CONSTITUTIONAL LAW—STANDING—TAXPAYER'S STANDING LIMITED TO CONGRESSIONAL ACTIONS AUTHORIZED BY THE TAXING AND SPENDING POWER—*Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 102 S. Ct. 752 (1982).

The issue of a taxpayer's standing to object to an expenditure of funds by the federal government has been in a state of flux since the landmark decision of *Flast v. Cohen*,[1] which granted taxpayers standing to contest expenditures allegedly violative of the establishment clause of the first amendment.[2] In what can be viewed as an attempt by the Burger Court to further limit the scope of taxpayer standing, the Supreme Court of the United States held in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[3] that a taxpayer may contest violations of the establishment clause only when the challenged congressional action has been taken pursuant to the taxing and spending clause of article I, section 8 of the United States Constitution.[4]

In *Valley Forge*, respondent-taxpayers challenged a governmental conveyance of federal property, as authorized by the Federal Property and Administrative Services Act of 1949 (the Act),[5] to a religiously affiliated educational organization. The Act authorizes the federal government to transfer surplus property[6] to private or public entities[7] with the Department of Health, Education and Welfare

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[1] 392 U.S. 83 (1968). Standing is derived from the cases and controversies clause of the United States Constitution. U.S. CONST. art. III, § 2, cl. 1. *See infra* notes 31-39 and accompanying text. For an introduction to the standing requirement, see generally Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968); Jaffe, *Comment: Standing Again*, 84 HARV. L. REV. 633 (1971).

[2] The establishment clause provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. For background to the establishment clause, see Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183 (1980).

[3] 102 S. Ct. 752 (1982).

[4] U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts . . . ." *Id.*

[5] 40 U.S.C. § 471 (1976). The declared policy of the Federal Property and Administrative Services Act is "to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, . . . ; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management." *Id.*

[6] Surplus property is defined in the Federal Property and Administrative Services Act as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator." 40 U.S.C. § 472(g) (1976).

[7] 40 U.S.C. § 484 (1976).

(HEW)[8] assuming responsibility for surplus real property to be used for educational purposes.[9] Surplus property may be transferred to a nonprofit, tax-exempt educational institution; the purchase price may be discounted by taking into account any benefit accruing to the federal government[10] as computed by a "public benefit allowance."[11]

In August, 1976, HEW, as authorized by the Act, transferred seventy-seven acres of land, including the buildings and fixtures thereon,[12] to Valley Forge Christian College.[13] The Valley Forge Christian College is a nonprofit educational institution devoted to the study of the Bible and to the preparation of its students for Christian service as ministers and laypersons, which purposes are reflected in its degree programs.[14] The college mandates daily attendance at chapel service and participation in "Christian activities" by all students.[15]

The Secretary of HEW determined a 100% public benefit allowance with the result that the seventy-seven acre tract, worth $577,500, was conveyed to the Valley Forge Christian College without any payment by that educational institution.[16] The college was required, however, to agree to use the property for thirty years for certain

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[8] The authorization of the Secretary of Health, Education and Welfare to dispose of surplus real property to be used for educational purposes has since been changed to the Secretary of Education. 20 U.S.C. § 3441(a)(2)(P) (1976 and Supp. III).

[9] 40 U.S.C. § 484(k)(1) (1976).

[10] 40 U.S.C. § 484(k)(1)(A),(C) (1976).

[11] 34 C.F.R. § 12.9(a) (1981) provides that:

> [t]ransferees shall be entitled to a public benefit allowance in terms of a percentage which will be applied against the value of the property to be conveyed. Such an allowance will be computed on the basis of benefits to the United States from the use of such property for educational purposes.

Id.

[12] The property at issue in this action was once part of a 181 acre tract on which the Department of the Army had built the Valley Forge General Hospital to provide medical care for the armed services. The hospital, in use for 30 years, was closed at the instance of the Secretary of Defense in April, 1973, as part of a program "to reduce the number of military installations in the United States." 102 S. Ct. at 756. Thereafter, the property was declared to be surplus by the General Services Administration. *Id.*

[13] Valley Forge Christian College was known as the Northeast Bible College at the time of the conveyance. *Id.* at 756 n.6. The college is associated with a religious society known as the Assemblies of God. *Id.* at 756.

[14] *Id; see also* Americans United for Separation of Church & State, Inc. v. United States Dep't of Health, Educ. & Welfare, 619 F.2d 252, 253-54 (3d Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982).

[15] Brief for Respondents at 5, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982) [hereinafter cited as Brief for Respondents]. Much of the "Christian activities" consisted of work with drug addicts and alcoholics and with mentally and physically handicapped children. Reply Brief for Federal Respondents at 3 n.2, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982).

