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## Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.: Citizen and Taxpayer Standing under the Establishment Clause Revisited

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## COMMENT

### *VALLEY FORGE CHRISTIAN COLLEGE v. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC.: CITIZEN AND TAXPAYER STANDING UNDER THE ESTABLISHMENT CLAUSE REVISITED*

BRADLEY M. BOLE

Under authority of the Federal Property and Administrative Services Act of 1949,<sup>1</sup> at least \$25.7 million worth of government surplus property<sup>2</sup> has been transferred to religious organizations at minimal or no charge.<sup>3</sup>

In 1976, the transfer of a seventy-seven-acre tract valued at \$1.3 million<sup>4</sup> to Valley Forge Christian College, a sectarian institution operated by the Assemblies of God, caught the attention of Americans United for Separation of Church and State, Inc., a non-profit organization avowedly dedicated to religious liberty and the constitutional principle of separation of church and state. The organization and four of its members filed suit in the United States District Court for the Eastern District of Pennsylvania seeking declaratory and injunctive relief to void the transfer as violative of the Establishment Clause of the first amendment.<sup>5</sup>

The district court granted the college's motion for summary

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1. 40 U.S.C. §§ 471-544 (1976 & Supp. III 1979).

2. *Americans United for Separation of Church and State, Inc. v. United States Dep't of Health, Education and Welfare*, 619 F.2d 252, 254 (3d Cir. 1980), *cert. granted*, 450 U.S. 909 (1981). The property was originally acquired by the government at a cost of \$64.5 million. *Id.* The government did not join the petition for certiorari. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 450 U.S. 909 (1981). The Supreme Court reversed under this title at 102 S. Ct. 752 (1982). This comment refers to the case as *Americans United*.

3. The Act authorizes the Secretary of Health, Education and Welfare to sell or lease the property to nonprofit, tax-exempt educational institutions for consideration that takes into account "any benefit which has accrued or may accrue to the United States" from the transferee's use of the property. 40 U.S.C. § 484(k)(1)(A), (C) (1976 & Supp. III 1979). By regulation, the Secretary can reduce the price of the surplus property by a "public benefit allowance" based on the "benefits to the United States from the use of such property for educational purposes." 34 C.F.R. § 12.9(a) (1981). As a matter of practice, the Secretary generally grants a public benefit allowance equal to 95-100% of the cost. *Valley Forge Christian College* was awarded a 100% allowance which permitted it to acquire the property free of charge. 102 S. Ct. at 756.

4. 619 F.2d at 253.

5. 102 S. Ct. at 756-57. The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

judgment and dismissed the complaint on the grounds that Americans United failed to satisfy the two-pronged test for taxpayer standing to sue previously announced by the Supreme Court in *Flast v. Cohen*.<sup>6</sup> Under that test, plaintiffs asserting only their status as taxpayers are limited to challenging congressional enactments under the Taxing and Spending Clause<sup>7</sup> that exceed specific constitutional limitations on the clause.<sup>8</sup> Because the Federal Property and Administrative Services Act of 1949 was enacted under the Property Clause,<sup>9</sup> rather than the Taxing and Spending Clause, the court concluded Americans United failed the *Flast* test.

The district court also found Americans United had "failed to allege that they have suffered any actual or concrete injury beyond a generalized grievance common to all taxpayers."<sup>10</sup> This finding, apparently unnecessary because Americans United failed the *Flast* test for taxpayer standing, reiterates several of the key points of the standing doctrine as it currently is defined by the Supreme Court.

The Court interprets the article III "Cases" and "Controversies" limitation to federal court jurisdiction<sup>11</sup> as requiring plaintiffs to allege a concrete or specific injury as a threshold requirement for standing to sue. The Court has stated such an injury assures "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor"<sup>12</sup> to present a "Case" or "Controversy." The Court also requires that the injury

6. 392 U.S. 83 (1968), cited at 102 S. Ct. at 757.

7. The Taxing and Spending Clause provides: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8.

8. 392 U.S. at 102-03. See *infra* notes 75-79 and accompanying text.

9. 102 S. Ct. at 762. The Property Clause provides: "The Congress shall have Power to dispose of . . . Property belonging to the United States . . ." U.S. CONST. art. IV, § 3, cl. 2.

10. 102 S. Ct. at 757.

11. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

12. 392 U.S. at 106.

be individual or personal, rather than "generalized grievances about the conduct of government or the allocation of power in the Federal System."<sup>13</sup>

### I. THE THIRD CIRCUIT AND THE ESTABLISHMENT CLAUSE AS A "PERSONAL" CONSTITUTIONAL RIGHT

The Court of Appeals for the Third Circuit agreed that Americans United lacked standing as taxpayers under *Flast*,<sup>14</sup> but found that the Establishment Clause arguably "creates in each citizen a 'personal constitutional right' to a government that does not establish religion."<sup>15</sup>

By giving every individual a personal interest in the Establishment Clause, the Third Circuit was able to bring *Americans United* within the scope of prior challenges brought under the Establishment Clause in which standing was allowed where plaintiffs could show they were "directly affected"<sup>16</sup> by alleged infringements of the constitutional guarantee. More importantly, the finding enabled the Third Circuit to skirt two major standing cases: *United States v. Richardson*<sup>17</sup> and *Schlesinger v. Reservists Committee to Stop the War*.<sup>18</sup> Both cases concluded that citizens seeking to force government to obey the mandates of its Constitution were asserting only generalized rather than individualized injuries.

In *Richardson*, a taxpayer plaintiff claimed that the executive branch's refusal to reveal expenditures of the Central Intelligence Agency violated the Statement and Accounts Clause<sup>19</sup> of the Constitution and hindered his ability to make informed decisions as a voter.<sup>20</sup> In *Schlesinger*, taxpayer and citizen plaintiffs alleged that

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13. *Id.*

14. 619 F.2d at 260. For a discussion of the Third Circuit's treatment of this case, see Comment, *Americans United for Separation of Church and State, Inc. v. HEW: Standing to Sue Under the Establishment Clause*, 32 HASTINGS L.J. 975 (1981).

15. 619 F.2d at 265.

