers and other checks on judicial aggrandizement;[130] the latter would undermine judicial legitimacy.[131] Far better for courts to apply the well-settled *Allen* rule and determine standing based on whether a plaintiff has suffered personal discrimination on account of the alleged favoritism. Although this may have the incidental effect of permitting some government religious discrimination to go unchallenged,[132] until the Supreme Court revisits *Allen*, courts should heed its command.[133]

IV. CONCLUSION

Characterizing religious favoritism in the distribution of government benefits as a "message" endorsing religion offers a creative way around the general bar to standing for plaintiffs claiming injury on account of discrimination against other people. Although this approach carries the benefit of enabling enforcement of the Establishment Clause where violations of the clause might otherwise go unchallenged, it would require courts either to devise artificial distinctions between religious and other forms of discrimination or to expand standing to challenge government discrimination far beyond the bounds the Supreme Court has set.

Not all government conduct that somehow implicates religion need necessarily also implicate the endorsement test. Where, as with the ef-

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Rohr, *supra* note 19, at 529–30. Where, as here, arbitrary line-drawing is plainly unnecessarily, *see supra*, courts should sit tight.

130 *See* Raines v. Byrd, 521 U.S. 811, 820 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 576 (1992); *Allen*, 468 U.S. at 752, 756; *Valley Forge*, 454 U.S. at 472–74; Warth v. Seldin, 422 U.S. 490, 498 (1975).

131 *See* Paul L. Caron & Rafael Gely, *Affirmative Refraction:* Grutter v. Bollinger *Through the Lens of* The Case of the Speluncean Explorers, 21 CONST. COMMENT. 63, 88 (2004) (observing that "dishonest manipulation of well-settled doctrine" can "undermin[e] the Court's legitimacy"); Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 361 (2002) ("[T]he legitimacy of judicial action lies in the logical justification of its results . . . ."); Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545, 589 (2004) ("[J]udicial lawmaking's legitimacy stems in part from an expectation of principled decisionmaking . . . .").

132 On its own, this concern is insufficient grounds for standing. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

133 Although the merits of *Allen* lie beyond the scope of this Note, it may be worth noting that some commentators have expressed displeasure with the case and a desire that it be overruled. *See, e.g.*, Healy, *supra* note 128; Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313, 1324–26 (1999). The important point for purposes of this Note, however, is not that *Allen* was right, but that it is the law.

fort to characterize religious favoritism in government benefits distribution as a message endorsing religion, fitting government conduct within the endorsement test's parameters requires distorting or even abandoning other settled principles, courts should exercise extreme caution. Although the Establishment Clause embodies foundational constitutional principles concerning church and state, it is not a license to run roughshod over other equally foundational principles that may from time to time hinder enforcement of the clause.