[16] 102 S. Ct. at 756. The Government regularly gave a 95% to 100% public benefit allowance to these religious organizations. Americans United for Separation of Church and

educational purposes[17] or the property would revert back to the federal government.[18]

Upon learning of the transfer of this property through a news release,[19] Americans United for Separation of Church and State, Inc. (Americans United)[20] and four of its employees brought suit in the United States District Court for the Eastern District of Pennsylvania seeking declaratory and injunctive relief, and contending that the conveyance of land to Valley Forge Christian College violated the establishment clause of the first amendment.[21] Americans United and the individual plaintiffs brought suit as taxpayers of the United States.[22] The District Court granted summary judgment for the college holding that Americans United did not have standing to sue as taxpayers.[23] On appeal, the Court of Appeals for the Third Circuit agreed that Americans United probably lacked standing to sue as taxpayers;[24] however, the court held that the organization had a personal stake in the protection afforded by the establishment clause by virtue of their separationist views and therefore had standing as citizens to bring this action.[25] The Supreme Court of the United

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State, Inc. v. United States Dep't of Health, Educ. & Welfare, 619 F.2d 252, 254 (3d Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982).

[17] 102 S. Ct. at 756. Pursuant to 34 C.F.R. § 12.9(c) (1981), transfers are subject to certain conditions, two of which are that "[t]he transferee will be obligated to utilize the property continuously in accordance with an approved plan of operation," and "[t]he transferee will file with the Department [of Education] such reports covering the utilization of the property as may be required." Valley Forge Christian College represented that it would augment its arts and humanities curriculum and that it would provide counselling for the inner cities. 102 S. Ct. at 756.

[18] Brief for Petitioner at 4, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982).

[19] 102 S. Ct. at 756-57.

[20] Americans United, with a membership of 90,000, is a nonprofit, tax-exempt organization with a stated purpose "to defend, maintain, and promote religious liberty and the principle of separation of church and state." Brief for Respondents, *supra* note 15, at 7.

[21] 102 S. Ct. at 757. Although other religious organizations had also been the beneficiaries of the federal government's largesse under the Federal Property and Administrative Services Act, this action had apparently never been challenged prior to commencement of this suit. *See* Americans United for Separation of Church & State, Inc. v. United States Dep't of Health, Educ. & Welfare, 619 F.2d 252, 254 (3d Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, 102 S. Ct. 752 (1982).

[22] 102 S. Ct. at 757.

[23] *Id.* The District Court opinion has not been reported.

[24] Americans United for Separation of Church & State, Inc. v. United States Dep't of Health, Educ. & Welfare, 619 F.2d 252, 260 (3d Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982). The court stated that under *Flast v. Cohen*, a plaintiff suing solely as a taxpayer could only challenge congressional exercises of the taxing and spending power. 619 F.2d at 260.

[25] Americans United for Separation of Church & State, Inc. v. United States Dep't of Health, Educ. & Welfare, 619 F.2d 252, 265 (3d Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982). The

States granted certiorari[26] to examine what it termed to be the Third Circuit's "unusually broad and novel view of standing."[27]

Before turning to the Court's decision, it will be useful to review the general principles of the standing requirement. The doctrine of standing is derived from the cases and controversies requirement of article III of the Constitution.[28] Although it has eluded a cogent definition,[29] standing has been held to require a "[c]oncrete injury,"[30] the gist of which is "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[31] It is not clear whether standing is mandated by article III or whether it is a prudential limitation;[32] nevertheless, it is a threshold requirement for every plaintiff in federal court. The focus of the standing inquiry is "on the party seeking to get his complaint before a federal court and not on

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court held that the establishment clause creates a constitutional right in every citizen to be free from a government that establishes a religion. *Id.*

> [C]ertain . . . constitutional provisions, such as the First Amendment, create legal rights in individuals. Yet, unless individuals averring an encroachment of their legal rights have some recourse other than the political process for the vindication and protection of those rights, the proud claim that individual citizens have rights against the government may be emptied of significance.

Id.

[26] Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 450 U.S. 909 (1981).

[27] 102 S. Ct. at 757.

[28] Association of Data Processing Service Org. v. Camp, 397 U.S. 150, 151 (1970). The "cases or controversies" requirement reads as follows:

> 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, cl. 1.

Standing is but one element of the case or controversy doctrine. The other elements are ripeness, mootness, advisory opinion, political question, and collusive suits. For a general discussion of the doctrine under the case or controversy doctrine, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-7 to -16 (1978).

[29] According to one commentator, the doctrine of standing is so confused that it has become "little more than a set of disjointed rules dealing with a common subject." Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

[30] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974).

[31] Baker v. Carr, 369 U.S. 186, 204 (1962).

