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Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines

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DISFAVORED CONSTITUTION, PASSIVE VIRTUES? LINKING STATE CONSTITUTIONAL FISCAL LIMITATIONS AND PERMISSIVE TAXPAYER STANDING DOCTRINES

*Joshua G. Urquhart**

This Article contrasts the permissive state taxpayer standing doctrines in place in most states with the restrictive federal and state taxpayer standing rules applied in federal court. It proposes a new theory to explain this disparity, arguing that ubiquitous state constitutional fiscal restrictions, which specifically limit a state government's ability to tax, spend, and borrow, are a primary impetus in the creation and development of liberal state taxpayer standing doctrines. The Article evaluates this novel hypothesis through an empirical-historical survey of the early state taxpayer standing decisions in every permissive jurisdiction and finds that these provisions are indeed involved in most cases and in most states. It concludes by discussing the implications of these results.

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INTRODUCTION

Texas Governor Oscar Branch Colquitt started submitting invoices to the state comptroller for various sundry expenses in June 1914.[1] They included charges for gas, ice, telephones, automobile repairs, coal, waiter services, eggs, bread, and other groceries.[2] The state legislature appropriated funds to pay the bills on February 11, 1915.[3] Texas State Representative W.C. Middleton filed a lawsuit against the Texas state comptroller, seeking to enjoin the appropriation.[4] He argued that it violated article IV, section 5 of the Texas Constitution, which at the time limited the governor's compensation to an annual salary of $4,000.[5] Middleton contended that the appropriation caused the governor to exceed this cap, and thus it constituted an unlawful expenditure of state taxpayer dollars.[6]

The trial court agreed. It issued a temporary injunction on June 12, 1915,[7] barring the comptroller from paying bills submitted by a hotel, book store, two grocers, a butcher, and two other creditors.[8] These bills totaled approximately $400 and included a $90 charge from the Driskill Hotel in

1. *See* Terrell v. Middleton, 187 S.W. 367, 368 (Tex. Civ. App. 1916).
2. *Id.*
3. *Id.*
4. *See* Martha Sue Parr, *Chicken Salad Case*, HANDBOOK TEX. ONLINE, http://www.tshaonline.org/handbook/online/articles/jrc01 (last visited Nov. 16, 2012).
5. *See* TEX. CONST. art. 4, § 5 (1876).
6. *See Terrell*, 187 S.W. at 368.
7. *See* Parr, *supra* note 4.
8. *Terrell*, 187 S.W. at 368.

Austin for fifteen gallons of chicken salad.[9] The court entered a permanent injunction after a bench trial, and the state comptroller appealed.[10]

The comptroller's first argument on appeal effectively was that Middleton lacked standing to pursue the state constitutional claims.[11] He contended that the "pleadings affirmatively show that [Middleton] has no interest in the suit other than as a citizen and as a taxpayer in general with other citizens and other taxpayers."[12] The appellate court rejected this argument. It noted that Middleton was seeking to enjoin the illegal expenditure of taxes collected by the state, a portion of which he paid himself.[13] The court compared such unlawful spending to the illegal collection of taxes and opined that because both effectively increased the tax burden, any affected taxpayer could challenge them.[14] It proceeded to the merits, holding that appropriations for fuel, water, lights, and ice were necessary to maintain the governor's mansion, but the groceries and other personal expenses constituted excess compensation in violation of the Texas Constitution.[15] The court acknowledged that the antiquated compensation limit was insufficient, but especially in light of previous failed attempts to amend the state constitution to raise it, there was no choice but to respect the provision.[16]

The comptroller appealed this decision to the Texas Supreme Court, which denied the writ of error in a per curiam opinion on February 20, 1917.[17] It similarly denied the motion for rehearing on March 28, 1917.[18] By this time, Colquitt had been replaced in office, but his successor, James "Pa" Ferguson, continued the practice of purchasing personal items with state funds.[19] He apparently promised to repay the state in the case of an unfavorable court outcome in sworn testimony before the Texas Senate, but that reimbursement never occurred.[20] Ferguson was impeached, convicted, and removed from office for misappropriating state funds in August and

9. *Id.* at 368–69.
10. *Id.*
11. The decision does not mention the term "standing," which generally was not employed by courts in 1916. Indeed, it was not even coined by the U.S. Supreme Court until its 1944 decision, *Stark v. Wickard*, 321 U.S. 288, 302 (1944). *See* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 7–8 (2001). However, despite the fact that decisions from the early twentieth century (like *Terrell*) do not use this modern-day terminology, commentators often consider them to be the first true "standing" decisions. *See infra* Part I.A (discussing early federal standing jurisprudence); *see also* Calvert v. Hull, 475 S.W.2d 907, 908 (Tex. 1972) (discussing early Texas standing jurisprudence).
12. *Terrell*, 187 S.W. at 369.
13. *Id.*
14. *Id.*
15. *Id.* at 372–73.
16. *Id.* at 371.
17. *See* Terrell v. Middleton, 191 S.W. 1138 (Tex. 1917).
18. *See* Terrell v. Middleton, 193 S.W. 139 (Tex. 1917).
19. *See generally* Parr, *supra* note 4.
20. *See id.*

September of 1917.[21] The bills for personal expenses thus cost one governor his job.

Terrell v. Middleton, or the "Chicken Salad Case" as it is known in Texas political lore,[22] is notable for reasons apart from its curious fact pattern and its sensational aftermath. The decision and its progeny have been cited repeatedly throughout the ensuing decades for the now-uncontroversial proposition that Texas taxpayers will have standing to challenge unlawful state government expenditures.[23] If one were to trace modern Texas state taxpayer standing jurisprudence back to a progenitor case, this would be it.

The result in *Terrell* may be surprising to commentators, practitioners, and students alike who are more familiar with the concept of taxpayer standing under federal justiciability principles. Most learn in law school that the rules are different in federal court. Federal taxpayers there generally cannot challenge unlawful or illegal government expenditures absent some unique, particularized injury, with one notable exception.[24] Nor does this change if one claims standing as a state (and not federal) taxpayer; recent U.S. Supreme Court decisions are clear that this type of plaintiff also lacks standing.[25]

But Texas courts are not federal courts, and they are free to open their doors to taxpayers challenging unlawful or illegal state expenditures if they wish.[26] And they have. Texas is not unusual in this regard. The majority of other jurisdictions—though by no means all of them, as commentators sometimes claim—likewise allow state taxpayer lawsuits, and many have

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21. *Id.*; Ralph W. Steen, *Ferguson, James Edward (1871–1944)*, HANDBOOK TEX. ONLINE, http://www.tshaonline.org/handbook/online/articles/ffe05 (last visited Nov. 16, 2012). This was not the end of Ferguson's political career. He unsuccessfully campaigned for Texas Governor in 1918, President (as an independent) in 1920, and U.S. Senator in 1922. *See id.* His wife, Miriam "Ma" Ferguson, was a better politician. She twice was elected Texas Governor, in 1924 and 1932. *See* John D. Huddleston, *Ferguson, Miriam Amanda Wallace [Ma] (1875-1961)*, HANDBOOK TEX. ONLINE, http://www.tshaonline.org/handbook/online/articles/ffe06 (last visited Nov. 16, 2012).

22. *See* Calvert v. Hull, 475 S.W.2d 907, 908 (Tex. 1972); *see also* Parr, *supra* note 4.

23. *See, e.g.*, *Calvert*, 475 S.W.2d at 908; Hendee v. Dewhurst, 228 S.W.3d 354, 378 (Tex. Ct. App. 2007); Tex. Indus. Traffic League v. R.R. Comm'n of Tex., 628 S.W.2d 187, 193 (Tex. App. 1982); Johnson v. Ferguson, 55 S.W.2d 153, 158 (Tex. Civ. App. 1932); Sherman v. Cage, 279 S.W. 508, 512 (Tex. Civ. App. 1925); *see also* Williams v. Lara, 52 S.W.3d 171, 178–79 (Tex. 2001) (summarizing Texas taxpayer standing law); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 900 n.30 (1960) [hereinafter Comment, *Taxpayers' Suits*] (citing *Terrell* for the proposition that Texas taxpayers can sue to enjoin an unlawful expenditure).

24. *See, e.g.*, 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531.10.1 (3d ed. 2008) ("[A] workably clear description can be provided as to federal taxpayer standing to challenge federal programs—standing is allowed only in a narrow range of Establishment Clause cases, and might yet be limited even further.").

25. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353–54 (2006) (no state taxpayer standing to challenge Ohio tax credits); *see also* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011) (no state taxpayer standing to challenge Arizona tax credits).

26. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . .").

for decades.[27] In other words, among American court systems, the federal rule is in the distinct minority. The question is why. Why have federal courts evolved so dissimilarly from their state counterparts?

That state courts grant taxpayers much broader standing than federal courts to challenge unlawful state expenditures is not a new observation; commentators have long acknowledged the disparity.[28] Yet none have ever provided a convincing explanation for it. This Article fills in that gap. It proposes that permissive state taxpayer standing doctrines are closely linked to a ubiquitous type of state constitutional provision that is conspicuously absent from the U.S. Constitution—namely, constitutional fiscal limitations that specifically restrict states' taxing, spending, and borrowing powers. These state constitutional fiscal restrictions, which are intended to protect the class of taxpayers as a whole, normally are unenforceable under traditional injury-based standing rules. This Article argues that state taxpayer standing rules have evolved accordingly to give the provisions judicially enforceable teeth.

That thesis should make a great deal of sense. If the intended beneficiaries of a state constitutional fiscal limitation would not have standing to sue to enforce its provisions, then it is hard to see who would.[29] The proposed link explains, for example, why the Texas appellate court would allow a state taxpayer to challenge the "chicken salad" appropriation. No one else would be injured by a violation of a constitutional gubernatorial salary cap at issue, at least in any practical sense. When a governor is paid more than he or she is constitutionally permitted, only the taxpayers are harmed, albeit in an abstract and indirect way. It should not be surprising that courts might let them sue.

This Article also ties together two notable strands of contemporary legal scholarship. The first, originally proposed by Professor Helen Hershkoff, suggests that distinct features of state constitutionalism can be an important driving force behind state justiciability doctrines, including, most notably,

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27. *See infra* Part II.A–B.

28. *See infra* Part II.B (discussing academic commentary on state taxpayer standing). For example, in 1960, the *Yale Law Journal* published an extensive—and still-cited—survey of the taxpayer standing rules in all fifty states. *See generally* Comment, *Taxpayers' Suits*, *supra* note 23.

29. Indeed, state courts have long offered this rationale to support their embrace of permissive taxpayer standing doctrines. *See, e.g.*, Dep't of Admin. v. Horne, 269 So. 2d 659, 663 (Fla. 1972) ("Despite our reluctance to open the door to possible multiple suits by 'ordinary citizens,' nonetheless, it is the 'ordinary citizen' and taxpayer who is ultimately affected and who is sometimes the only champion of the people in an unpopular cause."); Common Cause v. State, 455 A.2d 1, 9 (Me. 1983) ("[O]ther than a taxpayers' suit, there is no mechanism available [to enforce the constitutional provision at issue]. . . . It would conflict with the basic theory of American government if two branches of government, the legislative and the executive, by acting in concert were able, unchecked, to frustrate the mandates of the state constitution."); Boryszewski v. Brydges, 334 N.E.2d 579, 581 (N.Y. 1975) ("We are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action."); *see also* Zeigler v. Baker, 344 So. 2d 761, 764 (Ala. 1977) (same).

taxpayer standing rules.[30] The second, made most prominent by Professor Richard Briffault, focuses on constitutional fiscal restrictions that limit a government's ability to tax, spend, and borrow, which are a little-examined but important thread of state constitutionalism.[31] This Article synthesizes and builds on these influential theories.

Finally, and perhaps most importantly, this Article actually tests its thesis through an empirical-historical survey of the early state taxpayer standing cases in each permissive state. The results of the survey show that constitutional fiscal restrictions are indeed involved in most of these cases and in most states.[32] In other words, insofar as this Article proposes that state constitutional fiscal limitations are a major impetus for the creation and development of permissive taxpayer standing doctrines, its empirical findings are entirely consistent with that hypothesis.

Part I briefly summarizes the federal taxpayer standing rules. Part II contrasts them with the far more permissive doctrines employed in most states. Part III discusses various theories explaining this disparity and introduces the more recent scholarship examining state constitutional fiscal limitations. Part IV.A fully explains this Article's thesis that the federal-state taxpayer standing disparity can be traced to these ubiquitous restrictions. Part IV.B presents the survey of early state taxpayer standing cases in every permissive jurisdiction undertaken to evaluate this theory. Part V discusses the results.

I. TAXPAYER STANDING IN FEDERAL COURT

This Part discusses the current standards of taxpayer standing in federal courts. It first details the general anti–taxpayer standing principles (including the narrow Establishment Clause exception), and then discusses state taxpayers specifically.

A. Federal Anti–taxpayer Standing Principles Generally

The basic issue of federal court taxpayer standing has been the subject of tens or even hundreds of thousands of pages of academic and judicial commentary over the past several decades, and it thus warrants only a brief summary here.[33] Article III of the U.S. Constitution limits federal courts'

30. *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

31. *See generally* Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907 (2003).

32. *See infra* Part IV.B.2.

33. And yet, the subject is not any closer to being settled as a result of this voluminous treatment. *See* Ann Althouse, *Standing, In Fluffy Slippers*, 77 VA. L. REV. 1177, 1182 n.21 (1991) (cataloguing criticisms); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221–22 (1988) (calling standing law "incoherent" and cataloguing criticisms); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 613–15 (2004) (discussing and cataloguing academic criticism of standing jurisprudence).

jurisdiction to cases and controversies brought before them.[34] The Supreme Court has interpreted this to mean that a plaintiff must have standing—or a personal stake in the litigation—to bring his or her claims.[35] The academic literature refers to these injured parties with a direct interest in the litigation as "Hohfeldian" plaintiffs; in contrast, scholars usually call litigants without an individualized interest "non-Hohfeldian" plaintiffs.[36] Commentators and judges cite a well-rehearsed[37] litany of policy reasons in support of the federal standing doctrine.[38] It is beyond the scope of this Article to examine or evaluate these justifications.

The issue of standing often arises in federal court in the context of a taxpayer lawsuit. Plaintiffs in these types of cases usually seek to challenge purportedly unlawful government expenditures under the theory that they have standing because their taxes ultimately funded some small fraction of

34. *See* U.S. CONST. art. III, § 2. Federal courts also apply "prudential" standing limitations that are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." Warth v. Seldin, 422 U.S. 490, 498 (1975). These requirements preclude claims where, for example, a plaintiff's grievance falls outside the zone of interests protected by the statutory or constitutional provision invoked in his or her lawsuit. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984). Prudential standing limitations can be overridden by Congress. *See, e.g.*, Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need To Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1066–67 (1994).

35. *See, e.g.*, Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1442 (2011); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Allen v. Wright, 468 U.S. 737, 751 (1984); *see also* RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 136–55 (4th ed. 1996) (discussing standing principles generally). As noted above, the concept of standing traces back to the early twentieth century, but the term was not coined until the 1940s.

36. The "Hohfeldian/non-Hohfeldian" terminology is normally attributed to a 1968 article by Professor Louis Jaffe. *See* Louis L. Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034–35 (1968); *see also* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 3–4 & n.12 (1984) (discussing the genesis of the term "Hohfeldian").

37. Indeed, by 1988 one commentator dubbed the arguments "numbingly familiar." *See* Fletcher, *supra* note 33, at 222.

38. First, standing requirements might improve judicial decision making by requiring litigants to be adverse parties who have a stake in the case and who will be likely to present their side effectively. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962). Second, the requirements could help ensure that the parties most affected by a controversy can litigate it. *See, e.g.*, Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 311 (1979). Third, they can prevent advisory opinions by courts that might not appreciate the real-world consequences of the case at issue. *See, e.g.*, Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924). Fourth, standing requirements might increase judicial efficiency by "filtering out" disputes that come before a court in a suboptimal form. *See, e.g.*, Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 533–34 (2003). Finally, standing requirements could advance constitutional separation of powers principles by ensuring that federal courts only engage in policymaking in cases involving actual litigants. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

the illicit spending.[39] Courts and commentators offer a handful of arguments to support the justiciabililty of these lawsuits.[40] They have been the subject of extensive, but largely unsuccessful, federal standing-based litigation for nearly a century.[41]

Indeed, the first modern Supreme Court standing case involved precisely this fact pattern.[42] In *Frothingham v. Mellon*,[43] a taxpayer brought a lawsuit against the Secretary of the Treasury to restrain payments to several states that chose to participate in a federal program intended to encourage cooperation between the U.S. and state governments for the purpose of reducing infant mortality and protecting maternal health.[44] She argued that this program fell outside of Congress's enumerated constitutional powers.[45] The Court declined to reach the substance of the complaint. It disposed of the case for "want of jurisdiction," holding that any increased tax burden would be spread across a vast and ever-changing number of taxpayers.[46] The Court was especially troubled by the possibility that

> [i]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.[47]

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39. *See* Susan L. Parsons, Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 TEMP. L.Q. 951, 951–52 (1986); 74 AM. JUR. 2D *Taxpayers' Actions* § 1 (2012). Professor Nancy Staudt notes that the term "taxpayer lawsuit" encompasses two types of claims—taxpayers challenging their own tax bill and taxpayers challenging a government expenditure funded by their taxes. There is no controversy about the former action; therefore, this Article, like its predecessors, focuses on the latter. Nancy C. Staudt, *A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 776 (2003) (discussing taxpayer lawsuits generally).

40. *See* Parsons, *supra* note 39, at 953–55. First, some courts observe that taxpayers must replenish the government treasury for the improperly allocated funds, and thus, they will suffer a pecuniary injury as a result of an unlawful expenditure. *See id.* at 953. Second, other courts justify taxpayer lawsuits on a trust theory, viewing public officials as "trustees" holding the public funds at issue "in trust" for taxpayers. *See id.* at 953–54. Finally, a third group of courts view taxpayer actions as directly analogous to shareholder derivative lawsuits. *See id.* at 54–55; *see also* 4 JOHN MARTINEZ, C. DALLAS SANDS & MICHAEL LIBONATI, LOCAL GOVERNMENT LAW § 29.7 (2011) (detailing rationales).

41. *But see* Staudt, *supra* note 39, at 773–74 (observing that federal courts permit taxpayer lawsuits more frequently than commentators assert).