16. *E.g.*, *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). See *infra* notes 84-87 and accompanying text.

17. 418 U.S. 166 (1974). For a discussion of *Richardson* and its companion case, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), see *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 41, 236-43 (1974); Comment, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213 (1975).

18. 418 U.S. 208 (1974).

19. The Statements and Accounts Clause provides: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 17.

20. 418 U.S. at 168-69, 176.

a Pentagon policy allowing congressmen to retain their commissions in the Armed Forces Reserves violated the Constitution's Incompatibility Clause<sup>21</sup> and potentially allowed the executive department to exert undue influence on congressmen holding commissions.<sup>22</sup>

In both cases, the *Flast* test was mechanically applied and the plaintiffs were found to have failed to establish standing because they were not challenging congressional enactments under the Taxing and Spending Clause and the constitutional clauses under which the suits had been brought were not specific limitations to the taxing and spending power.<sup>23</sup> The Court, however, went further and denied standing to the plaintiffs as citizens seeking to enforce the Constitution on the grounds that their asserted injuries were common to all members of the public and reflected only generalized interests in constitutional governance too "abstract"<sup>24</sup> to ensure concrete adversity.

The Third Circuit distinguished *Richardson* and *Schlesinger* from *Americans United* on the basis of the constitutional clauses underlying the claims in the three cases. The court found the plaintiffs in *Richardson* and *Schlesinger* had based their challenges on only "general" limitations to governmental conduct,<sup>25</sup> and concluded "that the [Supreme] Court's consistent refusal to grant 'citizen standing' to ideological plaintiffs seeking to litigate the public interest has turned as much on the inadequacy of the alleged interest sought to be protected as it has on the deficiency of the injury alleged."<sup>26</sup>

Relying on its own prior conclusion that "each citizen has a personal stake in ensuring that the Government not establish a relig-

21. The Incompatibility Clause provides: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.

22. 418 U.S. at 212.

23. 418 U.S. at 175; 418 U.S. at 217-22.

24. 418 U.S. at 175; 418 U.S. at 217.

25. 619 F.2d at 262-63, 265.

26. *Id.* at 263. Support for this construction was found in the Supreme Court's comment in *Richardson* that it was "open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen." 418 U.S. at 178 n.11. Further support is the Court's statement in *Schlesinger* that because of the nonspecific nature of the Incompatibility Clause "it can be only a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant." 418 U.S. at 223.

ion"<sup>27</sup> and the proposition that "[t]he underlying justification for according standing in *Flast* . . . was the implicit recognition that the Establishment Clause does create in every citizen a personal constitutional right,"<sup>28</sup> the court reasoned Americans United had asserted "a particular and concrete injury to a right that is allegedly protected by the constitutional guarantee raised" and therefore had standing.<sup>29</sup>

In a concurring opinion, it also was argued that since the Establishment Clause and first amendment were created to protect minorities from the excesses of political majorities, citizens had a right to rely on the judiciary, rather than the political process, to enforce these protections.<sup>30</sup> Since Americans United appeared capable of presenting the issues raised by the case and no better plaintiffs appeared to be available to vindicate the Establishment Clause rights involved, the concurring judge endorsed standing for the organization.<sup>31</sup>

## II. THE SUPREME COURT: RIGID APPLICATION OF *Flast* AND A HARD LINE ON CITIZEN STANDING REAFFIRMED

The Supreme Court granted certiorari<sup>32</sup> and voted 5-4 to reverse the Third Circuit after concluding Americans United lacked standing.<sup>33</sup> The majority rigidly applied the *Flast* test for taxpayer standing and concluded Americans United failed the first prong of the test for two reasons: (1) The transfer was not a congressional decision, but rather a decision by the Department of Health, Edu-

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27. 619 F.2d at 262 (footnote omitted). The Third Circuit found further support for this distinction between specific constitutional rights and general constitutional limitations in three other cases in which the Supreme Court seemingly found standing on the basis of asserted injuries to plaintiff's fundamental rights. These were *Baker v. Carr*, 369 U.S. 186 (1962), in which standing was allowed for an alleged injury to plaintiff's right to vote; *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963), in which standing was granted for an asserted injury to the plaintiff's individual right under the Establishment Clause; and *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150 (1970), in which the Supreme Court stated "a spiritual stake in First Amendment values [is] sufficient to give standing to raise issues concerning the Establishment Clause." *Id.* at 154.

28. 619 F.2d at 262.

29. *Id.* at 265.

30. *Id.* at 266 (Rosenn, J., concurring). Support for this argument was found in the Supreme Court's liberalized standing rules allowing plaintiffs whose conduct was permissibly regulated to raise the claims of injured parties whose conduct was chilled by overbroad statutes when challenging those statutes under the Free Speech Clause. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

31. 619 F.2d at 266.

32. 450 U.S. 909 (1981).

33. 102 S. Ct. at 767-68.

cation and Welfare, and (2) authority for the transfer was derived from Congress' power under the Property Clause, rather than the Taxing and Spending Clause.<sup>34</sup>

The Court discounted the distinctions drawn by the Third Circuit between the challenge in *Americans United* and those in *Richardson* and *Schlesinger*. Observing that the Incompatibility Clause and Statement and Accounts Clause are no less fundamental than the Establishment Clause, the Court said:

Each establishes a norm of conduct which the federal government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution . . . . Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complimentary “sliding scale” of standing which might permit respondents to invoke the judicial power of the United States.<sup>35</sup>

Instead, the Court found that *Americans United*, like the plaintiffs in *Richardson* and *Schlesinger*, merely claimed that the Constitution had been violated and alleged no personal injury “other than the psychological consequence presumably produced by observation of conduct with which one disagrees.”<sup>36</sup> Concrete adversity is guaranteed not by the intensity of plaintiffs' interest in enforcing constitutional rights, the Court added, but by the presence of an actual individualized injury in fact.<sup>37</sup>

Joined by Justices Marshall and Blackmun, Justice Brennan dissented and traced the history of the Establishment Clause as a specific limitation on the levy and use of taxes, essentially agreeing with the Third Circuit that there is a personal concrete injury whenever this constitutional guarantee is violated.<sup>38</sup>

34. *Id.* at 762.