[32] *See Flast*, 392 U.S. at 93-94. *Compare id. with* Warth v. Seldin, 422 U.S. 490, 498 (1975), which states that standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." For the view that standing is not a constitutional requirement, see Berger, *supra* note 1.

the issues he wishes to have adjudicated."[33] The modern interpretation of standing is described in *Association of Data Processing Service Organizations v. Camp*.[34] The Court in *Data Processing* ruled that the challenged action must have caused the plaintiff "injury in fact, economic or otherwise,"[35] to an interest which was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee" in question.[36] Furthermore, the Court has added the requirement that the "injury in fact" be traceable "to the challenged action of the defendant."[37] Moreover, a plaintiff must allege an individual injury to his own interest, not a mere common view as to the constitutionality of a law.[38]

Frothingham v. Mellon[39] was the first case to consider the status of taxpayer standing in challenges to allegedly unconstitutional congressional action. The taxpayer-plaintiff in *Frothingham* alleged that the Maternity Act of 1921[40] was unconstitutional in that it would increase the burden of future taxation depriving her of her property in violation of due process of law.[41] The Court refused to recognize taxpayer suits, holding that the interest of an individual federal taxpayer in the United States treasury is a shared one with all taxpayers, and the effect on future taxation is too "remote, fluctuating and

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[33] 392 U.S. at 99. The court, however, must look at the substantive issues to decide whether there is a logical nexus between taxpayer status and the alleged claim. *Id.* at 101-02.

[34] 397 U.S. 150 (1970). *Data Processing* modified the "legal interest" test as used in Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137 (1939) and Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940). The legal interest theory evolved because the Court was concerned that sovereign immunity presented a barrier to actions against the government. Standing was justified because the individual's cause of action could be analogized to one available at common law against a private party. Thus, this theory "view[ed] the action as one for redress of a private wrong, thereby placing on defendants the burden of justifying their conduct under the authority of some constitutionally valid statute." Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 650 (1973).

[35] 397 U.S. at 152. Although the most common injury is economic, there can be non-economic injuries, for example, environmental injury as in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 727 (1972). Environmental injury was first validated in Sierra Club v. Morton, 405 U.S. 727 (1972), although standing was denied because the club failed to allege a personal injury to its members.

[36] 397 U.S. at 153.

[37] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976). For the view that *Simon* operates as a narrowing of the "injury in fact" requirement, see Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 873-74 (1977).

[38] Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

[39] 262 U.S. 447 (1923).

[40] Maternity Act of 1921, Ch. 135, 42 Stat. 224. The plaintiff in *Frothingham* alleged that the statute, which provided federal funds to states in order to improve infant and maternal health, exceeded Congress' power under article I and, therefore, it violated the tenth amendment's reservation of local governance for the states.

[41] 262 U.S. at 486.

uncertain" to be the basis of a challenge to an unconstitutional enactment.[42]

Flast v. Cohen[43] lowered the barrier erected by *Frothingham* by allowing taxpayer challenges to establishment clause violations.[44] In *Flast*, the Court was faced with a challenge to Titles I and II of the Elementary and Secondary Education Act of 1965,[45] which allowed educational expenditures to parochial schools. The taxpayers in *Flast* alleged that this violated the establishment clause of the Constitution.[46] The Court found that the taxpayers had standing and in so doing created a two-part nexus test for taxpayer suits.[47] The taxpayer must first establish that the exercise of congressional power is pursuant to the taxing and spending clause of article I, section 8 of the Constitution.[48] Secondly, the taxpayer must show that the challenged action violates "specific constitutional limitations" on the congressional taxing and spending power.[49] Having determined that the establishment clause was a specific constitutional limitation on the congressional taxing and spending power,[50] the Court found that a taxpayer *qua* taxpayer has "a clear stake" in preventing the breach of this limitation through the expenditure of tax monies.[51]

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[42] *Id.* at 487. Doremus v. Board of Educ., 342 U.S. 429 (1952), also held that a taxpayer's claimed injury of an unconstitutional expenditure for Bible reading in state public schools was insufficient to confer standing. The Court found that the injury was a religious difference only and that no "dollars-and-cents injury" was alleged. *Id.* at 433-34.

[43] 392 U.S. 83 (1968).

[44] *Flast* did not overrule *Frothingham*. *Flast* "decide[d] whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Id.* at 85. In fact, the *Flast* Court found that the decision in *Frothingham* was consistent with the test as announced by *Flast*. *Id.* at 104. The plaintiff in *Frothingham* failed to meet the second prong of the test; that is, her attack was not based on a breach of a limitation upon the power to tax and spend. *Id.* at 105.

