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A Hard and Fast Rule for Taxpayer Standing: Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.

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**A HARD AND FLAST RULE FOR
TAXPAYER STANDING: VALLEY FORGE
CHRISTIAN COLLEGE v. AMERICANS
UNITED FOR SEPARATION OF CHURCH &
STATE, INC.**

The article III “case and controversy” limitation on federal judicial power¹ requires that a plaintiff have “standing” to bring suit in federal court.² A litigant is granted article III standing only upon demonstration of actual or threatened individual injury³ re-

¹ See U.S. CONST. art. III, § 2. Article III of the Constitution provides that federal judicial power extends to “all Cases” arising under federal law, treaties or the Constitution, as well as those involving ambassadors, ministers and consuls. *Id.* Additionally, article III limits federal judicial power to “Controversies” in which the United States is a party, and those between (1) two or more states, (2) a state and citizens of another state, (3) citizens of different states, (4) citizens of the same state claiming lands under grants of different states, and (5) a state or its citizens, and foreign states or citizens. *Id.* To meet the federal case or controversy requirement, a plaintiff must bring suit “in an adversary context and in a form . . . capable of judicial resolution.” *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Thus, article III precludes federal courts from rendering advisory opinions, see *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Alabama State Fed’n of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Muskrat v. United States*, 219 U.S. 346, 362 (1911), and from adjudicating collusive suits, see *United States v. Johnson*, 319 U.S. 302, 305 (1943); *Chicago & Grand Truck Ry. v. Wellman*, 143 U.S. 339, 345 (1892).

² The doctrine of standing eludes precise definition, for it is comprised of a blend of constitutional requirements derived from article III and the Supreme Court’s self-imposed prudential limitations. The Supreme Court itself often fails to clearly distinguish the features of each component. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Flast v. Cohen*, 392 U.S. 83, 97 (1968); *Rescue Army v. Municipal Court*, 331 U.S. 549, 573 (1947). Standing differs from other elements of justiciability in that it focuses primarily on the status of the complaining party, and only secondarily on the issues sought to be adjudicated. *Flast v. Cohen*, 392 U.S. at 99-100. In addition to standing, other doctrines related to the case or controversy limitation on justiciability include ripeness, *e.g.*, *Poe v. Ullman*, 367 U.S. 497, 503-04 (1961), mootness, *e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974), and the political question doctrine, *e.g.*, *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939). See generally *L. TRIBE, AMERICAN CONSTITUTIONAL LAW* §§ 3-7 to 3-16, at 52-79 (1978).

³ See, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962); *L. TRIBE, supra* note 2, § 3-19, at 82-89. The personal-stake or injury-in-fact requirement serves several purposes. One is “to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.” *Baker v. Carr*, 369 U.S. at 204. Another purpose served by the injury requirement of standing is to prevent the “judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders.” *United States v. SCRAP*, 412 U.S. 669, 687

sulting from the challenged action.⁴ In recent years, judicial recognition of what is actionable personal injury has become more expansive.⁵ In the area of federal taxpayer standing, the Supreme Court eased the rigid standing requirements that historically had been imposed upon individual taxpayers, and held that a federal taxpayer had standing to challenge only congressional appropriations under the taxing and spending clause that allegedly violated the establishment clause of the first amendment.⁶ Recently, how-

(1973); see *Flast v. Cohen*, 392 U.S. at 106. Maintenance of the separation of powers is also served when federal judicial power can only be invoked by injured litigants. Such a limitation ensures that the judiciary is employed only when necessary and as a tool of last resort. See *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring); *Flast v. Cohen*, 392 U.S. at 95, 97; *Blair v. United States*, 250 U.S. 273, 279 (1919); *Chicago & Grand Truck Ry. v. Wellman*, 143 U.S. 339, 345 (1892).

Early standing decisions employed a "legal interest" test which required a plaintiff to show that the challenged governmental action threatened one of his legally protected constitutional or statutory interests. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). This test was later criticized as "going to the merits" and ultimately was overruled and replaced by the injury-in-fact test, *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 158 (1970). See *Americans United for Separation of Church & State, Inc. v. United States Dep't of HEW*, 619 F.2d 252, 255-56 (3d Cir. 1980), *rev'd sub nom.*, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.* 454 U.S. 464 (1982); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 452-53 (1970); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 482-85 (1972).

⁴ The injury in fact suffered by a plaintiff must be caused by or fairly traceable to the defendant's challenged conduct, such that the injury "is likely to be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976); see *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261-62 (1977); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *L. TRIBE*, *supra* note 2, § 3-21, at 92-93.

⁵ Economic injury has been the most commonly recognized basis upon which standing is granted to a plaintiff, but standing has been expanded to embrace injury to one's "'aesthetic, conservational, and recreational' [values] as well." *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (quoting *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966)); see *United States v. SCRAP*, 412 U.S. 669, 688-89 (1973) (injury to environment); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (injury to environment—standing denied due to plaintiffs' failure to allege their use of land in question); Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1147-51 (1978); Sedler, *supra* note 3, at 481-82, 487-88.

⁶ *Flast v. Cohen*, 392 U.S. 83, 88 (1968). Federal taxpayer standing has been limited to the *Flast* formulation that a federal taxpayer will have standing to challenge only those congressional exercises of the taxing and spending clause which allegedly violate the establishment clause. See *Protestants & Other Ams. United for Separation of Church & State v. Watson*, 407 F.2d 1264, 1265 (D.C. Cir. 1968); *Swomley v. Watt*, 526 F. Supp. 1271, 1273-74

ever, in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,⁷ the Supreme Court held that a plaintiff group dedicated to separation of church and state lacked standing, as citizens or as federal taxpayers, to challenge on establishment clause grounds the federal government's grant of property to a religious educational institution.⁸

Valley Forge involved the Federal Property and Administra-

(D.D.C. 1981); *infra* notes 26-27 and accompanying text. Before *Flast*, the Supreme Court had denied standing to a federal taxpayer who challenged, on due process grounds, the constitutionality of the Maternity Act of 1921, which provided federal funding to the states for the purpose of improving maternal and infant health. *Frothingham v. Mellon*, 262 U.S. 447, 448 (1923). The Court held that the plaintiff failed to show that she sustained any direct injury, either immediate or threatened, as a result of enforcement of the Act. *Id.*

Even before *Frothingham*, state and municipal taxpayers had been granted standing in federal court to challenge the illegal use of state and local tax monies. *E.g.*, *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1880). The inconsistency of permitting federal court challenges of local government action by state taxpayers while disallowing challenges of the federal government by federal taxpayers was explained by the *Frothingham* Court as the difference between a local taxpayer's interest in the use of a municipality's funds—"direct and immediate," 262 U.S. at 486, and a federal taxpayer's interest in the distribution of the Federal Treasury—"comparatively minute . . . remote, fluctuating, and uncertain," *id.* at 487. Yet, before *Flast*, the standing requirements applicable to state taxpayers raising constitutional questions in federal court remained confused and unclear. *See* Comment, *Standing to Contest Federal Appropriations: The Supreme Court's New Requirements*, 22 Sw. L.J. 612, 617 (1968) [hereinafter cited as Comment, *Standing to Contest Federal Appropriations*]. For instance, in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), a case on appeal from state adjudication, the Supreme Court reached the merits of an establishment clause challenge without considering the question of taxpayer standing. *Id.* at 15-17. In *Doremus v. Board of Educ.*, 342 U.S. 429, 434-35 (1952), however, the Court denied the state taxpayer standing to appeal a state supreme court determination. *Id.* at 435. Distinguishing *Everson*, the *Doremus* Court concluded that the activity in *Everson* (reimbursement of transportation costs to parents of children attending parochial schools) was supported by state taxes, whereas the activity in *Doremus* (required bible reading in public schools) was not shown to cause disbursement of state tax funds. *Id.* at 434. After *Flast* breached the *Frothingham* barrier against federal taxpayer suits, federal courts have been rather liberal in awarding state taxpayers standing to attack state spending that allegedly violates the establishment clause. *See, e.g.*, *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 927 n.1 (3d Cir. 1980) (citation to *Flast* as precedent to grant city taxpayers standing to challenge city expenditures to construct platform for papal mass and ceremonies), *cert. denied*, 451 U.S. 987 (1981); *Members of Jamestown Sch. Comm. v. Schmidt*, 525 F. Supp. 1045, 1046 (D.R.I. 1981) ("[i]t is undisputed that plaintiffs have standing to challenge expenditures under [the state] statute as violations of the Establishment Clause"). Nearly all state courts presently entertain state and municipal taxpayer's suits. *See Flast v. Cohen*, 392 U.S. at 108 & n.2 (Douglas, J., concurring); Comment, *Standing to Contest Federal Appropriations, supra*, at 614 & n.13. *See generally* Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 900-02 (1960).