35. *Id.* at 764-65.

36. *Id.* at 765.

37. *Id.*

38. *Id.* at 773-78 (Brennan, J., dissenting). The dissenters also accused the majority of using standing determinations to disguise decisions actually made on the merits of asserted claims. *Id.* at 768. See also Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

The dissenters further contended the term “injury” takes on different meanings depending on the statutory or constitutional context in which it occurs. 102 S. Ct. at 769. After tracing the history of the Establishment Clause, Justice Brennan concluded:

It may be that Congress can tax for *almost* any reason, or for no reason at all. There is, so far as I have been able to discern, but one constitutionally imposed limit on that authority. Congress cannot use tax money to support a church, or to encourage religion. That is “*the forbidden exaction.*” In absolute terms the history

Noting that the *Flast* test was created to provide taxpayers with an opportunity to challenge alleged violations of the Establishment Clause, the dissenters argued that *Americans United* was practically indistinguishable from *Flast*. "It can make no constitutional difference," Justice Brennan observed, that the Federal Property and Administrative Services Act was enacted under authority of the Property Clause rather than the Taxing and Spending Clause.<sup>39</sup> The only practical difference between enactments under the two clauses is the difference between the gift of a completed facility and the gift of money to construct a facility, which Brennan termed "a meaningless distinction."<sup>40</sup>

The dissenters also argued the majority's distinction between the *Flast* challenge to a congressional act and *Americans United's* challenge to a decision by HEW was formalistic and insignificant. Since the *Flast* challenge also was directed toward HEW implementation of a congressional enactment, Brennan suggested the two cases could be reconciled by allowing *Americans United* to amend its complaint to allege the Federal Property and Administrative Services Act was unconstitutional.<sup>41</sup> Further, since virtually all congressional enactments end up being implemented by officials in the executive branch, the first amendment in this instance "binds the Government as a whole, regardless of which branch is at work in a particular instance."<sup>42</sup>

### III. CURRENT STANDING DOCTRINE

Prior to 1968, plaintiffs injured by governmental action were de-

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of the Establishment Clause of the First Amendment makes this clear. History also makes it clear that 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 the Establishment Clause. Each, and indeed every, federal taxpayer suffers precisely the injury that the Establishment Clause guards against when the Federal Government directs that funds be taken from the pocketbooks of the citizenry and placed into the coffers of the ministry.

*Id.* at 778 (Brennan, J., dissenting) (citations omitted).

39. *Id.* at 779.

40. *Id.*

41. *Id.* at 778.

42. *Id.* at 779. In a separate dissent, Justice Stevens endorsed the Brennan dissent, agreeing that the Court has a more significant role to play in enforcing the Establishment Clause than other norms of governmental behavior such as those involved in *Richardson* and *Schlesinger*. Stevens also agreed "that the essential holding of *Flast v. Cohen* attaches special importance to the Establishment Clause and does not permit the drawing of a tenuous distinction between the Spending Clause and Property Clause." *Id.* at 781 (Stevens, J., dissenting).



nied standing unless they could show the action invaded "a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."<sup>43</sup> This legal interest test was abandoned in *Association of Data Processing Service Organizations, Inc. v. Camp*<sup>44</sup> and *Barlow v. Collins*.<sup>45</sup> It was replaced with a two-part test requiring plaintiffs to show an "injury in fact, economic or otherwise,"<sup>46</sup> and that "the interest to be protected . . . is arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question."<sup>47</sup> The courts

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43. *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939). See also K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.01 (3d ed. 1972). Professor Davis cites five examples of pre-1968 cases in which standing was denied to plaintiffs adversely affected by governmental action which they sought to challenge: *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), in which eighteen power companies adversely affected by the government-operated Tennessee Valley Authority were denied standing to challenge the constitutionality of the authority; *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), in which steel companies wishing to sell to the government were denied standing to challenge an allegedly unauthorized wage determination requirement; *Atlanta v. Ickes*, 308 U.S. 517 (1939), in which the city was denied standing to challenge a minimum price order requiring it to pay increased prices for coal; *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295 (1940), in which several plaintiffs constructing market facilities were denied standing to seek an injunction against the unlawful construction of a rail extension serving a competitor; *Frothingham v. Mellon*, 262 U.S. 447 (1923), in which a federal taxpayer was denied standing to challenge allegedly unconstitutional expenditures under the Maternity Act of 1921. For additional discussion of *Frothingham*, see *infra* notes 69-71 and accompanying text. Davis cautions that these cases are not typical of pre-1968 standing cases, but only of cases denying standing. *Id.* at 421. He invites comparison with *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), allowing an established radio station to challenge the grant of a license to a new competitor even though the station would have appeared to lack standing under existing rules.

The Supreme Court has acknowledged that the law of standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations. . . ." *United States ex rel. Chapman v. Federal Power Comm.*, 345 U.S. 153, 156 (1953). The Court also has observed that "[g]eneralizations about standing to sue are largely worthless as such." *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 151 (1970).

For a defense of current standing doctrine, see Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979). Brilmayer believes standing doctrine serves three policies embodied in article III. The first policy is judicial restraint to avoid undermining the doctrine of stare decisis through premature consideration or frequent reconsideration of issues. *Id.* at 302-06. The second policy identified by Brilmayer is that of avoiding due process problems that would arise if uninjured plaintiffs were allowed to assert and thereby pre-empt the claims of injured plaintiffs. *Id.* at 306-10. The third policy is that of safe-guarding the right of injured plaintiffs to decide whether and when to vindicate their rights. *Id.* at 310-15.

44. 397 U.S. 150 (1970).

45. 397 U.S. 159 (1970).

46. 397 U.S. at 152.

47. *Id.* at 153.

generally have not discussed the "zone of interest" portion of the standing test<sup>48</sup> and have concentrated on defining or modifying the "injury in fact" portion.

