

NOTE

A NEW THEORY OF TAXPAYER STANDING

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Abstract

Flast v. Cohen, decided by the Supreme Court in 1968, articulated a narrow exception to the general rule that merely being a taxpayer does not provide the necessary standing to challenge an expenditure of government funds alleged to violate the Constitution. Since the time of Flast, the Court has steadily narrowed the exception, retreating from the underlying rationale of the Flast decision—a trend most recently observable in the Court's decision in Arizona School Tuition Organization v. Winn. This Note proposes a new test for taxpayer standing which aims to preserve the doctrine, while remedying some its ills. Under this Note's proposed test, taxpayer standing is appropriate when the following three factors are met: (1) the taxpayer's status as a taxpayer bears a reasonable relationship to the challenged expenditure of government funds in question; (2) it is of practical necessity because the political system is structurally ill-equipped to provide a remedy for those who object to a particular expenditure of government funds alleged to violate the Constitution, or the taxpayer is a member of the class for whom the especial benefit of a constitutional limitation is intended to directly run; and (3) where no other plausible party has standing to challenge the alleged violation, leaving it functionally irremediable.

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I. INTRODUCTION

Since *Flast v. Cohen*, the Supreme Court has held open a narrow exception to the general rule of standing that merely being a taxpayer is insufficient grounds to invoke the judicial power to challenge an expenditure of government funds alleged to violate the Constitution.¹ The test articulated in *Flast* is that the taxpayer-plaintiff must show two things in order to merit standing. “First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked,” and “[s]econdly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.”² Since that case, however, the Supreme Court has made a steady retreat from the underlying rationale of the *Flast* decision by narrowing the scope of the exception, most recently in *Arizona School Tuition Organization v. Winn*.³ Some members of the court (Justices Scalia and Thomas) would repudiate the decision in *Flast* altogether and completely deny taxpayer standing.⁴

My Note focuses on a new theory of taxpayer standing that remedies the ills of the *Flast* doctrine without resorting to the extreme remedy suggested by Justices Scalia and Thomas. Under this theory, taxpayer standing, which is to say, standing arising solely out of a plaintiff’s status as a taxpayer, is appropriate where: (1) the taxpayer’s status as a taxpayer bears a reasonable relationship to the expenditure of government funds in question; (2) it is of practical necessity because the political system is structurally ill-equipped to provide a remedy for those who object to a particular expenditure of government funds alleged to violate the Constitution, or the taxpayer is a member of the class for whom the especial benefit of a constitutional limitation is intended to directly run; and, (3) where no other plausible party has standing to challenge the alleged violation, leaving it functionally irremediable.

Part II of this Note discusses the current jurisprudence on taxpayer standing. Part III states the problem and explains why the current doctrine is problematic. Part IV develops this new theory of taxpayer standing and demonstrates that it preserves the utility of the *Flast* doctrine in making the guarantees of the Constitution, especially the Establishment Clause, effective without falling prey to the same criticisms leveled against the *Flast* line of cases.

II. BACKGROUND

Article III, Section 2, clause 1 of the Constitution lays out the limits of the judicial branch in our Constitutional system:⁵

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two

¹ 392 U.S. 83 (1968).

² *Id.* at 102.

³ 131 S. Ct. 1436 (2011).

⁴ *Id.* at 1449-50.

⁵ Justiciability does not begin and end here, however. Some limits on the judicial power are embedded in the notion of the relationship among the three branches of the federal government embodied in the Constitution and are not readily found in the Case or Controversy Clause—for example, the political question doctrine.

or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This clause has been named the Case or Controversy Clause, and it has been read to impose the requirement that the judicial power of Article III courts is constitutionally limited to ‘cases’ and ‘controversies.’ Chief Justice Warren characterized this clause as “limit[ing] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process,” and as assigning the judicial branch a particular role and scope in our tripartite system of governance so that it may not unduly interfere with the operations of the other branches of the federal government.⁶

To ask whether an exercise of the power given to the judicial branch by our Constitution is proper in a given context is to ask about its *justiciability*. Justiciability, as Chief Justice Warren writes, is “a concept of uncertain meaning and scope,” which lacks “fixed content,” is not “susceptible of scientific verification,” and is subject to “many subtle pressures” which tend to blur constitutional and policy considerations.⁷ To ask whether a particular plaintiff has *standing* to bring a particular claim before an Article III court is one way of asking whether that particular claim, in relation to that particular plaintiff, is justiciable (although it is not to ask whether the *underlying* claim is justiciable, for although the party at hand may not be proper, others might be). Standing is often regarded as a particularly thorny problem in the law, because it is affected by the “same vagaries that inhere in justiciability” and often serves as shorthand for all of the various elements of justiciability.⁸

These difficulties notwithstanding, the Supreme Court has generally adhered to a relatively simple rule for standing, synthesized and expressed in *Lujan v. Defenders of Wildlife*:

The “irreducible constitutional minimum of standing contains three elements”: (1) “the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical”; (2) “there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly. . . trace[able] to the challenged action of the defendant and not . . . th[e] result [of] the independent action of some third party not before the court’”; and (3) “it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision” (internal quotations and citations omitted).⁹

While this rule generally serves to sensibly cabin judicial power and limit the judiciary’s ability to pass judgment in a purely advisory way, on an issue that is moot or unripe, in litigation that is friendly, or in cases where the controversy is feigned or collusive in nature, it is also seemingly hostile to the idea of taxpayer standing qua taxpayer. Strict

⁶ *Flast*, 392 U.S. at 95.

⁷ *Id.*

⁸ *Id.* at 98.

⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

standing requirements may even leave some otherwise justiciable claims irremediable for want of a party who has standing.

The phrase “taxpayer standing” will be used in this Note to refer to the concept of standing to challenge an exercise of the Congressional Taxing and Spending Power arising solely out of the taxpayer’s status as a taxpayer. Suits which rely upon a theory of taxpayer standing challenge the expenditure of state or federal funds that the taxpayer believes violate the Constitution. This is not the only way in which taxpayers may have standing to challenge federal laws or actions, of course; taxpayers may, *inter alia*, contest their tax liability or directly challenge the constitutionality of the collection of a tax.¹⁰

A. Early Cases and *Flast v. Cohen*

The first modern case to grapple with the issue of taxpayer standing was *Frothingham v. Mellon*, decided in 1923.¹¹ In that case, Frothingham attacked a law passed by Congress, the Maternity Act, on the grounds that it was unconstitutional and would thus increase her tax burden without due process of law.¹² The Court ruled that Frothingham lacked standing to pursue the action on the theory that her interest in the moneys of the treasury was too minute, and the effect upon her future taxation as a result of the expenditure of these funds was too “remote, fluctuating, and uncertain,” to permit an appeal to the court.¹³ They held that the case at bar was distinguishable from past precedents permitting a single taxpayer to “sue to enjoin an illegal use of the moneys of a municipal corporation” because the taxpayer’s interest there is “direct and immediate” and the injunction appropriate.¹⁴

Underpinning the ruling was the belief that the Court did not possess the “power per se to review and annul acts of Congress on the ground that they are unconstitutional.”¹⁵ This belief made the fine distinction that what the Court was actually doing in a case where the enforcement of a legal right conflicted with an unconstitutional law was enjoining the actions of the official, the statute notwithstanding, rather than holding the law itself unconstitutional.¹⁶ Putting aside the metaphysical complexities of the decision, the core ruling that merely being a taxpayer was always insufficient to challenge an act of Congress was well established until the case of *Flast v. Cohen* in 1968.

In *Flast*, taxpayers sued to enjoin the expenditure of federal funds to purchase materials for parochial schools under the Elementary and Secondary Education Act of 1965 on the grounds that such expenditure was contrary to the Establishment Clause of the First Amendment.¹⁷ The Court ruled that the taxpayers in this case had standing, overruling what was thought to be a broad prohibition on taxpayer standing from *Frothingham*, relying primarily upon the unique nature of the Establishment Clause.¹⁸ In the opinion of the court, Chief Justice Warren noted that the decision in *Frothingham* could be read to express either a constitutional prohibition on taxpayer suits or pragmatic considerations of judicial self-restraint.¹⁹ Given the reasons provided in *Frothingham*,

¹⁰ *Follett v. Town of McCormick, S.C.*, 321 U.S. 573 (1944).

¹¹ 262 U.S. 447 (1923).

¹² *Id.*

¹³ *Id.* at 487.

¹⁴ *Id.* at 486.

¹⁵ *Id.* at 488.

¹⁶ *Id.*

¹⁷ *Flast v. Cohen*, 392 U.S. 83, 85-87 (1968).

¹⁸ *Id.* at 103-04.

¹⁹ *Id.* at 92-93.

that the taxpayer interest was minute or remote, and that allowing the suit to continue would open the floodgates of litigation, the latter was the more sound reading.²⁰ The Court found no general constitutional bar to taxpayer suits but laid out two factors, which must be satisfied for such suits to proceed to address the concerns expressed in *Frothingham*. “First[ly], the taxpayer must establish a logical link between that status and the type of legislative enactment attacked,” and “[s]econdly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.”²¹ The first arm of the test is to ensure that a taxpayer may only challenge the constitutionality of exercises of the Taxing and Spending Clause.²² Therefore, taxpayers do not have standing to challenge incidental expenditures of funds ancillary to the administration of essentially regulatory statutes.²³ The second arm of the test demands that the taxpayer show that the challenged law exceeds a specific constitutional limitation put on the exercise of the Taxing and Spending Power, not merely that the law is generally beyond the powers delegated to Congress.²⁴ Simply put, the taxpayer’s claim in these cases must be that his or her tax money was “extracted and spent in violation of specific constitutional protections against such abuses of legislative power.”²⁵

In *Flast*, the Supreme Court held that the Establishment Clause of the First Amendment specifically limited the Taxing and Spending Power conferred on Congress by Article I, Section 8.²⁶ In the majority opinion, Chief Justice Warren stated that the taxpayers seemed to present the same issues of minuteness and remoteness as those in *Frothingham*, but were nonetheless permitted to go on with their suit. This was based on the theory that the Establishment Clause is special insofar as it was intended to prohibit the expenditure of, to use James Madison’s words, even “three pence” of personal taxpayer money to fund the establishment of a state religion, to favor one religion over another, or even to support religion in general.²⁷ Although Chief Justice Warren was careful to note that his decision did not foreclose the possibility of other specific limitations on the Taxing and Spending Power being later announced,²⁸ his ruling and the concurrence by Justice Fortas, who doubted whether there were any other types of Congressional expenditures which could be challenged by a litigant solely on the basis of being a taxpayer,²⁹ cemented the Establishment Clause as a special part of the Constitution for the purpose of taxpayer standing.

