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BRYAN DEARINGER*

The Future of Taxpayer Standing in Establishment Clause Tax Credit Cases

* Trial Attorney, United States Department of Justice (Honors Program), Civil Division. The positions taken in this Article are those of the author, not the Department of Justice. I would like to thank the faculty at Drake University Law School, particularly Russell E. Lovell II, for inviting me to present a distilled version of this Article as part of their speaker series at the 17th Annual Public Service Law Day Program in October 2012, where I received valuable comments and suggestions. I am also indebted to my wife, Courtney Dearinger; my brother, Professor Ryan Dearinger; and my colleague, Michelle Bennett, for their sensible advice and meticulous editing. Any errors are mine.

INTRODUCTION

Many important terms in our Constitution elude definition. Article III, Section 2 is a perfect example. It provides that the "judicial Power" of federal courts "shall extend to . . . Cases [and] Controversies,"[1] but says little more about these words.[2] Neither the

[1] U.S. CONST. art. III, § 2 (containing a list of nine categories of cases to which "the judicial Power [of the United States] shall extend").

Constitution nor the copious notes taken at its Convention offer any further definitional insight.[3] This silence has sprung the finest scholars into well-documented searches for the most accurate interpretation of federal judicial power.[4] The result has been constant competition for theoretical supremacy, but no clear winner.[5]

This Article does not announce victory. Nor does it dissect competing theories, as the mining of those old warhorses brings us no closer to solving the definitional mystery of Article III judicial power.

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2 *See, e.g.*, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 265 (1990) (noting that while Article III provides the judicial power, "it does not tell us in terms what counts as its exercise, nor what participation in its exercise is required in order to constitute the exercise of the judicial power by the courts vested with the power"); *see also* EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 16 (1914) ("[A]s to *what* that [judicial] power is, what are its intrinsic nature and scope, [the Constitution] says not a word."); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 78 (2007) ("Article III does not itself lay out the numerous and detailed rules of justiciability, and these rules are rather a lot for the two words 'cases' and 'controversies' to mean.").

3 Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1077 (2003); William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control Over Federal Jurisdiction*, 7 CONST. COMMENT. 89, 90 (1990) (noting lack of comprehensive record of Committee of Detail's drafting process for Article III). Of course, this could be because there was no dispute among the Framers as to the meaning of these terms. *See* Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 865; *see also* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (rev. ed. 1966) (discussing Madison's notes, which indicated that it was "generally supposed" by the delegates "that the jurisdiction given [in Article III] was constructively limited to cases of a Judiciary nature").

4 *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 771 (1998); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). Debates over the Article III judicial power inevitably lead to the larger question of the appropriate judicial role in our constitutional system, including the proper interpretive methodology courts should employ to determine constitutional meaning. *See generally, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); JACK M. BALKIN, LIVING ORIGINALISM (2011); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

5 *See generally* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY (2012); DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002).

No single overriding constitutional theory of judicial power has captured an entire Supreme Court at one time. Faith in a single theory is therefore a gamble before a Court that has known many but loved none.

On occasion, however, the Court has enjoyed long courtships with certain Article III doctrines. For instance, a majority of the Court has embraced the same general tripartite approach to the standing doctrine for nearly forty years,[6] even if it has not been defined "with complete consistency in all of the various cases decided"[7] during this time.[8] Despite throngs of critics,[9] the Court has consistently resisted invitations to expand or abandon the doctrine.[10] A similar doctrinal stability characterizes the constitutional barrier to taxpayer standing,[11] and the modern Supreme Court's treatment of the narrow exception to

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6 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–62 (1992) ("[S]tanding contains three elements. First, the plaintiff must have suffered an 'injury in fact[.]' . . . Second, there must be a causal connection between the injury and the conduct complained of[.] . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (quoting Allen v. Wright, 468 U.S. 737, 756 (1984); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976))).

7 Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982). *But see* Babbit v. Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979) (noting that the boundaries of the "case or controversy" requirement are matters of "degree . . . not discernible by any precise test").

8 The latest such example might be *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013), wherein the Court split 5-4 on the precise contours of the "actual or imminent" principle of an otherwise particularized threatened injury. In *Clapper*, the Court held that attorneys, journalists, and human rights activists lacked standing to challenge constitutionality of various surveillance provisions of the FISA Amendments Act of 2008. *Id.* at 1151–52. *Clapper* appears to add a new wrinkle to this component of standing with its insistence that the plaintiffs show surveillance, and thus the injury, was "certainly impending." *Id.* But the groundwork for such a ruling has existed since *City of L.A. v. Lyons*, 461 U.S. 95 (1983).

9 Among other pejoratives, the standing doctrine has been called "incoherent," *see, e.g.*, Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 480 (1996); a "jumbled mess," John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1010 (2002); "notoriously inconsistent," Hein v. Freedom from Religion Found., 551 U.S. 587, 619 (2007) (Scalia, J., concurring) (plurality opinion); "a quagmire," Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 389 (2006); and elitist, Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 326–27 (2002) (arguing that the Article III standing doctrine favors economically advantaged litigants).

10 *See, e.g.*, F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276–77 (2008).

11 *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923).

that rule announced in the much-maligned *Flast v. Cohen*.[12] Like the larger standing doctrine, the taxpayer version has been battle-tested,[13] but the Court has refused to expand or abandon it since 1968.[14]

Doctrinal stability prevailed once again in *Arizona Christian School Tuition Organization v. Winn*,[15] wherein the Court rejected taxpayer standing to challenge an Arizona law permitting taxpayers to claim a tax credit for donations made to school tuition organizations that provide scholarships to children attending private religious and non-religious schools.[16] In *Winn*, the Court split into three distinct, but overlapping, camps. A five-Justice majority held that the respondents, Arizona taxpayers, lacked taxpayer standing. The majority reasoned that the tax credit program did not involve direct expenditure of government funds generated through taxation, but

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12 392 U.S. 83 (1968) (establishing a narrow exception to the general rule against taxpayer standing for taxpayers raising Establishment Clause challenges to certain exercises of congressional power under taxing and spending power of Article I, § 8); *see infra* Part I.B.1.

13 *See, e.g.*, *Hein*, 551 U.S. at 623 (Scalia, J., concurring) ("It has often been pointed out, and never refuted, that the criteria in *Flast*'s two-part test are entirely unrelated to the purported goal of ensuring that the plaintiff has a sufficient 'stake in the outcome of the controversy . . . .'" (citation omitted)); United States v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring) (urging the Court to "lay to rest the approach undertaken in *Flast*"); *see also* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1450 (2011) (Scalia, J., dissenting). *Cf.* Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 662 (1973) (explaining that *Flast*'s two-part test "can be understood as an expedient by a court retreating from the absolute barrier of *Frothingham*, but not sure of how far to go and desirous of a formula that would enable it to make case by case determinations in the future. By any other standard, however, it is untenable.").

14 *See, e.g.*, *Hein*, 551 U.S. at 608–09 (declining to extend *Flast* exception to challenges to executive branch actions funded by unearmarked general appropriations); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347–49 (2006) (declining to expand *Flast* exception to Commerce Clause challenges); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 479–81 (1982) (declining to extend *Flast* exception to challenge agency's decision to transfer surplus federal property to a religious institution); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (same; no taxpayer standing to sue under Incompatibility Clause of Article I); *Richardson*, 418 U.S. at 175 (1974) (same; no taxpayer standing under Article I Accounts Clause to challenge statute permitting CIA to refrain from accounting for its expenditures); *Frothingham*, 262 U.S. at 486–87 (no taxpayer standing under the Tenth Amendment to challenge federal funding programs for reducing maternal and infant mortality).

15 131 S. Ct. 1436 (2011).

16 *Id.* at 1447; *see also* Adam Liptak, *Tax Credit is Allowed for Religious Tuition*, N.Y. TIMES, Apr. 5, 2011, http://www.nytimes.com/2011/04/05/us/05scotus.html?_r=0; Jess Bravin, *Private-School Tax Break is Upheld*, WALL ST. J., Apr. 5, 2011, http://online.wsj.com/article/SB10001424052748703712504576242992744305366.html.

instead operated by private choice, pre-government collection.[17] While Justices Scalia and Thomas concurred in this result under the *Flast* test, they also proposed that *Flast* be overturned, leaving all taxpayer (only) plaintiffs outside the doctrine.[18]

Justice Kagan's well written dissent—joined by Justices Ginsburg, Breyer, and Sotomayor—predicted the complete demise of the taxpayer standing exception.[19] All nine Justices, however, reaffirmed the "general prohibition on taxpayer standing."[20] All nine also applied *Flast*, and seven fully embraced the *Flast* exception despite coming to different conclusions about its scope and future.[21]

While this Article broadly addresses the past, present and future of the taxpayer standing doctrine in federal court, it pivots on *Winn* in a direction atypical for most Religion Clause and standing scholars because it defends the Court's decision. Much like *Hein v. Freedom from Religion Foundation*,[22] the Court's decision in *Winn* has become fodder for those displeased with the narrow scope of the taxpayer standing exception,[23] those numbering *Flast*'s days[24] or already mourning its death,[25] and those otherwise predicting exactly what

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17 *Winn*, 131 S. Ct. at 1447.

18 *Id.* at 1450 (Scalia, J., concurring) ("*Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established. I would repudiate that misguided decision . . . ."). *But see id.* (noting that he was nevertheless joining the Court's opinion because "respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds").

19 *Id.* at 1450–63 (Kagan, J., dissenting).

20 *Id.* at 1451.

21 *See id.* at 1440 (majority opinion of Kennedy, J., joined by Roberts, C.J., Scalia, J., Thomas, J., and Alito, J.); *id.* at 1450 (Kagan, J., dissenting, joined by Ginsburg, J., Breyer, J. and Sotomayor, J.); *see also id.* at 1449–50 (Scalia, J., concurring, joined by Thomas, J.) (noting that he would repudiate *Flast* but nevertheless joining the Court's opinion because "respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds").

22 551 U.S. 587 (2007) (plurality opinion) (declining to extend *Flast* exception to challenges to executive branch actions funded by unearmarked general appropriations).

23 *See infra* notes 25-27.

24 *See, e.g.*, William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 216 (2011) ("Although not formally overruling *Flast*, *Winn* moves significantly in that direction . . . ."); Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1096–97 (2011) [hereinafter Rahdert, *Forks Taken*] (predicting the demise of *Flast*).

25 *See, e.g.*, Mark C. Rahdert, *Court Reform and Breathing Space Under the Establishment Clause*, 87 CHI.-KENT L. REV. 835, 851 (2012) [hereinafter Rahdert, *Court Reform*] (arguing that *Hein* and *Winn* create a "no-taxpayer standing rule" as a measure of "court reform" to categorically restrict the substantive protections of the Establishment Clause).

Winn portends for Establishment Clause jurisprudence.[26] It would be tempting to agree with these pessimistic assessments, pronounce *Flast* dead, and endeavor to completely overhaul the taxpayer standing doctrine. But these themes have been examined elsewhere.[27] Furthermore, it is now well-settled that the Court will not permit taxpayer standing outside of the facts of *Flast*, and critics should look elsewhere to broaden the doctrine.[28]

Alternatively, it might be trendy to insist that the Roberts Court has invoked "passive virtues"[29] via the standing doctrine to avoid deciding Establishment Clause cases because a substantive sea change is afoot.[30] But I am not convinced that change is coming in either

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26 *See, e.g.*, *id.* at 840–42, 863–65 (speculating that the Supreme Court's alleged elimination of taxpayer standing is a prelude to a major doctrinal departure from its current Establishment Clause jurisprudence); Rahdert, *Forks Taken*, *supra* note 24, at 1096–97; Editorial, *Justice Kagan Dissents: A Wrongheaded Supreme Court Ruling Makes it Easier for States to Promote Religion*, N.Y. TIMES, Apr. 10, 2011, http://query.nytimes.com/gst/fullpage.html?res=9B00E1DC1039F933A25757C0A9679D8B63 ("The [*Winn* C]ourt's ruling is another cynical sleight of hand, which will reduce access to federal courts while advancing endorsement of religion."); Editorial, *High Court Ruling on Arizona Program Sets a Bad Precedent*, L.A. TIMES (Apr. 7, 2011), http://articles.latimes.com/2011/apr/07/opinion/la-ed-tuition-20110407 ("The decision might seem technical, but it will make it harder in the future for taxpayers to challenge programs that breach the wall between church and state.").

27 *See, e.g.*, *supra* notes 13; David P. Currie, *The Constitution in the Supreme Court: 1921–1930*, 1986 DUKE L.J. 65, 124 (arguing that *Frothingham v. Mellon*, 262 U.S. 447 (1923), was wrongly decided); Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 632 (1968) (urging the abandonment of the *Frothingham* rule); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961) (similar).

28 *Cf.* Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 8–14 (2010) [hereinafter Pushaw, *"Accidental" Plaintiffs*]. While many scholars have "urge[d] the Court to abandon or overhaul the entire [standing] doctrine, . . . stare decisis makes such proposals utopian." *Id.* at 105.

29 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111–98 (1962) (tying the "passive virtues" of judicial restraint to the Supreme Court's perceived legitimacy).

30 *See, e.g.*, Rahdert, *Forks Taken*, *supra* note 24, at 1096–97 (arguing that Supreme Court's curtailment of taxpayer standing as a method to usher in "a new version of the Establishment Clause that tolerates indirect government financial preference for particular faiths, and that treats spending for religious charitable services as part of the government's 'general welfare' enterprise, subject to the same principles of reciprocity that attach to all other forms of pork-barrel politics"); *cf.* Douglas W. Kmiec, *Standing Still—Did the Roberts Court Narrow, but Not Overrule,* Flast *to Allow Time to Re-think Establishment Clause Jurisprudence?*, 35 PEPP. L. REV. 509, 514 (2008) ("[W]hy not toss *Flast* now? Because, as Mother used to say, 'The soup is not ready yet.' . . . The primary benefit of the modest decision in *Hein* is that it gives the Roberts Court an opportunity to re-think the underlying religion-clause jurisprudence more carefully.").

direction. Those who have predicted the relaxation of the standing doctrine to facilitate a broader conservative doctrinal agenda are still waiting for this shift.[31] The merits of *Winn* provided a safe avenue for a standing expansion,[32] yet the Court did not take the bait.[33] Regardless, when it comes to Religion Clause cases, we cannot be certain; the sample size of Supreme Court decisions in the area is too small to conclude that its recent turn to standing[34] represents a treading of water before the alleged conservative sea change. The fact that the Court did not decide a single Religion Clause case during its 2012 term would indicate, if anything, relative doctrinal stability rather than unrest.[35]

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31 *See, e.g.*, Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 880–81 (2008) (predicting that "an increasingly conservative Roberts Court will seek to relax the strictest features of standing doctrine to facilitate its broader doctrinal agenda"); Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 586–87 (2012) [hereinafter Elliott, *Standing Lessons*] (noting health care, stem cell, and gay marriage litigation as potential facilitators of this movement). *But see Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (holding that official sponsors of California's "Proposition 8," the voter-enacted constitutional amendment eliminating the right of same-sex couples to marry, lacked Article III standing to appeal adverse federal district court ruling when the state refused to do so).

32 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002) (upholding Ohio's need-based school voucher program against Establishment Clause attack where "state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals"); *see also id.* at 649 ("[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." (citations omitted)).

33 *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011) (rejecting state taxpayer standing to challenge Arizona law permitting taxpayers to claim a tax credit for donations made to private organizations that provide scholarships to students at private religious and non-religious schools).

34 *See Winn*, 131 S. Ct. at 1449; Hein v. Freedom from Religion Found., 551 U.S. 587, 608–09 (2007).

35 Indeed, the Supreme Court decided only one First Amendment case in its 2012 term. In *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321, 2332 (2013), the Court struck down, on free speech grounds, a requirement imposed by the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (22 U.S.C. § 7601) that nongovernmental organizations wishing to receive funding from the federal government for HIV and AIDS programs overseas adopt a policy explicitly opposing prostitution. The Court granted certiorari to one Religion Clause case for its upcoming 2013 term, *Galloway v. Town of Greece*, which concerns a town's legislative prayer practice at local board meetings. *See* 681 F.3d 20, 34 (2d Cir. 2012) (holding that, based on the totality of circumstances—including the process by which prayers are selected and the sectarian nature of most of the prayers—a reasonable observer would believe the town endorsed a particular religion), *cert. granted*, 133 S. Ct. 2388 (May 20, 2013). The Court last addressed this particular issue in *Marsh v.*

Building on that stability, this Article offers a realistic appraisal of the taxpayer standing doctrine and what *Winn* portends for Establishment Clause tax credit challenges in the future. Parts I and II tell the abridged tales of taxpayer standing's past and present. While this Article concedes that *Flast*'s "nexuses" test may be fairly maligned,[36] it contends that *Flast* should be preserved or rehabilitated in a way that advances a normative, conscience-based theory of taxpayer standing.[37] This approach recognizes government-compelled taxing and spending scenarios wherein a taxpayer's pocketbook harm implicates the conscience injury protected by the Establishment Clause.[38] Part III addresses the future of taxpayer standing. It explains why *Flast*'s normative test dictates the rejection of taxpayer standing in *Winn*, and rebuts Justice Kagan's substantive arguments to the contrary. Specifically, I argue that Justice Kagan exaggerates the reach of *Winn* on a doctrinal level by ignoring the nub of the injury in *Flast*, conflating the legal incidence of tax credits and government expenditures, overstating the potential for underenforcement of the Establishment Clause, and incorrectly assuming that the *Flast* exception applies to state taxpayers in federal court.

While the sky is not falling on *Flast*, dark clouds have formed over plaintiffs in tax credit challenges under the Establishment Clause. To this end, the *Winn* dissenters exposed an ominous policy problem created by the majority's conclusion—namely, the fear that governments facing Establishment Clause taxpayer challenges may now have permission to launder direct financial aid to religion by using tax credits in lieu of direct appropriations.[39] Their efforts provoke further questions, which I explore in Part IV. For example, if the taxpayer standing doctrine is impossible to satisfy by individuals for whom access to federal court is sufficiently desirable, should the doctrine be altered? If so, how? Part IV offers three potential solutions: abandoning the rule against taxpayer standing, creating

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Chambers, 463 U.S. 783 (1983), wherein it held that the Nebraska legislature's practice of opening its sessions with a prayer, delivered by a state-employed clergyman, did not violate the Establishment Clause. *Id.* at 793.

36 *See infra* Part I.A–B.

37 *See infra* Part I.B.1–2. I do not, however, define "conscience" or otherwise attempt to delimit which beliefs are worthy of constitutional status. These tasks are not necessary to the points advanced in this Article. For an interesting piece that enters the fray, see generally Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365 (2006).

38 *See infra* Part I.B.3.

39 *See Winn*, 131 S. Ct. at 1450–51, 1462–63 (Kagan, J., dissenting).

taxpayer standing by statute, or allowing such actions to be brought in an Article I court. I ultimately conclude, however, that none of these options are constitutionally permissible or politically viable.

I
BACKGROUND: TAXPAYER STANDING'S PAST

The general Article III standing framework, comprising of three elements, has not changed in forty years.[40] At an "irreducible constitutional minimum," a proper plaintiff must allege a particularized "injury in fact" that is fairly traceable to the action of the defendant and likely to be redressed by a favorable judicial decision.[41] These standards are easy to recite, as every first-year law student will attest. The more difficult exercise is applying them to the facts of a given case.[42]

This problem is not new.[43] For two centuries, concerned and disconcerted citizens alike have sued the government for alleged violations of the Constitution despite not being directly and

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[40] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–62 (1992); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976).

[41] *See, e.g.*, *Lujan*, 504 U.S. at 560–61. Furthermore, as a matter of "prudence," the Supreme Court generally refuses to hear cases premised on "generalized grievances" more appropriately addressed in the representative branches, *e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975); the rights of third parties, *e.g.*, Kowalski v. Tesmer, 543 U.S. 125, 129 (2004); or complaints that do not fall within the "zone of interests" protected or regulated by the law invoked, *e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984). *See also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004) (explaining that prudential standing, while "closely related to Art. III concerns," embodies "judicially self-imposed limits on the exercise of federal jurisdiction"). The prudential standing doctrines are beyond the scope of this Article.

[42] *See* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 616 (2004) (explaining that federal judges must "contemplate the issue in fact-specific contexts and appear to defer to the legal rules that directly address the case at hand. Put differently, all plaintiffs must prove that they suffered an 'injury-in-fact,' but the definition of injury is not uniform across plaintiffs with diverse causes of action").

[43] However, the rise of a detailed methodology for standing, and the fight over its foundational underpinnings, is certainly a newer phenomenon. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) [hereinafter Sunstein, *What's Standing*] (dating the birth of Article III standing in the Supreme Court at 1944, in *Stark v. Wickard*, 321 U.S. 288 (1944)); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102–04 & n.5 (1998) (finding historical support dating back to the nineteenth century for the "triad of injury in fact, causation, and redressability" that "constitutes the core of Article III's case-or-controversy requirement" (citing, *inter alia*, Marye v. Parsons, 114 U.S. 325, 328–30 (1885))). It is generally agreed that the concept of standing as a limitation on the federal judicial power of Article III originated in a concurring opinion by Justice Frankfurter in *Coleman v. Miller*, 307 U.S. 433, 464–68 (1939).

individually deprived of life, liberty, or property in any form or fashion. As early as 1792, the Supreme Court took the cue from Article III, Section 2 and began demarcating a map of judicially redressable controversies as well as the injuries sufficient to create a proper plaintiff in federal court—using precursors to the justiciability doctrines of standing, ripeness, mootness, and the political question.[44] This narrowing continued apace into the nineteenth and twentieth centuries, at which time—scholars still debate precisely when—the standing doctrine cemented itself as *the* primary constitutional prerequisite to suit.[45]

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[44] *See* Hayburn's Case, 2 U.S. (2 Dall.) 408, 409–10, 1 L.Ed. 436 (1792) (refusing to evaluate Revolutionary War veterans' pension claims of widows and orphans because federal courts "cannot be warranted . . . by virtue of that part of the constitution delegating *Judicial power* . . . in exercising . . . any power not in its nature *judicial*" and suggesting that a proper party creates the standing necessary to maintain a lawsuit by the attorney general on that party's behalf); *see also* Muskrat v. United States, 219 U.S. 346 (1911) (holding that Congress cannot decide the "adverseness of parties prospectively; such determinations must be left to the courts"); Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922) (denying standing to citizens and taxpayers' general interest in invalidating the Nineteenth Amendment); *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam) (holding that it is insufficient to allege "merely a general interest common to all members of the public"); Stark v. Wickard, 321 U.S. 288, 310 (1944) ("It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.").

