# *ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION V. WINN*: RECONSIDERING *FLAST*'S EXCEPTION TO THE RULE AGAINST TAXPAYER STANDING AND ESTABLISHING THE TAX CREDIT DISTINCTION

## INTRODUCTION

The United States Supreme Court's decision in *Flast v. Cohen*[1] has been a source of controversy in American jurisprudence.[2] Over several decades, courts and commentators have wrestled with the meaning, scope, and historical underpinnings of the *Flast* exception to the general rule against taxpayer standing in Establishment Clause cases.[3]

The Court recently reconsidered *Flast*'s exception in *Arizona Christian School Tuition Organization v. Winn*.[4] The *Winn* Court held that a taxpayer lacks Article III standing under *Flast* to challenge a tax credit but not a government expenditure.[5] The Court had never before relied on this tax credit distinction to dismiss a claim for lack of standing.[6]

Part I of this Comment reviews the origins of the general bar against taxpayer standing and the *Flast* exception under the Establishment Clause, and their respective treatment in several Supreme Court cases leading up to *Winn*. Part II summarizes the facts, procedural history, and opinions of *Winn*. Part III analyzes *Winn*'s holding and the potential problems posed by *Flast*'s exception, namely its unduly vague meaning and misguided reliance on James Madison's *Memorial and Remonstrance Against Religious Assessments* (*Memorial and Remonstrance*).[7] Part III further analyzes the merits of *Winn*'s tax credit distinction, including its derivation from *Flast*, avoidance of speculative decisions, and preservation of judicial economy. In addition, the section compares the tax credit distinction under the Establishment Clause to the subsidy exception under the dormant Commerce Clause. Part IV concludes that the tax credit distinction in *Winn* has merit, particularly in today's litigious climate.

1. 392 U.S. 83 (1968).

2. *See, e.g.*, Kyle Duncan, *Misunderstanding Freedom from Religion: Two Cents on Madison's Three Pence*, 9 NEV. L.J. 32, 32 (2008).

3. *See, e.g.*, Craig A. Stern, *Another Sign from* Hein*: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1207–08 (2008).

4. Ariz. Christian Sch. Tuition Org. v. Winn (*Winn*), 131 S. Ct. 1436 (2011).

5. *See id.* at 1447.

6. *Id.* at 1452 (Kagan, J., dissenting).

7. 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed. 1901).

## I. BACKGROUND

### *A. The Origins of Standing Doctrine and the Exception to the Rule Against Taxpayer Standing*

Derived from the text of Article III, standing doctrine gives federal courts authority to hear only "Cases" and "Controversies."[8] General claims of ideological or symbolic harm do not create standing because they do not present a specific injury for which a court can provide redress.[9] To have standing before a court, a plaintiff must demonstrate a specific, personal injury caused by another.[10] If the Judiciary were not limited to hearing only cases and controversies, courts might encroach upon subject matters properly reserved for the Legislative and Executive Branches.[11] Standing doctrine enforces the constitutional separation of powers by distinguishing judicial authority from legislative and executive power.[12] It also ensures that the case before a court is suitable for adjudication.[13] Plaintiffs seeking redress under the Establishment Clause[14] based only on their taxpayer status generally must do so through the political process and not through the courts.[15]

The Court pronounced the rule against taxpayer standing in the seminal case of *Frothingham v. Mellon*,[16] decided with *Massachusetts v. Mellon*.[17] In *Flast*, the Court created an exception to the rule against taxpayer standing under the Establishment Clause if a claimant can establish a personal stake in the outcome.[18] Since *Flast*, the Court has grappled with the precise meaning and scope of this exception.

### *B.* Frothingham v. Mellon

In *Frothingham*, a federal taxpayer alleged that the effect of appropriations for the Maternity Act of 1921 would "increase the burden of future taxation and thereby take her property without due process of law."[19] In a unanimous decision, the Court dismissed the case for the plaintiff's lack of standing because the case presented a matter of public, not individual, concern.[20] The Court stated that in order to present a

8. U.S. CONST. art. III, § 2, cl. 1.
9. *See* Duncan, *supra* note 2, at 34.
10. Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 168 (2011).
11. *Winn*, 131 S. Ct. at 1442.
12. Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1056 (2011).
13. *Id.* at 1059.
14. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").
15. Duncan, *supra* note 2, at 34.
16. 262 U.S. 447 (1923).
17. *Id.* at 488–89.
18. Flast v. Cohen, 392 U.S. 83, 101 (1968).
19. *Id.* at 479, 486.
20. *Id.* at 480, 487.

"judicial controversy," a claimant must show that he or she sustained a "direct injury" and did not "merely . . . suffer[] in some indefinite way in common with people generally."[21] The Court suggested that a finding of taxpayer standing would have made subsequent legislative spending decisions subject to excessive judicial review, possibly undermining the separation of powers.[22]

### *C.* Flast v. Cohen

Forty-five years later, in *Flast*, federal taxpayers sought to enjoin government funding of parochial school instructional materials.[23] Carving out an exception to the general standing bar, the Court held that the claimants had standing because the government "extracted and spent" "tax money" in violation of the Constitution's establishment protections.[24]

The Court ruled that standing rests on whether a taxpayer has the requisite "personal stake in the outcome of the controversy."[25] Taxpayers could demonstrate standing when (1) their suit challenged congressional taxing and spending authority, as opposed to regulatory expenditures, and (2) their claim alleged a specific constitutional infringement.[26] In interpreting the scope of the Establishment Clause, Chief Justice Warren relied on James Madison's pivotal *Memorial and Remonstrance*, in which the then-Virginia legislator and eventual First Amendment draftsman asserted that a state tax levy to support Christian teachers would infringe upon people's religious liberties.[27]

In his dissent, Justice Harlan criticized the "personal stake" requirement as a mere restatement of the standing problem.[28] He also noted that the criteria of the two-part nexus test did not meaningfully measure the claimant's interest in the outcome of a suit.[29] Furthermore, Justice Harlan questioned the Court's reliance on "isolated dicta" from Madison's *Memorial and Remonstrance* as authority in interpreting the Establishment Clause.[30]

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21. *Id.* at 488–89.
22. *See id.* at 487 ("If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . .").
23. *Id.* at 85–86.
24. *See id.* at 105–06.
25. *Id.* at 101 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)) (internal quotation mark omitted).
26. *Id.* at 102.
27. *Id.* at 103–04. For a discussion of Madison's *Memorial and Remonstrance*, see *infra* Part III.A.2.
28. *Id.* at 121 (Harlan, J., dissenting).
29. *Id.*
30. *Id.* at 126.