⁷ 454 U.S. 464 (1982), *rev'g* 619 F.2d 252 (3d Cir. 1980).

⁸ *Id.* at 470, 482, 489-90.

tive Services Act of 1949,⁹ which authorizes the Secretary of Health, Education, and Welfare (HEW)¹⁰ to sell or lease surplus government property to nonprofit, tax-exempt educational institutions.¹¹ The Secretary is required to discount the transfer price of the property by considering any benefit that may accrue to the public from the transferee's use of the property.¹² In 1976, the De-

⁹ Act of June 30, 1949, ch. 288, 63 Stat. 377 (codified at 40 U.S.C. §§ 471-544 (1976 & Supp. IV 1980) and scattered sections of 41, 44 & 50 app. U.S.C.). The Act repealed several sections of the Surplus Property Act of 1944, ch. 479, 58 Stat. 765, the major purpose of which was to provide for the handling and disposal of war-generated surplus property. H.R. REP. No. 670, 81st Cong., 1st Sess. 1, *reprinted in* 1949 U.S. CODE CONG. & AD. NEWS 1475, 1475. Congress enacted the Act in response to a serious need for an improved federal property management program, as evidenced by such conditions as "excessive stocks, unnecessary duplication, lack of maximum utilization, unauthorized augmentation of congressional appropriations by free transfer of cash equivalents . . . , heavy direct losses to the Treasury, and waste in other forms." 1943 REPORT OF THE HOUSE COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS ON H.R. 2795, *quoted in* H.R. REP. No. 670, 81st Cong., 1st Sess. 2, *reprinted in* 1949 U.S. CODE CONG. & AD. NEWS 1476. Thus, the Act's general purpose is to provide "an economical and efficient system for . . . the procurement . . . the utilization . . . [and] the disposal of surplus property." 40 U.S.C. § 471 (1976).

¹⁰ The Secretary of HEW was empowered by the Administrator to transfer surplus property pursuant to the Act for health and educational purposes. 40 U.S.C. § 484(k)(1) (1976). After the establishment of the Department of Education, *see* Department of Education Organization Act, 20 U.S.C. §§ 3401-3510 (Supp. IV 1980); S. REP. No. 49, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1514, the HEW function of donating surplus property for educational purposes was transferred to the Department of Education, *see* 20 U.S.C. §§ 3411, 3441(a)(2)(P), 3447 (Supp. IV 1980). Hence, the Secretary of Education is now responsible for the disposition of surplus real property, including buildings situated thereon, "for school, classroom, or other educational use." 40 U.S.C. § 484(k)(1) (1976 & Supp. IV 1980). The rules and regulations promulgated by the Department of HEW for transfer of surplus property to educational institutions, which appeared in Title 45 of the Code of Federal Regulations, *see* 45 C.F.R. subtit. A, pt. 12 (1978), have been adopted by the Department of Education and recodified in Title 34 of the Code, *see* 34 C.F.R. pt. 12 (1981).

¹¹ 40 U.S.C. § 484(k)(1)(A) (1976). The Act established an executive branch agency known as the General Services Administration, headed by an Administrator appointed by and subject to the control of the President. *Id.* § 751; *see* H.R. REP. No. 670, 81st Cong., 1st Sess. 2, *reprinted in* 1949 U.S. CODE CONG. & AD. NEWS 1475, 1476. The Administrator requires federal agencies to maintain inventories of property under their control and to identify any excess property, which is transferred to other agencies that need it, or any surplus property, which may be transferred to other private or public entities. *See* 40 U.S.C. § 483(b)-(c), 484(c) (1976). The term "excess property" is defined by the Act as "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities . . ." *Id.* § 472(e). When excess property is no longer of use to any federal agency, as determined by the Administrator of General Services, it is "surplus property" and may be disposed of as designated by the Administrator. *See id.* § 472(g). Most disposals of surplus property must be accomplished through publicly advertised competitive bidding. *Id.* § 484(e)(1).

¹² This discount, known as a "public benefit allowance," is subject to the disapproval of the Administrator of General Services. 40 U.S.C. § 484(k)(1)(A), (C) (1976); 34 C.F.R. §

partment of HEW transferred a 77-acre tract of surplus government property¹³ to Valley Forge Christian College, a sectarian institution devoted to bible study, Christian service and theology.¹⁴ The Secretary, granting a 100% public-benefit discount, conveyed the property payment-free to the college in exchange for its agreement to use the property for 30 years exclusively for designated educational purposes.¹⁵

Americans United for Separation of Church and State, Inc. (Americans United) and four of its directors brought suit against the Department of HEW, seeking declaratory and injunctive relief to void the transfer.¹⁶ The plaintiffs, as citizens and federal taxpayers, challenged the conveyance as a deprivation of the fair and constitutional use of their tax dollars in violation of the establishment clause of the first amendment.¹⁷ The United States District Court for the Eastern District of Pennsylvania, dismissing the

12.9(a)-(b) (1981). The regulations provide that the property is to "be awarded to the applicant having a program of utilization which provides, in the opinion of the Department [of Education], the greatest public benefit." 34 C.F.R. § 12.5 (1981). The factors upon which the Secretary's public-benefit allowance may be based include the applicant's tax support, educational accreditation, sponsorship of public service training, plans to introduce new instructional programs, commitment to student health and welfare, research, and service to the handicapped. *Id.* pt. 12, exhibit A.

¹³ 454 U.S. at 468. The property transferred to the Valley Forge Christian College was part of 181 acres of land in Valley Forge, Pennsylvania. *Id.* at 467. It was purchased with federal tax funds by the Department of the Army in 1942, and an Army hospital was built thereon, at a cost exceeding \$10 million. 619 F.2d at 253. The land and buildings were identified as "surplus" in 1973 by the Administrator of General Services. 454 U.S. at 467-68.