B. *Hein, Winn*, and the Development of the *Flast* Exception

In the time since *Flast*, a number of rulings have been handed down which show a general retreat, holding that most taxpayer suits are barred for lack of standing in somewhat varying procedural postures. These cases include *Hein v. Freedom From Religion Foundation*, in which no standing was found where a taxpayer attempted to challenge federal executive actions funded by general appropriations;³⁰ and *Valley Forge Christian College v. Americans United for Separation of Church and State*, in which

²⁰ *Id.* at 93.

²¹ *Id.* at 102-03.

²² U.S. CONST. art. I, § 8.

²³ *See Flast*, 392 U.S. at 103-05.

²⁴ *See Id.* at 104-05.

²⁵ *Id.* at 106.

²⁶ *See Id.*

²⁷ *Id.* at 104.

²⁸ *Id.* at 105.

²⁹ *Id.* at 115 (Fortas, J., concurring).

³⁰ 551 U.S. 587 (2007).

standing was also denied where a taxpayer attempted to challenge an agency decision to transfer federal land pursuant to the Property Clause.³¹ Scholarly commentary has been mixed on the influence of *Flast* and the meaning of the subsequent case law.³² Specific limitations on the Congressional power to tax and spend were not found in the Statement and Account Clause³³ or the Incompatibility Clause.³⁴

In *Hein*, the Court held that federal expenditures by means of executive discretion to spend from a general Congressional appropriation did not permit suits predicated upon taxpayer standing.³⁵ In the majority opinion, Justice Alito reasoned that when the challenged expenditures “were not expressly authorized or mandated by any specific congressional enactment,” the resulting “lawsuit is not directed at an exercise of congressional power . . . and thus lacks the requisite ‘logical nexus’ between taxpayer status ‘and the type of legislative enactment attacked.’”³⁶ This was distinguished from a previous case in which the Court found a sufficient nexus between the taxpayer’s status as a taxpayer and a congressional exercise of the Taxing and Spending Power when administrative disbursements were made pursuant to an agency’s particular statutory mandate.³⁷ The Court declined to extend the holding in *Flast*, which was focused solely upon congressional action, to discretionary Executive Branch expenditures or to government spending as a whole on the theory that *Flast* was a “narrow exception” to the general bar on taxpayer standing which sensibly cabins taxpayer suits.³⁸ Alito argues that the facts of *Hein* make clear that the *Flast* decision correctly prohibits taxpayers from challenging speeches, proclamations, and conferences which otherwise praise religion or the activity of religious people and organizations to prevent federal courts from “superintend[ing], at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials,” or from turning the federal courts into “forums for taxpayers ‘generalized grievances’ about the conduct of government.”³⁹ Finally, Justice Alito acknowledges that if the Executive Branch were to use the funds from a general appropriation to say, build a church or hire clergy, then this ruling does not preclude *all* potential challenges, as there is likely a party with standing to challenge the expenditure based upon more than mere taxpayer status.⁴⁰

Justice Kennedy, concurring in the decision, echoed Justice Alito’s concern that an expansion of *Flast* to Executive Branch expenditures pursuant to general congressional appropriations would lead to undesirable “constant intrusion upon the

³¹ 454 U.S. 464 (1982).

³² See Note, *Taxpayer Suits and the Aggregation of Claims: The Vitiating of Flast by Snyder*, 79 YALE L.J. 1577, 1577 (arguing that *Snyder* vitiates *Flast*); Joel Fifield, *No Taxation without Separation: The Supreme Court Passes on an Opportunity to End Establishment Clause Exceptionalism: Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2533 (2007), 31 Harv. J.L. & PUB. POL’Y 1195, 1207 (arguing that *Hein* was a missed opportunity to unify taxpayer standing law); Note, *Standing in the Mud: Hein v. Freedom From Religion Foundation, Inc.*, 42 AKRON L. REV. 1277, 1278 (arguing that the Supreme Court has continually provided “perplexing decisions in taxpayer standing cases”).

³³ U.S. v. Richardson, 418 U.S. 166 (1974).

³⁴ Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

³⁵ *Hein*, 551 U.S. at 608-09.

³⁶ *Id.*

³⁷ *Id.* at 606-08.

³⁸ *Id.* at 608-09.

³⁹ *Id.* at 611-12.

⁴⁰ *Id.* at 614.

executive realm.”⁴¹ His concurrence adds the further insight 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,” and they “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.”⁴²

Justice Scalia, concurring in the judgment, argues that the Court has two choices in the present matter: (1) *Flast* “should be applied (at minimum) to *all* challenges to the governmental expenditure of a general tax revenues in a manner alleged to violate a constitutional provision, specifically limiting the taxing and spending power”; or (2) “*Flast* should be repudiated.”⁴³ Justice Scalia argues that *Flast* should be repudiated because both the ‘wallet injury’ and ‘psychic injury’ theories do not work. Sufficiently alleging a ‘wallet injury’ is infeasible because it would require satisfying the traceability and redressability prongs of the standing analysis by showing that the plaintiff’s tax bill would have been lower had the allegedly forbidden expenditure not been made and that the government will, “in response to an adverse court decision, lower taxes rather than spend the funds in some other manner.”⁴⁴ On the psychic injury, such a theory does not work because a “taxpayer’s purely psychological displeasure that his funds are being spent in an allegedly unlawful manner” cannot ever be “sufficiently concrete and particularized to support Article III standing.”⁴⁵ This is the case because taxpayers seeking relief that is not concrete and particularized by alleging only general grievances can only expect relief that “no more directly and tangibly benefits him than it does the public at large.”⁴⁶ These grievances, he argues, have their remedy in the political process, not through the courts.

In his dissent, Justice Souter echoed Justice Scalia’s argument that there was no principled reason not to extend the *Flast* decision, if it is good law, to Executive Branch expenditures. As the Establishment Clause applies just as equally to Executive Branch expenditures as it does to legislative exercises of the Taxing and Spending Power, to permit Executive Branch use of appropriated funds to accomplish an unconstitutional end would mean that “Establishment Clause protection would melt away.”⁴⁷ Where Justice Souter and Justice Scalia differ is on the issue of whether *Flast* should be abandoned or maintained. Justice Souter argued that to deny standing because of the vagueness of the plaintiff’s injury in these cases would repudiate prior case law which held, for example, that “being forced to compete on an uneven playing field based on race (without showing that an economic loss resulted)” or “living in a racially gerrymandered electoral district” was sufficient for standing, even though these injuries were no more concrete than seeing one’s tax dollars spent on religion.⁴⁸ To deny standing in these cases, he implies, is to fail to grasp the subtleties of intangible harms and is to repudiate the sensible conclusion the

⁴¹ *Id.* at 617 (Kennedy, J., concurring).

⁴² *Id.* at 618.

⁴³ *Id.* at 618 (Scalia, J., concurring).

⁴⁴ *Id.* at 619.

⁴⁵ *Id.* at 633.

⁴⁶ *Id.* at 634.

⁴⁷ *Id.* at 640 (Souter, J., dissenting).

⁴⁸ *Id.* at 642.

court drew in *Flast*: “[W]hen the Government spends money for religious purposes a taxpayer’s injury is serious enough to be ‘judicially cognizable.’”⁴⁹

The most recent ruling on the matter came in *Arizona School Tuition Organization v. Winn*,⁵⁰ where the Court held that taxpayers lacked standing to challenge a system of tax credits for contributions to school tuition organizations (STOs), which provide scholarships for students attending private schools, many of which are religious.⁵¹ Taxpayers alleged that the system of STO tax credits violated the Establishment Clause of the First Amendment (as applied to the States through the Fourteenth Amendment). In the opinion of the court, Justice Kennedy held that the taxpayers did not meet the conditions of the *Flast* exception permitting standing. Justice Kennedy read *Flast* to demand that money be extracted and spent in order for taxpayers to have standing, and that in the case of tax credits, a credit is not sufficiently like extraction and spending to justify use of the exception.

Additionally, Justice Kennedy argued that tax credits do not implicate individual taxpayers in sectarian activities. Unlike *Flast* (where a dissenting taxpayer knows that his or her money is being extracted and spent to contribute to an establishment in violation of his or her conscience) a tax credit does not extract and spend a conscientious dissenter’s funds in violation of the Establishment Clause or force a taxpayer to give up even three pence of his property for such a project. In the case of tax credits, the taxpayer lacks a sufficient connection between his or her status as a taxpayer and the injury because the causal connection between the dissenting taxpayer and the alleged establishment is nonexistent and any financial injury remains speculative. Taxpayers here failed to give the necessary causal story of the injury. While the State makes STOs possible, private citizens set up the STOs and contribute to them, and the STOs themselves decide where to allocate funds (and some STOs are non-sectarian). In this way, private individuals make the choice to support religious institutions, rather than the government (it is not “fairly traceable to the government”⁵²). Any injunction against the STO system would reduce the funding to the STOs in question but would not affect tax liabilities of taxpayers who choose not to contribute to a religious STO. The injunction would, therefore, not redress the putative injury, and the plaintiffs would lack standing.

Justice Kennedy reads cases since *Flast* to have confirmed Justice Fortas’s statement that taxpayer standing should only be permitted in the case of the Establishment Clause.⁵³ Although cases like *Winn* reached the merits without being dismissed for lack of standing (including a previous incarnation of the *Winn* case which went all the way up to the Supreme Court), Justice Kennedy argues that those cases do not mention standing, and therefore should not be taken to have anything material to say about standing, relying upon the proposition that “[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.”⁵⁴

⁴⁹ *Id.* at 643 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

⁵⁰ 131 S. Ct. 1436 (2011).