42. The Court was confronted with a similar claim of taxpayer standing in *Wilson v. Shaw*, 204 U.S. 24 (1907), but it declined to resolve it. *Id.* at 31; *see also* Comment, *Taxpayers' Suits*, *supra* note 23, at 915 n.112.

43. 262 U.S. 447 (1923).

44. *Id.* at 479–80.

45. *Id.* at 479.

46. *Id.* at 480, 487.

47. *Id.* at 487. More contemporary commentators argue that this view of *Frothingham* is overly simplistic, and in fact, the case should be evaluated in its proper historical context (i.e., it was decided only a short while after the federal courts abandoned the arcane writ pleading system, and much of its analysis harkens back to that regime). *See* Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1444–47 (1988).

The general anti–taxpayer standing principles embraced in *Frothingham* persisted throughout the next several decades.[48] The Court seemed to abruptly reverse course in 1968, however, when it held in *Flast v. Cohen*[49] that a federal taxpayer had standing to challenge a federal program providing educational assistance to certain religious schools.[50] Chief Justice Warren, writing for the majority, acknowledged the apparent inconsistency between *Frothingham* and *Flast*. He distinguished the two cases by noting that, whereas the former "merely" involved a situation in which the federal government was alleged to exceed its delegated powers, the latter concerned an expenditure that purportedly violated a specific and express constitutional spending restriction (the Establishment Clause).[51]

Justice Warren's opinion at least nominally established a new rule whereby taxpayer lawsuits would be permitted when (1) the challenged expenditure was made pursuant to Congress's Article I, Section 8 powers, and (2) the expenditure violated some express constitutional provision restricting those powers.[52] Justice Harlan warned in dissent that these limitations were untenable, and that the *Flast* holding ultimately would erode to the point where the federal anti–taxpayer standing principles were eviscerated.[53] A concurring Justice Douglas agreed but welcomed the outcome.[54]

Both were wrong. The ensuing decades saw a hasty retreat from *Flast* by the Court.[55] Two prominent 1974 decisions rejected taxpayer lawsuits based on the Accounts and Compatibility Clauses of the U.S. Constitution.[56] In *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[57] the Court further limited the *Flast* exception by rejecting a challenge to the transfer of a government hospital

48. *See, e.g.*, *Ex parte* Levitt, 302 U.S. 633 (1937) (rejecting a taxpayer challenge to the nomination of Hugo Black to the Supreme Court); *see also* John DiManno, Note, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639, 646 (2008) (summarizing post-*Frothingham* cases).

49. 392 U.S. 83 (1968).

50. *Id.* at 85–88.

51. *Id.* at 104–06.

52. *Id.* at 102–03; *see also* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 71–72 (7th ed. 2011).

53. *See Flast*, 392 U.S. at 131 (Harlan, J., dissenting) (calling *Frothingham* limits "untenable").

54. *Id.* at 107 (Douglas, J., concurring) (predicting the ultimate "demise of [*Frothingham*]").

55. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 609–10 (2007); *see also* DiManno, *supra* note 48, at 649. Commentators frequently refer to *Flast* as "limited to its facts" or some similar formulation. Indeed, a Westlaw law review database search for [Flast /20 limit! w/20 facts] conducted on February 22, 2012, generated 37 results, the majority of which contained some version of this description.

56. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209 (1974) (rejecting the Compatibility Clause); United States v. Richardson, 418 U.S. 166, 175 (1974) (rejecting the Accounts Clause).

57. 454 U.S. 464 (1982).

to a religious organization because it did not implicate Congress's taxing and spending powers.[58]

Most commentators view *Valley Forge* as effectively cementing *Flast*'s status as a one-off exception to the general federal anti–taxpayer standing principles.[59] The Court confirmed this interpretation in recent years. In *Hein v. Freedom from Religion Foundation, Inc.*,[60] it was presented with a challenge to an Executive Branch program intended to encourage faith-based organizations to compete for federal grants.[61] The plaintiff attacked the program on Establishment Clause grounds, asserting that his taxpayer status gave him standing.[62] Justice Alito, writing for the majority, disagreed.[63] He noted that the program was funded through general executive appropriations and not a specific Article I, Section 8 appropriation.[64] Justice Alito thus opined that "this case falls outside 'the narrow exception' that *Flast* 'created to the general rule against taxpayer standing established in *Frothingham*.'"[65] He endorsed the prevailing view that "in the four decades since its creation, the *Flast* exception has largely been confined to its facts."[66]

B. State Taxpayers in Federal Court

The question of whether the taxpayer standing limitations in federal court applied to plaintiffs challenging state (and not federal) expenditures was left open for decades.[67] Much of this uncertainty traces back to *Frothingham* itself, which noted that "[t]he interest of a taxpayer of a municipality in the

58. *Id.* at 479. The Court noted that the transfer in *Valley Forge* was undertaken via the Property Clause of the U.S. Constitution. *See* U.S. CONST. art. IV, § 3, cl. 2. This distinction results in the absurd situation whereby a plaintiff would have standing to challenge an appropriation of funds to a religious institution for the purpose of purchasing land, but he or she would not have standing to challenge the transfer of the land itself. *See, e.g.*, *Valley Forge*, 454 U.S. at 511–12 (Brennan, J., dissenting) (noting the incoherence).

59. *See, e.g.*, John J. Egan, III, Note, *Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken*, 63 B.U. L. REV. 717, 717 (1983) (characterizing *Flast* as "virtually overruled"); Eric B. Schnurer, Note, *"More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564, 566 (1986) ("[*Flast*] is today essentially a dead letter.").

60. 551 U.S. 587 (2007).

61. *Id.* at 594.

62. *Id.* at 596.

63. *Id.* at 597.

64. *Id.* at 605.

65. *Id.* at 608 (quoting Bowen v. Kendrick, 487 U.S. 589, 618 (1988)).

66. *Id.* at 609. This was not enough for Justice Scalia. He opened his concurrence by calling the distinctions between *Flast* and the subsequent taxpayer standing cases "utterly meaningless." *Id.* at 618 (Scalia, J., concurring). Scalia further opined that the Court should either overrule *Flast* or grant standing to all taxpayers asserting a constitutional spending violation. *Id.* at 633.

67. *See* Staudt, *supra* note 39, at 815–18 (concluding that as of 2003, "the full Court, notwithstanding numerous opportunities, has failed to impose explicit limitations that mirror the *Flast* doctrine for state taxpayers"); Richard M. Elias, Note, *Confusion in the Realm of Taxpayer Standing: The State of State Taxpayer Standing in the Eighth Circuit*, 66 MO. L. REV. 413, 413–25 (2001) (noting the same as of 2001).

application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court."[68]

Federal courts have long interpreted this observation to grant standing to taxpayers challenging county or municipal expenditures.[69] Indeed, the proposition that federal anti–taxpayer standing principles do not apply to local taxpayers is now uncontroversial.[70] That may seem odd at first blush. There generally are orders of magnitude fewer taxpayers at the local level, but on the other hand, a typical taxpayer pays far more to the federal government and could be affected to a greater degree by an unlawful expenditure of those tax dollars.[71] And in any event, the idea that a federal taxpayer who contributed (say) 0.000001 percent of a challenged expenditure has not suffered a sufficiently particularized injury to convey standing, whereas a local taxpayer who contributed 0.001 percent of one has, makes little sense. Regardless, it is the law.[72]

But local taxpayers are not state taxpayers, and for many decades, the Supreme Court was silent as to whether the latter group would have standing to challenge purportedly unlawful state expenditures.[73] Prior to 2006, the Court addressed state taxpayer standing on only one occasion, and even then it did not resolve the question.[74] Any confusion was dispelled in

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68. Frothingham v. Mellon, 262 U.S. 447, 486 (1923).

69. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 349 (2006); Staudt, *supra* note 39, at 825–26 (discussing local taxpayer lawsuits); Kyle B. Gee, Note and Comment, DaimlerChrysler Corp. v. Cuno*—Denying State Taxpayers Standing in Federal Court: Are Municipal Taxpayers Next?*, 38 U. TOL. L. REV. 1241, 1251 (2007) (same); *see also* David Spencer, Note, *What's the Harm? Nontaxpayer Standing To Challenge Religious Symbols*, 34 HARV. J.L. & PUB. POL'Y 1071, 1072 n.2 (2011). Some question whether the rationale for local taxpayer standing still holds in light of the Court's recent anti–taxpayer standing decisions. *See, e.g.*, Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs, 641 F.3d 197, 221–22 (6th Cir. 2011) (Sutton, J., concurring) (arguing that the local taxpayer standing rule is no longer defensible).

70. *See, e.g.*, *DaimlerChrysler*, 547 U.S. at 349 (citing without challenging *Frothingham*'s local taxpayer exception).

71. *See* Staudt, *supra* note 39, at 841 n.328 (generally comparing federal and local tax burdens). Professor Staudt also observes that many municipalities are actually bigger than some small states, with correspondingly larger budgets. *See id.* at 841 & n.328.

72. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989) (reaffirming *Frothingham*'s acceptance of municipal taxpayer suits). One explanation for this aspect of taxpayer standing jurisprudence is that municipal taxpayers are more akin to a corporation's shareholders, and not citizens of a particular nation or state. *Id.* (hinting at a corporation-based explanation); *Frothingham*, 262 U.S. at 487 (same).

73. *See, e.g.*, Gee, *supra* note 69, at 1251–52 (discussing the Court's pre-*DaimlerChrysler* state taxpayer standing jurisprudence); Staudt, *supra* note 39, at 815–18 (same).

74. *See* Doremus v. Bd. of Educ. of Hawthorne, 342 U.S. 429 (1952). In *Doremus*, New Jersey taxpayer-citizens challenged a state law providing for the reading of biblical verses at the beginning of each school day. *See id.* at 430. The plaintiffs claimed standing as state taxpayers. *See id.* at 431. The Court rejected the argument, essentially viewing the case as a religious dispute and not an attempt to vindicate any legitimate taxpayer interest. *See id.* at 434–35. It left open the possibility that other state taxpayers might have standing, however, observing that "[t]he taxpayer's action can meet [the federal standing] test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to

DaimlerChrysler Corp. v. Cuno.[75] The plaintiffs in the case consisted of Ohio taxpayers.[76] They challenged a state franchise tax credit intended to encourage businesses to purchase new manufacturing equipment on the theory that it violated the "dormant" or "negative" Commerce Clause.[77] The plaintiffs claimed they had taxpayer standing because the credit depleted the state taxpayer funds to which they had contributed.[78] The Court rejected the argument. It restated the basis for the anti–taxpayer standing rule first announced in *Frothingham* and held: "The foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers."[79] The Court recently reaffirmed this result in *Arizona Christian School Tuition Organization v. Winn*.[80]

II. STATE TAXPAYER STANDING IN STATE COURT

Part II discusses state taxpayer standing rules as applied in state courts. It focuses on both the state-by-state breakdown of which jurisdictions permit taxpayer lawsuits, and then discusses the general variations in those rules.

A. State Taxpayer Standing Rules Generally

It may be a tautology to say that state courts are not federal courts, but this does not make the observation any less true. The substantially dissimilar state taxpayer standing rules employed by the two types of tribunals are an excellent real-world demonstration of this axiom. The Supreme Court frequently has observed that state courts are not bound by any standing and justiciability limitations arising from Article III of the U.S. Constitution.[81] This includes the general federal refusal to adjudicate federal and state taxpayer lawsuits.[82] State courts therefore are free to hear

litigate here is not a direct dollars-and-cents injury but is a religious difference." *Id.* at 434; *see also* Staudt, *supra* note 39, at 803–04 (summarizing *Doremus*'s holding).

75. 547 U.S. 332 (2006).

76. *See id.* at 338–39.

77. *See* Cuno v. DaimlerChrysler Corp., 386 F.3d 738, 742–43 (6th Cir. 2004) (describing the Commerce Clause theory).

78. *See DaimlerChrysler*, 547 U.S. at 337–39. Other plaintiffs claimed standing as local taxpayers, arguing that any depletion to the state funds would ultimately deprive their local government of state-provided moneys. *Id.* at 349–50. The Court rejected that argument as merely "recasting" their state taxpayer challenge. *Id.* at 350.

79. *Id.* at 343–45.

80. *See* 131 S. Ct. 1436, 1444–45 (2011) (rejecting state taxpayer challenge to tuition tax credits).

81. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts . . . ."); *see also* Hershkoff, *supra* note 30, at 1836–37 ("State courts, however, are not bound by Article III, and judicial practice in some states differs—and differs radically—from the federal model.").

82. *See* Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1295–96 (2005) ("State judges are not bound by Article III and therefore can apply more lenient justiciability rules—for instance, by allowing taxpayer standing. . . ."); Hershkoff, *supra* note 30, at 1836–37.

any and all lawsuits by taxpayers challenging a purportedly unlawful or illegal expenditure if they wish. And they do. Most states—though not all, as some suggest—allow state taxpayer actions, and they have for decades.[83]

Permissive taxpayer standing regimes derive from different sources in different states. They are court-created doctrines in most jurisdictions.[84] In the remainder, a statute, civil procedure rule, or specific constitutional provision authorizes at least some degree of taxpayer or citizen lawsuit.[85] Whether a state's taxpayer standing regime ultimately derives from the common law or traces back to a statute, civil procedure rule, or constitutional provision matters very little in practice, however. The doctrines quickly take on a life of their own in either scenario, although a few states take express statutory limitations seriously,[86] and there are a handful of procedural quirks that seem unlikely to have arisen

83. *See, e.g.*, Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1301 (1985); Hershkoff, *supra* note 30, at 1855; Varu Chilakamarri, Comment, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 ANIMAL L. 251, 254–55 (2004); DiManno, *supra* note 48, at 656–57; Parsons, *supra* note 39, at 962–64; Michael J. Zidonik, Suzanne Reynolds, & Evelyn J. Lambeth, Comment, *Taxpayers' Actions: Public Invocation of the Judiciary*, 13 WAKE FOREST L. REV. 397, 402–03 (1977); *see also* James W. Doggett, Note, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 COLUM. L. REV. 839, 840 n.8 (2008).

84. These tend to fall within three sometimes overlapping subcategories. Some doctrines arise independently after a detailed analysis. *See, e.g.*, Fergus v. Russel, 110 N.E. 130, 135–36 (Ill. 1915); Borden v. La. State Bd. of Educ., 123 So. 655, 659 (La. 1929). Others borrow the well-established local taxpayer action tradition, often without detailed analysis. *See, e.g.*, Russman v. Luckett, 391 S.W.2d 694, 696 (Ky. 1965); Herr v. Rudolf, 25 N.W.2d 916, 919 (N.D. 1947). In a final group of state decisions, mostly dating to the early 1970s, courts rely on the seemingly apparent liberalization trend in *Flast* as the basis for their own state rules. *See, e.g.*, State v. Lewis, 559 P.2d 630, 634–35 n.9 (Alaska 1977); Dodge v. Dep't of Soc. Servs., 600 P.2d 70, 72 (Colo. 1979).

85. There are not always clean divisions between these groups. In some states, for example, a specific textual provision has been interpreted to authorize state taxpayer or citizen lawsuits, but the actual language in question does not necessarily compel that result. *See, e.g.*, ARK. CONST. art. 16, § 13 ("Any citizen of any county, city or town may institute suit, in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."); CAL. CIV. PROC. CODE § 526a (West 2011) (authorizing citizen-taxpayer lawsuits against "any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county"); Farrell v. Oliver, 226 S.W. 529, 529–30 (Ark. 1921) (holding that the Arkansas constitutional provision permits state taxpayer lawsuits); Los Altos Prop. Owners Ass'n v. Hutcheon, 137 Cal. Rptr. 775 (Cal. Ct. App. 1977) (noting that section 526a has been "judicially extended" to apply to state expenditures). In others, a permissive common law taxpayer standing regime has evolved in some jurisdictions in parallel with an express statutory provision. *See* ARIZ. REV. STAT. ANN. §§ 35-212 to -213 (2011) (statutorily establishing the procedure for taxpayer lawsuits); N.Y. STATE FIN. LAW § 123-b (McKinney 2002) (same); *see also* Wein v. Comptroller, 386 N.E.2d 242, 243–45 (N.Y. 1979). *But see* Ethington v. Wright, 189 P.2d 209, 212–13 (Ariz. 1948) (independently authorizing common law taxpayer actions); Boryszewski v. Brydges, 334 N.E.2d 579, 581 (N.Y. 1975) (same).

86. *See, e.g.*, N.Y. STATE FIN. LAW § 123-b(1) (authorizing taxpayer lawsuits, but excepting challenges to government-issued debt); *Wein*, 386 N.E.2d at 244–45 (holding that the statute prohibiting taxpayer challenges of state debt overrides the prior common law regime).

independently in the courts.[87] But overall, state taxpayer standing rules look indistinguishable in their development and implementation no matter their legal origin.

The general permissiveness of state taxpayer standing doctrines has been the subject of academic commentary since at least 1960.[88] In that year, the *Yale Law Journal* published a student work entitled *Taxpayers' Suits: A Survey and Summary*, which surveyed the taxpayer standing rules in every state.[89] It observed that thirty-four states allowed state taxpayer lawsuits, fourteen others were unclear, and only two states definitively prohibited them.[90] Commentators generally view this as the first comprehensive examination of state taxpayer standing rules, and they have cited it extensively over the past fifty years.[91]

Scholarly discussion of the phenomenon has continued ever since. A 1961 article by Professor Louis Jaffe in the *Harvard Law Review* echoed the observation that most states allowed state taxpayer lawsuits.[92] A student comment in the *Wake Forest Law Review* noted in 1977 that one of the two states (New York) identified by the *Yale Law Journal* survey as disallowing state taxpayer actions had reversed course, and by then only New Mexico prohibited taxpayer actions.[93] Similar articles popped up throughout the 1980s and 1990s.[94] Professor Hershkoff even observed that permissive state court taxpayer standing rules had become so widely acknowledged by 2001 that they were "for the most part uncontroversial."[95]

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87. In Massachusetts, for example, a taxpayer action will only be permitted if brought by no fewer than twenty-four taxpayers, no more than six of whom may be from the same county. *See* MASS. ANN. LAWS ch. 29, § 63 (LexisNexis 2007); *see also* Richards v. Treasurer & Receiver Gen., 67 N.E.2d 583 (Mass. 1946) (applying taxpayer standing statute).

88. A 1937 student note in the *Harvard Law Review* touched—but did not focus—on state taxpayer standing rules. *See* Note, *Taxpayers' Suits as a Means of Controlling the Expenditure of Public Funds*, 50 HARV. L. REV. 1275 (1937) [hereinafter Note, *Controlling the Expenditure*].