*D.* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.[31]

In *Valley Forge*, a nonprofit organization of taxpayers and several of its employees challenged a government decision to transfer a tract of federally-owned land to an evangelical Christian college.[32] Distinguishing *Flast*, the Court held that the claimants lacked standing to challenge a federal executive's donative transfer of property to a religious organization.[33] Justice Rehnquist found that the claimants failed *Flast*'s first prong because they challenged a decision by the Secretary of Health, Education, and Welfare under the Property Clause of the Constitution, not a congressional act under the Taxing and Spending Clause as required by *Flast*.[34]

In his dissent, Justice Brennan suggested that the distinction between the Property Clause and the Taxing and Spending Clause issues was artificial because government donations of real property and funds are functionally equivalent methods of providing financial support.[35]

*E.* Hein v. Freedom from Religion Foundation, Inc.[36]

In *Hein*, the Court examined a challenge to the President's creation of the White House Office of Faith-Based and Community Initiatives and similar departments in federal agencies supporting faith-based community groups' efforts to secure federal funding for nonreligious activities.[37] An organization opposed to the government endorsement of religion and several of its members brought an Establishment Clause claim against the agencies' uses of federal money to fund conferences promoting the President's faith-based initiative.[38] Declining to extend *Flast* beyond congressional appropriation challenges, a three-Justice plurality held that taxpayer status did not allow the claimants to challenge executive expenditures.[39]

Justice Alito's plurality opinion, which Chief Justice Roberts and Justice Kennedy joined, noted that, "in the four decades since its creation, the *Flast* exception has largely been confined to its facts."[40] The plurality further emphasized that *Flast* provided only a narrow exception, any extension of which would expand judicial power and "raise serious separation-of-powers concerns" between the Judicial and Executive

31. 454 U.S. 464 (1982).
32. *Id.* at 469.
33. *Id.* at 489 n.25, 490.
34. *Id.* at 480.
35. *Id.* at 511–12 (Brennan, J., dissenting).
36. 551 U.S. 587 (2007) (plurality opinion).
37. *Id.* at 593–94.
38. *Id.* at 595.
39. *Id.* at 593.
40. *Id.* at 609.

Branches.[41] In a concurrence joined by Justice Thomas, Justice Scalia concluded that *Flast* should be overruled because its conceptualization of injury in purely mental terms is "wholly irreconcilable" with Article III and particularized injury requirements embodied in standing doctrine.[42]

In a dissent that Justices Stevens, Ginsburg, and Breyer joined, Justice Souter expressed concern that government "favoritism for religion 'sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community.'"[43] According to the dissent, such a psychic or economic injury to religious nonbelievers "is serious and concrete enough to be 'judicially cognizable'"[44] and, thus, "sufficient for standing."[45]

The split between the Court's conservative and liberal blocs in *Hein* foreshadowed how the current Justices would align in *Winn*.

## II. *ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION V. WINN*

### *A. Facts*

In 1997, the Arizona legislature passed a law granting state income tax credits to Arizona taxpayers who donate to school tuition organizations (STOs).[46] STOs are nonprofit organizations that award private school scholarships to children.[47] Under the Arizona tax code, state taxpayers receive dollar-for-dollar tax credits of up to $500 per person and $1,000 per married couple for contributions made to STOs.[48]

STOs, in turn, use these charitable contributions to provide tuition grants or scholarships to students attending qualified private schools, which, in many cases, are religious.[49] A qualified school is a private school in Arizona that "does not discriminate on the basis of race, color, handicap, familial status or national origin . . . ."[50] The Arizona statute does not "preclude[] STOs from funding scholarships to schools that provide religious instruction" or that give religious-based admissions preferences.[51] Under the statute in effect at the time of this suit, however,

41. *Id.* at 611.
42. *Id.* at 618–20 (Scalia, J., concurring).
43. *Id.* at 643 (Souter, J., dissenting) (alterations in original) (quoting McCreary Cnty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 860 (2005)) (internal quotation marks omitted).
44. *Id.* (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).
45. *Id.*
46. *See* 1997 Ariz. Sess. Laws 548, 549–50 (codified as amended at ARIZ. REV. STAT. ANN. § 43-1089 (Supp. 2011)).
47. *Id.* at 550.
48. § 43-1089(A).
49. *Winn*, 131 S. Ct. 1436, 1440 (2011).
50. § 43-1089(H)(2)(a).
51. Winn v. Ariz. Christian Sch. Tuition Org. (*Winn II*), 562 F.3d 1002, 1005 (9th Cir. 2009), *rev'd*, 131 S. Ct. 1436 (2011).

STOs could not limit their scholarships for use at only one designated school.[52]

### *B. Procedural History*

In an earlier lawsuit after the statute was passed but before it took effect,[53] Arizona taxpayers challenged the statute in state court under the religion and anti-gift clauses of the Arizona Constitution and under the Establishment Clause of the United States Constitution.[54] Ultimately, the Arizona Supreme Court held that the statute was not unconstitutional on its face because the tax credit provided a neutral mechanism for encouraging investment in education.[55]

After the statute took effect, different plaintiffs, including Kathleen Winn, filed suit in federal court asserting that the statute violated the Establishment Clause *as applied*.[56] Because many STOs restrict the availability of scholarships to religious schools, the claimants alleged that the tax credit program deprived parents of a genuine choice between scholarships to private secular schools and religious ones.[57] The United States District Court for the District of Arizona dismissed the suit as "jurisdictionally barred by the Tax Injunction Act."[58] The United States Court of Appeals for the Ninth Circuit reversed the dismissal, and the United States Supreme Court affirmed that decision.[59]

On remand, Arizona Christian School Tuition Organization and other parties intervened as defendants.[60] The district court again dismissed the suit, this time for the taxpayers' failure to state a claim.[61] A three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed, holding that the claimants had standing under *Flast*.[62] On the merits, the appellate court ruled that the taxpayers had stated a claim that the statute violated the Establishment Clause.[63] The full court

52. *Id.* at 1006.
53. *Id.*
54. *See* Kotterman v. Killian, 972 P.2d 606, 610 (Ariz. 1999) (3–2 decision).
55. *Id.* at 625.
56. *See Winn*, 131 S. Ct. 1436, 1441 (2011).
57. *Winn II*, 562 F.3d at 1005. Although approximately twenty-five of the fifty-five STOs in Arizona limit scholarship grants to religious schools, at least eighty-five percent of the state-financed scholarship money is available only to students whose parents are willing to send them to religious schools. Winn v. Ariz. Christian Sch. Tuition Org. (*Winn III*), 586 F.3d 649, 650, 660 n.6 (9th Cir. 2009), *rev'd*, 131 S. Ct. 1436 (2011).
58. *Winn*, 131 S. Ct. at 1441; *see also* 28 U.S.C. § 1341 (2006) ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.").
59. Hibbs v. Winn (*Winn IV*), 542 U.S. 88, 112 (2004).
60. *Winn*, 131 S. Ct. at 1441.
61. *Id.*
62. *See Winn II*, 562 F.3d at 1008, 1011.
63. *See id.* at 1023.

denied en banc review, with eight judges dissenting.[64] The United States Supreme Court granted certiorari.[65]

### *C. Majority Opinion*

Justice Kennedy delivered the Court's opinion, which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined.[66] Because the Arizona taxpayers challenged a tax credit and not a government expenditure, the Court held the taxpayers lacked Article III standing under *Flast*.[67] In reaching its decision, the Court presented the various constitutional and common law principles of taxpayer standing in Establishment Clause cases.