¹⁴ 454 U.S. at 468. Valley Forge Christian College operates under the Assemblies of God, a religious order, and its main purpose is "to train leaders for church related ministries." *Id.*

¹⁵ *Id.* While the land conveyed to Valley Forge Christian College alone was appraised at \$577,500, *id.* & n.7, the total fair market value of the property was estimated to be in excess of \$1.3 million at the time of the transfer. 619 F.2d at 253. The use limitation was for the educational purposes described in the college's application for the property. The college stated it would add to its arts and humanities offerings and strengthen its psychology and counselling courses. 454 U.S. at 469. The circuit court noted that hundreds of church-dominant institutions have been granted government property under the Act, nearly always with a 95 to 100% public-benefit discount. 619 F.2d at 254. The court stated that the total fair market value of government property transferred to such organizations exceeds \$25.7 million and that the property was originally acquired by the government at a cost of almost \$64.5 million. *Id.*

¹⁶ 619 F.2d at 254. Americans United is a nonprofit, tax-exempt organization composed of 90,000 taxpayer members. *Id.* As declared in its articles of incorporation, the purpose of Americans United is "to defend, maintain and promote religious liberty and the constitutional principle of the separation of church and state." *Id.*

¹⁷ 454 U.S. at 469. The establishment clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

complaint, determined that the plaintiffs lacked standing as taxpayers to challenge the transfer of property since the transfer was effected pursuant to legislation that derived its power not from the taxing and spending clause, but from the property clause of the Constitution.¹⁸ The Court of Appeals for the Third Circuit reversed and remanded, holding that although the plaintiffs lacked taxpayer standing, they had citizen standing.¹⁹ This standing, the court reasoned, was based upon injury in fact to the plaintiffs' "shared individuated right" to a government that does not establish religion.²⁰ The Supreme Court, in a sharply divided opinion,

¹⁸ *Americans United for Separation of Church & State, Inc. v. United States Dep't of HEW*, No. 77-1321 (E.D. Pa. Dec. 15, 1978). Because the legislation that authorized the transfer was enacted pursuant to the property clause, the district court decided that the plaintiff taxpayers failed to show, under the *Flast* test, a link between their status and the type of legislative enactment attacked. See 619 F.2d at 260. The property clause of the Constitution provides Congress with the "[P]ower to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

¹⁹ 619 F.2d at 254.

²⁰ *Id.* at 254, 261. Judge Adams, writing for the Third Circuit panel, viewed the *Flast* Court as constrained to a finding of only taxpayer standing because the plaintiffs therein asserted only taxpayer injury. *Id.* at 261-62. But, Judge Adams maintained, "[t]he underlying justification for according standing in *Flast* it seems, was the implicit recognition that the Establishment Clause does create in every citizen a personal constitutional right, such that any citizen, including taxpayers, may contest under that clause the constitutionality of federal expenditures." *Id.* at 262. Since *Americans United* also alleged injury to their interest in the separation of church and state, an interest protected by the establishment clause, the court found that they suffered sufficient personal injury to confer standing. *Id.* at 262, 265.

Judge Rosenn, in a concurring opinion, argued that the first amendment is distinguishable from other constitutional provisions "which do not depend primarily upon judicial enforcement for their efficacy and where alleged violations thereof thus do not give rise to a judicially cognizable controversy." *Id.* at 266 (Rosenn, J., concurring). The concurrence asserted that the first amendment, because of its fundamental protection against majoritarian abuse, must be enforceable by an individual citizen, through the courts, rather than by vindication through the political process. *Id.* at 267 (Rosenn, J., concurring). The Court's recognition of the need to find an available plaintiff to enforce first amendment rights is reflected, Judge Rosenn argued, in the Court's liberalization of the standing rules applied in overbreadth challenges under the free speech clause. *Id.* (Rosenn, J., concurring) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). The concurrence declared that since alleged establishment clause violations "may not have an individual impact sufficient to confer standing in the traditional sense," *Americans United* should be granted citizen standing as the best available plaintiff to vindicate injury to its establishment clause interest of separation of church and state. 619 F.2d at 267-68 (Rosenn, J., concurring).

Judge Weis, in a dissenting opinion, disagreed with the majority's assertion that the *Flast* Court was limited by the plaintiffs' pleadings to a finding only of taxpayer standing, observing that the *Flast* plaintiffs also alleged in their brief "injury to the right to live under a government which separates itself strictly from the church." *Id.* at 270 (Weis, J., dissenting). The dissent insisted that the *Valley Forge* plaintiffs failed to allege any direct

reversed the Third Circuit decision and held that Americans United did not have standing, either as federal taxpayers or as citizens, to challenge the Secretary's conveyance.²¹

Justice Rehnquist, writing for the majority,²² examined the constitutional aspects of the standing doctrine as developed in the Court's recent opinions and declared that article III requires, at a minimum, that a litigant show personal injury resulting from the defendant's actions in order to invoke federal judicial power.²³ In addition to the constitutional requirements of standing, the majority observed, there exist the Court's self-imposed prudential considerations, which form a secondary barrier for a federal plaintiff to overcome.²⁴ Turning to the principal case, the majority first addressed the plaintiffs' assertion of taxpayer standing and found that the two-part "nexus" test for sufficient personal stake, as enunciated by the Court in *Flast v. Cohen*,²⁵ was not satisfied.²⁶

injury caused by the property transfer, or any direct benefit to them if the conveyance were voided or the property returned to the government. *Id.* at 270 (Weis, J., dissenting). Their complaint thus was only a "generalized grievance," insufficient to confer standing. *Id.* at 270-71 (Weis, J., dissenting). Judge Weis maintained that the establishment clause does not create a right enforceable by all citizens and that only plaintiffs alleging particularized injuries flowing from establishment clause violations will be granted standing. *Id.* at 271 (Weis, J., dissenting).

²¹ 454 U.S. at 490.

²² Chief Justice Burger and Justices White, Powell, and O'Connor joined in Justice Rehnquist's majority opinion. Justice Brennan, with whom Justices Marshall and Blackmun joined, dissented. Justice Stevens filed a separate dissenting opinion.

²³ 454 U.S. at 472.

²⁴ *Id.* at 474; see *supra* notes 2-3. The Court mentioned as a prudential limitation the rule that a plaintiff must not assert *jus tertii*—the legal rights or interests of absent third parties. 454 U.S. at 474-75; *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Additionally, the Court categorized the "zone of interests" test as a nonconstitutional standing requirement. 454 U.S. at 475. This test states that the plaintiff's alleged injury must be to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1969); see *infra* note 48.

²⁵ 392 U.S. 83 (1968); see *supra* note 6 and accompanying text.

²⁶ 454 U.S. at 478-80. The oft-quoted, operative language in *Flast* that constitutes its "double-nexus" test states: "First, the taxpayer must establish a logical link between [his taxpayer] status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102. The *Valley Forge* Court supported its finding that the plaintiffs failed to show a connection between their taxpayer status and the precise nature of the alleged infringement by surveying the line of cases denying taxpayer standing. 454 U.S. at 476-82. First, the Court noted that in *Frothingham v. Mellon*, 262 U.S. 447 (1923), a taxpayer, raising a due process challenge to federal funding to the states for improvement of maternal and infant health care, was denied standing because the alleged injury was too "remote, fluctuating, and uncertain." 454 U.S. at 477; see 262 U.S. at 487.

The *Flast* plaintiffs, Justice Rehnquist observed, were granted taxpayer standing first, because they challenged an exercise of congressional power under the taxing and spending clause and second, because they alleged that such action violated the establishment clause, a specific limitation on the taxing and spending power.²⁷ The Court reasoned that Americans United failed the first prong of this test because their challenge was not to an act of Congress, but rather to a property transfer by the Department of HEW, which was an executive branch action.²⁸ Even more fundamentally, the majority asserted, the conveyance under the Federal Property and Administrative Services Act constituted action taken pursuant to the property clause, rather than an exercise of power granted by the taxing and spending provision.²⁹

As to the concept of citizen standing, the Court rejected the Third Circuit's reasoning that the establishment clause creates in each citizen a personal constitutional right, sufficient to confer standing, to a government that does not establish religion.³⁰ The majority contended that the plaintiffs failed to identify any personal injury suffered as a consequence of the allegedly unconstitutional property transfer other than an abstract, psychological one insufficient to confer standing.³¹ Finally, Justice Rehnquist de-

Similarly, Justice Rehnquist observed that taxpayer standing was denied in a suit challenging, on establishment clause grounds, classroom bible reading in a state public school. 454 U.S. at 477-78; see *Doremus v. Board of Educ.*, 342 U.S. 429, 433-34 (1952). The *Valley Forge* Court also pointed to the denial of taxpayer standing in *United States v. Richardson*, 418 U.S. 166 (1974) and *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), cases in which the challenges were not based upon the taxing and spending clause, but, respectively, upon the accounts and incompatibility clauses of article I of the Constitution. 454 U.S. at 481; see 418 U.S. at 175, 228.