89. *See generally* Comment, *Taxpayers' Suits*, *supra* note 23.

90. *Id.* at 900–02.

91. *See, e.g.*, Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 794, (9th Cir. 1999); Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 664 (2011); Chilakamarri, *supra* note 83, at 259–62; Gee, *supra* note 69, at 1265 n.184; Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1266 n.2 (1961). According to West's KeyCite service, as of November 16, 2012, the survey has been cited by thirty-nine judicial decisions and thirty-five legal journals or secondary sources.

92. *See* Jaffe, *supra* note 91, at 1280–81 (observing that twenty-seven states expressly permit state taxpayer lawsuits, and nine more might permit them).

93. *See* Zidonik et al., *supra* note 83, at 402–03.

94. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 414–16 (1996); Friesen, *supra* note 83, at 1301–03; Robert M. Myers, *Standing in Public Interest Litigation: Removing the Procedural Barriers*, 15 LOY. L.A. L. REV. 1, 3 (1981); Parsons, *supra* note 39, at 967–68; Michael Weiss, Comment, *The Texas Tax Relief Act After Twelve Years: Adoption, Implementation & Enforcement*, 23 ST. MARY'S L.J. 491, 503–06 (1991).

95. *See* Hershkoff, *supra* note 30, at 1854–55.

Some commentators suggest that this disparity between federal and state taxpayer standing doctrines is not particularly meaningful in practice. This assertion dates back to at least 1969, when Professor Kenneth Davis argued that the then-existing permissive state taxpayer standing rules had not resulted in a flood of unmeritorious taxpayer lawsuits.[96] Renowned state constitutional scholar (and former Oregon Supreme Court Justice) Hans Linde echoed the view in 2005, observing that during his tenure the Oregon high court often was willing to reject cases on justiciability grounds, despite the fact that Oregon courts permit taxpayer actions.[97] This proposition is an interesting one, though more rigorous empirical work suggests that the question is more complicated than Professors Davis and Linde envisioned.[98]

B. The Surprising Nonuniversality of State Taxpayer Standing Rules

And yet the notion that virtually every jurisdiction permits state taxpayer lawsuits is largely overstated. Commentators have long characterized state taxpayer standing rules as permissive "in nearly every state,"[99] but that is not entirely accurate. This Article's survey of state taxpayer standing doctrines observed that "only" thirty-six states—the majority to be sure, but far from all—clearly permit state taxpayer lawsuits.[100] In contrast, eight states now prohibit state taxpayer actions, and it is unclear in six additional states whether taxpayers can challenge purportedly unlawful state government expenditures.[101]

The eight states that depart from the majority rule fall into two categories. Three—Kansas, New Hampshire, and Virginia—simply reject such lawsuits outright.[102] One should not be too critical of their omission from the academic state taxpayer standing commentary. The rejection of permissive state taxpayer standing regimes is a recent phenomenon in

96. *See* Kenneth C. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 470–71 (1970).

97. *See* Hans A. Linde, *The State and the Federal Courts in Governance: Vive la Différence!*, 46 WM. & MARY L. REV. 1273, 1282–83 (2005).

98. *See, e.g.*, Staudt, *supra* note 39, at 779–82. Professor Staudt suggests that taxpayer lawsuits are far more commonly allowed in federal court than academic commentators believe. Her *Taxpayers in Court* article documents a study finding dozens of Supreme Court and hundreds of lower federal court cases involving taxpayer actions over the past several decades. *Id.* at 800–04. This also could be occurring at the state level.

99. DiManno, *supra* note 48, at 656. For example, in 1985, Professor Jennifer Friesen characterized state taxpayer standing rules as follows: "Every state now permits taxpayer actions against municipalities, and all but New Mexico permit them for state taxpayers as well." Friesen, *supra* note 83, at 1301 n.165.

100. *See infra* Appendix.

101. *See infra* Appendix.

102. Kansas and New Hampshire disallow both state and local taxpayer actions, whereas Virginia permits the latter. *See, e.g.*, Theisman v. City of Overland Park, 253 P.3d 798, 2011 WL 2637452, at *8 (Kan. Ct. App. 2011) (noting that Kansas courts do not permit taxpayer actions); Baer v. N.H. Dep't. of Educ., 8 A.3d 48, 51–52 (N.H. 2010) (rejecting state taxpayer standing and overruling prior decisions to the contrary); Goldman v. Landsidle, 552 S.E.2d 67, 72 (Va. 2001) (expressly adopting the federal prohibition of taxpayer standing).

Virginia (2001) and New Hampshire (2010), and state taxpayer standing commentators have long been unclear with respect to Kansas.[103]

The remaining five definitive anti–taxpayer standing states—Indiana, New Mexico, Ohio, Rhode Island, and Wyoming—present a different story. These states permit "public importance" or "public interest" lawsuits, effectively in lieu of traditional taxpayer actions.[104] Under the public importance standing doctrine, undifferentiated citizens or residents of a state will be permitted to bring a lawsuit challenging government conduct, but only in cases involving a matter of "great" or "substantial" public importance.[105]

It is tempting to characterize public importance lawsuits as the equivalent of pure citizen actions and, thus, a broader form of taxpayer actions.[106] This Article rejects that view. Both taxpayer and public importance lawsuits involve non-Hohfeldian litigants, yet there are substantial distinctions between the doctrines, and the universes of plaintiffs do not overlap completely. Taxpayer lawsuits generally require that the plaintiff has paid taxes,[107] and the plaintiff normally must be challenging some

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103. *See* Comment, *Taxpayers' Suits*, *supra* note 23, at 901 n.33 (classifying Kansas taxpayer standing law as unclear). The 1986 Temple comment by Susan Parsons cites a Kansas civil procedure rule as authorizing taxpayer actions, but upon closer inspection, this provision narrowly authorizes only challenges to unauthorized contracts. *Compare* KAN. STAT. ANN. § 60-907 (1963), *with* Parsons, *supra* note 39, at 974 & n.176.

104. *See* State *ex rel.* Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978, 980 (Ind. 2003) (describing Indiana public standing doctrine); State *ex rel.* Coll v. Johnson, 990 P.2d 1277, 1284 (N.M. 1999) (allowing citizen lawsuits involving "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution"); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1082 (Ohio 1999) (authorizing citizen lawsuits "when the issues sought to be litigated are of great importance and interest to the public"); Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992) ("On rare occasions this court has overlooked the standing requirement to determine the merits of a case of substantial public interest."); Jolley v. State Loan & Inv. Bd., 38 P.3d 1073, 1077 (Wyo. 2002) ("We have recognized a more expansive or relaxed definition of standing when a matter of great public interest or importance is at stake."). The standing rules in Ohio and Rhode Island are more complicated than the foregoing generalization. Ohio permits state taxpayer lawsuits for a plaintiff contesting an expenditure from a special fund. *See* State *ex rel.* Masterson v. Ohio State Racing Comm'n, 123 N.E.2d 1, 2–3 (Ohio 1954). Rhode Island allows taxpayers to sue if they have suffered a particularized injury not shared by other similarly-situated taxpayers. *See* Ianero v. Town of Johnston, 477 A.2d 619, 621 (R.I. 1984). For the purposes of this Article, these states seem sufficiently restrictive to be classified as prohibiting such actions.

105. *See, e.g.*, DiManno, *supra* note 48, at 665–77 (discussing public importance or public interest doctrine). A handful of additional states allow both taxpayer and public importance lawsuits. *Id.* at 677. Alaska is particularly difficult because it sometimes merges the two doctrines, and it is hard to determine whether it permits taxpayer or public interest lawsuits, or some hybrid of the two. *See, e.g.*, Trs. for Alaska v. State, 736 P.2d 324 (Alaska 1987) (discussing Alaska's taxpayer-citizen standing doctrine). This Article errs on the side of caution and characterizes it as a permissive taxpayer standing jurisdiction.

106. *See, e.g.*, 13B WRIGHT, MILLER & COOPER, *supra* note 24, § 3531.10.1, at 37 ("[T]axpayer standing often has been asserted as an alternative to a more general theory of citizen standing.").

107. *See, e.g.*, Williams v. Lara, 52 S.W.3d 171 (Tex. 2001) (holding that taxpayer-plaintiff must be a taxpayer); Citizens Council Against Crime v. Bjork, 529 P.2d 1072, 1074

government action that theoretically affects his or her tax burden.[108] But standing normally will exist if those criteria are met. Public importance lawsuits, on the other hand, can be brought to challenge virtually any government action, but only in extraordinary circumstances involving a substantial public interest, as determined by the court overseeing the lawsuit.[109] Therefore, while some taxpayer lawsuits likely would be permitted in public importance states (and vice versa), many would not, and many public importance lawsuits are not taxpayer actions under any reasonable definition of the term. It thus seems inappropriate to call these states permissive taxpayer standing jurisdictions.

There are also six states in which it is at least somewhat unclear whether state taxpayer lawsuits would be permitted. Three of the six—Idaho, Hawaii, and Vermont—permit local taxpayer lawsuits.[110] The state decisions establishing this permissive taxpayer standing rule are broad enough on their face that state taxpayer actions likely would be permitted, but there were no published or reported decisions involving such lawsuits. Nevada lacks any taxpayer standing jurisprudence (state or local), so one cannot tell whether the state would permit state taxpayer actions. The Michigan Supreme Court announced in 2001 that it generally would prohibit taxpayer lawsuits under the theory that Michigan standing law is equivalent to its federal counterpart,[111] yet it reversed that holding nine years later.[112] Michigan ultimately is likely to permit state taxpayer lawsuits, but this reversal was recent enough that no subsequent decisions delineate the state's taxpayer standing rules. Finally, the state taxpayer standing cases in South Carolina are substantially contradictory, and the status of the law is unclear.[113]

(Wash. 1975) ("[P]etitioner . . . . alleges that its members are taxpayers, but they are not parties to this action. We cannot treat it as a taxpayer suit."); 74 AM. JUR. 2D, *supra* note 39, § 7.

108. For example, many states require that the taxpayer must be challenging an expenditure made from a fund into which he or she actually paid. *See infra* note 119 (listing cases from Arkansas, Iowa, Maine, and Minnesota requiring that the challenged expenditure must be from a fund into which the taxpayer-plaintiff has paid or will pay). *But see infra* note 122 (noting that Colorado, West Virginia, and perhaps Washington may permit state taxpayer actions challenging nonfiscal government conduct).

109. *See, e.g.*, DiManno, *supra* note 48, at 665–77 (discussing public importance standing requirements); Hershkoff, *supra* note 30, at 1857–58 (same).

110. *See, e.g.*, Akau v. Olohana Corp., 652 P.2d 1130, 1133–34 (Haw. 1982); Ameritel Inns, Inc. v. Greater Boise Auditorium Dist., 119 P.3d 624, 627–28 (Idaho 2005); Cent. Vt. Pub. Serv. Corp. v. Town of Springfield, 379 A.2d 677, 679 (Vt. 1977). With respect to Vermont, one state supreme court decision references a prior case in which state taxpayers were permitted to challenge unlawful expenditures, but the cited decision does not directly address the issue of taxpayer standing. *See* Brigham v. State, 889 A.2d 715, 719 (Vt. 2005).

111. *See, e.g.*, Lee v. Macomb Cnty. Bd. of Comm'rs, 629 N.W.2d 900, 907–08 (Mich. 2001).

112. *See* Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010).

113. *Compare* ATC S., Inc. v. Charleston Cnty., 669 S.E.2d 337, 340–41 (S.C. 2008) ("The injury to ATC, however, as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete

So what should be made of the fact that the permissiveness of state court standing rules is not quite as universal as commentators suggest? First, as indicated by the recent New Hampshire and Virginia decisions restricting state taxpayer standing rules and even the since-reversed similar trend in Michigan, the same narrowing of taxpayer standing principles at the federal level seems to be trickling down to at least a handful of states.[114] This should not be surprising given the influence of federal justiciability law on state courts.[115]

Second, the characterization of state taxpayer standing regimes as uniformly permissive invokes an understandable, but unfortunate, tendency among academics to view certain areas of state law as relatively homogenous on a state-to-state basis, and then compare this single generic "state" law with its federal counterpart.[116] This may help to highlight a noteworthy contrast between federal and the mainstream or majority state law on a particular issue, but it does so at a substantial cost. The overgeneralization can portray states as more homogenous than they really are. That, in turn, minimizes differences between states that could be just as worthy of analysis as the federal-state contrast that the commentators were trying to address in the first place.[117] For example, the mainstream view

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and particularized injury."), *with* Sloan v. Dep't of Transp., 666 S.E.2d 236, 241 (S.C. 2008) ("Nonetheless, '[a] taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina.'" (citing Sloan v. Sch. Dist. of Greenville Cnty., 537 S.E.2d 299 (S.C. Ct. App. 2000))). The state also permits citizen lawsuits invoking an important public interest. *See* Sloan v. Sanford, 593 S.E.2d 470, 472 (S.C. 2004).

114. *See* Gee, *supra* note 69, at 1273–76 ("Taxpayer standing has paralleled standing doctrine in general, which, since the founding era, has become increasingly more preclusive."); Staudt, *supra* note 39, at 773 ("[T]he undisputed view among legal scholars and commentators is that taxpayers, for a brief period in history, did have standing to bring lawsuits in federal court but judges for the most part have denied taxpayers the opportunity to be heard in court." (emphasis omitted)); *see also* Schnurer, *supra* note 59, at 566 (noting the same).

115. *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 969–70 (2011); *see also* City of Greenwood Vill. v. Petitioners for the Proposed City of Centennial, 3 P.3d 427, 436 n.7 (Colo. 2000) ("[S]imilar considerations underlie both Colorado and federal standing law, and we frequently consult federal cases for persuasive authority."); Dover Historical Soc'y v. City of Dover Planning Comm'n, 838 A.2d 1103, 1111 (Del. 2003) ("This Court has recognized that the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware."); ACLU of N.M. v. Albuquerque, 188 P.3d 1222, 1227 (N.M. 2008) ("New Mexico's standing jurisprudence indicates that our state courts have long been guided by the traditional federal standing analysis.").

116. *See, e.g.*, David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 708 (2005) ("To the extent that state courts consult the academic literature, they are likely to find either that their own state constitutions are not discussed at all, or that their constitutional law is fungible with that of other states . . . .").

117. What these differences might mean is a different story altogether. For example, the early "New Judicial Federalism" proponents argued that state constitutions reflect the specific character and values of their respective states; critics of this movement generally scoff at that, arguing that the view is divorced from any historical reality. *See, e.g.*, James A.

that state taxpayer standing rules are uniformly permissive easily could obscure the recent microtrend in a handful of states to eliminate or narrow these doctrines. This is a development that deserves comment, yet the mainstream view that sees state taxpayer standing doctrines as uniformly permissive precludes that discussion.

C. The Contours of State Taxpayer Standing Rules

The specific contours of the various state taxpayer standing doctrines can reflect fundamental attributes that are responsible for the creation and purpose of permissive taxpayer standing regimes in the first place, and as such, a brief discussion is warranted.[118] Perhaps the most frequent state taxpayer standing requirement is that there must be a nexus between the plaintiff's taxes and the government conduct being challenged. In other words, a taxpayer can only challenge government conduct that has the potential to affect his or her tax burden, even if only in a minute way. This often means that a state expenditure involving a specific fund can only be challenged by taxpayers who have paid into that fund.[119] Some states further limit taxpayer standing to actions challenging allegedly improper government expenditures, and not revenue collection measures.[120] Others distinguish between illegal expenditures (which can be challenged) and improvident ones (which cannot).[121] All of that said, a handful of states allow taxpayers to challenge virtually any government conduct, regardless of how it affects state taxpayer dollars.[122] Taxpayer actions in these

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Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1221 (1998).

118. That said, previous commentators have compiled an exhaustive list of the various state taxpayer standing requirements, and it is unnecessary to do so here. *See, e.g.*, Chilakamarri, *supra* note 83, app. A at 271.

119. *See, e.g.*, McGhee v. Ark. State Bd. of Collection Agencies, 243 S.W.3d 278, 283 (Ark. 2006) (holding that a taxpayer must have contributed to the challenged expenditure); Alons v. Iowa Dist. Ct., 698 N.W.2d 858, 871 (Iowa 2005) (a taxpayer must show an effect on a fund to which he or she has paid or will pay); Collins v. State, 750 A.2d 1257, 1260–61 (Me. 2000) (same); *see also* Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P., 603 N.W.2d 143, 147 (Minn. Ct. App. 1999) (noting that taxpayers lacked standing to challenge legal fees because the fees would not necessarily be deposited in a fund into which they had or would pay).

120. *See, e.g.*, Citizens for Rule of Law v. Senate Comm. on Rules & Admin., 770 N.W.2d 169, 175 (Minn. Ct. App. 2009); Manzara v. State, 343 S.W.3d 656, 659–61 (Mo. 2011) (holding that tax credits are not expenditures); *see also* Munger v. State, 689 S.E.2d 230, 239–40 (N.C. Ct. App. 2010) (declining to extend state taxpayer standing rules to situations not involving unlawful expenditures); Fent v. Contingency Review Bd., 163 P.3d 512, 520 (Okla. 2007) (emphasizing that a taxpayer can challenge an unlawful expenditure).

121. *See, e.g.*, Soukup v. Sell, 104 S.W.2d 830, 831 (Tenn. 1937).

122. *See, e.g.*, Barber v. Ritter, 196 P.3d 238, 246–47 (Colo. 2008) (suggesting that taxpayers will have standing to challenge any constitutional violation); Smith v. W. Va. State Bd. of Educ., 295 S.E.2d 680, 683 (W. Va. 1982) ("Moreover, where the right sought to be enforced is a public one in the sense that it is based upon a general statute or affects the public at large the mandamus proceeding can be brought by any citizen, taxpayer, or voter."); *see also* Greater Harbor 2000 v. City of Seattle, 937 P.2d 1082, 1090–91 (Wash. 1997) (noting the same with respect to a local taxpayer action and implying that the principle

jurisdictions are little more than citizen lawsuits with the extra requirement that the plaintiff has paid taxes.

