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Constitutional Law—Standing—Conveyance of Surplus Government Property to Church-Affiliated College

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CONSTITUTIONAL LAW—STANDING—CONVEYANCE OF SURPLUS GOVERNMENT PROPERTY TO CHURCH-AFFILIATED COLLEGE. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S. Ct. 752 (1982).

In August 1976 the Department of Health, Education, and Welfare (HEW), pursuant to the Federal Property and Administrative Services Act of 1949,[1] conveyed seventy-seven acres of surplus government property,[2] including buildings, fixtures, and equipment, to the Valley Forge Christian College[3] (Valley Forge) in Valley Forge, Pennsylvania.[4] The Secretary of HEW, pursuant to federal regulations,[5] computed a 100 percent "public benefit allowance," which permitted the petitioner to acquire the deed in fee simple with certain conditions subsequent[6] without making any financial payment

1. 40 U.S.C. §§ 471-544 (1976 & Supp. III 1979). The Act authorizes the Secretary of HEW (now the Secretary of Education) to dispose of surplus real property "for school, classroom, or other educational use . . . ." *Id.* § 484(k)(l). The Secretary is authorized to sell or lease the property to nonprofit, tax exempt educational institutions taking into account "any benefit which has accrued or may accrue to the United States from the use of such property . . . ." *Id.* § 484(k)(l)(A), (C).

2. The Act defines "surplus property" as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator [of General Services]." *Id.* § 472(g) (1976 & Supp. III 1979).

3. At the time of the conveyance, the petitioner was known as the Northeast Bible College. The petitioner was a nonprofit educational institution operated by the Assemblies of God "to offer systematic training on the collegiate level to men and women for Christian service as either ministers or laymen." Faculty members were required to "have been baptized in the Holy Spirit and be living consistent Christian lives." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 102 S. Ct. 752, 756 (1982).

4. The property was part of a larger tract of 181 acres northwest of Philadelphia acquired by the Department of the Army in 1942 and was the site of the Valley Forge General Hospital until it was closed in 1973. *Id.*

The Supreme Court placed the value of the property when transferred at $577,500, based on an appraisal which put no value on the buildings and fixtures on the property on the assumption that "the expense necessary to render them useful for other purposes would have offset the value of such an endeavor." *Id.* at n.7. The Third Circuit estimated the cost of acquisition of the property at $10,374,386 and stated its fair value at the time of transfer to be $1,303;730. Americans United For Separation of Church and State, Inc. v. United States Dep't of HEW, 619 F.2d 252, 253 (3d Cir. 1980).

5. 34 C.F.R. § 12.9(a) (1981) provides for the computation of a public benefit allowance "on the basis of benefits to the United States from the use of such property for educational purposes."

6. Valley Forge was required to use the property for thirty years solely for the educational purposes described in its application for the property. Those purposes were described by the petitioner as "a program of education . . . meeting the accrediting standards of the

for it.

Upon learning of the conveyance through a news release, Americans United for Separation of Church and State, Inc.[7] (Americans United) and four of its individual directors filed suit in the United States District Court for the Eastern District of Pennsylvania. Americans United argued that the conveyance violated the establishment clause[8] of the first amendment. The respondents sought declaratory and injunctive relief to void the conveyance and force the petitioner to transfer the property back to the United States government.

The district court granted summary judgment to Valley Forge and dismissed the complaint.[9] The Court of Appeals for the Third Circuit reversed the district court.[10] The Supreme Court granted certiorari[11] and reversed the Third Circuit by a five to four vote. The Court found that the respondent had suffered no actual injury sufficient to confer standing as a taxpayer or as a citizen and held that challenges under the establishment clause concerned rights which were no more "fundamental" than those prescribed by any

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State of Pennsylvania, The American Association of Bible Colleges, the Division of Education of the General Council of the Assemblies of God and the Veterans Administration." *Valley Forge*, 102 S. Ct. at 756.