[45] Elementary and Secondary Education Act of 1965, Public Law No. 89-10, 79 Stat. 27 (current version codified at 20 U.S.C. §§ 2711-2854, 3082-3086 (Supp. II 1978)). The plaintiff claimed that funds were being disbursed to finance education in and purchase textbooks for religious schools in violation of the establishment clause of the first amendment. 392 U.S. at 85-86.

[46] 392 U.S. at 87.

[47] *Id.* at 102-03. Whether "individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program . . . have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Id.* at 102.

[48] *Id.* at 102. The Court added that "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Id.*

[49] *Id.* at 102-03.

[50] *Id.* at 104. "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103; *see also* Everson v. Board of Educ., 330 U.S. 1, 39-41 (1947).

[51] 392 U.S. at 105. See J. VINING, LEGAL IDENTITY: THE COMING OF AGE IN PUBLIC LAW 125 (1978), for the view that the *Flast* decision "was wordplay, to hide acknowledgment that the persons before the Court 'were' secularists and that the threat to secularism was what moved the Court to see a role for itself."

The Court has not been willing to extend the *Flast* nexus test to constitutional mandates other than the establishment clause. In *United States v. Richardson*,[52] the Court determined that taxpayers had no standing to challenge certain provisions of the Central Intelligence Agency Act of 1949[53] allowing the CIA to withhold public reporting of expenditures as violative of the accounts clause of article I, section 9.[54] The majority opinion held that the plaintiff had failed to meet the *Flast* test because the challenge was not to an exercise of congressional power taken pursuant to the taxing or spending power.[55] In *Schlesinger v. Reservists Committee to Stop the War*,[56] the Supreme Court rejected a taxpayer suit challenging Armed Forces Reserve status for members of Congress as a violation of the incompatibility clause of article I, section 6.[57] The plaintiffs in *Schlesinger* likewise failed to satisfy the requirements of the nexus test.[58] Thus, the Court has established that standing to sue as a taxpayer can only be premised on a constitutional limitation on the taxing and spending power, and it has thus far found that only the establishment clause can act as such a constitutional limitation.

Valley Forge is the first case since *Flast v. Cohen* to deal with taxpayer suits alleging congressional action as violative of the establishment clause. The Supreme Court in *Valley Forge* reversed the decision of the Court of Appeals for the Third Circuit and held that Americans United had no standing to challenge the actions taken by HEW either as taxpayers[59] or under any other theory of standing.[60]

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[52] 418 U.S. 166 (1974).

[53] 50 U.S.C. §§ 403a-403j (1976).

[54] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and 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. 7.

[55] 418 U.S. at 175. The Court also found lack of a personal injury. Thus, the respondents' interest was a generalized grievance, and

> [w]hile . . . this respondent has a genuine interest in the use of funds and . . . his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute.

Id. at 177.

[56] 418 U.S. 208 (1974).

[57] The incompatibility clause states:

> 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 encreased 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.

[58] 418 U.S. at 228. The requirements of *Flast* were not met because the respondents challenged executive branch action permitting congressmen to maintain their Armed Forces Reserve status. *Id.*

[59] 102 S. Ct. at 763. The Third Circuit court also held that Americans United had no standing as taxpayers. Americans United for Separation of Church & State, Inc. v. United States

Noting that the cases and controversies requirement of the Constitution required "a concrete factual context"[61] within which to review a challenged action, rather than the "rarified atmosphere of a debating society,"[62] the Court found that Americans United failed to meet the two-part nexus test of *Flast v. Cohen*.[63] Americans United were thereby barred as taxpayers from challenging HEW's gratuitous conveyance of the seventy-seven acre tract to Valley Forge Christian College.[64] In addition, Americans United lacked standing as citizens to ensure that their government did not violate constitutional principles.[65]

Justice Rehnquist, writing for the majority, began his discussion of the standing requirement by noting that the Supreme Court has not always made clear whether standing is inherently required by article III or whether it is a policy consideration created by the Court.[66]

Dep't of Health, Educ. & Welfare, 619 F.2d 252, 260 (3d Cir. 1980), *rev'd sub nom.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 102 S. Ct. 752 (1982); *see also supra* note 24 and accompanying text.

[60] 102 S. Ct. at 764. What is also significant about *Valley Forge* is that had standing been found for Americans United, the conveyance to Valley Forge Christian College would not have met the holding of Tilton v. Richardson, 403 U.S. 672 (1971).

Tilton involved federal grants to four sectarian colleges pursuant to the Higher Education Facilities Act of 1963. *Tilton* upheld these grants because the sectarian affiliations were not found to interfere with their secular functions. *Id.* at 679. The five projects included a library building at Sacred Heart University, an arts building at Annhurst College, a science building and a library building at Fairfield University, and a language laboratory at Albertus Magnus College. *Id.* at 676. The Court, however, did find unconstitutional that portion of the statute which gave the government a right to recover the property in 20 years if a prohibition against religious use was violated. *Id.* at 633. The Court said that this 20 year limitation violated the establishment clause. *Id.* Chief Justice Burger, writing for the majority, said:

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. 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.