[45] There is much scholarly debate over whether and when standing doctrine became entrenched as a constitutional limitation. *Compare* Ann Woolhander & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 718 (2004) (arguing that "the nineteenth-century Supreme Court did see standing as a constitutional concern," particularly in lawsuits against federal and state governmental officials), *and* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1420–24 (1988) (noting several nineteenth-century cases using the metaphor "standing" to determine whether the plaintiff asserted the kind of substantive interest to obtain equitable remedies in court), *with* Ferejohn & Kramer, *supra* note 9, at 1009 (contending that the Supreme Court "fabricat[ed] the doctrine[] of standing" in the twentieth century), *and* Sunstein, *What's Standing*, *supra* note 43, at 168–79, 217 (arguing that the framers of the Constitution did not intend for Article III to require standing), *and* Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969) (finding no historical basis for the principle that an individualized stake by a plaintiff is a requirement of Article III). The truth appears to lie somewhere in the middle. *See, e.g.*, 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, 5–6 (2001) (recognizing that there is little direct evidence in support of either side's argument and concluding that the Founders would have supported the injury-in-fact threshold that the Supreme Court has imposed from Article III). This Article does not depend on the appropriate answer.

A. The Rule Against Taxpayer Standing

Taxpayers, by no surprise, are among those persons whose interests alone do not suffice to confer Article III standing. The Supreme Court first explained this in 1923, when it decided *Frothingham v. Mellon*.[46] Harriet Frothingham sued the Secretary of the Treasury for an injunction preventing expenditures under the Maternity Act,[47] which she claimed exceeded Congress's general welfare spending power and unconstitutionally increased her future tax burden so as to deprive her of property without due process of law.[48] Her interest was that of a disgruntled taxpayer bent on reducing her taxes, which she claimed could be accomplished by keeping federal spending down.

While Ms. Frothingham might have possessed an interest in the national fisc along with the taxpaying public, she could particularize nothing more. First, she had a causation problem. In dismissing her case on Article III standing grounds, the Court concluded that Ms. Frothingham's interest as a taxpayer in the moneys of the federal treasury was insufficient because it was "comparatively minute and indeterminable[,] and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."[49] She could not seriously argue that the Maternity Act caused her offensively high taxes, nor could she insist that enjoining spending under the Act would make Congress lower taxes. Congress would spend money on what it wanted and, even if it reduced Maternity Act expenditures, any corresponding reduction in her future taxes would be trivial and untraceable.[50]

Second, Ms. Frothingham had a redressability problem. Her putative injury was not judicially redressable because even if her suit were successful, the only remedy would have been for the Court to enjoin the congressional expenditure, not any federal tax itself.[51] Such

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46 262 U.S. 447 (1923). The Court may have telegraphed its punch a year earlier in *Fairchild v. Hughes*, 258 U.S. 126, 129–30 (1922), where it denied standing to citizens' and taxpayers' general interest in invalidating the Nineteenth Amendment.

47 The intent of the Act was to provide financial grants to States with programs for reducing maternal and infant mortality. *Frothingham v. Mellon*, 262 U.S. 447, 449 (1923). Ms. Frothingham also argued that the Maternity Act violated the Tenth Amendment. *Id.*

48 *Id.* at 480, 486.

49 *Id.* at 487.

50 *Id.* at 487–88.

51 That is to say, her tax liability is obviously not adjudicated in such a suit. *See* Flast v. Cohen, 392 U.S. 83, 118 (1968) (Harlan, J., dissenting). This is perhaps what the Court in *Frothingham* was arriving at when it lamented the "comparatively minute and

a resolution would do nothing to redress her future tax burden. Nor would it solve her problems to have the Maternity Act overturned; her remedy, rather, was to elect members of Congress who would repeal ill-advised laws. In this regard, the separation of powers performed the work of standing.[52] Ms. Frothingham had asked the Court to annul an Act of Congress rather than adjudicate a particularized case or controversy. The Court refused to entertain her request, explaining that to do otherwise would be "not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess."[53] Permitting such a lawsuit would not only open the floodgates to taxpayer lawsuits, it would also engulf the separation of powers.[54]

Third and most importantly, Ms. Frothingham had an injury problem. Ms. Frothingham's taxpayer interest in enjoining an allegedly unconstitutional statute was insufficient to create an Article III injury in fact. Her injury was an abstract grievance "shared with millions of others," rather than a particularized injury suffered by operation of the Maternity Act.[55] The Court noted that a proper plaintiff must establish "not only that the statute is invalid[,] but that

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indeterminable" effect upon Ms. Frothingham's future taxation. *Frothingham*, 262 U.S. at 487. But not everyone agrees with this casting of Ms. Frothingham's request. *See* Richard A. Epstein, *Standing and Spending—The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV. 1, 33–35 (2001) (arguing that Justice Sutherland placed undue emphasis on the idea that Ms. Frothingham was only seeking a tax refund).

52 Justice Fortas, with agreement from Justices Black and White, noted this much during oral argument in *Flast*. Oral Argument at 16:57, *Flast*, 392 U.S. 83 (No. 416), *available at* http://www.oyez.org/cases/1960-1969/1967/1967_416 (Fortas, J.: "Well, Mr. Pfeffer, as I read *Frothingham*, I would say that it's based squarely upon separation of powers . . . .").

53 *Id.*

54 *Frothingham*, 262 U.S. at 488–89.

55 *Id.* at 487–88. It is perhaps for this reason that the Supreme Court has, notwithstanding its 1968 decision in *Flast*, described taxpayer standing as a "legal fiction." *See, e.g.*, Hein v. Freedom from Religion Found., 551 U.S. 587, 593 (2007) (plurality opinion) ("In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm."). Of course, Ms. Frothingham would have had standing to challenge the *collection* of a paticular tax assessment as unconstitutional. *See, e.g.*, Follett v. Town of McCormick, 321 U.S. 573 (1944) (invalidating tax on preaching on First Amendment grounds); *see also Hein*, 551 U.S. at 599 (explaining that in such a "collection" case, "being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer"). But this was not her claim. *See Frothingham*, 262 U.S. at 480, 486 ("[Ms. Frothingham's] contention . . . seems to be that the effect of the [Maternity Act] will be to increase the burden of future taxation and thereby take her property without due process of law.").

he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[56] Were it otherwise, every taxpayer offended by a federal statute would have the ability to overturn it in court. The Court later elaborated on this theme in a case extending the *Frothingham* rule to state taxpayers,[57] wherein it explained that while taxpayers need not specifically trace their tax dollars from relinquishment to government expenditure, they must first allege "a good-faith pocketbook action"[58] that "as taxpayers they are, will, or possibly can be out of pocket because of" the challenged government activity.[59]

The ruling in *Frothingham* is decidedly broad. Despite protestations,[60] the Court has limited the *Frothingham* holding only once, and even then, only slightly.[61] By its terms, *Frothingham* would bar suit by federal taxpayers objecting to the spending of their tax dollars to support a church or religious institution, notwithstanding the Establishment Clause.

B. The Limited Exception to the Rule Against Taxpayer Standing

1. The Flast *"Nexuses" Test*

Some forty-five years later, in *Flast v. Cohen*,[62] the Court upended decades of jurisprudence to establish a very narrow exception to the taxpayer standing prohibition in federal court. The Court created this exception in *Flast* despite the fact that Congress had rejected legislation that would have authorized taxpayer standing to challenge

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[56] *Frothingham*, 262 U.S. at 448. The requirement of a personal injury to a proper plaintiff is not new. *See, e.g.*, *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam); Fairchild v. Hughes, 258 U.S. 126, 129 (1922); *cf.* Tyler v. Judges of the Court of Registration, 179 U.S. 405, 406 (1900) (adjoining landowner cannot assert his neighbor's potential property deprivation; rather, he must "aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens").

[57] Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429 (1952). *Doremus* involved a state law requiring "the reading, without comment, of five verses of the Old Testament at the opening of each public-school day." *Id.* at 430. The plaintiffs challenged the statute in their capacity as "citizens" and "taxpayers." *Id.* at 431.

[58] *Id.* at 434.

[59] *Id.* at 433.

[60] *See, e.g.*, *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 465–98 (1966); Currie, *supra* note 27, at 124; Culp Davis, *supra* note 27, at 632.

[61] *See* Flast v. Cohen, 392 U.S. 83 (1968).

[62] *Id.*

the very statute in question: the Elementary and Secondary Education Act of 1965.[63] The plaintiffs in *Flast* asked the Court to enjoin the expenditure of federal funds under the Act because that money was allegedly being used to support religious schools in violation of the First Amendment.[64] Specifically, the "claim [wa]s that the plaintiffs' money [wa]s being used in an official [government] program which [wa]s being conducted" in violation of the Establishment Clause.[65] The obvious question presented was whether the plaintiffs, suing solely in their capacity as federal taxpayers, had standing to raise this constitutional challenge.[66]

Writing for the *Flast* Court, Chief Justice Warren explained that the answer turned on whether the plaintiffs could "demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements."[67] The Chief Justice was not clear, however, on what comprised the proper stake—indeed, his language appears to restate the question rather than answer it.[68] While underscoring that

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63 At the committee levels in both the House and Senate, Congress considered amendments to the Elementary and Secondary Education Act that would have authorized such challenges. *See* 111 CONG. REC. H5771 (daily ed. Mar. 24, 1965), H5942-43 (daily ed. Mar. 25, 1965) (rejected by House); 111 CONG. REC. S7345 (daily ed. Apr. 7, 1965) (rejected by Senate); 111 CONG. REC. H5973 (daily ed. Mar. 25, 1965), H6132 (daily ed. Mar. 26, 1965), S7316-18 (daily ed. Apr. 7, 1965) (debate on the topic).

64 *Flast*, 392 U.S. at 85 ("In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment."). The funds in *Flast*, totaling in the millions, were used to support several education programs, including but not limited to "instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools." *Id.* at 85–86. The plaintiffs in *Flast* sued to have portions of the Act authorizing those expenditures declared unconstitutional and to enjoin any future expenditures. *Id.* at 85. They attempted to distinguish *Frothingham* on the basis that it established a rule of judicial self-restraint or abstention rather than a jurisdictional limitation under Article III, § 2, and thus had no application to the Religion Clauses of the First Amendment. *See* Flast v. Gardner, 271 F. Supp. 1 (S.D.N.Y. 1967), *rev'd*, Flast v. Cohen, 392 U.S. 83 (1968).

65 *Flast*, 271 F. Supp. at 8 (Frankel, J., dissenting).

66 In *Flast*, the district court answered this question in the negative. *Id.* Judge Frankel, the lone dissenter, would have found standing based on the rule that "the Establishment Clause forbids the use of tax money" by the government "to support any religion." *Id.* at 6. The Supreme Court ultimately embraced this conclusion. *Flast*, 392 U.S. at 106.

67 *Flast*, 392 U.S. at 102.

68 That is, taxpayer plaintiffs have standing if they have standing. *See id. But see* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 485–86 (1982) ("'[T]hat concrete adverseness which sharpens the presentation of issues' . . . is the anticipated consequence of proceedings commenced by one who has been injured in fact; *it is not a permissible substitute for the showing of injury itself*." (emphasis added) (quoting Baker v. Carr, 396 U.S. at 186, 204 (1962))).

Article III standing will not be satisfied "where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System," the Warren Court carved out an exception for what it determined was a distinct personal injury with a legal remedy available to redress it.[69] In an eight-to-one decision, the Court held that because a federal taxpayer can allege injury only when "his tax money is . . . extracted and spent,"[70] such an injured taxpayer "will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional

There are other problems with the Court's opinion in *Flast*. At times, the Court appears to conclude that the purpose of standing is merely to enable the Court to perform its work accurately, rather than to prevent interference with issues committed to the other branches of government. *See Flast*, 392 U.S. at 99–101 (noting that because standing focuses on the parties and not the issues of the case, the proper plaintiff question "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government"). This rationale has been thoroughly discredited by the Supreme Court itself. *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 11–12 (1998) (concluding that *Flast* failed to recognize the separation of powers aspects of Article III standing); Allen v. Wright, 468 U.S. 737, 752 (1984) (resting standing upon the "single . . . idea" of separation of powers). *But see* Berger, *supra* note 45, at 827–29 (arguing that standing has nothing to do with separation of powers). Furthermore, despite implying that the *issues* presented were irrelevant to the standing inquiry, Chief Justice Warren asserted that the issues could nevertheless be analyzed to ascertain whether the requisite "nexus" was present. *See Flast*, 392 U.S. at 102. Thus, in discounting issues and their obvious connection to the separation of powers, the Court may have simply been underscoring that the taxpayer's interest must be personal, not that it must be completely different from those shared by any other taxpayer.

[69] *Flast*, 392 U.S. at 106. Chief Justice Warren's majority opinion was unclear as to whether the *Frothingham* rule against taxpayer standing was based on constitutional or prudential grounds. *Compare id.* at 102 (explaining that the question of whether plaintiffs may sue based solely on their capacity as taxpayers "turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy *Article III requirements*" (emphasis added)), *with id.* at 105–06 (holding that "a taxpayer will have standing *consistent with Article III* to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power" (emphasis added)). Any lingering doubt on this issue appears to have been cleared up in *United States v. Richardson*, 418 U.S. 166 (1974), and, most recently, *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011). *See Richardson*, 418 U.S. at 172–73 (recognizing that *Frothingham* rule standing derived from the requirements of Article III, not prudential concerns). Indeed, the majority's opinion in *Winn* references the requirement and "foundational role" of Article III standing no fewer than nine times. 131 S. Ct. at 1440, 1441, 1442, 1443, 1449. Of course, if the rule against federal taxpayer standing derives from Article III, its exception cannot be based solely on judicial prudence.

[70] *See Flast*, 392 U.S. at 106.

provisions which operate to restrict the exercise of the taxing and spending power."[71] The *Flast* "nexuses" test thus requires an injured taxpayer plaintiff to first establish a "logical link between [his taxpayer] status and the type of legislative enactment attacked," and second, establish "a nexus between that status and the precise nature of the constitutional infringement alleged."[72]

The precise constitutional infringement that the *Flast* Court had in mind was the freedom of conscience protected by the Establishment Clause.[73] The Court treated that Clause as a specific bulwark against Congress's use of the taxing and spending power "to favor one religion over another or to support religion in general."[74] Invoking James Madison's famous *Memorial and Remonstrance Against Religious Assessments*[75] and channeling the "Jeffersonian proposition" against compelled exactions,[76] the Court considered the Clause sufficiently implicated by any law that would "force a citizen

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[71] *Id.* at 105–06. The Supreme Court's complete holding in *Flast* reads as follows:

> [W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review.

Id.

[72] *Id.* at 102–03.

[73] *Id.*

[74] *Id.* at 103 ("Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."). "The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power" and, as such, "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." *Id.* at 104; *see id.* at 115 (Fortas, J., concurring) ("In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens.").

[75] JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed., 1901).

[76] "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ." Thomas Jefferson, *Bill for Establishing Religious Freedom*, *in* THE SUPREME COURT ON CHURCH AND STATE 25, 25 (Robert S. Alley ed., 1988). Professor Steven Smith is credited for coining the phrase "Jeffersonian proposition." *See* Smith, *supra* note 37, at 374.

to contribute three pence . . . of his property for the support of any one establishment."[77] Indeed, such support to religion "by the use of taxpayers' money lay at the heart of Jefferson's and Madison's concern"[78] regarding the rights of conscience later enshrined in the Religion Clauses.[79] This fact was unanimously recognized twenty years prior in *Everson v. Board of Education*,[80] which held that the

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77 *Flast*, 392 U.S. at 103 (quoting JAMES MADISON, *supra* note 75, at 186) (internal quotation marks omitted). *See also* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 11 ("The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the Framers'] indignation. It was these feelings which found expression in the First Amendment."); NOAH FELDMAN, DIVIDED BY GOD 48 (2005) ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support."). Not everyone agrees, however, that Madison's "three pence" concern applies to Establishment Clause harm. *See, e.g.*, Kyle Duncan, *Misunderstanding Freedom from Religion: Two Cents on Madison's Three Pence*, 9 NEV. L.J. 32, 49–55 (2008) (arguing that Madison's claim is more grounded in the Free Exercise Clause than the Establishment Clause).

> [W]hen we translate Madison's "three pence" argument into modern doctrinal categories, it fails to support an exception to the ban on generalized taxpayer standing. . . . Instead, the argument was Madison's effective way of dramatizing the harm to free exercise rights of those whose religious relationships the assessment threatened to corrupt.

Id. at 53. This fact, however, should not detract from the conscience harm, which is recognized by both Clauses. René Reyes, *Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience*, 43 CONN. L. REV. 303, 319 (2010).

78 *See* Flast v. Gardner, 271 F. Supp. 1, 7 (S.D.N.Y. 1967) (Frankel, J., dissenting), *rev'd*, Flast v. Cohen, 392 U.S. 83, 88 (1968) (adopting Judge Frankel's standing conclusion); *see also* Locke v. Davey, 540 U.S. 712, 722 (2004) ("Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion."). Indeed, some have argued that the principle of liberty of conscience can be traced back to the Greek and Roman Stoics. *See* Martha Nussbaum, *John F. Scarpa Conference on Law, Politics, and Culture: Reply*, 54 VILL. L. REV. 677, 699–700 (2009).

79 *See* JAMES MADISON, *supra* note 75, at 186 (describing the rights of conscience as providing that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate"); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 711 n.22 (2002) (Souter, J., dissenting) ("As a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause."); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002) ("Establishment of religion, the Framers' generation thought, often had the effect of compelling conscience. [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed."). *But see* Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience*, 54 VILL. L. REV. 655, 664 (2009) (rejecting the argument that government support of religion violates a taxpayer's rights of conscience).

80 330 U.S. 1 (1947). *Everson* unanimously stated the governing substantive principles of the Establishment Clause as it pertains to taxation as follows: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever

First Amendment forbade government support of churches through the exaction of taxes and tithes.[81]

According to the *Flast* Court, the plaintiffs met the so-called "nexuses" test because they challenged Congress's exercise of power to tax and spend for the general welfare—i.e., the "challenged program involve[d] a substantial expenditure of federal tax funds," and the taxpayer plaintiffs "alleged that the challenged expenditures violate[d] the Establishment . . . Clause[]."[82] The Court viewed the Clause as a specific limitation on the federal power to tax and spend because it prevented Congress from using such powers to aid a particular religion or religion in general.[83] This specific, non-Article I limitation on Congress's taxing and spending power established the appropriate "nexuses" between the federal taxpayers' status (prong one) and the nature of the allegedly unconstitutional action (prong two) to support their claim of standing to secure judicial review.[84]

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they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 511–12.

[81] *See id.* at 32–45, 63–72 (appending JAMES MADISON, *supra* note 75, at 186); *see also Flast*, 271 F. Supp. at 9.

[82] *Flast*, 392 U.S. at 103. The Court specifically avoided the question of "whether the Free Exercise claim, standing alone, would be adequate to confer standing" in the case, having already found the Establishment Clause claim sufficient to establish the requisite nexus. *Id.* at 104 n.25.

[83] *Id.* at 102–03. Although the terms of the Establishment Clause arguably impose no greater limit on the taxing and spending power than other structural constitutional limitations, time has proven the *Flast* exception to be an Establishment Clause exception and nothing more. "[N]o claim on the merits other than one brought under the Establishment Clause has ever been permitted in a federal court by a plaintiff asserting taxpayer standing." Carl H. Esbeck, *What the* Hein *Decision Can Tell Us About the Roberts Court and the Establishment Clause*, 78 MISS. L.J. 199, 211 (2008); *see, e.g.*, Hein v. Freedom from Religion Found., 551 U.S. 587, 642 n.4 (2007) (Souter, J., dissenting) (plurality opinion) (conceding that "[o]utside the Establishment Clause context, . . . we have not found the injury to a taxpayer when funds are improperly expended to suffice for standing").

[84] *Flast*, 392 U.S. at 105–06. Under these circumstances, the Supreme Court

> fe[lt] confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution.

Id. at 106. It specifically distinguished this sentiment with its conclusion in *Frothingham*, where a federal taxpayer sought "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.*

2. Justice Harlan's Dissent

Justice Harlan dissented vigorously in *Flast*, believing that the majority's "nexuses" test rested on premises that could not withstand analysis.[85] In addition to critiquing virtually every aspect of Chief Justice Warren's majority opinion, Justice Harlan provided several thoughts on the substantive rights of taxpayer plaintiffs.[86] Borrowing Professor Louis Jaffe's use of the terms "Hohfeldian" and "non-Hohfeldian,"[87] Justice Harlan distinguished the interests of taxpayers, who contest the constitutionality of public expenditures ("non-Hohfeldian" plaintiffs who claimed no injury to a personal legal right) from the "Hohfeldian" taxpayer plaintiffs, who can connect the same challenge to the validity of their individual tax liabilities.[88] The non-Hohfeldian plaintiffs' interests in the expenditure of public funds was no different from those of the general public, and certainly did not exist by virtue of "any special rights retained by them in their tax payments."[89] The *Flast* plaintiffs were, in Justice Harlan's opinion, non-Hohfeldian litigants "challeng[ing] an expenditure," but "not a tax."[90] Granting standing for such action would not only "strain the judicial function and press to the limit judicial authority," it "might well alter the allocation of authority among the three branches of the Federal Government."[91]

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[85] *Id.* at 116–17 (Harlan, J., dissenting) ("Although I . . . agree with certain of the conclusions reached today by the Court, I cannot accept the standing doctrine that it substitutes for *Frothingham* . . . ." (footnote omitted)).

[86] Indeed, while Justice Harlan considered the standing issues presented in *Flast* "narrow and relatively abstract," he believed that "the principles by which they must be resolved involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system." *Id.* at 117.

[87] Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913)).

