Supplementary Material

Chapter 11: The Contemporary Era—Constitutional Authority and Judicial Power

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Arizona Christian School Tuition Organization v. Winn, 563 U.S. _ (2011)

In 1997, Arizona amended its tax code to provide a dollar-for-dollar tax credit up to $500 per person for contributions to school tuition organizations (STOs). STOs are charitable organizations, exempt from federal taxes, that provide scholarships to students attending private schools, including religious schools. Kathleen Winn and a group of other Arizona taxpayers filed suit in federal district court against the director of the state tax department, and several STOs for religious schools joined the suit. Winn sought a declaration that the tax credit was an unconstitutional establishment of religion. The district court dismissed the case for lack of standing, but the circuit court both reversed that decision and ruled that the tax credit was unconstitutional. In a 5–4 decision, the U.S. Supreme Court reversed the circuit court, concluding that taxpayers did not have standing to bring the constitutional claim in the federal courts. In doing so, the Court significantly modified the landmark decision in Flast v. Cohen *(1968), which allowed taxpayer suits in establishment clause cases.*

Is this decision consistent with Flast*, or does it narrow the earlier ruling? Why would federal courts restrict taxpayer suits? Why would cases involving establishment clause claims be an exception to that general principle? Are there circumstances in which the courts should not resolve constitutional disputes? Is a doctrine flawed if it does not maximize the ability of the courts to resolve constitutional disputes? Is the assessment of this case affected by whether other potential claimants with more traditional injuries could successfully raise these constitutional challenges in the federal courts? Is there a relevant difference between tax credits and government expenditures? If Winn has standing to challenge the Arizona tax code, does she also have standing to challenge the federal tax code that recognized STOs as tax-exempt charitable organizations?*

JUSTICE KENNEDY delivered the opinion of the Court.

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To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution. Standing in Establishment Clause cases may be shown in various ways. Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom . . . . Other plaintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation. . . .

For their part, respondents contend that they have standing to challenge Arizona's STO tax credit for one and only one reason: because they are Arizona taxpayers. But the mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court. To overcome that rule, respondents must rely on an exception created in *Flast v. Cohen* (1968). For the reasons discussed below, respondents cannot take advantage of *Flast*'s narrow exception to the general rule against taxpayer standing. . . .

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. . . . In the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees. . . . The Framers paid heed to these lessons. . . . By rules consistent with the longstanding practices of Anglo-American courts a plaintiff who seeks to invoke the federal judicial power must assert more than just the "generalized interest of all citizens in constitutional governance." *Schlesinger v. Reservists Committee to Stop the War* (1974).

Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary. If the judicial power were "extended to every question under the constitution," Chief Justice Marshall once explained, federal courts might take possession of "almost every subject proper for legislative discussion and decision." The legislative and executive departments of the Federal Government, no less than the judicial department, have a duty to defend the Constitution. . . . For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. . . .

To state a case or controversy under Article III, a plaintiff must establish standing. *Allen v. Wright* (1984). . . .

. . . . Absent special circumstances, however, standing cannot be based on a plaintiff's mere status as a taxpayer. . . .

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"The party who invokes the power [of the federal courts] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . .

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Each of the inferential steps to show causation and redressability depends on premises as to which there remains considerable doubt. The taxpayers have not shown that any interest they have in protecting the State Treasury would be advanced. Even were they to show some closer link, that interest is still of a general character, not particular to certain persons. Nor have the taxpayers shown that higher taxes will result from the tuition credit scheme. The rule against taxpayer standing, a rule designed both to avoid speculation and to insist on particular injury, applies to respondents' lawsuit. The taxpayers, then, must rely on an exception to the rule. . . .

The primary contention of respondents, of course, is that, despite the general rule that taxpayers lack standing to object to expenditures alleged to be unconstitutional, their suit falls within the exception established by *Flast*. . . .

. . . . *Flast* held that taxpayers have standing when two conditions are met.

The first condition is that there must be a "logical link" between the plaintiff's taxpayer status "and the type of legislative enactment attacked." . . .

The second condition for standing under *Flast* is that there must be "a nexus" between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged." . . .

After stating the two conditions for taxpayer standing, *Flast* considered them together, explaining that individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a sectarian entity. . . .

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It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit. Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. 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. . . . When the

government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. . . .

The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. . . .

Furthermore, respondents cannot satisfy the requirements of causation and redressability. When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of *Flast*, traceable to the government's expenditures. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs. Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. . . . And while an injunction against application of the tax credit most likely would reduce contributions to STOs, that remedy would not affect noncontributing taxpayers or their tax payments. As a result, any injury suffered by respondents would not be remedied by an injunction limiting the tax credit's operation.