In *Valley Forge*, the Government's grant of a 100% public benefit allowance in exchange for Valley Forge Christian College's assurance that the property would be used for certain nonsectarian purposes for a period of 30 years, 102 S. Ct. at 756, did not accord with the *Tilton* holding that restricted use of the property for a stated period violated the establishment clause.

[61] 102 S. Ct. at 758.

[62] *Id.*

[63] *Id.* at 762.

[64] *Id.*

[65] *Id.* at 764. The Court found that "assertion of a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.*

[66] 102 S. Ct. at 758; *see supra* note 32. Apart from the cases or controversies requirement in article III of the Constitution, the Court has formulated a set of "prudential principles" designed

Despite this uncertainty, the Court observed that a plaintiff is still required to suffer actual injury as a result of the defendant's illegal conduct.[67] Furthermore, this injury must be likely to be redressed by a favorable judgment.[68] These requirements are underscored by the judiciary's "due regard for the autonomy of those persons likely to be most directly affected by a judicial order,"[69] lest the federal courtrooms are to become platforms to air public grievances.[70] The majority was also concerned with the judiciary's role in the tripartite system of government,[71] despite the fact that judicial review might ultimately be a vindication of the rights of the individual.[72]

Turning to the major standing cases, the Court cited *Frothingham v. Mellon* as the general rule regarding taxpayer suits.[73] A direct injury was required to confer standing on a plaintiff, and the alleged injury from the burden of federal taxation[74] was, as the *Frothingham* decision made plain, too remote to ever be the basis for standing.[75] The majority viewed *Flast v. Cohen* as forming an exception to *Frothingham* only in very limited circumstances.[76] Thus, a taxpayer can only challenge congressional actions taken pursuant to the taxing and spending clause of the Constitution, and there must be a showing that the challenged statute exceeded a constitutional limita-

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to limit access to the federal judiciary beyond the strictures of article III. Thus, a plaintiff may not claim a generalized grievance common to a large group of citizens as a basis for his standing; nor may a plaintiff claim the rights of a third party. Warth v. Seldin, 422 U.S. 490, 499 (1975). The fear, according to the *Warth* decision, is that "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.* at 500. However, such prudential considerations may not supersede actual and direct injury. 102 S. Ct. at 760.

[67] 102 S. Ct. at 758 (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)).

[68] 102 S. Ct. at 758 (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976)).

[69] 102 S. Ct. at 759.

[70] *Id.*

[71] The Court in *Frothingham* said that to grant jurisdiction to taxpayer suits "would . . . not [be] to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess." 262 U.S. at 489. The *Flast* decision, however, points out the error in the belief that the separation of powers doctrine is imperiled by allowing a taxpayer to have standing. By itself, a resolution of the standing question does not interfere with the separation of powers because standing is not a decision on the substantive issues. *Flast*, 392 U.S. at 100-01.

[72] 102 S. Ct. at 759. The Court claimed that judicial review is a tool of last resort otherwise it would erode the effectiveness of the courts' power of review as a means of protecting individual rights. *Id.*

[73] *Id.* at 761.

[74] Although *Frothingham* refused to recognize federal taxpayer standing, it recognized the interest of a municipal taxpayer in the expenditure of tax monies. 262 U.S. at 486.

[75] *Id.* at 487.

[76] 102 S. Ct. at 763.

tion on the taxing and spending power.[77] According to the majority, Americans United failed to meet the first prong of the *Flast* test in two ways. They were challenging an agency decision, whereas *Flast* required that a congressional action be challenged in order to award standing to a taxpayer.[78] In addition, Americans United were complaining about an exercise of authority conferred by the property clause[79] rather than by the taxing and spending clause.[80] The Court noted that its view of *Flast* as an exception to *Frothingham* was bolstered by the more recent decisions of *Richardson* and *Schlesinger* in which the taxpayer-plaintiffs lacked standing because they failed to challenge actions pursuant to the taxing and spending power.[81]

Finally, the Court assessed whether Americans United had any other basis for standing. Justice Rehnquist noted that the Supreme Court has never allowed standing to be based on a citizen's right to a government administered according to the law.[82] The majority then dismissed the Third Circuit court's attempt to distinguish between such generalized citizen standing and the supposed more individual right created by the establishment clause to a government that does not promote religion.[83] This distinction, said the Court, rested on mere factual and not legal differences.[84] The majority opinion viewed the holding by the court of appeals as an attempt "to create a hierarchy of constitutional values."[85] But the Court held that the case or controversy requirement does not expand and contract as the importance of the claim increases and diminishes.[86] Furthermore,

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[77] *Id.* at 762-63.