[88] *Flast*, 392 U.S. at 119–20 (Harlan, J., dissenting) ("We must recognize that these non-Hohfeldian plaintiffs complain, just as the petitioner in *Frothingham* sought to complain, not as taxpayers, but as 'private attorneys-general.' The interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration. They are, as litigants, indistinguishable from any group selected at random from among the general population, taxpayers and nontaxpayers alike." (footnote omitted)).

[89] *Id.* at 118 ("The simple fact is that no such rights can sensibly be said to exist.").

[90] *Id.* at 128 ("If this case involved a tax specifically designed for the support of religion, as was the Virginia tax opposed by Madison in his Memorial and Remonstrance, I would agree that taxpayers have rights under the religious clauses of the First Amendment that would permit them standing to challenge the tax's validity in the federal courts." (footnote omitted)).

[91] *Id.* at 130.

Criticizing the Chief Justice's stated rationale, Justice Harlan further observed that if the requisite "personal stake in the outcome" is the heart of Article III standing,[92] mechanical application of *Flast*'s two-part nexuses test does little to further that principle. First, Justice Harlan argues that a taxpayer plaintiff's personal incentive to challenge a governmental expenditure has everything to do with government expenditure *vel non* and nothing to do with "the type of legislative enactment attacked."[93] Second, Justice Harlan points out the intensity of a taxpayer plaintiff's personal interest in *his* lawsuit is wholly unrelated to the importance that *others* place on the constitutional provision under which the taxpayer brings his challenge,[94] or whether that provision constitutes a "specific limitation" upon Congress's spending powers.[95] "The difficulty, with which the Court never comes to grips," according to Justice Harlan, "is that taxpayers' suits under the Establishment Clause are not in these circumstances meaningfully different from other public actions," where no special standing exception exists.[96] In this instance, the Court made no real connection between a taxpayer's status and the stake he has in Establishment Clause issues. To Justice

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92 It was at the time and remains so today. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962); Massachusetts v. EPA, 549 U.S. 497, 517 (2007) ("At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" (quoting *Baker*, 369 U.S. at 204)).

93 *Flast*, 392 U.S. at 102, 122–23 (Harlan, J., dissenting).

94 *Id.* at 124 ("I am quite unable to understand how, if a taxpayer believes that a given public expenditure is unconstitutional, and if he seeks to vindicate that belief in a federal court, his interest in the suit can be said necessarily to vary according to the constitutional provision under which he states his claim.").

95 *Id.* at 123–27.

> The Court's position is equally precarious if it is assumed that its premise is that the Establishment Clause is in some uncertain fashion a more "specific" limitation upon Congress' powers than are the various other constitutional commands. . . . [O]nly in some Pickwickian sense are any of the provisions with which the Court is concerned "specific(ally)" limitations upon spending, for they contain nothing that is expressly directed at the expenditure of public funds. . . .
>
> Even if it is assumed that such distinctions may properly be drawn, it does not follow that federal taxpayers hold any "personal constitutional right" such that they may each contest the validity under the Establishment Clause of all federal expenditures.

Id. at 127–28.

96 *Id.* at 128.

Harlan, the Court's new taxpayer standing exception test and the criteria for meeting it were entirely unrelated.[97]

3. Flast*'s Normative Test*

Judges, litigants, and scholars routinely misinterpret *Flast* by treating satisfaction of its "nexuses" test as the harm itself—i.e., that a logical nexus between the taxpayer status asserted and the claim adjudicated satisfies the exception.[98] Under this theory, every taxpayer has standing to challenge any government exercise of taxing or spending power that the plaintiff alleges violates the Establishment Clause.[99] All taxpayers are the same. As a result, merely restating the elements of the "nexuses" test allows a citizen to litigate his desire that the government act in a constitutional manner with regard to religion.

This elevates form over substance. *Flast* presumes an injured taxpayer and his funds as the object of harm. It requires taxpayer plaintiffs stirred by an otherwise generalized grievance to make a showing that the type of taxing and spending action they object to takes from them to spend on religion. The taxpayer's injury in such a case, as the Court explained, "would be that *his tax money is being extracted and spent* in violation of specific constitutional protections

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[97] *Id.* at 121. It is important to note, however, that Justice Harlan did not level this same critique of the *Flast* majority's holding that a taxpayer plaintiff be required to show "that *his* tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power" in order to fit within the exception. *See id.* at 106 (emphasis added). Nor did Justice Harlan view the absence of a broader exception as a threat to future enforcement of the Religion Clauses. *See id.* at 133 ("The recent history of this Court is replete with illustrations, . . . that questions involving the religious clauses will not, if federal taxpayers are prevented from contesting federal expenditures, be left 'unacknowledged, unresolved, and undecided.'"); *see also infra* Part III.B.3.

[98] *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1450–63 (2011) (Kagan, J., dissenting); Meredith L. Edwards, *Constitutional Law—Taxpayer Standing to Challenge Executive Spending—Discretionary Spending Versus Spending Pursuant to Congressional Authority*, 77 MISS. L.J. 695, 700–02 (2007); Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT. L. REV. 351, 364 (1993); Bradley Thomas Wilders, *Standing on Hallowed Ground: Should the Federal Judiciary Monitor Executive Violations of the Establishment Clause?*, 71 MO. L. REV. 1199, 1205–06 (2006).

[99] *See, e.g.*, *Winn*, 131 S. Ct. at 1450–51 (Kagan, J., dissenting). Justice Harlan's dissent in *Flast* specifically distinguished public actions from the majority's newfound standing exception, noting that while such a rule could have been applied to the case, it was never authorized by Congress. *See Flast*, 392 U.S. at 133 & n.23 (Harlan, J., dissenting).

against such abuses of legislative power."[100] Only taxpayers suffering such an injury can then benefit from the "nexuses" test.

The requisite harm is not merely the taxpayer's psychological displeasure of a possible violation of the Establishment Clause.[101] Nor is it the direct financial injury in the form of taxpayer money spent by the government.[102] Rather, it is both of these harms.[103] A better reading of *Flast* recognizes the narrow exception reserved for situations when a taxpayer's pocketbook harm implicates his conscience rights in a way that particularizes his personal stake as one who is compelled by the government to relinquish the protections afforded by the Establishment Clause.

The taxpayer-plaintiff's funds as the object of harm—however small[104]—are the starting point to any normative understanding of the *Flast* exception. Without the extraction of those funds, he suffers no pocketbook injury. With no pocketbook injury, the government has no revenue to spend and thus the taxpayer's rights of conscience cannot be directly implicated by that spending. Under such circumstances, the taxpayer lacks a sufficient "stake in the outcome of

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100 *Flast*, 392 U.S. at 106 (emphasis added); *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) ("The Court [in *Flast*] therefore understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff."). It cannot be overlooked that the Court in *Flast* required an exercise of *both* the taxing and spending power of Article I, Section 8. *Flast*, 392 U.S. at 102. The Court repeated these powers, using the conjunctive, a dozen times in *Flast*, and provided examples of how one power would be insufficient standing alone. *See id.* at 102, 105–06. The Court's "extract and spend" injury no doubt played a role in its language here: "The taxpayer's allegation in such cases would be that his [or her] tax money is being *extracted and spent* in violation of specific constitutional protections against such abuses of legislative power." *Id.* at 106 (emphasis added).

101 It is well settled that a taxpayer's psychological interest in having the government act constitutionally is insufficient to confer standing. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. at 497–98 & n.20 (rejecting "the concept of taxpayer injury necessarily recognizes the continuing stake of the taxpayer in the disposition of the Treasury to which he has contributed his taxes, and his right to have those funds put to lawful uses"); Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429 (1952); Frothingham v. Mellon, 262 U.S. 447, 488 (1923); Fairchild v. Hughes, 258 U.S. 126, 129 (1922).

102 *Cf. Frothingham*, 262 U.S. at 488.

103 *But see* Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 372–76 (2011) (pursuing argument that taxpayers who assert an Establishment Clause violation confuse their money with their conscience).

104 *See Flast*, 392 U.S. at 103 ("[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." (quoting JAMES MADISON, *supra* note 75, at 186)).

the controversy" under the Establishment Clause. This is because, as explained above, the Clause's conscience injury—the ending point of harm—is the *unwilling* contributor's compelled support of the very thing that the Clause was designed to protect against.[105] Because the right protected under the Establishment Clause makes it a cognizable "'injury' to have one's money taken and used for the proscribed purpose,"[106] the taxpayer plaintiff must connect his status directly to such an injury.

Though the Supreme Court has never expressly stated it, *Flast* is proof that harm to one's conscience must be coupled with financial harm to show a sufficient injury for taxpayer standing purposes. Indeed, even those who espouse the more expansive view of the taxpayer standing exception agree that, to set forth an injury under *Flast*, the constitutional "right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause" cannot be "split off from one another."[107] The nature of the assessment is more than cumulative;[108] there must also be a connection between the two. As Justice Souter has explained, "[t]he three pence implicates the conscience," making the harm from government expenditures on religion more than a mere "'Psychic Injury' that results whenever a congressional appropriation . . . raises hackles of disagreement with the policy supported."[109] And contrary to Justice Scalia's biopic position on taxpayer harm, the type of injury explicitly recognized as sufficient by *Flast* connects a taxpayer's pocketbook with his psyche when "*his* tax money is being extracted

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[105] *See supra* notes 73–79 and accompanying text; *see also, e.g.*, Nussbaum, *supra* note 78, at 701.

[106] Flast v. Gardner, 271 F. Supp. 1, 9 (S.D.N.Y. 1967) (Frankel, J., dissenting), *rev'd*, Flast v. Cohen, 392 U.S. 83 (1968) (adopting Judge Frankel's standing conclusion).

[107] *See, e.g.*, Hein v. Freedom from Religion Found., 551 U.S. 587, 638 (2007) (Souter, J., dissenting) (plurality opinion). Such an approach finds support in the rationales of *Flast* and *Cuno*, which explain that the "injury alleged in Establishment Clause challenges to federal spending is the very extract[ion] and spen[ding] of tax money in aid of religion." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343–44 (2006) (quoting *Flast*, 392 U.S. at 106). Even the *dissenting* Justices in recent taxpayer standing cases have recognized as much. *See Hein*, 551 U.S. at 638 (Souter, J., dissenting, joined by Stevens, J., Ginsberg, J., and Breyer, J.). Curiously, Justice Kagan failed to recognize this fact in *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450–63 (2011) (Kagan, J., dissenting). *See infra* Part III.B.1.

[108] *See, e.g.*, Rahdert, *Forks Taken*, *supra* note 24, at 1034 (advocating for an approach to Article III standing that provides for a cumulative, but not necessarily a connected, assessment of psychic and pocketbook harm).

[109] *Hein*, 551 U.S. at 639 (Souter, J., dissenting); *cf.* Rahdert, *Forks Taken*, *supra* note 24, at 1034–35.

and spent" in violation of his Establishment Clause right of conscience.[110] This unity of harm best embodies the Framers' concern that freedom of conscience not be compromised by the government extracting and spending taxpayer money in support of religion, and makes such harm particularized enough for federal taxpayers to raise it in court. This is *Flast*'s better test.

II
LIMITING THE EXCEPTION TO THE RULE: MODERN TAXPAYER STANDING

> The question here is not . . . whether the religious clauses of the First Amendment are hereafter to be enforced by the federal courts; the issue is simply whether plaintiffs of an additional category, heretofore excluded from those courts, are to be permitted to maintain suits.[111]
>
> —Justice John Marshall Harlan, II

While *Flast* "was hardborn and . . . endured a difficult adolescence,"[112] it has found its place in modern standing jurisprudence and, barring any drastic shift in the Supreme Court's makeup, is here to stay.[113] The proof of the pudding is in the eating: *Flast* remains a "narrow exception," and the Supreme Court began limiting it shortly after the decision was handed down.[114] This was

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110 *Flast*, 392 U.S. at 106 (emphasis added). I do not agree with Justice Scalia that *Flast* was based solely on "Psychic Injury," or that the Court's decision in *Cuno* confirms this position. *See Hein*, 551 U.S. at 620–29 (Scalia, J., concurring). Nor do I agree that "there are only two logical routes available to th[e] Court" in this area. *See id.* at 628. The problem with Justice Scalia's position is that he defines "Wallet Injury" too narrowly—i.e., only the claim that the plaintiff's "tax liability is higher than it would be, but for the allegedly unlawful government action." *Id.* at 619. While this description of taxpayer injury makes for an easy Article III analysis, it fails to account for the universe of possible claims. A proper taxpayer plaintiff could view his overall tax liability as acceptable while challenging how it is spent by the government. Wallet Injury (even if not traceable) can be proper when it directly implicates the right of conscience protected by the Establishment Clause. This activity *is* traceable (to the government's compelled exaction for religion) and redressable (striking down the law).

111 *Flast*, 392 U.S. at 133 (Harlan, J., dissenting).

112 Freedom from Religion Found. v. Chao, 433 F.3d 989, 997 (7th Cir. 2006) (Ripple, J., dissenting).

113 *Cf.* Pushaw, *"Accidental" Plaintiffs*, *supra* note 28, at 105. *Winn* reiterated this fact, as seven Justices specifically voted to retain *Flast* and all nine applied it. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011).

114 *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 479–81 (1982) (no taxpayer standing to challenge executive branch action taken under Article IV's Property Clause); Tilton v. Richardson, 403 U.S. 672, 689 (1971) (suggesting that no taxpayer standing exists to sue under Free Exercise

accomplished, in large part, by confining the *Flast* exception to its facts.

In its 1974 decision in *Schlesinger v. Reservists Committee to Stop the War*,[115] the Court refused to extend *Flast* beyond challenges to a congressional enactment under Article I, Section 8, as was the case in *Flast*.[116] Ten years later, in *Valley Forge Christian College v. Americans United for Separation of Church and State*,[117] the Court repeated this holding using language that further limited *Flast*'s future reach[118] and emphasized that its exception did *not* relax the injury-in-fact and redressability requirements of constitutional standing in Establishment Clause cases.[119] And in its 2006 holding in *DaimlerChrysler Corporation v. Cuno*[120] that the rule against taxpayer standing also applies "to so-called 'tax expenditures,' which reduce amounts available to the treasury by granting tax credits or exemptions,"[121] the Roberts Court unanimously confirmed that "[t]he

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Clause); United States v. Richardson, 418 U.S. 166, 175 (1974) (no taxpayer standing to sue under Statement and Account Clause of Article I); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (no taxpayer standing to sue under Incompatibility Clause of Article I).

115 418 U.S. at 208. *Schlesinger* involved a citizen/taxpayer challenge to the ability of a person to hold an Armed Forces Reserve commission simultaneously with his membership in Congress, pursuant to the Incompatibility Clause of Article I, Section 6, Clause 2. *Id.*

116 *Id.* at 228. While the plaintiffs in *Schlesinger* raised a claim under the Incompatibility Clause rather than the Establishment Clause, the Court's holding with regard to standing was not based on this fact. Specifically, the Court rejected taxpayer standing based on prong one of *Flast* because "respondents did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status." *Id.*

117 454 U.S. at 464. *Valley Forge* involved a First Amendment challenge by taxpayers to the government's free transfer of federal property to a nonprofit religious school. The expenditure was authorized under Article IV, Section 3, Clause 2 of the Constitution. *Id.*

118 *Id.* at 473–74 (rejecting taxpayer standing in an Establishment Clause case stemming not from a congressional enactment under the Taxing and Spending Clause but, rather, from executive branch action taken under the Property Clause). While *Valley Forge* hinged on *action* by the government, the action resulted in *non-tax income* coming into government's hands. *See id.* at 480–81 & n.17.

119 *Id.* at 485–86, 488–90.

120 547 U.S. 332 (2006). In *Cuno*, the Court refused to extend *Flast* for alleged Commerce Clause violations. It held that state taxpayers lacked standing in federal court to challenge, under the Commerce Clause, Ohio's investment tax credit to a major automobile manufacturer. *Id.* at 344–46. According to the Court, "[w]hatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to 'contribute three pence . . . for the support of any one [religious] establishment."' *Id.* at 347 (quoting JAMES MADISON, *supra* note 75, at 186).

121 *Id.* at 343–44 (holding that a state taxpayer's "injury" from allegedly unlawful legislative expenditure is "not 'concrete and particularized [nor] actual or imminent'" (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992))). Tax expenditures are

Court [in *Flast*] understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff."[122]

One year later, the Court continued this trend in *Hein v. Freedom From Religion Foundation*.[123] *Hein* reaffirmed, among other principles, that a taxpayer's purely psychological interest in ensuring that appropriated funds are spent in accordance with the Establishment Clause does not suffice to confer standing.[124] Instead, to meet the *Flast* exception as it is now understood, pocketbook injury is required in the form of specifically mandated and unambiguously appropriated public monies extracted from taxpayers and given to an outside religious entity in violation of the Establishment Clause.[125]

Hein involved a suit by the Freedom from Religion Foundation (FFRF), alleging that the executive branch[126] violated the Establishment Clause by using its discretionary funds to co-host conferences—open to both religious and secular non-profit groups—

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defined by Congress as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." Congressional Budget Act of 1974, Pub. L. No. 93-344, § 3, 88 Stat. 297, 299 (1974); *see infra* notes 151, 196, and accompanying text.

122 *Id.* at 344–45 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)) (first alteration added)). Arguably, *Bowen v. Kendrick* might be considered the lone outlier in the Supreme Court's relatively consistent application of the *Flast* exception in cases where standing is litigated. 487 U.S. 589 (1988). Taxpayers in *Bowen* raised an Establishment Clause challenge the distribution of funds by the Department of Health and Human Services, pursuant to the Adolescent Family Life Act, providing aid to pregnant teenagers and adolescent parents. *Id.* at 593–94. The statute in question, enacted pursuant to Article I, Section 8, specifically authorized and unambiguously appropriated disbursement of federal funds to outside entities, including religious organizations. *Id.* Although the specific action challenged in the case came from an executive agency, the Court determined that an agency's administration of a specific congressional mandate was of no moment under *Flast*. *Id.* at 618–20. This distinguishes *Bowen* from *Hein*.

123 551 U.S. 587 (2007) (plurality opinion). *Hein* was a plurality opinion by Justice Alito that was joined by Chief Justice Roberts and Justice Kennedy. Justice Alito's plurality opinion in *Hein* is controlling because it expresses the narrowest position taken by the Justices who concurred in the judgment. *See* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764 n.9 (1988); Marks v. United States, 430 U.S. 188, 193 (1977).

124 *Hein*, 551 U.S. at 599–600; *see also Valley Forge*, 454 U.S. at 485–86.

125 *Hein*, 551 U.S. at 603–04, 608–09. Of course, the extraction need not be directly traceable to the expenditure.

126 This included the White House Office of Faith-Based and Community Initiatives, Department of Labor, Department of Health and Human Services, and Department of Education. *Id.* at 592–95. The government invited representatives of nonprofit groups, both secular and sectarian, to attend these conferences and learn about federally funded opportunities to receive social services grants. *Id.*

at which certain speakers, including the President and Cabinet officials, "used 'religious imagery' and praised the efficacy of faith-based programs in delivering social services."[127] FFRF insisted that its members had Article III standing based solely on their interest as federal taxpayers.[128] Rather than dismiss the case on its merits,[129] a plurality held that the plaintiffs could not avail themselves of the *Flast* exception.[130]

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[127] *Id.* at 592–94. The nub of the allegation was that executive branch speakers were promoting the idea that faith-based community programs might be more effective at providing social services than secular entities because of their religious orientation. *Id.* at 595–96; *see also* Exec. Order No. 13199, 3 C.F.R. 752 (2001) (establishing the White House Office of the Faith-Based and Community Initiatives to ensure that "private and charitable community groups, including religious ones, . . . have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes" and adhere to "the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality"); Exec. Order No. 13279, 3 C.F.R. 258 (2002) (assisting faith-based community groups' eligibility to compete for federal financial support without impairing their independence or autonomy, as long as they did "not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization").

[128] *Hein*, 551 U.S. at 593. The plaintiffs in *Hein* did not challenge the validity of their individual tax liabilities, nor did they allege that they were in attendance at any of the co-hosted conferences. Such an argument may have provided a separate basis for Article III standing as direct exposure to an offensive governmental religious object. *See, e.g.*, Newdow v. Lefevre, 598 F.3d 638, 642 (9th Cir. 2010); ACLU v. Grayson Co., 591 F.3d 837, 843 (6th Cir. 2010); Green v. Haskell Cnty. Bd. of Comm'rs, 568 F.3d 784, 793 (10th Cir. 2009).

[129] Precedent in the Establishment Clause area dictated such a result. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom from Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 116 (2008) ("This was a lawsuit destined to go nowhere, even if the Supreme Court had affirmed the Seventh Circuit's decision to uphold taxpayer standing in the case."). The problem recognized by the First Amendment is not that taxpayer-salaried executive branch officials would speak (favorably or unfavorably) about religion or meet with religious groups. *Cf.* Van Orden v. Perry, 545 U.S. 677, 683 (2005) (plurality opinion) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." (quoting Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 213 (1963)) (internal quotation marks omitted)). Rather, it was that compelled financial support of government-sponsored churches and Congress's express use of its taxing and spending power to disburse monies outside the government to subsidize religion that animated the support for, and eventual adoption of, the Free Exercise and Establishment Clauses. *See, e.g.*, Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 11 ("The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the Framers'] indignation. It was *these* feelings which found expression in the First Amendment." (emphasis added)).

[130] *Hein*, 551 U.S. at 608–09. The plurality's holding rested primarily on *stare decisis* and separation of powers concerns. Justice Souter's dissent advocated for a subjective, case-by-case consideration of whether an alleged injury is "too abstract, or otherwise not

On a doctrinal level, the decision in *Hein* was more about the Supreme Court's power to decide a legal question than the answer it should give. It was the Court's definitive statement on "the rigor with which the *Flast* exception . . . ought to be applied."[131] In this regard, *Hein* concerned the fundamental limits of *Flast*, the scope of the exception to the rule against federal taxpayer standing, and the Supreme Court's decision to preserve or abandon the integrity of that underlying rule.[132] The plurality expressly adopted what *Schlesinger* and *Valley Forge* had implied and what Justice Powell's concurring opinion in *Richardson* specifically urged[133]: "limit[ing] the expansion of federal taxpayer and citizen standing . . . to an outer boundary drawn by the *results* in *Flast*."[134]

In demarcating those results, the *Hein* Court emphasized congressional culpability. It explained that the challenged expenditures in *Flast* were funded "by a specific congressional appropriation" under Congress's taxing and spending power and disbursed to private religious schools "pursuant to an unambiguous congressional mandate" that directed a certain amount of public funds be made available to these schools.[135] Thus, the challenged expenditures presented "one of the specific evils" the Establishment Clause was designed to address—that freedom of conscience not be compromised by Congress extracting and spending an unwilling

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appropriate, to be considered judicially cognizable." *Id.* at 642 (internal quotation omitted).

