

## A Winn for Originalism Puts Establishment Clause Reform Within Reach

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## A WINN FOR ORIGINALISM PUTS ESTABLISHMENT CLAUSE REFORM WITHIN REACH

Patrick T. Gillen\*

In *Flast v. Cohen*,<sup>1</sup> the Supreme Court held that taxpayers could bring suits challenging government expenditures alleged to violate the Establishment Clause. *Flast* was a pivotal decision implicating two of the most difficult areas of constitutional law, the volatile interplay of law and religion,<sup>2</sup> and the complex justiciability doctrines the Court uses to determine its jurisdiction under Article III.<sup>3</sup> In *Flast* the Court took up this task as part of its effort to harmonize two fundamental interests, the government's power to tax and spend for the general welfare on the one hand, and our individual right to religious liberty on the other.<sup>4</sup> But *Flast* has proven deeply problematic, with two sitting Justices and prominent academics calling for its reversal.<sup>5</sup>

The Court's most recent effort to deal with the troubled legacy of *Flast* is *Arizona School Tuition Organization v. Winn*,<sup>6</sup> in which the Supreme Court rejected a taxpayer challenge to a tuition tax credit that benefitted religious schools advanced under *Flast*.<sup>7</sup> Although decided only last term, *Winn* has already been criticized as being inconsistent with *Flast* and the original understanding of the Establishment Clause.<sup>8</sup>

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<sup>1</sup> 392 U.S. 83 (1968).

<sup>2</sup> *Id.* at 87.

<sup>3</sup> *Id.* at 95–99.

<sup>4</sup> *Id.* at 103–04, 105–06.

<sup>5</sup> *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 618–20 (2007) (Scalia, J., concurring, joined by Thomas, J.). Academic considerations of *Flast* are legion, but for a recent analysis calling for the outright reversal of *Flast*, see Douglas W. Kmiec, *Standing Still—Did The Roberts Court Narrow, but Not Overrule Flast to Allow Time to Re-think Establishment Clause Jurisprudence?*, 35 PEPP. L. REV. 509 (2008). Others suspect that *Flast*'s days are numbered. See Kyle Duncan, *Misunderstanding Freedom from Religion: Two Cents on Madison's Three Pence*, 9 NEV. L.J. 32, 61–62 (2008); Mark C. Rahdert, *Court Reform and Breathing Space Under the Establishment Clause*, 87 CHI.-KENT L. REV. 835, 863–65 (2012).

<sup>6</sup> 131 S. Ct. 1436 (2011).

<sup>7</sup> *Id.* at 1440.

<sup>8</sup> For another discussion of *Winn* reaching a very different conclusion but acknowledging this pattern, see William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 215 n.3, 251–52.

I disagree. Quite the contrary, I believe that *Winn* puts the Supreme Court within reach of a comprehensive reform of its taxpayer standing doctrine that is both principled and consistent with the original understanding of the provision. For the same reason, I do not believe that *Flast* needs to be overruled in order to address the serious problems the decision has created; it simply needs to be limited along the lines suggested by *Winn*.

In *Winn*, the Supreme Court recognized that in order to demonstrate standing under the Establishment Clause a taxpayer must be able to show a personal injury caused by the use of the taxing power; more specifically, that the government has used its taxing power to “extrac[t]” money from the taxpayer that is later used to support religion.<sup>9</sup> *Winn* makes plain that a taxpayer cannot show the injury needed to support standing simply by pointing to a use of the *taxing* power that provides some generalized benefit to religious institutions.<sup>10</sup> Much needed reform of *Flast* can be achieved simply by employing the more refined focus used in *Winn* to isolate the precise *spending* of public funds that creates a taxpayer injury that is cognizable under the Establishment Clause.

The Court should recognize that the type of *spending* that violates the Establishment Clause, creating the taxpayer injury cognizable under the Establishment Clause, is an extremely narrow category of expenditures that use public funds to support what the Court has called “inherently religious” activity.<sup>11</sup> In so doing, the Court will obviate the basis for taxpayer challenges to the vast range of spending programs through which government and religious entities cooperate to advance legitimate social goals. It will do so by recognizing that the Establishment Clause was not understood to bar spending programs that advance secular goals through providing funding to religious organizations, even if such spending provides a collateral benefit to religious institutions, and consequently, that such programs do not give rise to a taxpayer injury cognizable under the Establishment Clause. The Court has an historic reform of its precedent within reach.

In Part I, I briefly sketch the original understanding of the Establishment Clause and show that it was not understood to prohibit spending programs that extended benefits to religious institutions providing general social welfare services. I argue that while the rationale for taxpayer standing in *Flast* is consistent with the original understanding of the First Amendment, the actual holding in *Flast* represented an historically unsupported and unsound expansion of claims that were cognizable under the Establishment Clause.<sup>12</sup>

In Part II, I survey Supreme Court cases entertaining challenges to spending programs that conferred some arguable benefit on religious entities from *Flast*

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<sup>9</sup> *Winn*, 131 S. Ct. at 1447 (quoting *Flast*, 392 U.S. at 106).

<sup>10</sup> *Id.*

<sup>11</sup> *Bowen v. Kendrick*, 487 U.S. 589, 605 (1988).

<sup>12</sup> See *infra* notes 91–99 and accompanying text.

through *Mitchell v. Helms*.<sup>13</sup> This section shows that the flaws in *Flast* led the Court to adopt a series of presumptions that were designed to remedy the problem created by the *Flast* decision, namely, allowing taxpayer challenges to spending programs without requiring a showing that public funds were actually being used to advance religion. The Court remedied this fatal flaw in many challenges to spending programs advanced under *Flast* by presuming that spending programs which provided some benefit to institutions with a pervasively sectarian character must be presumed to advance religion. In effect, such presumptions, which the Court often employed when addressing Establishment Clause claims on the merits, served as a gap-filler that remedied a defect in standing that can be traced back to *Flast*.

In Part III, I consider Supreme Court case law addressing taxpayer standing for Establishment Clause claims between *Flast* and *Winn* and show that cases testing the limits of *Frothingham v. Mellon*<sup>14</sup> and *Flast* have led the Court to a more refined focus on the precise injury that a taxpayer must show to support standing under the Establishment Clause. These cases helped pave the way for *Winn*, which requires a sharper focus on the specific use of the taxing power that creates the taxpayer injury made cognizable in *Flast*.<sup>15</sup>

In Part IV, I argue that the Court must use the same refined focus it used in *Winn* when it evaluates challenges to spending programs advanced under *Flast*. In *Winn*, a use of the taxing power that provided a generalized benefit to religion did not inflict the taxpayer injury made cognizable in *Flast*.<sup>16</sup> By the same token, a use of the spending power that provides a generalized benefit to religion does not inflict the taxpayer injury properly deemed cognizable under *Flast*.<sup>17</sup> Therefore, a taxpayer seeking to proceed under *Flast* must allege and later prove that public funds are in fact being used to finance inherently religious activity, not merely that public funds provide a benefit to religious institutions.<sup>18</sup> If the Court narrows the focus of the standing inquiry to the actual use of public funds, it can achieve a comprehensive reform of its taxpayer standing doctrine that is consistent with both the original understanding of the Establishment Clause and the gravamen of controlling precedent in the area.

## I.

Brief attention to the historical controversy surrounding the use of civil law to coerce support for religion helps establish the framework needed to determine the

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<sup>13</sup> 530 U.S. 793 (2000).

<sup>14</sup> 262 U.S. 447 (1923).

<sup>15</sup> *Winn*, 131 S. Ct. at 1447.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1447–48.

proper scope and extent of taxpayer standing under *Flast*. As is well known, coerced support for religion was a feature of the established church in England, where the King mandated tithing to the local parish and took royal revenues from taxes levied on the clergy, who were said to hold their offices through him.<sup>19</sup> And although many early colonists fled England to avoid the established church, some colonies used civil law to coerce financial support for religion, a practice that was at the heart of the struggle to define and protect religious liberty.<sup>20</sup>

Many of the state constitutions drafted during the Revolutionary and Early National periods specifically addressed the use of civil law to compel financial support for religion.<sup>21</sup> Some constitutional provisions expressly prohibited legally compelled support for religion without qualification.<sup>22</sup> Several of the constitutions

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<sup>19</sup> See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 93, 175–76 (1897); see also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002) (noting the widely shared view that “conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed”); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003) (providing an excellent review of “establishment” as understood in Great Britain and the United States).

<sup>20</sup> See, e.g., McConnell, *supra* note 19, at 2152–53; see also NICHOLAS TROTT, THE LAWS OF THE BRITISH PLANTATIONS IN AMERICA, RELATING TO THE CHURCH AND THE CLERGY, RELIGION AND LEARNING (B. Cowse ed., 1720) (providing a comprehensive catalogue of colonial laws implementing various measures along the lines of the English establishment Trott wished to have legislated for the colonies). For more wide-ranging discussions of the state constitutional provisions, see GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 134–92 (1986); 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES, 258–444 (1950); see also MARC W. KRUMAN, BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA (1997) (discussing how the state constitutions reflect an effort to balance natural rights against the need to preserve the public order).

<sup>21</sup> For a detailed examination of the mechanics of this process, see BRADLEY, *supra* note 20, at 19–57; CURRY, *supra* note 20, at 134–92; STOKES, *supra* note 20, at 258–444; see also WILLIAM GEORGE TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 14 (1948).

<sup>22</sup> See, e.g., GA. CONST. of 1789, art. IV, § 5, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 789 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (“All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.”); GA. CONST. of 1777, art. LVI, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 784 (“All persons whatever shall have the free exercise of their religion . . . and shall not, unless by consent, support any teacher or teachers except those of their own profession.”); N.J. CONST. of 1776, art. XVIII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2597 (“[N]or shall any person . . . ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry . . .”); N.C. CONST. of 1776, art. XXXIV,

that allowed compelled support for religion did so in language that barred compelled support for a religion contrary to a citizen's religious conviction.<sup>23</sup> And some of the provisions authorizing coerced support for religion left open an alternative use of revenues generated by provisions mandating support for religion.<sup>24</sup>

There is no question that the use of civil law to coerce support for religion provided an impetus for the religious liberty provision of the First Amendment. For example, an Anti-federalist writing as "A Countryman" opposed ratification in part because he feared that the power to lay and collect taxes for the general welfare, combined with the Necessary and Proper Clause, gave the federal government the power to enact laws concerning religion.<sup>25</sup> Other Anti-federalists expressed similar

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*reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra, at 2793* ("[N]or [shall any person] be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry . . ."); PA. CONST. of 1776, art. II, *reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra, at 3082* ("[N]o man ought or of right can be compelled to . . . erect or support any place of worship, or maintain any ministry . . ."); S.C. CONST. of 1778, art. XXXVIII, *reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, supra, at 3257* ("No person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support."); VT. CONST. of 1777, ch. I, art. III, *reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, supra, at 3740* ("[N]o man ought, or of right can be compelled to . . . support any place of worship, or maintain any minister . . .").

<sup>23</sup> See, e.g., MASS. CONST. of 1780, art. III, *reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, supra note 22, at 1890* ("[A]ll moneys [sic] paid by the subject . . . shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination . . ."); N.H. CONST. of 1784, part I, art. I, § VI, *reprinted in 4 FEDERAL AND STATE CONSTITUTIONS, supra note 22, at 2454* ("[T]he people of this state . . . hereby fully empower [sic] the legislature to authorize [communities] . . . to make adequate provision at their own expence [sic], for the support and maintenance of public protestant teachers of piety, religion and morality: *Provided notwithstanding*, That . . . [communities] shall at all times have the exclusive right of electing their own public teachers . . . . And no portion of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination.").

<sup>24</sup> See, e.g., MD. CONST. of 1776, art. XXXIII, *reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, supra note 22, at 1689* ("[N]or ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county . . .").

<sup>25</sup> *Letters from a Countryman*, N.Y.J., Jan. 17, 1788, *reprinted in 6 THE COMPLETE ANTI-FEDERALIST 86–87* (Herbert J. Storing ed., 1981) ("[W]e have often read, and heard of governments, under various pretences [sic], breaking in . . . upon the rights of conscience particularly; for in most of the old countries, their rulers, it seems, have thought it for the general welfare to establish particular forms of religion, and make every body worship God in a certain way, whether the people thought it right or no, and punish them severely, if they would not . . .").

concerns.<sup>26</sup> Scholars have long recognized that the dispute over laws enacted to provide financial support for religion were at the heart of the debate surrounding the religious liberty provisions of the state and federal constitutions.<sup>27</sup>

But there is another side of the story that is equally clear. This dispute centered on the use of civil power to coerce financial support for what can be thought of as archetypal religious activity, i.e., supporting ministers and religious denominations so they could engage in activities such as preaching and worship.<sup>28</sup> The great controversy concerning use of civil power to coerce financial support for religion present during the Revolutionary and Early National period was not directed towards the use of public funds to support religious entities providing secular services such as education.<sup>29</sup>

The narrow focus of the original liberty provisions on compelled support for inherently religious activity becomes clearer if the controversial practice of using civil law to coerce financial support for inherently religious activities is contrasted with another widespread practice, which existed for one hundred years after the religious liberty provisions were ratified but proved noncontroversial. It is well known that in the early days of our nation's history, public funds were granted to religious entities performing social services such as schools, orphanages, asylums, or hospitals.<sup>30</sup>

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<sup>26</sup> See *Essay by Deliberator*, FREEMAN'S J., Feb. 20, 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 25, at 179; see also *Essays of an Old Whig*, INDEP. GAZETTEER, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 25, at 36–37.

<sup>27</sup> Scholars agree on this point even while differing over the precise scope of the prohibition. For prominent examples of the so-called “separationists” approach to this issue, see CURRY, *supra* note 20, at 134–92 (arguing that the Establishment Clause prohibits use of civil law to compel support for one state-preferred religion); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 107–08 (1994) (arguing that in some states, ratification of the Bill of Rights was delayed due to fear that the federal government could impose religious taxes); see also FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA (2003) (arguing that the Founders sought to remove government power over religion in order to create a free market of religious ideas along lines akin to those suggested in Adam Smith's *The Wealth of Nations*). For prominent examples of the so-called “non-preferentialists” interpretation, see BRADLEY, *supra* note 20, at 113 (arguing that the Establishment Clause prohibits sect preference); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE (1982) (arguing that the First Amendment does not “preclude Federal governmental aid to religion when it [is] provided on a nondiscriminatory basis”); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 483 (2002) (arguing that the no-aid principle endorsed by anti-aid strict separationists cannot be squared with historical understanding).