[78] *Id.* at 762. The majority failed to deal with the fact that *Flast* involved actions taken by the Commissioner of Education. 392 U.S. at 86.

[79] U.S. CONST. art. IV, § 3, cl. 2. The property clause states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.*

[80] 102 S. Ct. at 762.

[81] *Id.* at 763. *Richardson* involved statutes governing the CIA, 418 U.S. at 149, and *Schlesinger* involved reserve commissions given by the executive branch to Congressmen, 418 U.S. at 212. Challenges to the taxing and spending power were not involved.

[82] *Id.* at 764. The Court pointed out that such standing would convert the federal courts into a forum for the airing of generalized grievances concerning governmental conduct. *Id.*

[83] *Id.*; *see supra* note 25.

[84] 102 S. Ct. at 764.

[85] *Id.* at 765. Thus,

> *Schlesinger* and *Richardson* [cannot] be distinguished on the ground that the Incompatibility and Accounts Clauses are in some way less 'fundamental' than the Establishment Clause. 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.

Id. at 764.

[86] *Id.* at 765.

the establishment clause has no talismanic effect over the requirement of personal injury.[87] Thus, in order to obtain standing, one must allege a personal injury. An alleged injury that the government has not conformed to the Constitution is not sufficient and is no more so when the claim involves the establishment clause.

Justice Brennan's dissent[88] focused on the unique place of the establishment clause as a limitation on the disposition of tax funds. According to Justice Brennan, *Frothingham* must be seen as denying taxpayer standing when that standing intrudes on the legislative branch's as well as the executive branch's exclusive power to determine the purpose of the taxation.[89] In light of the unique place of the establishment clause,[90] the holding in *Frothingham* is necessarily limited with regard to taxpayer suits.[91] The lesson of history is that the establishment clause was enacted in order to prohibit taxation for religious purposes.[92] Therefore, the federal taxpayer is the proper party to challenge government support of religion in violation of the establishment clause.

The federal taxpayer has a special role and this was brought out by *Flast*, according to the dissent. *Flast* was an attempt to enforce the framers' intent with regard to taxpayer suits.[93] The two-part nexus

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[87] The Court added,

> [T]he philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor . . . has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.

Id. at 767.

[88] Justice Marshall and Justice Blackmun joined Justice Brennan's dissenting opinion. Justice Stevens filed a separate dissent which agreed fundamentally with Justice Brennan's dissent and added that there was no "difference between a disposition of funds pursuant to the Spending Clause and a disposition of realty pursuant to the Property Clause" in light of the fact that the establishment clause is a specific constitutional limitation. *Id.* at 781 (Stevens, J., dissenting).

[89] 102 S. Ct. at 772-73 (Brennan, J., dissenting). A federal taxpayer does not have a continuing interest in the disposition of his tax monies. Thus, a taxpayer may not use the courts to object to the use of tax funds. *Id.* at 773 (Brennan, J., dissenting).

[90] The dissenters refused to rule out the possibility that there are other specific limitations on the taxing and spending power besides the establishment clause. *Id.* at 777 n.18 (Brennan, J., dissenting).

[91] *Id.* at 773 (Brennan, J., dissenting).

[92] *Id.* at 775 (Brennan, J., dissenting) (citing Everson v. Board of Educ., 330 U.S. 1 (1947)). Justice Black, writing for the majority in *Everson*, reviewed at length the environment of the times that bred the establishment clause. 330 U.S. at 8-13. He concluded that "[n]o 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 16; *see also* MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in id.* at 63-72.

[93] 102 S. Ct. at 776-77 (Brennan, J., dissenting).

test announced by the *Flast* majority balanced the interests of the citizen alleging taxpayer status to challenge a violation of the establishment clause with the Court's developing view of taxpayer standing.[94] *Flast* was consistent with the principle "that no judgment about standing should be made without a fundamental understanding of the rights at issue."[95] Justice Brennan's concern was that the majority's attempt to resolve these cases at the threshold overlooked the need to give full consideration to the constitutional protections involved.[96] The dissenters thus charged the majority with ignoring the constitutional heritage by making a determination that Americans United lacked standing without considering the special role of the establishment clause. Moreover, to suggest that the *Flast* nexus test was not met because Americans United challenged the acts of an agency rather than congressional action[97] and because the statute involved was an exercise of congressional power under the property clause rather than the taxing and spending clause[98] was specious, according to Justice Brennan, and therefore, the majority failed to explain why *Valley Forge* and *Flast* were not alike.[99]

In *Valley Forge*, as in *Flast* before it, the Court was presented with "a situation without identifiable victims."[100] When a constitutional mandate is violated there is not always a specific victim, but that does not mean that no injury has been suffered. As one commentator has stated, the establishment clause, unlike some other constitutional provisions, was intended to protect a minority, in this case a religious minority.[101] "The use of the governmental process to foster religious beliefs antithetical to some citizens violates the rights of those

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[94] *Id.* at 777 (Brennan, J., dissenting); *see, e.g.*, Doremus v. Board of Educ., 342 U.S. 429, 433-34 (1952) (limiting taxpayer suits to those involving expenditure of funds). *See supra* note 42. 42.