131 *Id.* at 603 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 481 (1982)) (internal quotation marks omitted).

132 Indeed, the *Hein* plurality's analysis of *Flast* was an integral and necessary part to the Court's reasoning in that case. *Hein*, 551 U.S. at 602–15. As such, this reasoning constitutes binding precedent. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

133 United States v. Richardson, 418 U.S. 166 (1974); *see Hein*, 551 U.S. at 610 ("[W]e have adopted the position set forth by Justice Powell in his concurrence in *Richardson* . . . .").

134 *Hein*, 551 U.S. at 610 (quoting *Richardson*, 418 U.S. at 196) (internal quotation marks omitted).

135 *Id.* at 604.

taxpayer's funds on religion.[136] It was precisely this concern, the Court explained, that justified the "results in *Flast*."[137]

Rather than establishing any link between their taxpayer status and the expressly mandated and appropriated congressional enactment attacked,[138] the best the *Hein* plaintiffs could do was "point to unspecified, lump sum" congressional budget appropriations for the general, discretionary use of the executive branch.[139] This did not cut the constitutional mustard under *Flast*.[140] Four years would pass before the Court would address taxpayer standing again.

III
WINN

A. Case Synopsis

Arizona Christian School Tuition Organization v. Winn[141] was the only religion case decided in the Supreme Court's 2010 term. It involved an Arizona law permitting state taxpayers to claim a dollar-

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136 *Id.* at 623 (Scalia, J., concurring); *see also id.* at 616 (Kennedy, J., concurring) (explaining that the Establishment Clause "expresses the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion").

137 *Id.* Assuming a sufficient taxpayer injury allegation, *see supra* Part.I.C, the "outer boundary drawn by the *results* in *Flast*" therefore meant that the exception to the general rule against federal taxpayer standing would apply only to taxpayer challenges of (1) "exercises of congressional power," *id.* at 605, 615; (2) "under the Taxing and Spending Clause," *id.* at 604–05; (3) that contain "an express congressional mandate" and a "specific congressional appropriation," *id.* at 603–04; and (4) expressly for the expenditure of funds dedicated to the specific activity that violates the Establishment Clause, *id.* at 604–05, 608–09. Where these elements do not exist, "the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked'" is absent because the taxpayer's suit "is not directed at an exercise of congressional authority" in violation of the Establishment Clause. Flast v. Cohen, 392 U.S. 83, 102 (1968). Instead, he is simply raising a violation of law to which he is no more subjected than any other person.

138 *Flast*, 392 U.S. at 102.

139 *Hein*, 551 U.S. at 607–08 (holding that the appropriations challenged by plaintiffs were "not expressly authorized or mandated by any specific congressional enactment"). The Court reasoned that, "[b]ecause almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court." *Id.* at 610.

140 *Id.* at 610–11 (citing plaintiffs' amended complaint, which focused primarily on this type of federal activity, including various speeches delivered by federal executive branch officials); *see also id.* at 612–14 (attacking Seventh Circuit panel's extension of *Flast*, and the logic of its "zero-marginal-cost" test).

141 131 S. Ct. 1436 (2011).

for-dollar tax credit of up to $500 for donations made to school tuition organizations (STOs).[142] STOs are private, 501(c)(3) organizations that use those donations to provide scholarships to children attending private secular and religious schools.[143] The plaintiffs (and eventual respondents), a group of Arizona taxpayers, brought an Establishment Clause challenge to the tax credit program,[144] arguing that it permitted STOs "to use State income-tax revenues to pay tuition for students at religious schools."[145] While the constitutionality of the program was a cinch based on *Zelman v. Simmons-Harris*,[146] the case gained followers in light of its taxpayer standing implications.[147]

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142 *Id.* at 1440–41. Specifically, the Individual Scholarship Tax Credit Program, located in section 43-1089 of the Arizona Tax Code, permitted Arizona taxpayers to claim dollar-for-dollar nonrefundable state income tax credits of up to $500 per person (and $1000 per married couple filing jointly) against state liability for donations to qualified school tuition organizations (STOs). ARIZ. REV. STAT. ANN. § 43-1089(A) (2011). This effectively allowed every Arizona taxpayer to choose whether $500 of his or her tax liability would go to the State or to an STO. A "qualified" STO must be a private, tax-exempt charity pursuant to 26 U.S.C. § 501(c)(3); must allocate "at least ninety per cent of its annual revenue" to scholarships for children attending qualified schools; cannot restrict its grants to students attending only one school; and cannot discriminate on the basis of race, color, handicap, familial status, or national origin. ARIZ. REV. STAT. ANN. §§ 43-1601(3), -1602(A), -1603(B)(1)–(2) (2011). Furthermore, scholarship donors cannot request that their donations be designated for a particular student beneficiary, such as a dependent. *Id.* § 43-1603(B)(4) (2011).

On the same day it enacted the tuition tax credit, the Arizona Legislature passed a parallel statute that provides corporations a dollar-for-dollar tax credit for contributions to STOs, as well as a statutory tax credit that benefits only public schools. *See id.* §§ 43-1183, -1089.01 (2011). The latter credit allows any individual Arizona taxpayer to receive up to a $200 tax credit for fees paid or contributions made to public schools for various extracurricular activities or educational programs. *Id.* § -1089.01 (2011). On February 29, 2012, Arizona's Governor signed a revised version of § 43-1089.01 into law, which doubled the amount that an individual could donate to an STO. *See id.* § 43-1089.03 (2012).

143 *See* ARIZ. REV. STAT. ANN. § 43-1602(A); 26 U.S.C. § 501(c)(3). According to the Arizona Department of Revenue, in 2010, fifty-three school tuition organizations in the state awarded over 26,450 tuition scholarships to over 365 schools. ARIZ. DEP'T OF REVENUE, INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2010 (2011), *available at* http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2010.pdf.

144 Respondents made both facial and as-applied constitutional challenges to the tax credit law. *Winn*, 131 S. Ct. at 1441. Critical to the Supreme Court's decision—and the scope of this Article—was the fact that the plaintiffs in *Winn* did not allege that parents or students were denied the benefits of the statute. This was a taxpayer standing case.

145 *Id.*

146 536 U.S. 639 (2002) (upholding Ohio's need-based school voucher program against Establishment Clause attack, where "state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals"); *see also id.* at 649 ("[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government

The respondents did not claim that the STOs were state actors subject to the Establishment Clause; nor did they argue that STOs, rather than private citizens, were the recipients of the challenged tax credits. Rather, they sued only the state of Arizona,[148] based solely on their interest as dissenting taxpayers.[149] The respondents did not argue that the tax credit law levied a tax on them (or anyone for that matter). Indeed, their stated position "concern[ed] the ability of 'third party' state taxpayers to challenge the constitutionality of a state's treatment of *other* taxpayers" who chose to donate to an STO.[150]

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aid reaches religious schools only as a result of the genuine and independent choices of private individuals."). Of course, for those who believe the purpose of the standing doctrine is to limit the judge-made law to circumstances where the resolution of a legal dispute demands it, *Zelman* could itself be used as a barrier to any relief in *Winn*-type cases.

147 *See* Erik S. Jaffe, *Looking Ahead: October Term 2010*, 2010 CATO SUP. CT. REV. 407, 423 (2010).

148 More specifically, the respondents sued the Director of the Arizona Department of Revenue in his official capacity. The Superintendent of Public Instruction and various private STO organizations later intervened.

149 The issue of standing was not raised until the second round of district court litigation in *Winn*. On remand from the Supreme Court, the district court assumed standing and dismissed the case on its merits. *See* Winn v. Hibbs, 361 F. Supp. 2d 1117, 1120 (D. Ariz. 2005) (holding that the "Tuition Tax Credit is a program of true private choice" and thus constitutional under *Zelman*). The Ninth Circuit reversed and remanded, however, concluding that the respondents had taxpayer standing under the *Flast* exception and that they had stated a valid as-applied Establishment Clause claim that the primary purpose and/or effect of the tax credit law was to advance religion, rather than to provide Arizona school children equal access to a wide range of educational options. Ariz. Christian Sch. Tuition Org. v. Winn, 562 F.3d 1002, 1012–23 (9th Cir. 2009). It then denied en banc review with such a strong dissent filed by eight judges that the original panel took it upon itself to write a separate opinion concurring in the denial of the rehearing so it could respond to the dissent. Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649 (9th Cir. 2009). The Supreme Court granted certiorari. 130 S. Ct. 3350 (2010).

This was not the first Establishment Clause challenge by taxpayers to Arizona's Tax Credit Program. Shortly after its enactment in 1998, the Supreme Court of Arizona rejected such a challenge on the merits in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999). The *Kotterman* court held that the statute had a secular purpose of bringing educational alternatives and opportunities to private schools and did not have the primary effect of advancing religion because the tax credit is "available to all taxpayers who are willing to contribute to an STO" and "multiple layers of private choice" prevented any benefits to religious schools being attributed to the State of Arizona. *Id.* at 611–14. For similar reasons, it rejected taxpayer challenges brought under the Arizona Constitution. *Id.* at 617–25.

150 Brief for Respondents at 33, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991) [hereinafter *Winn* Respondents]. Respondents were therefore "'third parties' whose own tax liability was not a relevant factor." Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2335 (2010) (citing Hibbs v. Winn, 542 U.S. 88 (2004)); *see also* Brief for Respondents at 11, Hibbs v. Winn, 542 U.S. 88 (2004) (No. 02-1809) (explaining that respondents' constitutional challenge to the state tax credit is "not

The respondents further insisted that because the Arizona state treasury could lose potential revenue to religious schools through donations permitted by the tax credit program, dissenting taxpayers had standing to challenge those "funds" under the *Flast* exception.[151] To the respondents, the Arizona legislature's decision to provide tax credits to private STO donors was a decision *not* to tax those persons, which was the equivalent of a decision to tax and spend in support of STO tuition scholarships for students to attend religious (and secular) schools. In other words, the tax *credit* program was a government *spending* program. Arizona taxpayers who donated to STOs were spending government money on religion, as the money in their pockets was not actually theirs.

Writing for a five-Justice majority, Justice Kennedy held that *Flast* does not grant taxpayer standing to third parties to challenge tax benefits provided to state taxpayers, who decide to donate through the Arizona program.[152] The Court explained that individual taxpayer plaintiffs

> suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a sectarian entity. As *Flast* put it: "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Flast* thus "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff."[153]

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[a] suit[] by taxpayers seeking to postpone or avoid payment of state taxes. Such suits thus do not seek to 'enjoin, suspend or restrain' the 'assessment, levy or collection' of taxes"); *Hibbs*, 542 U.S. at 104–05 (2004) (treating taxpayer-plaintiffs' suit as a "[t]hird party" action that did not "[s]eek to stop the collection (or contest the validity) of a tax" imposed on them). Nor did the respondents argue that the statute expressly mandated and specifically appropriated government funds to religious organizations. Rather, the parties agreed that the law provided a tax credit to certain taxpayers who donate their money to qualified STOs.

151 *Winn* Respondents, *supra* note 150, at 17 (arguing, *inter alia*, that tax credits and other plans which "reduce the revenues entering the treasury" are the same as the government spending its tax revenues).

152 *Winn*, 131 S. Ct. at 1449.

153 *Id.* at 1445–46 (alteration in original) (citation omitted) (quoting Flast v. Cohen, 392 U.S. 83, 105–06 (1968); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006)). "'Such an injury,' *Flast* continued, is unlike 'generalized grievances about the conduct of government' and so is 'appropriate for judicial redress.'" *Id.* at 1446 (quoting *Flast*, 392 U.S. at 106).

According to the Supreme Court, the respondents' taxpayer standing argument failed to meet the *Flast* exception for three primary reasons: (1) a tax credit is not a government expenditure under *Flast*; (2) private income that never enters the state treasury is not government money; and (3) three intervening layers of private choice do not amount to direct government action.

1. A Tax Credit Is Not a Government Expenditure Under Flast

First, the Arizona tax credit is not a direct government expenditure under *Flast*. A government expenditure or outlay is a direct transfer of government (or public) revenues, generated by taxation, to the subsidized entity.[154] Such an expenditure is a necessary starting point in taxpayer lawsuits under the Establishment Clause, for without it, a plaintiff could not allege that the government extracted and spent his tax money to support religion—something the Supreme Court has consistently required in taxpayer challenges since *Flast*.[155] As the *Winn* Court explained, in such a case a dissenting taxpayer "whose tax dollars are 'extracted and spent'" for the challenged activity "knows that he has in some small measure been made to contribute to an establishment in violation of conscience" protected by the Establishment Clause.[156]

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154 The *Winn* Court rejected the argument that the Arizona tax credit should be understood as a government expenditure as a matter of law. *See Winn*, 131 S. Ct. at 1447–48. In so holding, the Court declined to adopt the tax expenditure analysis as a legal framework in this area, something it had previously refused to do. *See, e.g.*, Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 675–80 (1970) (holding that tax exemptions to churches did not violate the Religion Clauses); Mueller v. Allen, 463 U.S. 388, 398–402 (1983) (same as to tax deductions to all taxpayers for school expenses); *see also* Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 857 (1993) (conceding that the Supreme Court has "not fully applied this concept in the context of Establishment Clause analysis").

155 *See supra* Part I.B.3.

156 *Winn*, 131 S. Ct. at 1447 (quoting *Flast*, 392 U.S. at 106). I interpret the "establishment in violation of conscience" to mean the violation of the freedom of religious conscience from government coercion protected by the Establishment Clause. *See id.*; *see also, e.g.*, FELDMAN, *supra note* 77, at 48 ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support."); Jaffe, *supra* note 87, at 1046 (conceding that "an offense to such a group is an offense to the conscience of each of the persons who constitute the group because each is forced to participate in the official support of a religion").

Even those who attempt to cast *Winn* as treating taxpayer harm in solely economic terms must come to grips with Justice Kennedy's opinion, which appears to connect the economic and psychological harms. *Compare* Rahdert, *Court Reform*, *supra* note 25, at

A tax credit, on the other hand, is a product of legislative forbearance. It occurs when the government *declines* to impose a tax.[157] It does not extract a penny from taxpayers, and the state makes no spending decision with it. *Flast* suspended the usual rule against taxpayer standing precisely to prevent compelled exaction in violation of the plaintiff taxpayer's Establishment Clause rights,[158] a Clause drafted and ratified out of a concern that individuals might be coerced by the federal government to "pay[] taxes to support religious purposes that their consciences told them not to support."[159] Absent an individual allegation of compelled extraction by the government, nothing limits that liberty of conscience, and thus no *Flast* claim exists.

This distinction between governmental expenditures and tax credits doomed the *Winn* respondents' chances before the "nexuses" test could even be applied.[160] But its application would not have changed the Court's conclusion. Because the respondents did not challenge the direct expenditure of their tax money pursuant to the taxing and spending power, the prong one link between a taxpayers' status and the "legislative enactment attacked"[161] could not be met. Furthermore, because the respondents retained control over their money in accordance with their consciences, no direct nexus existed between the dissenting taxpayer and the Establishment Clause under prong two.[162] Arizona's tuition tax credit did "not 'extrac[t] and spen[d]' a conscientious dissenter's funds in service of an establishment, or 'force a citizen to contribute three pence only of his property' to a sectarian organization."[163]

846–47 & n.48 (arguing that *Winn* improperly treats the argument of taxpayer plaintiffs "as asserting [only] a purely economic harm"), *with Winn*, 131 S. Ct. at 1448 ("[W]hat matters under *Flast* is whether sectarian STOs receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience.").

157 *Winn*, 131 S. Ct. at 1447–48.

158 *Flast*, 392 U.S. at 103.

159 Hein v. Freedom from Religion Found., 551 U.S. 587, 638 (2007) (Souter, J., dissenting) (plurality opinion) (quoting FELDMAN, *supra note* 77, at 48). I disagree with Professor Feldman to the extent he argues that the Establishment Clause protects *only* the freedom of conscience. *See* FELDMAN, *supra* note 77, at 350–52, 398–411.

160 *Winn*, 131 S. Ct. at 1447.

161 *Flast*, 392 U.S. at 102.

162 *Winn*, 131 S. Ct. at 1447 ("[A]warding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.").

163 *Id.* (citations omitted) (quoting *Flast*, 392 U.S. at 106).

2. Private Income that Never Enters the Treasury Is Not Government Money

Second, the money in a private donor's pocket did not belong to Arizona. It passed from the donor's hands to an STO without entering the state treasury. The respondents argued that a taxpayer's entire income is government property that becomes his own only when the government decides *not* to exercise its taxation power over 100% of it.[164] This novel theory assumes that private income should be considered "government property even if it has not come into the tax collector's hands"—a premise which "finds no basis in standing jurisprudence"[165] or even within the minority view of taxpayer standing.[166] Private bank accounts, the Court explained, "cannot be equated with the Arizona State Treasury."[167] While the Arizona Department of Revenue monitored STOs and were in some way connected to them[168]—much like the executive branch in *Hein* was

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164 *See Winn* Respondents, *supra* note 150, at 17. The respondents' position also attempts to distinguish between a tax credit—which the respondents treat as an expenditure of government funds—and a tax deduction, which is not, because it results in a smaller tax benefit that the taxpayer is "entitled to keep." *See id.* at 6–7. This argument is problematic even under the respondents' overarching tax expenditure theory, as both practices have the potential to reduce state revenue. Furthermore, if a taxpayer kept the money he otherwise would have donated to a charity, he would be taxed on those funds and thus would not actually keep them.

165 *Winn*, 131 S. Ct. at 1449. At times, the respondents' theory in this regard resembles the remarkably antiquated view that all persons are possessions of the government.

166 *See, e.g.*, Hein v. Freedom from Religion Found., 551 U.S. 587, 639 (2007) (Souter, J., dissenting) (plurality opinion) (arguing that because an objecting taxpayer is injured when *public* funds are spent in aid of religion, "every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution"). The minority view concedes that *Flast* is "in a class by itself" but is justified by the "Madisonian relationship of tax money and conscience." *Id.* at 642–43.

167 *Winn*, 131 S. Ct. at 1448. The Arizona Supreme Court reached the same conclusion. *See* Kotterman v. Killian, 972 P.2d 606, 621 (Ariz. 1999) (concluding that "this tax credit is not an appropriation of public money"). For this reason, the *Winn* plaintiffs could not utilize the "outsider alienation" claim of Article III standing to support their Establishment Clause claim, as it was private dollars, rather than state money, that provided the financial support to religious STOs. *But see* Marshall & Nichol, *supra* note 24, at 246 ("In *Winn* itself, the claim could be made that the Arizona taxpayers bringing suit were alienated by the state's use of money to support religious schools.").

168 The dissent tried to connect the state and the STOs on many levels in order to overcome the "extract and spend" requirement of *Flast*. *See Winn*, 131 S. Ct. at 1458 & n.9 (citing ARIZ. REV. STAT. ANN. §§ 43-1502(A)-(C), 43-1506 (2010)) ("[T]he statute establishing the initiative requires the Arizona Department of Revenue to certify STOs, maintain an STO registry, make the registry available to the public on request and post it on a website, collect annual reports filed by STOs, and send written notice to STOs that have failed to comply with statutory requirements."). *Cf.* Marshall & Nichol, *supra* note 24, at 222 & n.54. But in doing so, the dissent lost sight of the fact that the STOs were not

connected to the faith-based programs—STOs were not receiving tax credits, only the taxpayers who made donations to them were. "Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."[169]

3. Three Intervening Layers of Private Choice Do Not Amount to Direct Government Action

Third and relatedly, the Arizona tax credit program operates entirely on private choice—three layers of private choice, to be exact. "Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs."[170] A tax credit is provided only to the taxpayer who decides to donate his or her money to an STO, whether religious or secular.[171] Without the creation of a private STO and a private donation, the tax credit does not operate. Without parents choosing a private school, the donated money goes nowhere. And as explained above, in either case, the money never enters the state treasury.[172]

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receiving the challenged tax credit; only private citizens were. Indeed, were the opposite true, the plaintiffs in *Winn* would have sued the STOs in place of the State of Arizona. And even if such a claim had been brought, the dissent's argument would have failed *Hein* as an "unspecified, lump sum" congressional budget appropriation for Arizona's mere maintenance of the STO registry. *See Hein*, 551 U.S. at 607–08; *see also* Freedom from Religion Found. v. Nicholson, 536 F.3d 730, 740–42 (7th Cir. 2008) (explaining that, to meet the *Flast* exception after *Hein*, taxpayers must point to "expenditures made pursuant to an express congressional mandate and a specific congressional appropriation [from] the taxpayers expressly for [the alleged violation of the Establishment Clause]"). Extending the *Flast* exception to such miscellaneous expenditures would subject nearly every legislative action to Establishment Clause challenge by any taxpayer. *Hein* specifically warned against this. *See Hein*, 551 U.S. at 607–08. "Merely claiming that tax dollars are being spent pursuant to an objectionable enactment is insufficient to establish [the *Flast*] link." Morrison v. Callaway, 369 F. Supp. 1160, 1162 (D.D.C. 1974)).

169 *Winn*, 131 S. Ct. at 1448.

170 *Id.* Indeed, a fourth layer consists of parents applying for an STO scholarship for their child.

171 *Id.* at 1447 ("When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers."); *id.* at 1448 ("Here, . . . contributions result from the decisions of private taxpayers regarding their own funds."). Furthermore, as mentioned above, the donating taxpayer cannot earmark the donation for a particular student. *See* ARIZ. REV. STAT. ANN. § 43-1603(B)(4) (2013).