<sup>28</sup> See generally Michael W. McConnell, *Coercion: The Lost Element of the Establishment*, 27 WM. & MARY L. REV. 933, 936–39 (1986) (arguing that the Establishment Clause should be understood as a reflection of the Framers' concern that people would be coerced into joining a religion other than their own); McConnell, *supra* note 19.

<sup>29</sup> See, e.g., BRADLEY, *supra* note 20, at 125–27 (arguing that schools in the post-Revolutionary period were widely seen as “religiously grounded” and encouraged to teach “piety” and “religious . . . virtue”).

<sup>30</sup> John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 379–80 (1996).

This longstanding practice became politically controversial in the second half of the nineteenth century because of a nativist reaction to large-scale immigration by ethnic groups that were predominantly Roman Catholic.<sup>31</sup>

The result was a set of proposed constitutional amendments to the federal and state constitutions beginning in the mid-1870s, designed to ensure that public money was not transferred to private “sectarian” institutions.<sup>32</sup> The effort to amend the federal constitution to prohibit this practice, the so-called Blaine Amendment, failed.<sup>33</sup> But many state constitutions were amended to include prohibitions based on the Blaine Amendment. These so-called Blaine Amendments contributed to broader restrictions on public aid by disqualifying institutions (including those institutions providing secular services) from receiving public aid based on their religious character.<sup>34</sup>

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<sup>31</sup> See BRADLEY *supra* note 20, at 32, 44–45; HAMBURGER, *supra* note 27, at 201–29; Marie Carolyn Klinkhamer, *The Blaine Amendment of 1876: Private Motives for Political Action*, 42 CATH. HIST. REV. 15, 26 (1956) (illustrating the public outrage at the request by the Catholic communities to receive public funding for private religious schools and that they be allowed to educate their children in Catholic schools only or to introduce Catholic teachings into public schools’ curricula); F. William O’Brien, *The Blaine Amendment, 1875–76*, 41 U. DET. L.J. 137, 137–47 (1963); Joseph P. Viteritti, *Blaine’s Wake: School Choice, The First Amendment, And State Constitutional Law*, 21 HARV. J. L. & PUB. POL’Y 657, 666–67 (1998). For the view that the Blaine Amendments, which twenty-nine states added to their constitutions to ensure that no funding would be given to sectarian schools, proceeded, in part, from an emerging (and positive) value of non-sectarianism, as well as anti-Catholicism, see Noah Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. 65, 110–12 (2002).

<sup>32</sup> See HAMBURGER, *supra* note 27, at 287–334 (describing the Liberalists’ campaign to promote separation with a constitutional amendment); see also Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941 (1951); O’Brien, *supra* note 31, at 138–43 (discussing the Blaine Amendment); Klinkhamer, *supra* note 31 (detailing the history of the Blaine Amendment); Viteritti, *supra* note 31, at 670 (noting that President Grant wrote to Congress to “propos[e] a constitutional amendment that would deny public support to religious institutions”).

<sup>33</sup> HAMBURGER, *supra* note 27, at 324–25. The Blaine Amendment provided that:  
 [n]o state shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor [sic], nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.  
 44 CONG. REC. 205 (1875).

<sup>34</sup> See, e.g., ALA. CONST. art. XIV § 263 (“No money raised for the support of the public schools, shall be appropriated to or used for the support of any sectarian or denominational school.”); ALASKA CONST. art. VII, § 1 (“No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.”); ARIZ. CONST. art. IX, § 10 (“No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.”); CAL. CONST. art. IX, § 8 (“No public money shall ever be appropriated for the support of any sectarian or denominational school . . . .”); COLO. CONST. art. IX, § 7 (“Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any

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appropriation . . . to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever . . . .”); DEL. CONST. art. X, § 3 (“No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school . . . .”); FLA. CONST. art. I, § 3 (“No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”); HAW. CONST. art. X, § 1 (“[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist: 1. Not-for-profit corporations that provide early childhood education and care facilities serving the general public; and 2. Not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities.”); IDAHO CONST. art. IX, § 5 (“Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation . . . to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever . . . .”); ILL. CONST. art. X, § 3 (“Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation . . . in aid of any church or sectarian purpose . . . .”); IND. CONST. art. I, § 6 (“No money shall be drawn from the treasury, for the benefit of any religious or theological institution.”); IOWA CONST. art. I, § 3 (“[N]or shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”); KAN. CONST. art. 6, § 6(c) (“No religious sect or sects shall control any part of the public educational funds.”); KY. CONST. § 189 (“No portion of any fund . . . shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.”); MASS. CONST. art. XVIII, § 2 (“No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers . . . .”); MICH. CONST. art. VIII, § 2 (“No public monies or property shall be appropriated or paid or any public credit utilized . . . to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school.”); MINN. CONST. art. XIII, § 2 (“In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.”); MISS. CONST. art. 8, § 208 (“No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school.”); MO. CONST. art. I, § 5 (“Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation . . . to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever . . . .”); MONT. CONST. art. 10, § 6(1) (“The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation . . . to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.”); NEB. CONST. art. VII, § 11 (“[A]ppropriation of public funds shall not be made to any school or institution of learning

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not owned or exclusively controlled by the state or a political subdivision thereof; *Provided*, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature.”); NEV. CONST. art. 11, § 2 (“[A]ny school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction . . . .”); *id.* § 9 (“No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution.”); *id.* § 10 (“No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.”); N.H. CONST. pt. 2, art. 83 (“[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.”); N.M. CONST. art. XII, § 3 (“[N]o part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.”); N.Y. CONST. art. XI, § 3 (“Neither the state nor any subdivision thereof, shall use its property . . . in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.”); N.D. CONST. art. VIII, § 5 (“No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.”); OHIO CONST. art. VI, § 2 (“[N]o religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”); OKLA. CONST. art. II, § 5 (“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”); OR. CONST. art. I, § 5 (“No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.”); PA. CONST. art. III, § 15 (“No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.”); *id.* § 29 (“No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association.”); S.C. CONST. art. XI, § 4 (“No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.”); S.D. CONST. art. VIII, § 16 (“No appropriation of lands, money, or other property or credits to aid any sectarian school shall ever be made by the state . . . to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.”); TEX. CONST. art. I, § 7 (“No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.”); UTAH CONST. art. X, § 9 (“Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.”); VA. CONST. art. VIII, § 10 (“No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision

The salient point is that these amendments were premised on the recognition that existing state constitutional provisions did *not* prohibit the funding of religious entities providing secular services.<sup>35</sup> Indeed, critics of the Blaine Amendment pointed out that the federal provision also did not prohibit this practice.<sup>36</sup> Put simply, spending programs that used public funds to pay religious entities providing social services did not violate the original religious liberty provisions contained in the federal and state constitutions. Consequently, additional constitutional amendments were necessary in order to prohibit the practice.

The Court utterly disregarded this larger historical context when it dealt with early claims challenging expenditures that violated the Establishment Clause. A handful of early cases, *Bradfield v. Roberts*,<sup>37</sup> *Everson v. Board of Education*,<sup>38</sup> and *Flast* itself, provide stark illustrations of the Court's failure to systematically consider the specific types of spending that would violate the Establishment Clause.<sup>39</sup> These cases failed to place challenges to spending programs providing some benefit to religious institutions in historical context and employed a free-wheeling analysis inconsistent with the rigorous focus on the actual use of public funds which the

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thereof . . . ."); WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . . ."); WIS. CONST. art. I, § 18 ("[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."); *id.* art. X, § 3 ("[N]o sectarian instruction shall be allowed [in the public schools]; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours."); WYO. CONST. art. I, § 19 ("No money of the state shall ever be given or appropriated to any sectarian or religious society or institution."); D.C. CODE § 44-715 (2012) ("It is hereby declared to be the policy of the government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control; and no money appropriated for charitable purposes in the District of Columbia shall be paid to any church or religious denomination, or to any institution or society which is under sectarian or ecclesiastical control.").

<sup>35</sup> See HAMBURGER, *supra* note 27, at 296, 324 (noting that Liberals proposed such amendments because of the lack of constitutional protection for the separation of church and state); O'Brien, *supra* note 31, at 203–04 (noting that many politicians did not believe the Establishment Clause captured what the Blaine Amendments did).

<sup>36</sup> See DOUGLAS W. KMIEC ET AL., THE AMERICAN CONSTITUTIONAL ORDER 228 (2009) (citing O'Brien, *supra* note 31, at 204).

<sup>37</sup> 175 U.S. 291 (1899).

<sup>38</sup> 330 U.S. 1 (1947).

<sup>39</sup> See *Flast v. Cohen*, 392 U.S. 83, 105-106 (1968) (declining to state an opinion on the merits, deciding on standing alone); *Everson*, 330 U.S. at 8–18 (focusing on the history of the Amendment and whether the services provided were "so separate and so indisputably marked off from the religious function" that the provision would not offend the First Amendment); *Bradfield*, 175 U.S. at 297-300 (finding federal funding of a private hospital run by monastic brothers and sisters of the Roman Catholic Church not to be a violation of the Establishment Clause).

Court used to evaluate taxpayer standing for alleged violations of the Establishment Clause in *Doremus v. Board of Education*.<sup>40</sup> The result was to create a tension in the Court's case law that *Flast* resolved incorrectly.<sup>41</sup> A brief examination of these cases puts *Flast* in context and goes a long way to explaining why the decision has proved so controversial and so troublesome.

In *Bradfield*, a federal taxpayer claimed that a contract under which the District of Columbia paid a private hospital operated by a Roman Catholic religious order for providing care to poor patients sent there by the District violated the Establishment Clause.<sup>42</sup> The Court of Appeals had specifically held that *Bradfield* had standing as a taxpayer to challenge the contract.<sup>43</sup> It held that the Establishment Clause did not bar use of public funds to pay a private corporation operated by religious entities for providing services to the public based in large part on the fact that the federal constitution did not include a Blaine Amendment.<sup>44</sup>

The Supreme Court deliberately passed over “objections . . . to the character in which the complainant sues, [which was] merely that of a citizen and taxpayer.”<sup>45</sup> The Court went on to consider *Bradfield*'s claim that payments to the hospital, a private corporation run by a religious order, violated the Establishment Clause because “public funds are being used and pledged for the advancement and support of a . . . sectarian corporation . . . contrary to the Constitution.”<sup>46</sup> Here, the Court assumed for the purpose of deciding the case that paying public funds to a sectarian

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<sup>40</sup> 342 U.S. 429, 434 (1952) (requiring a direct injury, which, in the case of a taxpayer, is satisfied “only when it is a good-faith pocket book action”); see also *Flast*, 392 U.S. at 102–03 (requiring only a “logical link” or “nexus”).

<sup>41</sup> See Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN L. REV. 943, 955 (2008) (criticizing *Flast* for making standing about whether a plaintiff “will try hard enough”).

<sup>42</sup> *Bradfield v. Roberts*, 175 U.S. 291, 292 (1899).

<sup>43</sup> *Roberts v. Bradfield*, 12 App. D.C. 453, 459–60 (D.C. Cir. 1898), *aff'd*, 175 U.S. 291 (1899).

<sup>44</sup> *Id.* at 472 (noting a Blaine Amendment in the Illinois's constitution). The Court continued:

As we have before remarked, all the States seem to have provisions in their constitutions of the same general purport as the First Amendment to the Federal Constitution, which have not been regarded as interfering with the incorporation of churches or sectarian establishments. But many of them, also, contain special prohibitions of donations or grants of public money in aid of such establishments.

*Id.*; see also *id.* at 475 (referencing decisions made under states' Blaine Amendments and continuing “[b]earing in mind the essential difference between the constitutional prohibition controlling the foregoing [state] decisions, respectively, and that of the Federal Constitution, which governs here, we do not find any necessary antagonism between them and the conclusion at which we have arrived; on the contrary, inferences, logically deducible therefrom, would seem to support that conclusion”).

<sup>45</sup> *Bradfield*, 175 U.S. at 295.

<sup>46</sup> *Id.* at 293, 295.

corporation would be “invalid, as resulting indirectly in the passage of an act respecting an establishment of religion.”<sup>47</sup> But after considering Bradfield’s allegations that the hospital was run by a corporation that was owned and controlled by a religious order operating under the auspices of the Catholic Church, the Court concluded that this did not “change the legal character of the corporation or render it . . . a religious or sectarian body,” and did not “change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being,” and rejected Bradfield’s claim.<sup>48</sup>

In *Everson*, a state taxpayer challenged a program that reimbursed parents for bus fares paid to transport their children to Catholic parochial schools on the grounds that it violated the Establishment Clause.<sup>49</sup> The Court engaged in a lengthy exploration of the purpose of the First Amendment reasoning that “[w]hether this . . . law is one respecting an ‘establishment of religion’ requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes.”<sup>50</sup> Describing the abuses associated with the establishing of religion in terms of sect-preference and penalties for nonconformity, it noted “all of these dissenters were compelled to pay tithes and taxes to support the government-sponsored churches . . . [t]he imposition of taxes to pay ministers’ salaries and to build and maintain churches and church property aroused their indignation,” and “[i]t was these feelings which found expression in the First Amendment.”<sup>51</sup>

As it had in prior cases,<sup>52</sup> the Court referred to the struggle for religious freedom in Virginia as illustrative of the practices which had spurred people to “reach[] the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.”<sup>53</sup> The Court reasoned that the provisions of the First Amendment “had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.”<sup>54</sup> The Court also referenced the

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<sup>47</sup> *Id.* at 297 (“If we were to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not.”).

<sup>48</sup> *Id.* at 297–98.

<sup>49</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 3, 8 (1947).

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.* at 10, 11.

<sup>52</sup> *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 162–65 (1878) (describing debates over civil laws compelling financial supports for religious sects); *cf.* *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 46–48 (1815) (discussing the struggle in the context of a property dispute in which Virginia sought to reclaim land).

<sup>53</sup> *Everson*, 330 U.S. at 11.