First, Justice Kennedy recounted the Constitution's "tripartite allocation of power" and Article III limitations placed on the Judiciary.[68] The Court explained that a plaintiff seeking to invoke judicial power under Article III must allege more than a "generalized interest of all citizens."[69] Justice Kennedy indicated that the case-or-controversy requirement of Article III restricts judicial power to disputes presenting a specific injury in need of redress.[70] The Court further cautioned that, if courts were not otherwise restricted, the Judiciary might encroach upon matters properly reserved for the Legislature.[71]

Second, the Court noted that a case or controversy requires standing, which has certain minimum constitutional requirements under *Lujan v. Defenders of Wildlife*,[72] including (1) an "injury in fact" that is "concrete" and "actual"; (2) a "causal connection" that is "fairly . . . trace[able]"; and (3) the "'likely,' as opposed to merely speculative . . . redress[ability]" of the injury.[73] The *Winn* Court found that the claimants' alleged injury would require the Court to speculate about the potential impact of the STO tax credit on future tax bills.[74] Thus, *Lujan*'s three-part test provided no basis for standing.[75]

64. *Winn III*, 586 F.3d 649, 650, 658 (9th Cir. 2009), *rev'd*, 131 S. Ct. 1436 (2011).
65. *Winn*, 131 S. Ct. at 1441.
66. *Id.* at 1439.
67. *See id.* at 1447.
68. *Id.* at 1441–42 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 47 (1982)) (internal quotation mark omitted).
69. *Id.* (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974)) (internal quotation mark omitted).
70. *See id.* at 1441.
71. *Id.* at 1442.
72. 504 U.S. 555 (1992).
73. *Winn*, 131 S. Ct. at 1442 (first and second alterations in original) (quoting *Lujan*, 504 U.S. at 560–61). Under *Lujan*, a plaintiff does not have standing merely as a citizen to claim that government action violates the Constitution or federal law because an Article III case or controversy requires a showing of "some direct injury" and not merely "a generally available grievance about government." *Lujan*, 504 U.S. at 573–74.
74. *Winn*, 131 S. Ct. at 1444.
75. *See id.*

Third, the Court cited the rule against taxpayer standing, which provides that taxpayer status is generally insufficient to establish standing in Establishment Clause cases in order to limit potential judicial encroachment on the Legislative Branch.[76] Because the purported injury from the tax credit was "speculative" and not particular, the Court found that the Arizona taxpayers did not have standing to assert their claim based on the general rule.[77]

Fourth, the Court evaluated the claimants' possible standing under *Flast*'s nexus test.[78] The Court noted that the *Flast* exception is applicable to a religious entity's receipt of government expenditures drawn or extracted from general tax revenues.[79] The Court acknowledged that governmental expenditures and STO tax credits might have similar economic consequences but found that the contribution of tax credit savings to a taxpayer-designated, sectarian organization does not invoke *Flast*.[80]

Fifth, the majority reviewed similar tax benefit cases in which the Court had reached a decision on the merits.[81] The majority found that the Court's decision to rule on the merits of other tax benefit cases did not support standing in *Winn* because those cases did not reference standing and thus do not stand for the proposition that no jurisdictional defect existed.[82] The majority cautioned that courts would risk mistake if they assumed or relied on unstated rules of law from prior cases.[83]

### *D. Concurring Opinion*

In a concurring opinion joined by Justice Thomas, Justice Scalia criticized the Court's holding in *Flast* as an anomaly in American jurisprudence.[84] As he did in *Hein*, Justice Scalia noted that he would repudiate *Flast* because its conceptualization of injury in purely mental terms is "irreconcilable" with Article III and particularized injury requirements embodied in standing doctrine.[85] Justice Scalia indicated that he nevertheless joined the majority opinion because the Court held that Arizona

76. *See id.* at 1442.
77. *See id.* at 1444–45.
78. *Id.* at 1445.
79. *Id.* at 1448.
80. *Id.* at 1447.
81. *Id.* at 1448 (citing Mueller v. Allen, 463 U.S. 388 (1983); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Walz v. Tax Comm'n, 397 U.S. 664 (1970)).
82. *Id.*
83. *Id.* at 1448–49; *see also* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 119 (1993) (O'Connor, J., dissenting) (noting that stare decisis is limited to "questions actually considered and passed on, [which] ensures that this Court does not decide important questions by accident or inadvertence").
84. *Winn*, 131 S. Ct. at 1449–50 (Scalia, J., concurring).
85. *See id.* at 1450; *see also* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 618–20 (2007) (Scalia, J., concurring).

taxpayers lacked standing to sue "by applying *Flast* rather than distinguishing it away on unprincipled grounds."[86]

### *E. Dissenting Opinion*

In a dissenting opinion that Justices Ginsburg, Breyer, and Sotomayor joined, Justice Kagan concluded that the Arizona taxpayers had proper standing for their Establishment Clause claim.[87] Justice Kagan agreed with the majority that the general prohibition on taxpayer standing did not provide the claimants with a basis for having their day in court.[88] According to Justice Kagan, however, the *Flast* exception did.[89] Justice Kagan suggested that a "simple" application of *Flast*'s two-part test demonstrated the claimants had standing.[90] Under *Flast*'s first prong, Justice Kagan maintained that the claimants' attack against an Arizona tax code provision served as the requisite challenge to congressional taxing and spending power.[91] Justice Kagan further insisted that the Arizona taxpayers satisfied *Flast*'s second prong by invoking the Establishment Clause, a specific constitutional limitation on taxing and spending authority.[92] In Justice Kagan's view, the claimants had established their personal stake in the outcome of their constitutional challenge by satisfying both prongs of *Flast*'s nexus test.[93]

The dissent then criticized the majority for its novel distinction between tax credits and government expenditures in deciding if the claimants had standing.[94] Justice Kagan noted that, in the nearly forty-four years since *Flast*, no prior court had made this tax credit distinction for purposes of standing.[95] In the dissent's view, this distinction had never been made because it is one without a meaningful difference.[96] In response to the majority's warning against presuming jurisdiction when it passes sub silentio,[97] the dissent dismissed the warning as false because "[t]his and every federal court" considers standing even when not raised by the litigants.[98] Justice Kagan further insisted that the Court not "disregard the implications of an exercise of judicial authority assumed to be