7. Americans United's purpose, as stated in its articles of incorporation, was "to defend, maintain and promote religious liberty and the constitutional principle of the separation of church and state." Americans United For Separation of Church and State, Inc. v. United States Dep't of HEW, 619 F.2d 252, 254 (3d Cir. 1980). The respondent described itself as a nonprofit organization composed of 90,000 "taxpayer members" who "would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution." *Valley Forge*, 102 S. Ct. at 757.

8. U. S. CONST. amend. I states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

9. The court found, under Flast v. Cohen, 392 U.S. 83 (1968), that Americans United lacked standing to sue as taxpayers and had failed to allege any actual injury "beyond a generalized grievance common to all taxpayers." *Valley Forge*, 102 S. Ct. at 757.

10. Americans United For Separation of Church and State, Inc. v. United States Dep't of HEW, 619 F.2d 252 (3d Cir. 1980). The Third Circuit agreed that Americans United lacked taxpayer standing under *Flast* but found that the respondents had standing as citizens to challenge the conveyance as an " 'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.' " *Id.* at 261. Judge Rosen, concurring, expressed an additional reason: "[A]s a practical matter, no one is better suited to bring this lawsuit and thus vindicate the freedoms embodied in the Establishment Clause." *Id.* at 266. Judge Weis dissented. He agreed that the plaintiffs did not have standing as taxpayers but found no injury in fact other than a "generalized grievance . . . too abstract to satisfy the injury in fact component of standing." *Id.* at 268-69 (citing Schlesinger v. Reservists Comm. To Stop The War, 418 U.S. 208 (1974), and United States v. Richardson, 418 U.S. 166 (1974)).

11. 450 U.S. 909 (1981).

other constitutional provision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S. Ct. 752 (1982).

The power of the Supreme Court to review acts of the legislative and executive branches of the federal government presents a fundamental dilemma in a democratic society.[12] Since Chief Justice Marshall's opinion in *Marbury v. Madison*,[13] the Court has generally been reluctant to exercise its review power unless strictly necessary to resolve concrete issues between adversary parties.[14] To implement this policy, the Court has fashioned procedural doctrines designed to limit the circumstances under which the Court will invoke its "ultimate function" of reviewing the constitutionality of acts of the coordinate branches of government.[15]

Standing differs from other procedural considerations by focusing on the party bringing the lawsuit instead of on the issues being presented.[16] Whether viewed as a limitation imposed by article III of the Constitution or as a rule of self-restraint, the doctrine of standing to challenge governmental conduct in federal courts has

12. *See* J. NOWAK, R. ROTUNDA & N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 14, 83 (1978) [hereinafter cited as NOWAK, CONSTITUTIONAL LAW]. That the concept of majority rule can be effectively undermined by unrestrained judicial activism is demonstrated by the decisions of the Court between 1887 and 1937 which espoused the now discredited doctrine of substantive due process. *Id.* at 385-450. The dilemma has generated contrasting schools of thought regarding the proper role of the Court. Some judges and constitutional scholars favor a strict view of judicial review, which should be exercised only when absolutely necessary. *See, e.g.*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978); L. HAND, THE BILL OF RIGHTS 11-18 (1958); H. WECHSLER, PRINCIPLES' POLITICS AND FUNDAMENTAL LAW (1961); Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955); Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19 (1969); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Other commentators and writers believe the judicial function includes active protection of the constitutional rights of individuals. *See, e.g.*, C. BLACK, THE PEOPLE AND THE COURT, (1960); W. O. DOUGLAS, THE RIGHT OF THE PEOPLE (1958); W. O. DOUGLAS, GO EAST, YOUNG MAN (1974); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

13. 5 U.S. (1 Cranch) 137 (1803).

14. NOWAK, CONSTITUTIONAL LAW, *supra* note 12, at 83-85.

15. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 56-80. These include doctrines regarding advisory opinions, ripeness, mootness, collusive suits, political questions, and standing. While usually identified as self-imposed rules of judicial restraint, these considerations are also grounded in the language of article III of the Constitution, which provides that the judicial power extends only to "cases and controversies." The line between those considerations which are mandated by article III and those imposed by the Court itself has seldom been clear, especially in the area of standing.