A complete statement of the doctrine as the Court currently perceives it was recited by Justice Rehnquist writing for the majority in *Americans United*:

The term "standing" subsumes a blend of constitutional requirements and prudential considerations . . . and it has not always been clear in the opinions of this Court whether particular features of the "standing" requirement have been required by Article III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution.<sup>49</sup>

Recent cases, Rehnquist found, indicate article III requires "at an irreducible minimum" that a plaintiff allege: (1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"<sup>50</sup> (2) that there is some causal relationship between the conduct and the injury,<sup>51</sup> and (3) that the injury "is likely to be redressed by a favorable decision."<sup>52</sup>

The requirement of a direct, redressable injury allows three policies embodied in article III to be served. First, it ensures that disputes will be resolved, "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."<sup>53</sup> Second, it allows the court to resolve disputes with some confidence that all relevant facts are before it.<sup>54</sup> Third, since a decision holding a legislative or executive act unconstitutional affects the relationships between co-equal branches of government, the injury requirement guards against unwise or unnecessary judicial intrusion into the activities of these other branches.<sup>55</sup>

Rehnquist concluded his analysis by noting that the court has

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48. Davis, *supra* note 43, at § 22.07.

49. 102 S. Ct. at 758 (citations omitted).

50. *Id.*, (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).

51. 102 S. Ct. at 758 (citing Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)). See also Linda R.S. v. Richard D., 410 U.S. 614 (1973).

52. 102 S. Ct. at 758 (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

53. *Id.*

54. *Id.*

55. *Id.* at 759.

further modified the doctrine for prudential, rather than constitutional, reasons by: (1) restricting plaintiffs to asserting injuries only to themselves and not to third parties,<sup>56</sup> (2) refraining from adjudicating "abstract questions of wide public significance" that amount to "generalized grievances"<sup>57</sup> better left to resolution through the political process, and (3) requiring that the complaint fall within the zone of interests protected by the statute or constitutional guarantee involved.<sup>58</sup>

#### IV. THE INJURY IN FACT REQUIREMENT

Neither the requirement of an injury in fact nor the requirement of standing in general are mentioned specifically in the Constitution.<sup>59</sup> The Court has asserted that standing has a historical basis in the English judicial system and was adopted by implication by the framers of the Constitution.<sup>60</sup> Legal scholars, however, have persuasively shown that uninjured plaintiffs were allowed to bring a variety of actions in English courts challenging excesses in authority in the Eighteenth Century and that modern American standing doctrine essentially has been developed and adapted by the Supreme Court.<sup>61</sup>

Further, the Court has ignored or modified the doctrine in various situations. For example, the Court has not limited the federal courts to rendering judgments strictly within the context of adversary proceedings in which one party alleges an injury, but instead has allowed the courts to enter consent decrees, probate estates in the District of Columbia and the territories, enjoin strikes for eighty days, admit aliens, dispose of voluntary bankruptcy petitions and accept guilty pleas when parties are in agreement.<sup>62</sup>

The injury-in-fact requirement also has proven to be flexible in varying circumstances. For example, while the Court has applied

56. *Id.* at 759-60 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

57. 102 S. Ct. at 760 (citing 422 U.S. at 499-500); *see also* 418 U.S. 166 (1974); 418 U.S. 208 (1974) and *Ex parte Levitt*, 302 U.S. 633 (1937).

58. 102 S. Ct. at 760 (citing *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)).

59. *See Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 *YALE L.J.* 816, 818 (1969).

60. *Id.* at 816.

61. *Id.* at 818-27. Berger shows that the English judiciary allowed plaintiffs to bring a variety of actions challenging excesses in authority without showing any injury to their personal interest. These included writs of prohibition, certiorari, mandamus, quo warranto and relator actions.

62. *Davis, Standing: Taxpayers and Others*, 35 *U. CHI. L. REV.* 601, 607 (1968).

the requirement strictly in constitutional challenges, it has been generous in finding injuries for challenges based on statutory rights. In *United States v. Students Challenging Regulatory Agency Procedures*,<sup>63</sup> standing was allowed under the then-existing Administrative Procedures Act<sup>64</sup> to challenge an Interstate Commerce Commission surcharge on freight rates despite a highly speculative injury. The students alleged the surcharge might increase the use of non-recyclable goods "thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area."<sup>65</sup>

Congress has taken advantage of this relaxed view of injury in statutory cases and has given standing to "any person" and "any interested person" without specifying an injury requirement.<sup>66</sup> The Court, however, has indicated that there are some limits to this expansion. In *Sierra Club v. Morton*,<sup>67</sup> the Court acknowledged that aesthetic, conservational and recreational injuries may be sufficient to sustain standing, but then denied the Sierra Club standing to challenge a Department of Interior decision to construct a ski resort adjacent to Sequoia National Park because the environmental organization failed to allege any of its members used the park and would be injured by the development.

Further, while the Court has refused to find asserted violations of constitutional guarantees sufficient to allow standing, it has agreed that minimal economic injuries are adequate to allow plaintiffs access to the federal courts.<sup>68</sup>

Of particular relevance to *Americans United* is the Court's ma-

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63. 412 U.S. 669 (1973).

64. 5 U.S.C. § 702 (1966) (current version at 5 U.S.C. § 552 (1976 & Supp. IV 1980)).

65. 412 U.S. at 688.

66. See Tushnet, *supra* note 38, at 666-67. The author cites the Clean Air Act, 42 U.S.C. §§ 1857-18571 (1970 & Supp. V 1975) (current version at 42 U.S.C. §§ 7401-7616 (Supp. IV 1980)), providing "any person may commence a civil action on his own behalf. . . ." *Id.* at § 1857h-2(a)(2) (1970) (current version at § 7604(a) (Supp. IV 1980)), and the Federal Elections Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (amending scattered sections of 2, 5, 18, 26, 47 U.S.C.), allowing any qualified voter to bring suit to test the Act's constitutionality. See also Comment, *supra* note 14, at 978 n.18, citing congressional acts giving standing to "any person" or "any interested person."

67. 405 U.S. 727 (1972).