172 *Winn*, 131 S. Ct. at 1448. The Arizona Supreme Court concluded similarly in *Kotterman*, the precursor to *Winn*, explaining as follows:

> [N]o money ever enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any

"While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention."[173] This private action places the dissenting taxpayer out of an equation that is itself created and driven by the discretionary, intervening choices of other private individuals,[174] rather than the government extracting and spending "his tax money" to fund religious STOs or provide government scholarships to religious schools.[175]

4. Additionally, No Traditional Article III Standing

Winn involved a tax credit to a private individual rather than a direct tax appropriation from the state treasury. Further, it concerned that individuals' private choice to donate to an STO rather than a compelled exaction and specific legislative mandate to pay for religious activity. Accordingly, treating the respondents' alleged injury as sufficient in *Winn* would have extended the taxpayer standing exception well beyond the outer boundaries of *Flast*,[176] cutting the entire concept loose from its doctrinal moorings.

> common understanding of the words, we are not here dealing with "public money."

Kotterman v. Killian, 972 P.2d 606, 618 (Ariz. 1999).

173 *Winn*, 131 S. Ct. at 1448.

174 This notion was captured in *Winn* during an oral argument exchange between Justice Scalia and respondents' counsel:

> [Counsel]: Let me—let me put it to you this way[]: Suppose the government in this case gave the money to the STOs directly itself, and the STOs then gave out the scholarships. Would it be constitutional for an STO to say to a parent who comes asking for a scholarship, are you Catholic? If you're not, we won't give you a scholarship—
>
> Justice Scalia: Perhaps not, but you have—
>
> [Counsel]: What's the difference?
>
> Justice Scalia: You have an intervening . . . contributor. And it's that person who is making the decision of whether to give it to a religious or nonreligious organization; it isn't the government making that decision.

Transcript of Oral Argument at 39, Winn v. Ariz. Christian Sch. Tuition Org., 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-987.pdf.

175 Flast v. Cohen, 392 U.S. 83, 106 (1968). This rationale is not inconsistent with, say, *Valley Forge*, a decision that, while hinging on *action* by the government, dealt with circumstances that resulted in non-tax income coming into government's hands. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 467–68 (1982) (upholding transfer of surplus federal property to a nonprofit religious school under the Property Clause of Art. IV, § 3, cl. 2).

176 Hein v. Freedom from Religion Found., 551 U.S. 587, 610 (2007) (quoting United States v. Richardson, 418 U.S. 166, 196 (1974) (Powell, J., concurring)). Indeed, the Court

However, even assuming *arguendo* an injury-in-fact to the dissenting taxpayers, the aforementioned layers of private choice and lack of governmental action meant that the *Winn* taxpayers could not establish causation or redressability under a traditional Article III analysis. In fact, the Justices appeared to unanimously agree that the respondents lacked standing under Article III.[177] The Court explained that while taxing and spending measures can be traced to a congressional choice, the Arizona tax credit program, which *forgoes* taxing and operates on private choice, "prevent[s] any injury the objectors may suffer from being fairly traceable to the government."[178] Moreover, although the remedy sought by the dissenting taxpayers—an injunction against the tax credit program—may have reduced private contributions to STOs, it would not have affected the noncontributing dissenter's tax payments. Thus "any injury suffered by respondents would not be remedied" by the injunction sought.[179] Not only did the government not extract or spend the respondents' tax money on religion,[180] their tax payments would not have changed based on a successful lawsuit.

Furthermore, the respondents' diminished revenue injuries failed the causation requirement of Article III for at least three reasons.[181] First, the respondents were unable to establish that state revenues had actually decreased due to the tax credit program.[182] Indeed, as the Court explained, "[b]y helping students obtain scholarships to private schools, both religious and secular," Arizona's STO program could just as likely "relieve the burden placed on Arizona's public schools,"

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explained that "[i]t would be a departure from *Flast*'s stated rationale." *Winn*, 131 S. Ct. at 1447.

177 *Winn*, 131 S. Ct. at 1448–49 (plurality opinion); *id.* at 1449–50 (Scalia, J., concurring); *id.* at 1451 (Kagan, J., dissenting). *But see id.* at 1451 (conceding that the case "cannot be resolved" by the traditional standing analysis). A recently published article criticizing Justice Kennedy's majority opinion in *Winn* is premised, mistakenly, on the ground that traditional Article III standing was up for grabs in the case. *See* Marshall & Nichol, *supra* note 24, at 227–29.

178 *Winn*, 131 S. Ct. at 1448.

179 *Id.*

180 *Id.*

181 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (holding that under the second prong of the tripartite Article III standing test, "there must be a causal connection between the injury and the conduct complained of").

182 *Winn*, 131 S. Ct. at 1444; *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006) (rejecting a similar argument involving Ohio state tax credit to induce DaimlerChrysler expansion within the state, finding it "unclear that tax breaks of the sort at issue here do in fact deplete the treasury: [t]he very point of the tax benefits is to *spur* economic activity, which in turn *increases* government revenues" (emphasis added)).

resulting in "an immediate and permanent cost *savings* for the State."[183] Second, causation problems also plagued the respondents' other alleged revenue injury—an increased individual tax burden.[184] As the Court explained, because tax credits like Arizona's § 43-1089(A) can actually secure "cost savings for the state,"[185] it is more likely that an objecting taxpayer's economic position will be better, not worse.[186] Even overlooking the speculative nature of this alleged injury, proving causation and redressability would force courts to assume that lawmakers would respond to diminished state revenues (or an injunction against the STO tax credits) by *increasing* the tax burdens of its people,[187] and "that any tax increase would be traceable to the STO tax credits, as distinct from other governmental expenditures or other tax benefits."[188] Each of these conclusions would require courts to play politics and assume specific exercises of fiscal discretion by a state legislature to establish standing—something the Court unanimously rejected in *Cuno*.[189]

Third and finally, causation was wanting because, by the respondents' own admission, the conduct complained of was taken not by the government, but rather by other (donating) taxpayers. Article III's causation requirement asks whether the injury is "fairly . . . trace[able] to the challenged action of the defendant, *and not [the] resul[t of] the independent action of some third party not before the*

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183 *Winn*, 131 S. Ct. at 1444 ("[T]he average value of an STO scholarship may be far less than the average cost of educating an Arizona public school student. Because it encourages scholarships for attendance at private schools, the STO tax credit may not cause the State to incur any financial loss."); *see also* Mueller v. Allen, 463 U.S. 388, 395 (1983) ("By educating a substantial number of students [private] schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers.").

184 *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 487 (1923) (noting that the "effect upon future taxation, of any payment out of funds" is too "remote, fluctuating and uncertain" to give rise to a case or controversy under Article III).

185 *Winn*, 131 S. Ct. at 1444.

186 *Id.* at 1443–44; *see, e.g.*, *Cuno*, 547 U.S. at 344 ("The very point of the tax benefits is to *spur* economic activity, which in turn *increases* government revenues." (emphasis added)); Kotterman v. Killian, 972 P.2d 606, 621 (Ariz. 1999).

187 *Winn*, 131 S. Ct. at 1444 (such a scenario requires a court to "speculate 'that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit.'" (quoting *Cuno*, 547 U.S. at 344)).

188 *Id.*

189 *See Cuno*, 547 U.S. at 344 ("Federal courts may not assume a particular exercise of . . . state fiscal discretion in establishing standing: a party seeking federal jurisdiction cannot rely on such '[s]peculative inferences . . . to connect [his] injury to the challenged actions of [the defendant].'"); ASARCO v. Kadish, 490 U.S. 605, 614 (1989).

court."[190] The gravamen of the respondents' lawsuit concerned their ability "to challenge the constitutionality of a state's treatment of *other* taxpayers."[191] The private decisions by these other taxpayers to donate their money to private STOs, and later take a tax credit, breaks any possible chain of causation between the alleged injury and government action. Moreover, as parties who were not "the object of the Government action [they challenge]," it is highly unlikely that the respondents could have met the "substantially more difficult" causation standard reiterated in *Lujan*.[192]

B. Justice Kagan's Dissent

Justice Kagan authored an impassioned dissent in *Winn* that predicted the complete demise of the taxpayer standing exception in Establishment Clause cases.[193] She did not conclude that *Flast* or its progeny should be overturned in favor of a more relaxed standard.[194]

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190 Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976) (emphasis added); *see also Kadish*, 490 U.S. at 614–15.

191 *See Winn* Respondents, *supra* note 150, at 33.

192 "When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of someone else, much more is needed." Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (emphasis omitted). When the existence of an "element[] of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,'" the plaintiff must present facts showing that the independent actors will proceed in such a manner. *Id.* (quoting *Kadish*, 490 U.S. at 615); *see* Warth v. Seldin, 422 U.S. 490, 504–08 (explaining that "the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III"); Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973) (holding that "[t]he party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury" (internal quotation marks omitted) (quoting Frothingham v. Mellon, 262 U.S. 447, 488 (1923))). Were it otherwise, the *Winn* respondents would have found a way to manipulate the taxpayer standing doctrine and ultimately set legal precedent in the Establishment Clause arena despite no particularized connection to the case. The tail would wag the dog.

193 *Winn*, 131 S. Ct. at 1450–63 (Kagan, J., dissenting) ("Today's decision devastates taxpayer standing in Establishment Clause cases."). Justice Kagan's *Winn* dissent was the first of her Supreme Court tenure. It was joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Kagan's dissent underscored that the Court had, on several occasions, reached a decision on the merits of Establishment Clause tax credit cases without questioning the plaintiffs' standing. *Id.* at 1452–53 (collecting cases). As explained by Justice Kennedy's majority opinion, however, because those decisions did not so much as mention standing, they do not stand for the proposition that no jurisdictional defect existed. *Id.* at 1448–49. This Article does not address that issue.

194 The *Winn* dissent's workaround may have been to treat *Flast* as a "guarantee of access to the Judiciary." *Id.* at 1450. Unfortunately, the Supreme Court has never espoused such a view.

Rather, according to the dissent, a "simple restatement of the *Flast* standard," was enough to establish that the respondents had standing: "[Respondents] attack a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution's taxing and spending clause (*Flast* nexus, part 1). And they allege that this provision violates the Establishment Clause (*Flast* nexus, part 2)."[195] The fact that Arizona used a tax credit rather than a direct government subsidy was of no moment, Justice Kagan explained, as the same injury resulted.[196] Nor was it problematic to the dissent that the respondents never alleged that *their* "tax money [wa]s being extracted and spent" in violation of the Establishment Clause,[197] because under *Flast* "restated," no such injury was necessary. In Justice Kagan's view, because "[t]axpayers who oppose state aid of religion have equal reason to protest," whether the aid comes from a tax credit or a government subsidy, their opposition was sufficient to confer standing under *Flast*.[198]

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195 *Id.* at 1451 (Kagan, J., dissenting). *But see id*. at 1452 ("Finding standing here is merely a matter of applying *Flast*."); *see supra* Part I.B.3.

196 *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

197 *See* Flast v. Cohen, 392 U.S. 83, 106 (1968). Indeed, the dissent treated this as a new requirement. *Winn*, 131 S. Ct. at 1448–49 (Kagan, J., dissenting). *But see* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343–44 (2006) (explaining that "injury alleged in Establishment Clause challenges to federal spending is the very extract[ion] and spen[ding] of tax money in aid of religion" (quoting *Flast*, 392 U.S. at 106)). Even the *dissenting* Justices in recent taxpayer standing cases have recognized as much. *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 638 (2007) (Souter, J., dissenting, joined by Stevens, J., Ginsberg, J., and Breyer, J.). According to Justice Kagan, the only injury taxpayers need to establish under *Flast* is whether any legislature uses its taxing and spending power to "channel tax dollars to religious activities." *Winn*, 131 S. Ct. at 1459.

198 *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting) ("Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy."). At the outset of her dissent, Justice Kagan saw fit to distinguish "principle" from precedent. *See id.* The former was clearly her belief that tax expenditure analysis should be embraced in the legal landscape of taxpayer standing. *Id.* at 1452 & n.1. That budgetary concept "posits that, regardless of where the [economic] program or policy appears, all subsidy, incentive, and relief programs should be evaluated by the same standards." Adler, *supra* note 154, at 860–61. It therefore treats direct expenditures and tax breaks identically as a matter of economic policy. Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 380–81 (1998). Unfortunately, the Supreme Court has not cooperated. *See supra* note 154.

This is an article about standing, and as such, it does not address the economic policy nuances of tax expenditure analysis or the wisdom of constitutionalizing that budgetary theory. For excellent pieces that do, see generally Edward A. Zelinsky, Winn *and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25 (2011); Edward D. Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1 (2010); Linda

C. Four Critiques of the Winn *Dissent*

A preeminent tax scholar recently explained how Justice Kagan's dissent in *Winn* overlooked the avenue of municipal taxpayer standing in federal court as well as the ability of state taxpayers to challenge tax policies under more liberal standing rules in state courts.[199] I argue that Justice Kagan also exaggerated the reach of *Winn* on a doctrinal level by ignoring the nub of the injury in *Flast*, conflating the legal incidence of tax credits and government expenditures in this area, overstating the predicted underenforcement of the Establishment Clause, and incorrectly assuming that the *Flast* exception applies to state taxpayers in federal court.

1. The Dissent Ignores the Heart of the Injury in Flast*: Taxpayer Harm*

Though passionate and well written, Justice Kagan's arguments lack substantive punch. First, while the *Winn* dissent recycles the vague two-prong phraseology of the *Flast* test, it ignores the heart of the injury in *Flast*, the most recent Supreme Court taxpayer standing decisions interpreting it, and the undisputed fact that the taxpayer standing exception has been limited to the results in *Flast*.[200]

As explained above, "a taxpayer alleges injury only by virtue of his liability for taxes."[201] In the Establishment Clause context, this moves

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Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407 (1999).

199 Edward A. Zelinsky, *Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing after* Cuno *and* Winn, 40 HASTINGS CONST. L.Q. 1, 47–52 (2012) [hereinafter Zelinsky, *Driver's Seat*]. The Supreme Court has left untouched the municipal taxpayer standing rule first identified in *Frothingham*, which had been treated as similar to that of a stockholder of a private corporation, and thus involved less attenuated interests than that of federal or state taxpayers due to "the peculiar relation of the corporate taxpayer to the corporation." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 349 (2006) (internal quotation marks omitted) (quoting Frothingham v. Mellon, 262 U.S. 447, 487 (1923)). Municipal taxpayer standing is beyond the scope of this Article. For excellent pieces attacking the underpinnings of that doctrine as applied to the twenty-first century, see Zelinsky, *Driver's Seat*, *supra*, at 53–57; Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 841–43 (2003) [hereinafter Staudt, *Taxpayers in Court*].

200 *See supra* Part I.B.3.

201 Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 478 (1982) (citing *Flast*, 392 U.S. at 102); *see also* Hein v. Freedom from Religion Found., 551 U.S. 587, 599 (2007) (explaining that taxpayer standing claims are premised on the theory that "having paid lawfully collected taxes into the Federal Treasury[,] . . . [taxpayers] have a continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution").

plaintiffs from those alleging "that the Constitution has been violated [and] nothing else"[202] to persons injured as taxpayers. *Flast* presumes the quintessential and threshold taxpayer injury of compelled exaction by the government.[203] It stands for the limited[204] proposition that a federal taxpayer plaintiff whose "tax money is . . . extracted and spent" by Congress on religion has standing to protest that his money is being used in alleged violation of the Establishment Clause.[205]

To this end, the proper distinction is not about a literally traceable economic injury, as Justice Kagan would have it.[206] Instead, the threshold requirement is that the plaintiff *himself* is coerced, by virtue of a tax on his income, to pay for government-compelled support of religion in violation of his rights of conscience.[207] The *Winn* dissent prefers to skip this taxpayer harm aspect of the *Flast* exception, in part by claiming—incorrectly—that *Flast*'s "extract and spend" premise has played no formal role in the Court's taxpayer standing cases.[208] According to the dissenters, the constitutionality of Arizona's tax credit program can be challenged by any taxpayer because it resembles a government spending program, is located in

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

203 *See Flast*, 392 U.S. at 106; *Cuno*, 547 U.S. at 343–44; *supra* Part I.B.3; *see also* Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429, 433–34 (1952) (denying taxpayer standing because the plaintiffs made "no allegation that [the alleged unconstitutional activity of mandated Bible reading] is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school" and distinguishing the outcome in *Everson v. Bd. of Educ. of Ewing Twp*., 330 U.S. 1 (1947), where the plaintiffs "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of").

204 *See Hein*, 551 U.S. at 610 (specifically adopting Justice Powell's concurring opinion in *United States v. Richardson*, 418 U.S. 166, 196 (1974), which "limit[ed] the expansion of federal taxpayer and citizen standing . . . to an outer boundary drawn by the *results* in *Flast*" (quoting *Richardson*, 418 U.S. at 196) (internal quotation marks omitted) (emphasis added by *Hein* Court)); *see also* Pelphrey v. Cobb Cnty, 547 F.3d 1263, 1280 (11th Cir. 2008) (stating that "[t]he *Flast* exception remains narrow"); *In re* Navy Chaplaincy, 534 F.3d 756, 761 (D.C. Cir. 2008) ("The [Supreme] Court has subsequently made clear that *Flast* is a very narrow exception to the general bar against taxpayer standing."); Laskowski v. Spellings, 546 F.3d 822, 826 (7th Cir. 2008) ("The Supreme Court has now made it abundantly clear that *Flast* is not to be expanded *at all*.").

205 *Flast*, 392 U.S. at 106; *see supra* Part I.B.3.

206 *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1460-61 (2011) (Kagan, J., dissenting), ("No taxpayer can point to an expenditure (by cash grant or otherwise) and say that her own tax dollars are in the mix; in fact, they almost surely are not.").

207 *See supra* Part I.B.3.

208 Of course, a unanimous Court recognized this precept in *Cuno*. *See* 547 U.S. at 343–44. Furthermore, as stated *supra* note 107, even the *dissenting* Justices in recent taxpayer standing cases have recognized this limitation.

the Arizona tax code, was enacted pursuant to Arizona's equivalent of the Taxing and Spending Clause, and allegedly violates the Establishment Clause.[209]

However, if the taxpayer injury is qualitatively distinguishable from the general grievance that the government has acted unconstitutionally—a point the *Winn* dissent concedes[210]—that difference must exist, and it must be qualitatively explained. *Flast*'s exception is based entirely on such a difference. The difference, of course, is the government's compelled exaction and spending of a taxpayer's funds to support religion.[211] It is through these taxed funds that the taxpayer first becomes the object of a potentially unconstitutional exercise of power at the hands of the government.[212] This is because the levying of taxes and spending of tax revenue is precisely how government *coerces*—rather than suggests, encourages, or even incentivizes—taxpayers to fund the cost of supporting religion.[213] Where no specific tax is involved, a taxpayer's *Flast* right to protest a compelled exaction evaporates.

Were it otherwise, taxpayer status would not matter; bare government support of religion would provide standing for any intellectually dissatisfied plaintiff,[214] including third-parties challenging the treatment of other taxpayers.[215] The taxpayer injury would be qualitatively indistinguishable from the generalized grievance.[216] Any plaintiff could challenge any legislative decision to collect anything less than every penny of available income from others. Furthermore, Justice Kagan's argument that persons who choose not to donate to STOs are economically worse off than their donating counterparts[217] fails to acknowledge, much less implicate,

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209 *See Winn*, 131 S. Ct. at 1451–52 (Kagan, J., dissenting).

210 *Id.* at 1451 (Kagan, J., dissenting).

211 *Cf. Flast*, 392 U.S. at 106; *Cuno*, 547 U.S. at 343–44.

212 *See supra* Part I.B.3.

213 *See supra* Part I.B.3.

214 In other words, if actual taxpayer harm was not a requirement under *Flast*, why require the taxpayer status? Why not simply allow all citizens to raise claims for any and all potential government support for religion?

215 *See Winn* Respondents, *supra* note 150, at 33 (conceding that their lawsuit "concern[ed] the ability of 'third party' state taxpayers to challenge the constitutionality of a state's treatment of other taxpayers").

216 *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982) (stating that a "generalized grievance about the conduct of government" is nonjusticiable). Here, the grievance would be a religious difference.

217 *Winn*, 131 S. Ct. at 1457–58 (Kagan, J., dissenting).

the rights of conscience protected by the Establishment Clause. Those non-donating Arizonans are no worse off in that they are not subject to the compelled exaction in support of religion. Conversely, to the extent these taxpayers raise an economic injury unaccompanied by a violation of their rights of conscience, they do not meet the *Flast* exception in the first place.

A forced, taxpayer contribution by the government to an outside religious entity was the gravamen of the claim in *Flast*, and it simply did not exist in *Winn*, no matter how hard the respondents tried to manufacture it.[218] Their challenge was not based on the argument that a certain unconstitutional tax was levied against them or that their tax money was being spent in a manner to which they objected. It was not based on their taxes whatsoever.[219]

2. The Dissent Conflates the Economic and Legal Incidences of Tax Credits and Direct Expenditures

Second, the *Winn* dissent insists that tax credits are *economically* "indistinguishable" from direct government expenditures and thus should be treated identically for purposes of standing.[220] This economic fungibility argument,[221] however, equates the potential budgetary burden of a tax credit with its legal incidence. Justice Kagan undoubtedly is correct that governments, as an economic matter, care equally about the financial impact of tax credits and

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218 Justice Kagan appears to have admitted this much in her dissent. *See id.* at 1462 (noting that the Arizona tax credit law did not "force[] any given taxpayer to pay for the subsidy out of her pocket").

219 At most, it was based on the taxes paid and credits received by third party taxpayers. The connection between the respondents' tax bill and the tax credit that someone else obtained, however, is much more attenuated. The latter can choose to contribute to a purely secular organization, or might choose to contribute nothing. At most, the state of Arizona was forcing the respondent taxpayers to subsidize other taxpayers' charitable impulses concerning education, which may or may not support a religion. That may be unfair, but it does not meet the *Flast* exception, much less an Establishment Clause injury that the exception protects.

220 *Winn*, 131 S. Ct. at 1456 (Kagan, J., dissenting); *cf.* Adler, *supra* note 154, at 859–60 ("Although the primary objective of the [Internal Revenue Code] is to raise revenue, it is also used as a fiscal, economic, and social policy tool.").