<sup>54</sup> *Id.* at 13.

controversies concerning the use of public funds to provide financial support for religious schools that had produced the Blaine Amendments, while noting that decisions under those provisions “show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.”<sup>55</sup>

The Court concluded that the Establishment Clause was designed to ensure that “[n]o tax in any amount . . . can be levied to support any religious activities or institutions, whatever they may be called,”<sup>56</sup> and as a consequence “New Jersey cannot . . . contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.”<sup>57</sup> But it also acknowledged that the Establishment Clause should not be interpreted to prohibit citizens from “receiving the benefits of public welfare legislation” regardless of their religious beliefs.<sup>58</sup> Ultimately, it held that the Establishment Clause did not “prohibit[] New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools.”<sup>59</sup> Emphasizing that the “State contributes no money to the schools,” the Court concluded that the program did not violate the wall of separation between church and state it deemed required by the First Amendment.<sup>60</sup>

The Court’s failure to analyze standing in these cases, when combined with its flawed historical analysis, created a tension in the case law under the Establishment Clause. The root cause of the tension was the Court’s decision in *Frothingham*, which created the bar on taxpayer grievances. In *Frothingham*, a federal taxpayer argued that the Maternity Act of 1921<sup>61</sup> violated the Tenth Amendment and sought to enjoin implementation of the statute arguing that the spending authorized by the Maternity Act would result in increased taxation, which, in turn, would deprive her of property without due process of law.<sup>62</sup>

The Court dismissed *Frothingham*’s claim for lack of standing reasoning that “[t]he administration of any statute, likely to produce additional taxation . . . is essentially a matter of public and not of individual concern,” and noting that to allow standing here would authorize any taxpayer to challenge the legality of any statute involving an outlay of public funds.<sup>63</sup> Describing the separation of powers concerns that would be presented if taxpayer suits supported judicial interference with the legislative function, the Court emphasized that a party seeking to enjoin a

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<sup>55</sup> *Id.* at 14.

<sup>56</sup> *Id.* at 16.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 17.

<sup>60</sup> *Id.* at 18.

<sup>61</sup> Ch. 135, 42 Stat. 224 (1921).

<sup>62</sup> *Frothingham v. Mellon*, 262 U.S. 447 (1923).

<sup>63</sup> *Id.* at 487.

statute “must be able to show not only that the statute is invalid but that he has sustained . . . some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.”<sup>64</sup> For these reasons, it concluded that Frothingham failed to allege such an injury and that her claim, in essence, was “merely that officials of the executive department of the government [were] executing . . . an act of Congress asserted to be unconstitutional.”<sup>65</sup>

The Court’s first effort to address the implications of *Frothingham* for taxpayer claims under the Establishment Clause was *Doremus*, which involved a state taxpayer’s challenge to a New Jersey statute that required reading of five verses of the Bible and recitation of the Lord’s Prayer.<sup>66</sup> The state supreme court had passed over a jurisdictional objection based on the plaintiffs’ status as taxpayers, and held that reading the Old Testament and Lord’s Prayer did not constitute sectarian instruction or worship and therefore did not violate the Establishment Clause.<sup>67</sup> When the case came to the Supreme Court for review, the plaintiffs’ appeal was dismissed for lack of jurisdiction.<sup>68</sup>

The Court began by scrutinizing the complaint that alleged taxpayer status and emphasizing that “there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it.”<sup>69</sup> It then observed that in order to advance a claim a taxpayer “must be able to show not only that the statute is invalid but that he has sustained . . . some direct injury . . . not merely that he suffers in some indefinite way in common with people generally,”<sup>70</sup> and conceded that a “taxpayer’s action can meet this test, but only when it is a good-faith pocketbook action.”<sup>71</sup> Finding no cost associated with the contested practice, the Court dismissed the case on the ground that “the grievance . . . here is not a direct dollars-and-cents injury but is a religious difference.”<sup>72</sup>

*Doremus* seemed to require a taxpayer advancing an Establishment Clause claim to allege and later prove that the practice alleged to violate the Establishment Clause actually caused a use of public funds. But then came *Flast*, which took a different approach to the matter. The result was to create a body of precedent far

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<sup>64</sup> *Id.* at 488.

<sup>65</sup> *Id.* The Court affirmed the dismissal of Frothingham’s claim on the grounds that deciding the question presented “would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another coequal department, an authority which we plainly do not possess.” *Id.* at 489.

<sup>66</sup> *Doremus v. Bd. of Educ.*, 342 U.S. 429, 430 (1952).

<sup>67</sup> *Doremus v. Bd. of Educ.*, 75 A.2d 880, 889 (N.J. 1950).

<sup>68</sup> *Doremus*, 342 U.S. at 434–35.

<sup>69</sup> *Id.* at 433.

<sup>70</sup> *Id.* at 434.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

removed from—indeed at odds with—the original understanding of the Establishment Clause.<sup>73</sup>

*Flast* was a federal taxpayer suit claiming that the provisions of the Elementary and Secondary Education Act of 1965 (ESEA)<sup>74</sup> violated the First Amendment.<sup>75</sup> Plaintiffs, as federal taxpayers, argued that the First Amendment barred implementation of those portions of the ESEA using public funds to provide students enrolled in private schools, including religious schools, with services (special education, for example), as well as the use of instructional materials (textbooks, for example).<sup>76</sup> The Court recognized that the first question was whether the claim could be advanced in light of its decision in *Frothingham*.<sup>77</sup>

After a lengthy review of justiciability doctrine, the Court held that taxpayers had standing if they could meet two requirements.<sup>78</sup> The first requirement obliged the taxpayer to show a logical nexus between the status as taxpayer and the type of legislation challenged. Here, the Court held that “a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause,”<sup>79</sup> while citing *Doremus* for the proposition that it would “not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.”<sup>80</sup> The second prong required the taxpayer to establish a nexus between taxpayer status and “the precise nature of the constitutional infringement alleged.”<sup>81</sup> The Court explained that this requirement obliged the taxpayer to “show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.”<sup>82</sup>

The Court found the taxpayers satisfied both of these requirements.<sup>83</sup> With respect to the first requirement, the Court noted that the ESEA was an exercise of the tax and spend power.<sup>84</sup> Turning to the second prong, the Court observed “history vividly illustrates that one of the specific evils feared by those who drafted the

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<sup>73</sup> See generally William F. Cox, Jr., *The Original Meaning of the Establishment Clause and Its Application to Education*, 13 REGENT U. L. REV. 111 (2000) (“Over the last half-century, the Court has wrongly interpreted the [First] Amendment, resulting in decisions contradictory . . . to Founding-era interpretations . . .”).

<sup>74</sup> Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.).

<sup>75</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>76</sup> *Id.* at 87.

<sup>77</sup> *Id.* at 85, 91–92.

<sup>78</sup> *Id.* at 101.

<sup>79</sup> *Id.* at 102.

<sup>80</sup> *Id.* At the same time, the Court foreclosed challenges based on “an incidental expenditure of tax funds in the administration of an essentially regulatory statute,” using *Doremus* as an illustration of this point. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 102–03.

<sup>83</sup> *Id.* at 103.

<sup>84</sup> *Id.*

Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general.”<sup>85</sup> Relying on this historical evidence, the Court concluded that the Establishment Clause “operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power.”<sup>86</sup> The Court then held that the “complaint contains sufficient allegations under the criteria we have outlined to give them standing to invoke a federal court’s jurisdiction for an adjudication on the merits.”<sup>87</sup>

The decision in *Flast* rests on three elements. The first is the Court’s definition of the harm to taxpayers made cognizable under the Establishment Clause—the use of the tax and spend power to take a citizen’s money and use it to support religion.<sup>88</sup> The second is the two-pronged test that the Court fashioned for the stated purpose of identifying the claims that could be advanced by taxpayers.<sup>89</sup> The third is the Court’s actual holding, which applied the newly minted test to hold that the allegations advanced in *Flast* were sufficient to show an injury cognizable under the Establishment Clause.<sup>90</sup>

The opinion in *Flast* has a certain superficial appeal, but when the holding is viewed in historical context it is clear that *Flast* erred when it defined the “precise nature of the constitutional infringement alleged”<sup>91</sup> for the purpose of the second prong of its standing analysis, and applied its newly minted test to hold that the taxpayers had standing. *Flast*’s historically flawed analysis essentially assumed the point at issue, that is, whether a use of public funds which provided a benefit to religious schools, but did not finance inherently religious activity, inflicted a taxpayer injury sufficient to support standing.

The root of this error lay in *Bradfield* and *Everson*. In *Bradfield*, the Court assumed (albeit “for the purpose of this question only”) that spending public funds to compensate a religious entity for providing social services would violate the Establishment Clause.<sup>92</sup> The Court of Appeals had rejected this proposition by noting that the federal constitution did not feature a Blaine Amendment, only the First Amendment, and the federal government’s long history of contracting with religious entities demonstrated that the First was not understood to bar the practice (although the practice was barred in states with Blaine Amendments).<sup>93</sup> In *Everson*, the Court mustered evidence that the First Amendment’s Establishment Clause was intended

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 104.

<sup>87</sup> *Id.* at 106.

<sup>88</sup> *Id.* at 103.

<sup>89</sup> *Id.* at 102.

<sup>90</sup> *Id.* at 106.

<sup>91</sup> *Id.* at 102.

<sup>92</sup> *Bradfield v. Roberts*, 175 U.S. 291, 297 (1899).

<sup>93</sup> *Roberts v. Bradfield*, 12 App. D.C. 453, 466, 471, 475 (D.C. Cir. 1898), *aff’d*, 175 U.S. 291 (1899).

to bar use of the tax and spend power to coerce support for inherently religious activity.<sup>94</sup> It even went so far as to note the controversy surrounding the Blaine Amendments and the fact that state courts deciding cases under them encountered “difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.”<sup>95</sup> Yet the Court failed to appreciate that the Blaine Amendments represented a redrawing of that difficult line in a way that plainly indicated that the use of public funds to provide a support to religious institutions delivering secular services did not violate the First Amendment.

*Flast* relied on the inaccurate historical analysis of *Everson* when it held that the Establishment Clause prohibited the use of public funds authorized by the ESEA. Worse still, in *Flast* the Court relied on *Everson*’s historical error to hold that the mere allegation that spending authorized by the ESEA provided a benefit to religious schools was cognizable as a “constitutional infringement” under the Establishment Clause.<sup>96</sup> In *Doremus*, the Court had required the taxpayer to demonstrate that the practice said to violate the Establishment Clause actually required a use of public funds.<sup>97</sup> But in *Flast*, the Court did not require the taxpayers to show how the ESEA actually used public funds to support inherently religious activity—it just assumed public funds were being used to advance religion because ESEA aid was going to students enrolled in religious institutions.<sup>98</sup> The errors that followed from the flawed historical analysis in *Everson* and *Flast* would have far-reaching and pernicious consequences for the Court’s effort to craft a stable body of precedent under the Establishment Clause.

## II.

The decision in *Flast* resulted in a multiplicity of taxpayer challenges to spending programs that conferred some benefit on religious entities.<sup>99</sup> The Court was then forced to determine the specific uses of public funds that violated the Establishment

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<sup>94</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

<sup>95</sup> *Id.* at 14.

<sup>96</sup> *Flast v. Cohen*, 392 U.S. 83, 87, 102 (1967).

<sup>97</sup> *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952).

<sup>98</sup> *Flast*, 392 U.S. at 103.

<sup>99</sup> *See, e.g.*, *Aguilar v. Felton*, 473 U.S. 402 (1985); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472 (1973); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). For an analytical perspective reviewing district court decisions in religion and school cases for common trends and the number of factors that appear to come into play in those decisions, see Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185 (2012).

Clause and give some explanation for its decision. This question had been given short shrift in *Flast*, even as it purported to define the injury to taxpayers prohibited by the Establishment Clause and therefore sufficient to support standing. But the critical question can not be avoided anymore.

Moreover, the Court was forced to confront claims proceeding under *Flast* in the context created by *Everson*, which for all its sloppy historical analysis, did recognize that not every spending program that provided some benefit to religious institutions violated the Establishment Clause. The Court's forty-year effort to fix principles that distinguished permissible from impermissible forms of aid to religious schools shed light on the defective holding in *Flast*, as shown by a brief examination of the Court's decisions involving tax and spend programs that provided aid to religious schools.

A good place to begin is *Board of Education v. Allen*,<sup>100</sup> handed down the same day as *Flast*. *Allen* involved a claim that a state program, which required local school districts to lend textbooks free of charge to students regardless of whether they attended public or private schools, violated the Establishment Clause.<sup>101</sup> The Court upheld the program, relying on *Everson* and noting that although the books went to the pupils, the books were owned by the state, and concluding "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."<sup>102</sup> The Court rejected the plaintiffs' effort to distinguish *Everson* on the grounds that "books . . . are critical to the teaching process, and in a sectarian school that process is employed to teach religion" by noting "religious schools pursue two goals, religious instruction and secular education."<sup>103</sup> It also rejected the claim that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."<sup>104</sup>

In *Lemon v. Kurtzman*,<sup>105</sup> the Court struck down programs providing partial reimbursement for the cost of teachers' salaries, as well as providing textbooks and instructional materials in specified secular subjects on the grounds that they required an impermissible entanglement between church and state.<sup>106</sup> Describing the language of the religion clauses as "at best opaque,"<sup>107</sup> the Court reasoned that it was required to "draw lines with reference to the three main evils against which the Establishment

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<sup>100</sup> 392 U.S. 236 (1968).

<sup>101</sup> *Id.* at 238.

<sup>102</sup> *Id.* at 243–44.

<sup>103</sup> *Id.* at 245.

<sup>104</sup> *Id.* at 248.

<sup>105</sup> 403 U.S. 602 (1971).

<sup>106</sup> *Id.* at 606–07. Rhode Island paid teachers in nonpublic schools a salary supplement of 15% of their annual salary. *Id.* at 607. Both programs had provisions that were designed to ensure that the use of public funds was limited to secular (nonreligious) subjects. *Id.* at 608.

<sup>107</sup> *Id.* at 612.

Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”<sup>108</sup>

At its root, the Court held that the “substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.”<sup>109</sup> Focusing on the subsidy of teacher salaries, the Court rejected analogies to the bus fare allowed in *Everson* or the textbooks in *Allen*, and concluded that it could not “ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.”<sup>110</sup> This risk required monitoring and, the Court reasoned, these “prophylactic contacts will involve excessive and enduring entanglement between state and church.”<sup>111</sup>

Then, in *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>112</sup> the Court presumed that programs using public funds to provide maintenance and repair grants to private schools and tax assistance to parents (not schools) would be used to advance religion based on the sectarian nature of the schools.<sup>113</sup> Although the act was premised on the important role these schools played in educating citizens, the plaintiffs argued that “because of the substantially religious character of the intended beneficiaries” (characterized as the schools, not the families receiving the tax assistance), the laws violated the Establishment Clause.<sup>114</sup> Citing Madison’s *Memorial*

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<sup>108</sup> *Id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)).

<sup>109</sup> *Id.* at 616. For the role that *Lemon* played in creating the presumption that religious schools were pervasively sectarian and the deeply problematic nature of the presumption, see Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as “Pervasively Sectarian,”* 7 TEX. REV. L. & POL. 1 (2002).

<sup>110</sup> *Lemon*, 403 U.S. at 617.

<sup>111</sup> *Id.* at 619. The Court recognized the auditing procedure authorized under the Rhode Island law could insert government into inspection and evaluation of the religious content of a religious organization. *Id.* at 620. In the same vein, the Court emphasized that the Pennsylvania statute also provided direct financial aid to the religious schools—not in-kind aid of the sort previously allowed—and concluded that the auditing designed to prevent misuse of public funds would result in excessive entanglement. *Id.* at 621–22. The Court also grounded its holding on the political divisiveness it attributed to such programs, *id.* at 622, but such claims do not merit detailed analysis because this is not a legal ground, and it has been disregarded over time.

<sup>112</sup> 413 U.S. 756 (1973).

<sup>113</sup> *Id.* The Court addressed a challenge to three provisions of a New York statute providing aid that benefitted religious schools. *Id.* at 761–62. The first element of the program provided grants for maintenance and repair of school facilities educating low-income families with the amount of the grant calculated on a per-student basis and capped at 50% of the per student maintenance costs at public schools. *Id.* at 762–63. The second provided tuition reimbursement to low-income parents with children attending nonpublic schools in amounts between fifty (\$50) and one hundred dollars (\$100), and capped at no more than 50% of actual tuition costs. *Id.* at 764. The third provided a tax benefit to parents whose children attended nonpublic schools. *Id.* at 765.

<sup>114</sup> *See id.* at 768.

*and Remonstrance Against Religious Assessments* yet again, the Court struck down all three provisions.<sup>115</sup> The Court struck down the maintenance grants on the grounds that the money presumptively subsidized religious activity taking place in the building because it was not explicitly limited to maintenance of areas where exclusively secular activity took place.<sup>116</sup> And it struck down tuition reimbursements to parents sending children to religious schools on the theory that these measures must be presumed to be aid to religion because the benefits made it easier for parents to send children to religious schools.<sup>117</sup>

*Nyquist* is noteworthy for the Court's rejection of arguments designed to show that there was no meaningful connection between the spending program and religious activity. The Court rejected the argument that the amount of the tuition reimbursement given to parents was so marginal that it did not even cover the costs of instruction in secular subjects, never mind paying for religious activity that took place in the school—even if the aid to parents was seen as aid to schools.<sup>118</sup> And it struck down tax benefits extended to parents on the grounds that “[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education,” reasoning that “assistance to parents who send their children to sectarian schools” had the “inevitable effect” of “aid[ing] and advanc[ing] those religious institutions.”<sup>119</sup>

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<sup>115</sup> *Id.* at 760.

<sup>116</sup> *Id.* at 774, 777–80 (rejecting argument that given the limitations on the amount of reimbursements, there would be no money left over after secular upkeep costs to spend on inherently religious activity). The Court had rejected the idea that the maintenance and repair grants should be seen as supporting maintenance of those portions of the facilities where instruction in secular subjects took place, emphasizing “[n]o attempt is made to restrict payments to . . . expenditures related to . . . facilities used exclusively for secular purposes,” and concluding that “[a]bsent appropriate restrictions . . . it . . . cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian . . . schools.” *Id.* at 774.

<sup>117</sup> *Id.* at 780–83. To the Court, the tuition grant had to be seen as coerced support for religious instruction. Finding that the effect of the aid was to ensure that parents “ha[d] the option to send their children to religion-oriented schools,” and analogizing such support to the Virginia General Assessment to support “Teachers of the Christian Religion,” *id.* at 783, 784 n.39, the Court rejected the argument that there was no proof that public funds used to reimburse parents who paid tuition were actually transferred to religious schools (because parents had already paid the tuition) on the ground that the effect of the grant was to offer an “incentive to parents to send their children to sectarian schools,” *id.* at 786.

<sup>118</sup> *Id.* at 787.

<sup>119</sup> *Id.* at 791–93 (quoting *Comm. for Pub. Educ. v. Nyquist*, 350 F. Supp. 655, 675 (S.D. N.Y. 1972) (Hays, J., concurring in part and dissenting in part)). And in a companion case, *Levitt*, the Court struck down a state law reimbursing schools for certain costs of testing and record-keeping because the tests were prepared in-house and “no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.” *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472, 480 (1973).

*Nyquist* shows that the practical result of the presumption that the Court began to employ when evaluating whether programs providing some benefit to religious schools used public funds to support religion was to put defendants in a situation where they had to try to prove themselves out of Establishment Clause claims by demonstrating there was no meaningful connection between the use of public funds and religious activity. The Court's rejection of such arguments in *Nyquist* presaged the tack it would take for the next ten to fifteen years.

In *Meek v. Pittenger*,<sup>120</sup> the Court addressed and upheld a loan of secular textbooks based on *Allen*. But the Court struck down the direct loan of secular instructional materials under the effect prong by presuming that the secular materials would be used to advance religion.<sup>121</sup> Then two years later, in *Wolman v. Walter*,<sup>122</sup> a Court that was plainly divided seemed to begin backing away from the notion that secular aid must be presumed to support religious activity taking place in the school.<sup>123</sup> A clear majority approved the aid that was plainly secular and could be regarded as divertible to some religious purpose only by the most far-fetched assumptions.<sup>124</sup> But a majority of the Court struck down provisions lending instructional materials to families and funding for field trips on the theory that such aid had to be seen as

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<sup>120</sup> 421 U.S. 349 (1975).

<sup>121</sup> *Id.* at 365–66. The Court reasoned that “it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role,” and when aid “flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, state aid has the impermissible effect of advancing religion.” *Id.* (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)) (internal quotation marks omitted). The Court also struck down the provision providing secular auxiliary services, although rendered by public employees, relying on *Lemon* for its conclusion that the “potential for impermissible fostering of religion is present,” while the monitoring required to prevent it would lead to excessive entanglement. *Id.* at 369 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)).

<sup>122</sup> 433 U.S. 229 (1977).

<sup>123</sup> *Id.* “In broad outline, the statute authorizes the State to provide nonpublic school pupils with [1] books, [2] instructional materials and equipment, [3] standardized testing and scoring, [4] diagnostic services, [5] therapeutic services, and [6] field trip transportation.” *Id.* at 233.

<sup>124</sup> *Id.* at 236–48. Textbook loans were permissible in that “[t]his system for the loan of textbooks to individual students bears a striking resemblance to the systems approved in *Board of Education v. Allen*, 392 U.S. 236 (1968), and in *Meek v. Pittenger*, 421 U.S. 349 (1975).” *Id.* at 237–48. Testing provisions were constitutional since “the State provides both the schools and the school district with the means of ensuring that minimum standards are met. . . . This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*.” *Id.* at 240. For diagnostic aid, the Court found its “decisions contain a common thread to the effect that the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion.” *Id.* at 242. Therapy services were permissible in that “[t]he influence on a therapist’s behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution.” *Id.* at 247.

advancing the religious mission of the schools because teachers could use it in connection with religious indoctrination.<sup>125</sup>

In *School District of the City of Grand Rapids v. Ball*<sup>126</sup> and *Aguilar v. Felton*,<sup>127</sup> the notion that programs must be presumed to advance religion when aid was provided to pervasively sectarian institutions reached its zenith. In *Grand Rapids*, the Court struck down a program providing instruction in secular subjects given by public employees in classrooms in nonpublic schools grounding its conclusion that the aid advanced religion on the pervasively sectarian nature of the schools where the aid was delivered.<sup>128</sup> The Court disregarded findings that there was no evidence of any religious indoctrination by the public employees on the grounds that this was not dispositive.<sup>129</sup> And it rejected the claim that the instruction provided by public employees was secular, and therefore permissible, on the grounds that to allow this practice “would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system.”<sup>130</sup> In *Aguilar*, a companion case, the Court struck down a program where public employees delivered remedial instruction to students in religious schools, even though it featured monitoring provisions designed to prevent any illicit religious activity by public employees, relying on *Lemon* once again to conclude that

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<sup>125</sup> *Id.* at 248–55. Relying on *Meek*, the Court held that the result of providing instructional material to parents of students attending religious schools was prohibited because, “[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school.” *Id.* at 250 (quoting *Meek v. Pittenger*, 421 U.S. 349, 366 (1975)). Here, as in *Nyquist*, the Court rejected the argument that the aid was to parents (not the schools themselves), reasoning that because the religious schools plainly benefitted, allowing the aid on the grounds that it went to parents would exalt form over substance. *Id.* In the same way, it struck down aid to field trips on the theory that they were “an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct.” *Id.* at 254.

<sup>126</sup> 473 U.S. 373 (1985).

<sup>127</sup> 473 U.S. 402 (1985).

<sup>128</sup> *Grand Rapids*, 473 U.S. at 375, 379. The opinion directly quotes the district court, which found “without hesitation” that the schools are “pervasively sectarian . . . that the purposes of these schools is to advance their particular religions,” and that “a substantial portion of their functions are subsumed in the religious mission.” *Id.* at 379 (quoting *Am. United for Separation of Church & State v. Sch. Dist. of Grand Rapids*, 546 F. Supp. 1084, 1096 (W.D. Mich. 1982)). It gave three reasons for its holding: (1) teachers might “become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs”; (2) the programs created a “symbolic link between government and religion”; and (3) the programs had the effect of “providing a subsidy to the primary religious mission of the institutions affected.” *Id.* at 385.

<sup>129</sup> *Id.* at 388.

<sup>130</sup> *Id.* at 395–97 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 624–25 (1971)).

the monitoring scheme designed to ensure the public aid was not used for religious indoctrination created risk of an excessive entanglement between church and state.<sup>131</sup>

By now the Court's troubled efforts to articulate a set of principles governing when a use of public funds providing some benefit to religious schools violated the Establishment Clause had attracted widespread criticism.<sup>132</sup> In *Agostini*, the Court identified and rejected some of the presumptions that had been used to justify decisions striking down programs providing secular aid to students in religious schools on the theory such programs used public funds to advance religion.<sup>133</sup> The Court

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<sup>131</sup> *Aguilar v. Felton*, 473 U.S. 402, 409 (1985).

<sup>132</sup> *See, e.g.*, *Cnty. of Allegheny v. ACLU Greater Pittsburgh*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in judgment and dissenting in part) (“Substantial revision of our Establishment Clause doctrine may be in order . . . .”); *Aguilar*, 473 U.S. at 421 (O’Connor, J., dissenting) (expressing doubts about the entanglement analysis); *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985) (Rehnquist, J., dissenting) (“One of the difficulties with the entanglement prong is that . . . it creates an ‘insoluble paradox’ in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement.”); *see also* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 318–26 (2000) (discussing the progression of law from *Everson* to *Agostini* as it relates to the dichotomy of public involvement with private choice of schools); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 330–31 (1986) (“The Court’s sporadic retreat to the *Lemon* test probably reflects the intuition that there is something basically ‘right’ about the analytic tools of each prong—‘purpose,’ ‘effect,’ and ‘entanglement’—of the test. The Court’s recurrent drift away from *Lemon* doubtlessly reflects the belief that there is something dreadfully ‘wrong’ with the way that test is presently packaged.”); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach*, 72 CORNELL L. REV. 905, 908 (1987). Professor Simson suggests revisions to *Lemon* and other Establishment Clause jurisprudence to a more objective analysis because, “failure to minimize the extent to which judges are left to intuition in applying the test is apt to undermine the protective functions of the clause. Very simply, the promotion of religion is something that most people—judges included—have difficulty seeing as bad.” Simson, *supra*, at 908.

<sup>133</sup> The Court rejected three critical assumptions undergirding its decisions in *Ball* and *Aguilar*. *Id.* at 222–35. It rejected the idea that the placement of public employees in religious schools engendered illicit inculcation of religion by the state because intervening case law had rejected the idea that “solely because of her presence on private school property, a public employee will be presumed to inculcate religion.” *Id.* at 224 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that the public school district could provide a sign language interpreter to a deaf student in a parochial school as part of a federal program providing aid to the disabled)). In effect, *Zobrest* and *Witters* had rejected the presumption so heavily relied upon in *Lemon*, *Nyquist*, and *Aguilar*, where the Court had said it was not assuming that public school teachers would do the wrong thing—but had in effect presumed that they would do so unintentionally by striking down the aid based on this supposed risk. It rejected the idea that the presence of public employees in religious schools would create a symbolic union between church and state, observing that the same aid could be provided in the parking lot of religious schools while prior cases had concluded that “[t]o draw this

held that public aid would be deemed to have the effect of advancing religion only if it: (1) “result[ed] in governmental indoctrination” of religion; (2) “define[d] its recipients by reference to religion”; or (3) “creat[ed] an excessive entanglement” with religion.<sup>134</sup> Applying its newly refined criteria for evaluating whether government programs beneficial to religious schools had the primary effect of advancing religion, the Court concluded that the aid at issue in *Agostini* (sending public school teachers into parochial school classrooms to provide remedial instruction) passed muster under the Establishment Clause.<sup>135</sup>

*Mitchell v. Helms* represents the Court’s most recent effort to address spending programs providing some arguable benefit to religious schools and shows a Court still divided when wrestling with the troubled legacy of *Flast*.<sup>136</sup> In *Mitchell*, the Court addressed a challenge to application of the ESEA’s provisions allowing public funds to be used to purchase secular educational materials and equipment (for example library and media materials, computer hardware and software), allocated for use in public and private schools based on student enrollment, the very spending that had provoked the decision in *Flast*.<sup>137</sup> Relying heavily on *Meek* and *Wolman*, the challengers argued that the provisions at issue violated the Establishment Clause because it constituted “direct, nonincidental aid” to religious schools that could be (and had been) diverted to religious uses.<sup>138</sup>

The plurality opinion, authored by Justice Thomas, relied on the neutrality and private choice factors to reason that where aid was allocated based on religion-neutral criteria and directed as a result of individual choice, any benefit to religion arising from the aid program could not be attributed to the government.<sup>139</sup> By

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line based solely on the location of the public employee is neither ‘sensible’ nor ‘sound.’” *Id.* at 225–28. And it rejected the idea that “placing full-time public employees on parochial campuses to provide [secular] instruction would impermissibly finance religious indoctrination,” finding “most fatal to the argument . . . that it applies with equal force when those services are provided off campus,” an argument *Aquilar* had implicitly rejected. *Id.* at 228, 230.