⁵¹ Taxpayers may give \$500 for individuals and \$1000 for married couples to an STO of their choice and receive a tax credit. 96% of STOs support parochial schools. *Id.* at 1448.

⁵² *Winn*, 131 S. Ct. at 1448.

⁵³ *Id.*

⁵⁴ *Id.* at 1448-49; see *infra* Part III (b), for a fuller discussion of unacknowledged jurisdictional defects.

Justice Scalia, with whom Justice Thomas joined concurring in the opinion, argues that this whole line of jurisprudence is misconceived and that he would overrule *Flast* thereby removing any exceptions permitting standing. The concurrence is scarcely a paragraph long, but Justice Scalia, in that space, argues that “[u]nder a principled reading of Article III, [the struggles the majority and dissent have in ruling] are unnecessary” because “*Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established.”⁵⁵ Therefore, he would “repudiate that misguided decision and enforce the Constitution.”⁵⁶

In her dissent, Justice Kagan argues that the majority is hopelessly formalistic to the point of reading the *Flast* decision out of the law, at least for clever lawmakers.⁵⁷ The thrust of her argument is that, if *Flast* is to be taken seriously, tax expenditures (tax credits, targeted tax breaks, and the like) cannot be treated any differently than appropriations because they are functionally the same.⁵⁸ Different treatment in courts would permit a legislative body to easily switch between them to avoid an Establishment Clause challenge, allowing them to do an end-run around the *Flast* decision.⁵⁹ Justice Kagan criticizes the central distinction the majority makes between “extraction and spending” and tax expenditure as relying upon a cherry-picked notion of what the *Flast* decision purports to say. She argues that *Flast* does not mean to say that taxpayers have to be able to directly trace any one particular tax dollar which they have paid to the government to an improper funding of religion in violation of the Establishment Clause in order to have standing to challenge the constitutionality of the expenditure.⁶⁰ Rather, in her opinion, all a taxpayer must do is claim that the government has exercised the Taxing and Spending Power in violation of the Establishment Clause.⁶¹ The taxpayer need not directly trace any particular tax dollar that he or she has paid to the challenged disbursement because the evil that the Establishment Clause means to prevent has already happened – namely, that the Taxing and Spending Power has been used to favor one religion over another, or to promote religion generally.

Justice Kagan argues that the *Winn* holding permitting the government to cloak their social agenda as a tax expenditure instead of an appropriation to avoid the threat of challenge from taxpayers is just as absurd as holding that a taxpayer would be barred from challenging an exercise of the Taxing and Spending Power if the government agreed to not use that particular taxpayer’s dollars to fund religion.⁶² In either scenario, the harm which the Establishment Clause meant to prevent has been accomplished because regardless of whose taxpayer money is spent, the government has used it to establish religion.⁶³ Bolstering this argument is the historical point that the particular tax which James Madison, the architect of the Establishment Clause, objected to so vehemently when he wrote *Memorial and Remonstrance Against Religious Assessments* was exactly this sort of tax.⁶⁴ The tax at issue there allowed those objecting to government funding for religious schools to opt out and put their tax dollars into a fund

⁵⁵ *Winn*, 131 S. Ct. at 1450 (Scalia, J., concurring).

⁵⁶ *Id.*

⁵⁷ *Id.* at 1451 (Kagan, J., dissenting).

⁵⁸ *Id.* at 1455.

⁵⁹ *Id.* at 1451.

⁶⁰ *Id.* at 1459.

⁶¹ *Id.* at 1451.

⁶² *Id.* at 1459.

⁶³ *Id.*

⁶⁴ *Id.* at 1461.

the government would use to support non-religious county schools.⁶⁵ Although the particulars may differ slightly between this case and that at issue in *Winn*, the intuitive force of the analogy is strong. As was the case in Madison's time, in *Winn* an individual objecting taxpayer's money will not go to support a religious school, but the government is still using the tax system to establish religion.

III. THE PROBLEM

This section describes the premise of this Note, namely, that taxpayer standing as a doctrine is constitutionally permissible but broken in its present form and therefore in need of a new formulation. Part A outlines the contrary position that taxpayer standing should never be permitted. Part B discusses previous taxpayer standing cases, which have been allowed to proceed to final judgment where jurisdictional defects were allowed to pass *sub silentio*. Part C briefly outlines the result if taxpayer standing is wholly disallowed: that there may well be no remedy for aggrieved taxpayers in certain situations.

A. No Taxpayer Standing

Some jurists and commentators believe that taxpayer standing is never permissible.⁶⁶ The consistent refrain from this camp has been that taxpayer standing is inconsistent with the constitutionally irreducible minimums that have been developed through the Court's Article III jurisprudence.⁶⁷ Plaintiffs are thought, generally, to have two lines of argument when it comes to alleging an injury in these cases. First, they can allege that they have suffered real financial harm because their tax bill would actually be lower if the challenged conduct were to be enjoined. The Supreme Court has been quick to reject this argument as grasping and speculative because taxpayers have not been held to have a sufficiently large interest in the federal treasury to permit standing out of a concern for the fisc.⁶⁸ Furthermore, the Court has been skeptical that the government would lower taxes as a result of any judicial action, making the specific tax burden argument unworkable.⁶⁹ If the challenged conduct were to be enjoined, the government may create a different but similar program or may simply choose to spend the funds somewhere else. Either way, it is highly speculative to say that the overall tax burden of any taxpayer would be lower. The court aptly makes these points in *Frothingham*.⁷⁰

Second, plaintiffs may allege a psychic injury arising out of a violation of the Establishment Clause (or other part of the Constitution).⁷¹ Critics of taxpayer standing have argued that this injury is not concrete and particularized enough to justify standing (in that relief would not particularly benefit any one taxpayer any more than any other citizen), and that the taxpayer really only expresses a general grievance about the operation of government.⁷² The argument goes that general grievances should not be resolved in the judiciary, but rather through the political process.⁷³

⁶⁵ *Id.*

⁶⁶ See *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 618 (2007) (Scalia, J., concurring) (repudiating taxpayer standing doctrine entirely).

⁶⁷ *Id.*

⁶⁸ *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Hein*, 551 U.S. at 619.

⁷² *Id.* at 593.

⁷³ *Id.* at 636.

Many of the arguments for eliminating taxpayer standing, like much of the standing doctrine, blend constitutional and pragmatic concerns seldom differentiating one from the other.⁷⁴ Insofar as a constitutional barrier is concerned, little attention has been given to the constitutional terms of “cases” and “controversies.”⁷⁵ This is not altogether surprising, as the limitations on standing contained in the Constitution are broadly put and require a good deal of work to be defined.⁷⁶ Given the vagueness of the Constitution on this point, it is almost certainly true that the Framers intended the judiciary to come up with a doctrine, perhaps grounded in the historical common-law, that attempts to outline the contours of a case or controversy such that law suits can be sensibly cabined. It is an open question whether courts should follow this implicit invitation and attempt to move beyond the words “case” or “controversy” to consider pragmatic concerns, or attempt to parse their “true” meaning through explication of the constitutional text.

Even if it is agreed that “case” or “controversy” should be the beginning and end points for standing, it is certainly not implausible to think that the constitutionally irreducible minimums that the court has identified for standing are implicit in the words “case” or “controversy” themselves, such that weighing pragmatic and other concerns when deciding on standing is proper constitutional law.⁷⁷ Acknowledging that the Framers may have intended, or that the Constitution and common sense likely compel, the weighing of pragmatic concerns in determining whether something should be labeled a “case” or “controversy” apt to adjudication in the courts, those who argue against taxpayer standing by eliding the distinction between pragmatic and “constitutional” (meaning a formalistic reading of the words “case” or “controversy” themselves) should not be condemned out of hand, because those arguments may well be one and the same. This Note’s new theory of taxpayer standing uses pragmatic reasoning in interpreting Article III’s standing requirements to cabin the doctrine of taxpayer standing itself by weighing prudential reasons. Therefore it would be subject to similar criticism if considering such pragmatic concerns were not justified.⁷⁸

B. Unacknowledged Jurisdictional Defects

That a number of cases likely having jurisdictional defects have been allowed to proceed to judgment on the merits without mention of the standing issue is a key indicator of the weakness in the current taxpayer standing doctrine.⁷⁹ Despite the general proposition that the Court has “an obligation to assure [itself] of litigants’ standing under Article III,”⁸⁰ the current position of the Supreme Court concerning these cases is that, “when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this

⁷⁴ *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

⁷⁵ Justice Scalia’s citation to de Tocqueville in the *Hein* case aside. See *infra* note 82.

⁷⁶ See, e.g., Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (exploring the validity of pluralism in constitutional interpretation, suggesting that no one mode of interpretation will ever suffice).

⁷⁷ See *Lujan v. Defenders of Wildlife*, 505 U.S. 555, 560-561 (1992).

⁷⁸ See U.S. CONST. art. III, (the necessity of consideration of pragmatic concerns in Part III.D, *infra*).

⁷⁹ See *Hibbs v. Winn*, 542 U.S. 88 (2004) (holding that Tax Anti-Injunction Act did not bar taxpayer suit, without mentioning taxpayer standing issue); *Mueller v. Allen*, 463 U.S. 388 (1983) (permitting taxpayers to challenge constitutionality of a tax deduction without mentioning standing issue); *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (permitting taxpayer challenge to school aid statute without mentioning standing issue); *Hunt v. McNair*, 413 U.S. 734 (1973) (permitting taxpayer challenge to South Carolina statutory scheme of aid to colleges without mentioning standing); *Walz v. Tax Comm. of the City of New York*, 397 U.S. 664 (1970) (permitting realty owner to challenge, on a taxpayer theory, tax exemptions for religious organizations without mentioning standing).

⁸⁰ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006).

Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.”⁸¹ This means that “[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.”⁸² Justice Kennedy has justified this position practically, arguing “the Court would risk error if it relied on assumptions that have gone unstated and unexamined.”⁸³

All of that notwithstanding, the patchy application of this jurisdictional barrier presents some evidence of implicit disagreement or confusion concerning the present doctrine.⁸⁴ If the doctrine of taxpayer standing that has grown out of *Flast* really were so clear, then courts should have no problem applying the relevant standard, especially when doing so would reduce the burden on all parties by dismissing litigation at the very outset of cases. Poor conformity with what appears to be a relatively simple rule, in spirit at least, is evidence for one or both of the following two propositions: (1) *Flast* is confusing, and therefore is not applied when it should be; or (2) *Flast* does not conform with intuitive notions of justice, and therefore its poor application indicates implicit disagreement with its holding.⁸⁵ It is difficult to divine which of these two forces is at work in any particular case. Either way, the consistent ability for jurisdictional defects to pass *sub silentio* indicates that the current doctrine is broken.

This idea is supported by the failure of the Supreme Court to rule on the issue of taxpayer standing in *Hibbs*, when the case first came before the Court. The Court held that the Tax Anti-Injunction Act did not bar the suit.⁸⁶ Justice Kennedy deals with this shortcoming in *Hibbs*’s second iteration using a mere in-line citation: “cf. *Hibbs v. Winn*, 542 U.S. 88, 124 S.Ct. 2276, 159 L.Ed.2d 172 (reaching only threshold jurisdictional issues).”⁸⁷ This is both an unsatisfying explanation of what happened in the first iteration and an invitation to ask whether some jurisdictional issues are not threshold issues. It is absurd to attempt to define a jurisdictional barrier imposed by statute⁸⁸ as somehow logically prior to one embedded in the Constitution itself. If the basic requirements laid out in Article III were not satisfied, it is impossible to see how the Tax Anti-Injunction Act matters at all—the case should simply have been dismissed for lack of standing. *Hibbs v. Winn* would have been the perfect time to indicate that the plaintiffs’ first trip to the Supreme Court was all for naught, regardless of the applicability of the Tax Anti-Injunction Act, because *they lacked standing to bring their claim anyway*.⁸⁹ Instead, the decision does not address the issue of standing. In fact, in none of the three opinions which were filed does the word ‘standing’ appear at all. If the judicial sensibilities of the Justices of the Supreme Court were so offended by the specter of taxpayer standing in the second time around, it is baffling that none of them had anything to say about it the first

⁸¹ *Hagans v. Levine*, 415 U.S. 528, 533 n.5 (1974).

⁸² *Ariz. Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011).

⁸³ *Id.* at 1449.

⁸⁴ See, e.g., Jeff Todd, *Undead Precedent: The Curse of a Holding ‘Limited to its Facts,’* 40 TEX. TECH. L. REV. 67 (explaining that decisions are sometimes limited to their facts because of a later judicial determination that they were wrongly decided).

⁸⁵ *Id.*

⁸⁶ *Hibbs v. Winn*, 542 U.S. 88 (2004).

⁸⁷ *Ariz. Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011).

⁸⁸ *Hibbs*, 542 U.S. 88 (2004). was concerned with the applicability of the Tax Anti-Injunction Act to the same facts.

⁸⁹ Remember the principle laid out in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006), which said that the Court must assure itself of litigants’ standing under Article III.

time the case came before the Court. It is especially remarkable given the limited number of cases the Court takes on. There is a slim likelihood that the same plaintiffs would reach the Court twice, much less to resolve yet another jurisdictional question.

C. Unavailability of Other Remedies

Taxpayer standing may be an imperfect doctrine, but it is necessary in certain situations because of the unavailability of other remedies. Take, for example, the case of the tax credits at issue in *Winn*.⁹⁰ If the plaintiffs there are prohibited from bringing suit to challenge the tax credit, there are no other parties with proper standing. The Acting Solicitor General for the United States, as amicus curiae in support of the petitioner Arizona School Tuition Organization, acknowledged this fact at oral argument in front of the Supreme Court.⁹¹ As no other direct procedural or administrative remedy is available, the only remedy has to come from the political process. There are good arguments supporting the proposition that general grievances against the government should not be adjudicated in the courts. Allowing general grievances to be adjudicated in courts could result in turning the judiciary into a constant, overreaching, and odious monitor of the functioning of the other branches of government.⁹² However, the political process should not be entrusted with remedying all ills. If the conduct at issue truly violates the Establishment Clause, and is the functional equivalent of conduct which could fairly be challenged in court, it would be to exalt form over substance and effectively abdicate the responsibility of enforcing the Constitution to call the challenged conduct non-justiciable.⁹³

IV. SOLUTION

A. Why Have Taxpayer Standing At All?

Before laying out any theory of taxpayer standing, it is necessary to refute the argument that Justice Scalia voices in *Winn* and *Hein* that taxpayer standing should not exist at all because the injury alleged in such cases is not concrete and particularized, but rather expresses a general grievance not certain to be remedied by the sought-after relief.⁹⁴

The contention that the injury alleged in taxpayer standing cases is not concrete and particularized is foundationally weak and fails to grasp the real crux of taxpayer

⁹⁰ *Winn*, 131 S. Ct. 1436.

⁹¹ Transcript of Oral Argument at 8, *Ariz. Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (No. 09-987).

⁹² *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 593 (2007).

⁹³ The effect of the *Winn* decision can be seen in state taxpayer standing doctrine. For example, in Missouri there is reason to believe that the doctrine has been tightened in conformity with the majority's reasoning in *Winn* to disallow taxpayer suits. See *Manzara v. State*, 343 S.W.3d 656 (Mo. banc 2011) (holding that taxpayers did not have standing to challenge redeveloper tax credit as a matter of Missouri constitutional law, relying upon *Winn*).

⁹⁴ *Hein*, 551 U.S. at 633-634. This, of course, is tantamount to saying that there is no "case" or "controversy" here. Justice Scalia is content to let Alexis de Tocqueville do some of the arguing in an important passage in *Hein* where he quotes de Tocqueville as having written that "judicial censure, exercised by the courts on legislation, cannot extend without distinction to all laws, for there are some of them that can never give rise to the sort of clearly formulated dispute that one calls a case." A. de Tocqueville, *Democracy in America* 97 (H. Mansfield & D. Winthrop trans. and eds. 2000). Justice Scalia, realizing that by repudiating the *Flast* doctrine wholly he is saying that there is no case here, throws the onus onto this de Tocqueville quote in the *Hein* case rather than say it himself. Three points bear making: (1) what de Tocqueville wrote should have no bearing upon what the Supreme Court thinks of taxpayer standing, (2) he wrote in French, and (3) he may well have been speaking metaphorically about whether you can call certain suits "cases."

standing cases. To allege that the government has used its funds to violate the Establishment Clause is both concrete, in that it identifies a real, albeit intangible harm, and particularized, in that the harm is being worked upon the individual taxpayer.⁹⁵ As Justice Souter argues in *Hein*, standing was conferred in cases where parties were being forced to compete on an uneven playing field as a result of race (with no corresponding economic loss) or were harmed by living in a gerrymandered district.⁹⁶ These examples surely represent no more concrete harms than seeing the government spend tax dollars in violation of the Establishment Clause. Merely because the harm is being distributed amongst all taxpayers does not mean that the injury is not “particularized.” Connecting particularity with generality is a poor way of conceptualizing the animating spirit of the particularity requirement because it foists a false dichotomy on readers—“particular” versus “general.” The opposite of “particular” is not “general”; rather, it is “nonspecific.” Harms can be both general and particular if they affect all people equally.

It is not irrational to say that where all taxpayers are harmed equally, they all possess standing because they have suffered individually, and therefore have a particularized injury, although the conduct complained of afflicts them all in common. Holding that particular is incommensurate with general is like saying that the victims of a mass tort have only suffered a general and not particularized harm. Each individual victim has suffered a particular injury as a result of the tortious conduct, although it may well affect each in the class of affected persons equally. If an injury is not particular that really means it is nonspecific, which is to say that it is unclear if the plaintiff who has brought the suit has suffered a *specifically personal* and *cognizable* injury. Some psychic harms, like those arising from violations of the Establishment Clause, are both specified, in that they are individualized and are alleged with particular facts, and are cognizable, in that they represent a violation of a legally recognized right. In such cases, the harm is particularized. When the harm is a general psychic harm, but a person has not individually suffered that harm, then the harm is not sufficiently particular to that person. Although the conduct may well have been sufficient to engender real harm, *it has not done so for that person.*⁹⁷

On Justice Scalia’s point that general grievances should not be aired in court, plaintiffs in taxpayer standing suits are indeed presenting broad complaints about the

⁹⁵ See, William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 232. (arguing for a robust understanding of cognizable harms, including psychic harms in the case of the Establishment Clause).

⁹⁶ *Hein*, 551 U.S. at 642.

⁹⁷ See, *Federal Election Commission v. Akins*, 524 U.S. 11, 24 (1998). One might say, in response to this, that merely pleading that you have suffered the requisite psychic harm is enough to get over this hurdle. That may be correct. However, this does not mean that violations of the Establishment Clause or other parts of the Constitution which cause purely intangible and psychic harms should therefore not be cognizable (see *supra* note 90)—these cases just present situations in which the ‘particular’ harm requirement is not particularly high. In some cases, alleging particular harm, like in the case of a mass tort where a plaintiff alleges physical injury will present a real hurdle, in that the plaintiff will have to show that he or she has suffered the complained of injury. Merely because the “particularized” injury requirement may not present a serious hurdle in taxpayer standing cases is not a good reason to deny standing. Justice Breyer ably makes some of the points I make in this section in *Federal Elections Commission v. Akins*: “Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’” In other words, generality does not disqualify a claim; the abstractness which often goes with it creates the problem. Justice Breyer also makes the analogy to mass tort claims and interference with voting rights claims as examples of generalized harms which are nonetheless concrete enough to confer standing.

manner in which the government is spending money, but they are coupled with an individualized complaint about how their tax dollars are spent and comes in a special context. Insofar as taxpayers, and not citizens at large, may properly possess standing to challenge an exercise of the Taxing and Spending Power or other expenditure of government funds, their status as a taxpayer guarantees that there is a direct relationship between that status and the complained of injury. When these complaints arise in the context of the Establishment Clause, taxpayers can only allege a grievance which is general because the establishment of religion is not an act which is typically targeted, in any meaningful sense at least, at a particular person or group of persons. It would be nonsensical to hold that complaints which can be characterized as “general” cannot be used to challenge conduct alleged to violate the Establishment Clause because that would be tantamount to holding that the Establishment Clause cannot be judicially enforced at all.⁹⁸

Reduced to its simplest form, Justice Scalia’s argument is that the judiciary lacks the power to invalidate exercises of the Taxing and Spending Power that violate the Establishment Clause because there is no perfect party to bring suit and remedy the violation. What this argument fails to grasp is the fundamental difference between proper taxpayer standing cases and the general class of cases where the perfect party to bring suit cannot be found. In the latter cases, the inability to find the proper plaintiff suggests that there has been no harm,⁹⁹ and in the former cases, the inability to find the proper plaintiff suggests that the harm is not one which is easily *cognizable*.