68. See Davis, *supra* note 62, at 611-12, citing examples of standing granted on the basis of trifling injuries. These include a fine of \$5, *McGowan v. Maryland*, 366 U.S. 420 (1961); a poll tax of \$1.50, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); and a fraction of one vote, *Baker v. Carr*, 369 U.S. 186 (1962).

nipulation of the injury in fact requirement in the area of taxpayer standing. In the seminal case of *Frothingham v. Mellon*,<sup>69</sup> the Court announced an apparent absolute ban on taxpayer challenges to governmental actions. In *Frothingham*, a taxpayer claimed the Maternity Act of 1921, providing federal funds to states establishing maternal and infant health programs, was a congressional invasion of powers reserved to the states by the tenth amendment. The effect of this unconstitutional act, she claimed, would be to increase her future federal tax burden and "thereby take her property without due process of law."<sup>70</sup> The Court found that a taxpayer's interest in the federal treasury was shared by millions of others and therefore "comparatively minute and indeterminable" and that the program's effect on her future taxes was "remote, fluctuating and uncertain."<sup>71</sup> Because of this, the Court concluded the taxpayer had not shown a "direct" injury sufficient to sustain standing.

Commentators and the Court found the result in *Frothingham* unsatisfactory for several reasons. The Court's suggestion that a federal taxpayer's bill was too minute to give rise to a substantial injury was both inaccurate and inconsistent with prior decisions allowing challenges based on a municipal taxpayer's interest in a city's treasury.<sup>72</sup>

More importantly, the logical implication of the *Frothingham* holding was the unacceptable proposition that "if illegal action raises the amounts that all taxpayers must pay, no one has standing to challenge the action."<sup>73</sup> This barrier became particularly troublesome in the 1960's when Congress began to consider providing federal aid to schools sponsored by religious organizations. Since a Supreme Court decision on the propriety of such aid would affect Congress's willingness to provide it, groups favoring and opposed to the idea and Congress itself were eager to provide a mechanism for challenging constitutionality of an act providing financial aid.<sup>74</sup>

In *Flast*,<sup>75</sup> the Court obliged by dropping the *Frothingham* bar-

69. 262 U.S. 447 (1923).

70. *Id.* at 486.

71. *Id.* at 487.

72. *Id.* at 486. In *Flast* the Court acknowledged the weakness of this rationale. 392 U.S. at 93-94.

73. Davis, *supra* note 43, at § 22.01.

74. C. WRIGHT, LAW OF FEDERAL COURTS § 13 (3d ed. 1976).

75. 392 U.S. 83.

rier to allow taxpayer suits based on the Establishment Clause. Here, taxpayers challenged the use of tax money to provide instruction and materials at religious schools through the Elementary and Secondary Education Act of 1965, alleging the expenditures violated the Establishment and Free Exercise Clauses of the first amendment. The Court found article III itself did not bar taxpayer suits if the taxpayers could demonstrate a sufficient personal stake in the outcome.<sup>76</sup> To determine the circumstances in which a taxpayer could demonstrate "the personal stake and interest that impart the necessary concrete adverseness" required by article III, the Court promulgated its two-prong nexus test:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.<sup>77</sup>

The Court then found that the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."<sup>78</sup> This conclusion was reached after a brief historical analysis of the clause which the Court found "vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."<sup>79</sup>

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76. *Id.* at 85-86, 101.

77. *Id.* at 102-03. For discussions of the *Flast* nexus test, see Bogen, *Standing Up for Flast: Taxpayer and Citizen Standing to Raise Constitutional Issues*, 67 *Ky. L.J.* 147 (1978-79).

78. 392 U.S. at 104.

79. *Id.* at 103.

## V. FINDING THE INJURY IN ESTABLISHMENT CLAUSE CHALLENGES

Although the Court hinted it might be willing to further open the *Flast* exception to *Frothingham* by agreeing to consider what other clauses may be specific limits on the taxing and spending power,<sup>80</sup> *Americans United* shows the exception is narrow and limited strictly to *Flast* situations.<sup>81</sup>

The dissenters in *Americans United* are correct in noting that the factual distinctions between this case and *Flast* are constitutionally insignificant. The majority in *Americans United* did not explain how a gift of land to aid a religious organization differs from a gift of money, but instead mechanically applied *Flast* and denied standing. As the dissenters suggest, the majority's unwillingness to reconcile the two cases or expand the *Flast* test more likely indicates an unwillingness to reach the merits of the claim rather than fastidious concern with constitutional principle.<sup>82</sup>

The Court's strict application of the *Flast* test in *Americans United* at least kept the Court from committing itself further to the fiction that a plaintiff's interest in his tax bill guarantees concrete adversity in Establishment Clause challenges. The Court failed, however, to recognize that the plaintiff's actual motive in Establishment Clause challenges is to preserve the sanctity of the constitutional guarantee itself.

In this sense, the Third Circuit was on the right track when it sought to allow Establishment Clause challenges outside the taxpayer context. By giving every citizen a personal interest in the guarantee, an injury sufficient to sustain standing can be found any time the clause is violated. More significantly, standing will be found without regard to effect on the plaintiff's tax bill.<sup>83</sup>

The Supreme Court has allowed non-taxpayer challenges under the clause, but because of the injury in fact requirement has lim-

80. *Id.* at 105.

81. One indication of how rigid the *Flast* exception has become can be found at 102 S. Ct. 763, n. 17 in which Justice Rehnquist essentially performs a *Frothingham* analysis on the *Americans United* problem. Because denying the land transfer to Valley Forge Christian College would have a speculative or nonexistent impact on tax burdens, he questions whether *Americans United* would have standing even if it could meet the *Flast* test.

82. 102 S. Ct. at 768 (Brennan, J., dissenting).

83. Although the Court in *Flast* did not specifically state whether the plaintiff's injury was to his Establishment Clause right or to his tax bill, a pre-*Flast* case, *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), suggests that the injury was to the plaintiff's tax liability. In *Doremus*, taxpayers were denied standing to challenge Bible reading in public schools because the program did not cost money and plaintiffs could not show their challenge was "a good-faith pocketbook action." *Id.* at 434.

ited such challenges primarily to plaintiffs who can show they are "directly affected" by the government action.<sup>84</sup> Thus, the Court has found standing for parents and school children seeking to challenge various Bible reading and school prayer programs.<sup>85</sup>

In *Engel v. Vitale*,<sup>86</sup> the Court went a little further and allowed an Establishment Clause challenge to a school prayer program by plaintiffs who suffered only indirect coercive pressure because the specified prayer was non-denominational and students who did not wish to recite it were excused or allowed to remain silent. The Court did not discuss standing in *Engel*, but acknowledged "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."<sup>87</sup> Some commentators viewed this statement as an easing of the injury requirement in non-taxpayer challenges under the Establishment Clause cases,<sup>88</sup> but, as *Americans United* shows, the requirement is still alive and well.