²⁷ 454 U.S. at 762; see *Flast v. Cohen*, 392 U.S. 83, 102-03, 105-06 (1968).

²⁸ 454 U.S. at 762 & n.15; see *supra* note 11.

²⁹ 454 U.S. at 762 & n.16.

³⁰ *Id.* at 483. The Court determined that the instant case was indistinguishable from *Schlesinger*, 418 U.S. at 217, and *Richardson*, 418 U.S. at 175, cases in which the plaintiffs were found to have complained of only a generalized grievance, articulable by all citizens, that the government had failed to observe constitutional provisions. 454 U.S. at 483. Such injury, the Court noted, is insufficient to confer article III standing. *Id.* The majority also rejected the notion that citizen standing should be granted in *Valley Forge* because the establishment clause is a more "fundamental" limitation on governmental conduct than the provisions involved in *Schlesinger* and *Richardson*. *Id.* at 484.

³¹ 454 U.S. at 485-86. The plaintiff group's firm commitment to the principle of separation of church and state would, the Court recognized, cause its members to feel "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. Such "injury," however, falls short of the quantum required to confer standing, which is "not measured by the intensity of the litigant's interest or the fervor of

clared that establishment clause claims demand no preferential treatment, and supply no exceptions to standing burdens, because there is "no principled basis on which to create a hierarchy of constitutional values."³²

Justice Brennan, in a vigorous dissent, contended that, before applying a standing test, the Court is constrained to determine whether there exists a constitutional or statutory definition of injury which creates a cause of action for redress of that injury.³³ Justice Brennan viewed the establishment clause as embodying one such definition of injury in its prohibition against the use of tax funds to support religion.³⁴ This prohibition, the dissent emphasized, is a clearly recognized constitutional limitation on Congress' taxing and spending power, with the taxpayer as its intended beneficiary.³⁵ Thus, the dissent reasoned, the *Valley Forge* plaintiffs did have standing since they suffered precisely the type of injury comprehended by the establishment clause, and because "the federal taxpayer is a singularly 'proper and appropriate party to invoke a federal court's jurisdiction' to challenge a federal bestowal of largesse" as a violation of that clause.³⁶

Having argued, based on his interpretation of *Flast*, that the *Valley Forge* plaintiffs should be granted taxpayer standing, Justice Brennan rejected the distinctions the majority drew between the instant case and *Flast*.³⁷ First, the legislative-executive dichotomy is invalid, the dissent asserted, because although the first amendment restricts legislative authority, executive branch officials are invariably the actors who carry out the legislative

his advocacy." *Id.* at 486.

³² *Id.* at 484.

³³ *Id.* at 493 & n.5. (Brennan, J., dissenting); see *infra* note 65 and accompanying text.

³⁴ *Id.* at 500-01 (Brennan, J., dissenting). Justice Brennan quoted the Court's language regarding the meaning of the establishment clause restriction on the power to tax: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt, to teach or practice religion." *Id.* at 501 (Brennan, J., dissenting) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947)).

³⁵ 464 U.S. at 504. (Brennan, J., dissenting). An understanding of the taxpayer as the intended beneficiary of the establishment clause, the dissent claimed, is what led the *Flast* Court to its finding of a "constitutional imperative of taxpayer standing" in certain establishment clause cases. *Id.* at 507 (Brennan, J., dissenting).

³⁶ *Id.* at 509 (Brennan, J., dissenting) (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968)).

³⁷ 454 U.S. at 510 (Brennan, J., dissenting). Justice Brennan also took issue with the majority's narrow construction of the plaintiffs' pleadings as challenging not the Act itself, but an executive branch action pursuant to the Act. *Id.* (Brennan, J., dissenting); see *id.* at 479 n.15.

scheme.³⁸ Second, the dissent considered unavailing the majority's distinction of *Valley Forge* as involving an exercise of property clause authority rather than spending clause authority.³⁹ Justice Brennan maintained that the relationship of a taxpayer to a breach of the establishment clause is the same whether the breach is "in the form of a cash grant to build a facility, or in the nature of a gift of property, including a facility already built."⁴⁰

It is suggested that the restrictive view of standing requirements demonstrated by the majority in *Valley Forge* will have a negative impact upon the likelihood of standing being granted to remaining classes of potential plaintiffs who challenge property transfers on establishment clause grounds.⁴¹ While the *Valley Forge* majority mentioned the lack of geographic proximity between the individual plaintiffs and the site of the transferred property as a factor in support of its denial of standing,⁴² it is far from certain that local residents whose land abuts the surplus property would fare any better in gaining access to the federal courts to

³⁸ *Id.* at 510-11 (Brennan, J., dissenting). In rejecting the majority's distinction between legislative and executive branch action, the dissent stated that "[t]he First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance." *Id.* at 511 (Brennan, J., dissenting).

³⁹ *Id.* (Brennan, J., dissenting). Confronting the majority's reliance upon *Schlesinger* and *Richardson*, see *supra* note 26, the dissent maintained that standing was denied in those cases not because the plaintiffs did not allege a violation of the spending clause, but because the complaints did not even involve an appropriation or "distribution of government largesse," 454 U.S. at 511 (Brennan, J., dissenting). The *Schlesinger* plaintiffs contested the constitutionality of permitting members of Congress to hold commissions in the Armed Forces Reserve. *Schlesinger*, 418 U.S. at 210-11. The *Richardson* complaint centered not upon the purpose of the CIA expenditure of funds but rather upon the plaintiffs' claim that they should know *how* the agency spends public money. *Richardson*, 418 U.S. at 175. Similarly, the dissent distinguished *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), relied upon in part by the majority, see *supra* note 26, from the instant case, noting that the *Doremus* taxpayers were denied standing because they were not complaining about the use of their tax dollars. 454 U.S. at 507 & 505 n.16 (Brennan, J., dissenting).

⁴⁰ 454 U.S. at 511-12 (Brennan, J., dissenting) (citation omitted). Justice Stevens filed a separate dissenting opinion, agreeing that the distinctions made by the majority were of no jurisprudential significance. *Id.* at 513-15 (Stevens, J., dissenting). Justice Stevens stated: "For the Court to hold that plaintiffs' standing depends on whether the Government's transfer was an exercise of its power to spend money, on the one hand, or its power to dispose of tangible property, on the other, is to trivialize the standing doctrine." *Id.* at 513-14. (Stevens, J., dissenting).

⁴¹ See Note, *Americans United for Separation of Church and State, Inc. v. HEW: Standing to Sue Under the Establishment Clause*, 32 HASTINGS L.J. 975, 1007-08 (1981); Comment, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.: Citizen and Taxpayer Standing Under the Establishment Clause Revisited*, 10 FLA. ST. U.L. REV. 253, 269 (1982).