[95] 102 S. Ct. at 777 (Brennan, J., dissenting).

[96] *Id.* at 768 (Brennan, J., dissenting). In Justice Brennan's opinion, the majority failed to consider the establishment clause right itself while they discussed at length the standing requirement. *Id.*

[97] *Id.* at 778 (Brennan, J., dissenting); *see supra* note 78.

[98] 102 S. Ct. at 779 (Brennan, J., dissenting).

[99] *Id.* at 778 (Brennan, J., dissenting). According to Justice Brennan:

> The Framers of the First Amendment could not have viewed it as less objectionable to the taxpayer to learn that his tax funds were used by his government to purchase property, construct a church, and deed the property to a religious order, than to find his government providing the funds to a church to undertake its own construction. So far as the Establishment Clause, and the position of the taxpayers are concerned, the situations are interchangeable.

Id. at 779 n.20 (Brennan, J., dissenting).

[100] Bogen, *Standing Up for* Flast: *Taxpayer and Citizen Standing to Raise Constitutional Issues*, 67 KY. L.J. 147, 170 (1978).

[101] *Id.* at 169-70.

persons (presumably a minority) to be free of governmental aid to opposing religious viewpoints."[102] *Flast* is reflective of this desire to protect the taxpaying minority;[103] *Valley Forge* strips this constitutional guarantee of its strength. *Valley Forge* clearly limits *Flast* to its facts. The very plaintiffs that *Flast* set out to protect, that is, those who seek to prevent use of their tax monies for religious purposes, are effectively precluded from bringing an action in all but the rarest of circumstances.

The majority's attempt to distinguish *Flast* rests on specious grounds. The Court viewed as determinative the fact that Americans United was challenging executive action rather than legislative action as required by *Flast*,[104] yet the majority ignored that *Flast* itself involved a taxpayer challenge to actions taken by the Commissioner of Education.[105] As Justice Brennan noted in his dissent, "it is difficult to conceive of an expenditure for which the last governmental actor, either implementing directly the legislative will, or acting within the scope of legislatively delegated authority, is not an Executive Branch official."[106] Constitutional prohibitions do not focus on the legislative branch only; the Constitution seeks to limit all governmental excesses.[107] The *Valley Forge* decision holds that an agency may accomplish indirectly that which Congress may not do directly. Thus, the executive branch, which has the authority to enforce the law, may now also circumvent it.

The Court's reliance on *Schlesinger* and *Richardson* is also misplaced. Neither one of these cases involved a challenge to the taxing and spending power.[108] The logical nexus between taxpayer status and the constitutional infringement was missing in both instances.

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[102] *Id.* Since government aid to religions, according to Professor Bogen, is the type of injury which the United States Constitution sought to prevent, then those who oppose such aid should have standing to contest it. And when the injury is caused by "*Flast*-type expenditures," then the individual taxpayer is the best victim. *Id.*

[103] *See supra* text accompanying notes 93-95.

[104] 102 S. Ct. at 762.

[105] *See* 392 U.S. at 85-86; *see also supra* note 78.

[106] 102 S. Ct. at 779 (Brennan, J., dissenting).

[107] *Id.* According to Justice Brennan,

> [T]he First Amendment is phrased as a restriction on Congress' legislative authority; this is only natural since the Constitution assigns the authority to legislate and appropriate only to the Congress . . . . The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance.

Id.

[108] *Schlesinger* involved a challenge to an executive branch decision allowing Congressmen to retain their Armed Forces Reserve status, 418 U.S. at 212, and *Richardson* involved a challenge to a statute allowing the CIA to withhold information regarding its expenditures, 418 U.S. at 149; *see also supra* text accompanying notes 52-58.

With regard to taxpayer standing, they held only that a taxpayer has no standing to assert that a non-taxing or non-spending constitutional proscription has been violated.[109] *Valley Forge*, however, did involve an expenditure—the purchase of property later donated by the federal government to a religiously affiliated organization—and it thus was a violation of the limits imposed by the establishment clause.