Thus, there is the necessity of identifying an injury in *Americans United*. One commentator has suggested that owners of property adjacent to the land transferred to Valley Forge Christian College might have standing by alleging an injury to their "beneficial interest in the public use of land."<sup>89</sup> Support for this was found in several lower court cases allowing standing to challenge religious use of public property.<sup>90</sup> Resort to this theory, however, simply would promote another troublesome fiction. Like the taxpayer standing test, the "beneficial interest" theory fails to recognize the true concern of the plaintiff in vindicating the Establishment Clause. In *Americans United*, Justice Rehnquist declared the purpose of standing doctrine is to promote the policies of full and ad-

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84. *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. at 224 n.9.

85. *Engel v. Vitale*, 370 U.S. 421 (1962); *Zorach v. Clauson*, 343 U.S. 306, 309 n.4 (1952); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 206 (1948). See also Comment, *supra* note 14, at 986-87.

86. 370 U.S. 421.

87. *Id.* at 430.

88. See Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 27 (1962). Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUP. CT. REV. 1, 22.

89. Comment, *supra* note 14, at 988.

90. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), cert. denied, 414 U.S. 879 (1973); *Baird v. White*, 476 F. Supp. 442 (D. Mass. 1979); *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970).



verse resolution of issues embodied in article III.<sup>91</sup> If this is so, then the "beneficial interest" theory presumes that adjacent landowners would raise the issues of *Americans United* more fully and adversely than would a 90,000-member organization with financial resources to pursue the case to the Supreme Court, experience in Establishment Clause litigation and an avowed dedication to its underlying principles.

This is, in fact, the primary criticism that commentators have leveled against current standing doctrine: an injury in fact does not necessarily guarantee concrete adversity or full resolution of the issues.<sup>92</sup> Rather, it has been argued:

[t]he most reliable indicia of motivation are litigation costs; and this is particularly relevant where a plaintiff challenges a government with virtually unlimited resources. Further, an issue is far more likely to be sharply presented by a well-financed public interest organization such as Sierra Club than by some bedraggled hermit who lives in the wilds of Sequoia National Park.<sup>93</sup>

In its search for an injury in *Americans United*, the Third Circuit considered whether under current standing doctrine the only plaintiff with sufficient injury to sue was "a nonsectarian educational institution that had actually applied for the award of government property in question, but lost out to the Valley Forge Christian College."<sup>94</sup> The Third Circuit properly rejected this proposition, but for the wrong reason. The rejection would have been proper for the reason just stated: it is unreasonable to assume unsuccessful competitors for the land transfer would pursue the case with greater thoroughness and adversity than would *Americans United*.

The Third Circuit instead rejected the proposition on the basis that the existence of a "better plaintiff" should not prohibit an injured plaintiff from raising the issues.<sup>95</sup> This was made necessary by the Supreme Court's elevation of injury-in-fact to a constitutional prerequisite, in effect equating "better plaintiff" with "injured plaintiff."

Thus, the Third Circuit was left with the problem of identifying

91. See *supra* notes 53-55 and accompanying text.

92. Comment, *Standing to Sue in Federal Courts: The Elimination of Preliminary Threshold Standing Inquiries*, 51 TUL. L. REV. 119, 145 (1976).

93. *Id.* (Footnotes omitted).

94. 619 F.2d 263-64, n.72.

95. *Id.*

an injury. This it resolved by suggesting a hierarchy of constitutional rights that allowed the Establishment Clause to be designated "personal" so that even indirect infringements of it would cause an injury sufficient to satisfy the Supreme Court.<sup>96</sup> This resolution was reasonable, but doomed to collapse of its own weight. The concept of injury-in-fact simply has become so burdened with the requirement of "concrete" injuries that non-coercive offenses to the conscience simply did not fit into the Supreme Court scheme.

## VI. POSSIBLE ALTERNATIVES TO STANDING DOCTRINE

The Supreme Court's decision in *Americans United* was predictable. Its rigid application of the *Flast* test and the denial of citizen standing in the absence of a direct injury was not a surprise in light of *Richardson* and *Schlesinger*. However, its result, denying virtually anyone an opportunity to challenge the constitutionality of a program that has substantially benefitted religious organizations at taxpayer expense, compels some reconsideration of the value and effectiveness of the underlying doctrine.

Current standing rules seek to serve three constitutional principles: complete adversity, full resolution of the issues, and due regard for co-equal branches of government.<sup>97</sup> As already noted, it is at least questionable whether the Court's insistence in focusing on the nature of a plaintiff's injury rather than taking a realistic view of the circumstances surrounding the litigation guarantees adversity or thoroughness.<sup>98</sup>

It is also at least questionable whether the standing doctrine as defined in *Americans United* has maintained the balance of power between the judicial, executive and legislative branches of government. The Supreme Court has acknowledged that the purposes of the Establishment Clause and the Bill of Rights are to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."<sup>99</sup> Yet, those who seek to vindicate these constitutional protections are turned away by the courts and left to contend with the political process that authorized and approved the challenged transfer. As

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96. *Id.* at 261-66.

97. 102 S. Ct. at 758-59, *see supra* notes 53-55 and accompanying text.

98. *See supra* notes 89-90 and accompanying text.

99. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

one commentator has noted:

Litigation that challenges unconstitutional legislation does not constitute an "improper interference" with nor an "intrusion" into the legislative domain. No authority to make laws in excess of granted powers was "committed" to Congress; instead courts were authorized to check Congressional excesses . . . . A legislative usurpation does not change character when it is challenged by a stranger; and judicial restraint thereon remains a "judicial" function, not an "intrusion," though undertaken at the call of one without a personal stake.<sup>100</sup>

Any fears of intrusion into the legislative and executive branch should be somewhat alleviated by the fact that judicial review in situations similar to *Americans United* is directed only at the constitutionality of legislative enactments, not their wisdom. In other words, the court will review only after Congress has taken a position on the matter and only for the purpose of determining whether the enactment comports with the Constitution. The Court is neither intruding on Congress's decision to address the matter nor mandating the manner in which it should be addressed. Such a review should not be considered offensive by either branch; it merely reflects the proper checks and balances of our constitutional system.<sup>101</sup>

If current standing doctrine arguably does not serve any of the purposes which the Court feels are embodied in article III, the next question must be whether it serves any purpose at all. Commentators generally agree that standing inquiries are useful for another purpose—reserving the case for the proper plaintiff and guarding against an improper plaintiff.<sup>102</sup> As stated earlier, the Supreme Court essentially uses injury as its yardstick for determining who is the "better plaintiff." There are, however, several possible alternatives which can better serve the same purpose.

One alternative interpretation of standing proposed by Professor Davis would greatly simplify the doctrine and slightly ease the injury requirement. Under this formulation, designed primarily to determine standing based on statutory provisions, but adaptable to challenges based on constitutional provisions, "[a] person whose legitimate interest is injured in fact or imminently threatened with

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100. Berger, *supra* note 59, at 828-29.

101. Bogen, *supra* note 77, at 158-62.

102. Davis, *supra* note 43, at § 22.04.

injury by governmental action should have standing to challenge that action in absence of legislative intent that the interest is not to be protected.”<sup>103</sup> The disadvantage of this proposal and other alternatives proposed by Davis<sup>104</sup> is that they continue to focus on the requirement of an injury,<sup>105</sup> thereby promoting the dubious notion that injury alone will identify the better plaintiff, guarantee adversity, and full resolution of the issues. The advantage of the proposal is that it gives an injured plaintiff standing without having to prove legislative intent to allow the challenge. Instead, it shifts the burden to the defendant, who must prove the plaintiff lacks standing on the basis of legislative intent not to protect the asserted interest.<sup>106</sup> This would make it easier for a plaintiff to meet the injury requirement, thereby reducing the burden of proving standing. The proposal also simplifies standing rules by using them strictly to identify the proper plaintiff and relying on other doctrines to satisfy other prudential or constitutional concerns now subsumed by standing doctrine. Professor Davis states:

The courts should avoid hypothetical or remote questions—through the law of ripeness, not through the law of standing. The courts should decline to enter political areas—through the law of political questions, not through the law of standing. The courts should limit themselves to issues “appropriate for judicial determination”—through the law of case or controversy, not through that part of the law of case or controversy pertaining to standing. The courts should avoid taking over functions of government that are committed to executives or administrators—through the law of scope of review, not through the law of standing. The courts should virtually stay away from some governmental activities, such as foreign affairs and military operations—through the law of unreviewability, not through the law of standing. The courts should insist upon competent presentation of cases—through refusals to respond to inadequate presentations, not through the law of standing.<sup>107</sup>

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103. *Id.* at 438. The Court has relaxed the injury requirement in challenges based on the Administrative Procedures Act and other statutory provisions, arguably creating a separate standing doctrine for cases not involving constitutional provisions. *See supra* notes 62-66 and accompanying text. However, Davis’s proposed test can be adapted to constitutional challenges by requiring examination of the intentions of the framers of the constitutional provision involved. *See infra* notes 116-21 and accompanying text.

104. Davis, *supra* note 62, at 628-36 (listing 14 proposals for what standing doctrine ought to be).

105. Davis, *supra* note 43, at § 22.08.

106. *Id.*

107. *Id.* at § 22.04.

Another standing proposal urges the Court to abandon standing as a threshold inquiry and require plaintiffs to prove injury, legislative intent, causation and other elements of standing while litigating their claims.<sup>108</sup> This proposal recognizes that, despite the Supreme Court's protestations to the contrary,<sup>109</sup> standing decisions usually are based on a preliminary evaluation of the merits. Since this preliminary inquiry is likely to be incomplete and impressionistic, the proposal moves it into the forum where the elements of a cause of action can be fully developed. If plaintiffs are unable "to show something more than a vague concern for legality,"<sup>110</sup> the case would be dismissed. The advantage of this proposal is the recognition that standing decisions usually are based on the merits of a claim before the merits are adequately explored. The disadvantage is that it simply moves the problems of what constitutes an injury, what injury is sufficient and which plaintiff should assert it over the threshold and into the case without providing any guidance as to how to resolve these questions.

A third alternative attempts to broaden the concept of an injury sufficient to sustain standing to include either "(1) a concrete injury that is arguably within the zone of interests to be protected or regulated by the statute or constitutional provision alleged to be violated, or (2) an injury of the type contemplated by the provision in question" even if the injury is speculative, indirect or intangible.<sup>111</sup> This proposal moves in the right direction by recognizing that violation of some laws and constitutional guarantees will produce concrete injuries, while violation of others will not. If a plaintiff suffers a concrete injury, he basically is covered by existing standing rules. For these plaintiffs, the proposal urges a liberal interpretation of "arguably within the zone of interests" protected so that the injured plaintiff "need not show conclusively that it [injury] was intended to be protected against by the violated statute or provision, rather he need only make a plausible argument on the point."<sup>112</sup> On the other hand, a plaintiff suffering an intangible harm would be required to show clear statutory or constitutional

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108. Comment, *supra* note 92, at 143-48. This proposal draws on the theories of Professor Albert. See Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

109. See *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970). In abandoning the legal interest test for standing, the Court stated: "The 'legal interest' test goes to the merits. The question of standing is different." *Id.*

110. Comment, *supra* note 92, at 146.

111. Comment, *supra* note 17, at 234.

112. *Id.* at 231.

intent to protect an asserted interest because the question becomes whether the plaintiff has suffered any injury at all.<sup>113</sup> This proposal would have allowed standing in *Richardson*<sup>114</sup> and *Schlesinger*<sup>115</sup> under the second part of the test, for although violation of the constitutional clauses involved produces indefinite injuries, the provisions appear to protect against them.