Another typical standing limitation is that taxpayers can only seek to enjoin prospective spending. Courts in these states do not permit taxpayer actions attempting to recoup prior unlawful expenditures on behalf of the government.[123] Taxpayers in other jurisdictions cannot sue to compel a government official to undertake an affirmative action—they can only block an improper expenditure.[124] A few states impose the requirement that a taxpayer-plaintiff must show an actual impact on his or her taxes.[125] It is not enough to allege that public funds are being improperly spent; the taxpayer must aver facts sufficient to show that the illicit spending actually results in higher taxes. States vary as to how specific that showing must be.[126]

One not-uncommon requirement is that the taxpayer-plaintiff must alert the relevant government unit to the improper conduct before initiating the lawsuit, and he or she can only proceed with the case if the government refuses to take corrective action.[127] The failure to provide this notification

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would hold at the state level); Parsons, *supra* note 39, at 971–73 & nn.147–57 (discussing the trend in some states to allow taxpayer challenges to nonfiscal conduct).

123. *See, e.g.*, Beckerle v. Moore 909 So.2d 185, 187–88 (Ala. 2005); Dewhurst v. Hendee, 253 S.W.3d 320, 331–32 (Tex. Ct. App. 2008).

124. *See, e.g.*, Reeder v. Wagner, No. 435, 2008 (Del. June 2, 2009), *available at* http://courts.delaware.gov/OPINIONS/download.ASPx?ID=122440; Mouton v. Dep't of Wildlife & Fisheries, 657 So. 2d 622, 626–28 (La. Ct. App. 1995).

125. *See, e.g.*, Seymour v. Region One Bd. of Educ., 874 A.2d 742, 749 (Conn. 2005) ("'It is not enough for the plaintiff to show that her tax dollars have contributed to the challenged project . . . . [T]he plaintiff must prove that the project has directly or indirectly increased her taxes . . . .'" (citing Seymour v. Region One Bd. of Educ., 803 A.2d 318 (Conn. 2002))); Kerpelman v. Bd. of Pub. Works, 276 A.2d 56, 60–61 (Md. 1971) (same); Demartino v. Marion County, 184 P.3d 1176, 1179–80 (Or. Ct. App. 2008) (same); *see also* Berent v. City of Iowa City, 738 N.W.2d 193, 202–03 (Iowa 2007) (holding that when a taxpayer pays into the fund from which an illegal expenditure is made, an actual impact on taxes is presumed).

126. For example, in Connecticut's restrictive taxpayer standing regime, a suggested inference that an illegal expenditure necessarily will increase the plaintiff's taxes will not be enough to convey standing. *See, e.g.*, Conn. Post LP v. State Traffic Comm'n, No. X01CV990160337S, 2000 WL 33983848, at *5–6 (Conn. Super. Ct. Sept. 22, 2000). Iowa courts, in contrast, sometimes permit such inferences. *See* Alons v. Iowa Dist. Ct., 698 N.W.2d 858, 865 (Iowa 2005).

127. *See, e.g.*, Parsons v. S.D. Lottery Comm'n, 504 N.W.2d 593, 596 (S.D. 1993) ("[I]n taxpayer actions, the plaintiffs are required to ask the state attorney general to bring an action on behalf of the public or show why such request would be futile."); Saucier v. Emp't Sec. Dep't of the State of Wash., 954 P.2d 285, 287–88 (Wash. Ct. App. 1998) (holding that in taxpayer actions, plaintiffs must first request action by the attorney general, and can only bring suit upon denial of this request); Jenner v. Wissore, 517 N.E.2d 1220, 1227–28 (Ill. App. Ct. 1988) (same); *see also* Marjorie A. Shields, *Application of Municipal Taxpayer Standing Doctrine*, 51 A.L.R.6TH 333 (2010); *Necessity and Sufficiency of Efforts To Induce Public Officers To Bring Suit as Condition of Taxpayer's Right To Bring Suit*, 124 A.L.R. 585 (1940) (cataloguing authorities). This requirement sometimes is statutory. *See, e.g.*, ARIZ. REV. STAT. ANN. § 35-213 (2011) (permitting a lawsuit by an Arizona taxpayer only with sixty days notice to the attorney general).

is a bar to bringing a taxpayer lawsuit in some states,[128] whereas others have carved out exceptions (e.g., notice is unnecessary if it would be pointless).[129]

A few jurisdictions also permit taxpayer actions only for certain types of claims, usually limited to those invoking an important public policy interest. Alaskan taxpayers, for instance, can only challenge "substantial" government expenditures.[130] Taxpayers in Florida and perhaps Arizona will only have standing to challenge an unconstitutional (and not "merely" unlawful) government action absent a special interest.[131]

Finally, and perhaps most interestingly, a few states limit taxpayer actions to only those lawsuits that would be unable to be brought outside of the taxpayer action context due to a lack of traditional standing.[132] Courts in these jurisdictions recognize that some claims against the government do not lend themselves to the type of particularized injury normally required to convey standing. Any nominally affected state taxpayer can challenge the allegedly improper government conduct, but only when no one else likely would have standing to do so. This limitation is perhaps the most interesting one because it reflects one of the first—and still most convincing—rationales for allowing taxpayer lawsuits in the first place.

III. EXPLAINING THE FEDERAL-STATE DISPARITY

This next part discusses different explanations for the disparity between federal and state taxpayer standing principles. It first addresses traditional theories before moving onto a discussion of the contributions Professor Hershkoff has made to state constitutional discourse. This part then discusses the dynamic between permissive taxpayer standing rules and the limitations on government discretion over fiscal matters resulting from state constitutional provisions.

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128. *See, e.g.*, *Parsons*, 504 N.W.2d at 596 (holding that the only exception to the attorney general notice requirement is when he or she is already a party).

129. *See, e.g.*, Farris v. Munro, 662 P.2d 821, 823–24 (Wash. 1983) (noting an exception to the notice rule when requiring it would be useless).

130. *See* Hoblit v. Comm'r of Natural Res., 678 P.2d 1337, 1340–41 (Alaska 1984) (the magnitude of the challenged transaction will be an important factor in determining whether to permit the action to proceed).

131. *See* N. Broward Hosp. Dist. v. Fornes, 476 So .2d 154, 155–56 (Fla. 1985); Dep't of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981). Arizona is more complicated. State taxpayer actions are permitted both by statute and the common law in that jurisdiction. *See* ARIZ. REV. STAT. ANN. § 35-213 (authorizing taxpayer lawsuits by statute under certain circumstances); Ethington v. Wright, 189 P.2d 209 (Ariz. 1948) (permitting taxpayer lawsuit under the common law). Some authority from the state suggests that common law taxpayer standing actions will only be permitted to challenge unconstitutional (and not "merely" unlawful) expenditures. *See* Bennett v. Napolitano, 81 P.3d 311, 318 (Ariz. 2003).

132. *See* Transactive Corp. v. N.Y. State Dep't of Soc. Servs., 706 N.E.2d 1180, 1184 (N.Y. 1998) (rejecting a common law taxpayer action because there was no indication that no other potential plaintiff would have standing); Consumer Party of Pa. v. Pennsylvania, 507 A.2d 323, 329 (Pa. 1986) (stating a five-part test governing taxpayer lawsuits, the first part of which is whether "the governmental action would otherwise go unchallenged").

A. Traditional Theories

The last point segues nicely into a discussion of the theories offered to explain the general permissiveness of state taxpayer standing rules in state courts and the corresponding narrow federal regime. The early commentary focused on three aspects of state taxpayer standing doctrines. First, a smattering of articles from the 1960s through the 1980s speculated that permissive state taxpayer standing rules evolved so as to permit judicial challenges to broad swaths of governmental activity that otherwise would have been immune from lawsuit under a federal injury-in-fact requirement.[133] This assertion has some empirical support, as evidenced by the state court decisions identifying the enforceability of constitutional and/or statutory provisions as a main impetus for their embrace of liberal taxpayer standing rules.[134]

Yet despite this observable link between enforceability concerns and these doctrines, and although more than one commentator has called potential unenforceability the "fundamental reason" underlying permissive state taxpayer standing rules,[135] the few early scholars to address the argument did not elaborate on it. The failure to develop this idea is unfortunate. As discussed extensively throughout this Article, the notion that state taxpayer standing doctrines evolved to give teeth to potentially unenforceable state constitutional provisions generally seems correct, at least in the very specific context of state constitutional fiscal limitations.[136]

A second, earlier theory explaining liberal state taxpayer standing rules is somewhat more developed. The first articles to approach the subject of state taxpayer standing in a more analytical fashion focused on the historical tradition permitting taxpayer lawsuits at the local level, arguing that this pedigree largely explains why most states allowed such actions by the early 1960s.[137] They essentially contend that state courts oftentimes co-

133. *See, e.g.*, Comment, *Taxpayers' Suits*, *supra* note 23, at 910–11; Parsons, *supra* note 39, at 955.

134. *See supra* note 29 (citing authorities from Alabama, Florida, Maine, and New York); *see also* Faden v. Phila. Hous. Auth., 227 A.2d 619, 621–22 (Pa. 1967) ("[T]he fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallengeable in the courts.").

135. *See* Parsons, *supra* note 39, at 952–55 (1986); *see also* Chilakamarri, *supra* note 83, at 254 (favorably quoting Parsons).

136. *See infra* Parts IV.B.2, V.A.

137. *See, e.g.*, Note, *Controlling the Expenditure*, *supra* note 88, at 1277–78. The 1960 *Yale Law Journal* survey, *Taxpayers' Suits*, also opened with a discussion of the American historical precedents involving local taxpayers, which dated back to the mid-nineteenth century. *See* Comment, *Taxpayers' Suits*, *supra* note 23, at 896–99. It acknowledged that this line of authorities primarily evolved through municipal taxpayer lawsuits, but argued that, at the end of the day, there was little to distinguish these cases from state taxpayer actions, and thus it was only natural that state courts would evolve to permit them. *Id.* at 900–02. Professor Jaffe expanded upon this approach in his 1961 article. He closely examined the early development of public actions generally, and taxpayer lawsuits specifically, in English and American courts in the eighteenth and nineteenth centuries. *See* Jaffe, *supra* note 91, at 1269–82. Like the Yale survey, he noted that the development of state taxpayer standing doctrines occurred almost exclusively through local actions, implying

opt the well-established tradition of permitting municipal or county taxpayer lawsuits and expand that doctrine to encompass analogous state actions.

The main problem with both explanations is that they only tell half the story. With respect to the first argument, for example, it is certainly true—and again, empirically observable in the case law—that concerns about the enforceability of a particular constitutional provision or statute outside of the taxpayer action context are a major impetus for the state taxpayer standing doctrines in place in some jurisdictions.[138] But so what? There are federal constitutional provisions that, if violated, would be unlikely to result in a particularized injury sufficient to convey Article III standing to challenge those violations.[139] They have not inexorably led to permissive federal taxpayer standing rules.[140] Indeed, the Supreme Court addressed this precise issue in *United States v. Richardson*,[141] and it emphatically rejected the idea that the potential unenforceability of a constitutional provision (in that case, the Accounts Clause[142]) is an argument in favor of taxpayer standing—quite the opposite, the Court opined.[143] The argument may be a coherent theory on its face to explain why states generally permit taxpayer lawsuits, but it is substantially undercut by the federal-state disparity in practice.

A similar point holds with respect to the local taxpayer action analogy. No one disputes that there is a strong historical basis for allowing local taxpayer lawsuits at the state level, and some courts no doubt were influenced by those rules to adopt an identical doctrine for state taxpayers.[144] But the same historical tradition is present at the federal level as well. Federal courts have long permitted municipal or county taxpayer lawsuits; this practice was expressly preserved in *Frothingham*, and it remains good law today.[145] As such, the second theory also fails to explain

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that this was the genesis of the then-current permissive state taxpayer standing rule. *Id.* at 1281–82.

138. *See supra* notes 29, 134 and accompanying text.

139. The Establishment Clause is the most notable of these, but there are a handful of others. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 12 (authorizing Congress "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"); U.S. CONST. amend. XXVII (prohibiting the alteration of Congressional compensation until after an intervening election of Representatives).

140. *See supra* Part I.A (discussing restrictive federal taxpayer standing rules).

141. 418 U.S. 166 (1974).

142. *See* U.S. CONST. art. I, § 9, cl. 7.

143. *See Richardson*, 418 U.S. at 179–80. The Court observed: "In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." *Id.* at 179.

144. *See supra* note 84 (discussing states that adopt local taxpayer standing rules at the state level).

145. *See supra* Part I.B (discussing the permissive municipal taxpayer standing rules in federal court). Some commentators speculate that in light of the increasingly restrictive federal standing decisions, the *Frothingham* municipal taxpayer standing exception is ultimately endangered. *See, e.g.*, Gee, *supra* note 69, at 1273–78.

why these analogous local taxpayer standing rules were so influential in state but not federal court.

A third potential explanation for the permissive state taxpayer standing doctrines offered by earlier[146] and sometimes even contemporary[147] scholars is a purely textual one. This rationale—if true—actually could explain why these rules are different at the state and federal levels, and not just why state courts might generally grant broad state taxpayer standing. The theory points to the Article III case and controversy requirement and suggests that because state constitutions frequently do not contain this language, the difference between the forums can be attributed to that omission.[148]

This argument, however, is ultimately unconvincing for two reasons. First, many of the jurisdictional clauses in state constitutions actually contain roughly equivalent language to the federal case and controversy requirement.[149] Yet the vast majority of these states still allow taxpayer lawsuits.[150] There is nothing inherent in the particular wording of state analogues to the federal case and controversy requirement that explains why the federal jurisdictional grant has been interpreted so restrictively.

This textual theory also ignores the widespread influence of federal standing jurisprudence on state decisions in the field, even in the absence of any similar state constitutional provision. Some state constitutions may lack a textual equivalent to the Article III jurisdictional grant, but this does not mean that federal principles play no part in the creation of state justiciability rules. To the contrary, state courts borrow heavily from their federal counterparts—especially with respect to standing requirements—when formulating these doctrines, even without any case and controversy

146. *See, e.g.*, Friesen, *supra* note 83, at 1299–1300; James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 808–09 (1992) (attributing liberal state taxpayer standing rules to a lack of limiting constitutional language).

147. *See, e.g.*, Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125, 128 (2007); Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 164–65 (2005); Linde, *supra* note 97, at 1275; Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non–Article III Plaintiffs*, 110 YALE L.J. 1003, 1006–07 & n.16 (2001).

148. *See, e.g.*, Klee, *supra* note 147, at 164–65 ("State courts are courts of general jurisdiction, governed by state constitutions that seldom have 'case or controversy' (or jurisdictional) requirements for standing as federal courts . . . ."); Elmendorf, *supra* note 147, at 1006 ("Most state courts are courts of general jurisdiction, unfettered by constitutional provisions analogous to Article III.").

149. *See* Doggett, *supra* note 83, at 876–77 (discussing state equivalents to the Article III "case and controversy" requirement). For example, the California Constitution grants California courts jurisdiction over "cause[s]." *See, e.g.*, CAL. CONST. art. VI, § 12(a). The constitutions of Alaska, Kansas, North Carolina, and Oregon all expressly grant their state courts jurisdiction over "cases." *See* Doggett, *supra* note 83, at 876 n.236.

150. *See supra* Part II.B (observing that only eight states expressly disallow taxpayer lawsuits).

approximation.[151] Why should taxpayer standing principles be immune from this influence?

So all of these traditional explanations for the general permissiveness of state taxpayer standing rules are fundamentality unsatisfying. Either the theories fail to explain the federal-state taxpayer standing disparity, or they are substantially belied in practice. What could explain the phenomenon, then? One recent scholar took a promising step toward answering this question.

B. Hershkoff's State Courts and the "Passive Virtues"

The *Harvard Law Review* published Professor Hershkoff's sweeping article, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*,[152] in 2001. The article explores the similarities and differences in federal and state justiciability rules in substantial detail, arguing that any inconsistencies can and do—and should—reflect disparities in state and federal institutions and the purposes of governance and structure underlying them.[153] Hershkoff touched upon a number of distinct justiciability doctrines in her comprehensive work, including taxpayer and citizen lawsuits, moot disputes, political questions, and advisory opinions.[154] Her piece has been enormously influential to the state constitutional discourse over the past decade.[155]

Hershkoff dedicated several pages of the article to a discussion of the status of public action litigants in state court, including, most notably, state taxpayer lawsuits.[156] She noted that almost every state allows some degree of taxpayer actions, even in the absence of a showing of an increased tax burden or particularized injury.[157] Hershkoff went on to describe these

151. *See, e.g.*, City of Greenwood Vill. v. Petitioners for Proposed City of Centennial, 3 P.3d 427, 436 n.7 (Colo. 2000) ("[S]imilar considerations underlie both Colorado and federal standing law, and we frequently consult federal cases . . . ."); Dover Historical Soc'y v. City of Dover Planning Comm'n, 838 A.2d 1103, 1111 (Del. 2003) (federal standing standards "are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware"); ACLU v. City of Albuquerque, 188 P.3d 1222, 1227 (N.M. 2008) (despite the lack of a state equivalent to the case and controversy requirement, "[New Mexico] courts have long been guided by the traditional federal standing analysis").

152. Hershkoff, *supra* note 30. Hershkoff's titular quotation, "Passive Virtues," is a reference to Professor Alexander Bickel's seminal 1961 *Harvard Law Review* article, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

153. *See generally* Hershkoff, *supra* note 30.

154. *Id.*

155. Specifically, according to West's KeyCite service, as of November 16, 2012, ten courts—all of them state appellate tribunals—and 124 legal journals or other secondary works have cited her article.

156. Hershkoff, *supra* note 30, at 1852–59.

157. *Id.* at 1855. Hershkoff observed that New Mexico's standing rules properly could be seen to permit citizen (and not taxpayer) standing in cases involving an important public interest. *Id.* at 1856 n.123 (citing State v. Johnson, 990 P.2d 1277, 1284 (N.M. 1999)).

generally permissive taxpayer standing rules as "for the most part uncontroversial."[158]

None of this was particularly new or groundbreaking; commentators have offered similar assessments for decades.[159] But Hershkoff went one step further in her analysis. She linked the permissive state taxpayer standing rules to a feature of state constitutionalism that had not been previously suggested. Hershkoff wrote: "Because state constitutions include many substantive social and economic provisions, taxpayer standing provides an important mechanism for regulatory enforcement and policy elaboration, sometimes placing interbranch disputes before the court."[160] Her article is more specific in a footnote explaining this proposed connection between liberal standing rules and substantive state constitutional provisions. There, Hershkoff offered the example of constitutional provisions regulating and circumscribing legislative discretion over fiscal matters, citing a 1991 law review article discussing state constitutional debt limitations.[161]

Hershkoff revisited this idea later in her piece. In a section addressing the applicability of the principles and arguments supporting restrictive federal justiciability doctrines, she again suggested that permissive state taxpayer standing rules were appropriate in light of certain unique characteristics of state constitutionalism. Hershkoff cited the often-discussed inclusion of "positive rights and regulatory norms" in state constitutions, which she argued "explicitly engage state courts in substantive areas that have historically been outside the Article III domain."[162] She specifically identified positive right guarantees[163] such as the provision of free public schools and the regulation of various public service entities like corporations, railroads, and banks.[164]

The notion that there is a distinct connection between liberal state taxpayer standing rules and substantive social and economic state

158. *Id.* at 1855.