⁴² 454 U.S. at 487 & n.23.

challenge a particular transaction.⁴³ It appears that the only potentially successful means of attaining standing for such plaintiffs is that of the "beneficial interest" theory. According to this theory, plaintiffs who live on property contiguous to public land are deemed to have an interest in the continued public use of the land strong enough to accord them standing to challenge alleged religious use of the property.⁴⁴ The "beneficial interest" theory, however, although espoused by some of the lower federal courts, has never been adopted by the Supreme Court.⁴⁵

The disappointed nonsectarian bidder for the surplus property is another potential plaintiff who may be foreclosed from challenging a *Valley Forge*-type of property transfer.⁴⁶ Since this plaintiff

⁴³ Cf. Rhode Island Comm. on Energy v. General Servs. Admin., 561 F.2d 397, 401 (1st Cir. 1977) (local residents of area surrounding surplus property, asserting standing based on statutory noncompliance rather than on constitutional violation, denied standing). In Rhode Island Comm. on Energy v. General Servs. Admin., the Rhode Island Committee on Energy and individuals residing near a surplus Navy site, claiming threatened environmental injury, were denied standing to challenge an impending sale of the property by the General Services Administrator to an electric utility company that planned to build a nuclear power plant on the site. *Id.* at 401-02. The plaintiffs asserted, *inter alia*, statutory noncompliance with the Federal Property and Administrative Services Act (FPASA), 40 U.S.C. §§ 471 *et seq.* (1976), insofar as the Administrator ignored a Department of the Interior request that it be granted the property and be permitted to use it as a wildlife refuge. 561 F.2d at 400. Hence, a determination by the Administrator that the Navy site was "surplus property" (transferable to private or public entities) and not "excess property" (transferred to other needful federal agencies), *see supra* note 11, was unauthorized so long as there existed a requesting federal agency, 561 F.2d at 401. Although the court conceded that the plaintiffs showed sufficient article III injury in fact through environmental harm, it nonetheless denied the plaintiffs standing because it determined that, since nearby residents of surplus federal property were not intended by Congress to be beneficiaries of the statute, they are not within the "zone of interests" arguably protected by the Act. *Id.* at 401-02.

⁴⁴ *See* Anderson v. Salt Lake City Corp., 475 F.2d 29, 31 (10th Cir.) (county residents allowed standing to challenge maintenance of religious monument on courthouse grounds as violative of establishment clause), *cert. denied*, 414 U.S. 879 (1973); Allen v. Hickel, 424 F.2d 944, 946-47 (D.C. Cir. 1970) (local residents granted standing to object to use of a crèche in Christmas pageant in nearby federal parkland), *on remand* 333 F. Supp. 1088 (D.D.C. 1971), *rev'd on other grounds sub nom.* Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973); Baird v. White, 476 F. Supp. 442, 445 (D. Mass. 1979) (city resident had standing to contest use of restricted area of Boston Common for papal mass); *see also* ACLU v. Rabun County Chamber of Commerce, Inc., 510 F. Supp. 886, 890 (N.D. Ga. 1981) (observers of lighted Latin cross on state recreational property had standing to seek its removal).

⁴⁵ *See* Note, *supra* note 41, at 988, 1008.

⁴⁶ *See* Americans United for Separation of Church & State, Inc. v. United States Dep't of HEW, 619 F.2d 252, 264 n.72 (3d Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982). Judge Rosenn asserted that in the factual context of *Valley Forge*, the existence of a plaintiff possessed of economic interests that meet traditional standing requirements would be "relatively rare." 619 F.2d at 268 (Rosenn, J., concurring). He further observed that there cer-

essentially would be complaining of a loss of benefit, and not about any form of coerced religious support or participation—the injury recognized in most establishment clause cases⁴⁷—the “personal interest” at stake might be deemed outside the “zone of interests” protected by the establishment clause.⁴⁸ Further, since the applicant’s main concern would be that it, rather than the religious organization, should have received the property, the Court might deny standing on the ground that the claimed injury is not likely to be redressed by a favorable decision. Redress of the claimed injury would be too speculative in that the Court would have to assume the unsuccessful bidder would benefit in a tangible fashion if the government conveyance were declared void.⁴⁹

tainly was no such plaintiff in the instant case since the record did not indicate any other applicant competing for the transferred property. *Id.* at 268 n.2 (Rosenn, J., concurring).

While a local resident asserting statutory noncompliance with the FPASA would not have standing to challenge a property transfer under the Act, *see supra* note 43, a disappointed bidder for the government property might be deemed to have standing to challenge such a transfer on grounds of statutory noncompliance. *See Merriam v. Kunzig*, 476 F.2d 1233, 1240-43 (3d Cir.) (unsuccessful bidder to furnish leasehold office space to General Services Administration, which solicited bids pursuant to FPASA, granted standing to challenge alleged unlawful award to another), *cert. denied*, *Gateway Center Corp. v. Merriam*, 414 U.S. 911 (1973). In *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708 (D.C. Cir. 1977), however, standing was denied to potential purchasers of surplus government industrial machinery who sought to invalidate a negotiated sale by the General Services Administration to Lockheed on the ground that it violated the FPASA because, *inter alia*, the GSA failed to advertise publicly for competitive bids. *Id.* at 720.

⁴⁷ *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 106 (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 & n.9 (1963); *Everson v. Board of Educ.*, 330 U.S. 1, 5 (1947).

⁴⁸ The “zone of interests” test is the second part of a two-part standing analysis for challenges to federal governmental action announced by the Court in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). This formulation requires a plaintiff to allege (1) that due to the challenged action he incurred an article III “injury in fact, economic or otherwise,” and (2) that the injured interest is “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* at 152-53. This “zone of interests” test is a prudential rather than constitutional limitation. *See supra* note 24. Thus, whereas the unsuccessful nonsectarian bidder who lost out to the Valley Forge Christian College may meet the injury-in-fact test by alleging loss of economic benefits, this injured interest may not be deemed within the zone of interests intended to be protected by the establishment clause. The bidder, it is submitted, would thus fail the second part of the *Data Processing* test.

⁴⁹ An unsuccessful bidder would not be likely to receive the surplus property even if the government’s transfer of the property to a sectarian institution were voided as violative of the establishment clause. Accordingly, the bidder would not be able to rely on “the remote possibility, unsubstantiated by allegations of fact, that [its] situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.” *Warth v. Seldin*, 422 U.S. 490, 507 (1975). Thus, the bidder’s injury would be incapable of direct redress by the court through the requested remedy. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-46 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617-19 (1973);

The dearth of available plaintiffs who might successfully pursue an establishment clause challenge to a governmental land grant is a potential consequence of the decision, and not a fundamental flaw in the opinion's rationale, since "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."⁵⁰ Nevertheless, the scarcity of plaintiffs who may sue in a factual context similar to *Valley Forge* may be criticized,⁵¹ for such a result stands in marked contrast to the general relaxation of federal standing requirements in nontaxpayer suits,⁵² and it represents a retreat from *Flast* and a

cf. *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 717 (D.C. Cir. 1977) (potential purchasers of surplus federal property denied standing to invalidate sale to Lockheed because alleged economic harm would not be remedied by rescission).

⁵⁰ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (citation omitted). *But see* *United States v. SCRAP*, 412 U.S. 669, 687 (1973) ("standing is not to be denied simply because many people suffer the same injury").

⁵¹ The Court's holding in *Warth v. Seldin*, 422 U.S. 490, 518 (1975), that none of the variously situated plaintiffs had standing to challenge the constitutionality of a zoning ordinance, prompted Justice Brennan's criticism that the Court "tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional . . ." *Id.* at 520 (Brennan, J., dissenting). Justice Brennan claimed that the majority's result "can be explained only by an indefensible hostility to the claim on the merits." *Id.* (Brennan, J., dissenting). Perhaps the *Valley Forge* decision can similarly be attributed to the majority's unwillingness to reach the merits, clothed in the rubric of standing. *See* Comment, *supra* note 41, at 266.

⁵² Recent Supreme Court decisions have predicated standing not only on tangible economic injuries, but also on such abstract injuries as those to one's interest in the environment or social surroundings. *See* *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970); *L. TRIBE, supra* note 2, § 3-19, at 82-85. For example, users of parks in the District of Columbia were held to have alleged sufficient harm by complaining that a railroad rate increase permitted by a government agency would discourage recycling of goods, thereby encouraging the manufacture of more goods, and ultimately cause more litter everywhere, including District of Columbia parks. *United States v. SCRAP*, 412 U.S. 669, 688 (1973). The *SCRAP* Court granted plaintiffs standing while recognizing the "attenuated line of causation to the eventual injury of which they complained." *Id.*; *see* *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (alleged harm to environmental interests sufficient injury in fact, but standing denied due to plaintiffs' failure to use area in question). In the context of social surroundings, the Court found that tenants who alleged "loss of important benefits from interracial associations" had standing to bring a fair housing complaint against the landlord's discriminatory practices. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972); *see* *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 112 (1979).