A similar proposal that produces somewhat different results has been advanced by Professor Bogen.<sup>116</sup> This proposal moves further away from focusing on the plaintiff's asserted injury and emphasizes examination of the constitutional provision underlying a claim to determine who would be the "better plaintiff" to make the claim. If governmental action produces a "non-political" injury—one which causes specific harm to a person or his property—then the injured person would be the proper party to assert the claim and would have standing. This is because where a specific injury exists, the courts are not likely to take the challenges of uninjured parties seriously and because suits by uninjured parties may interfere with the injured plaintiff's claim through the doctrine of stare decisis.<sup>117</sup>

However, if governmental action produces a non-specific "political" injury, the better plaintiff would be determined according to the underlying constitutional provision. If the provision expressly prohibits harm to an individual, then the individual who suffers that harm is the best plaintiff and should be found to have standing.<sup>118</sup> If the provision relates to the distribution of powers between state and federal governments, then the governmental body affected, rather than citizens or taxpayers, would be the better plaintiff.<sup>119</sup> If the provision is directed at preserving the integrity of government itself by, for example, requiring minimum ages, prohibiting conflicts of interest or limiting terms in office, then affected individuals who can force a confrontation under these clauses should be granted standing.<sup>120</sup> If the provision is intended to protect minorities from the tyranny of the majority, then minorities specifically harmed or taxpayers forced to pay in violation of

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113. *Id.* at 231-32.

114. *See supra* notes 19-20 and accompanying text.

115. *See supra* notes 21-22 and accompanying text.

116. Bogen, *supra* note 77.

117. *Id.* at 153-54.

118. *Id.* at 163.

119. *Id.* at 163-65.

120. *Id.* at 165-69.

the guarantee should be given standing.<sup>121</sup>

While this proposal does the best job of identifying the better plaintiff to assert various claims and would appear to allow standing to Americans United, it does not go far enough in allowing challenges to violations of constitutional provisions designed to preserve the integrity of the governmental system. It may be possible for certain individuals to force a confrontation with governmental officials sufficient to obtain standing. For example, an underage candidate can sue election officials for refusing to put his name on the ballot. However, too often it may not be possible to force a confrontation. This proposal essentially denies standing to citizens seeking to force their government to operate according to the processes specified by its Constitution and relies on the executive and legislative branches to check each other through the political process. Thus, standing still would be denied in *Richardson*<sup>122</sup> and *Schlesinger*<sup>123</sup> situations.<sup>124</sup>

The best standing alternative would be an extension of the Bogen proposal. Plaintiffs who have suffered a specific injury are generally granted access to the courts under existing standing rules. Since all citizens are, in effect, injured by the non-specific harms produced by violation of many constitutional provisions, resort to Bogen's "better plaintiff" rule to determine which plaintiff should sue is appropriate. However, the rule should be further expanded to allow citizen suits to enforce the constitutional integrity of government itself. Bogen's argument against this rests primarily on the difficulty of fashioning a judicial remedy for the alleged violation.<sup>125</sup> For example, Justice Black, while a congressman, voted to establish pensions for the Supreme Court. After his appointment, a citizen sued<sup>126</sup> for an alleged violation of article I, section 6, clause 2 prohibiting the appointment of any senator or representative to an office for which the salary was increased during the

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121. *Id.* at 169-70.

122. *See supra* notes 19-20 and accompanying text.

123. *See supra* notes 21-22 and accompanying text.

124. It should be noted that denying citizens access to the courts to enforce constitutional provisions does not necessarily leave the would-be plaintiffs without any alternative course of action. Through exercise of first amendment free-speech and free-press rights, citizens have been able to influence both the political and judicial process. For a discussion of this alternative, see Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.F. RESEARCH J. 521.

125. Bogen, *supra* note 77 at 168-69. Bogen also argues that if citizens are allowed to sue on governmental integrity provisions, the Court may begin drawing lines between acceptable and unacceptable activity, thereby encouraging activity close to the line. *Id.* at 169.

126. *Ex parte Levitt*, 302 U.S. 633 (1937).

elected official's terms in Congress. The Court held that the plaintiff did not have standing to assert the claim. If the Court had taken the case, Bogen questions whether it could have made an adequate choice among the various possible remedies. These remedies included barring Justice Black from participating in further decisions and from drawing salary, invalidating the pension entirely or only as to Justice Black, setting all the cases in which he participated for reargument or only those in which his vote was the deciding factor, imposing a temporary bar until the legislature's next session, or holding the appointment to be constitutional. Inability to fashion an adequate remedy may be a genuine problem in some, but not all of these cases. The solution in *Richardson* would not have been so difficult; the Court could have resolved the problem there simply by requiring the executive department to reveal expenditures of the Central Intelligence Agency as the Constitution appears to require. In *Schlesinger*, the solution of requiring congressmen to relinquish their Army Reserve commissions appears equally simple. In the cases where an adequate remedy cannot be fashioned, the Court, as noted by Professor Davis, can always resort to other doctrines, such as political question. The better plaintiff to assert violations of constitutional provisions preserving governmental integrity may be citizen groups such as Americans United, Reservists Committee to Stop the War or Sierra Club. Their standing could be decided on the basis of motivation, demonstrated ability to fully and adversely litigate the issues and financial resources to pursue cases to their ultimate resolution.

## VII. CONCLUSION

Critics of the Court's current standing doctrine correctly point out that the injury-in-fact requirement is an artificial and easily manipulated standard that does not guarantee adversity or full resolution of the issues. It allows the Court to make decisions on the merits of claims without saying so. Further, the doctrine too often becomes a bar to plaintiffs seeking to vindicate important constitutional guarantees.

The mechanical application of the *Flast* test in *Americans United* and the Court's refusal to consider citizen standing indicate how rigid the Court has become in approaching its responsibility of maintaining our constitutional system of checks and balances against governmental excesses. As the alternate standing



proposals demonstrate, a simpler, more flexible and more reasonable standing doctrine is within reach.