If tax expenditures and appropriations are functional equivalents,¹⁰⁰ the conclusion follows that the harm that each can cause is the same.¹⁰¹ The only problem is that it is difficult to attach the harm to a particular citizen. In some cases, this difficulty will be enough to bar suit because the harm complained of is not the proper type of harm (e.g., when Congress passes a poorly conceived and injurious law that is nevertheless constitutional) or because the harm is *de minimis*, and thus is not felt by any particular citizen acutely enough (e.g., expenditures to religious institutions in pursuit of a legitimate regulatory regime).¹⁰² However, there are cases where the harm complained of is uniquely constitutional and of the proper magnitude, but for which there is no perfect plaintiff to bring suit.¹⁰³ In these cases, it would be sensible to have a doctrine that permits taxpayers qua taxpayers to challenge unconstitutional exercises of the Taxing and Spending Power when there is no other remedy reasonably available.

⁹⁸ Justice Ginsburg aptly makes this point in the oral argument of *Ariz. Sch. Tuition Org. v. Winn*. See Transcript of Oral Argument at 8, *Ariz. Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

⁹⁹ See, e.g., *U.S. v. Fruehauf*, 365 U.S. 146, 157 (1961) (re-affirming the prohibition against advisory opinions because they fail to present a “clash of adversary argument”).

¹⁰⁰ See *Winn*, 131 S. Ct. at 1455.

¹⁰¹ Courts should be careful not to dismiss Establishment Clause harms as those which arise from the paranoid delusions or political machinations of religious zealots and militant atheists. See Marshall, et. al., *supra* note 96, at 232-47 (explaining how the Establishment Clause was designed to protect against psychic injury and elucidating the types of cognizable psychic injury, including denominational harms, “corruption” harms, and others).

¹⁰² *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

¹⁰³ See, e.g., *Winn*, 131 S. Ct. at 1455 (holding that even assuming the taxpayers were sufficiently harmed, issues of redressability and causation pre-empted the court from finding that the taxpayers had standing).

It can be said in response to this contention that suits predicated upon taxpayer standing are really just advisory opinions masquerading as legitimate suits.¹⁰⁴ To that, there are two retorts. First, in cases where the Taxing and Spending Power is being challenged by a taxpayer solely upon the basis of his or her taxpayer status, there is a reasonably direct link between the complained of behavior (uses of government funds or preferences) and the plaintiff's taxpayer status. Whatever else may be said about them, these suits are not *purely* advisory.¹⁰⁵ Second, any impression that these suits are asking for decisions which are advisory, and thereby asking the judiciary to unduly encroach upon the legitimate domain of the legislature, is a result of the unique nature of the harm and not because of judicial overreach. In many situations, the legislature has manipulated the system, whether consciously or not, to make it difficult to identify a suitable plaintiff. However, the essential character of the violation has not changed, whether it is classified as a tax credit or tax expenditure (or any other like switch). There is no reason to think the types of conduct taxpayers have heretofore challenged invoke a particularly sensitive domain that the judiciary should label non-justiciable. Allowing pedestrian tax expenditures to be unchallengeable is to exalt form over substance and to unduly shackle the judiciary to rank formalism.

B. Non-Justiciability

Rather than create an exception to the standing doctrine, some would simply leave many questions that can be reached only by allowing taxpayer standing (e.g., the tax credit in *Winn*)¹⁰⁶ outside of the reach of the courts—which is to say, non-justiciable.¹⁰⁷ This argument invokes the strong form of justiciability, that the underlying controversy is simply something that the judiciary is not competent to rule upon, rather than the weak form of justiciability, that the proper parties are not before the court or that the issue is unripe or moot, but not that the underlying issue is non-justiciable.¹⁰⁸ An advisory opinion may, of course, touch upon political questions that are themselves non-justiciable, but their major weakness is that they are non-justiciable in the weak form because the proper party is not present although the underlying issue is suitable for adjudication in the courts. Casting taxpayer standing cases as falling prey to the same objections as advisory opinions fails to recognize that the characterization has transmuted a relatively weak form of non-justiciability (one that is concerned about the messenger) into a much stronger one (one that precludes any discussion of the message). Unlike the prohibition on advisory opinions generally, a characterization of taxpayer standing as advisory would lead to the preclusion of litigating the underlying issue. This is not to say

¹⁰⁴ Advisory opinions are not permissible as a matter of the oldest and highest authority, notwithstanding the English practice. See *Hayburn's Case*, 2 U.S. 408, 409 (1792) (holding that the Attorney General could not solicit the Supreme Court, ex officio and without an application from any particular person, for a writ of mandamus to compel the execution of an act of Congress); JOHN JAY, CORRESPONDENCE & PUBLIC PAPERS OF JOHN JAY, Vol. 3, 486-89. (Henry P. Johnston, A.M. ed., 1st ed., 1891).

¹⁰⁵ See Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 644 (1992) (arguing that the term "advisory opinion" has been used widely and confusingly to discuss both a constitutional bar and a pragmatic bar, but that the only constitutional bar to advisory opinions comes in the case of pre-enactment/pre-action review or a political question and that decisions in cases of mootness, un-ripeness, and lack of standing are not constitutionally barred).

¹⁰⁶ *Winn*, 131 S. Ct. at 1436.

¹⁰⁷ *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 618 (2007).

¹⁰⁸ See Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 129-138 (2007) (arguing that mootness, ripeness, advisory opinions, and standing are non-justiciable in a weaker way than the political question doctrine in a purpose-based approach to justiciability).

that there would be no remedy for the grievances taxpayers assert in these cases; the remedy would just have to be political in some fashion.¹⁰⁹

There is good reason to think that not all constitutional questions are justiciable. The issue must be ripe and not moot, the parties truly adverse, and the issue not solely hypothetical (which is to say, not advisory).¹¹⁰ Outside of these, there are good reasons for invoking the strong form of non-justiciability. In the Supreme Court's political question jurisprudence, it has identified six factors for determining whether an issue should not be decided upon in the courts: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."¹¹¹ The following have been found to be political questions not apt to adjudication in the courts: what constitutes a republican form of government under the Guarantee Clause,¹¹² what constitutes an Indian tribe,¹¹³ the mode of amending the federal Constitution,¹¹⁴ and the nature of impeachments.¹¹⁵

As they relate to taxpayer standing, none of these six factors weigh towards invoking a strong form of non-justiciability with respect to those underlying issues that can only be reached through taxpayer standing suits. As a threshold matter, the second factor, a lack of judicially discoverable and manageable standards, is merely judicial lip-service to the idea of a restrained judiciary and has no real meaning. As the Court has succeeded in giving meaning to nebulous concepts like "due process,"¹¹⁶ what lurks within the Ninth Amendment,¹¹⁷ and the shadows and penumbras cast by the various constitutional amendments,¹¹⁸ it is not unreasonable to think that a judicial standard for taxpayer standing is "discoverable" and "manageable." Plainly, factor five, an unusual need for unquestioning adherence to a prior political decision, is inapplicable to taxpayer standing—that factor is for such weighty matters as foreign policy and the prosecution of a war or armed conflict. Factors four (due respect to coordinate branches of government) and six (potential for multiple pronouncements by various departments on one question) are also inapplicable to taxpayer standing—there is no other branch of government equipped to rule upon the constitutionality of a general assessment or tax expenditure, so there is no risk of multiple pronouncements or a lack of respect for coordinate branches. Factor one (textually demonstrable commitment to another branch) is inapplicable as the

¹⁰⁹ See discussion *infra* Part III.D.2 (discussing possibility of political remedies in this situation).

¹¹⁰ See Siegel, *supra* note 109, at 129-38 (considering a purpose-based approach to justiciability which preserves many of the traditional categories of justiciability).

¹¹¹ Baker v. Carr, 369 U.S. 186, 217 (1962).

¹¹² Luther v. Borden, 48 U.S. 1 (1849).

¹¹³ U.S. v. Holliday, 70 U.S. 407 (1865).

¹¹⁴ Coleman v. Miller, 307 U.S. 433 (1939).

¹¹⁵ Nixon v. United States, 506 U.S. 224 (1993).

¹¹⁶ See, e.g., Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988) (discussion of substantive due process).

¹¹⁷ See Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (holding that the right of marital privacy is a "personal right 'retained by the people' within the meaning of the Ninth Amendment").

¹¹⁸ *Id.* at 484 (holding "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help to give them life and substance").

Constitution does not obviously lodge responsibility on this matter in any branch, least of all the Legislative or Executive Branches. Finally, factor three (need for nonjudicial policy determination) is inapplicable—the court managed to rule upon the constitutionality of what amounts to the functional equivalent of a tax credit (*Winn*) in *Flast* without having to make any sort of non-judicial policy determination.¹¹⁹

Given the inapplicability of the underlying rationale of the political question doctrine, to some of the underlying questions of taxpayer standing which would otherwise be rendered non-justiciable, there is good reason to think that a judicial remedy should exist. This is especially true where the political system is structurally ill-equipped to give a political remedy to the aggrieved taxpayer.¹²⁰

C. An Analogy to *Ultra Vires* Corporate Actions

When a corporation has exceeded the legal authority granted to it by its charter, an *ultra vires* derivative action may be brought by shareholders to enjoin the conduct, or, in extreme cases, an action may be brought *quo warranto* by the State Attorney General to dissolve the corporation.¹²¹ Such an action protects minority interests in the corporation from being subjugated to those of the majority by allowing the minority party to step into the shoes of the corporation to enforce the guiding principles of the charter that govern their association.¹²² Not only can the minority shareholders bring a suit on behalf of the corporation to enjoin *ultra vires* conduct, it is a longstanding rule that an *ultra vires* action cannot be ratified by the shareholders of a corporation, as it was never within the authority of the corporation to engage in that conduct in the first place.¹²³ This further protects minority shareholders from the intense pressure that the majority shareholders may use in the attempt to get minority shareholders to vote for ratification in order to cleanse the *ultra vires* conduct. The rationale behind the procedural safeguards that have been put in place to enforce the rights of minority viewpoints in the corporate context applies, and with much greater force, to the constitutional question at hand.