86. *Winn*, 131 S. Ct. at 1450 (Scalia, J., concurring).
87. *Id.* at 1450, 1452 (Kagan, J., dissenting).
88. *See id.* at 1451.
89. *Id.*
90. *Id.* at 1451–52.
91. *See id.* at 1451.
92. *Id.*
93. *Id.* at 1452.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1448–49 (majority opinion).
98. *See id.* at 1454 (Kagan, J., dissenting). Justice Kagan also pointed out that the Court had adjudicated five similar tax benefit cases without questioning the plaintiffs' standing, including in a prior iteration of this same case. *Id.* at 1452–53; *see also Winn IV*, 542 U.S. 88, 111–12 (2004) ("In a procession of cases not rationally distinguishable from this one, no Justice or member of the bar of this Court ever raised a § 1341 objection that . . . should have caused us to order dismissal of the action for want of jurisdiction." (citing Mueller v. Allen, 463 U.S. 388 (1983))).

proper for over 40 years."[99] Lastly, the dissent lamented the purported implications of the Court's decision, stating that it "devastates taxpayer standing in Establishment Clause cases."[100] Justice Kagan suggested that, "[h]owever blatantly the government may violate the Establishment Clause, taxpayers [can no longer] gain access to the federal courts" because the tax credit distinction allows government to "insulate its financing of religious activity from legal challenge."[101]

## III. ANALYSIS

The United States Supreme Court has long accepted the notion that the Establishment Clause limits government favoritism for religion.[102] However, the Court has also espoused the proposition that taxpayers generally lack standing to challenge congressional appropriations.[103] The Court sought to reconcile these competing principles in *Flast*, which has arguably become the most controversial taxpayer suit in American jurisprudence.[104] *Winn* highlights the potential shortcomings posed by *Flast*'s exception and establishes the tax credit distinction in taxpayer standing suits under the Establishment Clause.

### *A. Potential Problems Posed by* Flast

Two potential problems presented by *Flast*'s exception to the rule against taxpayer standing include (1) its unduly vague meaning and (2) its exclusive reliance on James Madison's *Memorial and Remonstrance Against Religious Assessments*.

#### 1. The *Flast* Exception Is Unduly Vague

First, the *Flast* exception lacks precision. To relax the general standing bar, the *Flast* Court required plaintiffs to establish a nexus between their federal taxpayer status and each of (1) the challenged legislative taxing and spending authority, and (2) the specific constitutional infringement alleged.[105] The Court noted that a claimant could not challenge an incidental regulatory expenditure nor merely allege that an enactment is generally beyond congressional powers.[106] However, the Court did not define or provide any further context for how proximate

99. *Winn*, 131 S. Ct. at 1455 (Kagan, J., dissenting) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 307 (1962)) (internal quotation marks omitted).

100. *Id.* at 1462.

101. *Id.*

102. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another.").

103. *See* Frothingham v. Mellon, 262 U.S. 447, 487–88 (1923).

104. *See* Stern, *supra* note 3.

105. Flast v. Cohen, 392 U.S. 83, 102 (1968).

106. *Id.* at 102–03.

the "logical link" or "nexus" must be, thus creating a slippery slope for the *Flast* exception.[107]

Because the *Flast* exception is so vague, it can support sharply divergent opinions.[108] Whereas the majority in *Winn* found that the Arizona taxpayers' purported injury under *Flast*'s nexus test was merely "speculative,"[109] the dissent suggested that its "simple restatement of the *Flast* standard should be enough to establish that the [claimants] have standing."[110] Evidence of such divergent opinions, in turn, raises concerns that decisions on standing are wrongly influenced by the Court's instincts on the merits or views related to judicial intervention rather than by the claimants' eligibility to invoke jurisdiction.[111]

2. *Flast*'s Exclusive Reliance on Madison's *Memorial and Remonstrance* Is Misguided

Second, the *Flast* Court's exclusive reliance on Madison's *Memorial and Remonstrance* is misguided. In an effort to reconcile the Establishment Clause and general standing bar, the *Flast* Court deemed the Establishment Clause a specific limitation to congressional taxing and spending power.[112] To arrive at this conclusion, the *Flast* Court relied exclusively on James Madison's *Memorial and Remonstrance Against Religious Assessments*.[113] Madison's *Memorial and Remonstrance* is "an important document in the history of the Establishment Clause."[114] Indeed, the Court has cited it in more than thirty cases over the last sixty-five years.[115] And its author, James Madison, is "generally recognized as the leading architect of the religion clauses of the First Amendment."[116]

However, *Flast*'s exclusive reliance on Madison's *Memorial and Remonstrance* is misguided because the *Memorial and Remonstrance* (a) was a political, not a legal, argument;[117] (b) appears to reflect Madi-

107. *See id.*

108. *See* Rahdert, *supra* note 12, at 1015.

109. *Winn*, 131 S. Ct. 1436, 1447 (2011).

110. *Id.* at 1451 (Kagan, J., dissenting). For examples of similarly divergent views on the scope and meaning of the *Flast* exception, see the Court's plurality or majority opinions and dissents in Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593, 637 (2007), and Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 470, 490 (1982).

111. *See* Rahdert, *supra* note 12, at 1015–16; *id.* at 1057 ("[J]udges who think intervention [is] necessary, because the government action in question may be unconstitutional, are more likely to be generous about standing.").

112. *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

113. *See* Duncan, *supra* note 2, at 36 (noting that, other than Madison's *Memorial and Remonstrance*, the *Flast* Court cited no other piece of historical evidence for its creation of the taxpayer standing exception).

114. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2499 (2011).

115. *See, e.g.*, *id.*; Everson v. Bd. of Educ., 330 U.S. 1, 11–12 (1947).

116. *Flast*, 392 U.S. at 103.