159. *See supra* Part II.A (discussing commentary on permissive state taxpayer standing rules).

160. Hershkoff, *supra* note 30, at 1855 (footnotes omitted). At least one prior commentator implicitly acknowledged the correlation between permissive state taxpayer standing rules and state constitutional litigation, though she did so summarily and did not propose any link between the concepts. *See* Friesen, *supra* note 83, at 1302 (calling taxpayer suits to enforce state constitutional rights "commonplace").

161. Hershkoff, *supra* note 30, at 1855 n.116 (citing Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301).

162. *Id.* at 1889–90.

163. "Positive rights" provisions have long been a popular topic among state constitutionalists. *See* Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 316–19 (2011). *See generally* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459 (2010). Indeed, Professor Hershkoff has frequently written on the issue. *See, e.g.*, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

164. *See* Hershkoff, *supra* note 30, at 1890.

constitutional regulatory provisions is undeniably attractive at first blush. These constitutional provisions generally are absent at the federal level, and therefore, Hershkoff's suggested link provides a succinct and compelling explanation for both the permissive state taxpayer regimes employed in most states, as well as the corresponding federal-state disparity.

Yet certain aspects of the argument do not resonate as well on closer inspection. For example, the implication that permissive state taxpayer standing doctrines are necessary or especially well-suited to allow state courts to intervene in disputes over positive rights is incomplete at best. If a state or local government is required to do something by the state constitution, then it is entirely plausible that an affected individual might suffer an actionable injury-in-fact if the state failed to comply with this obligation, even under traditional injury-based standing rules.[165] Imagine, for instance, a state constitutional provision guaranteeing a free public education. That is a classic constitutional positive right, and yet there appears to be no reason why a child who is promised this schooling would be unable to claim the requisite legal injury if that public service is withheld. Injury-based standing rules seem perfectly sufficient to enforce that type of constitutional provision.[166]

Nor does the fact that state constitutions sometimes regulate banks or railroads or corporations seem particularly relevant to the lenient taxpayer standing rules in state court. Federal law regulates all of those as well, and federal courts obviously take an opposite view on the issue of taxpayer standing. Furthermore, it is not hard to imagine that if a state government failed to properly enforce or apply one of these substantive regulatory provisions, one or more individuals might suffer a necessary injury-in-fact to convey standing under traditional justiciability rules.[167]

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165. *See, e.g.*, Usman, *supra* note 163, at 1519–20 ("Interpreting positive rights does not inherently press the courts into the narrow domain of cases that constitute non-justiciable political questions. To the contrary, positive rights, like their negative rights counterparts, invite judicial interpretation.").

166. This hypothetical is not novel or unprecedented. *See* Lobato v. State, 216 P.3d 29, 35 (Colo. App. 2008), *rev'd on other grounds*, 218 P.3d 358, 367 (Colo. 2009). In *Lobato*, the Colorado Court of Appeals held that parents of students had injury-based standing to challenge the failure of the state to provide sufficient funds for education in violation of the Colorado Constitution's "positive right" guaranty. *Id.* The Colorado Supreme Court did not disturb this determination. *See* Lobato v. State, 218 P.3d 358, 363 (Colo. 2009). Commentators are in accord with this result. *See* James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49, 85 (2006) (discussing justiciability of positive right education cases); Aaron Jay Saiger, *School Choice and States' Duty To Support "Public" Schools*, 48 B.C. L. REV. 909, 966–68 (2007) (same).

167. For example, Hershkoff cites the Oklahoma Constitution's regulation of monopolies and its imposition of miner safety standards. *See* Hershkoff, *supra* note 30, at 1890 n.300 (citing OKLA. CONST. art. V, § 44; *id.* art. VI, § 26). But if a company was engaging in monopolistic business practices, one would expect that its competitors or customers might suffer a particularized injury-in-fact sufficient to attempt to compel the Oklahoma government to enforce that constitutional provision. Similarly, if the state government failed to enforce miner safety standards, one of the affected miners could claim his or her heightened personal risk as a sufficient injury to convey standing. There may be some

Still, it is impossible to deny that Hershkoff's argument was a thoughtful and original idea, and one which can shed a great deal of light on a phenomenon that has received surprisingly little attention from contemporary scholars.[168] It should come as no surprise, then, that several judges and commentators have since embraced—mostly uncritically—her proposed connection between permissive state taxpayer standing doctrines and substantive state constitutional social and economic regulatory provisions.[169] And in fact, although this link is overbroad to some degree, it contains a great deal of truth. That thesis is the focus of the rest of this Article.

C. State Constitutional Fiscal Limitations and Briffault's Disfavored Constitution

One conspicuous omission in the foregoing critique of Professor Hershkoff's article should be readily apparent. The positive rights and detailed regulatory provisions often found in state constitutions may be inadequate to explain why state courts generally permit taxpayer lawsuits, whereas federal courts do not. But the same cannot be said about her largely unspoken implication that there is some link between permissive taxpayer standing rules and state constitutional provisions limiting a state government's discretion over economic or fiscal matters.[170] Those very specific constitutional restrictions seem particularly apt to trigger the enforceability concerns that some courts and commentators associate with liberal taxpayer standing doctrines.[171] And perhaps just as importantly,

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prudential question as to whether the state is the proper defendant in that scenario, of course, but this would not implicate a question of injury-based standing.

168. Professor Hershkoff responded to these criticisms in our correspondence. She observed that state constitutional provisions like positive rights and regulatory measures generally were not actionable at common law, especially in cases involving solely nongovernmental litigants, which is an argument that she has fleshed out at length. *See* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1541–46 (2010). Two immediate rebuttals come to mind. First, this Article solely envisions lawsuits against governmental entities (and not private litigants) as a method to enforce positive right and regulatory constitutional provisions. Second, as an empirical matter, recent decades have seen a number of lawsuits seeking to exercise these types of constitutional provisions that were permitted by the state courts. *See supra* note 166. In any event, she certainly raises an excellent point, and one that warrants future inquiry.

169. *See* Manzara v. State, 343 S.W.3d 656, 673–74 (Mo. 2011) (Wolff, J., concurring) (citing Hershkoff for the proposition that "[t]he differences in taxpayer standing cases reflect the profound differences between the constitutions under which these courts function"); *see also* Chia & Seo, *supra* note 147, at 129 (also citing Hershkoff); John C. Reitz, *Standing To Raise Constitutional Issues*, 50 AM. J. COMP. L. 437, 460 (Supp. 2002) (favorably quoting Hershkoff for the same); DiManno, *supra* note 48, at 661 (same); Doggett, *supra* note 83, at 873–74 n.222 (same).

170. *See* Hershkoff, *supra* note 30, at 1855 n.116, 1889–90 (citing constitutional debt restrictions as an example of state constitutional efforts to "constrain state and local fiscal authority").

171. Indeed, there is a well-developed literature discussing the problem of standing in the context of a specific sort of constitutional fiscal restriction—a balanced budget amendment.

these limitations at least nominally are intended to protect the class of taxpayers as a whole.[172] If the taxpayer-beneficiaries would not have standing to challenge violations of these specific fiscal limitations expressly designed to protect them, then it is hard to see how anyone else would. Perhaps those provisions could explain the difference in federal and state taxpayer standing rules.

A few examples may help to demonstrate this potential dynamic. To use the same specific constitutional fiscal limitation identified by Hershkoff, consider a restriction on the issuance of government debt.[173] Who would be injured if a state government blatantly violated it? Not the government that illegally borrowed the money, and not the debtholders who willingly lent it—indeed, the taxpayers and/or citizens of the particular jurisdiction would seem to have the most plausible claim of injury, however broad or widely disseminated.[174] Or imagine a not-uncommon state constitutional provision forbidding a state or local government from providing funds to be used for abortion services.[175] Even if a state agency began directly and unabashedly paying providers in connection with every abortion provided in the state, it is unlikely that any specific individual would suffer the particularized harm necessary to convey standing under an Article III analysis. After all, the only persons even affected by such an action would be the beneficiaries of those illicit funds.

Nor are these sorts of fiscal limitations a minor or inconsequential component of state constitutions. They are littered throughout the

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See, e.g., Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1165–66; Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences*, 12 J.L. & POL. 153, 185–88 (1996); Gay Aynesworth Crosthwait, Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065, 1073–82 (1983).

172. *See* Briffault, *supra* note 31, at 908–09 ("[F]ar less attention has been paid to a distinctive feature of state constitutions that has little to do with civil liberties or positive rights—the many provisions that seek to protect taxpayers by limiting the activities and costs of government."); Phillip J.F. Geheb, *Tax Increment Financing Bonds As "Debt" Under State Constitutional Debt Limitations*, 41 URB. LAW. 725, 732–33 (2009) (characterizing the purpose of debt limitations as "protect[ing] the public from the inherent 'shortsightedness' of legislatures to incur debt without considering the burden on future taxpayers"); *see also* Reuven Mark Bisk, Note, *State and Municipal Lease-Purchase Agreements: A Reassessment*, 7 HARV. J.L. & PUB. POL'Y, 521, 521–22 (1984) (same). Academic commentators are not alone in this assessment of the purpose behind constitutional fiscal restrictions. *See* Common Cause v. State, 455 A.2d 1, 10 (Me. 1983) ("[T]he taxpayers of the state are surely among the principal intended beneficiaries of that [constitutional public purpose] provision."); Dep't of Ecology v. State Fin. Comm., 804 P.2d 1241, 1246 (Wash. 1991) (stating the same with respect to debt limitations).

173. *See* Hershkoff, *supra* note 30, at 1855 n.116.

174. *But see* Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 607 (1997) (suggesting that bondholders might have standing).

175. *See, e.g.*, Hotaling v. Hickenlooper, 275 P.3d 723 (Colo. App. 2011) (challenging cancer screening grants awarded to abortion providers allegedly in violation of a constitutional abortion funding ban). In the interest of full disclosure, the author was lead counsel for the State in this case.

constitutional landscape in virtually every state.[176] Indeed, a few scholars have identified these fiscal restrictions as a main feature distinguishing state constitutions from their federal counterpart.[177] Professor Briffault is the most prominent of them. His 2003 article, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*,[178] closely examines the state constitutional fiscal limits that (he argues) are intended to protect taxpayers by limiting the activities and costs of government.[179] Briffault identified several such provisions that can be found in most, if not virtually all, state constitutions. These include public purpose requirements, which expressly limit the authority of state or local governments to transfer public moneys or other financial assistance to private enterprises;[180] antigift clauses, which prevent a state from lending its credit to private individuals or corporations;[181] debt limitations, which take a variety of forms but generally restrict the ability of state or local governments to incur debt;[182] and tax and expenditure limitations, which broadly restrict the amount of taxes that can be assessed and collected by

176. *See, e.g.*, Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1315–16 (noting that over three-quarters of states have constitutionalized debt restrictions).

177. *See, e.g.*, Briffault, *supra* note 31, at 908 ("The Federal Constitution says next to nothing about public finance, and when it does so, it either provides authority for congressional action or sets procedures for raising and spending money. It places just a handful of substantive constraints on federal taxation and no restrictions on federal borrowing at all."); G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L.J. 767, 774 (2009) (state constitutional fiscal limitations are "without parallel or precedent in the Federal Constitution"); *see also* Susan P. Fino, *A Cure Worse than the Disease? Taxation and Finance Provisions in State Constitutions*, 34 RUTGERS L.J. 959, 969–70 (2003) (attributing the proliferation of constitutional fiscal limitations to easily amendable state constitutions); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2605–07 (2005) (discussing state constitutional fiscal regulation). As discussed below, the absence of specific federal constitutional fiscal limits can be overstated. *See infra* Part V.C.

178. *See* Briffault, *supra* note 31.

179. *See id.* at 908–09. Briffault was not the first to suggest that the main goal of state constitutional fiscal limitations is to protect state taxpayers as a whole. *See, e.g.*, Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 618, 619–23 (1959).

180. *See* Briffault, *supra* note 31, at 910–15. Commentators generally attribute the provisions to the "disastrous consequences" of government investment in private enterprises in the first half of the nineteenth century, specifically including the Erie Canal debacle, when thirteen states defaulted on their debts to some degree. *Id.* at 910–11.

181. *Id.* at 911–12. These clauses generally were added to state constitutions during the nineteenth century in response to the Panic of 1837, which saw several states lend their credit to speculative railroad enterprises and then declare bankruptcy when the projects collapsed. *See, e.g.*, Nicholas J. Houpt, Note, *Shopping for State Constitutions: Gift Clauses As Obstacles to State Encouragement of Carbon Sequestration*, 36 COLUM. J. ENVTL. L. 359, 363–64, 381–83 (2011) (discussing the origin of gift clauses).

182. *See* Briffault, *supra* note 31, at 915–18. Debt limitations restrict the ability of governments to borrow money. *See id.* at 915–16. They are more varied than public purpose requirements or antigift clauses. Some prohibit debt outright, some limit it to a dollar figure or percentage of the state budget, and some impose supermajority legislative or voter approval requirements on the issuance of debt. *Id.*

state and local governments and the particular services on which these revenues can be spent.[183] Briffault characterized these fiscal restrictions as fundamentally defining state constitutionalism as much or even more than the more popular positive rights and expansive individual liberties invoked by many contemporary state constitutionalists.[184]

Yet Briffault was more interested in exploring how these constitutional fiscal limitations were enforced and applied in practice. He called them the "disfavored constitution" for two reasons. Briffault first noted that, as of 2003, these provisions had not received much attention from scholars who generally preferred to focus on higher profile topics.[185]

Second, and perhaps more interestingly, Briffault argued that state courts have generally disfavored these constitutional fiscal limitations in practice.[186] He contended that they often construe the fiscal limits as narrowly and formalistically as possible in order to avoid constraining state and local government discretion.[187] Briffault suggested a number of explanations for this phenomenon.[188] He ultimately concluded that these fiscal limitations are a crucial—though little-discussed—aspect of state constitutionalism, and the participants in the decades-long discourse over state constitutional law might benefit from considering them.[189]

Briffault was not the first commentator to examine many of the specific state constitutional fiscal limitations central to his piece.[190] He was not

183. *Id.* at 927–39. These provisions limit a state's ability to impose taxes and appropriate expenditures. Like debt restrictions, they can take a variety of forms. The early constitutional limits tended to focus on property taxes, but in the past century, they became quite diverse and were expanded to various types of state taxation and spending. *Id.* at 929–34.

184. *Id.* at 908–09.

185. *Id.* at 908 & n.8. Briffault noted that even the most ardent critics of state constitutionalism tended to focus on issues involving federal constitutional analogues. *Id.* at 908 (citing Gardner, *supra* note 146, at 780–98); *see also* Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 869–72 (2012) (echoing that conclusion with respect to debt and tax limitations).

186. *See* Briffault, *supra* note 31, at 909–10, 939–44.

187. *Id.*; *see also* Darien Shanske, *The Supreme Court and the New Old Public Finance: A New Old Defense of the Court's Recent Dormant Commerce Clause Jurisprudence*, 43 URB. LAW. 659, 703 & n.200 (2011) (citing Briffault for the proposition that state courts construe state constitutional fiscal limitations narrowly).

188. These explanations include the influence of post–New Deal federal jurisprudence, which views such economic matters as political questions; judicial sympathy with the purposes behind the government programs at issue; a pervasive view among judges that violations of these fiscal restrictions are essentially victimless infractions; and the possibility that courts view these limitations as artifacts that do not reflect contemporary political reality. *See* Briffault, *supra* note 31, at 939–44.

189. *Id.* at 955–57.

190. *See, e.g.*, Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143 (1993) [hereinafter Rubin, *Constitutional Aid Limitation*] (discussing limits on the use of public moneys or other assets to aid private entities); Dale F. Rubin, *Public Purpose in the Northwest: A Sinkhole of Judicial Interpretation—The Case for Alternatives in the Delivery of Public Services and the Granting of Subsidies*, 32 IDAHO L. REV. 417 (1996) [hereinafter Rubin, *Public Purpose*] (same); Sterk & Goldman, *supra* note 176, at 1301 (discussing debt limitations); Kristin E.

even the first to observe that state courts are often reluctant to enforce various types of these provisions.[191] His article was, however, perhaps the first scholarly work to conceptualize this sprawling web of "Briffaultian" fiscal limitations as a pervasive thread of state constitutionalism, which had been dismissed or minimized by courts and commentators alike.[192] Scholars have cited it favorably over the past several years, both for the proposition that these limitations constitute a distinct strain of state constitutionalism, as well as part of a more detailed examination of specific types of fiscal restrictions.[193]

IV. STATE CONSTITUTIONAL FISCAL LIMITATIONS AND PERMISSIVE STATE TAXPAYER STANDING RULES: TESTING THE LINK

Part IV sets forth this Article's hypothesis: that there is a link between the generally permissive state taxpayer standing rules and the prevalence of state constitutional fiscal limitations. It then presents the results of an empirical-historical study intended to evaluate this theory.

A. Proposing a Link Between State Constitutional Fiscal Limitations and Permissive State Taxpayer Standing Rules

The juxtaposition of Professor Hershkoff's discussion of generally permissive state taxpayer standing regimes and Professor Briffault's examination of state constitutional fiscal limitations is not intended to be subtle. This Article fundamentally argues that the two concepts are inextricably linked, with the latter acting as a direct impetus for the former. According to this theory, most of the detailed fiscal limitations frequently found in state constitutions—but generally not in their federal

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Hickman, Comment, *The More Things Change, the More They Stay the Same: Interpreting the Pennsylvania Uniformity Clause*, 62 ALB. L. REV. 1695 (1999) (discussing taxation uniformity provisions); Justin J.T. Hughes & Garth B. Rieman, Comment, *A New Generation of State Tax and Expenditure Limitations*, 22 HARV. J. ON LEGIS. 269 (1985) (discussing government expenditure limitations).

191. *See, e.g.*, Rubin, *Constitutional Aid Limitation*, *supra* note 190, at 143–45 (observing that state courts are reluctant to enforce public purpose requirements); Rubin, *Public Purpose*, *supra* note 190, at 417–19 (same); Sterk & Goldman, *supra* note 176, at 1358–60 (observing that state courts are reluctant to enforce constitutional debt restrictions).