<sup>134</sup> *Id.* at 234.

<sup>135</sup> *Id.* at 234–35.

<sup>136</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>137</sup> Compare *id.* at 801–03 (plurality opinion), with *Flast v. Cohen*, 392 U.S. 83, 85–88 (1968).

<sup>138</sup> *Mitchell*, 530 U.S. at 814 (internal quotation marks omitted).

<sup>139</sup> Citing *Agostini*, the plurality reasoned that whether funding violated the Establishment Clause depended ultimately on whether any resulting benefit to religion could be attributed to the government, and further, that the resolution of this question determined whether government aid “subsidized” religion in a manner prohibited by the Establishment Clause. *Id.* at 809 (citing *Zobrest*, 509 U.S. at 10; *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 488–89 (1986)). Next, the plurality found that when government extended secular aid on a neutral basis, there was no basis for a claim that government aid supported religious indoctrination. *Id.* at 809–13. And here the plurality emphasized that the Court had consistently treated evidence that a program allocated aid according to genuine private choice as strong indicia of neutrality while at the same time rejecting claims that aid programs violated the

the same token, so long as the aid provided by the government did not have religious content, any use of the aid for a religious purpose could not be attributed to government.<sup>140</sup> Here the plurality took pains to reject the claim that the aid was unconstitutional simply because it freed resources for religious uses.<sup>141</sup> And it went out of its way to reject the idea that the constitutionality of government programs providing some benefit to religious entities turned on whether these were deemed “pervasively sectarian,” reasoning that “the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government’s secular purpose.”<sup>142</sup> For these reasons, the plurality found the aid program did not violate the Establishment Clause as applied to religious schools and overruled *Meek* and *Wolman* to the extent they were inconsistent with the holding.<sup>143</sup>

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Establishment Clause merely because it had the effect of reducing some of the costs of education in religious schools. *Id.*

<sup>140</sup> *Id.* at 820. The plurality then connected *Allen* with subsequent cases where the Court had rejected claims that secular aid advanced religion in violation of the Establishment Clause by relying on neutrality and private choice, concluding that the “issue is not divertibility of aid but rather whether the aid itself has an impermissible content.” *Id.* at 819–23 (citing *Zobrest*, 509 U.S. at 18 (permitting public school district’s sign language interpreter in a parochial school despite serving as a potential medium for religious teaching to deaf student); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 486–87 (1986) (permitting funding of vocational education for students attending sectarian schools due to the principle of neutrality and decisions that are unattributed to government policy); *Mueller v. Allen*, 463 U.S. 388, 391 n.2 (1983) (allowing financial assistance to sectarian institutions through tax deductions for expenses incurred in sending their children to parochial schools without segregation to secular subjects); *Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968) (permitting aid so long as it is not “unsuitable for use in the public schools because of religious content”). Later the plurality in *Mitchell* buttressed this point by noting that there was ample evidence that some of the equipment (for example projectors or computers) had been used to convey religious content, but finding such diversion immaterial because it is not attributable to the government. *See Mitchell*, 530 U.S. at 820, 833–34 & n.17.

<sup>141</sup> *Id.* at 824–25. The Court noted, with a hint of irony (or maybe tongue-in-cheek), that it was “perhaps conceivable that courts could take upon themselves the task of distinguishing among the myriad kinds of possible aid based on the ease of diverting each kind. But it escapes us how a court might coherently draw any such line.” *Id.* at 825.

<sup>142</sup> *Id.* at 827.

<sup>143</sup> *Id.* at 829. The Court found no government-sponsored religious indoctrination because any religious activity that could be associated with the aid was not attributable to the government given that the aid was allocated on religiously neutral criteria and flowed according to genuine private choice. *Id.* at 829–31. In addition, the aid did not have religious content and consequently it could not be seen as violating the effects prong as interpreted in *Agostini*. *Id.* at 831. Here the plurality mustered opinions demonstrating that neither of the cases could be squared with the main weight of the Court’s holdings, including *Everson* and *Allen*, which had allowed programs providing similar benefits to religious schools. *Id.* at 835–36. And it reasoned that *Agostini* had effectively rejected the reasoning in *Meek* and *Wolman* when it rejected the presumption undergirding *Aguilar*. *Id.* at 836.

Justices O'Connor and Breyer concurred in the judgment resolving the case on narrower grounds based on the refined effects test laid down in *Agostini* and the factual similarity between those cases.<sup>144</sup> Of particular significance here is their rejection of *Meek* and *Wolman* as creating “two irreconcilable strands of our Establishment Clause jurisprudence,” one, represented by *Meek* and *Wolman*, that presumed divertibility of public aid to religious uses, and the other, represented by *Allen*, which refused to presume diversion.<sup>145</sup> They chose the rule applied in *Allen* with the consequence

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<sup>144</sup> The refined effects test found that the government did not define recipients based on religious criteria. *Id.* at 845–46 (O'Connor, J., concurring). In addition, the program did not result in government indoctrination for a number of interrelated reasons; it used federal funds to purchase secular materials loaned to religious schools in a manner designed to supplement, not supplant, funding from other sources, with protections designed to prevent the diversion of the aid to religious uses; and “no [government] funds ever reach[ed] the coffers of religious schools.” *Id.* at 846–49, 867. The concurring Justices rejected the plurality’s view that government aid to religious schools did “not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content.” *Id.* at 837. While acknowledging that neutrality was an important indicator that government programs distributing secular aid did not have the impermissible effect of advancing religion, the concurrence maintained that neutrality could not be viewed as dispositive. *Id.* at 839–40. They also rejected the plurality’s equation of direct and indirect aid, reasoning that the unique risks of divertibility presented by “direct aid,” particularly direct aid in the form of public funds, justified treating programs where the government provided aid directly to religious institutions, even on a per-capita basis, differently from programs where aid was directed based on “true private-choice” (for example vouchers used by private individuals). *Id.* at 840–44. Here the concurrence offered a distinction between “per-capita-aid” programs, where the government transfers aid directly to the religious school, even when allocated according to private choices (e.g., attendance) as opposed to what it called “true private-choice” programs (apparently meaning programs where the government directs or assigns aid to the individual recipient who can then use the aid, even if the use confers some benefit on a religious entity). *Id.* at 842.

<sup>145</sup> The plurality addressed the challengers’ two principal arguments. *See id.* at 814 (plurality opinion) (noting the challengers arguments that the Establishment Clause barred “direct, nonincidental aid” to religious schools and that the provision to religious schools of aid that is divertible to religious uses is barred by the Establishment Clause). The concurrence rejected the argument that *Meek* and *Wolman* required invalidation of programs providing aid in the form of instructional material. *Id.* at 849–52 (O'Connor, J., concurring). Referring to *Allen*, the concurrence noted that “[a]t the time they were decided, *Meek* and *Wolman* created an inexplicable rift within our Establishment Clause jurisprudence concerning government aid to schools.” *Id.* at 849 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968)). The concurrence explained by contrasting *Meek* and *Wolman* with *Allen*, and pointing out that “while the Court was willing to apply an irrebuttable presumption that secular instructional materials and equipment would be diverted to use for religious indoctrination [in *Meek* and *Wolman*], it required evidence that religious schools were diverting secular textbooks to religious instruction [in *Allen*].” *Id.* at 851. Emphasizing that the “inconsistency between the two strands of the Court’s jurisprudence did not go unnoticed,” the concurring Justices concluded that the distinction made between aid in the form of textbooks and other instructional materials was irrational. *Id.* at 851–52.

that in order “[t]o establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes.”<sup>146</sup>

Two points stand out from the Court’s thirty-year effort to resolve the merits of cases advanced under *Flast*. The first is that the Court ultimately rejected the presumptions it had created to justify decisions holding that programs providing some aid or benefit to religious entities performing secular services violated the Establishment Clause. As explained further below, these presumptions served as gap-fillers that remedied the lack of taxpayer injury needed to support standing in the first place. The Court’s rejection of these presumptions invites renewed attention to the injury said to support standing.

The second point is that the Court ended up with a test that required plaintiffs to demonstrate that public aid had actually been used to advance religion. Here too, the Court’s renewed focus on the actual use of aid provided with public funds emphasizes the need to demonstrate taxpayer injury to support standing in the first place.

There is good reason to believe that the Court’s more recent decisions will yield a stable set of principles that can be used to evaluate challenges to public programs advanced under the Establishment Clause. But the larger question is why federal courts ever decided these cases in the first place. Before turning to that question it is necessary to briefly examine the Court’s efforts to deal with *Flast*’s standing test.

### III.

The Court dealt with taxpayer standing in a handful of cases from *Flast* to *Winn* that provide the foundation for the reform of *Flast*.<sup>147</sup> *Flast* purported to create an exception to the general bar on taxpayer standing laid down in *Frothingham* on the grounds that the Establishment Clause was designed to protect taxpayers from a specific and very personal injury—a use of the tax and spend power to coerce support for religion.<sup>148</sup> For this reason, the Establishment Clause was understood to create

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<sup>146</sup> Justices O’Connor and Breyer agreed with the plurality that *Agostini* had undermined the presumption undergirding *Meek* and *Wolman* and joined the plurality to overrule those decisions. *Id.* at 857. The concurring Justices rejected the argument that the actual use of some of the materials in connection with religious instruction was a diversion of aid to a religious use that required the program to be struck down on the grounds that the evidence of actual diversion was *de minimis* and could not justify such a drastic remedy. *Id.* at 860–67.

<sup>147</sup> *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). Together these cases develop a discussion between the variety of interests that have weighed against any exception to *Frothingham*’s bar on taxpayer standing beyond that of Congress’s Article I, § 8 taxing and spending powers limited by the Establishment Clause.

<sup>148</sup> *Flast v. Cohen*, 392 U.S. 83, 102–06 (1968) (“We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. . . . Consequently, we hold that a taxpayer will have standing consistent

a specific restraint on the tax and spend power.<sup>149</sup> And the two-pronged test promulgated in *Flast* was said to distinguish taxpayers advancing claims arising from this personal injury made cognizable by the Establishment Clause from other cases where the Court had rejected taxpayer suits as generalized grievances.<sup>150</sup>

*Flast* quite naturally engendered taxpayer litigation designed to test the limits of the bar on taxpayer grievances created by *Frothingham*, and the Court's response was remarkably consistent. The Court consistently refused to find that other constitutional provisions served as a limitation on the tax and spend power and reinforced the general bar on taxpayer standing laid down in *Frothingham*.<sup>151</sup> The Court refused to extend *Flast* in any way, shape, or form, limiting *Flast* to its role as a restraint on a congressional exercise of its tax and spend power to appropriate funds "in aid of religion,"<sup>152</sup> the proposition it took *Flast* to stand for.<sup>153</sup>

The feature of these cases that is pertinent here is the Court's discussion of the taxpayer injury that justified the *Flast* exception to the bar on taxpayer grievances created by *Frothingham*. It is the contribution these cases made to the Court's refined focus on the injury that justified the exception in *Flast*. That exception provided the foundation for *Winn* and fosters an opportunity to refine the application of *Flast* along lines that are consistent with the original understanding of the Establishment Clause.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,<sup>154</sup> the Court confronted a taxpayer challenge to the Department of Health Education and Welfare's (HEW) transfer of federal property to a Christian

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with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.").

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 104–05.

<sup>151</sup> See *Cuno*, 547 U.S. at 347 (refusing to find that the Commerce Clause served as a limitation on the tax and spend power); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (rejecting the contention that the Incompatibility Clause operated as a specific check on the tax and spend power that supported standing for taxpayers who argued that the clause prohibited reservists from receiving payment while sitting as members of Congress); *United States v. Richardson*, 418 U.S. 166, 174–75 (1974) (rejecting the claim that the Accounts Clause supported standing for taxpayers challenging a statute that authorized disbursements to the CIA without providing an accounting).

<sup>152</sup> *Cuno*, 547 U.S. at 348.

<sup>153</sup> See *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 609–10 (2007) (refusing to consider taxpayer standing against congressional appropriations to an Executive Branch department that would grant funds to faith-based initiative groups); *Cuno*, 547 U.S. at 347 (refusing to extend taxpayer standing under the Commerce Clause); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 479–482 (1982) (refusing to extend taxpayer standing to challenge Executive Branch action taken pursuant to Property Clause of Art. IV).

<sup>154</sup> 454 U.S. 464 (1982).

college at no charge to the college (because the property would be used for an educational purpose).<sup>155</sup> The plaintiffs were allowed to proceed based on their status as taxpayers and based on allegations that they “would be deprived of the fair and constitutional use of his (her) tax dollars for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution,” and sought to undo the transfer.<sup>156</sup>

The Supreme Court held that the taxpayers lacked standing.<sup>157</sup> The Court began by noting that *Frothingham* had rejected a taxpayer’s challenge to federal spending, although premised on the claim that it would result in increased taxation, because the relationship between the expenditure and the tax burden was remote and uncertain, and as a result, the plaintiff failed to show a direct personal injury but, instead, “suffer[ed] in some indefinite way in common with people generally.”<sup>158</sup> *Doremus* was used to illustrate the proposition because in that case the Court had relied on *Frothingham* to reject taxpayers’ challenge to religious readings in the classroom on the ground that the plaintiffs’ grievance was “not a direct dollars-and-cents injury but is a religious difference.”<sup>159</sup>

The Court held that the plaintiffs did not satisfy the test in *Flast*, essentially because the plaintiffs challenged an Executive Branch decision, not a congressional exercise of its tax and spend power.<sup>160</sup> The Court acknowledged that the taxpayer plaintiffs were deeply offended by the transfer of property to a religious institution and believed it was unconstitutional, but held that they did not have the personal stake needed to support standing because “[t]hey fail to identify any personal injury suffered by them as a consequence of the alleged unconstitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.”<sup>161</sup>

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<sup>155</sup> *Id.* at 466–69.