221 Justice Kagan's argument channels the *Valley Forge* dissents on this topic. *See Valley Forge*, 454 U.S. at 511–12 (Brennan, J., dissenting) ("It can make no constitutional difference in the case before us whether the donation to the petitioner here was in the form of a cash grant to build a facility or in the nature of a gift of property including a facility already built." (citing Tilton v. Richardson, 403 U.S. 672 (1971))); *id.* at 515 (Stevens, J., dissenting) (disputing any fundamental jurisprudential difference "between a disposition of funds pursuant to the Spending Clause and a disposition of realty pursuant to the Property Clause").

expenditures.[222] But the budgetary practices and concerns of politicians do not determine, as a legal question, the standing of a taxpayer to challenge a tax credit on Establishment Clause grounds.

Furthermore, the legal question is more complicated than whether "indistinguishable" financial mechanisms are being used to facilitate religious subsidy.[223] Money may be fungible while providers are not.[224] For example, Justice Kagan's vogue "bailout" hypothetical asks whether providing government money to banks through a tax credit, rather than direct appropriations, would "calm the furor" of those opposed to the bailout.[225] Even in that case, however, the federal government still decides on whom to spend the money (big banks), and the banks would therefore be assured the funds in either scenario. By contrast, decisions on whether, when, and how to fund STOs in Arizona—including whether to fund religious or non-

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222 *Winn*, 131 S. Ct. at 1456–57 (Kagan, J., dissenting); *see also* Adler, *supra* note 154, at 861–63 (noting that Congress explicitly adopted tax expenditure analysis for all its budgetary matters as part of the Congressional Budget Act of 1974).

223 *See id.* at 1456–57 (Kagan, J., dissenting); *see also* Marshall & Nichol, *supra* note 24, at 237 (arguing that the taxpayer's "wound is the same regardless of whether taxes are directly levied to support a religious institution or credits are used to accomplish an identical result. Either way, tax obligations are being deployed to facilitate religious subsidy. In both cases, a contesting plaintiff presents only a nonparticularized psychic grievance."). I respectfully disagree with Justice Kagan, as well as Professors Marshall and Nichol in this regard. In the case of a direct tax levied from the plaintiff, his psychic injury as a taxpayer cannot exist without the compelled exaction of his funds by the government to pay for religion. The extracting and spending of taxes is precisely how government coerces—rather than suggests, encourages, or incentivizes—taxpayers to fund the cost of supporting religion. In the case of the tax credit to third parties, the injury is comprised of psychic injury alone. A private decision is made to provide money to religion, of which the plaintiff can choose not to contribute. There is no compelled exaction and no unity of taxing and spending by the government. *See supra* Part I.B.3.

224 For a comical attack on the economic fungibility rationale in the taxpayer standing context, *see* Boris I. Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After* Flast v. Cohen, 36 U. CHI. L. REV. 364, 368–71 (1969) (lamenting, among several other offshoots, the "dormant taxpayer" doctrine, perpetuated by the notion that because "money is fungible, . . . offensive expenditures might have been financed with the 'tax money' contributed by the plaintiff in past years," despite the fact that his income was below the exemption level during the year his suit was commenced); *see also id.* at 369–70 (noting that the "incipient taxpayer" doctrine—i.e., taxpayer standing for non-taxpayers who "could reasonably be expected to become taxpayers at a later time"—naturally "swallowed up the dormant taxpayer doctrine," because "if a suit can be maintained by one who has not yet helped to finance his government's operations, it can a fortiori be maintained by an incipient taxpayer").

225 *See Winn*, 131 S. Ct. at 1455–56 (Kagan, J., dissenting). Though Justice Kagan's rhetoric informs her position on the analytical soundness of *Flast*'s "extract and spend" requirement, her hypothetical concerning the bailout does not pretend to replicate any possible taxpayer standing circumstance.

religious STOs—were made by private individuals.[226] In that way, Justice Kagan's example actually underscores a major doctrinal *difference* between a legislature's decision to extract and appropriate public monies to STOs and Arizona's decision to leave that decision to Arizonans. As explained above, while tax credits are based on voluntary private conduct, and are intended to encourage or incentivize a given behavior,[227] appropriation spending happens despite any behavior one might take.[228] Even if a tax credit program is viewed as incentivizing private individuals to donate to STOs, the ultimate decision is out of Caesar's hands.

Moreover, a great many things that are "economically indistinguishable" are not actually or legally identical. The argument that, after *X* or *Y* occurs, the government may be left in an economically indistinguishable position (transaction costs aside), is not a valid basis for invoking the *Flast* exception. Indeed, the government was left in a similar position in *Hein*—its money was indisputably spent in support of religion—and the Supreme Court did not settle for equivalencies.[229] If economic indistinguishability was insufficient in a *government spending* case (*Hein*),[230] so too would it be when the challenged spending is the product of private choice

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226 *See id.* at 1438–39 ("When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. . . . Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs."). Put differently, while constructing a church and providing for all of its supplies is equally offensive to the Establishment Clause as the government giving the church the money to build and purchase the supplies itself, the same cannot be said for the private individual who decides, in the first instance, to provide his money to the church for that purpose. Of course, the counterargument here is that in *Winn*, the challenged decision wasn't entirely made by private choice. The creation of the tax credit was the doings of the *government*, which thus enabled private citizens to make the choice to donate.

227 Tax credits are much like deductions in this regard. *Cf.* 26 U.S.C. §§ 170(c), 174, 401, 501 (2010) (providing tax deductions that incentivize charitable giving, research and development, and even saving money for its own sake).

228 *Cf.* Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 690 (Brennan, J., concurring); *see also supra* note 152; *infra* notes 231–32.

229 *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 608–09 (2007); *see also supra* Part II.

230 *Hein*, 551 U.S. at 608–09 (rejecting taxpayer standing to challenge executive branch discretionary spending as violating the Establishment Clause and holding that the *Flast* exception applies only when Congress specifically mandates and unambiguously appropriates public money extracted from taxpayers to a religious entity or for religious uses).

(*Winn*).[231] Although the Court has countenanced the comparison between indirect tax expenditures and direct outlays in certain contexts,[232] it has specifically rejected it in Establishment Clause cases, finding "no genuine nexus between tax exemption and establishment of religion" because the government's decision to *forego* potential tax revenue does not provoke the historical concerns that animated the Clause.[233] If, as some believe, standing is a mere

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231 *See Winn*, 131 S. Ct. at 1446–48. Here, again, the dissent's argument proves too much. It would apply to tax deductions for contributions to religious institutions just as much as to tax credits, despite the former being specifically permitted by law. *See, e.g.*, 26 U.S.C. § 170(c) (allowing a taxpayer to deduct from taxable income, any "contribution or gift to or for the use of . . . [a] corporation, trust, or community chest, fund, or foundation . . . organized and operated exclusively for religious . . . purposes"); *see also*, *e.g.*, *Walz*, 397 U.S. at 679 (holding that tax exemptions for churches did not violate the Religion Clauses); Mueller v. Allen, 463 U.S. 388, 403 (1983) (same as to tax deductions to all taxpayers for school expenses); United States Catholic Conference v. Baker, 885 F.2d 1020, 1032 (2d Cir. 1989) (rejecting pro-choice plaintiffs' challenge to the tax-exempt status of the Catholic Church for lack of clergy, voting, competitive advantage, or taxpayer standing). *But see* Larson v. Valente, 456 U.S. 228, 247 n.23 (1982) (holding that a statute that makes "explicit and deliberate distinctions between different religious organizations," thus communicating government endorsement or disapproval of such religions, is justiciable and subject to strict scrutiny); Bob Jones Univ. v. United States, 461 U.S. 574, 598–99 (1983) (holding that racially discriminatory schools are not "charitable" as defined by the Code and, therefore, the IRS can deny them tax-exempt status).

232 *See, e.g.*, Regan v. Taxation with Rep. of Wash., 461 U.S. 540, 544–45 (1983) (with respect to free speech challenge to IRS's limitation on lobbying by 501(c)(3) organizations); *Bob Jones Univ*., 461 U.S. at 591 (with respect to equal protection clause challenges to revocation of tax-exempt status of racially discriminatory institution). *But see* Adler, *supra* note 154, at 868 (conceding that "no court has explicitly adopted the term 'tax expenditure analysis'"). Justice Kagan's dissent in *Winn* used the same fact to argue for the opposite proposition. *See Winn*, 131 S. Ct. at 1452 ("In the decades since *Flast*, no court—not one—has differentiated between appropriations and tax expenditures in deciding whether litigants have standing.").

233 *See Walz*, 397 U.S. at 675. Justice Brennan elaborated in his concurring opinion:

> [T]hose who urge the [religious tax] exemptions' unconstitutionality argue that exemptions are the equivalent of governmental subsidy of churches. General subsidies of religious activities would, of course, constitute impermissible state involvement with religion.
>
> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.

Id. at 690 (footnotes omitted); *see* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 882 n.7 (1995) (Souter, J., dissenting) (explaining that "the Court in *Walz* explicitly distinguished tax exemptions from direct money subsidies and rested its decision on that distinction").

proxy for judgment on the merits,[234] rejecting taxpayer standing in such cases would make even further sense, notwithstanding economic indistinguishability.[235]

In this respect, the psychological aspect of *Flast*'s normative test provides another reason why a purely economic (tax expenditure) analysis of the Arizona tax credit is improper as a legal doctrine. The argument raised by the *Winn* dissenters, that persons who choose not to donate to STOs are economically worse off than donators, fails to account for the fact that,[236] as a matter of constitutional law, they are better off psychologically to the extent that they are not subject to the compelled exaction in support of religion that is the heart of *Flast*.[237]

3. The Dissent's Fear of an Underenforced Establishment Clause Is Greatly Exaggerated and Not an Independent Basis for Granting Standing

Third, Justice Kagan's fear that, in many cases, "no one other than taxpayers"[238] will have standing in an Establishment Clause tax credit case is not a reason to grant them standing. The Supreme Court has consistently rejected the theory that if no person would otherwise

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234 *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) (contending that standing decisions, as a mere proxy for the merits, can be predicted by the ideologies of judges and the type of plaintiff); Daniel A. Farber, *Standing on Hot Air:* American Electric Power *and the Bankruptcy of Standing Doctine*, 121 YALE L.J. ONLINE 121, 122 (2011) ("The unpredictability and ideological nature of standing law seems inherent in the three-part test, whose terms seem to serve as a kind of Rorschach inkblot allowing each Justice to project her own worldview onto each case."). *But see* Daniel E. Ho & Erica L. Ross, *Did Liberal Judges Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 647–54 (2010) (discussing political valence of standing decisions and concluding "our evidence shows that standing preferences are distinguishable from merits preferences"); Staudt, *Taxpayers in Court*, *supra* note 199, at 650–66 (finding, in an empirical study of taxpayer standing to challenge government spending projects, that only forty-two percent of taxpayers who obtained standing also prevailed on the merits, "a finding that suggests courts do not use standing as a means of deciding the merits but instead make two independent decisions").

235 *See supra* note 144 and accompanying text.

236 *See Winn*, 131 S. Ct. at 1457–58 (Kagan, J., dissenting); Marshall & Nichol, *supra* note 24, at 237.

237 *See supra* Part I.B.3.

238 *Winn*, 131 S. Ct. at 1451 (Kagan, J., dissenting); *see also* Epstein, *supra* note 51, at 3 (noting the fear that "[i]f no one has standing to call [the government] to account, it can disregard the law with impunity—a result that would make an ass of the law" (quoting WILLIAM WADE & CHRISTOPHER FORSYRH, ADMINISTRATIVE LAW (7th ed. 1994))).

have standing, there is sufficient reason to grant standing.[239] Were the opposite true, the doctrine would be observed only when satisfied.

The dissent's fear of an underenforced Establishment Clause is not only incorrect, it perpetuates a myth that taxpayer standing is the primary method for plaintiffs to raise challenges under the Clause.[240] This ignores, for example, claims involving underinclusive religious tax exemptions,[241] government action that coerces or proscribes various religious activity,[242] public religious displays,[243] and other

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239 Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 479 (1982) (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974)). Indeed, the lack of standing for certain taxpayers often *supports* the conclusion that the subject matter is more properly committed to the mechanisms of fast (or political) constitutionalism: the discretion of the executive branch, the scrutiny of the legislature and, ultimately, the political process. *Cf.* United States v. Richardson, 418 U.S. 166, 179 (1974). Plaintiffs do not get a pass on standing because their claim arises under a counter-majoritarian right. *See Valley Forge*, 454 U.S. at 484 (rejecting a "hierarchy of constitutional values" or "sliding scale" standing doctrine "under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases" and concluding that the "norm of conduct" set by the Establishment Clause is no more (or less) fundamental "than any other inscribed in the Constitution"). Indeed, *Valley Forge* specifically rejected the idea that "enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege 'distinct and palpable injury to himself.'" *Id.* at 488.

240 Rahdert, *Court Reform*, *supra* note 25, at 844 ("To be sure, there have been many Establishment Clause challenges over the years since *Flast* that did not depend either directly or indirectly on taxpayer standing."). In fairness, Professor Rahdert rightfully explains that without the *Flast* exception, challenges to tax credits such as that in *Winn* would be impossible in federal court. *See id.* at 850. That, however, is much narrower a point than Justice Kagan was trying to make. *See Winn*, 131 S. Ct. at 1461 (opining that the Court's decision "insulate[s government] financing of religious activity from legal challenge").

241 *E.g.*, Tex. Monthly v. Bullock, 489 U.S. 1, 14–17 (1989) (plurality opinion) (holding that tax exemption for religious property violates the Establishment Clause if drawn too narrowly; exemption limited to religious periodicals "effectively endorses religious belief"). Justice Kennedy's opinion in *Winn* recognized this much. *See Winn*, 131 S. Ct. at 1440 (noting that Article III standing can arise through the "costs and benefits . . . result[ing] from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation"). Although outside the scope of this Article, an interesting question is whether this might leave the traditional Article III door open for parents denied tuition support under the Arizona program.

242 *E.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 295 (2000) (government sanctioned prayer before public high school football games); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (government mandated religious loyalty oaths); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (government sanctioned religious release time).

243 *E.g.*, Pleasant Grove v. Summum, 555 U.S. 460, 460 (2009) (public park display of Ten Commandments); McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (courthouse display of Ten Commandments); Van Orden v. Perry, 545 U.S. 677, 692 (2005) (same); Lynch v. Donnelly, 465 U.S. 668, 671 (1984) (public holiday displays).

actual or symbolic relationships between government and religion.[244] Indeed, the possibility of a taxpayer-only legal landscape in the Establishment Clause area is so rare that Justice Kagan failed to provide a single example of such a case. (Surely the merits of a school choice program like that in *Winn* was not such a case, in light of *Zelman v. Simmons-Harris*.)[245]

This rarity is evident when analyzing the hypotheticals posed by the *Winn* dissent to confirm their fears that, in the direct-spending-versus-tax-credit situation, no one will have standing because "no one other than taxpayers has suffered the injury necessary to challenge government sponsorship of religion."[246] Justice Kagan paints a scenario wherein a state legislature gives $500 annually to Jewish citizens as a reward "for their religious devotion," either through an annual stipend or by "allow[ing] Jews to claim the aid on their tax returns," and concludes that because taxpayers' economic concerns would be identical under the Establishment Clause, "[t]heir access to the federal courts should not depend on which type of financial subsidy the State has offered."[247]

But if the stake is access to court, Justice Kagan paints outside the lines. While the standing of her hypothetical plaintiffs might be somewhat related to taxing and spending,[248] the injury-in-fact is that a non-Jewish plaintiff is being taxed while the Jewish person is not. As such, the legal claim is premised on the argument that no rational basis exists for differentiating between the taxpaying plaintiff and the

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244 *E.g.*, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994) (holding that statute creating special school district coinciding with boundaries of single religious group constitutes unconstitutional aid under Establishment Clause); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 491 (1979) (involving nonentanglement claim involving Catholic Church's challenge to National Labor Relations Act jurisdictional provision implicating Catholic high school teachers); *Zorach*, 343 U.S. at 308 (Establishment Clause challenge to religious "released time" program at public school, as creating a symbiotic relationship between church and state). *Cf.* Flast v. Cohen, 392 U.S. 83, 133 (1968), (Harlan, J., dissenting) ("The recent history of this Court is replete with illustrations, . . . that questions involving the religious clauses will not, if federal taxpayers are prevented from contesting federal expenditures, be left 'unacknowledged, unresolved, and undecided.'").

245 536 U.S. 639, 653–55 (2002) (upholding Ohio's need-based school voucher program against Establishment Clause attack, where "state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals").

246 *Winn*, 131 S. Ct. at 1451, 1457–58 (Kagan, J., dissenting).

247 *Id.* at 1457.

248 Because Justice Kagan does not specify whether a compelled-exaction is involved, it is difficult to decipher whether the hypothetical lends itself to a *Flast* analysis in the first instance.

Jew, making the spending unconstitutional (here, as a denominational preference) under the Equal Protection Clause.[249] A similar conclusion applies to Justice Kagan's tax credit for purchasing crucifixes from the government, or her "Jewish reward" if obtained as an exemption.[250] The prospective plaintiff in these cases would simply need to donate money to any charity (religious or otherwise) and claim the credit on her tax form equal to that as if she were Jewish or it were akin to a crucifix purchase. Under Justice Kagan's hypothetical, the Internal Revenue Service would thereafter disallow the plaintiff's deduction because the payment is not actually for crucifixes or to a Jewish institution. The plaintiff could then bring an Establishment Clause suit under *Texas Monthly v. Bullock*,[251] or raise an equal protection claim because the government lacks a rational basis (or an intermediate or strict scrutiny basis) to treat the plaintiff's desired charity different from the crucifix payment or Jewish institution.[252] Because a traditional Article III injury exists in each of these cases, the plaintiff(s) would not need to rely on the narrow *Flast* exception to raise their claims. Creating an entirely separate basis for taxpayer standing would be unnecessary and add little to the constitutional calculus. Thus it is simply inaccurate to conclude, as the dissent did, that *Winn* "insulate[s government's] financing of religious activity from legal challenge."[253]

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249 *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (holding that Equal Protection Clause prohibits discrimination on the basis of religion); Lupu & Tuttle, *supra* note 129, at 135 (explaining that a government's sectarian preference in distributing benefits violates the Equal Protection Clause).

250 *See Winn*, 131 S. Ct. at 1457.

251 489 U.S. 1, 14–15 (1989) (plurality opinion) (tax exemption for religious property violates the Establishment Clause if drawn too narrowly; exemption limited to religious periodicals "effectively endorses religious belief").

252 In the "Jewish Reward" example, if the government's action is underinclusive—i.e., providing tax credits or deductions only to one religious organization, it presents a *Texas Monthly* problem. *See id.* Furthermore, in the crucifix case, a member of a religion that does not recognize the crucifix (or specifically rejects it and/or is offended by it) could allege an independent Establishment Clause claim based on the offense to his or her sensibilities or on the "outsider alienation" theory. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (explaining that government action endorsing religion violates the Establishment Clause because it "sends a message to nonadherents that they are outsiders, not full members of the political community"). Such an injury is sufficient to trigger Article III standing in the cases dealing with the government's display of religious symbols. *See, e.g.*, McCreary Cnty. v. ACLU, 545 U.S. 844, 850 (2005); Van Orden v. Perry, 545 U.S. 677, 681–82 (2005); Allegheny v. ACLU, 492 U.S. 573, 578–79 (1989). These claims need not rely on the narrow taxpayer standing exception to proceed.

253 *Winn*, 131 S. Ct. at 1461 (Kagan, J., dissenting).

The *Winn* dissent took great umbrage at the prospect that state legislatures might use a tax credit to reach a result that might be held unconstitutional if accomplished through direct spending.[254] This complaint has common-sense appeal, as explained below.[255] However, as a doctrinal matter, it improperly equates private choice with that of the government.[256] Justice Kagan speculates that no legislature will ever spend government money to support religion when it can use tax credits to achieve the same result. The counterargument, however, is that such a decision is one for the political branches, whose fast constitutionalism must be pursued at peril of electoral defeat.[257]

It may also be shortsighted to predict that state legislatures will now simply spend through tax credits rather than direct expenditures "to preclude taxpayer challenges to state funding of religion."[258] This will not insulate taxpayer standing challenges in state court. Because states are not constrained by Article III,[259] they can create standing

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254 *Id.* at 1462 (Kagan, J., dissenting) ("The Court's opinion . . . offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* will not stand in the way."); *id.* at 1450 ("From now on, the government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion.").

255 *See infra* Part IV.A.

256 *See supra* Part III.A.3.

257 Justice Kennedy appeared to recognize this much in his concurring opinion in *Hein*. *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 618 (2007) (Kennedy, J., concurring) ("It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations."). Richard C. Shragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 650 (2011) ("Lack of judicial enforcement does not relieve the political branches of their duty to obey the Constitution. . . ."). *But see* New York v. United States, 505 U.S. 144 (1992) (O'Connor, J.) (appearing to recognize the inherent power of a legislature to remain inert, even in the face of constitutional violations). The court's potential role may, however, color its political decision making, as I explain below. *See infra* Part IV.C.

258 *Winn*, 131 S. Ct. at 1450.

259 ASARCO v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute."); *see also* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 43 (1988) (noting a study which found that "thirty-four states permit taxpayers' suits to challenge state government action"). *But see* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial*

doctrines to suit their own institutions. Furthermore, as Professor Zelinsky recently pointed out, because most state courts have more liberal taxpayer standing doctrines than do their federal counterparts, *Winn* will not preclude taxpayer challenges to state funding systems, but rather, simply channel them from federal courts to state courts.[260] This is a small, but meaningful, gain for proponents of a broader taxpayer standing doctrine, particularly when considering that *Flast* may not apply to state taxpayers in federal court in the first place.