192. Professor Robert F. Williams, a leading state constitutional theorist, provided an introduction to Briffault's piece (among others) in the Fifteenth Annual Issue on State Constitutional Law in the *Rutgers Law Journal*. Robert F. Williams, *Introduction*, 34 RUTGERS L.J. 905 (2003). He called the *Disfavored Constitution* "an exceptionally thoughtful consideration of the very important, but relatively low-visibility, fiscal provisions in state constitutions. . . . These fiscal provisions, concerning governmental taxation, spending, and borrowing, are among the most important in state constitutions concerning the way we govern ourselves." *Id.* at 905.

193. *See, e.g.*, G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1111–12 & nn.169–71 (2005); Tarr, *supra* note 177, at 773–74; *see also* Michael J. McCarthy, Silicon Valley Taxpayers Association*: Local Voters, State Propositions, and the Fate of Property Assessments*, 97 CALIF. L. REV. 1899, 1904 (2009) (discussing constitutional fiscal limitations in California).

counterpart[194]—specifically are intended to protect taxpayers from the improper or ill-advised use of their funds by the state government.[195] Only state taxpayers as a whole, and not any particularized individual or group, will normally be injured if these Briffaultian restrictions are disregarded or violated. This Article argues that taxpayer standing rules have evolved in many jurisdictions to reflect this dynamic by allowing individual taxpayers to challenge purported violations of these widespread and specific—but otherwise unenforceable—state constitutional fiscal limitations.

In other words, state courts often face a dilemma. They can ignore a specific and detailed constitutional restriction on government fiscal conduct designed to protect a broad but definable class of people, simply because these beneficiaries are the undifferentiated class of state taxpayers. Or they can give the Briffaultian limitations judicially enforceable teeth by allowing a non-Hohfeldian plaintiff to sue on behalf of this class, despite the taxpayer-plaintiff's lack of traditional injury-based standing. Neither alternative must be especially appealing, but courts must pick one nonetheless. It should not be surprising that state courts often choose the latter option. This Article thus proposes the following hypothesis: the permissive state taxpayer standing rules in place in most states are closely linked with ubiquitous state constitutional fiscal restrictions, which would be otherwise unenforceable by the very beneficiaries that they are intended to protect.

This all may sound familiar, because it is. The idea closely tracks the rationale for permitting Establishment Clause taxpayer challenges announced in *Flast*. There, Chief Justice Warren focused narrowly on the fact that the Establishment Clause is a clear and specific limitation on Congress's Article I, Section 8 taxing and spending power.[196] He rejected the proposition that taxpayer standing would exist in the absence of such a direct and express spending restriction.[197] Yet Warren pointedly declined to speculate as to the existence of any other additional specific constitutional spending limitations, noting that "[w]hether the Constitution contains other specific limitations can be determined only in the context of future cases."[198] The *Flast* majority opinion itself therefore refused to answer the question of whether Establishment Clause challenges are a special one-time exception to the general federal anti–taxpayer standing rules, or whether the principle announced in the case was a doctrine of general applicability that could be invoked in the future under a similar set

194. *See* Sterk & Goldman, *supra* note 176, at 1315–16 (cataloguing claims that the U.S. Constitution is devoid of fiscal limits).

195. *See supra* note 171 (listing various commentators and courts who describe state constitutional fiscal limitations as intended to protect the public).

196. *See* Flast v. Cohen, 392 U.S. 83, 104–06 (1968).

197. *Id.*

198. *Id.* at 104–05. For a thorough discussion of the court's opinion, see Debra L. Lowman, *A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action*, 30 SEATTLE U. L. REV. 651, 665–67 (2007).

of circumstances (i.e., a specific and direct spending restriction prohibits a particular federal expenditure), however uncommon they might be.

This last observation raises an interesting point. Commentators and courts understandably portray *Flast* as being drastically ratcheted back or "limited to its facts" over the past several decades; they essentially endorse the first of these two possible interpretations of the decision.[199] But perhaps the second view is the better one. Perhaps the circumstances in which the *Flast* exception will be applicable are just so rare at the federal level that they only occur (or at least, have only occurred so far) in the Establishment Clause context. Or to pose this possibility as a question: What if the reason why the Establishment Clause exception to the general federal prohibition on taxpayer lawsuits has never been expanded to any other specific federal constitutional spending restrictions is only because federal courts have not found any? In that case, at least some substantial portion of the purported *Flast* retrenchment should be attributed not to a hostility toward the decision by the courts (though that hostility certainly exists), but instead to the fact that these courts have simply answered "no" to Warren's open question.[200]

The sprawling landscape of state constitutionalism, and especially Briffault's "disfavored constitution," provides a wonderful contrast to this view of *Flast* and its aftermath. As opposed to the U.S. Constitution and its infamously scant fiscal restrictions, state constitutions are chock full of such undeniably specific and detailed fiscal limitations.[201] The post-*Flast* evolution of federal taxpayer standing rules might have been quite different if the U.S. Constitution resembled its state counterparts in this regard. Federal taxpayers might commonly be permitted to bring lawsuits challenging federal expenditures as violating one of these hypothetically numerous specific federal constitutional fiscal limitations in that alternate universe. And indeed, that is exactly what this Article postulates has happened at the state level. The widespread "specific constitutional limitations imposed upon an exercise of the [government's] taxing and spending power,"[202] so crucial to Warren's *Flast* analysis, have caused state taxpayer standing rules to take very different and more permissive paths than did their federal equivalent.

This argument meshes well with many of the technical restrictions applied to taxpayer actions in the various states. The mainstream requirement limiting taxpayer lawsuits to situations in which there is a

199. *See supra* Part I.A (discussing post-*Flast* retrenchment).

200. That notion is consistent with the views of post-*Flast* judges and commentators. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1445 (2011) (quoting *Hein* for the same principle); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 609 (2007) (noting that the Court has "declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause"); *see also* 13B WRIGHT, MILLER & COOPER, *supra* note 24, § 3531.10.1 (same).

201. *See supra* Part III.C (discussing the prevalence of state constitutional fiscal limitations).

202. *Flast*, 392 U.S. at 105.

sufficient economic nexus between the plaintiff's taxes and the government conduct being challenged—and in some states, even further limiting challenges to government expenditures and not revenue collection measures—is well-suited to serve as a practical limitation confining taxpayer lawsuits to fiscal challenges.[203] Similarly, only affirmative spending can violate a specific fiscal limitation, which by definition restricts government conduct and does not mandate that it undertake or perform any affirmative duty. The common requirement that a taxpayer can only enjoin an improper expenditure, and not compel the government to take some type of action, therefore serves as an important gatekeeping mechanism limiting taxpayer actions to fiscal challenges.[204] Finally, the relationship between the rule in a few states limiting taxpayer actions to constitutional or "substantial" claims and the idea that state taxpayer standing doctrines are closely linked with state constitutional fiscal restrictions should speak for itself.[205]

It is important to emphasize one final point. This Article's thesis is not created from whole cloth. The argument that state constitutional fiscal limitations are a primary driving force behind these liberal standing doctrines is, in one sense, little more than an elaboration on Hershkoff's original idea that state justiciability rules often are linked to substantive state constitutional provisions.[206] Yet despite that promising hint toward the ultimate genesis of the doctrines and Briffault's contemporaneous "disfavored constitution" commentary, no scholar has really examined the seemingly promising connection between the two specific concepts. The silence on this score is disappointing. There are fifty states, and only a little less than three-fourths of them clearly employ permissive taxpayer standing doctrines. There is no need to theorize in the abstract about what might or might not be responsible for the creation and development of these permissive rules; one could simply look at the cases themselves to see what

203. *See supra* Part II.C (discussing the rule limiting taxpayer challenges to unlawful expenditures).

204. *See supra* Part II.C (discussing the rule confining taxpayer challenges to lawsuits seeking to enjoin government expenditures and not to compel affirmative conduct).

205. *See supra* Part II.C (discussing states limiting taxpayer actions to substantial or constitutional challenges).

206. *See supra* Part III.B (discussing Hershkoff's theory). Furthermore, and as noted above, at least one high profile court decision has identified this precise link. In *Common Cause v. State*, 455 A.2d 1 (Me. 1983), the Maine Supreme Court was faced with a taxpayer lawsuit attacking an arrangement whereby the city of Bath, Maine, the state of Maine, and a major shipping company would finance, build, and operate a ship repair facility. *See id.* at 5–6. The plaintiffs argued that certain aspects of the transaction violated the Maine Constitution's public purpose and credit provisions. *See id.* at 7–8. The state and city asked the Maine courts to reject the action for lack of standing. *See id.* at 8. The Maine Supreme Court ultimately disagreed, stating that, "other than a taxpayers' suit, there is no mechanism available [to enforce the constitutional provisions at issue]. . . . It would conflict with the basic theory of American government if two branches of government, the legislative and the executive, by acting in concert were able, unchecked, to frustrate the mandates of the state constitution." *Id.* at 9–10.

types of claims are involved in the decisions establishing liberal taxpayer standing regimes in various states.

This Article undertakes just such an inquiry. It evaluates the foregoing thesis linking permissive state taxpayer standing doctrines and constitutional fiscal limitations through an empirical-historical survey examining the types of claims involved in the early taxpayer standing cases in all permissive jurisdictions. The results and their implications are set forth below.

B. The Survey

This Section offers the methodology and typology of the survey used to test the Article's hypothesis and then presents the survey's results.

1. Methodology and Typology

The task of identifying the decisions leading to the current state taxpayer standing doctrine in place in a given state is theoretically straightforward. One need only locate a few current state taxpayer standing cases and then trace back the decisions they cite (and then the decisions cited by those, and so on) until an ascertainable case law establishing the current rule is identified. The reality of the task is far more complicated, however.

This complexity is due to several reasons. First, standing rules in many states have changed over the past century or more—and sometimes, they have changed more than once.[207] These changes are also often partial and incomplete. Courts frequently modify, expand, or restrict the rule in effect at the time of the decision without reversing it.[208] It was not easy to decide how to classify each state in light of this dynamic. Therefore, the survey incorporated the following rules: First, only state taxpayer standing rules currently employed in a jurisdiction were included. If there was an earlier taxpayer standing doctrine that subsequently was reversed, the now-inoperative prior regime was ignored. If the rules had been only modified in the past (i.e., a subsequent decision partially altered existing permissive rules), however, then the cases establishing the original rule were included.

Second, the survey also generally includes only decisions in which standing was granted. It seemed problematic to evaluate the creation and development of a permissive state taxpayer standing doctrine through cases

207. *Compare* Lee v. Macomb County Bd. of Comm'rs, 629 N.W.2d 900, 907 (Mich. 2001) (expressly adopting federal Article III standing requirements despite earlier precedent to the contrary), *with* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 688 (Mich. 2010) (overruling *Lee*); *see also* Wein v. Comptroller, 386 N.E.2d 242, 244–45 (N.Y. 1979) (noting the shift first to permit taxpayer lawsuits, then to restrict them for certain types of claims).

208. *See Wein*, 386 N.E.2d at 245 (upholding common law standing rule but precluding certain types of lawsuits where such a prohibition is consistent with the legislative intent of a parallel taxpayer standing statute); *see also* Munger v. State, 689 S.E.2d 230, 239–40 (N.C. Ct. App. 2010) (explaining that recent North Carolina authorities would only permit taxpayer standing to challenge a government expenditure and not a discriminatory statue).

rejecting standing. They might only reflect that the claim at issue was not the type of challenge generally associated with such doctrines. There were a few instances, however, in which a first progenitor decision in a jurisdiction rejected standing in a way that unequivocally established a pro–taxpayer standing rule in the relevant state.[209] One cannot trace the evolution of taxpayer standing rules in these jurisdictions without considering those decisions; thus, they are included.

Third, the survey only includes state—and not local—taxpayer standing decisions. That may sound obvious on its face given this Article's specific focus, but the question is more difficult in practice. State decisions do not always distinguish between state and local taxpayer lawsuits when addressing the issue of taxpayer standing.[210] Given this lack of distinction, it is tempting to ignore the constraint limiting the survey to state taxpayer lawsuits. If local taxpayer cases are instrumental and even interchangeable in the creation and development of particular state taxpayer standing rules, after all, why should they be excluded from the survey?[211] The answer is that these local taxpayer cases play some role—to varying degrees—in the evolution of state taxpayer standing doctrines in many jurisdictions. It would be all but impossible to distinguish the state taxpayer cases that are directly or substantially influenced by analogous local precedents from those that are only indirectly or incidentally influenced by them. Rather than undertake this unworkable task, the survey applies a bright-line rule and includes only the state taxpayer standing jurisprudence itself.

Those are the basic "ground rules"; now for the methodology. The primary goal of the survey was to locate the first progenitor case in every

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209. *See, e.g.*, McKinney v. Watson, 145 P. 266, 267 (Or. 1915) (rejecting state taxpayer standing in the case but holding that such standing will generally exist); Lyon v. Bateman, 228 P.2d 818, 823–24 (Utah 1951) (holding that state taxpayers should be permitted to challenge unlawful expenditures but noting that no such spending had been challenged in the instant case); *see also In re* Biester, 409 A.2d 848, 852–53 (Pa. 1979) (holding that taxpayers would have standing to challenge government conduct under certain conditions, but not in the instant case). In addition, in *Arneson v. Board of Trustees of the Employees' Retirement System of Georgia*, 361 S.E.2d 805 (Ga. 1987), the Georgia Supreme Court held that a state taxpayer challenging an *ultra vires* act on the part of the state government will have standing only if the act is, in fact, outside of the power of that agency or officer. *See id.* at 806–07. Because the court essentially tied together the standing and merits determinations, it is hard to classify the decision as a "standing" or "no standing" one.

210. For example, Texas courts generally have cited *Terrell v. Middleton* without distinguishing between state and local taxpayers. *See, e.g.*, Calvert v. Hull, 475 S.W.2d 907, 908 (Tex. 1972); City of Austin v. Thompson, 219 S.W.2d 57, 61 (Tex. 1949); Osborne v. Keith, 177 S.W.2d 198, 200 (Tex. 1944); Hendee v. Dewhurst, 228 S.W.3d 354, 378 (Tex. Ct. App. 2007); Tex. Indus. Traffic League v. R.R. Comm'n of Tex., 628 S.W.2d 187, 193 n.4 (Tex. Ct. App. 1982); Lopez v. Ramirez, 558 S.W.2d 954, 958 (Tex. Civ. App. 1977); First Nat'l Bank of Bellaire v. Prudential Ins. Co. of Am., 551 S.W.2d 112, 114 (Tex. Civ. App. 1977); Anderson v. Houts, 240 S.W. 647, 649 (Tex. Civ. App. 1922).

211. *See, e.g.*, Price v. Commonwealth Transp. Cabinet, 945 S.W.2d 429, 431–32 (Ky. Ct. App. 1996) (discussing the evolution of Kentucky's state taxpayer standing regime and noting that it evolved largely from local taxpayer decisions); Regan v. Babcock, 247 N.W. 12, 16 (Minn. 1933) (permitting a state taxpayer lawsuit based solely on local taxpayer action precedents).

permissive jurisdiction; as discussed below, these initial decisions are the most important, both for methodological and practical reasons. The research in a particular state started with a Westlaw "natural language" search for [taxpayer standing lawsuit action challenge illegal unlawful expenditure]. That usually turned up several recent cases explaining the current state taxpayer standing rules in a particular jurisdiction. The survey traced back the cases cited in these recent decisions, and then the cases cited in those, and so on, until it identified a manageable handful of the first decisions establishing the current taxpayer standing rules. The survey then searched the West headnote "States—Fiscal Management, Public Debt and Securities—Rights and Remedies of Taxpayers" (360k168.5 k) in each state to confirm that it had not missed the first progenitor decision or any other important early cases. The survey also used a few law review surveys to double-check its results.[212] Finally, in a few states where this was unproductive, it performed a text search for [taxpayer w/40 standing] to verify that no cases existed.

Confirming that the first progenitor decisions in each state had been identified generally was not difficult. The 1960 Yale survey cited most of these cases, and the West headnote search uncovered most of the rest. Many of the progenitor cases also acknowledged that they were resolving a question of first impression.[213] Once this first—and most important—decision was found, locating its most immediate progeny was a straightforward task. One difficult choice was where to draw the line in terms of the number of subsequent cases to include; the survey did not apply any hard-and-fast rule in this regard. The general goal was to collect three decisions, but this was not always possible. There were only one or two cases in some states, whereas in others, based on the development of the caselaw, it seemed appropriate to include four or more. The judgment required to determine how many cases to include for each state obviously interjects the potential for bias; as such, this Article posits that the first progenitor results are the most replicable and thus meaningful.[214]

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212. *See* Chilakamarri, *supra* note 83, app. A at 271; Comment, *Taxpayers' Suits*, *supra* note 23, at 900 n.30; Parsons, *supra* note 39, at 963 n.87. These comments were all valuable to varying degrees, though each had its drawbacks. The Yale survey was the most comprehensive and accurate, but it is a half century old, so some of the state doctrines have changed. Parson's comment is also more than twenty-five years old, and it heavily borrows from the Yale piece, so it shares many of the same problems. Finally, the Chilakamarri comment, while more recent, commingles state and local taxpayer doctrines.

213. *See, e.g.*, Nania v. Borges, 551 A.2d 781, 783 (Conn. Super. Ct. 1988) (observing that the question of state taxpayer standing was one of first impression); Fergus v. Russel, 110 N.E. 130, 135–36 (Ill. 1915) (same); Wertz v. Shane, 249 N.W. 661, 662–63 (Iowa 1933) (same).

214. *See, e.g.*, Joshua G. Urquhart, Younger *Abstention and Its Aftermath: An Empirical Perspective*, 12 NEV. L.J. 1, 39–40 & nn.261–62 (2011) (discussing this possibility of unintended bias). Essentially, the concern is that one might be tempted to include more decisions from states that tend to support the Article's main hypothesis. In this regard, in the five states in which more than four cases were included, the twenty-seven included decisions actually undercut the Article's thesis. *See infra* Appendix (showing that in Alabama,

The survey then determined whether each included decision involved a state constitutional fiscal limitation. It used Professor Briffault's definition as a starting point to determine whether a constitutional provision was a fiscal restriction, and then added in a few additional types of limitations that fell within the basic spirit of Briffault's premise, even if he did not identify them by name.[215] Several cases involved multiple claims, some of which were state constitutional fiscal challenges and some of which were not; the survey classified all such cases as involving state constitutional fiscal limitations.