<sup>156</sup> *Id.* at 469. Americans United grounded its standing on its status as an organization with over ninety thousand “taxpayer members,” and indeed, the Court found that standing had to be grounded among its membership because the corporation demonstrated no distinct injury of its own. *Id.* at 476–77 & n.14.

<sup>157</sup> See generally *Valley Forge*, 544 U.S. 464 (1982).

<sup>158</sup> *Id.* at 478 (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)).

<sup>159</sup> *Id.* at 478 (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (internal quotation marks omitted)). The Court also emphasized that *Flast* had distinguished *Frothingham* on the grounds that the plaintiff had not invoked “a specific limitation on [Congress’s] power to tax and spend.” *Id.* at 479.

<sup>160</sup> The Court gave two reasons for its holding. First, the *Flast* exception was a restraint on the exercise of legislative (not executive) power, but the plaintiffs sought to challenge an executive branch decision. *Id.* at 479 & n.15. Second, the property transfer here was not an exercise of Congress’s taxing and spending power. *Id.* at 480.

<sup>161</sup> *Id.* at 485 (emphasis omitted). In a footnote, the Court cited back to *Schlesinger*’s citation of *Doremus*, stating that:

[w]e have no doubt about the sincerity of the respondents’ stated objectives and the depth of their commitment to them. But the essence of

*Valley Forge* was significant because the plaintiffs sought to use their status as taxpayers to bootstrap standing for their objection to a transfer of federal property to a religious organization, an injury not made cognizable in *Flast*.<sup>162</sup> The Court refused to allow the plaintiffs to use their taxpayer status to support standing based on an injury not connected to a use of the taxpayers' money.<sup>163</sup> And by the same token it found that the injury relied on by the taxpayers was not cognizable under *Flast* because the individual taxpayers could not show the personal "dollars-and-cents injury" needed to support taxpayer standing.<sup>164</sup>

*Valley Forge* was followed by *Bowen v. Kendrick*,<sup>165</sup> a taxpayer challenge to the funding of religious organizations under the Adolescent Family Life Act (AFLA).<sup>166</sup> The AFLA program provided grants to private organizations to provide secular services, including counseling regarding premarital sex and pregnancy,<sup>167</sup> and the taxpayers alleged that the program violated the Establishment Clause on its face and as-applied.<sup>168</sup> The district court struck down the act on its face reasoning that the act advanced religion because supporting counseling rendered by religious organizations made it "possible for religiously affiliated grantees to teach adolescents on issues that can be considered 'fundamental elements of religious doctrine,'" and "[t]o presume that . . . counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic."<sup>169</sup> The Supreme Court reversed, holding AFLA was constitutional on its face and remanding the case for consideration of the as-applied challenge to determine whether any grants to religious organizations violated the Establishment Clause.<sup>170</sup>

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standing "is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct."

*Id.* at 487 n.21 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225–26 (1974)).

<sup>162</sup> *Id.* at 479–80, 482.

<sup>163</sup> *Id.* at 480–81 n.17.

<sup>164</sup> *Id.* at 478–80.

<sup>165</sup> 487 U.S. 589 (1988).

<sup>166</sup> *Id.* at 593, 597; Pub. L. 97-35, 95 Stat. 578 (codified as amended at 42 U.S.C. § 300z *et seq.* (1982 & Supp. IV 1982)).

<sup>167</sup> *Id.* at 597.

<sup>168</sup> *Id.* at 593.

<sup>169</sup> *Id.* at 598–99 (quoting *Bowen v. Kendrick*, 657 F. Supp. 1547, 1562–63 (D.D.C. 1987) (internal quotation marks omitted)).

<sup>170</sup> *Id.* at 593. Rejecting the facial challenge, the Court held that there was no reason to presume that religious organizations could not deliver the secular counseling that AFLA funds were designed to support while entertaining the idea that the program would be unconstitutional if it granted those same funds for the same purpose largely to institutions that were pervasively sectarian. *Id.* at 604, 608–13.

Of interest here is the Court's rejection of the argument that the plaintiffs had no standing under *Valley Forge* because they were challenging Executive Branch contracting decisions (not a congressional exercise of the tax and spend power), and the dispute concerning the remand.<sup>171</sup> Observing that *Flast* had involved a suit against an executive branch official administering a spending program created by Congress, the Court emphasized that "AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate."<sup>172</sup> For this reason, it held that there was a "sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute," and distinguished *Valley Forge* on the grounds that it involved an exercise of executive power under the Property Clause.<sup>173</sup> Because the plaintiffs could show an exercise of congressional tax and spend authority they fit within *Flast*, even as narrowly construed in *Valley Forge*.

The holding here represented an orthodox application of *Flast*, which had held that the taxpayers had standing to challenge ESEA grants to religious schools just because the resources purchased by public funds provided a benefit to religious schools.<sup>174</sup> Here, of course, the public monies (not materials) were being transferred to religious institutions to implement a secular program.<sup>175</sup> Even so, that left the Court in *Bowen* with the same question so often begged in these cases: exactly how did the use of funds inflict the taxpayer injury identified in *Flast*?

The Court remanded the as-applied challenge but fractured as to the principles that should control the proceedings below.<sup>176</sup> The Court agreed that the District Court's holding that AFLA aid had been given to pervasively sectarian religious organizations was not adequately supported by the record<sup>177</sup> and consequently relief could not be justified on the assumption that organizations with a religious dimension could not deliver secular counseling services without inculcating religion.<sup>178</sup>

But the majority could not agree as to the use of funds that would support a finding of liability on the remand. Justice Rehnquist, joined by Justices O'Connor

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<sup>171</sup> *Id.* at 619–20.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>175</sup> *Bowen*, 487 U.S. at 597.

<sup>176</sup> *Id.* at 621 (claiming that these would be an as applied violation if aid went to a "pervasively sectarian" religious organization); *id.* at 623–24 (O'Connor, J., concurring) (arguing any use of public funds in the promotion of religious doctrine violates the Establishment Clause); *id.* at 624 (Kennedy, J., concurring) (disagreeing with the Court's standard for lower courts).

<sup>177</sup> *Id.* at 620–21 (majority opinion).

<sup>178</sup> *Id.* at 613, 620 (noting the services authorized by AFLA "are not themselves 'specifically religious activities,' and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations").

and White, indicated that on remand the appellees should have a chance to “show that AFLA aid is flowing to grantees that can be considered ‘pervasively sectarian’ religious institutions, such as we have held parochial schools to be,” while cautioning that “it is not enough to show that the recipient . . . is affiliated with a religious institution or that it is ‘religiously inspired.’”<sup>179</sup> He also indicated that the District Court should “consider . . . whether in particular cases AFLA aid has been used to fund ‘specifically religious activit[ies] in an otherwise substantially secular setting.’”<sup>180</sup>

Justices Kennedy and Scalia concurred in the decision but wrote separately to disavow the idea that relief turned on whether AFLA grantees were “pervasively sectarian.”<sup>181</sup> In their view, “such a showing will not alone be enough . . . to make out a violation of the Establishment Clause.”<sup>182</sup> They reasoned that “the only purpose of further inquiring whether any particular grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion” because the “question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant.”<sup>183</sup>

In *DaimlerChrysler Corp. v. Cuno*,<sup>184</sup> the Court rejected the idea that the Commerce Clause served as a specific restraint on the tax and spend power that would support taxpayer standing akin to the Establishment Clause.<sup>185</sup> It did so on the ground that “[w]hatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to ‘contribute three pence . . . for the support of any one [religious] establishment.’”<sup>186</sup> Here, the Court emphasized that the *Flast* Court had found that one of the “specific evils” the Establishment Clause was meant to address was “that the taxing and spending power would be used to . . . support religion.”<sup>187</sup> It had “understood the ‘injury’ alleged . . . in challenges to federal spending to be the very ‘extract[ion] and spend[ing]’ of ‘tax money’ in aid of religion,”<sup>188</sup> and it had concluded that restraint of such spending would “redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer . . . personally.”<sup>189</sup> Because there was no indication that the Commerce Clause was intended to act as a similar restraint on the taxing power, the Court held the taxpayers had only a “generalized grievance[ ].”<sup>190</sup>

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<sup>179</sup> *Id.* at 621.

<sup>180</sup> *Id.* at 621 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

<sup>181</sup> *Id.* at 624–25 (Kennedy, J., concurring).

<sup>182</sup> *Id.* at 624.

<sup>183</sup> *Id.* at 624–25.

<sup>184</sup> 547 U.S. 332 (2006).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 347.

<sup>187</sup> *Id.* at 348 (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968)).

<sup>188</sup> *Id.* (quoting *Flast*, 392 U.S. at 106).

<sup>189</sup> *Id.* at 348–49 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 514 (1982) (Stevens, J., dissenting)).

<sup>190</sup> *Id.* at 348.

Then in *Hein*,<sup>191</sup> the Court held that *Flast* did not give taxpayers standing to challenge an Executive Branch initiative designed to ensure that faith-based organizations enjoyed equal access to federal grant programs on the grounds that it violated the Establishment Clause, albeit without a majority opinion.<sup>192</sup> The plurality opinion, authored by Justice Alito and joined in by Chief Justice Roberts and Justice Kennedy held that the plaintiffs' claim was a generalized grievance barred by *Frothingham*, and used *Doremus* as an example of a taxpayer attempting to assert the "interests of the public at large," because the grievance in that case was "not a direct dollars-and-cents injury but . . . a religious difference."<sup>193</sup> The plurality distinguished *Flast* on the grounds that "[t]he expenditures challenged in *Flast* . . . were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate."<sup>194</sup> It distinguished *Bowen* because "AFLA not only expressly authorized and appropriated specific funds for grantmaking, it also expressly contemplated that some of these moneys might go to projects involving religious groups."<sup>195</sup> Finding that the congressional appropriation to the executive branch "did not expressly authorize, direct, or even mention the expenditures," the plurality reasoned that the "link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here," and refused to extend *Flast* to a use of public funds that "resulted from executive discretion, not congressional action."<sup>196</sup>

The plurality rejected the argument that distinguishing *Flast* on the grounds that in *Hein* the Executive Branch had spent money without congressional approval was arbitrary because the injury to the taxpayer was the same.<sup>197</sup> Here, it emphasized that *Flast* itself had rested on a distinction between congressional appropriations and

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<sup>191</sup> *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007).

<sup>192</sup> *Id.* at 592–95. The plaintiffs alleged that the program violated the Establishment Clause because it advanced religion, grounding their standing on their status as "federal taxpayers . . . opposed to the use of Congressional . . . appropriations to advance and promote religion." *Id.* at 595–96 (quoting Amended Complaint at ¶ 10, *Freedom From Religion Found., Inc. v. Chao* (W.D. Wisc. Sept. 6, 2007) (No. 04 C 0381S)).

<sup>193</sup> *Id.* at 600–01 (quoting *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952)).

<sup>194</sup> *Id.* at 604. By way of support for this assertion, the plurality noted that "[a]t around the time the [ESEA] was passed and *Flast* was decided, the great majority of nonpublic elementary and secondary schools . . . were associated with a church," and consequently "Congress surely understood that much of the aid mandated by the statute would find its way to religious schools." *Id.* at 604 n.3. I realize this reading of *Flast* can be questioned, but the important point here is to understand how the Court is reading *Flast*.

<sup>195</sup> *Id.* at 606–07 (citing *Bowen v. Kendrick*, 487 U.S. 589, 595–96 (1988)). The plurality rejected the plaintiff's reliance on *Bowen* "for the simple reason that they can cite no statute whose application they challenge. The best they can do is to point to unspecified, lump-sum 'Congressional budget appropriations' for the general use of the Executive Branch." *Id.*

<sup>196</sup> *Id.* at 605.

<sup>197</sup> *Id.* at 609.

merely incidental expenditures (the grounds used to distinguish *Doremus*), and refused to extend *Flast* to the Executive Branch on the grounds that this would raise serious separation of powers concerns that *Flast* had failed to value properly.<sup>198</sup>

The Court was plainly divided. Justice Kennedy joined the plurality opinion,<sup>199</sup> but wrote separately to affirm *Flast* while emphasizing the separation of powers concerns that justified the refusal to extend taxpayer standing to discretionary spending by the Executive Branch.<sup>200</sup> Justices Scalia and Thomas concurred in the judgment, but offered a scathing critique of the plurality opinion, arguing that there was no principled way to distinguish the harm at issue in *Hein* from the injury alleged in *Flast* and calling for the overruling of *Flast* as inconsistent with Article III limitations on judicial power.<sup>201</sup> For their part, the dissenters rejected the distinction between Legislative Branch and Executive Branch expenditures as supported by neither logic nor precedent.<sup>202</sup> Such was the unhappy state of *Flast* when the Court took up *Arizona Christian School Tuition Organization v. Winn*.<sup>203</sup>

In *Winn*, the Court took up a question it had passed over in *Cuno* and addressed the kind of use of the taxing power that might violate the Establishment Clause.<sup>204</sup> In that case state taxpayers argued that tax credits extended to state taxpayers for contributions to school tuition organizations (STOs) providing scholarships to religious schools advanced religion in violation of the Establishment Clause.<sup>205</sup> The taxpayer plaintiffs argued that the law allowed STOs “to use State income-tax revenues to pay tuition for students at religious schools, some of which [would] discriminate on the basis of religion.”<sup>206</sup> The Court granted certiorari and dismissed the claim for lack

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<sup>198</sup> *Id.* at 609–10 (“*Flast* itself distinguished the incidental expenditure of tax funds in the administration of an essentially regulatory statute . . . .” (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)) (internal quotation marks omitted)). Citing the potentially far-reaching implications such an extension of *Flast* would have in terms of judicial oversight of Executive Branch activities, the Court indicated the argument would raise serious separation of powers concerns that *Flast* itself had weighed too lightly. *Id.* at 611. For further discussion on the connection between standing and separation of powers, see Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers after Massachusetts and Hein*, 20 REGENT U. L. REV. 175, 198 (2007–2008) (“[E]xcessive judicial involvement could threaten the vitality of separation of powers and can undermine the vitality of self-government.”).

<sup>199</sup> *Id.* at 588.