The Constitution, much like a corporate charter, governs the association between government (analogous to the directors and officers of a corporation) and citizens (analogous to shareholders). While the Constitution is meant to preserve and promote democratic ideals, including that of majority rule, it contains an unmistakable counter-majoritarian strain, which is meant to protect the interests of minority viewpoints. Amongst other things, these protections include the preservation of the right not to have to contribute to a government that establishes a religion. If, in the corporate context, minority shareholders are empowered to enforce the guarantees of the foundational document that governs their association with other shareholders and with management by

¹¹⁹ *Flast v. Cohen*, 392 U.S. 83 (1968).

¹²⁰ This is incorporated into the test articulated in Part III.D, *infra*.

¹²¹ Today, most corporations (other than municipal corporations) have as their purpose something like, “any lawful purpose . . .” As such, the only truly *ultra vires* action for these corporations is an illegal action. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1307 (2001) (explaining the continued vitality of the *ultra vires* doctrine in modern corporate law); Comment, *Quo Warranto and Private Corporations*, 37 YALE L.J. 237, 239 (1927) (relating *quo warranto* proceeding to the corporate context).

¹²² See Greenfield, *supra* note 122, at 1304-07 (noting that the *ultra vires* doctrine protected shareholders by limiting corporate activities to those enumerated in the charter and that a sole dissenting shareholder could sue to enjoin *ultra vires* actions, even if all other shareholders assented).

¹²³ *Cal. Nat’l Bank v. Kennedy*, 167 U.S. 362, 367 (1897) (citing both to American and English cases holding for the proposition that an *ultra vires* action cannot be ratified).

employing unique procedural mechanisms (the derivative action) and by enshrining counter-majoritarian principles into the fabric of corporate law (the idea that *ultra vires* actions cannot be ratified), then there is equal or better reason to protect citizens with minority viewpoints from violations of the foundational document that is the bedrock of our society by providing them with counter-majoritarian principles (the Establishment Clause) and unique procedural mechanisms (taxpayer standing).

D. A New Theory of Taxpayer Standing

This new theory of taxpayer standing conceives of all questions of standing as constitutional questions. Insofar as an examination of standing requires pragmatism to be sensible at all, such considerations cannot be divorced from the project of constitutional interpretation — pragmatic concerns are baked into the analysis of whether the legal conclusions of “case” or “controversy” are affixed to a particular dispute, rendering it apt to adjudication in the courts. This test for taxpayer standing is informed by pragmatic concerns, but it is not any more antithetical to constitutional interpretation than any other attempts to use pragmatism to define the boundaries of the standing doctrine.

This is a more sensible route than separating “constitutional” from “pragmatic” types of standing requirements. Separating those requirements, makes the doctrine even more complicated by imposing two different types of barriers, as the Court acknowledges it has done in *Elk Grove Unified School District v. Newdow*.¹²⁴ Forcing would-be litigants to jump through an additional hurdle *not required* by the Constitution to vindicate constitutional rights is simply improper. If no pragmatic limitation can be found in Article III itself, it should not be imposed upon prospective plaintiffs.¹²⁵

Hence, this Note proposes the theory that taxpayer standing is appropriate where: (1) the taxpayer’s status as a taxpayer bears a reasonable relationship to the expenditure of government funds in question; (2) it is of practical necessity because the political system is structurally ill-equipped to provide a remedy for those who object to a particular expenditure of government funds alleged to violate the Constitution or the taxpayer is a member of the class for whom the especial benefit of a constitutional limitation is intended to directly run; and (3) where no other plausible party has standing to challenge the alleged violation, leaving it functionally irremediable.

1. Reasonable Relationship to Challenged Expenditure

The *Flast* test expresses broadly the same concerns as this first prong. It says that the taxpayer must do two things to have standing: (1) “establish a logical link between [status as a taxpayer] and the type of legislative enactment attacked”; and (2) “establish a nexus between that status and the precise nature of the constitutional infringement alleged.”¹²⁶ The main problem with the *Flast* test is that it is turbid and confusing. The first part of the test is meant to express the idea that a party can only challenge exercises of the Taxing and Spending Clause of the Constitution. This part of the test is unclear and without a sound foundation. As Justice Scalia and Justice Souter argue in *Hein*, whether the expenditure of government funds were to be effected by the Executive Branch, pursuant to a general appropriation, or the Legislative Branch as a direct exercise of the Taxing and Spending Power, the Establishment Clause (or any other part of the

¹²⁴ 542 U.S. 1, 11 (2004).

¹²⁵ *But see* Judge Posner, who appears to approve of these separate requirements, in *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d. 652, 655-656 (7th Cir. 2011).

¹²⁶ *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

Constitution) can be violated just the same.¹²⁷ In keeping with the criticism of the *Winn* decision articulated in Part II.C, courts should not exalt form over substance, especially when it may allow an end-run around the Establishment Clause. Were the legislature to give a general appropriation subject to executive discretion with full knowledge that the Executive Branch would use that money to violate the Establishment Clause, the courts should not be prevented from adjudging the expenditures to be unconstitutional regardless of formalistic distinctions.¹²⁸ Even if such a scheme were not at issue, the fear expressed in *Hein* that the power of the judiciary would be improperly expanded by turning courts into constant monitors of governmental functions is ameliorated by the remaining two prongs of the test articulated in this Note.¹²⁹

The second prong of the *Flast* test incorporates the idea that “the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional Taxing and Spending Power and not simply that the enactment is generally beyond the power delegated to Congress by Art. I, § 8.”¹³⁰ This part of the test makes sense as a limitation on purely advisory opinions or as attempting to cabin the scope of taxpayer suits, such that taxpayers cannot challenge laws which have nothing to do with the use of their tax dollars. It does not make sense, however, when used to limit the scope of taxpayer suits to only Establishment Clause challenges. If taxpayer standing should not be permitted under parts of the Constitution other than the Establishment Clause, then the most rational way to find this limitation is not to argue that those other parts of the Constitution do not place specific limitations on the power of Congress under the Taxing and Spending Power. Indeed, the other limitations contained within the First Amendment, the Second Amendment, the Fifth Amendment, and all of the other parts of the Constitution place specific limitations upon Congress’ power, including their power under the Taxing and Spending Power. The reason taxpayers should not be able to challenge laws which are alleged to violate those parts of the Constitution comes either (1) from the fact that a taxpayer’s status as a taxpayer does not bear a reasonable relationship to the challenged law (think of a law which allowed federal prosecutors to hold people to account for capital offenses without a presentment of indictment by Grand Jury, which is plainly in violation of the Fifth Amendment, but which lacks a reasonable relationship to a taxpayer’s status qua taxpayer); or (2) from the fact that taxpayer standing is not necessary because a better party would have standing. In sum, taxpayer standing may be appropriate only in cases of Establishment Clause violations, but that is not because other parts of the Constitution do not place specific limitations upon Congress’ power under the Taxing and Spending Power; rather, it is because either the challenged conduct bears no reasonable relationship to the plaintiff’s status as a taxpayer or taxpayer standing is unnecessary because of another party who would otherwise have standing.

Requiring only that the taxpayer’s status as a taxpayer bear a reasonable relationship to the challenged governmental expenditure does away with much of the confusion in the *Flast* test without sacrificing any of its animating spirit. Additionally, it has the added benefit of avoiding the formalistic line-drawing which has led to the absurdity attendant to exalting form over substance. Surveying some of the key cases in

¹²⁷ *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 618 (2007) (Scalia, J., concurring) (Souter, J., dissenting) (plurality opinion).

¹²⁸ *Hein*, 551 U.S. at 618.

¹²⁹ See *infra* Parts III.D.2 and III.D.3 (giving the two other prongs of the test).

¹³⁰ *Flast*, 392 U.S. at 102-03.

this area, like *Winn*,¹³¹ which presented a state tax credit alleged to violate the Establishment Clause, asking whether the taxpayer's status as a taxpayer bears a reasonable relationship to the challenged conduct yields a clear answer: yes. In the *Flast* case,¹³² the use of government money to buy textbooks and otherwise support religious education bears a sufficiently reasonable relationship to the plaintiff's status as a taxpayer to confer standing. In *Frothingham*,¹³³ although the Maternity Act may not present a particularly *good* case, the expenditure of government funds by an administrative agency bears a reasonable enough relationship to the plaintiff's status as a taxpayer to confer standing. In *Hein*,¹³⁴ the President's praise for religious-based organizations and speeches which used religious imagery, although perhaps costing the federal government *something*, did not bear a reasonable enough relationship to the plaintiff's status as a taxpayer to confer standing. A criticism might be leveled that this approach packs some elements of judgment on the merits of a case into this analysis, but merits are not always necessary to determine that a reasonable relationship does not exist and consideration of some of the merits may not always be unadvisable (this same criticism has been leveled at the Supreme Court's pleading requirements jurisprudence).¹³⁵ In *Valley Forge*,¹³⁶ the transfer of government-owned real property to religious institutions is not different enough to justify denying standing, because real property requisitioned as part of a taking and compensated out of the federal coffers implicates the same interests so far as the taxpayer is concerned as other types of extraction and disposition. Remember, this survey of taxpayer standing cases has only been examined with regards to the first prong of this Note's test—there may well be other reasons to deny standing that come from the other two prongs.

2. Political Remedy

The second prong of this test articulates that standing should be conferred where it is of practical necessity because the political system is ill-equipped to provide a remedy for those who object to a particular expenditure alleged to violate the Establishment Clause or any other part of the Constitution.