In addition to expansion of the *type* of injury sufficient for federal standing, the *quantum* of injury a plaintiff must suffer in order to have a "personal stake" in the controversy has often been trivial. *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (imposition of \$1.50 poll tax); *Baker v. Carr*, 369 U.S. 186, 206-07 (1962) (impairment of even a fraction of one vote); *see* *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973); *Davis, Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 612-13, 629 (1968). Recently, the Court granted standing to bring a fair housing complaint, based on loss of oppor-

refortification of the bar on federal taxpayer suits.⁵³

It is submitted that the proper resolution of the standing dilemma in *Valley Forge* was to grant Americans United standing as federal taxpayers to challenge the property grant. In denying taxpayer standing, the majority insisted upon a literal application of the first prong of the *Flast* test to the instant facts. Such an approach arguably engenders continued confusion as to the injury a citizen-taxpayer must show in order to bring an establishment clause challenge,⁵⁴ since, as the four dissenting justices convincingly maintained, the differences the majority drew between *Valley Forge* and *Flast* are more apparent than real.⁵⁵ Specifically, the denial of taxpayer standing in *Valley Forge* on the ground that the property transfer was by an executive branch official is difficult to reconcile with the grant of standing in *Flast*, which also involved a challenge to actions taken by officials of the Department of HEW pursuant to legislatively delegated authority.⁵⁶ Similarly, the dis-

tunity to live in an integrated community, to a "tester" for a civil rights organization who received false availability information from landlords. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376 (1982). Cognizable personal injury is difficult to perceive in this case, since the testor had no intention of actually buying or renting from the defendant. *Id.* at 373.

⁵³ See *supra* note 6 and accompanying text.

⁵⁴ The two-part *Flast* test has been severely criticized for its restrictiveness and for the incongruous results a strict adherence to that test creates. For example, Professor Davis contends that "using courts to enforce constitutional and statutory limitations on the authority of officers is as appropriate when the statute under which the officers act has been enacted pursuant to the congressional power to tax and spend as it is when the statute has been enacted pursuant to some other congressional power." Davis, *supra* note 52, at 636. Professor Tribe maintains that it is not "realistic to assume that only spending programs as such can consume significant tax funds" and that the *Flast* Court has "drawn a sharp if artificial distinction between challenges to spending programs as such and challenges of any other kind." L. TRIBE, *supra* note 2, § 3-19, at 84 n.18. In one critic's view, implicit in a ruling allowing taxpayers standing only to challenge appropriations under the taxing and spending power "is the assumption that the character of the taxpayer's injury varies according to the enumerated power which Congress happens to exercise in spending tax money," Comment, *Standing to Contest Federal Appropriations*, *supra* note 6, at 622, and "[s]uch a distinction is indefensible," *id.* at 624.

⁵⁵ See *supra* text accompanying notes 37-40. Justice Brennan, criticizing the distinctions drawn by the *Valley Forge* majority, stated: "The tortuous distinctions thus produced are specious, at best: at worst, they are pernicious to our constitutional heritage." 454 U.S. at 510 (Brennan, J., dissenting).

⁵⁶ See 454 U.S. at 510 (Brennan, J., dissenting). The Secretary of HEW was sued in *Flast* as the official authorized by Congress to administer the federal grants to religious schools under the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241(a), 821-827 (1976). 392 U.S. at 85.

The congressional-executive spending dichotomy derived from the first component of the *Flast* nexus test was employed to deny standing to federal taxpayers in *Swomley v. Watt*, 526 F. Supp. 1271 (D.D.C. 1981), in which plaintiffs challenged expenditures of fed-

inction between action taken pursuant to the spending power, and that taken under the property clause, loses its significance in a concrete factual setting. As the Court itself has previously indicated,⁵⁷ the impact on taxpayers is the same when land purchased and facilities built with tax funds are deeded to a religious organization as when the government directly channels tax monies for building facilities to a religious order.⁵⁸ Such superficial distinc-

eral tax funds by the Department of the Interior for the maintenance of a "Holy City" replica on a federal game preserve. *Id.* at 1273-74; see *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 216-18 (D.C. Cir. 1976) (executive spending is not "subject to taxpayer suit on a test analogous to *Flast*").

⁵⁷ In *Tilton v. Richardson*, 403 U.S. 672 (1971), federal taxpayers were permitted to make an establishment clause challenge to federal construction grants to church-related colleges pursuant to the Higher Education Facilities Act of 1963. *Id.* at 676. The Court noted that the Act provided for the government's retention of a 20-year interest in any facility constructed with federal funds, and that if a recipient converted the facility to religious uses during such period, the government would recover its funds. *Id.* The Court struck down as violative of the establishment clause that part of the Act which removed, after 20 years, the restriction that the facility be used for secular purposes only. *Id.* at 683. In language that bespeaks a recognition of the indistinction between a grant-in-aid and a grant of property, vis-à-vis taxpayer injury, the Court stated:

It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. . . . If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

Id. Because in *Valley Forge* the government did not demand payment for the fair market value of the property from the Valley Forge Christian College, it arguably acted to aid religion with federal taxpayers' dollars, albeit in an indirect form, by donating the proceeds which otherwise would have been recovered by the Federal Treasury under the Federal Property and Administrative Services Act. See 40 U.S.C. § 485(a) (1976) (proceeds "from any sale, lease, or other disposition of surplus property, shall be covered into the Treasury as miscellaneous receipts"). Accordingly, it is suggested that, as in *Tilton*, federal taxpayer standing should have been granted to Americans United to challenge the property transfer as a compulsory taxpayer contribution to a religious body.

⁵⁸ See 454 U.S. at 511-12 & 512-13 n.20 (Brennan, J., dissenting); see also Note, *supra* note 41, at 992-93 ("the coerced financial support of religion . . . is at least arguably present in *Americans United*"). Criticizing the *Flast* test, Justice Harlan posited, "interest as taxpayers arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form." *Flast*, 392 U.S. at 123 (Harlan, J., dissenting). The lack of any meaningful distinction between an appropriation of property and an appropriation of cash, when constitutional rights are asserted, is further illustrated in cases involving abridgment of a plaintiff's civil rights. *E.g.*, *McGlotten v. Connally*, 338 F. Supp. 448, 457-59, 462 (D.D.C. 1972). In *McGlotten*, a Black American was allowed standing to litigate the issue of whether granting federal tax benefits to organizations which discriminated against the plaintiff on the basis of race is a form of federal financial assistance within the meaning of the Civil Rights Act. 338 F. Supp. at 460-61. Answering in the affirmative, the court asserted that "[d]istinctions as to the method of distribution of federal funds or their equivalent seem beside the point." *Id.* at 461. Significantly, section 601 of the Civil Rights Act of 1964, which protects citizens' fifth and fourteenth amendment equal protection rights, provides

tions are the inevitable result of an approach which adheres mechanically to the *language* of the *Flast* test without recognizing the underlying first amendment *guarantees* that spawned the test.

Justice Brennan, on the other hand, employed a deeper level analytical approach, beginning with an examination of historical source materials that evidence the objectives of the Framers in drafting the first amendment.⁵⁹ Significantly, the Court has re-

that federal financial assistance shall not be denied to any person on the basis of race, color or national origin. 42 U.S.C. § 2000d (1976). "Federal financial assistance" is only briefly defined by the Act, *see id.* § 2000d-1, but the standard regulations issued pursuant to section 2000d-1 by federal agencies congressionally authorized to extend such benefits state:

The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, . . . (4) the sale and lease of . . . Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient.

45 C.F.R. § 80.13(f) (1981) (Dep't of Health and Human Services); *see* 7 C.F.R. § 15.2(g) (1981) (Dep't of Agriculture); 28 C.F.R. § 42.102(c) (1981) (Dep't of Justice).