In addition, the Court relied on another false distinction. The majority found that Americans United did not base its complaint on the taxing and spending power but rather on an agency action taken pursuant to a statute enacted under the property clause.[110] There is no distinction between property conveyed gratuitously to a religiously affiliated college and a purchase of and subsequent grant of, for example, textbooks to the same institution. Funds have been expended in both situations. There is just as logical a nexus between taxpayer status and the conveyance of property by the government as there is between taxpayer status and government spending under the taxing and spending clause.

Although religious interests may have motivated Americans United in bringing this action, the financial impact of a gratuitous conveyance serves as the nexus providing the real stake. And although "a citizen [be forced] to contribute three pence only of his property for the support of any one establishment,"[111] the expenditure of tax monies to promote sectarian education is repugnant to the Constitution. The government has effectively spent tax monies to benefit an admittedly fundamentalist Christian organization, yet taxpayers are not given the opportunity to challenge this expenditure.[112] This is despite the special place of the establishment clause in the scheme of the United States Constitution.[113] The framers clearly intended that tax monies should not be used to foster religion.[114]

If these taxpayers do not have standing under *Flast* because the taxing and spending power has not been the underlying authorization of the governmental actor, then *Flast* has been inferentially overruled. In its zeal to keep the Court above the political fray, the majority

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[109] For example, the Court in *Richardson* limited *Flast* to situations in which the taxpayer-plaintiff proved that the expenditure violated a specific constitutional limitation on the taxing and spending power. 418 U.S. at 174-78. Only the establishment clause has been found to be such a limitation.

[110] 102 S. Ct. at 762.

[111] MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 3, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 65-66 (1947).

[112] It is also probable that tax monies will be spent in the monitoring of Valley Forge Christian College's secular curriculum as represented in the college's application for the tract of land. *See supra* note 17.

[113] *See supra* text accompanying notes 90-92.

[114] *See supra* note 92.

severely limits the second prong of the *Flast* nexus test.[115] *Valley Forge*, thus, follows in the path of recent Burger Court decisions which have chipped away at the liberalization of the standing requirement to make it into a formidable bar to judicial review, especially in the context of public actions.[116]

The *Valley Forge* decision is another step in the erosion of standing to challenge allegedly unconstitutional governmental excesses. *Flast* was very explicit in its holding that a taxpayer may challenge expenditures allegedly violating the establishment clause because of that provision's unique role as a limitation on the taxing and spending power.[117] *Richardson* and *Schlesinger* are not inconsistent with this thinking.[118] These later cases do not expand the list of specific constitutional limitations, but neither do they inhibit taxpayer suits involving taxing and spending in violation of the establishment clause. The majority in *Valley Forge* attempts to say that because the Federal Property and Administrative Services Act was enacted on the authority of the property clause of the Constitution, that no taxing or spending power was involved.[119] This simply does not follow and is merely *ipse dixit* logic, not representative of the realities of the situation.

Valley Forge, therefore, should be seen for what it is, the conservatism of a majority that wants to limit the availability of the Court to cases with which it feels ideologically comfortable. In the wake of *Valley Forge*, a taxpayer who is aggrieved by the use of tax monies for the establishment of religion may only be heard by a federal court if the statute under which the expenditure is made can be proven to have been enacted under the taxing and spending clause itself.[120] Even though the action may not in reality be taken without the use of the taxing and spending power, if the statute was promulgated pursuant to some other constitutional clause the taxpayer-plaintiff will have no standing to be heard.

In conclusion, the Supreme Court's analysis ignores the unique role of the establishment clause as a limitation on the government's expenditure of tax monies. This would not create a hierarchy of constitutional values; it would restate the obvious, that the framers of

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[115] *See supra* text accompanying note 49.

[116] *See generally* Sedler, *supra* note 37.

[117] 392 U.S. at 103-04.

[118] *See supra* notes 52-58 and accompanying text.

[119] *See supra* note 80.

[120] Apparently the United States Court of Appeals for the District of Columbia thought that *Valley Forge* only limited *Flast* to suits involving the taxing and spending clause and did not otherwise reduce the scope of *Flast*. Murray v. Buchanan, 674 F.2d 14, 18 (D.C. Cir. 1982). Thus, taxpayers had standing to challenge the government's paying of congressional chaplains. *Id.* at 16.

the United States Constitution were concerned lest the federal government use treasury monies to foster the advancement of religion. It would have been more reasonable for the Court to recognize that there are some congressional actions which are not authorized by the taxing and spending clause but which, nonetheless, involve the taxing and spending power. Viewing the establishment clause as a limitation on the use of tax funds is consonant with this intent and is an effective rein on unconstitutional excesses in the guise of seemingly innocuous governmental largesse.

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