The Supreme Court has acknowledged in its Equal Protection jurisprudence that insular or discrete minorities who lack political power sometimes merit additional protection in the form of intermediate or strict scrutiny. The factors for granting heightened scrutiny were well collected by the Second Circuit in *Windsor v. United States*.¹³⁷ The Second Circuit said that the following considerations are relevant: (1) “whether the class has been historically subjected to discrimination”; (2) “whether the

¹³¹ *Ariz. Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

¹³² *Flast*, 392 U.S. 83.

¹³³ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

¹³⁴ *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007)

¹³⁵ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007). Academic angst reached its peak with articles such as: Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (arguing that federal pleading standards are “in crisis”); Brian S. Clarke, *Grossly Restricted Pleading: Twombly/Iqbal, Gross, and Cannibalistic Facts in Compound Employment Discrimination Claims*, 2010 UTAH L. REV. 1101, 1141 (arguing that Twombly/Iqbal has effectively destroyed the viability of compound employment discrimination claims); Arthur R. Miller, *From Conley to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (arguing that our very democratic ideals are threatened by these decisions); and many others.

¹³⁶ *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

¹³⁷ *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

class has a defining characteristic that frequently bears a relation to ability to perform or contribute to society”; (3) “whether the class exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group”; and (4) “whether the class is a minority or politically powerless.”¹³⁸ This is not to say that immutability and political power are dispositive—minors and aliens deserve strict scrutiny despite either being mutable or having political power. If the scales of justice can be manipulated in the *final* judgment on the basis of whether the party is a member of a discrete or insular minority, or otherwise merits such treatment, surely it is not too reaching to say that a pragmatic doctrine like standing should be sensitive to similar concerns.

This part of the test should not be interpreted to say that just because it is *difficult* to obtain relief through the political system, this part is satisfied; rather, the requirement encompasses only those situations in which the political system is structurally ill-equipped to provide a remedy, parallel to those situations in which insular or discrete minorities are thought to lack power in Equal Protection jurisprudence. For example, the Affordable Care Act (“Obamacare”)¹³⁹ may well be difficult to repeal through the exercise of the political process and taxpayers may think that it is unconstitutional (and may still think so after *The Health Care Cases*),¹⁴⁰ but that does not mean that the political system is structurally ill-equipped to provide a remedy. What is structurally ill-equipped to provide a remedy in the context of this test is a nuanced point, but generally, when, as a result of the fact that a taxpayer is a member of an insular minority or has immutable qualities possessed by the relevant group to which he or she belongs (the group to which the Constitutional violation is particularly offensive) that taxpayer has less than the typical amount of political power. Then, the taxpayer may not be able to get effective relief through the political process and the political system is structurally ill-equipped to provide that relief.

The foregoing is not meant to say that a plaintiff must necessarily be a member of an insular or identifiable minority in order for taxpayer standing to be proper. In situations where the plaintiff is a member of the class for whom the especial benefit of a constitutional limitation is intended to directly run, taxpayer standing may be proper. For example, those who object to the establishment of a national religion, despite being a member of the religion that the government intends to establish may satisfy the second prong of this test. This is to be contrasted with the situation in *Frothingham*, where the taxpayer objected to the expenditure of federal funds in support of mothers.¹⁴¹ She was neither a member of an insular or identifiable minority for whom the political system was ill-equipped to provide a remedy, nor was she a member of the class for whom the especial benefit of the constitutional limitation she invoked (the Tenth Amendment) was intended to directly run (the direct benefit runs to the States, and then to the people, the ultimate beneficiary of all constitutional limitations).¹⁴² There are two ways of conceiving of such an approach: (1) that as a result of the specific constitutional limitation in question, it may be assumed that the dissenter is a member of a politically weak group for whom the constitutional limitation was put in place to protect; or (2) for those whom the

¹³⁸ *Id.* at 181 (internal quotations and citations omitted) (gathering factors from *Bowen v. Gilliard*, 483 U.S. 587 (1987) and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

¹³⁹ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 STAT. 119.

¹⁴⁰ *Nat’l Fed’n of Ind. Bus.v. Sebelius*, 132 S. Ct. 2566 (2012).

¹⁴¹ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

¹⁴² *Id.*

benefit was specially intended to directly run to, their interest in the enforcement of that constitutional limitation is particularly important and meaningful.

This part of the test is meant to protect those groups for whom violations of the Constitution, especially the Establishment Clause, are particularly odious and for whom it would be difficult to effectively petition the political branches of government for relief. It is also meant to track the idea that taxpayer standing is a last resort of sorts, that should only be conferred when there is reason to suspect that constitutional violations will otherwise go un-remedied.

Looking at key cases of interests, it is fairly clear that in *Flast*, *Winn*, and *Valley Forge*, the plaintiffs are members of the class for whom the benefit of the constitutional limitation embodied in the Establishment Clause was intended to run (and likely satisfied the structurally ill-equipped requirement, anyway). In the *Cuno* case, an alleged violation of the Commerce Clause does not satisfy the second prong of this test, as the political system is adequately equipped to provide a remedy for improvident exercises of legislative power under the Commerce Clause, and the benefit was not intended to run to the plaintiffs in particular.¹⁴³ The Court picked up this logic when it argued that “[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,” and disallowed a comparison between different parts of the Constitution at such a high level of generality as to sap them of all relevant differences.¹⁴⁴

3. *Functional Irremediability*

The third prong of this test formulates the requirement that where no other plausible party has standing (and where the other two prongs of the test are met), taxpayer standing should be permitted because, otherwise, Constitutional violations would be left functionally irremediable.

The Supreme Court has taken a dim view to this sort of argument, particularly in *Schlesinger v. Reservists Comm. to Stop the War*, where the Court said: “The assumption that if respondents have no standing to sue, no one would have standing, is not reason to find standing.”¹⁴⁵ In *Valley Forge*, the Court explained that position thusly: “Implicit in [this argument] is the philosophy that the business of the federal courts is correcting constitutional errors, and that ‘cases and controversies’ are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor.”¹⁴⁶ This argument is wrongheaded and cynical in the extreme both about taxpayer standing and the job of federal courts. Justice Rehnquist appears to be actively mocking the conception of the courts which holds that they serve a useful purpose in society by helping to correct errors in the foundational document meant to protect the freedoms of the people against the encroachments of the government.

To say that the courts should not attempt to correct constitutional violations when possible, to imply that that is not a “transcendent” or worthy endeavor, or to argue that allowing taxpayer standing will bring down the system of checks and balances are all

¹⁴³ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332. (2006).

¹⁴⁴ *Id.* at 347. The Court’s implication in *Cuno* that the Commerce Clause does not provide a specific limitation upon the State’s taxing and spending powers is incorrect—it most certainly does.

¹⁴⁵ 418 U.S. 208, 227 (1974).

¹⁴⁶ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982).

wrong and cynical. If the guarantees of the Constitution are allowed to become a dead letter on the theory that insular minorities or those with unpopular viewpoints should only have recourse through the political system, a grave mistake has been made. It is naïve to believe that the political system will listen to them; aggrieved taxpayers should not be forced to content themselves with the frustration and the false hope that politicians will fix their problems in order to get the full benefit of the rights *to which they are entitled*.

This is not meant to imply that the case or controversy requirement embedded in Article III should be dispensed with wantonly when standing is difficult to find, or when, all things considered, no party should have standing to sue. The case or controversy requirement undoubtedly serves a useful function in cases where the issues are moot, unripe, or where the parties are not actually adverse. In cases like *Winn*, however, where the challenged expenditure bears a reasonable relationship to the taxpayer's status as a taxpayer, and a political remedy is difficult to obtain, it is definitely relevant in analyzing the standing doctrine that no other party would have standing to challenge the government expenditure in question. As has been argued, the question of standing should be (and, in fact, is) sensitive to pragmatic concerns,¹⁴⁷ and insofar as this test formulates a practical concern that a constitutional violation would be allowed to go un-remedied because of formalism (even if it is useful formalism), the question of whether any party would have standing to challenge a government expenditure alleged to be unconstitutional is an important consideration. This is not to say that solely because there is no party with standing, there should therefore be a judicial remedy; there are certainly situations in which general grievances about the conduct of government should not be entertained in the judiciary. These cases are weeded out by various prongs of this Note's test.

4. *Applying the Whole Test*

This section will apply the test formulated in this Note to the key cases in Part I. In summary, the test for taxpayer standing proposed here-in is as follows:

1. The taxpayer's status as a taxpayer bears a reasonable relationship to the expenditure of government funds in question,
2. It is of practical necessity because the political system is structurally ill-equipped to provide a remedy for those who object to a particular expenditure of government funds alleged to violate the Constitution, or the taxpayer is a member of the class for whom the especial benefit of a constitutional limitation is intended to directly run, *and*
3. Where no other plausible party has standing to challenge the alleged violation, leaving it functionally irremediable.

In *Frothingham*, the first important case on taxpayer standing, the taxpayer challenged the Maternity Act as a violation of the Tenth Amendment which would thereby deprive her of her property (via taxation) without due process of law.¹⁴⁸ While the case is undoubtedly weak on constitutional grounds, prong (1) of this test is satisfied—the exercise of the Taxing and Spending Power to extract and spend money is undoubtedly reasonably related to the taxpayer's status as a taxpayer. Where the case fails is in prong (2), as the political system is not structurally ill-equipped to remedy the

¹⁴⁷ See *supra* notes 63-67 and 112-113.

¹⁴⁸ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

alleged violation (amongst other things, the States have an obvious interest in enforcing the limits of federalism), nor is Frothingham a member of the class to whom the especial benefit of the limitation laid out in the Tenth Amendment was intended to directly run.

In *Flast*, the taxpayer challenged expenditures under the Elementary and Secondary Education Act of 1965 to purchase materials for parochial schools as a violation of the Establishment Clause.¹⁴⁹ Prong (1) of this test is satisfied—the exercise of the Taxing and Spending Power to extract and spend money on materials for parochial schools is reasonably related to the taxpayer’s status as a taxpayer. Prong (2) of this test is also satisfied, as taxpayers are members of the class for whom the benefit of the Establishment Clause was intended to directly run. Furthermore, the political system is ill-equipped to provide an effective remedy for those who object to the use of federal funds for parochial schools, because parochial schools are a deeply ingrained and tax-preferred part of society. Finally, prong (3) of this test is satisfied. If taxpayers were to not have standing to challenge the expenditures, then no one would—certainly not the schools that receive the funds, probably not the schools that share the receipt of funds under the Elementary and Secondary Education Act of 1965 with the parochial schools, and likely not any other potential party.