⁵⁹ In his dissent, Justice Brennan cited James Madison, recognized as "the leading architect of the religion clauses of the first amendment," *Flast*, 392 U.S. at 103, specifically, his *Memorial and Remonstrance Against Religious Assessments* and the *Bill for Establishing Religious Freedom* authored by Thomas Jefferson and reintroduced by Madison, 7 years after it originally was introduced. 454 U.S. at 502-04 & n.14 (Brennan, J., dissenting). Madison's *Remonstrance* was his fervent response to a bill "Establishing a Provision for Teachers of the Christian Religion," introduced in the Virginia State Assembly in 1785, which provided for a tax levy to support teachers of the Christian religion. *See id.* at 502 (Brennan, J., dissenting); *Flast*, 392 U.S. at 104 n.24. In his *Remonstrance*, Madison argued that it is an unalienable right of every man to exercise religion according to the dictates of his own conviction and conscience. Madison further warned that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 WRITINGS OF JAMES MADISON 183, 186 (Hunt ed. 1901), *reprinted in* *Everson v. Board of Educ.*, 330 U.S. 1, 63-72 (1947) (Rutledge, J., dissenting) (supp. app.).

The *Valley Forge* dissent also quoted the operative language of the Virginia bill for religious freedom: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." 454 U.S. at 503 (Brennan, J., dissenting) (quoting 12 Henings Stat. 86 (1823)). When Madison became a member of the Constitutional Convention, and shortly after the enactment of the Virginia bill in 1786, he proposed and secured the submission and ratification of the first amendment at the first session of the First Congress. *Everson v. Board of Educ.*, 330 U.S. 1, 38-39 (1947) (Rutledge, J., dissenting). Thus, it has been generally recognized that Madison's views provide the necessary proof of the meaning of the first amendment:

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.

turned to these same materials in both *Flast* and pre-*Flast* cases for guidance in elucidating the meaning of the establishment clause.⁶⁰ The most notable of the Court's resulting interpretations is the sweeping statement that: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt, to teach or practice religion."⁶¹

It is submitted that, by focusing on the history and purpose of the establishment clause, the dissenting justices correctly approached the issue of federal taxpayer standing when plaintiffs raise a constitutional challenge to government bestowals of land upon a religious institution. Such an approach comprehends both the restrictions imposed upon government action by the establishment clause and the taxpayer's relationship to those restrictions, an understanding of which led the *Flast* Court to formulate its double-nexus test.⁶² Indeed, Justice Brennan explained, the "two-part *Flast* test did not supply the rationale for the Court's decision, but rather its exposition."⁶³ Thus, by delving beyond the words of the *Flast* test to the rights and protections afforded by the establishment clause, which are the foundation of taxpayer standing, the dissent found only profound similarities, rather than

Id. at 39 (Rutledge, J., dissenting).

Notwithstanding general recognition of the approach to the establishment clause recognizing that taxpayers retain unique rights under that clause different from those afforded by other constitutional provisions, it was expressly rejected by Justice Harlan. See *Flast*, 392 U.S. at 125-26 (Harlan, J., dissenting). The flaw in such an approach, Justice Harlan maintained, is the obscurity and complexity of the historical purposes of the religious clauses of the first amendment, rendering impossible any accurate interpretation of the Framers' intentions. *Id.* (Harlan, J., dissenting). "[G]iven the ultimate obscurity of the Establishment Clause's historical purposes, it is inappropriate for this Court to draw fundamental distinctions among the several constitutional commands upon the supposed authority of isolated dicta extracted from the clause's complex history." *Id.* at 126 (Harlan, J., dissenting).

⁶⁰ See *Flast*, 392 U.S. at 103-04 & 103 n.24; *Everson v. Board of Educ.*, 330 U.S. 1, 11-16 (1947); *Reynolds v. United States*, 98 U.S. 145, 162-64 (1878).

⁶¹ *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947), quoted in *Valley Forge*, 454 U.S. at 501 (Brennan, J., dissenting).

⁶² See 454 U.S. at 505-08 (Brennan, J., dissenting); see also *Flast*, 392 U.S. at 102-04. Justice Brennan analyzed the *Flast* decision, granting standing to a federal taxpayer, as a reconciling of the allowance of state and municipal taxpayer standing in federal court, see *supra* note 6, with the Court's historical understanding that the establishment clause was intended to prohibit the government from using tax funds for the advancement of religion, 454 U.S. at 507 (Brennan, J., dissenting).

⁶³ *Id.* at 509 (Brennan, J., dissenting). The *Flast* double-nexus test, Justice Brennan maintained, was intended to "set forth principles to guide future cases involving taxpayer standing." *Id.* (Brennan, J., dissenting).

fatal distinctions, between *Valley Forge* and *Flast*.

Justice Brennan's dissenting opinion, however, accomplished more than an insightful analysis of the rationale that led the *Flast* Court to allow one establishment clause claim to pierce the barrier against federal taxpayer suits. The dissent advocates what appears to be a new theory of taxpayer standing, or at least expressly articulates for the first time what Justice Brennan found implicit in *Flast*: a federal taxpayer is afforded by the establishment clause an implied right of action to contest any governmental use of tax dollars, either direct or indirect, that is alleged to support religion.⁶⁴ This conceptualization of taxpayer standing, it is submitted, provides a long-needed comprehensive synthesis of the historically broad understanding of the establishment clause with the historically restrictive policy of channelling claims only through litigants whose interests are legitimately at stake. Furthermore, there appears to be no logical deficiency in employing the implied right of action theory in this context. Since the establishment clause prohibits congressionally authorized use of tax funds for religious purposes, and since the taxpayer is the direct and intended beneficiary of that restriction, when a taxpayer points to use of tax dollars that supports religion, he has automatically alleged sufficient article III injury to be granted standing to press the establishment

⁶⁴ The concept of an implied right of taxpayers to contest governmental appropriations of tax funds or their equivalent is discernible in Justice Brennan's observation that the nature and source of the claim asserted is often decisive in finding cognizable article III injury:

[T]he Constitution, and by legislation the Congress, may impart a new, and on occasion unique, meaning to the terms "injury" and "causation" in particular statutory or constitutional contexts. The Court makes a fundamental mistake when it determines that a plaintiff has failed to satisfy the two-pronged "injury-in-fact" test, or indeed any other test of "standing," *without first determining whether the Constitution or a statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstances presented to the court.*

454 U.S. at 492 (Brennan, J., dissenting) (emphasis added). The implied right of action theory of taxpayer standing was alluded to in the concurring opinions in *Flast*. Specifically, Justice Douglas stated:

I would be as liberal in allowing taxpayers standing to object to [first amendment violations] as I would in granting standing to people to complain of any invasion of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights.