The survey also captured one final piece of information. In order to control for the fact that there were different numbers of cases included for various states, it placed each permissive jurisdiction into one of four groups: (1) states in which constitutional fiscal limitations played an exclusive role in the evolution of these doctrines (i.e., all early decisions involved such challenges); (2) states in which constitutional fiscal limitations played a substantial role in the evolution of these doctrines (i.e., half or more of the early decisions involved such challenges); (3) states in which constitutional fiscal limitations played a modest role in the evolution of these doctrines (i.e., a minority of the early decisions involved such challenges); and (4) states in which constitutional fiscal limitations played no role in the evolution of these doctrines (i.e., no early decisions involved such challenges).

2. Results

Thirty-six states clearly permit state taxpayer lawsuits under their current standing doctrines, as stated above. The survey included 122 published and unpublished decisions from these jurisdictions, for an average of 3.4 decisions per state. A table listing the state-by-state results is included as an appendix at the end of this Article.

Connecticut, Illinois, Oregon, and Washington, twelve of the decisions involved Briffaultian limitation, thirteen did not, and two were unclear).

215. As discussed below, *infra* Part IV.B.2, government compensation limits were by far the most commonly found of these "quasi-Briffaultian" provisions. *See, e.g.*, Griffin v. Rhoton, 107 S.W. 380 (Ark. 1907) (challenge to prosecutor salary in excess of constitutional salary cap); Leckenby v. Post Printing & Publ'g Co., 176 P. 490 (Colo. 1918) (challenge to a Lt. Governor's expense appropriation on the grounds that it was an unconstitutional salary increase); Arneson v. Bd. of Trs. of the Emps.' Ret. Sys. of Ga., 361 S.E.2d 805 (Ga. 1987) (challenge to a government pension program on the grounds that it was unconstitutional retroactive compensation). Single subject appropriation requirements are another common fiscal limitation in the survey that was not explicitly identified by Briffault. *See, e.g.*, Stewart v. Stanley, 5 So. 2d 531 (La. 1941) (single subject appropriations challenge to crime commission appropriation). In one state, two cases involved a provision implicating both restrictions (i.e., a constitutional provision requiring that salary appropriations be confined to a single subject). *See* Dep't of Educ. v. Lewis, 416 So. 2d 455 (Fla. 1982); Dep't of Admin. v. Horne, 269 So. 2d 659 (Fla. 1972).

The number of cases in a particular state ranged from one (Maine[216] and Arizona[217]) to six (Alabama[218] and Connecticut[219]). The included cases spanned the time period from 1881[220] to 2009.[221] Looking at only the first progenitor state taxpayer standing decision in a particular jurisdiction, those cases ranged from 1881 to 1988.[222] It was reasonably clear whether the particular taxpayer challenge involved a state constitutional fiscal limitation in 119 of the survey decisions; in contrast, three cases were so vague in their description of the plaintiffs' claims that the type of challenge being brought is unknowable.[223] This latter group includes one first progenitor case.[224]

With respect to the most meaningful group of decisions—the first progenitor cases—twenty-five of the thirty-five ascertainable decisions (71.4%) involved state constitutional fiscal challenges. Of the ten first progenitor cases that did not involve any Briffaultian fiscal limitations, six (17.1%) involved statutory or other nonconstitutional claims and four (11.4%) involved state constitutional challenges that were not fiscal in nature.

The aggregate survey results are consistent with this topline finding. With respect to the state-by-state categorization metric, which attempts to control for the fact that the survey includes different numbers of cases for various jurisdictions, state constitutional fiscal limitations played an exclusive role in the creation and development of permissive state taxpayer

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216. *See* Common Cause v. State, 455 A.2d 1 (Me. 1983). A more recent Maine decision addressed the issue of the standing of state sales taxpayers to bring a taxpayer action, but it rejected standing. *See* Collins v. State, 750 A.2d 1257 (Me. 2000).

217. *See* Ethington v. Wright, 189 P.2d 209 (Ariz. 1948). A more recent Arizona decision addressed the issue of state taxpayer standing, but it ultimately rejected standing because the plaintiffs were not alleging the unconstitutional or illegal expenditure of taxpayer moneys. *See* Bennett v. Napolitano, 81 P.3d 311, 318 (Ariz. 2003).

218. *See* Zeigler v. Baker, 344 So. 2d 761 (Ala. 1977); Goode v. Tyler, 186 So. 129 (Ala. 1939); Leedy v. Taylor, 164 So. 820 (Ala. 1935); Abramson v. Hard, 155 So. 590 (Ala. 1934); Hall v. Blan, 148 So. 601 (Ala. 1933); Turnipseed v. Blan, 148 So. 116 (Ala. 1933).

219. *See* Bingham v. Dep't of Pub. Works, 16 A.3d 865 (Conn. Super. Ct. 2009); Conn. Post LP v. State Traffic Comm'n, No. X01CV990160337S, 2000 WL 33983848 (Conn. Super. Ct. Sep. 22, 2000); Enama v. Weicker, No. CV94-0046563S, 1994 WL 282165 (Conn. Super. Ct. June 13, 1994); Henry v. Life Haven, No. 329566, 1992 WL 170652 (Conn. Super. Ct. July 9, 1992); Stanley Works v. Dep't of Pub. Works, No. 393661, 1991 WL 204897 (Conn. Super. Ct. Sep. 27, 1991); Nania v. Borges, 551 A.2d 781 (Conn. Super. Ct. 1988).

220. *See* Lynn v. Polk, 76 Tenn. 121 (1881). The *Lynn* case was a chronological outlier. The next earliest decisions were a trio of 1907 cases. *See Griffin*, 107 S.W. 380; Schley v. Lee, 67 A. 252 (Md. 1907); Christmas v. Warfield, 66 A. 491 (Md. 1907).

221. *See Bingham*, 16 A.3d 865.

222. The latest first state taxpayer standing decision was *Nania*, 551 A.2d 781.

223. *See Leedy*, 164 So. 820; Richardson v. Blackburn, 187 A.2d 823 (Del. Ch. 1963); Reiter v. Wallgren, 184 P.2d 571 (Wash. 1947). There also were a few additional cases in which the type of state constitutional challenge was not explicitly identified, but based on the context, it must have been a fiscal one. *See, e.g.*, Richards v. Treasurer & Receiver Gen., 67 N.E.2d 583 (Mass. 1946); Leichter v. Barber, 451 N.Y.S.2d 899 (App. Div. 1982); *Lynn*, 76 Tenn. 121 (1881).

224. *See Reiter*, 184 P.2d 571.

doctrines in eight jurisdictions (22.2%); a substantial role in fourteen jurisdictions (38.9%); a modest role in nine jurisdictions (25.0%); and no role in the remaining five jurisdictions (13.9%). In other words, state constitutional fiscal limitations played an exclusive or substantial role in the early state taxpayer standing decisions in more than three-fifths—twenty-two of thirty-six (61.1%)—of the permissive state taxpayer standing jurisdictions.[225] With respect to the less meaningful unweighted aggregate survey results, slightly more than half of the total number of cases included in the survey—64 of the 119 ascertainable decisions (53.8%)—involved Briffaultian fiscal challenges.

The cases not involving state constitutional fiscal challenges were roughly split evenly between nonfiscal state constitutional challenges and nonconstitutional claims. Thirty of the ascertainable non-Briffaultian cases (25.0%) consisted of statutory, *ultra vires* or other nonconstitutional challenges. Twenty-five of these ascertainable cases (20.8%) involved state constitutional claims, but the claims did not implicate any fiscal limitations.

Finally, two very specific types of state constitutional fiscal limitations seemed to play an especially important role in the creation and development of state taxpayer standing doctrines in many of the permissive jurisdictions. Seventeen decisions involved constitutional challenges based on government salary or compensation limits. This is 14.3 percent of all ascertainable survey decisions, and more than a quarter (26.6%) of the survey cases involving state constitutional fiscal limitations. It is an understatement to say that state courts seem quite willing to permit state taxpayer lawsuits challenging executive or legislative official salaries or other government compensation on the grounds that they violate a specific state constitutional restriction, at least in the early taxpayer standing cases included in the survey.

It was also fairly common for a court to allow a state taxpayer to challenge a government expenditure on the grounds that it violated the jurisdiction's single-subject appropriation restriction. This type of constitutional provision generally requires that any legislative appropriation be limited to a single subject, ostensibly to combat various forms of legislative misconduct (e.g., attaching unpopular substantive measures to a "must pass" budget bill).[226] Six decisions included in the survey involved such single subject appropriation restrictions.[227] Therefore, more than a third of the included state constitutional fiscal decisions (twenty-three out

225. Twenty-two of these twenty-three states include a first-progenitor decision involving Briffaultian limitations; the remaining one was unclear. *Id.*

226. *See generally* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 803 (2006) (discussing single subject appropriation rules); *see also* Ondrea D. Riley, Comment, *Annual Federal Deficit Spending: Sending the Judiciary to the Rescue*, 34 SANTA CLARA L. REV. 577, 591–92 (1994).

227. This is 5.0 percent of all ascertainable survey cases, and 9.2 percent of those that involve state constitutional fiscal limitations.

of sixty-four) involved either government compensation or single subject appropriation restrictions.[228]

V. IMPLICATIONS OF THE SURVEY RESULTS

The final part of this Article discusses the implications of the survey results. It begins by discussing the degree to which the survey affirms or disaffirms the Article's hypothesis. It then concludes by considering additional implications of the empirical results and suggesting avenues for future research.

A. The Hypothesis Confirmed . . .

The most important conclusion to be gleaned from these survey results is that this Article's hypothesized link between permissive state taxpayer standing doctrines and state constitutional fiscal limitations appears to exist in practice, at least to some degree. Twenty-five of thirty-five (71.4%) of the ascertainable first progenitor cases involved these Briffaultian challenges.[229] This is highly suggestive of a connection between the two doctrines. There is a wide universe of statutory and constitutional claims that could be brought under the guise of a state taxpayer lawsuit in state court; indeed, one can find many of them in the decisions included in the survey.[230] It is difficult to believe that the narrow category of state constitutional fiscal restrictions would come up over and over again in the first progenitor decisions in so many states absent some connection between the two concepts.

And again, this first progenitor result is almost certainly the most meaningful metric. First, from a methodological standpoint, using only the first permissive taxpayer standing case avoids the exercise of judgment in determining how many cases to include for each state, which eliminates bias and weighting concerns.[231] Second, and more conceptually, it is entirely predictable that a later state court might latch on to the earlier taxpayer standing precedent devised from a progenitor case involving Briffaultian limitations, even when the claims before it do not implicate that sort of fiscal challenge. Indeed, this precise scenario—a first progenitor case involving a state constitutional fiscal challenge that is followed by

228. As mentioned above, two Florida decisions involved a single subject appropriation requirement specifically applicable to government official salary appropriations. *See supra* note 215. Although this requirement arguably could be classified as either type of restriction, the survey placed it in the government compensation limitation category.

229. *See supra* Part IV.B.2.

230. *See, e.g.*, Green v. Jones, 261 S.W. 43 (Ark. 1924) (statutory challenge to a convict lease-out arrangement); Ahlgren v. Carr, 25 Cal. Rptr. 887 (Cal. Dist. Ct. App. 1963) (statutory challenge to textbook purchase); Nania v. Borges, 551 A.2d 781 (Conn. Super. Ct. 1988) (statutory challenge based on the failure to observe a budgetary reserve requirement); Light & Power Constr. Co. v. McConnell, 181 A.2d 86 (Del. Ch. 1962) (statutory challenge to a bidding contract); Masson v. Reindollar, 69 A.2d 482 (Md. 1949) (*ultra vires* challenge to a road contract).

231. *See supra* Part IV.B.1.

subsequent cases not involving those claims—occurred in the included survey decisions in six jurisdictions (i.e., nearly a quarter of the states with a first progenitor decision involving state constitutional fiscal claims).[232]

The robustness of this conclusion is underscored when one looks at the aggregate results encompassing all survey cases. Using the state-by-state categories defined above, state constitutional fiscal challenges were an exclusive or substantial driving force behind the particular permissive taxpayer standing doctrine in nearly two-thirds (61.1%) of the relevant jurisdictions.[233] Looking at the (less meaningful) unweighted aggregate results, more than half (53.8%) of all decisions included in the survey where the type of challenge being brought is ascertainable involve Briffaultian fiscal limitations.[234] This should all lead to one inescapable conclusion—there is a distinct and unmistakable connection between state constitutional fiscal limitations and permissive state taxpayer standing doctrines, at least in the early state taxpayer standing decisions.

A second important observation is that the survey results undercut any theory broadly linking permissive state taxpayer standing doctrines and nonfiscal substantive social and economic constitutional regulatory provisions, specifically including positive rights and regulatory norms.[235] Relatively few cases in the survey even involved any type of nonfiscal state constitutional claims.[236] And even among those challenges, very few (if any) involve substantive policy provisions or positive rights.[237] Therefore, insofar as this Article rejects the premise that permissive state taxpayer standing doctrines are linked to the broader universe of non-Briffaultian substantive economic and social constitutional regulatory provisions, then the survey results are consistent with that position.

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232. Texas is a prime example of this phenomenon. After the initial decision in *Terrell v. Middleton*, 187 S.W. 367, 368 (Tex. Civ. App. 1916), the subsequent Texas state taxpayer standing cases generally do not involve state constitutional fiscal challenges. *See, e.g.*, Calvert v. Hull, 475 S.W.2d 907, 908 (Tex. 1972); Johnson v. Ferguson, 55 S.W.2d 153, 158 (Tex. Civ. App. 1932); Sherman v. Cage, 279 S.W. 508, 512 (Tex. Civ. App. 1925). Other states in which this pattern occurred include Missouri, North Carolina, Pennsylvania, Tennessee, and Utah.

233. *See supra* Part IV.B.2.

234. *See supra* Part IV.B.2.

235. *See supra* Part III.B (critiquing this theory).

236. In fact, non-Briffaultian constitutional claims are implicated in a minority—twenty-five of fifty-five—of all remaining survey decisions. *See supra* Part IV.B.2; *infra* Appendix. Of course, given that this Article was examining taxpayer lawsuits, the fact that there were very few nonfiscal constitutional challenges probably should not be surprising.

237. For example, several of the state constitutional claims in the survey cases involved separation of powers issues. *See, e.g.*, Ethington v. Wright, 189 P.2d 209 (Ariz. 1948) (challenge to improper legislative delegation of nonprofit property appraisal duties); Greenfield v. Russel, 127 N.E. 102 (Ill. 1920) (challenge to a legislative investigation on separation of powers grounds); Okla. Pub. Emps. Ass'n v. Okla. Dep't of Cent. Servs., 55 P.3d 1072 (Okla. 2002) (challenge to a delegation of mental health institution management duties in violation of the state constitution).

B. . . . but Only to Some Degree

And yet, it is important not to overstate these conclusions for two reasons. First, the survey findings were far from universal. The link between state constitutional fiscal limitations and permissive state taxpayer standing doctrines may be reasonably strong, but it is not uniform by any stretch. A significant minority of survey cases did not involve any state constitutional fiscal claims.[238] This includes five states—Arizona, California, Delaware, Minnesota, and New Jersey—in which none of the survey cases involved a state constitutional fiscal challenge.[239] Moreover, roughly a quarter of the survey decisions (counting all included decisions from Delaware and New Jersey), and six of the thirty-five ascertainable first progenitor decisions, encompass only statutory or other nonconstitutional challenges.

So just as commentators are inaccurate when they say that "virtually all" states permit state taxpayer lawsuits,[240] the hard-to-deny connection between Briffaultian constitutional fiscal limitations and permissive state taxpayer standing doctrines can be mischaracterized as stronger than it really is. Part of the explanation for this may be the possibility, as discussed above, that some state courts may have extended existing permissive taxpayer standing rules developed from earlier state constitutional fiscal challenges to broader types of lawsuits in later cases.[241] Yet even this is largely inconsistent with the fact that the first progenitor decisions in ten jurisdictions do not involve any state constitutional fiscal claims.[242] These nonfiscal progenitor cases show that permissive state taxpayer standing doctrines arise outside the state constitutional fiscal challenge context in a sizeable minority of jurisdictions. There must be something else to help explain this federal-state taxpayer standing disparity, at least in part.

One tempting response is to simply wave away the federal taxpayer standing regime as a unique outlier. This argument views liberal taxpayer

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238. Specifically, 28.6 percent of ascertainable first progenitor decisions and 46.2 percent of all such survey decisions involved exclusively non-Briffaultian claims. *See supra* Part IV.B.2.

239. *See Ethington*, 189 P.2d 209; Stanson v. Mott, 551 P.2d 1 (Cal. 1976); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Cal. State Emps. Ass'n v. Williams, 86 Cal. Rptr. 305 (Cal. Ct. App. 1970); Ahlgren v. Carr, 25 Cal. Rptr. 887 (Cal. Dist. Ct. App. 1963); Kuhn Constr. Co. v. State, 366 A.2d 1209 (Del. Ch. 1976); Koffler v. McBride, 283 A.2d 855 (Del. Ch. 1971); Richardson v. Blackburn, 187 A.2d 823 (Del. Ch. 1963); Light & Power Constr. Co. v. McConnell, 181 A.2d 86 (Del. Ch. 1962); McKee v. Likins, 261 N.W.2d 566 (Minn. 1977); Rockne v. Olson, 254 N.W. 5 (Minn. 1934); Regan v. Babcock, 247 N.W. 12 (Minn. 1933); Yacenda Food Mgmt. Corp. v. N.J. Highway Auth., 496 A.2d 733 (N.J. Super. Ct. App. Div. 1985); Warnock Ryan Leasing, Inc. v. State Dep't of Treasury, Div. of Purchase and Prop., 475 A.2d 1270 (N.J. Super. Ct. App. Div. 1984); Essex Cnty. Welfare Bd. v. Dep't of Insts. and Agencies, 371 A.2d 771 (N.J. Super. Ct. App. Div. 1977).

240. *See supra* Part II.B (noting that at least eight states do not permit state taxpayer lawsuits).

241. *See supra* note 232.