<sup>200</sup> *Hein*, 551 U.S. at 615–18 (Kennedy, J., concurring).

<sup>201</sup> *Id.* at 618 (Scalia, J., concurring).

<sup>202</sup> *Id.* at 637 (Souter, J., dissenting).

<sup>203</sup> 131 S. Ct. 1436 (2011).

<sup>204</sup> *Compare id.* at 1447, with *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006) (observing that “[q]uite apart from whether the franchise tax credit is analogous to an exercise of congressional power under Article I, § 8, plaintiffs’ reliance on *Flast* is misguided”).

<sup>205</sup> *Winn*, 131 S. Ct. at 1440.

<sup>206</sup> *Id.* at 1441 (quoting Complaint at ¶¶ 29–31, *Arizona Christian Sch. Tuition Org. v. Winn*, 361 F. Supp.2d 1117 (D. Ariz. 2005) (No. CIV. 00-0287-PHXEH)) (internal quotation marks omitted).

of taxpayer standing holding that the taxpayer claim did not fit within *Flast* and therefore was a generalized grievance barred by the rule in *Frothingham*.<sup>207</sup>

The Court began by noting that in *Flast* the two-pronged test had been “deemed satisfied . . . based on the allegation that Government funds had been spent on an outlay for religion in contravention of the Establishment Clause.”<sup>208</sup> Here, it emphasized that *Flast* “understood the ‘injury’ . . . to be the very ‘extract[ion] and spen[ding]’ of ‘tax money’ in aid of religion alleged by a plaintiff,”<sup>209</sup> and that “[s]uch an injury’ . . . is unlike ‘generalized grievances about the conduct of government’ and so is ‘appropriate for judicial redress.’”<sup>210</sup> The Court relied once again on Madison’s *Memorial and Remonstrance* as epitomizing the harm the Establishment Clause was meant to prevent, that is, the use of the taxing and spending power to take an individual’s money and apply it to support religion.<sup>211</sup>

With this framework in mind, the Court rejected the plaintiffs’ effort to secure taxpayer standing on the grounds that “the tax credit is, for *Flast* purposes, best understood as a governmental expenditure.”<sup>212</sup> The Court emphasized that “[a] dissenter whose tax dollars are ‘extracted and spent’ knows that he has in some small measure been made to contribute to an establishment in violation of conscience,” while the tax credit given to those who contributed to STOs did “not ‘extrac[t] and spen[d]’ a conscientious dissenter’s funds in service of an establishment.”<sup>213</sup> And from this it followed that the plaintiffs could not establish causation and redressability; the tax credit program did not cause an improper spending of the taxpayers’ money to support religion, and by the same token, enjoining the tax credit program would not halt a use of the taxpayer’s funds deemed improper under *Flast*.<sup>214</sup>

Taken together these cases show the result of the Court’s ongoing effort to define the taxpayer injury needed to support standing under *Flast*. The Court has insisted that the injury must be caused by a congressional exercise of the taxing and spending power, not executive or (presumably) judicial action.<sup>215</sup> And here the Court

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<sup>207</sup> *Id.* at 1440–41. Emphasizing the separation of powers concerns underlying the bar on taxpayer standing, the Court stated that “claims of taxpayer standing rest on unjustifiable economic and political speculation” as support for its holding that the taxpayers’ challenge to the tax credit was barred for the same reasons that barred any taxpayer suit, and that plaintiff’s argument did not fit within the *Flast* exception. *Id.* at 1441–47 (citing *Cuno*, 547 U.S. at 344).

<sup>208</sup> *Id.* at 1445 (citing *Flast v. Cohen*, 392 U.S. 83, 85–86 (1968)).

<sup>209</sup> *Id.* at 1446 (quoting *Cuno*, 547 U.S. at 348).

<sup>210</sup> *Id.* at 1446 (quoting *Flast*, 392 U.S. at 106).

<sup>211</sup> *Id.* at 1446 (“In Madison’s view, government should not ‘force a citizen to contribute three pence only of his property for the support of any one establishment.’” (quoting *Flast*, 392 U.S. at 103)).

<sup>212</sup> *Id.* at 1447.

<sup>213</sup> *Id.* at 1447 (quoting *Flast*, 392 U.S. at 106).

<sup>214</sup> *Id.* at 1447–48.

<sup>215</sup> *See id.* at 1445 (noting that courts require that taxpayers can only challenge a statute

has insisted that Congress specifically authorized the appropriation said to violate the Establishment Clause in *Bowen* and *Hein*.<sup>216</sup> In *Valley Forge*, the Court made it plain that taxpayers had to point to an identifiable expenditure of public funds in order to proceed under *Flast*.<sup>217</sup>

Other cases have focused more on the use of the taxing power. *Cuno* and *Winn* shed light on the specific use of the taxing power needed to support standing. In *Cuno*, the Court's scrutiny of *Flast* led it to emphasize that the taxpayer injury made cognizable in *Flast* was a use of the tax power to extract money from an individual that later is used to support religion.<sup>218</sup> In *Winn*, the Court rejected a taxpayer's challenge to a use of the tax power that did not involve such an extraction and spending of taxpayer money to finance religion.<sup>219</sup>

*Winn* is the fruit of the Court's painstaking efforts to make sense of *Flast* while it has struggled to address cases entering the federal courts under *Flast*'s two-pronged test.<sup>220</sup> The Court's efforts have yielded a rigorous analysis of the precise injury described in the *Flast* decision, and therefore, the precise use of the tax and spend power that is properly restrained. The Court can engage in a meaningful reform of *Flast* if it employs the same rigor when it evaluates the precise use of the spending power that inflicts the personal injury (thereby creating the personal stake needed to support taxpayer standing under *Flast*).

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under the Establishment Clause if "the allegation was that the Federal Government violated the . . . Clause in the exercise of its legislative authority both to collect and spend tax dollars"). The *Winn* Court cited both *Hein* and *Valley Forge*. *Id.*

<sup>216</sup> *See id.* at 1445.

<sup>217</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982).

<sup>218</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006).

<sup>219</sup> *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1437 (2011).

<sup>220</sup> These painstaking efforts have prompted praise and criticism in scholarship written in the short span of time since the decision. Some have viewed the *Winn* decision as shortchanging the analysis needed in standing and Establishment Clause jurisprudence. *See* Marshall & Nichol, *supra* note 8, at 251–52. Others have viewed the *Winn* decision as aptly focusing more closely on the precise harm caused by the alleged constitutional violation. Tim Keller, *Arizona Christian School Tuition Organization v. Winn: Does the Government Own the Money in Your Pocket?*, 2011 CATO SUP. CT. REV. 149, 182 (noting that there was no harm because Arizona taxpayers were spending "their own money," not other taxpayers' money). The discussion criticizing the decision appears focused on the alleged need to broaden standing doctrines to allow obviously constitutional "psychic harm" injuries rather than focusing closely on the Article III requirements of insuring that proper plaintiffs are proceeding in the action and that the injury alleged meets *Flast*'s test. *Compare* Marshall & Nichol, *supra* note 8, at 252 ("Failing to grant standing to those asserting these [psychic harm] injuries means core Establishment Clause guarantees will be violated without judicial redress."), *with* Keller, *supra*, at 181–82 ("The plaintiffs in *ACSTO* could not show a particular injury because the tax credits at issue did not extract and spend the plaintiffs' money.").

## IV.

*Flast* continues to provoke controversy more than forty years after it was decided and therefore continues to demand our attention.<sup>221</sup> Courts and commentators continue to look for a solution.<sup>222</sup> Must *Flast* be overruled or can it be refined so as to improve on the defects that prompt criticism without disregarding the parts of the decision that seem to account for its resilience? I believe the answer to these questions can be found by looking at *Flast* in the context provided here.

In fashioning the exception to the bar on taxpayer grievances erected in *Frothingham*, the Court in *Flast* was able to make a persuasive showing that the Establishment Clause was meant to prohibit the use of civil law to compel financial support for religion.<sup>223</sup> The core element of *Flast* was an individual liberty interest protected by the Establishment Clause.<sup>224</sup>

*Flast* showed that using the taxing and spending power to take a citizen's money to support religion was understood to violate the right to religious liberty that the First Amendment was designed to protect.<sup>225</sup> And it demonstrated the connection between that individual liberty interest and one's status as a taxpayer which, in turn, supported the claim that the Establishment Clause was understood to impose a restraint on the tax and spend power.<sup>226</sup> By identifying the specific use of public funds which violated the religious liberty protected by the First Amendment, the Court could make a persuasive showing that the taxpayer whose funds were taken to support religion had a concrete and personal "injury-in-fact" that was properly cognizable under the Establishment Clause.<sup>227</sup>

In addition, the two-pronged test fashioned in *Flast* does serve to distinguish taxpayer grievances advanced under the Establishment Clause from other taxpayer grievances in a meaningful way. The test allowed the Court to anchor the exception created in *Flast* to the connection it demonstrated between taxpayer status and the individual religious liberty interest protected by the Establishment Clause. In this way, the test allowed the Court to create an exception to the general bar on taxpayer standing erected in *Frothingham* without undermining, in principle, the important role the Court's standing doctrine plays in promoting the separation of powers.

*Flast* endures for these reasons. Its core premise, that is, that the Establishment Clause was meant to prohibit the use of the tax and spend power to compel support

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<sup>221</sup> See, e.g., Edward R. Shaoul, Comment, Arizona Christian School Tuition Organization v. Winn: Reconsidering *Flast*'s Exception to the Rule Against Taxpayer Standing and Establishing the Tax Credit Distinction, 89 DENV. U. L. REV. 305 (2011).

<sup>222</sup> See *id.*

<sup>223</sup> *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968).

<sup>224</sup> See generally *Flast*, 392 U.S. 83.

<sup>225</sup> *Id.* at 104–06.

<sup>226</sup> *Id.* at 105–06.

<sup>227</sup> *Id.* at 87, 103.

for religion because this infringed on a personal right to religious liberty, is historically defensible and continues to command respect.<sup>228</sup> The two-pronged test—for all its defects—does serve to differentiate the Establishment Clause from other provisions as a specific restraint on the tax and spend power.

*Flast* remains controversial—and reform is necessary—because its actual holding is deeply flawed. The *Flast* Court found standing even though the taxpayers had not demonstrated the personal injury the Court had used to justify the exception it created to *Frothingham*'s bar on taxpayer grievances.<sup>229</sup> In doing so, it utterly disregarded the historical understanding of the Establishment Clause. The historical record that the Court relied on to justify the exception in *Flast* supports the view that the Clause operated as a limitation on the tax and spend power to protect individuals from being coerced into supporting inherently religious activities.<sup>230</sup> But the historical record also shows that spending measures which involved outright payments to religious institutions providing secular services were not understood to violate the religious liberty provisions.<sup>231</sup>

This original understanding of the comparatively limited scope of the restraint on the tax and spend power created by the Establishment Clause was not based on any failure to appreciate that spending programs which transferred public funds to religious institutions performing secular services were beneficial to religious institutions. Quite the contrary, the controversy that sparked the Blaine Amendment and others like it proceeded from a recognition of, and objection to, such programs for this very reason.<sup>232</sup> But the fundamental point is that the movement to amend the federal and state constitutions to prohibit such practices conclusively demonstrates a consensus that this practice did not violate the original religious liberty provisions of the federal or state constitutions.<sup>233</sup>

The history of the original religious liberty provisions and the Blaine Amendments show that the use of public funds to support religious institutions providing secular social services was understood to be different from the use of public funds to support inherently religious activity.<sup>234</sup> Put in terms of the personal injury to a

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<sup>228</sup> *Id.* at 104–06; *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1445–47 (2011).

<sup>229</sup> *See Flast*, 392 U.S. at 88, 102.

<sup>230</sup> *See, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 186 (Hunt ed., 1901) [hereinafter *Memorial and Remonstrance*].

<sup>231</sup> *See Bradford v. Roberts*, 175 U.S. 291 (1899) (holding that contracting with a religiously affiliated hospital did not amount to an unconstitutional establishment of religion).

<sup>232</sup> *See HAMBURGER, supra* note 27, at 298–300 (discussing the Blaine movement and an 1876 draft for a proposed amendment that would strengthen the separation of church and state in light of the inadequacies of the First Amendment).

<sup>233</sup> *Id.* at 298–301.

<sup>234</sup> *See, e.g.*, O'Brien, *supra* note 31, at 155–57 (outlining the original rationale that Blaine wrote in his letter to Congress advocating for the amendment).

religious liberty interest, the distinction can be framed as follows. The use of public funds to finance inherently religious activities was understood to violate the right to religious liberty protected by those same religious liberty provisions. In contrast, the use of public funds to finance the provision of secular services by private entities, including religious entities, was understood to finance the secular activity and therefore was quite sensibly not taken to violate the personal right to religious liberty guaranteed by the original liberty provisions.

By chance or design, the holding in *Flast* involved a sleight of hand. It justified the exception to the bar on taxpayer standing with reference to a particular taxpayer injury, the use of public funds to support inherently religious activity. But the Court held the plaintiffs had standing in *Flast* without showing any such a misuse of public funds. Instead of requiring the plaintiffs to show an actual use of taxpayer funds to support inherently religious activity, the Court let the plaintiffs get by with nothing more than a showing that public funds provided a collateral benefit to institutions with a religious character. Put another way, the Court replaced the inquiry required by the Establishment Clause with the inquiry allowed by the Blaine Amendment. By allowing the plaintiffs to proceed without showing the actual injury-in-fact described in *Flast*, the Court *assumed* the existence of the taxpayer injury properly deemed cognizable under the Establishment Clause.

*Flast* is controversial and problematic because of this disconnect between the rationale for the rule it announced and the actual holding in the case. The two-pronged test served to distinguish the injury made cognizable under the Establishment Clause from other taxpayer grievances. But it did not conclusively resolve the standing issue because it was only an initial step toward the scrutiny of the factual basis for standing required by Article III as interpreted by *Frothingham* and the principle for the exception in *Flast*.<sup>235</sup> Properly applied, *Flast* required the Court to determine whether the plaintiffs' showing actually supported the injury the Court had described when it fashioned the exception in *Flast*,<sup>236</sup> but the Court failed to engage in that analysis.<sup>237</sup> The result of this disconnect between the rationale in *Flast* and its actual holding was to vastly expand the range of challenges that could be advanced under *Flast* in a manner wholly inconsistent with the original understanding of the Establishment Clause.