392 U.S. at 114 (Douglas, J., concurring). Similarly, Justice Stewart asserted: "Because [the establishment clause] plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution." *Id.* (Stewart, J., dissenting).

clause issue.⁶⁵

The position advanced by the dissent in *Valley Forge* takes on additional merit when contrasted with the Third Circuit's novel theory of general citizen standing to pursue establishment clause claims.⁶⁶ While the implied right of action theory is consistent with traditional notions of injury and causation, a theory of standing based upon a citizen's "shared individuated right" to constitutional governance entirely dispenses with these essential standing requirements, for a finding of injury under the establishment clause in *Valley Forge* is seemingly unintelligible without reference to the plaintiffs' taxpayer status.⁶⁷

⁶⁵ See 454 U.S. at 493 n.5 (Brennan, J., dissenting). The reasoning that leads to implying a right of taxpayer standing under the establishment clause when tax funds are used to advance religion is analogous to the analysis employed by federal courts in implying causes of action directly from the Constitution. See *L. TRIBE*, *supra* note 2, § 3-22, at 98 n.6. Both analyses recognize that a plaintiff has been injured by some act of the defendant which violates a constitutional duty owed directly to the plaintiff. For example, in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Court noted that the fourth amendment guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by federal authority. *Id.* at 392. From this guarantee the Court inferred a cause of action for damages for a plaintiff's injuries caused by an unreasonable search by federal officials in violation of the fourth amendment. *Id.* at 396-98. See generally Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1146-55 (1969). Thus, when injury is alleged as a result of unconstitutional governmental action, it should be deemed proper to determine the standing issue by ascertaining and examining the interests intended to be protected by the constitutional provision allegedly violated. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) ("standing may be based on an interest created by the Constitution or a statute"); Note, *Recent Standing Cases and a Possible Alternative Approach*, 27 HARVARD L.J. 213, 229-30 (1975) ("injury should be deemed sufficient for standing, even though speculative or indirect or intangible, if the statute or constitutional provision in question anticipates such an injury and seeks to protect against it"). See generally Bogen, *Standing Up for Flast: Taxpayer and Citizen Standing to Raise Constitutional Issues*, 67 KY. L.J. 147, 162-71 (1978).

⁶⁶ See 619 F.2d at 262. The court of appeals, in recognizing the plaintiffs' claim to a "personal constitutional right" flowing from the establishment clause, answered affirmatively the question left undecided in Justice Fortas' *Flast* concurrence, "whether 'the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for [standing to bring] this [kind of] challenge.'" *Id.* (quoting *Flast v. Cohen*, 392 U.S. at 115-16 (Fortas, J., concurring)). Although the Third Circuit insisted that its thesis of standing, based upon the establishment clause's creation in each citizen of a "'personal constitutional right' to a government that does not establish religion," 619 F.2d at 265, is different from general citizen standing, *id.* at 262, this theory nonetheless amounts to a "generalized interest of all citizens in constitutional governance" too abstract to constitute injury in fact, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217, 227 (1974); see *Valley Forge*, 454 U.S. at 482-83.

⁶⁷ See 619 F.2d at 270 (Weis, J., dissenting); 454 U.S. at 485-86. Significantly, even the concurring Third Circuit judge, arguing for liberalized standing under the first amendment,

Finally, it is submitted that the implied right of action theory will effect no undue increase in the number of plaintiffs suing in federal court. Since a taxpayer still must complain of governmental appropriation of tax dollars or their equivalent as allegedly violative of the establishment clause, the two-part standing test under this formulation remains highly restrictive.⁶⁸ In contrast, the "shared individuated right" theory of standing would effect a dramatic increase in litigation. It invites the result that any citizen may be heard to raise any constitutional claim, not just an establishment clause claim, because all citizens are the "ultimate beneficiaries" of a constitutionally run government.⁶⁹ The Third Circuit's

tacitly admitted that granting standing to Americans United under a "personal constitutional right" theory is tantamount to abandonment of the traditional requirement of injury in fact. 619 F.2d at 267-68 (Rosenn, J., concurring). Indeed, Judge Rosenn stated:

Unlike statutes allegedly violative of the Free Exercise and Free Speech Clauses, statutes alleged to violate the Establishment Clause may not have an individual impact sufficient to confer standing in the traditional sense. Rather, such statutes may have the more general effect or purpose of aiding religion. In such circumstances, there is not an available class of likely plaintiffs whose conduct has been or will be circumscribed by the existence of the offending statute and who will thus have standing to seek judicial review.

Id. (Rosenn, J., concurring). The potential breadth of the "shared individual right" theory has been criticized both for its acceptance of the separationists' interest in enforcement of the establishment clause as concrete injury and for its augmentation of relief provided by judicial review. *See Note, supra* note 41, at 1001.

⁶⁸ Davis, "Judicial Control of Administrative Action": A Review, 66 COLUM. L. REV. 633, 665 (1966). The fear that federal courts would be inundated by countless suits if federal taxpayer standing were allowed was anticipated and rebutted by Professor Davis before the Court's *Flast* decision:

Arguments that the courts would be flooded with taxpayer suits if taxpayers could challenge expenditures are based on a misunderstanding. The Court could, and would in early cases, establish the constitutionality of basic spending programs, putting to rest through enunciation of principles more than nine-tenths of potential problems. Then the judicial doors would be open for the special problems, such as the validity of federal aid to parochial schools. The long-term effect on the volume of litigation would be slight.

Id. The *Flast* Court itself recognized and rejected the "flood of litigation" argument, stating that this fear "has been mitigated by the ready availability of the devices of class actions and joinder under the Federal Rules of Civil Procedure, adopted subsequent to the decision in *Frothingham*." 392 U.S. at 94; *see Comment, Standing to Contest Federal Appropriations, supra* note 6, at 625 ("[t]he excuse of crowded courtrooms is poor reason for denying the vindication of constitutional rights"). Such comments, it is suggested, are equally applicable to the more expansive, yet still bounded, theory of taxpayers' implied right under the establishment clause to challenge governmental disbursements that support religion.

⁶⁹ *See* 454 U.S. at 489-90 & n.26 (there is no principled basis for confining the "personal constitutional right" premise of standing to litigants relying on the establishment clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("[t]he proposition that all constitutional provisions are enforceable by any citizen simply because

theory thus runs directly counter to the Court's frequently articulated refusal to hear "public interest" suits brought by citizens seeking a ruling on the constitutionality of legislative or executive branch action that had no concrete impact upon them.⁷⁰

CONCLUSION

The *Valley Forge* Court was confronted with taxpayers raising an establishment clause challenge to the government's bestowal of land, purchased and improved with taxpayers' dollars, upon a religious institution, under a program that had already authorized transfers to sectarian entities of surplus property valued at over \$25 million.⁷¹ Rather than permit Congress to be the first and last judge of the constitutionality of such government action, the Court should have granted standing to adjudicate the establishment of religion issue to the most appropriate and most directly injured party—the federal taxpayer. The grant of taxpayer standing in this case could have been properly premised upon a broader reading of the *Flast* double-nexus test. This would have involved a recognition that taxpayers qua taxpayers are as logically connected to governmental allocation of tangible property pursuant to property clause authority as they are to governmental appropriation of tax funds pursuant to taxing and spending power. A second formulation of taxpayer standing involves recognition of the taxpayer's implied right under the establishment clause to attack governmental allocation of its largesse. Although the former approach would have been adequate to resolve the standing issue in *Valley Forge*, its viability is limited to cases in which federal taxpayers attack disbursement statutes that arise under either the taxing and spending clause or the property clause. The second theory, however, provides the federal taxpayer with a right of action to chal-

citizens are the ultimate beneficiaries of those provisions has no boundaries"). Justice Harlan, dissenting in *Flast*, attacked the citizen "personal constitutional right" doctrine of standing under the first amendment because it would "threaten the proper functioning both of the federal courts and of the principle of separation of powers," and because it would "very substantially increase the number of situations in which individual citizens could present for adjudication 'generalized grievances about the conduct of government.'" *Flast*, 392 U.S. at 129-30 n.18 (Harlan, J., dissenting).

⁷⁰ See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-27 (1974); *United States v. Richardson*, 418 U.S. 166, 176-80 (1974); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam). See generally L. TRIBE, *supra* note 2, § 3-20, at 89-92; Note, *supra* note 65, at 214-18.

⁷¹See *supra* note 15.

lenge any use of his tax dollars to support religion, regardless of the specific constitutional clause enabling that appropriation. It is hoped that in future taxpayer suits brought under the establishment clause, the Supreme Court will adopt the implied right of action theory of standing. Such an adoption will make more meaningful the taxpayer's establishment clause protections that are long embedded in our constitutional heritage, and will avoid continued confusion as to the nature of the injury a taxpayer must incur before he is permitted to advance to the merits of his claim.

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