242. *See supra* Part IV.B.2.

standing rules as the default stance for any jurisdiction (state or federal), regardless of the claim at issue. The only important question in evaluating the federal-state disparity, then, is why the federal anti–taxpayer standing doctrine is so different from the mainstream position exemplified by the majority of states—not why the states themselves are so permissive. But this argument is undercut by the eight states that preclude state taxpayer actions and perhaps even the six additional jurisdictions in which the state taxpayer standing rules are ultimately unclear.[243] The restrictiveness of the federal taxpayer standing regime may place it alongside a minority of states, but that minority does exist. Put simply, the federal standard is not nearly as unique or *sui generis* as some commentators characterize it. This complex and multifaceted issue is beyond the scope of this Article.

A more fundamental reason why the survey results should be taken with a grain of salt, at least with respect to confirming this Article's hypothesis, is that the issue of state taxpayer standing could be disproportionately likely to implicate state constitutional fiscal limitations by its very nature. In other words, there may be a distinct correlation between the presence of Briffaultian restrictions in state constitutions and permissive state taxpayer standing rules in those same states, but that does not necessarily imply causation.[244]

The obvious mechanism for this correlation is straightforward. Most states require a nexus between a taxpayer-plaintiff and the action being challenged.[245] This normally means that the plaintiff must be challenging an expenditure from a fund into which he or she paid taxes, or at the very least, conduct that has the potential to diminish the money held in that fund.[246] As a result, taxpayer challenges seem largely predestined to involve fiscal challenges and, even more specifically, claims that a government expenditure or equivalent fiscal conduct violated a specific limitation. Statutory fiscal restrictions can be changed by the legislature that authorized the expenditure in question, so they should not play much of a role in these lawsuits. That leaves constitutional fiscal restrictions as the most logical culprit to be implicated by the claims usually asserted in state taxpayer lawsuits.

This Article's hypothesis, therefore, may have the relationship backward. Permissive state taxpayer standing doctrines did not evolve because of the widespread existence of Briffaultian fiscal limitations; instead, the technical requirements applied to most state taxpayer lawsuits essentially act as a justiciability filter that disproportionately allows through only those claims implicating state constitutional fiscal challenges. But if that is "all" this

243. *See supra* Part II.B (discussing jurisdictions that do not permit state taxpayer lawsuits).

244. *See, e.g.*, Urquhart, *supra* note 214, at 49–50 & n.304 (citing authorities distinguishing between correlation and causation).

245. *See supra* Part II.C (discussing the required nexus between the challenged expenditure and the plaintiff's taxes).

246. *See supra* Part II.C.

Article shows—that state taxpayer standing requirements tend to act to restrict such lawsuits to state constitutional fiscal claims—then that seems like a noteworthy conclusion in and of itself.[247] In any event, the issue of causality is an interesting one that is worthy of future inquiry.

C. The Importance of the Prevalence of State Constitutional Fiscal Limitations

There is another important point to make about the apparent relationship between state constitutional fiscal limitations and permissive state taxpayer standing doctrines. It ultimately is unlikely that these spending restrictions, viewed singularly in isolation, are solely responsible for the creation and development of the relevant taxpayer standing rules. State constitutions undeniably are much more concerned than their federal counterpart with limiting the federal government's discretion over fiscal matters. But commentators can exaggerate the purported dearth of such fiscal limitations in the U.S. Constitution.[248] There certainly are much fewer of these Briffaultian restrictions in the federal constitution, but they are not totally absent. The Establishment Clause is only one.[249]

The Twenty-Seventh Amendment, for example, requires that any change in congressional salaries can only take effect after the next biennial election.[250] The provision should call to mind the state constitutional compensation limits that play a central role in the early state taxpayer standing cases in so many jurisdictions.[251] Furthermore, the army appropriations clause in Article I, Section 8 expressly prevents Congress from appropriating army-related funds for a time period longer than two years—clearly another type of specific and direct spending limitation.[252] Both of these provisions provide narrow and concrete restrictions on the fiscal conduct of the government in a way that is similar to the state constitutional fiscal limitations central to this Article's thesis. But despite their Briffaultian nature, the Supreme Court has never interpreted either of these provisions to convey standing to a taxpayer challenging a purportedly illegal federal government expenditure.[253]

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247. I am grateful to Professor William Hubbard for putting this point so eloquently in our correspondence.

248. *See supra* note 177 (cataloguing commentators who assert that the U.S. Constitution generally does not restrict fiscal conduct).

249. *See supra* Part I.A (discussing the *Flast* retrenchment).

250. *See* U.S. CONST. amend. XXVII.

251. *See supra* Part IV.B.2 (noting that government compensation limits and single subject appropriation requirements are implicated in a disproportionate number of cases).

252. *See* U.S. CONST. art. I, § 8, cl. 12.

253. Notwithstanding this silence, a few lower courts have passed on both of these questions. Early decisions generally permit taxpayer standing to challenge an appropriation purportedly violating U.S. CONST. art. I, § 8, cl. 12. *See, e.g.*, W. Mining Council v. Watt, 643 F.2d 618, 630–33 (9th Cir. 1981) (allowing taxpayer challenge based on army appropriations clause); Katcoff v. Marsh, 582 F. Supp. 463 (E.D.N.Y. 1984), *modified*, 755 F.2d 223 (2d Cir. 1985) (same); *see also* 13B WRIGHT, MILLER & COOPER, *supra* note 24, § 3531.10.1 (noting that *Western Mining Council* granted taxpayer standing to bring an army

That observation admittedly undercuts this Article's hypothesis, at least to some degree. If constitutional fiscal restrictions necessarily or inevitably result in the creation of permissive state taxpayer standing doctrines so as to avoid their otherwise unenforceability, then one would expect to see a well-developed line of federal cases permitting taxpayer challenges to expenditures that arguably violate one of these provisions. This is especially true in light of *Flast*'s Establishment Clause holding. The Court obviously knows how to create exceptions to the general federal anti–taxpayer standing rule when confronted with a specific and direct spending restriction.[254] And yet it has not with respect to these two similarly-purposed constitutional fiscal limitations. So why are state constitutional fiscal restrictions so prone to lead to permissive taxpayer standing rules, but their federal equivalents are not?

The first obvious answer is that just as state courts often devise permissive state taxpayer standing rules from cases involving constitutional fiscal limitations and then extend them outside of that context,[255] federal courts may have created the federal anti–taxpayer standing doctrine from disputes unrelated to any constitutional spending limits and then subsequently applied that principle in cases involving such fiscal restrictions. In other words, the default rules at both the federal and state levels control, even under circumstances that are quite different from those that led to their creation in the first place. But this observation merely raises two interrelated questions. What is the ultimate origin of these default rules? And why are they adhered to so strongly, even when the case at hand does not implicate the same concerns on which they were based?

These more subtle and far-reaching questions are probably best answered by Professor Briffault's insight about fiscal restrictions and the fundamental nature of state constitutionalism. State constitutions are not merely subordinate versions of the federal constitution with lots of quirky ad hoc fiscal limitations thrown in. To the contrary, Briffault argues, ubiquitous fiscal restrictions make state constitutions an intrinsically different creature from their federal counterpart. Their prevalence, specificity, and unique focus on protecting taxpayers from improper fiscal conduct fundamentally define state constitutionalism in a way that is distinct from the U.S. Constitution.[256]

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appropriations clause challenge). All of these decisions predate the Court's more recent efforts to narrow *Flast*, so it is questionable whether courts would reach the same result today. With respect to the Twenty-Seventh Amendment, lower courts have unanimously rejected claims of taxpayer standing. *See, e.g.*, Schaffer v. Clinton, 240 F.3d 878, 881 (10th Cir. 2001). Individual congressmen may have nontaxpayer standing where a salary change actually affects them, however. *See* Boehner v. Anderson, 30 F.3d 156, 160–61 (D.C. Cir. 1994).

254. *See supra* Parts I.A, IV.A (discussing *Flast* rationale).

255. *See supra* Part V.B & note 232 (discussing the states that fit this pattern).

256. *See, e.g.*, Briffault, *supra* note 31, at 909 ("Fiscal limits, as well as positive rights, thus characterize state constitutional law."); *see also* Williams, *supra* note 192, at 905.

Therein lies one plausible explanation. A court can ignore an uncommon or one-off constitutional fiscal protection as a "political question" or similarly nonjusticiable issue with little or no long-term institutional consequences.[257] The plaintiff invoking this provision will be disappointed, to be sure, but as long as the scenario does not seem likely to repeat itself over and over again, the isolated unenforceability of the specific fiscal restriction will be tolerable. Things change when a constitution is riddled with so many of these limitations that they assume the identity of a distinct and identifiable constitutional thread. It then is much more difficult for a court to refuse to enforce the restrictions for a lack of standing. That court faces a troublesome choice. It must choose whether to (1) allow the plaintiffs to proceed despite the lack of traditional injury-based standing, (2) distinguish the constitutional fiscal limitation in question from the similar provisions that are interspersed throughout the constitution, or (3) ignore a pervasive constitutional theme.

This may be the reason that the isolated fiscal limitations in the U.S. Constitution have not led to the same widespread embrace of taxpayer lawsuits that has occurred at the state level. There just are not enough of them. Federal courts generally decline to consider challenges predicated on (for example) the Twenty-Seventh Amendment on standing grounds because doing so has so few ramifications on any other types of substantive federal constitutional provisions or overarching themes (e.g., separation of powers, federalism, due process).[258] State courts, in contrast, refuse to ignore the myriad of Briffaultian fiscal restrictions that are interspersed throughout state constitutions because that would be a much more difficult and consequential task. These courts essentially would be deleting an omnipresent and crucial thread of state constitutionalism, which they understandably are reluctant to do. Constitutional fiscal limitations therefore might only drive the creation of permissive taxpayer standing doctrines once they reach a critical mass. Before that, and they can be "written out" of a constitution with little long term institutional cost to the courts; after, and they cannot be ignored.

D. Permissive Taxpayer Standing Rules: An Exception to Briffault's "Disfavored Constitution"?

There is one final point to make. Professor Briffault's "disfavored constitution" may be a plausible explanation for the federal-state taxpayer standing disparity, but that does not mean it is fully consistent with this Article's thesis. Indeed, the idea that constitutional fiscal limitations are a major impetus for the creation and development of permissive state

257. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 152–53 (6th ed. 2012) (noting that the federal standards for determining what is or is not a nonjusticiable political question are largely *ad hoc* and "useless"); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1045 (1985); Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 442–43 (2003).

258. *See Schaffer*, 240 F.3d at 881.

taxpayer standing rules actually undercuts Briffault's argument in one important way.

This inconsistency traces to one of the dual meanings in the term "disfavored constitution." As explained above, Briffault used it as shorthand for the general inclination of many courts to minimize or even disregard state constitutional fiscal restrictions.[259] This judicial hostility to Briffaultian limitations in one sense conflicts with this Article's argument that state courts generally permit taxpayers to challenge violations of those provisions, even when traditional standing rules would preclude the claim. If fiscal limitations are such a fundamental thread of state constitutionalism that they compel courts to relax traditional injury-based standing rules, then why do these same state courts give the restrictions short shrift on the merits?

This seeming contradiction is only underscored by the suspicion that dismissing a lawsuit on justiciability grounds is an easy way to avoid reaching the merits of a difficult and disfavored constitutional fiscal challenge while still resolving the case.[260] A judge need not undertake the often controversial and complicated task of slapping down a putative—and largely victimless—economic overreach by the legislative or executive branches if he or she simply can reject a lawsuit on standing grounds because it is brought by an undifferentiated taxpayer.[261] Yet courts seem especially unlikely to rely on injury-based standing limits in that scenario if this Article's thesis is correct.

Perhaps the best thing to say about this apparent inconsistency is that one should not make too much of it. This Article did not attempt to determine whether the taxpayer-plaintiff ultimately was successful in the included permissive taxpayer standing cases involving constitutional fiscal limitations. It is entirely possible that courts interpreted the provisions at issue narrowly on their merits in those cases, which would be consistent with Briffault's "disfavored constitution." Furthermore, Briffault's argument that courts tend to minimize or ignore constitutional fiscal limitations on their merits does not purport to be an empirical one. It is conceivable that a more rigorous inquiry (if one could be devised) might disprove or qualify his thesis.

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259. *See* Briffault, *supra* note 31, at 909–10, 939–44 (discussing the reluctance of state courts to enforce constitutional fiscal limits); *see also supra* note 194 and accompanying text (cataloguing additional commentary noting this reluctance).

260. This suspicion is shared by courts and commentators alike. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 18 (2004) (Rehnquist, C.J., dissenting) ("The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim."); Winter, *supra* note 47, at 1373 ("[T]he doctrine of standing is either a judicial mask for the exercise of prudence to avoid decisionmaking or a sophisticated manipulation for the sub rosa decision of cases on their merits.").

261. For example, resolving a constitutional fiscal challenge can require the court to weigh and reconcile competing fiscal and nonfiscal constitutional provisions. *See, e.g.*, Guinn v. Legislature of Nev., 71 P.3d 1269 (Nev. 2003) (balancing educational funding and tax-increase voting requirements); *see also* Briffault, *supra* note 31, at 951–52 (discussing *Guinn*).

More substantively, there is a general temporal difference between the cases included in the survey, which largely date to the first half of the twentieth century, and the authorities relied on by Briffault, which are of much more recent vintage.[262] Briffault's "disfavored constitution" therefore might be a much more recent phenomenon that largely postdates the earlier emergence of permissive taxpayer standing rules.[263]

And finally, there is a mundane explanation for any seeming contradiction. Two types of fiscal limitations involved in many of the survey cases—government compensation and single subject appropriation limits—were not specifically addressed by Briffault.[264] State court hostility to Briffaultian limitations might not extend to those specific types of provisions.[265] Perhaps they are not subject to a more narrow construction as are many of the restrictions explicitly identified by Briffault. In any event, more work must be done in this regard.

CONCLUSION

This Article's fundamental thesis is quite simple: Most states permit taxpayer lawsuits because their state constitutions are littered with—and to some degree, defined by—a myriad of constitutional fiscal restrictions that would be unenforceable unless the intended taxpayer-beneficiaries[266] could sue to invoke them. So state courts allow state taxpayer actions in order to give meaning to this important thread of state constitutionalism. This is a novel theory. A number of scholars have examined the issue of permissive state taxpayer standing doctrines over the past half century,[267] but no one has proposed a link between liberal state taxpayer standing rules and constitutional fiscal limitations. And yet, a simple empirical-historical survey of early state taxpayer standing decisions in all permissive jurisdictions suggests that there is some degree of truth to it.

But it is important to emphasize that—as is so often the case with issues of state law—there is substantial variance among the jurisdictions, and it would be wrong to view the creation and development of state taxpayer standing doctrines as a monolithic or homogenous process. It is hard to dispute the connection between state constitutional fiscal limitations and liberal state taxpayer standing doctrines, but the link is by no means uniform or universal. That suggests that this Article's argument—while certainly novel—is at best incomplete, and more research is necessary to understand the ultimate impetus behind permissive state taxpayer standing

262. *See supra* Part IV.B.2 (summarizing the dates of the included cases).

263. I am grateful to Professor Briffault for suggesting this theory to me in our correspondence. Professors Hershkoff and Hubbard concurred with his observation.

264. *See supra* Part IV.B.2 (discussing the prevalence of these two provisions in the survey cases).

265. *See* Briffault, *supra* note 31, at 910–18.

266. *See supra* Part III.C (discussing the purpose behind state constitutional fiscal limitations).

267. *See supra* Parts II.A, III.A (discussing views on permissive state taxpayer standing doctrines).

regimes. That work remains for a future project. This Article only aspires to introduce a new and potentially promising theory into the academic discourse. Hopefully it has succeeded.

APPENDIX

State	No.	PC	CFL	NF	NC	Uncl.	GC	SS	Cat.
AL	6	Y	4	0	1	1	2	0	S
AZ	1	Nc	1	0	0	0	0	0	N
AK	3	Y	2	1	0	0	0	0	S
AR	4	Y	2	1	1	0	1	1	S
CA	4	Ns	0	2	2	0	0	0	N
CO	3	Y	2	1	0	0	1	1	S
CT	6	Ns	0	0	6	0	0	0	N
DE	4	Ns	1	0	2	1	0	1	M
FL	4	Y	2	2	0	0	2	0	M
GA	3	Y	2	1	0	0	1	0	S
HI									
ID									
IL	5	Y	2	3	0	0	2	0	M
IN									
IA	4	Y	2	1	1	0	1	0	S
KS									
KY	3	Y	3	0	0	0	0	0	E
LA	3	Y	2	1	0	0	0	1	S
ME	1	Y	1	0	0	0	0	0	E
MD	4	Nc	1	2	1	0	0	0	M
MA	3	Y	3	0	0	0	0	0	E
MI									
MN	3	Ns	0	1	2	0	0	0	N
MS	2	Y	2	0	0	0	1	0	E
MO	3	Y	1	0	2	0	0	0	M
MT	4	Y	3	1	0	0	0	0	S
NE	3	Y	3	0	0	0	0	1	E
NV									
NH									
NJ	3	Ns	0	0	3	0	0	0	N
NM									
NY	3	Y	3	0	0	0	1	0	E
NC	3	Ns	1	0	2	0	0	1	M
ND	2	Y	2	0	0	0	0	0	E
OH									
OK	3	Y	2	1	0	0	0	0	S
OR	5	Y	4	0	1	0	2	0	S
PA	3	Nc	1	2	0	0	1	0	M

RI									
SC									
SD	4	Y	3	1	0	0	0	0	S
TN	2	Y	1	0	1	0	0	0	S
TX	4	Y	1	0	3	0	1	0	M
UT	3	Nc	1	1	1	0	0	0	M
VT									
VA									
WA	5	U	2	1	1	1	0	0	S
WV	3	Y	2	1	0	0	1	0	S
WI	3	Y	3	0	0	0	1	0	E
WY									
Total	122	25Y 10N 1U	64	25	30	3	17	6	8E 14S 9M 5N

Legend: PC: First progenitor case involves constitutional fiscal limitations; CFL: Cases involving state constitutional fiscal limitations; NF: Cases involving nonfiscal constitutional challenges; NC: Cases involving nonconstitutional challenges; Uncl.: Cases with unknown an challenge; GC: Cases involving government compensation challenges; SS: Cases involving single subject appropriation challenges; Cat.: Category; Nc: First progenitor case involves nonfiscal constitutional challenge; Ns: First progenitor case involves nonconstitutional challenge; U: First progenitor case involves unknown challenge; E: All cases involve state constitutional fiscal challenges; S: Majority of cases involve state constitutional fiscal challenges; M: Minority of cases involve state constitutional fiscal challenges; Y: Yes; N: No cases involve state constitutional fiscal challenges.