. . . . [W]hat matters under *Flast* is whether sectarian STOs receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen's conscience. Under that inquiry, respondents' argument fails. Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations. Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona State Treasury.

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If an establishment of religion is alleged to cause real injury to particular individuals, the federal courts may adjudicate the matter. Like other constitutional provisions, the Establishment Clause acquires substance and meaning when explained, elaborated, and enforced in the context of actual disputes. That reality underlies the case-or-controversy requirement, a requirement that has not been satisfied here.

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Reversed.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

. . . . *Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established. I would repudiate that misguided decision and enforce the Constitution. . . .

I nevertheless join the Court's opinion because it finds respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds. . . .

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

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For almost half a century, litigants like the Plaintiffs have obtained judicial review of claims that the government has used its taxing and spending power in violation of the Establishment Clause. . . .

Today, the Court breaks from this precedent by refusing to hear taxpayers' claims that the government has unconstitutionally subsidized religion through its tax system. . . .

This novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of

accomplishing the same government objective—to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.

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Taxpayers have standing, *Flast* held, when they allege that a statute enacted pursuant to the legislature's taxing and spending power violates the Establishment Clause. . . .

They attack a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution's taxing and spending clause (*Flast* nexus, part 1). And they allege that this provision violates the Establishment Clause (*Flast* nexus, part 2). By satisfying both of *Flast*'s conditions, the Plaintiffs have demonstrated their "stake as taxpayers" in enforcing constitutional restraints on the provision of aid to STOs. . . . Finding standing here is merely a matter of applying *Flast*. . . .

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. . . . In the decades since *Flast*, no court—not one—has differentiated between appropriations and tax expenditures in deciding whether litigants have standing. . . .

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. . . . [C]onsider an example far afield from *Flast* and, indeed, from religion. Imagine that the Federal Government decides it should pay hundreds of billions of dollars to insolvent banks in the midst of a financial crisis. Suppose, too, that many millions of taxpayers oppose this bailout on the ground (whether right or wrong is immaterial) that it uses their hard-earned money to reward irresponsible business behavior. In the face of this hostility, some Members of Congress make the following proposal: Rather than give the money to banks via appropriations, the Government will allow banks to subtract the exact same amount from the tax bill they would otherwise have to pay to the U.S. Treasury. Would this proposal calm the furor? Or would most taxpayers respond by saying that a subsidy is a subsidy (or a bailout is a bailout), whether accomplished by the one means or by the other? Surely the latter; indeed, we would think the less of our countrymen if they failed to see through this cynical proposal.

And what ordinary people would appreciate, this Court's case law also recognizes—that targeted tax breaks are often "economically and functionally indistinguishable from a direct monetary subsidy." *Rosenberger v. Rector and Visitors of University of Virginia* (1995). . . .

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Consider some further examples of the point, but this time concerning state funding of religion. Suppose a State desires to reward Jews—by, say, $500 per year—for their religious devotion. Should the nature of taxpayers' concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend? Or assume a State wishes to subsidize the ownership of crucifixes. It could purchase the religious symbols in bulk and distribute them to all takers. Or it could mail a reimbursement check to any individual who buys her own and submits a receipt for the purchase. Or it could authorize that person to claim a tax credit equal to the price she paid. Now, really—do taxpayers have less reason to complain if the State selects the last of these three options? . . .

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The majority offers just one reason to distinguish appropriations and tax expenditures: A taxpayer experiences injury, the Court asserts, only when the government "extracts and spends" her very own tax dollars to aid religion. . . .

. . . . [H]ere is how *Flast* primarily justified its holding: "[O]ne of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." That evil arises even if the specific dollars that the government uses do not come from citizens who object to the preference. . . .

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And something still deeper is wrong with the majority's "extract and spend" requirement: It does not measure what matters under the Establishment Clause. . . . Imagine the Internal Revenue Service places a checkbox on tax returns asking filers if they object to the government using their taxes to aid religion. If the government keeps "yes" money separate from "no" money and subsidizes religious activities only from the nonobjectors' account, the majority's analysis suggests that no taxpayer would have standing to allege a violation of the Establishment Clause. . . . But this Court has never indicated that States may insulate subsidies to religious organizations from legal challenge by eliciting the consent of some taxpayers. . . .

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. . . . The Court's opinion thus offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge. . . .

And by ravaging *Flast* in this way, today's decision damages one of this Nation's defining constitutional commitments. . . .