4. The Flast *Exception Does Not Apply to State Taxpayers in Federal Court*

Professor Zelinsky has persuasively explained how the decisions in *Cuno* and *Winn* will channel state tax credit challenges to state courts, which will develop a freestanding body of state law governing tax credits and exemptions beyond direct review by the Supreme Court.[261] He concludes that this body of law, while more likely to recognize taxpayer or citizen standing, will also "be more permissive toward state policies than would a comparable corpus of cases decided by federal judges."[262]

As it pertains to the taxpayer standing doctrine as a whole, I believe *Cuno* does more than that, and that the *Winn* Court erred in applying the *Flast* test in the first place. Notwithstanding this error, *Hein* and *Cuno* support the conclusion that the *Flast* exception is not available to state taxpayers in federal court. Thus, while the *Winn* dissenters outline a blueprint for state legislatures to ensure that "*Flast* will not stand in the way" to taxpayer standing in federal court,[263] it likely never has.

Function, 114 HARV. L. REV. 1833, 1852–59 (2001) (explaining that some states have now adopted standing doctrines similar to that provided by Article III).

260 Zelinsky, *Driver's Seat*, *supra* note 199, at 47–52.

261 *Id.* Such a system would be beyond direct review by the Supreme Court in light of its taxpayer standing jurisprudence. This would not be a novel circumstance. *See, e.g.*, *Kadish*, 490 U.S. at 636–37 (treating as nonjusticiable certain advisory opinions issued by state courts on questions of federal constitutional law).

262 Zelinsky, *Driver's Seat*, *supra* note 199, at 64; *see also, e.g.*, Perry v. Brown, 671 F.3d 1052, 1074 (9th Cir. 2012) ("State courts may afford litigants standing to appear where federal courts would not . . . .").

263 *Winn*, 131 S. Ct. at 1462 (Kagan, J., dissenting). ("The Court's opinion . . . offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* will not stand in the way."). Justice Kagan uses the term "tax expenditure" to include tax credits, exemptions, and the like. *See supra* note 197.

In *Cuno*, the Court unanimously reaffirmed that the *Frothingham* rule against federal taxpayer standing "applies with undiminished force to state taxpayers" who challenge "state tax or spending decisions simply by virtue of their status as taxpayers."[264] The Court, however, has never specifically decided whether state taxpayers might *otherwise* have Article III standing to raise Establishment Clause challenges in federal court—i.e., if their taxpayer status could qualify as a direct, concrete Article III injury.[265] If the answer is yes, there would be no need to apply an exception to the rule against taxpayer standing, as the rule would perforce not apply to them. If the

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264 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345, 346 (2006) ("We indicated as much in *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429 (1952)."); *see also id.* at 346 ("[S]tate taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers."). In *Cuno*, the state plaintiffs alleged standing for Commerce Clause challenges based solely on their status as Ohio taxpayers. *Id.* at 338. Not unlike the plaintiffs in *Winn*, their alleged injury was that franchise tax credits provided to DaimlerChrysler depleted Ohio's available revenues. *See id.* at 339 n.2 (noting state taxpayers' argument that tax benefits for DaimlerChrysler "diminished the funds available to the . . . State, imposing a 'disproportionate burden' on plaintiffs"). Just as in *Doremus*, the Court held that the interests of a taxpayer in the moneys of the state treasury "are too indeterminable, remote, uncertain and indirect' to support standing to challenge 'their manner of expenditure.'" *Id.* at 345 (quoting *Doremus*, 342 U.S. at 433) (internal quotation marks omitted).

265 While the Supreme Court has never squarely considered or decided state taxpayer standing to raise Establishment Clause challenges in federal court, it has, in a small group of cases over sixty years, assumed that such plaintiffs had Article III standing in the cases before it. I count eighteen such cases. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 648 (2002); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion); Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 694 n.2 (1994); Sch. Dist. of Grand Rapids v. Ball, 473 U.S 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); March v. Chambers, 463 U.S. 783, 786 n.4 (1983); Mueller v. Allen, 463 U.S. 388, 392 (1983); Wolman v. Walter, 433 U.S. 229, 232 (1977); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 744 (1976); Meek v. Pittenger, 421 U.S. 349, 355 n.5 (1975), *overruled by Mitchell*, 530 U.S. at 808; Griggs v. Pub. Funds for Pub. Schs. of N.J., 417 U.S. 961 (1974) (mem. op.); Marburger v. Pub. Funds for Pub. Schs. of N.J., 417 U.S. 961 (1974) (mem. op.); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 478 (1973); Hunt v. McNair, 413 U.S. 734, 735 (1973); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 762 (1973); Sloan v. Lemon, 413 U.S. 825, 827 (1973); Lemon v. Kurtzman, 403 U.S. 602, 611 (1971); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 666 (1970).

In not one of these cases, however, did the Court analyze, or even meaningfully discuss, the issue of state taxpayer standing under Article III, much less whether the *Flast* exception would apply to state taxpayer Establishment Clause claims in federal court. This list does not include cases that involved state taxpayers on a direct financial basis, rather than solely by virtue of their status as indirect, dissenting taxpayers. *See* Tex. Monthly v. Bullock, 489 U.S. 1, 7–8 (1989) (plurality opinion) (finding state taxpayer standing in an action challenging sales tax exemption provided by Texas statute for religious periodicals where plaintiff sought a *refund* of nearly $150,000 in sale taxes paid under protest).

answer is no, the unanimous rationale in *Cuno* would apply,[266] and state taxpayers raising Establishment Clause challenges in federal court would be left arguing that the *Flast* exception also applies to them.[267]

After *Hein*, however, those taxpayers cannot benefit from the *Flast* exception because it is plain that "the results in *Flast*"[268] do not extend to state taxpayers. As explained above, the results in *Flast* were that injured *federal* taxpayer plaintiffs could raise an Establishment Clause challenge to *Congress's* Article I, Section 8 taxing and spending power creating a federal law to disburse federal funds in support of religion.[269] Indeed, under the very terms of the *Flast* test, state taxpayer plaintiffs have standing to assert Establishment Clause challenges "*only* [to] exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution."[270] Use of other powers by Congress, actions by the executive branch, or that of state governments, do not suffice.[271] This is because these other avenues could not give rise to "the specific evils feared by [the Framers]"—that "*congressional* power under the taxing and spending clause" of Article I, Section 8 "would be used to favor one religion over another or to support religion in general."[272] Because the Establishment Clause did not apply to the states until it

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266 *See Cuno*, 547 U.S. at 345 (holding that the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers").

267 *Cf. Perry*, 671 F.3d at 1074 ("State courts may afford litigants standing to appear where federal courts would not, but whether they do so has no bearing on the parties' Article III standing in federal court.").

268 Hein v. Freedom from Religion Found., 551 U.S. 587, 610 (2007) (quoting United States v. Richardson, 418 U.S. 166, 196 (1974)) (emphasis omitted).

269 *See* Flast v. Cohen, 392 U.S. 83, 103 (1968); *supra* Parts II.B.1–4.

270 *Flast*, 392 U.S. at 102, 105 (emphasis added); *see also id.* at 102–03 (explaining that part two of the test requires a showing that the challenged activity exceeds "specific constitutional limitations imposed upon the exercise of the *congressional taxing and spending power*" (emphasis added)).

271 *See Hein*, 551 U.S. at 608–10 (no taxpayer standing to challenge executive branch discretionary spending as violating the Establishment Clause and "no taxpayer standing to sue under Free Exercise Clause of First Amendment" (citing Tilton v. Richardson, 403 U.S. 672, 689 (1971))); *see also Cuno*, 547 U.S. at 343–44 (no state taxpayer standing to sue under Commerce Clause); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479–82 (1982) (no taxpayer standing to challenge executive branch action taken pursuant to Property Clause of Article IV); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (no taxpayer standing to sue under Incompatibility Clause of Article I); *Richardson*, 418 U.S. at 175 (no taxpayer standing to sue under Statement and Account Clause of Article I).

272 *Flast*, 392 U.S. at 102-03 (emphasis added).

was incorporated into the Fourteenth Amendment,[273] the substantive rationale behind *Flast*—i.e., the "specific evils feared by the Framers"—does not fit the actions of state governments.[274] Arizona's tax credit program, then, fails to meet the terms or substantive rationale of the *Flast* exception. It was not a product of the federal taxing and spending power[275] and had nothing to do with Congress.[276]

Accordingly, relative to a *Flast*-like exception, *Cuno* and *Winn* do more than simply channel state tax credit disputes to state courts. Those decisions force all state taxpaying plaintiffs to rely on state law, in state court, to obtain taxpayer standing to attack state tax credit programs on Establishment Clause grounds. Whether this can be remedied, and how, are topics to which I now turn.

IV
ESTABLISHMENT CLAUSE TAXPAYER STANDING ALTERNATIVES

On a doctrinal level, the *Winn* dissent erred by trying to fit third-party state tax credit challenges into the narrow *Flast* exception. This is impossible without moving beyond "the results in *Flast*."[277] *Winn* concludes that there is a legal distinction between direct expenditures and tax credits, even if their economics overlap. *Cuno* and *Hein* remove *Flast* from the state taxpayer's quiver. However, neither of these conclusions addresses, on a policy level, Justice Kagan's concerns that state and federal governments weary of Establishment

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273 *See* Everson v. Bd of Educ. of Ewing Twp., 330 U.S. 1 (1947).

274 *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS 41 (1998). The obvious counterarguments here are that the rights of conscience predates the structural no-establishment principle and only the latter was originally intended to bind the national government but not the states. *See, e.g.*, Smith, *supra* note 37, at 371 (explaining that the freedom of conscience "has a strong claim to being 'deeply rooted in this Nation's history and tradition'" (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977))).

275 Nor could the argument be made that Arizona's taxing and spending power was the same as that of Congress. *Compare* U.S. CONST. art. I, § 8, *with* ARIZ. CONST. art. IX, § 3.

276 The *Flast* exception does not result in the unenforceability of the Establishment Clause against the states—claims under the Clause can still be made by plaintiffs in a variety of ways, *see supra* notes 272-75 and accompanying text, and by state taxpayers in state court. *See, e.g.*, Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999); Zelinsky, *Driver's Seat*, *supra* note 199, at 47–52. In this regard, *Flast* simply removes federal courts as a potential forum to raise state taxpayer-only claims.

277 Hein v. Freedom from Religion Found., 551 U.S. 587, 610 (specifically adopting Justice Powell's concurring opinion in United States v. Richardson, 418 U.S. 166, 196 (1974)), which "limit[ed] the expansion of federal taxpayer and citizen standing . . . 'to an outer boundary drawn by the *results* in *Flast*'" (quoting *Richardson*, 418 U.S. at 196) (emphasis added by *Hein* Court)); *see supra* Parts II, III.B.4.

Clause taxpayer challenges can simply launder direct financial aid to religion by using tax credits in lieu of direct appropriations.[278] Such a result, though doctrinally outside *Flast*, appears analytically troublesome considering that the structural limitations imposed on government by the Establishment Clause would seem to protect both forms of action.[279] Of course, because a traditional Article III injury exists in many of these instances, taxpayer plaintiffs will not need to rely on the *Flast* exception to raise their claims.[280] Thus, the problem is not as widespread as Justice Kagan insists.

But Justice Kagan is technically correct that this option is not available for every potential taxpayer plaintiff. Those left outside the courthouse are likely to argue that strikingly similar taxing and spending policies executed in slightly different ways should not have different constitutional consequences. A majority of the Court, however, is unlikely to merge the Article III treatment of tax practices it specifically set apart in *Cuno* and *Winn*. Disappointed plaintiffs will need to either wait out a change in the Court's composition, or find other ways to create taxpayer standing in federal court.

A. Abandon the Rule Against Taxpayer Standing?

The easiest solution would be to abandon the rule against taxpayer standing. Federal courts could treat the Establishment Clause as both the source of the right and the substantive description of those entitled to enforce it, and simply ask whether the plaintiff states a claim arising under that right.[281] Such an approach would sidestep the standing requirement and alleviate the enforcement problem often

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278 *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1450–51, 1462–63 (2011); *cf.* Siegel, *supra* note 2, at 107 ("Standing doctrine should turn on real distinctions, not on gestures designed to propitiate the gods of justiciability.").

279 Marshall & Nichol, *supra* note 24, at 237, 251–52.

280 *See supra* Part III.C.3.

281 *Cf.* Fletcher, *supra* note 234, at 223 ("[S]tanding should simply be a question on the merits of plaintiff's claim."); *see also id.* at 290–91 ("[W]e should ask, as a question of law on the merits, whether the plaintiff has the right to enforce the particular legal duty in question."). Professor Sunstein has similarly argued that the standing doctrine is used, improperly, as substitute for the question whether the plaintiff has a cause of action, and should therefore be discarded. *See generally* Sunstein, *What's Standing*, *supra* note 43. He views injury-in-fact as "neither a necessary nor a sufficient element." *Id.* at 182 (arguing that the principal question for standing should be "whether the law ha[s] conferred a cause of action"); *see also* Mark Tushnet, *Foreward: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999) (advocating a presumption in favor of standing); Nichol, Jr., *supra* note 9, at 338–40 (advocating federal court assume standing unless strong reasons exist for denying it).

posed by the Clause, which does not lend itself to an individual-rights analysis akin to the rest of the Bill of Rights.[282] This suggested route, however, requires a suspension of both *stare decisis* and reality,[283] as the Court has consistently resisted calls to expand or abandon its taxpayer standing doctrine and nothing suggests an about-face.[284] The narrow *Flast* exception to the *Frothingham* rule is well-settled standing law and, barring a shift in the Court's makeup, it is here to stay.

B. Broader Taxpayer Standing by Statute Supported by Legislative Findings?

The surprising doctrinal stability of the rule against taxpayer standing,[285] coupled with the Court's reluctance to alter its jurisprudence in this area,[286] could push proponents of a broader doctrine to the political branches. Recognizing the Court's reticence, Congress might take various steps to create standing to raise Establishment Clause challenges to tax credits (and exemptions) of the sort encountered in *Winn*.[287] Much like it considered in the Elementary and Secondary Education Act of 1965,[288] Congress could

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282 *See, e.g.*, Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 10–11 (2009); *cf.* AMAR, *supra* note 274, at 32–42, 246–57; Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 23–24 (2006); Ira C. Lupu, *Federalism and Faith Redux*, 33 HARV. J.L. & PUB. POL'Y 935, 937–42 (2010) (citing, *inter alia*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in the judgment)) (arguing that, unlike the Free Exercise Clause, "[t]he Establishment Clause does not purport to protect individual rights").

283 Pushaw, *"Accidental" Plaintiffs*, *supra* note 28, at 105 (noting that while many scholars have "urge[d] the Court to abandon or overhaul the entire [standing] doctrine, . . . stare decisis makes such proposals utopian").

284 *See supra* Parts II-III, and cases cited *supra* note 13. The Court has, however, abandoned the traditional standing doctrine in certain limited areas, such as in various Fourth Amendment contexts. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 140 (1978) ("dispensing with the rubric of standing" when deciding whether a criminal defendant can raise a violation of the Fourth Amendment's search and seizure provisions).

285 *See supra* Parts II–III.

286 *See supra* Parts II–III.

287 *Cf.* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 182–225 (2011) [hereinafter Elliott, *Standing Problems*] (outlining various Congressional options to broaden the tripartite standing doctrine, including providing standing by statute, conferring bounties to prevailing plaintiffs, or providing for non-Article III tribunals). It should be noted that prior to suggesting these fixes, Professor Elliott specifically assumes, for the sake of her argument, that the modern standing doctrine is overly restrictive. *Id.* at 181.

288 Both the House and Senate considered amendments to the Elementary and Secondary Education Act that would have authorized such challenges. *See* 111 CONG.

enact legislation expressly authorizing taxpayer standing for third-party dissenting taxpayer plaintiffs in an attempt to constitutionalize broader harm than that recognized by the Court.[289] Such a statute might read as follows:

> A case or controversy within the meaning of Article III of the Constitution exists whenever a plaintiff taxpayer [of the United States/State of *X*] presents a First Amendment Establishment Clause challenge to [Tax Credit Act *Y*] if, assuming the challenged tax credit was a direct government expenditure, that taxpayer would otherwise have standing under the taxpayer standing exception enunciated in *Flast v. Cohen*, 392 U.S. 83 (1968).

This statute would have provided taxpayer standing to the plaintiffs in *Winn*. Unfortunately, it is likely to be held unconstitutional at the federal level. The Supreme Court has consistently held that congressional grants of standing suffice only to remove prudential barriers to standing.[290] They cannot remove the limits imposed by the case-or-controversy requirement of Article III,[291] which includes the

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REC. 5771, 5942–43 (1965) (rejected by House); *id.* 7345 (rejected by Senate); *see also id.* 5973, 6132, 7316–7318 (debate on the topic).

289 Some noted legal scholars have gone even further, suggesting that Congress could, through substantive legislation, create legislative standing in order to effectuate the substantive goal. *See, e.g.*, Sunstein, *What's Standing, supra* note 43, at 230–36 (locating source of such congressional authority in Article III; proposing a "bounty system" in cases involving private defendants and the executive branch); Daan Braveman, *The Standing Doctrine: A Dialogue Between the Court and Congress*, 2 CARDOZO L. REV. 31, 39 (1980) (locating the source of such congressional authority in Article III); Mark Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 670–71 (1977) (similar; locating congressional authority in Necessary and Proper Clause of Article I, Section 8).

290 *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 163 (1997) ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."). This Article does not enter the debate of whether the bar on generalized grievances is rooted in the separation of powers doctrine or some other, more malleable source, such that it cannot be overcome by Congress.

291 *See, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009); Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." (quoting Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979) (internal quotation marks omitted)); *Gladstone*, 441 U.S. at 100 ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' In no event, however, may Congress abrogate the Art. III minima . . . ." (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975))); Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) ("[W]here a dispute *is otherwise justiciable*, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' is one within the power of Congress to determine." (quoting Flast v. Cohen, 392 U.S. 83, 100 (1968) (emphasis added)).

general prohibition on taxpayer standing.[292] Thus, as scholars have generally noted, statutory standing would do nothing to remove the barrier that taxpayers (among other plaintiffs) face under the modern tripartite standing doctrine, which the Supreme Court locates in Article III itself.[293]

Nor can Congress likely accomplish the same under the guise of legislative "fact finding," whereby it would articulate—or "find"—that particular taxpayer harms are sufficient to meet the strictures of Article III.[294] First, the Court is unlikely to treat such activity by Congress as legislative *fact*-finding. Creating a legislative record of "facts" is often no more than the political art of ladling into the record the favorable quotes of tame witnesses made during staged hearings in order to support substantive legislation.[295] This is distinguishable from trying to conclusively establish jurisdictional facts for a pre-existing legal test fashioned by the Supreme Court. Defining what type of taxpayer injuries are justiciable smacks of a finding of *law* on the legal issue of whether there exists a constitutional "case" or "controversy" sufficient to provide the court with subject matter jurisdiction. This, of course, is the Judiciary's domain.[296]

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292 *See Flast*, 392 U.S. at 102 (explaining that question of whether plaintiffs may sue based solely on their capacity as taxpayers "turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy *Article III requirements*" (emphasis added)); *see* cases cited *supra* note 61.

293 Elliott, *Standing Problems*, *supra* note 287, at 183. The Supreme Court has not shied from this conclusion. *See, e.g.*, Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 771 (2000); Allen v. Wright, 468 U.S. 737, 751 (1984). *But see* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 449–51 (1994) (arguing that the Court misinterpreted the "case" or "controversy" language of Article III when creating the tripartite standing test).

294 *See generally* Elliott, *Standing Problems*, *supra* note 287, at 182–83 (citing, *inter alia*, Braveman, *supra* note 289, at 38–39); James Dumont, *Beyond Standing: Proposals for Congressional Response to Supreme Court "Standing" Decisions*, 13 VT. L. REV. 675, 678–81 (1989); Sunstein, *What's Standing*, *supra* note 43, at 230; Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1181–82 (1993).

295 Bryan Dearinger, *The State of the Nation, Not the State of the Record: Finding Problems with Judicial "Review" of Eleventh Amendment Abrogation Legislation*, 53 DRAKE L. REV. 421, 474 (2005).

296 *See* Elliott, *Standing Problems*, *supra* note 287, at 192–93 ("It is almost inconceivable . . . that the Court would accept congressional efforts to *redefine* the constitutional limits of standing. . . . If Congress were to enact statutes that purport to alter outcomes under the tripartite test, it would be rewriting Article III, something the Court has made clear that it cannot do.") (internal citations omitted)); *cf.* Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1092 (1991) ("Simply put, the legislature's

Second, even if the Supreme Court were to treat this behavior as legislative fact-finding, it likely would chew up Congress's "facts" and spit them out over the "hard floor of Article III"[297] that has defined the standing doctrine for forty years.[298] As I have explained in a previous work, the Court has become increasingly skeptical of Congress's fact-finding in support of prophylactic legislation.[299] While the Court has explained "that 'Congress need [not] make particularized findings in order to legislate[,]'"[300] it has, since the late 1990s, jealously guarded its constitutional prerogative to "say what the law is,"[301] no matter how mild the threat or the applicable standard of review.[302] The question of Article III standing fits squarely within the judicial review rubric of *Marbury* because the Court is saying "what the law is" with respect to the scope of its Article III judicial power, in that it declares the law to be that the

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responsibility in the United States' system of government is to enact statutes. The court's responsibility is to interpret and apply the statutes to resolve disputes."); *see also, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219–34 (1995) (similar).

297 Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009).

298 I speak here of the cases solidifying the "irreducible minimum" of the tripartite test. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

299 Dearinger, *supra* note 295, at 458–62.

300 *Id.* at 438 n.75 (quoting Perez v. United States, 402 U.S. 146, 156 (1971)); *see also* Gonzales v. Raich, 545 U.S. 1, 21 (2005); United States v. Lopez, 514 U.S. 549, 562 (1995).