16. Flast v. Cohen, 392 U.S. 83, 99 (1968).

been one of the most confused and confusing areas of the law.[17] The law of standing prior to 1968 developed primarily around challenges based on asserted economic interests, and two principles were discernible.[18] First, federal taxpayers did not have standing to sue over the expenditure of tax dollars because their individual interest in the revenues was deemed too remote and indirect to satisfy the case or controversy requirement of article III.[19] Second, citizens seeking redress as private parties for governmental action injurious to their interests had to demonstrate the invasion of a "legal right" to have standing to challenge the action.[20]

The law concerning the standing of federal taxpayers appeared to have been resolved in *Frothingham v. Mellon*,[21] in which the Court denied the plaintiff standing to challenge federal expenditures alleged to violate the tenth amendment and the due process clause of the fifth amendment.[22] The Court held that the effect of federal expenditures on an individual taxpayer was "so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preven-

17. The law of standing as developed by the Supreme Court has become an area of incredible complexity. Much that the Court has written appears to have been designed to supply retroactive satisfaction rather than future guidance. The Court has itself characterized its law of standing as a 'complicated specialty of federal jurisdiction.' United States ex rel. Chapman v. F.P.C., 345 U.S. 153, 156 (1953). Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970).

18. Sedler, *Standing, Justiciability and All That: A Behavioral Analysis*, 25 VAN. L. REV. 479, 482 (1972).

19. Massachusetts v. Mellon/Frothingham v. Mellon, 262 U.S. 447 (1923).

20. L. Singer and Sons v. Union Pac. R.R., 311 U.S. 295 (1940); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); City of Atlanta v. Ickes, 308 U.S. 517 (1939); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Associated Indus. v. Ickes, 134 F.2d 694 (2nd Cir. 1943), *dismissed as moot*, 320 U.S. 707 (1943). *See* Scott, *Standing In The Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

21. 262 U.S. 447 (1923). *Frothingham* was decided with the companion case of Massachusetts v. Mellon, *id.* Prior to 1923, the Supreme Court had occasionally heard taxpayer challenges to federal disbursements. Wilson v. Shaw, 204 U.S. 24 (1907) (Court reached the merits of a federal taxpayer suit to enjoin expenditures for building the Panama Canal); Millard v. Roberts, 202 U.S. 429 (1906) (Court assumed, without deciding, that a taxpayer of the District of Columbia could challenge the expenditure of public funds to improve private railroad grade crossings); Bradfield v. Roberts, 175 U.S. 291 (1899) (Court decided a federal taxpayer challenge to payments to a District of Columbia hospital on the merits). *See generally* Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 634 (1967-68).

The ability of state and municipal taxpayers to challenge the validity of local expenditures is well established. Everson v. Board of Educ., 330 U.S. 1 (1947); Crampton v. Zabriskie, 101 U.S. 601 (1880). *But cf.* Doremus v. Board of Educ., 342 U.S. 429 (1952) (taxpayer challenge to reading of Bible verses in school dismissed as not justiciable).

22. The plaintiff in *Frothingham* challenged the constitutionality of the Maternity Act of 1921, ch. 135, 42 Stat. 224 (1921), as an invasion of a sphere reserved to the states under the tenth amendment and as a deprivation of her property without due process of law. 262 U.S. at 479-80.

tive powers of a court of equity."[23] *Frothingham* defined the law regarding federal taxpayers' suits until 1968, when *Flast v. Cohen*[24] was decided.

In *Flast* the Court held that *Frothingham* was not an absolute constitutional barrier to taxpayer suits. The Court recognized standing in a taxpayer's action to challenge the expenditure of federal funds under the Elementary and Secondary Education Act of 1965[25] as a violation of the establishment clause.[26] The focus was on the party, not on the issue; the party was required to demonstrate a "personal stake in the outcome" to insure the "concrete adverseness" necessary to adjudication of constitutional issues.[27] The Court examined the substantive issues, not on the merits, but "to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."[28]

The nexus test had two parts: first, the taxpayer was required to establish that the challenged expenditure exceeded congressional authority under the taxing and spending clause of article I, section 8 of the Constitution;[29] second, the taxpayer was required to show that the challenged expenditure contravened a specific constitutional limitation on the power to tax and spend and "not simply that the enactment [was] generally beyond the powers delegated to Congress by Art. I, § 8."[30] The Court in *Flast* found that the establishment clause was specifically intended by the framers of the Constitution to prevent the use of the taxing and spending power to support religion and held that the plaintiffs met the nexus requirements.[31] While the *Flast* case arose in the context of a challenge

23. 262 U.S. at 487.