The Court's tortured effort to fashion a principled body of precedent in cases involving spending programs that conferred some form of benefit to religious institutions providing secular services was a direct result of the flawed holding in *Flast*. When the Court in *Flast* assumed the taxpayer injury needed to support standing, it licensed a wide range of taxpayer challenges to spending programs providing some collateral benefit to religious institutions. Reading the cases gives one the impression

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<sup>235</sup> For a recent piece forcefully highlighting this defect in *Flast*, see Kmiec, *supra* note 5, at 510.

<sup>236</sup> *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

<sup>237</sup> *Id.* at 106.

that the assumption of injury the Court used to find standing in *Flast* slowly led to a presumption of violation when the Court decided the merits.

Indeed, when one looks back at the cases proceeding under *Flast*, the striking feature of the case law is an utter lack of any meaningful connection between the actual use of public funds and any religious activity. The plaintiffs in *Nyquist* could not show that the maintenance grant was actually used to finance upkeep of the chapel.<sup>238</sup> There was no way in which the taxpayers in *Lemon* could show that the modest salary supplement actually financed any religious message uttered by the instructor as opposed to the instruction in secular subjects the funding was meant to finance.<sup>239</sup> There was no way that the taxpayers in *Meek*, *Wolman*, *Ball* or *Aguilar* could show that secular educational materials or funds used for educational activities actually financed any religious commentary that might attend use of texts or other instructional materials or might be uttered on a field trip. For that matter, there was no way in which the plaintiffs in *Flast* could show that materials purchased with public funds were used to finance religious activity in private schools.<sup>240</sup>

The plaintiffs in these taxpayer suits could not—and did not—attempt to show an actual use of public funds to pay for inherently religious activity. In fact, these cases were not about the actual use of public funds to finance religious activity. That is why the claims advanced were based on presumptions about the use of aid provided with public funds. Indeed, the presumptions themselves rested on a hidden premise—the implicit claim that public funds must be presumed to finance whatever religious activity took place with materials provided with public funds (e.g., secular instructional materials, for example) or around instruction in secular subjects partially supported by public funds.

The Court adopted these presumptions in many cases and used them as a way to bridge the gap between the actual use of public money and religious activity. But to its credit, the Court refused to use such a presumption of diversion to religious use in cases where the nature of the aid or its delivery made the presumption seem utterly untenable, for example, in cases like *Allen*, which involved textbooks on secular subjects.<sup>241</sup> Still, the presumptions proved too much. It was the seemingly haphazard presumption of religious use in some cases and refusal to presume religious use in others that made the Court's decisions seem so contradictory and so unprincipled. The strange logic which led the Court to presume that secular instructional materials would be used to advance religion<sup>242</sup> also supported the presumption that secular textbooks would be used to advance religion even though the Court refused

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<sup>238</sup> See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973).

<sup>239</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>240</sup> See *Flast*, 392 U.S. 83.

<sup>241</sup> See *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

<sup>242</sup> See *Meek v. Pittenger*, 421 U.S. 349 (1975).

to do so.<sup>243</sup> As a result, the Court's line-drawing failed to command respect and, to its credit, it has rejected these cases.

The larger point is that the need to create these *presumptions* arose from the *assumption* of standing in *Flast*. Indeed, it is striking that the presumptions the Court adopted in these cases really served to remedy the defect in standing licensed by the holding in *Flast*. Taken together, the presumptions the Court used to rationalize how given forms of aid must be seen as supporting religion were nothing more than legal fictions used to posit some link between the actual use of public funds and religious activity. But the need to create those presumptions highlights the fact that these taxpayer plaintiffs could not point to the constitutional infringement properly made cognizable under the Establishment Clause in the first place—even the harm described in *Flast* itself. As a result of the standing error licensed by *Flast*, these taxpayers secured decisions on programs that they did not have standing to challenge because the programs did not inflict the taxpayer injury properly deemed cognizable in *Flast*. In this regard, it comes as no surprise that as the Court has backed away from the presumptions that undergirded its early precedent in this area, it has become increasingly focused on the actual use of public funds as in *Agostini* and *Mitchell*.

The good news is that the Court's painstaking efforts to limit the boundaries of standing under *Flast* have helped bring the critical flaw in *Flast*'s holding to light. Many have criticized the lines drawn by the Court.<sup>244</sup> But the Court's steady course, a refusal to overrule *Flast* on one hand, a refusal to extend the decision on the other,<sup>245</sup> represents an earnest effort to preserve the core holding in *Flast* without extending it in a way that undermines the important constitutional values served by the general bar on taxpayer grievances created in *Frothingham*. Indeed, the Court's efforts have proven productive because they have led to an ever more refined focus on the precise nature of the injury-in-fact properly deemed cognizable under *Flast*.

In this regard, the decisions in *Valley Forge* and *Winn* complement one another and show the benefits of a rigorous focus on the connection between use of the tax and spend power and the taxpayer injury said to support standing. Both decisions reject efforts to use taxpayer status to bootstrap standing based on an injury not properly cognizable in *Flast*. In *Valley Forge*, the taxpayer plaintiffs could not show a *spending* of their money that supported the property transfer; the taxpayers sought to use taxpayer status to advance a claim that was not based on violation of the personal religious liberty interest protected by the Establishment Clause as described in *Flast*.<sup>246</sup> In *Winn*, the taxpayer plaintiffs could not show a *taxing* of their money,

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<sup>243</sup> See *Allen*, 392 U.S. 236.

<sup>244</sup> The varied criticisms of the Court's decisions are beyond the scope of this Article. Like the Court in *Hein*, I take *Flast* where the Court has left it, understood to be a narrow limit on congressional use of the tax and spend power to take money and appropriate it in a manner that violates the Establishment Clause.

<sup>245</sup> See, e.g., *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 615 (2007).

<sup>246</sup> See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

that resulted in a transfer of funds to support religion.<sup>247</sup> Taken together, *Valley Forge* and *Winn* show that the taxpayer must show both a use of the taxing power to extract money and a use of the spending power to finance religious activity in order to demonstrate the taxpayer injury cognizable under the Establishment Clause.

Moreover, the requirement that taxpayers show a use of their money to finance religion in order to demonstrate the injury properly deemed cognizable under the Establishment Clause does not reduce a religious liberty interest to a mere economic injury. Quite the contrary, the exercise of the tax and spend power to coerce support for religion is made cognizable under the Establishment Clause principally because of the non-economic offense against the religious liberty of the citizen who objects to this use of their funds. The point is that the dollars-and-cents injury provides the necessary foundation for non-economic dimension of the injury cognizable under the Establishment Clause.

Put another way, it is the dollars-and-cents injury caused by the abuse of the tax and spend power that yields the precise injury to the conscience that the Establishment Clause prohibits, that is, the misuse of the individual taxpayer's monies to support religion. Consequently, the economic injury must be shown in order to fit within the rule of *Flast* and seek redress for an injury with economic and non-economic dimensions. It is this dollars-and-cents injury which distinguishes the injury made cognizable in *Flast* from the generalized grievance shared by all taxpayers who object to a use of the tax and spend power in a way that may benefit religion but does not involve a use of their money to finance religious activity.<sup>248</sup>

It must be emphasized that the focus on the actual use of public funds is an essential element of the standing inquiry. In *Flast*, the Court reasoned that the particular *personal* injury it described, the injury caused by use of the tax and spend power to coerce financial support for inherently religious activity, gave the taxpayer a *personal* stake in the matter different in kind from taxpayer objections to other spending programs.<sup>249</sup> The specific *personal* injury described in *Flast* must be shown to support standing. Otherwise, the taxpayer has only a generalized grievance about the collateral benefits these programs confer on religious institutions, not the *personal*

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<sup>247</sup> See *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

<sup>248</sup> For this reason, I disagree with those who believe "Justice Kennedy's opinion in *Winn* fails" because it defines the taxpayer injury narrowly while "affirming *Flast* and allowing taxpayer standing when the government 'extracts and spends.'" See Marshall & Nichol, *supra* note 8, at 231. The Court is simply focusing more intently on the role that the taxpayer injury made cognizable in *Flast* serves as the necessary element of the non-economic injury. On the other hand, I do agree there is a tension between the refined focus in *Winn* and the holding in *Flast*, but I believe this simply highlights the defect in *Flast* noted here.

<sup>249</sup> I understand that positing the connection between the individual taxpayer's monies and whatever public monies are put towards inherently religious activity involves the legal fiction that each taxpayer has participated in some fraction with any expenditure, but this legal presumption, which undergirds *Flast*, is not insupportable. In a dispute regarding private funds contributed to a pool of funds, for example, a mutual fund, the Court would likewise—and not unrealistically—take such an approach to the matter.

injury caused by a use of the tax power to confiscate a citizen's money which is later used to finance religious activity. This vital distinction explains why the Court consistently examines the injury alleged by the taxpayer as an element of standing and the Court's failure to make this inquiry in other cases cannot justify a reclassification of this question as one solely related to the merits as the Court made plain in *Winn*.<sup>250</sup>

For these reasons, I disagree with those who have criticized the decision in *Winn* on the grounds that "asserting that the taxpayer harm recognized by the Establishment Clause occurs only when the taxpayer's funds flow directly into religious coffers . . . contradicts not only common sense but the historical record."<sup>251</sup> The historical support for the argument is the claim that such a view of the taxpayer injury is inconsistent with Madison's position because the General Assessment bill to which Madison objected allowed undesignated sums to be appropriated for "seminaries of learning" but Madison opposed the bill nonetheless.<sup>252</sup>

Setting aside the larger question of what weight should be given to Madison's views, the claim is implausible. The *Memorial and Remonstrance* is directed towards the provisions of the bill that allowed civil power to coerce support for inherently religious activity; it does not take issue with the use of civil law to fund education as allowed by the "seminaries" provision.<sup>253</sup> Assuming the "seminaries" provision was a purely secular alternative (a point where skepticism would be merited), the absence of any objection to this provision in the *Memorial and Remonstrance* makes sense because there was little question that the state could use its tax and spend power to support education.

Moreover, as the Court noted in *Winn*, there is good reason to believe that "[h]owever the 'seminaries' provision might have functioned in practice, critics took the position that the proposed bill threatened compulsory religious contributions."<sup>254</sup> It seems much more plausible to think that the "seminaries" provision was seen as a window-dressing provision which, however it worked, could not excuse the use of civil authority to compel support for religion. Certainly that is how the *Memorial and Remonstrance* treats the bill.<sup>255</sup>

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<sup>250</sup> *Winn*, 131 S. Ct. at 1448 (disregarding apparent tension with prior cases addressing tax expenditures on the merits while noting that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed"). For the same reason, the larger imbroglio concerning the coherence or consistency of the Court's standing doctrine is beyond the scope of this article, see, for example, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988). Here, I take the Court's approach to standing in this area at face value and argue that desirable refinement of standing doctrine in this area is within reach.

<sup>251</sup> See Marshall & Nichol, *supra* note 8, at 237–38.

<sup>252</sup> *Id.*

<sup>253</sup> See *Memorial and Remonstrance*, *supra* note 236, at 186, 188 (expressing opposition to use of civil law to coerce support for religion).

<sup>254</sup> *Winn*, 131 S. Ct. at 1446.

<sup>255</sup> See *Memorial and Remonstrance*, *supra* note 236, at 186, 188.

*Winn*'s standing analysis is a great success, not a failure. *Winn* shows the benefit of a refined focus on the precise use of the tax and spend power that inflicts the taxpayer injury properly deemed cognizable under the Establishment Clause because it produces results consistent with the original understanding of that provision. In *Winn*, there was no question that the state had used its tax power in a way that provided some benefit to religion by making private funds more readily available to private schools, including religious schools.<sup>256</sup> But the Court held that this use of the taxing power did not inflict the injury in fact needed to confer standing under *Flast*.<sup>257</sup>

The taxpayers in *Winn* could not show the injury needed to support standing because they could not show the specific use of the *taxing* power described in *Flast*.<sup>258</sup> More specifically, they could not show a use of the taxing power to take money from them that was later used to finance religion.<sup>259</sup> Therefore the taxpayers could not show the personal injury caused by a misuse of their money that gives rise to the personal stake required to support standing under the Establishment Clause.<sup>260</sup> As a result, their objection to the collateral benefit that the state's use of the taxing power conferred on religious institutions was properly characterized as a generalized taxpayer grievance barred by *Frothingham*.<sup>261</sup>

The Court should employ this refined focus when it evaluates challenges to congressional use of the *spending* power to determine whether it inflicts the taxpayer injury properly deemed cognizable under the Establishment Clause. More specifically, the Court should require the taxpayer to demonstrate that public funds are actually being used to finance inherently religious activity. A taxpayer who can show such a use of public funds can demonstrate an injury caused by the spending power properly deemed cognizable under the Establishment Clause as described in *Everson* and *Flast*.

By the same token, a taxpayer unable to show such a use of public funds to support inherently religious activity is like the taxpayer in *Winn*. The taxpayer may be able to show a use of the spending power that provides a collateral benefit to religion, but the taxpayer cannot show a use of public money that's actually prohibited by the Establishment Clause because the taxpayer cannot show a use of her funds to finance inherently religious activity. As a result, the taxpayer cannot show the *personal* injury caused by a misuse of his funds that gives rise to the personal stake needed to support standing under the Establishment Clause. Therefore, the objection to the use of the spending power is properly characterized as a generalized grievance barred by *Frothingham*, not the *personal* injury made cognizable by the rationale in *Flast*.

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<sup>256</sup> See *Winn*, 131 S. Ct. 1436.

<sup>257</sup> See *id.* at 1449.

<sup>258</sup> See *id.* at 1437.

<sup>259</sup> See *id.* at 1438.

<sup>260</sup> See *id.*

<sup>261</sup> See *id.* at 1438, 1443.

*Flast* does not need to be overruled; it needs to be limited along the lines suggested here. *Winn* has precisely defined the use of the *taxing* power that must be shown to support standing. The Court should scrutinize claims that the *spending* power has produced an injury sufficient to support standing under the Establishment Clause in the same way. When the Court applies *Flast* it must insist that the taxpayer show a use of the spending power that results in the actual use of public funds to finance inherently religious activity. If the Court does so, it will succeed in a reform of *Flast* that is both principled and consistent with the original understanding of the First Amendment.