301 Dearinger, *supra* note 295, at 440–61; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

302 Dearinger, *supra* note 295, at 454–62 (chronicling the Court's heightened scrutiny and increased distrust of congressional findings in the context of legislation enacted pursuant to Section Five of the Fourteenth Amendment, after nearly fifty years of consistently granting enormous deference to Congress in this area). *Compare* Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) ("It was for Congress, as the branch that made this judgment, to assess and weigh the . . . risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating [a state's discrimination] as a means of dealing with the evil . . . . It is not for us to review the congressional resolution of these factors."), *with* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729 (2003) (demanding that "Congress [physically] evidence . . . a pattern of constitutional violations on the part of the States in th[e] area" sought to be remedied by the use of Section 5 legislation). Unsurprisingly, the majority of scholars who advocated for a deferential standard of review of non-prudential statutory standing did so prior to the Court's modern hostility toward legislative findings related to constitutional violations, beginning with *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Compare* Dearinger, *supra* note 295, at 454–62, *with* Pierce, Jr., *supra* note 294, at 1181–82 (suggesting rational basis review for congressional findings creating statutory standing), *and* Sunstein, *What's Standing*, *supra* note 43, at 230 ("Perhaps courts will review . . . [findings of causation and redressability] under a deferential standard.").

plaintiff cannot raise the substantive constitutional claim in federal court.[303] The Court's recent willingness, in the context of anti-discrimination laws enacted under Section Five of the Fourteenth Amendment, to critique documented congressional findings of discrimination as "isolated," "anecdotal," or "conjectural"[304] transfers easily to the standing doctrines, where subjective judgments abound and strict scrutiny does not apply.[305] Indeed, rejecting legislative findings supporting the expansion of Article III standing is a far less intrusive judicial act than critiquing findings made to protect suspect classifications or fundamental rights.

But when faced with the alternatives, placing the keys of taxpayer standing in the Supreme Court's hands might be the best—or least worst—alternative. At times, Congress has proven that its judgment as to the propriety of statutory standing is not as finely calibrated as its proponents like to suggest. Remember that Congress dispensed with statutory standing in the statute under attack in *Flast* itself,[306] only to later receive a reprieve from the Court.[307]

Nor does Congress always endeavor to stay scrupulously within the confines of the Constitution when enacting legislation.[308] Few would

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303 *Cf.* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE. L.J. 1219, 1229 (1993) ("In the first place, the legislature is not supreme in our system of government—the Constitution is. Holding a statute unconstitutional because it transgresses Article III is nothing more than a recognition of that principle—a principle the Supreme Court has felt obligated to defend since the first case holding an Act of Congress unconstitutional under Article III.").

304 *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369–72 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89–91 (2000). *But see* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); *Katzenbach*, 384 U.S. at 651.

305 *See supra* Part I. This may even be true on the merits in particular Religion Clause challenges as well. *See, e.g.*, Schwartzman, *supra* note 103, at 381 (noting that the Court has "applied much weaker forms of review" in compelled-support cases (citing David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1014–17 (1982))).

306 *See* 111 CONG. REC. 5771, 5942–43 (rejected by House); *id.* 7345 (rejected by Senate); *see also id.* 5973, 6132, 7316–7318 (debate on the topic).

307 Flast v. Cohen, 392 U.S. 83, 102–06 (1968).

308 *See, e.g.*, Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation? Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 503–04 (2009) ("Knowing the courts are available to correct (some of) their constitutional errors, legislators have little incentive to expend great effort in enacting only constitutionally permissible statutes."). Professor Tushnet refers to this as "judicial overhang." MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 81 (2008) ("The judicial overhang sometimes promotes legislative disregard of the constitution."); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS

commit to respecting its constitutional judgments the same way we do the Court's. As others have examined, the importance of reelection may make Congress content to manufacture a judicial controversy in order to avoid a political one,[309] or otherwise refuse to play any meaningful role in hard constitutionalism. Such delegations to or conscriptions of the Judiciary could be accomplished by practicing "anticipatory obedience" regarding Article III standing questions,[310] or by enacting the expansive statutory standing provision outlined above, knowing full well that the Court would find it unconstitutional.[311] Alternatively, legislators can remain inert, publically grounding their decision *not* to support the substantive legislation on the standing provision's certain demise in federal court.[312] Either way, members of Congress wishing to support or attack constitutionalizing tax credits for religious schools can do so while avoiding negative electoral consequences, knowing full well that the Judiciary must play referee.[313] "Fuzzy, leave-the-details-to-

58–65 (1999) [hereinafter TUSHNET, TAKING THE CONSTITUTION] (similar). At least one scholar has explained how Congress's use of the Supreme Court as a "release valve" for majoritarian preferences will lead to what she calls "upside-down" majoritarian style of judicial review that covers for the increasingly inert or non-majoritarian political branches. Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 179–81 (2012). *But see* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 568 (2009) ("However, every Congressional enactment passed under the commerce power, and every appropriation under the General Welfare Clause, involves an implicit interpretation of these clauses, whether or not any court ever considers them.").

309 *See* Elliott, *Standing Lessons*, *supra* note 31, at 499.

310 *See* Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, *in* CONGRESS AND THE CONSTITUTION 271 (Neal Devins & Keith E. Whittington eds., 2005) (noting instances where Congress has "adapt[ed legislation] to ensure that it will survive judicial scrutiny" in well-settled areas of law).

311 *Cf.* TUSHNET, TAKING THE CONSTITUTION *supra* note 308, at 59–61 (concluding that congressional disinterest or irresponsible legislation are effects of judicial overhang). Sometimes, not even the prospect of unconstitutional laws can change this behavior. *See supra* notes 306–07.

312 *Cf.* New York v. United States, 505 U.S. 144 (1992) (O'Connor, J.) (appearing to recognize the inherent power of a legislature to remain inert, even in the face of constitutional violations).

313 Or, more specifically, federal appellate courts. *Cf.* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1288 (1994) ("Legislatures, like private markets, can cycle, especially when allocating the benefits of capital gains or the burdens of capital losses. In those situations, legislatures may opt for inaction, leaving the status quo by default."); *id.* ("Unlike legislatures, however, appellate courts do not have the option of declining to resolve necessary issues contained in cases properly presented for review. As a result, their decisional processes must be structured to ensure an outcome in every case."); *cf.* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 605 (1995) (noting

be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty."[314] What is more, "activist judges" are perfect scapegoats because they cannot bite back.[315] Accordingly, Congress's political and cyclical nature, leading to its tendency to conscript or blame the Judiciary, provides a practical reason why the courts might be the best place to protect the purpose and consistency of the taxpayer standing doctrine, even if they are not perfect guardians.[316]

C. Broader Taxpayer Standing by Creating a Specialized Article I Court?

Save for abandoning the rule against taxpayer standing, relying on state courts to challenge state tax credit policies on Establishment Clause grounds, or creating taxpayer standing by statute, Congress could try to confer taxpayer standing to bring *Winn*-type actions in an Article I court, such as the United States Tax Court, where Article III standing restrictions do not apply.[317] Because these cases would

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conflict-averse nature of legislators, explaining that the "frequency of strategic avoidance and legislative gamesmanship suggests that legislators will generally be tempted to hide behind, rather than to contest, judicial interpretations of statutory law," in the absence of a strong political demand otherwise).

314 Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

315 *Cf.* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 343–46 (2009) (explaining how "judicial activism" has been made a pejorative by both liberals and conservatives).

316 *Cf.* Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113–14 (1921) ("[T]he legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend.").

317 Congress has the power to confer jurisdiction on Article I courts like the U.S. Tax Court under the language of Article III, which vests the United States judicial power in the Supreme Court and the inferior courts that Congress has ordained and established. U.S. CONST. art. III, § 1. Indeed, non-Article III judges far outnumber their Article III counterparts, and include not only U.S. Magistrate Judges and administrative law judges, but also such courts as the Tax Court, bankruptcy courts, the Court of International Trade, and the Court of Claims, territorial courts, and the courts of the District of Columbia. For an excellent discussion of these specialized courts, see generally Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377 (1990).

Professors Krinsky and Elliott, among others, have also suggested resort to an Article I tribunal as a way for Congress to get around the vagaries of the general tripartite standing test. *See* David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301, 301–08 (2007); Elliott, *Standing Problems*, *supra* note 287, at 205–25; *see also, e.g.*, James Dumont, *Beyond*

always involve review of government action, rather than citizen suits against a private party, various due process review concerns would not appear to threaten the legitimacy of the Article I court.[318] Leaving aside the myriad political problems attending such a tribunal,[319] could a statute conferring jurisdiction over Establishment Clause tax credit challenges to an Article I court be upheld as constitutional?

Probably not. In *Commodity Futures Trading Commission v. Schor*, the Supreme Court warned that congressional attempts to transfer jurisdiction to non-Article III tribunals "for the purpose of emasculating" Article III courts will be invalidated.[320] Central to the Court's admonition was its description of the personal and structural purposes of Article III.[321] The personal purpose—to safeguard

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Standing: Proposals for Congressional Response to Supreme Court "Standing" Decisions, 13 VT. L. REV. 675, 684–89 (1989) (suggesting tribunal with narrow jurisdiction over environmental claims not meeting Art. III standing threshold).

318 Here, I speak of the personal constitutional guarantees to judicial review by an impartial, independent Article III adjudicator. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 50 (1932) (suggesting that where Congress creates an Article I tribunal, it is free to disregard such Article III guarantees if the case in question involves "public" rather than private rights); *see also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–68 (1982). But see *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), in which the Court stated that "[a]n absolute construction of Article III is not possible in this area of frequently arcane distinctions and confusing precedents." *Id.* at 583 (internal quotation marks omitted). Rather, "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Id.* at 587. The Court has also invoked consent of the parties as a basis for permitting the jurisdiction of non-Article III tribunals. *See id.* at 584; Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–50 (1986).

319 Such problems are beyond the scope of this Article. For an excellent discussion of them, *see, e.g.*, Elliott, *Standing Problems*, *supra* note 287 at 211–14 (suggesting various factors which threaten the independence of non-Article III courts including, *inter alia*, no life tenure, fewer salary protections, and political pressure from the President, Congress, and agency heads, as well as litigation steering by powerful interest groups); *see also* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 292 & n.7 (1990) (explaining how much easier it is to "stack" non-Article III courts than their Article III counterparts). While Professor Elliott believes that many of these factors can be solved or blunted, pressure from Congress may be insuperable. *See* Elliott, *Standing Problems*, *supra* note 287, at 214.

320 478 U.S. 833, 850 (1986) (quoting Nat'l Ins. Co. v. Tidewater Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting) (internal quotation marks omitted)). The Court in *Schor* upheld an agency's adjudication of a state law counterclaim that fell outside the scope of the statute the agency was charged with enforcing. *Id.* at 838–40.

321 Whether the personal purpose is better understood as concern of the due process clause rather than Article III is beyond the scope of this Article. *See, e.g.*, *Crowell*, 285 U.S. at 86–88 (Brandeis, J., dissenting) (insisting that due process was the exclusive source of the right to judicial review); Bator, *supra* note 2, at 267–68; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372–73 (1953).

litigants' rights to have their claims decided by judges that are free from potential domination by the political branches[322]—was not violated in *Schor* because recourse to an Article III forum was waived by the litigants.[323] However, the question of whether the alternative tribunal damaged the structural purpose of Article III—to protect "the role of the independent judiciary within the constitutional scheme of tripartite government"[324]—was more complicated, and required consideration of several factors. These included (1) "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts"; (2) "the origins and importance of the right to be adjudicated"; and (3) the concerns that motivated Congress "to depart from the requirements of Article III" in the first place.[325]

A statute conferring jurisdiction over Establishment Clause tax credit challenges to an Article I court would appear not to offend the personal purpose of Article III. Review of government action could take place in that tribunal,[326] and the dissenting taxpayer could—and most likely would— consent to the jurisdiction of the Article I court if it promised adjudication of her Establishment Clause tax credit claim on the merits.[327] Furthermore, because such actions are not cognizable in federal court under any formulation of the current

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322 *Schor*, 478 U.S. at 848 (citing United States v. Will, 449 U.S. 200, 218 (1980)).

323 *See id.* at 848–49 (holding that the "personal" right protected by Article III "is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried"); *see also Thomas*, 473 U.S. at 584.

324 *Schor*, 478 U.S. at 848 (quoting *Thomas*, 473 U.S. at 583).

325 *Id.* at 851.

326 *See* Crowell v. Benson, 285 U.S. 22, 50 (1932) (suggesting that where Congress creates Article I tribunal, it is free to disregard such Article III concerns if the case in question involves "public" rather than private rights); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–68 (1982) (holding that a bankruptcy court deciding a state-law contract claim violated Article III of the Constitution, but explaining that Congress could constitutionally assign to non-Article III tribunals "public rights" cases, or matters arising between individuals and the government "in connection with the performance of the constitutional functions of the executive or legislat[ure] . . . that historically could have been determined exclusively by those" branches (internal quotation marks omitted)).

327 *See supra* note 323. On the other hand, the litigant might lack standing to forfeit the protections provided by Article III. *Cf.* Meltzer, *supra* note 319, at 304 ("Two Massachusetts residents cannot agree to federal court adjudication of their state law contract action because the states have an interest in federal non-interference that the litigants are unlikely to protect.").

taxpayer standing doctrine,[328] there is no claim to safeguard. Thus the rights of those dissenting, non-donating taxpayers to impartial adjudication would not be violated.

Whether the statute would offend the structural purpose of Article III, however, presents a closer question. First, if limited to taxpayer challenges to tax credit programs like that in *Winn*, the Article I court would not, as a literal matter, exercise the broad "range of jurisdiction and powers normally vested only in Article III courts."[329] Nor, at first glance, would it appear to offend the "essential attributes of judicial power" reserved to Article III courts,[330] as the Article I tribunal would be exercising jurisdiction over that which is unreviewable in federal court. However, if one of the essential attributes of judicial power is the constitutional case or controversy limitation,[331] creating a tribunal solely to hear cases that Article III courts could not hear would certainly invite institutional critique. Concurrent jurisdiction between the two tribunals hearing taxpayer Establishment Clause claims would lead to simultaneous litigation and, in many cases, conflicting outcomes.[332] And if the plaintiff lacked standing under Article III, any appeal of the Article I decision would raise a host of problems, not the least of which being that an Article III court would lack jurisdiction to hear a losing party's claims.[333]

Second, it might be argued that because "the origins and importance of the right to be adjudicated"[334] in the tax credit cases are public in nature (i.e., created by statute) rather than a product of equity, admiralty, or the common law, there is no danger of encroachment upon the traditional judicial prerogatives of Article III

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328 *See supra* Parts II–III. The lone exception would be the standing to appeal adverse judgments recognized in *ASARCO v. Kadish*, 490 U.S. 605, 618 (1989) (conferring Article III standing to intervening-defendants based on adverse judgment against them in state court, despite the fact that taxpayer-plaintiffs who initiated suit in federal court lacked standing).

329 *Schor*, 478 U.S. at 851.

330 *Id.* (internal quotation marks omitted).

331 *See supra* Part I.A.

332 *See* Elliott, *Standing Problems*, *supra* note 287, at 215.

333 *See id.* (suggesting that the Article III court would lack jurisdiction to hear the losing party's claims from Article I tribunal if brought in the latter to avoid standing obstacles). The exception would be if the holding in *Kadish* could apply to the Article I tribunal, despite the potential for jurisdictional bootstrapping. *See Kadish*, 490 U.S. at 618 (conferring Article III standing to intervening-defendants based on adverse judgment against them in state court, despite the fact that taxpayer-plaintiffs who initiated suit in federal court lacked standing).

334 *Schor*, 478 U.S. at 851.

courts.[335] However, if the origin of a claim is *constitutional*, and its remedy lies in equity, the public rights exception should not apply, particularly where, as in our case, such matters "historically could [not] have been determined exclusively by" the executive or legislative branches.[336] If our hypothetical Article I tribunal would decide the constitutionality of tax credit challenges under the Establishment Clause, what power would it be exercising other than the "judicial Power of the United States"?[337] Whether a challenged activity of the government violates the Constitution is not something over which the political branches have the final word. The availability of a judicial remedy for such a claim depends on Article III itself,[338] not the will of Congress.[339] Accordingly, Congress could not constitutionally assign resolution of that claim to a non-Article III court.[340] The Constitution assigns this task to the Judiciary alone.[341]

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335 *Id.* at 853; *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–68 (1982). *Compare* Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011) ("[W]e have long recognized that, in general, Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." (internal quotation marks omitted)), *with id.* at 2612 (explaining, on the other hand, that because Article I tribunal adjudication of public rights cases "depends upon the will of congress whether a remedy in the courts shall be allowed at all, so Congress could limit the extent to which a judicial forum was available" (internal quotation marks omitted)).

336 *N. Pipeline Constr. Co.*, 458 U.S. at 67–68; *see* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 458 (1977) (extending public rights exception to cases "where the Government is involved in its sovereign capacity under . . . [a] statute creating enforceable public rights," while "[w]holly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated").

337 U.S. CONST. art III, § 1.

338 U.S. CONST. art III, § 2, cl. 1 ("The judicial Power shall extend to all cases . . . arising under this Constitution.").

339 Murray's Lessee v. Hoboken Land and Improvement Co. (*Murray's Lessee*), 42 U.S. (18 How.) 272, 284 (1855); *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54–55 (1989) ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.").

340 U.S. CONST. art III, § 2, cl. 1; *Stern*, 131 S. Ct. at 2609 ("Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's judicial Power on entities outside Article III."). Furthermore, the Supreme Court has continued "to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." *Id.* at 2613. A challenge akin to *Winn*—which derives from the Establishment Clause and seeks declaratory and injunctive relief not provided by statute—would not appear to fit this model. The "experts" at resolving such claims are the federal judiciary. *Id.*

Schor's third structural purpose—"the concerns that drove Congress to depart from the requirements of Article III"[342]—also counsels against the constitutionality of the proposed Article I tribunal. When the legislative purpose in creating a tribunal outside Article III is to evade the limitations created by that Article for claims deemed justiciable by Congress but not the Supreme Court, the judicial power has been emasculated by the trivialization of its self-imposed constitutional limitations.[343] Furthermore, entrusting such claims to adjudicators beholden to the political branches not only jeopardizes doctrinal consistency,[344] it ultimately weakens the primary structural value of Article III—adjudicatory independence.[345] This liberty-protecting, power-diffusing, and authority-checking aspect of Article III ensures that judicial decisions are rendered "not with an eye toward currying favor with Congress or the Executive, but rather with the '[c]lear heads . . . and honest hearts' deemed 'essential to good judges.'"[346]

Congress, it turns out, is no more likely than the Supreme Court to fill the tax credit standing hole in Establishment Clause cases.

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341 *Stern*, 131 S. Ct. at 2609 ("The Constitution assigns th[e] . . . resolution of 'the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law'—to the Judiciary." (quoting *N. Pipeline Constr. Co.*, 458 U.S. at 86–87 n.39)); *see also* THE FEDERALIST, Nos. LXXVIII–LXXII (Alexander Hamilton) (H. Lodge ed., 1888).

342 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

343 *Id.* at 850. For this reason, among others, Professor Elliott's latest article (concerning the general standing doctrine) suggests that Congress would have more success creating an Article I tribunal "as part of a larger remedial scheme" than solely for the purpose of solving a perceived problem with the current standing doctrine. *See* Elliott, *Standing Problems*, *supra* note 287, at 222.

344 *See supra* Part IV.B.

345 Meltzer, *supra* note 319, at 300 (arguing that the "value most consistent" with the terms of Article III is "adjudication by tribunals free from the control of the federal political branches"); *see also Stern*, 131 S. Ct. at 2608 ("'[T]he "judicial Power of the United States" . . . can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.'" (quoting United States v. Nixon, 418 U.S. 683, 704 (1974))).

346 *Stern*, 131 S. Ct. at 2609 (quoting 1 THE WORKS OF JAMES WILSON 363 (James DeWitt Andrews ed., 1896)).

CONCLUSION

> [D]issenting opinions are not always a reliable guide to the meaning of the majority; often their predictions partake of Cassandra's gloom more than of her accuracy.[347]
>
> —Judge Henry J. Friendly

It is unusual for scholars or litigators who work in the Establishment Clause area to agree with what the Supreme Court has done to a doctrinal topic, particularly when that topic is standing. For that reason, I expect there to be resistance to this Article. However, I believe that, much like the traditional standing doctrine, the Court's faithful courtship with the taxpayer version will continue, and jurisdictional restraint will be its defining characteristic.

Winn, in this regard, is proof that the sky is not falling on *Flast*. Critics insisting otherwise, including the dissenters in *Winn*, advance arguments based on a faulty premise of what *Flast* protects and what the *Winn* majority actually said. To paraphrase Judge Friendly, they emphasize the gloom of the taxpayer standing doctrine but ignore *Winn*'s accuracy.[348] Specifically, they exaggerate the reach of *Winn* by ignoring the heart of the injury in *Flast*, conflating the legal incidence of tax credits and government expenditures, overstating the potential for underenforcement of the Establishment Clause, and incorrectly assuming that the *Flast* exception applies to state taxpayers in federal court.

Harm to a taxpayer's conscience must be connected to his financial harm as a taxpayer in order to establish a sufficient injury for standing purposes. *Flast*'s normative test requires that an injured taxpayer plaintiff stirred by an otherwise generalized grievance make a showing that the type of congressional taxing and spending action he objects to takes from him to spend on religion.[349] This test has found its place in modern standing jurisprudence and, barring a drastic shift in the Court's makeup, it is here to stay.[350] Accordingly, litigants and scholars should not expect the Court to abandon the rule against taxpayer standing; stare decisis makes such a result utopian.[351] Nor should they expect Congress to create taxpayer standing by statute[352]

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347 Local 1545, United Bhd. Of Carpenters & Joiners of Am. v. Vincent, 286 F.2d 127, 132 (2d Cir. 1960).

348 *Id.*

349 *See supra* Part I.B.3.

350 *See supra* notes 22, 110–11.

351 *See supra* Part IV.A; Pushaw, *"Accidental" Plaintiffs*, *supra* note 28, at 105.

352 *See supra* Part IV.B.

or confer taxpayer standing to bring Establishment Clause challenges to tax credits in an Article I court.[353]

Future scholarship and advocacy would be better spent determining whether—true to Justice Kagan's prediction—Congress or state legislatures are in fact laundering direct financial aid to religion by using tax credits in lieu of direct appropriations.[354] Careful thought, not blind optimism, must be given to which litigation strategies will best provide taxpayer plaintiffs the opportunity to challenge such enactments in state or federal court. In the interim, review of Establishment Clause tax credit challenges in federal court will be doubtful.

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353 *See supra* Part IV.C. Litigants could, however, rely on state courts to challenge state tax credit policies on Establishment Clause grounds. *See* Zelinsky, *Driver's Seat*, supra note 199, at 47–52.

354 *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1450–51, 1462–63 (2011) (Kagan, J., dissenting).