117. *See* Duncan, *supra* note 2, at 47.

son's "free exercise," not "establishment," concerns;[118] and (c) is not binding authority for *Flast*.

a. The *Memorial and Remonstrance* Was a Political, Not Legal, Argument

First, Madison's *Memorial and Remonstrance* arose during a political debate about popular legislation,[119] on which courts cannot opine.[120] The *Memorial and Remonstrance* originated in a Virginia congressional debate in 1785 over a bill proposing a tax to support Christian teachers.[121] In an impassioned plea, James Madison asserted that any such assessment, even one amounting to "three pence only," would infringe upon people's religious liberties by forcing conformity to a particular religion.[122] At the time, James Madison served as a Virginia legislator and not as a constitutional advocate or First Amendment draftsman presenting a legal argument about judicial review or taxpayer standing.[123] A political argument in the Virginia state legislature about the proposed use of tax dollars does not serve as a valid, legal basis for taxpayer standing of all U.S. citizens under the Establishment Clause.[124]

b. Madison Appears to Have Been Making a "Free Exercise," Not an "Establishment," Claim

Second, James Madison did not appear to be making an "establishment" claim,[125] which was the very basis of the *Flast* decision.[126] Indeed, the Establishment Clause did not even exist at the time of Madison's *Memorial and Remonstrance*.[127] Commentators have suggested that the Virginia dispute focused primarily on whether the proposed assessment violated the "free exercise" rights set forth in the 1776 Declaration and not whether the tax constituted an "establishment" of religion.[128] In his *Memorial and Remonstrance*, James Madison advocated for those constituents concerned about the tax's potential interference with their religious activities.[129] By relying on the *Memorial and Remonstrance* to

118. *Id.* at 50.

119. *Id.* at 47–48.

120. *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

121. *Flast*, 392 U.S. at 104 n.24.

122. *Id.* at 103–04 (quoting MADISON, *supra* note 7, at 186).

123. Duncan, *supra* note 2, at 46; *see also Flast*, 392 U.S. at 103, 104 n.24.

124. *See* Duncan, *supra* note 2, at 54.

125. *Id.* at 50; *see also* U.S. CONST. amend. I.

126. *See Flast*, 392 U.S. at 105–06.

127. James Madison issued his *Memorial and Remonstrance* in 1785, but Congress did not submit the Bill of Rights, including the First Amendment's Establishment Clause, to the states until 1789. *See* Williams v. Florida, 399 U.S. 78, 108 n.2 (1970) (Black, J., concurring in part and dissenting in part); Everson v. Bd. of Educ., 330 U.S. 1, 37 (1947) (Rutledge, J., dissenting).

128. *See* Duncan, *supra* note 2, at 51 (citing THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 146, 148 (1986)).

129. "The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." MADISON, *supra* note 7, at

support taxpayer standing under the Establishment Clause,[130] *Flast* may have improperly conflated "free exercise" with "establishment" of religion.[131]

c. The *Memorial and Remonstrance* Is Not Binding Authority for *Flast*

Third, the *Memorial and Remonstrance* does not serve as binding authority for *Flast*.[132] Because of its origins outside the Framers' debates regarding the Establishment Clause, the *Memorial and Remonstrance* is not authoritative like typical legislative history, let alone binding on the Court. At best, the *Memorial and Remonstrance* has some persuasive authority given that (1) the facts of the underlying dispute were analogous to those in *Flast*, and (2) its author played a leading role in the subsequent creation of the Establishment Clause.

Viewed in its proper context, Madison's *Memorial and Remonstrance* fails to support on its own an exception to the general bar against taxpayer standing.[133] In his dissent in *Flast*, Justice Harlan criticized the Court's reliance on "isolated dicta" from Madison's *Memorial and Remonstrance*,[134] eerily foreshadowing the problems that *Flast* would pose for courts in general and the *Winn* Court in particular.

*B.* Winn*'s Tax Credit Distinction for Standing Under the Establishment Clause*

Not only does *Winn* highlight the potential problems posed by *Flast*, but it also distinguishes between a tax credit and a government expenditure for purposes of evaluating taxpayer standing under the Establishment Clause.[135] The following analysis will seek to demonstrate that (1) the tax credit distinction, though new to standing, does not violate precedent; (2) the utility of the tax credit distinction depends on the context; and (3) the tax credit distinction has merit in the context of *Winn*.

184. "Above all are [men] to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of conscience.'" *Id.* at 186 (quoting THE VA. DECLARATION OF RIGHTS art. XVI (1776)). "Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights." *Id.* at 190. *See also* Duncan, *supra* note 2, at 52.

130. *See Flast*, 392 U.S. at 103–04.

131. *See* Duncan, *supra* note 2, at 52. *But see Everson*, 330 U.S. at 40 (Rutledge, J., dissenting) (noting that, for Madison, "'[e]stablishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom").

132. *See Flast*, 392 U.S. at 126, 126 n.15 (Harlan, J., dissenting).

133. *See* Duncan, *supra* note 2, at 53.

134. *See Flast*, 392 U.S. at 126 (Harlan, J., dissenting).

135. *See Winn*, 131 S. Ct. 1436, 1449 (2011).

1. The Tax Credit Distinction Is New to Standing Doctrine, but Does Not Violate Precedent

Although novel to standing doctrine, the Court's distinction between a tax credit and a government expenditure does not violate precedent. In *Winn*, the Court relied on the tax credit distinction in deciding that the claimants lacked standing.[136] In her dissent, Justice Kagan aptly pointed out that the Court had never before relied on this distinction to dismiss a claim for lack of standing.[137] Justice Kagan suggested that a tax credit is merely a state subsidy in another name.[138] Either way, according to Justice Kagan, the Arizona government financed sectarian STOs and scholarships, thereby allowing taxpayers to challenge the subsidy.[139] The dissent further suggested that the majority's "extraction" requirement was new, disingenuous, or lacked precedential support.[140] However, the Court previously cited *Flast*'s extraction requirement in *DaimlerChrysler v. Cuno*.[141] In *Cuno*, the Court noted that the *Flast* Court "understood the 'injury' alleged in Establishment Clause challenges to federal spending to be the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff."[142]

In addition, the dissent pointed out that the Court had previously reached a decision on the merits of Establishment Clause cases involving tax credits without questioning the claimants' standing.[143] However, as the majority noted, those cases did not mention standing and thus did not stand for the proposition that no jurisdictional defect existed.[144] Without mentioning or otherwise ruling on standing, those cases do not serve as binding precedent for purposes of taxpayer standing or judicial review.[145] Courts would indeed risk grave error if they relied on or assumed unstated rules of law from prior cases.[146] Any such judicial practice would

136. *Id.* at 1447.

137. *Id.* at 1452 (Kagan, J., dissenting). The Court made a similar albeit less fine distinction between a grant of real property and government expenditure in Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 480 (1982), which also faced criticism by its dissenting Justices. *Id.* at 511–12 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting).

138. *See Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

139. *Id.*

140. *See id.* at 1459 (suggesting that that the majority "plucks the three words 'extrac[t] and spen[d]' from . . . the *Flast* opinion," whose two-part nexus test contains no such extraction requirement, to "severely constrict" the scope of the decision).

141. 547 U.S. 332, 348 (2006).