24. 392 U.S. 83 (1968).

25. 20 U.S.C. §§ 241, 821 (1976). The plaintiffs in *Flast* sought to enjoin the expenditure of funds to finance instruction in reading, arithmetic, and other subjects in religious schools. 392 U.S. at 85-86.

26. 392 U.S. at 105-06.

27. *Id.* at 99-101 (citing Baker v. Carr, 369 U.S. 186 (1962)).

28. *Id.* at 102.

29. *Id.*

30. *Id.* at 103. *See also* Bogen, *Standing Up For Flast: Taxpayer and Citizen Standing To Raise Constitutional Issues*, 67 KY. L. J. 147, 148-53 (1978-79); Tushnet, *The New Law of Standing: A Plea For Abandonment*, 62 CORNELL L. REV. 663, 688-90 (1977).

31. 392 U.S. at 103. The Court distinguished *Frothingham* on the basis that neither the tenth amendment nor the due process clause of the fifth amendment were specific limitations on the spending and taxing power. Therefore, the plaintiff in *Frothingham* failed the second part of the nexus requirement. In *Flast* the nexus requirement was deemed to satisfy article III's "case or controversy" requirement by providing "the necessary specificity, . . . adverseness and . . . vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Id.* at 106. Before *Flast*, of course,

under the establishment clause, the Court did not limit its holding to that provision,[32] and the potential for taxpayer suits under other constitutional provisions was apparent.

During the period between *Frothingham* and *Flast*, the law of nontaxpayer or "citizen" standing had focused on the "legal right" or "legal interest" test[33] which had become "the dominant prudential limitation on federal standing" prior to 1970.[34] A private party had to demonstrate a direct harm to a "legally protected interest" to support a cause of action or a right to sue.[35] However, the legal interest test was not uniformly applied,[36] and in the same year *Flast* was decided, the Supreme Court significantly modified it in *Hardin v. Kentucky Utilities Co*.[37] *Flast* and *Hardin* expanded the traditional view of standing and provided a broader base for challenges to government action by private parties as citizens or as taxpayers.

Two years later, the Supreme Court discarded the "legal interest" test altogether. In *Association of Data Processing Service Organizations v. Camp*[38] the Court held that sellers of data processing services had standing to contest a ruling by the Comptroller of the

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Frothingham stood for the proposition that taxpayer suits were not a form of constitutional challenge traditionally thought to be capable of judicial resolution.

32. *Id.* at 105.

33. *See* cases cited *supra* note 20.

> The principle [that one threatened with direct injury as a result of a statute authorizing violation of legal rights may challenge the validity of the statute] is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.

Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939). *See generally* Scott, *Standing In The Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

34. Marquis, *The Zone of Interests Component of the Federal Standing Rules: Alive and Well After All?*, 4 UALR L.J. 261, 263 (1981).

35. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

36. *Compare* FCC v. NBC (KOA), 349 U.S. 239 (1943); Scripps-Howard Radio v. FCC, 346 U.S. 4 (1942); and FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) *with* cases cited *supra* note 20.

37. 390 U.S. 1 (1968). The Court held that a private utility had standing to challenge the TVA's sale of electric power to towns served by the plaintiff when the sales contravened a 1959 statute designed "to protect private utilities from TVA competition." *Id.* at 6. This holding largely discredited prior law, which had held that a competitive interest alone was not sufficient to confer standing. *See, e.g.*, Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955) (referred to in *Hardin*, 390 U.S. at 7 n.7); *see also* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 450-52 (1969-70).