In *Hein*, the taxpayer challenged political speeches, rallies, and conferences which praised the good works of religious charities.¹⁵⁰ It is difficult to draw a line at which point the use of federal dollars in connection with something having a religious character becomes large enough to bear a reasonable relationship to a taxpayer’s status as a taxpayer. Challenging the praise of religious organizations’ good works which comes with associated *de minimis* costs¹⁵¹ (or is truly ancillary to the administration of a legitimate administrative program) fails prong (1) of this test. Speeches and conferences which aim to reach out to religious organizations to help society function better and for which the main harm alleged is a symbolic one, simply do not create an injury that bears closely enough upon the taxpayer’s interest qua taxpayer. To say otherwise would be to sap any meaning out of the “reasonable relationship” requirement in the first prong of the test. It is a fact of society that the government must deal with religious organizations to maximize its effectiveness—not every such interaction rises to the level of concern to the taxpayer qua taxpayer.

If however, prong (1) was satisfied, the suit fails on prong (2). Although the plaintiffs at issue have the same character as those in *Flast*, merely being the especial beneficiary of the constitutional limitation is not always enough by itself, as such a status is part of the general proposition that the focus of the concern is that the political system is structurally ill-equipped to remedy the alleged violation. As a result, when there is little reason to suspect that the political system is ill-equipped to remedy the alleged violation, but the plaintiff is part of the benefitted class (everyone for the Establishment Clause), taxpayer standing is not appropriate. Here, there is little reason to believe that the political system is ill-equipped to remedy the Executive Branch’s partnership with religious organizations or positive rhetoric about them (there are elections after all).

If, for the sake of argument, *Hein*’s plaintiff passes prong (2), then on prong (3), there is reason to think that if the taxpayers at issue do not have standing to sue, then no

¹⁴⁹ *Flast v. Cohen*, 392 U.S. 83 (1968).

¹⁵⁰ *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007).

¹⁵¹ *Id.* (describing the cost of this Executive speech as *de minimis* because only costs associated were ancillary costs, such as the cost of the Conference).

one does (unless Congress itself had standing to sue over the Executive's improper use of general appropriations funds). If *Hein*'s plaintiff indeed passes this prong, and thereby the test, then maybe the test allows a borderline frivolous case to reach the courts. This is not necessarily the worst result. If the doctrine surrounding the Establishment Clause, born out of the idea that a taxpayer should not be forced to spend even three pence on the establishment of religion, does not occasionally permit borderline frivolous lawsuits, then either we have the perfect test on our hands or, more likely, we have one that is overly restrictive.

In *Valley Forge*, the taxpayer challenged the transfer of real property owned by the government to religious institutions.¹⁵² Like it or not, prong (1) of this test is likely to be satisfied. Wary of the risk of exalting form over substance, it must follow that real property transfers to religious institutions can violate the Establishment Clause just as easily as the transfer of cash in the form of a subsidy or a tax expenditure. Insofar as the transfers are not *de minimis* or a truly ancillary part of a legitimate regulatory regime, which they are not, they satisfy prong (1). So far as prong (2) is concerned, there is little likelihood of a political remedy (no one is going to take away those pieces of land from the religious institutions to which they have been granted), and the taxpayers are the class for whom the Establishment Clause was intended to especially benefit. On prong (3), no one else would have standing to challenge the transfer of land to the religious institutions: Those who were excluded from the program likely lack a cognizable claim and those religious institutions themselves who were awarded land have suffered no injury. Although it is undesirable to have the judiciary meddling in how the federal government disposes of wartime property gained through eminent domain, there is a countervailing interest in seeing that such disposal does not turn into the tacit establishment of religion through transfers under the guise of merely enacting a necessary government divestment function.

In the *Cuno* case, taxpayers challenged the award of a state tax credit to incentivize car companies to stay in Toledo, Ohio under a theory of State law similar to a challenge under the Commerce Clause.¹⁵³ On prong (1), significant tax breaks to automobile companies certainly bear a reasonable relationship to the taxpayer's status qua taxpayer. Where the case fails, however, is prong (2). There, it makes little sense to say that the government is structurally ill-equipped to provide a remedy because the plaintiff is a member of an insular or discrete minority or that the plaintiff taxpayer possesses an unusually strong interest in personally enforcing the Commerce Clause (as the benefit of the Commerce Clause only indirectly flows to the taxpayer; recall the criticism of high level abstraction in *Cuno*).¹⁵⁴

In *Winn*, the taxpayer challenged a state tax credit alleged to be in violation of the Establishment Clause.¹⁵⁵ Tax expenditures like the tax credits at issue are the functional equivalents of subsidies, and are therefore reasonably related to the taxpayer's status as a taxpayer. Hence, Prong (1) is satisfied. Prong (2) of this test is satisfied for exactly the same reasons as it was in *Flast*.¹⁵⁶ Finally, prong (3) of this test is satisfied—the Acting Solicitor General, arguing as *amicus curiae* in support of the petitioner, Arizona School

¹⁵² *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

¹⁵³ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

¹⁵⁴ *Id.* at 347.

¹⁵⁵ *Ariz. Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

¹⁵⁶ See discussion *supra* Part III.D.3.

Tuition Organization, acknowledged that there would be no party with standing to challenge the constitutionality of the scheme, and there is really no reason to doubt that assertion.¹⁵⁷ As Justice Ginsburg shrewdly pointed out, “the underlying premise of *Flast v. Cohen* [is] that the Establishment Clause will be unenforceable unless we recognize taxpayer standing.”¹⁵⁸ The decision in *Winn* is a step towards formalism that erects a barrier making the enforcement of the Establishment Clause more difficult. Rather than allow the Establishment Clause to rot on the paper on which it was written, permitting taxpayer standing when the three prongs of this test are met is a rational and fair way of balancing Article III’s case or controversy requirement and the necessity that the guarantees contained within the Constitution come to fruition.

E. Shortcomings of the Test

It might fairly be said that this test will not provide a more usable framework than the *Flast* test (and will invite the same problems of indeterminacy) because it is more complicated and because it asks for a greater weighing of pragmatic factors traditionally eschewed by judges. While this may be true, the fact remains that the *Flast* test simply does not work, and insofar as this test attempts to respond to the underlying concerns that motivated the initial formulation of taxpayer standing and allows taxpayers meaningful access to relief from alleged constitutional violations, it would be a step forward in taxpayer standing jurisprudence. What is more, it would not be unduly difficult to administer. Although each prong presents a separate difficulty (Does the expenditure bear a *reasonable* relationship? Is a political remedy highly unlikely as a matter of *structural* factors? Would the wrong be functionally *irremediable*?), it is not beyond the capabilities of judges to grasp the core concerns that have motivated the doctrine of taxpayer standing and apply a test better tailored to those issues. At the end of the day, is it preferable to debate the metaphysics of a government program in the attempt to see whether we can fairly infer a nexus between that program and the taxpayer, *or* are we better served by asking ourselves whether challenges of government expenditures, regardless of how they come, bear a reasonable relationship to a taxpayer’s status as a taxpayer, and if so, whether we would be depriving taxpayers of needed relief from alleged violations of their constitutional rights by denying standing? To vindicate the rights and protections in the Constitution, we are better off with the latter.

V. CONCLUSION

The doctrine of taxpayer standing is a historical departure from the general doctrine of standing. Specifically, in that it can be read to loosen certain traditional requirements of standing (for example, the injury need not be quite so immediate and particular and there is some reason to be dubious about the effectiveness of the relief in reducing tax liability). However, it is not a departure from the more deeply rooted and general principle that every violation of the Constitution should, in principle, have a remedy which is reasonably accessible (whether that be political or judicial).¹⁵⁹ The *Flast* test as applied in *Winn* deprived taxpayers of any practical remedy. To hold that taxpayer

¹⁵⁷ *Transcript of Oral Argument* at 8, *Ariz. Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

¹⁵⁸ *Id.* At 8.

¹⁵⁹ This is to be distinguished from the idea that every wrong in society has a Constitutional remedy, a proposition for which there is ample authority to doubt. *See, e.g.,* *Mueller v. Gallina*, 311 F. Supp. 2d 606, 609 (2004). The law is clearly not intended to punish every violation of the moral law. However, every violation of the federal Constitution should, in principle, have a remedy contemplated by the Constitution, unless the guarantees of the document are drained of any meaning. This remedy need not be judicial.

standing is effectively barred is to deny taxpayers a necessary outlet for remedying constitutional violations. The Constitution has been read to impose a system of checks and balances where the judiciary plays a crucial role in ensuring that the rights of average citizens are not unduly infringed upon. In cases such as *Winn* and *Flast*, taxpayers who are denied standing have no reasonable political alternative and thus are denied any effective relief from abuse in our constitutional system.

While the *Flast* test might be broken, there is still good reason to have a narrow doctrine that sometimes permits standing which arises solely out of a taxpayer's status as a taxpayer. The new test of taxpayer standing proposed in this Note attempts to pick up the animating spirit of the *Flast* decision, while avoiding some of the interpretive hurdles and apparent confusion that plague it. A more nuanced and comprehensive approach makes it unnecessary to go to the extremes that have led some to suggest that taxpayer standing should not exist at all. Under this Note's test, taxpayer standing is appropriate when three factors are met: (1) the taxpayer's status as a taxpayer bears a reasonable relationship to the expenditure of government funds in question; (2) it is of practical necessity because the political system is structurally ill-equipped to provide a remedy for those who object to a particular expenditure of government funds alleged to violate the Constitution, or the taxpayer is a member of the class for whom the especial benefit of a constitutional limitation is intended to directly run; and (3) where no other plausible party has standing to challenge the alleged violation, leaving it functionally irremediable.

If applied, this new test would do away with some of the useless formalism that has arisen as a result of the *Flast* decision, provide a clearer picture of the underlying concerns motivating the doctrine of taxpayer standing, and still provide necessary judicial relief for violations of the Constitution, especially the Establishment Clause, which would otherwise be functionally irremediable.