142. *Id.* (alterations in original) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

143. *Winn*, 131 S. Ct. at 1452–53 (Kagan, J., dissenting); *see also* Bowen v. Kendrick, 487 U.S. 589, 619 (1988) (finding standing partly because, in similar cases, the Court had "not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges").

144. *Winn*, 131 S. Ct. at 1448 (majority opinion).

145. *See id.*

146. *See id.* at 1449; Harper v. Va. Dep't of Taxation, 509 U.S. 86, 119 (1993) (O'Connor, J., dissenting).

greatly undermine stare decisis.[147] Furthermore, just as every other court "has an independent obligation to consider standing,"[148] so does the Court in *Winn*. All courts, including the United States Supreme Court, retain the authority to grant or deny standing sua sponte, even if the parties or lower courts do not raise the issue.[149] In *Winn*, the Court duly exercised its authority to deny standing.[150]

2. The Utility of the Tax Credit Distinction Depends on the Context

The utility of the distinction between a tax credit and a government expenditure depends on the context. In her dissent, Justice Kagan acknowledged that the distinction is not useful in every context because "the distinction is one in search of a difference" in "*many* contexts."[151] In suggesting the purportedly artificial distinction in *Winn*, the dissent emphasized that federal and state government budgeting rules routinely insist on cost calculations relating to tax credits as well as tax expenditures.[152] In a budgeting context, departments of revenue, of course, want to understand the financial impact of both tax credits and expenditures on their bottom lines.[153] However, state budgeting practices are not dispositive of whether a tax credit distinction has merit in Establishment Clause cases.[154]

The dissent also indicated that Arizona STOs, in their solicitation efforts, acknowledge that donor contributions come from other taxpayers.[155] In a sales and marketing context, STOs, of course, will couch the tax credit in a way that is self-serving and most likely to maximize contributions.[156] However, advertising and sales practices are not dispositive of whether a tax credit distinction has merit in Establishment Clause cases.[157]

The dissent further noted that the Court itself in *Cuno* suggested that injuries resulting from a tax subsidy and cash grant are equivalent.[158]

147. *See Harper*, 509 U.S. at 120 ("Any rule that creates a grave risk that [the Court] might resolve important issues of national concern *sub silentio*, without thought or consideration, cannot be a wise one.").

148. *Winn*, 131 S. Ct. at 1454 (Kagan, J., dissenting).

149. *See id.*

150. *See id.* at 1449 (majority opinion).

151. *Id.* at 1455 (Kagan, J., dissenting) (emphasis added).

152. *See id.* at 1456.

153. *See id.*

154. *Cf.* Duncan, *supra* note 2, at 54 (noting that an unmistakably political argument about the proposed use of tax dollars does not serve as a legal basis for taxpayer standing).

155. *Winn*, 131 S. Ct. at 1458 (Kagan, J., dissenting) (noting that STOs, to elicit support, "highlight that 'donations' are made not with an individual's own, but with other people's—*i.e.*, taxpayers'—money").

156. *Cf.* Duncan, *supra* note 2, at 56 ("Madison's views were protean, depending on whether he was occupying the role of Virginia legislator, constitutional advocate, First Amendment draftsman, President, or former President.").

157. *Cf. supra* note 154.

158. *Winn*, 131 S. Ct. at 1457 (Kagan, J., dissenting) ("In either case . . . the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer

However, the lack of utility of the tax credit distinction in a Commerce Clause case is not indicative of its merit in an Establishment Clause case.[159] These examples merely demonstrate that the tax credit distinction may not have merit in every context.

In her dissent, Justice Kagan also presented examples of overt state funding of religion to highlight the purported invalidity of the tax credit distinction.[160] For example, Justice Kagan presented a hypothetical scenario in which a state seeks to reward members of different religious sects $500 per year for their religious devotion.[161] The dissent then asked, should taxpayer standing of nonadherents depend on whether targeted recipients receive an annual stipend or claim the $500 in aid on their annual tax returns?[162] Of course not, but this scenario does not present the facts of *Winn*. Whereas Justice Kagan's hypothetical scenario presents overt government favoritism for specific religious groups identified by the state, the charitable contributions in *Winn* "result from the decisions of private taxpayers regarding their own funds."[163] In any case, purported victims of overt discrimination could likely "advance[] arguments for jurisdiction independent of *Flast*"[164] by demonstrating a direct, concrete injury under *Frothingham*[165] or *Lujan*.[166] This hypothetical situation merely highlights that the tax credit distinction is not useful in the context of overt religious discrimination, thereby begging the question if the distinction has merit in cases like *Winn*.

3. The Tax Credit Distinction Has Merit in *Winn*

The Court's distinction between a tax credit and a government expenditure has merit in *Winn*. The strength of the rule against taxpayer standing relative to *Flast*'s exception arguably informed the Court's tax credit distinction. The Court has understood the rule against taxpayer standing as a general or default prohibition.[167] Conversely, the Court has

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contributes." (quoting DaimlerChrysler v. Cuno, 547 U.S. 332, 344 (2006)) (internal quotation marks omitted)).

159. *Cf. Cuno*, 547 U.S. at 349 (ruling that Ohio state and Toledo city taxpayers do not have standing on grounds that the Establishment Clause challenge in *Flast* is somehow like their Commerce Clause challenge to tax credits inducing an automobile manufacturer to remain in Toledo).

160. *See Winn*, 131 S. Ct. at 1457 (Kagan, J., dissenting) (citing Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989), in which the Court found that a Texas sales tax exemption for religious publications violated the Establishment Clause).

161. *Id.*

162. *Id.*

163. *Id.* at 1448 (majority opinion) ("Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs.").

164. *Id.* at 1449.

165. *See supra* text accompanying note 21.

166. *See supra* text accompanying note 73.

167. *Cf. Winn*, 131 S. Ct. at 1445 ("*Flast*'s holding provides a 'narrow exception' to 'the general rule against taxpayer standing.'" (quoting Bowen v. Kendrick, 487 U.S. 589, 618 (1988))); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593 (2007) (plurality opinion) ("In *Flast v. Cohen*, we recognized a narrow exception to the general rule against federal taxpayer standing." (citing Flast v. Cohen, 392 U.S. 83, 88 (1968))); DaimlerChrysler v. Cuno, 547 U.S. 332, 348 (2006)

viewed *Flast* as a "narrow exception" to the rule.[168] The relatively narrow scope of *Flast*'s exception likely sowed the seeds of the tax credit distinction.[169]

The tax credit distinction might not be useful to a state comptroller preparing budget scenarios, to a nonprofit fundraiser seeking to maximize charitable contributions, or to a court hearing a case involving a facially discriminatory tax credit, but the distinction has real meaning in interpreting *Flast*'s "narrow exception" to the rule against taxpayer standing. The distinction between a tax credit and a government expenditure in *Winn* has merit because it (a) is rooted in the text of *Flast*; (b) avoids speculative decisions; and (c) preserves judicial economy.

a. The Tax Credit Distinction Is Rooted in the Text of *Flast*

First, the tax credit distinction derives from the very text of *Flast*, which requires a taxpayer to challenge not just taxing authority—but congressional taxing *and* spending power—to be eligible for standing.[170] *Flast*'s first prong requires that a taxpayer challenge an exercise of "congressional power under the taxing and spending clause."[171] In an apparent subrule, the Court elaborated on the meaning of *spending*, noting the type of regulatory expenditures that would not invoke the rule.[172] In *Flast*, the Court mentioned "taxing *and* spending" authority on eleven occasions,[173] including once in the Court's statement of the holding.[174] In the sentence following the holding, the Court provided further context to the meaning of "taxing and spending" power by using the "extract[ion] and spen[ding]"[175] analogy, on which the Court had indeed relied prior to *Winn*.[176] The *Flast* Court used an "or" construction in discussing these distinct congressional powers on just one occasion, when it referred to the government's *failed* assertion that no standing be conferred to challenge a "taxing *or* spending" program.[177]

("[A] broad application of *Flast*'s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in . . . precedent . . . ." (citing *Flast*, 392 U.S. at 106)).

168. *See supra* note 167.

169. *Cf. Winn*, 131 S. Ct. at 1445 ("It must be noted *at the outset* that . . . *Flast*'s holding provides a 'narrow exception' to 'the general rule against taxpayer standing.'" (emphasis added) (quoting *Bowen*, 487 U.S. at 618)).

170. *See Flast*, 392 U.S. at 102.

171. *Id.*

172. *See id.* ("It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.").

173. *See id.* at *passim* (emphasis added).

174. *See id.* at 105–06 ("Consequently, we *hold* that a taxpayer will have standing consistent 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." (emphasis added)).

175. *See id.* at 106 ("The taxpayer's allegation in such cases would be that his [or her] tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.").

176. *See* DaimlerChrysler v. Cuno, 547 U.S. 332, 348 (2006).

177. *Flast*, 392 U.S. at 98 (emphasis added).

If the *Flast* Court intended the exception to apply to exercises of mere taxing and not spending authority, it would have said so. The Arizona taxpayers' interpretation of a tax credit suggests that a contribution yielding tax credits is "owed to the State" and "should be treated as if it were government property."[178] However, that interpretation renders *Flast*'s spending language superfluous or defines a tax credit in a way that has "no basis in standing jurisprudence."[179] Because a tax credit invokes taxing and not spending power, it does not fall within the *Flast* exception.

b. The Tax Credit Distinction Avoids Speculative Decisions

Second, the tax credit distinction avoids speculative decisions. Whereas an affirmative tax on targeted constituents may make the alleged economic or psychic harm discernible, a tax credit requires courts to speculate about the potential impact of such tax credit on future tax bills.[180] To find specific injury, courts must assume that legislators will increase plaintiffs' tax bills to offset the supposed deficit caused by the tax credit.[181] To find requisite redressability, courts must speculate that, if injunctive relief were provided, elected officials would pass along the purported increased revenue by way of reduced taxes for taxpayer-plaintiffs.[182]

Conjecture regarding improperly vetted claims leads to bad decisions.[183] Decisions of the United States Supreme Court have wide implications that are not easily undone because they establish binding, federal-question precedent for lower courts.[184] By establishing the tax credit distinction and denying standing in *Winn*, the Court properly avoids issuing what otherwise might be considered an advisory opinion in a matter that lacks specific injury.[185] Instead, the Court seeks to develop concrete and consistent Establishment Clause jurisprudence for the benefit of federal and state courts, government officials, and taxpayer-citizens.[186]

178. *Winn*, 131 S. Ct. 1436, 1448 (2011). *But see id.* at 1458 (Kagan, J., dissenting) ("[T]he STO tax payment is . . . 'costless' to the individual; it comes out of what [the taxpayer] otherwise would be legally obligated to pay the State—hence, out of public resources." (quoting *Winn IV*, 542 U.S. 88, 95 (2004))).

179. *See id.* at 1448.

180. *See id.* at 1444, 1447.

181. *Id.* at 1444.

182. *Id.*

183. *See id.* at 1449 ("The Court would risk error if it relied on assumptions that have gone unstated and unexamined.").

184. *See* Martin v. Hunter's Lessee, 14 U.S. 304, 353–55 (1816).

185. *Cf.* Alabama v. Arizona, 291 U.S. 286, 291–92 (1934) ("This court may not be called on to give advisory opinions or to pronounce declaratory judgments. . . . Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent.").

186. *See* Mahnich v. S. S.S. Co., 321 U.S. 96, 113 (1944) (Roberts, J., dissenting) (noting how inconsistency in the Court's decisions can "leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow").

c. The Tax Credit Distinction Preserves Judicial Economy

Third, the distinction between a tax credit and a government expenditure preserves judicial economy. Whereas the *Winn* Court suggested that it merely declined to extend *Flast*,[187] the dissent insisted that the Court's decision "devastates taxpayer standing in Establishment Clause cases."[188] Obviously, both perspectives have conflicting views as to whether a challenge to a tax credit is properly within the *Flast* exception. Because the Court had never ruled on this issue before *Winn*, the magnitude of the decision's impact on potential claimants and lower courts is difficult to measure. Regardless of one's view on the merits of that tradeoff, the Court's denial of standing in *Winn* frees the Judiciary from having to hear similar cases in the future. This preservation of judicial economy provided an underlying policy justification for the Court's decision.[189] A universal rule to provide standing for all claims challenging a tax credit could have resulted in an expansion of Establishment Clause plaintiffs.[190] A broad application of *Flast* arguably would have been "at odds with . . . *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances.'"[191] The Court's decision in *Winn* indeed averts that outcome.[192]

*C. Comparison of the Tax Credit Distinction in* Winn *to the Subsidy Exception Under the Dormant Commerce Clause*

Although a tax credit and a subsidy are similar in some ways,[193] the juxtaposition of *Winn*'s tax credit distinction under the Establishment Clause and the subsidy exception under the dormant Commerce Clause arguably reveals further reasoning for the Court's decision in *Winn*.[194]

Taxpayer standing under the Establishment and dormant Commerce Clauses are similar in several respects. Under each legal doctrine, a private litigant is seeking to invoke the power of the federal Judiciary to challenge legislative or executive authority.[195] Each legal doctrine in-

187. *See Winn*, 131 S. Ct. at 1449 (noting that a contrary holding would "alter the rules of standing").

188. *Id.* at 1462 (Kagan, J., dissenting).

189. *See id.* at 1449 (majority opinion) ("In an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so.").

190. *See id.*

191. DaimlerChrysler v. Cuno, 547 U.S. 332, 348 (2006) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

192. *Cf.* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (noting that "[r]elaxation of standing requirements is directly related to the expansion of judicial power").

193. *Cf. Winn*, 131 S. Ct. at 1456 (Kagan, J., dissenting) ("[T]ax breaks are often 'economically and functionally indistinguishable from a direct monetary subsidy.'" (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 859 (1995) (Thomas, J., concurring))).

194. *See* Elliott, *supra* note 10, at 189 (reviewing various means Congress might employ to expand standing under the Commerce Clause, from which the dormant Commerce Clause emanates).

195. *Cf.* Rahdert, *supra* note 12, at 1063 n.255 (noting various ways in which litigants might challenge displays of commerce and spending authority in the context of the dispute resolution aims of *Frothingham*).

volves a federal or state government actor and a purportedly discriminatory tax.[196] Under each legal doctrine, a claimant asserts breach of a constitutional provision: the Establishment Clause or Commerce Clause.[197] Under each legal doctrine, the enactment at issue displays varying levels of religious-based[198] or commerce-based discriminatory bias.[199] Under each legal doctrine, a court determines if the government actor exceeded its establishment or commerce powers.[200]

As provided by the *Winn* Court, a taxpayer lacks standing under *Flast* to challenge a tax credit but not a government expenditure.[201] By comparison, a claimant may establish standing under the dormant Commerce Clause to challenge a state tax discriminating against out-of-state parties[202] but not a similarly discriminatory state subsidy from general tax funds.[203] Unlike the newly shielded status in *Winn* of a tax credit under the Establishment Clause,[204] the analogous discriminatory tax exemption or rebate receives *no* such favorable treatment under the dormant Commerce Clause.[205] Because the dormant Commerce Clause generally aims to prevent the discriminatory tax policy at issue—which goes to the heart of interstate commerce—the Court might be more generous about taxpayer standing in that context and thus unwilling to adopt the tax credit distinction. Purported violations of the Establishment Clause,

196. *See Cuno*, 547 U.S. at 348 (dictum) ("[T]he [Establishment and Commerce] Clauses are similar in that they often implicate governments' fiscal decisions . . . .").

197. *See id.* at 345–46 (noting that a claim by city and state taxpayers alleging that Daimler-Chrysler's tax credit imposed a disproportionate tax burden on them under the Commerce Clause "is no different from similar claims by federal taxpayers" already rejected by the Court as insufficient to establish standing under the Establishment Clause).

198. *See* Bowen v. Kendrick, 487 U.S. 589, 593 (1988) (holding that the Adolescent Family Life Act did not violate the Establishment Clause "on its face," but remanding for determination of whether the Act violated the Establishment Clause "as applied").

199. In a dormant Commerce Clause case, an enactment might be per se invalid, discriminatory on its face, discriminatory in purpose, discriminatory in effect, merely burdensome on interstate commerce, or within the ordinary police power of the state. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392–94 (1994).

200. *See supra* note 194.

201. *See Winn*, 131 S. Ct. 1436, 1447 (2011).

202. *See, e.g.*, Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 336–37 (1992) (invalidating an Alabama law imposing a waste disposal fee on hazardous waste generated outside Alabama and disposed of in Alabama but not on hazardous waste generated and disposed of in Alabama).

203. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994) (dictum) ("A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce . . . ."); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988) (dictum) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the dormant Commerce Clause] . . . .").

204. *See Winn*, 131 S. Ct. at 1447.

205. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 568, 595 (1997) (invalidating a Maine state statute that provided a property tax exemption to charitable institutions in Maine but denied full exemption to institutions conducted or operated principally for the benefit of persons who were not Maine residents); *W. Lynn Creamery*, 512 U.S. at 188 (invalidating a Massachusetts state law that imposed an assessment on all sales of milk to Massachusetts retailers but rebated all proceeds from this assessment to Massachusetts dairy farmers).

however, can take many forms beyond just discriminatory tax policy.[206] Therefore, the Court might find that plaintiffs challenging a tax credit under the Establishment Clause do not require as much latitude to bring a claim as those challenging a tax credit under the dormant Commerce Clause.

## CONCLUSION

Approximately forty-four years ago in *Flast*, the Supreme Court created, for Establishment Clause claims, a "dramatic" exception to the general rule against taxpayer standing.[207] Since then, the Court has wrestled with the precise meaning and scope of *Flast*,[208] whose exception is unduly vague and exclusively relied on James Madison's *Memorial and Remonstrance Against Religious Assessments*. *Flast*'s reliance on Madison's *Memorial and Remonstrance*, however, is misguided because it was a political, not a legal, argument; appears to reflect Madison's "free exercise," not "establishment," concerns; and is not binding authority for *Flast*.

In *Winn*, the Court reconsidered the *Flast* exception and relied on a distinction between a tax credit and a government expenditure in dismissing an Establishment Clause claim for the plaintiffs' lack of standing.[209] Although "novel" in the context of standing doctrine,[210] *Winn*'s tax credit distinction has merit because it derives from the text of *Flast*, avoids speculative decisions, and preserves judicial economy.[211] Furthermore, the tax credit distinction does not unduly restrict taxpayer standing in Establishment Clause cases because purported violations of the Establishment Clause—unlike those of the dormant Commerce Clause—can take many forms beyond just discriminatory tax policy.

As did *Hein*, *Winn* highlighted the division between the Court's conservative and liberal blocs, which denied and unsuccessfully supported standing, respectively.[212] Critics of Article III standing doctrine maintain that the Court's strict version of standing emerged in reaction to public interest litigation in the late 1970s.[213] In this current "era of fre-

206. *Cf. Winn*, 131 S. Ct. at 1449 (noting that standing in Establishment Clause cases can be shown in various ways).

207. Duncan, *supra* note 2.

208. *See* Stern, *supra* note 3.

209. *See Winn*, 131 S. Ct. at 1447.

210. *See id.* at 1450 (Kagan, J., dissenting).

211. *See id.* at 1449 (majority opinion); Flast v. Cohen, 392 U.S. 83, 102 (1968).

212. *See Winn*, 131 S. Ct. at 1439; Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 591 (2007). The conservative bloc is further split between the Justices who seek to eliminate taxpayer standing altogether and those who prefer an incremental approach. *See Winn*, 131 S. Ct. at 1449–50; *Hein*, 551 U.S. at 615, 618; Rahdert, *supra* note 12, at 1046.

213. *See* Elliott, *supra* note 10, at 169.

quent litigation,"[214] the Court's strict version of taxpayer standing under the Establishment Clause appears to be alive and well.

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214. *Winn*, 131 S. Ct. at 1449.

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