38. 397 U.S. 150 (1970). The case was brought under the Administrative Procedure Act, 5 U.S.C. § 702 (1976 & Supp. IV 1980). Section 702 of that Act provides: "A person suffering legal wrong because of agency action, or adversely affected . . . within the meaning of a relevant statute, is entitled to judicial review."

Currency which permitted national banks to provide computer services to customers and other banks.[39] The Court articulated a two-pronged approach to citizen standing: (1) there must be "injury in fact, economic or otherwise,"[40] and (2) the interest sought to be protected must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[41]

That the "zone of interests" prong was to be liberally applied was demonstrated in *Barlow v. Collins*,[42] the companion case to *Data Processing*. In *Barlow* the Court found that tenant farmers had standing to challenge the economic injury caused by a federal regulation which relieved the farmers of prior restrictions on the assignment of government payments.[43] Although this application of the "zone of interests" approach was a liberal one, Justices Brennan and White dissented from the majority's treatment of the standing question and argued that, after *Flast*, standing should turn solely on the existence of "injury in fact, economic or otherwise."[44]

The most expansive application of the zone of interests formulation came in *United States v. SCRAP*,[45] in which the Court held that an ad hoc group of law students had standing to challenge an Interstate Commerce Commission railroad rate increase. The increase was alleged to result in the diversion of natural resources out of the locale and "economic, recreational and aesthetic harm."[46] The Court recognized the "attenuated line of causation to the eventual injury" but found the allegations, if proved, sufficient to meet

39. The Court rejected the legal interest test as too strongly implicating the merits. "The question of standing is different." 397 U.S. at 153.

40. *Id.* at 152.

41. *Id.* at 153.

42. 397 U.S. 159 (1970).

43. 16 U.S.C. § 590h(g) (1976) allowed farmers to assign payments only "as security for cash or advances to finance making a crop." The challenged regulation defined "making a crop" to include assignments to secure rent payments, permitting the farmers to do something previously prohibited. 7 C.F.R. § 709.3 (1982). The farmers' challenge was based on the contention that landlords could compel them to finance all their farm needs from the landlords at high interest rates. 397 U.S. at 160-63.

44. 397 U.S. at 172 (Brennan, J., dissenting). In an opinion addressed to both *Data Processing* and *Barlow*, Justices Brennan and White argued that the determination of injury in fact provided the "personal stake in the outcome" and "necessary adverseness" to meet the case or controversy requirements of article III and that no further inquiry was "pertinent." *Id.* at 172-73. *See* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 457 (1969-70).

45. 412 U.S. 669 (1973). SCRAP stands for Students Challenging Regulatory Agency Procedures.

46. *Id.* at 675-76.

the injury in fact standard.[47] Thus, in the five years from 1968 to 1973, the Supreme Court had recognized an exception to the *Frothingham* barrier to taxpayer suits, modified and then discarded the legal interest test, and substituted a zone of interests formulation which, in its application, was often indistinguishable from the injury in fact approach suggested by Justices Brennan and White.[48]

About the same time *SCRAP* was decided, the Court began to limit the broad ramifications of *Data Processing* and *Barlow* by emphasizing causation as a necessary component of standing.[49] The process had begun three months prior to *SCRAP* in *Linda R.S. v. Richard D.*[50] In *Linda* the mother of an illegitimate child alleged discriminatory prosecutions under a Texas statute which made the failure to pay child support a crime.[51] The statute had been construed by the Texas courts as applying only to married parents.[52] The Court denied the plaintiff standing, finding that the relief sought would not redress the claimed injury because it would not result in support payments to the mother, but only in the incarceration of the father.[53] Since the injury would not be redressed by enforcement of the statute, it was considered too remote to be justiciable.[54]

The focus on causation was further developed in two cases involving challenges by groups of indigents and others to a zoning ordinance[55] and an Internal Revenue Service ruling[56] claimed to deny suitable housing and hospital services to the poor. In *Warth v.*

47. *Id.* at 688-90. The year before *SCRAP*, the Court, in Sierra Club v. Morton, 405 U.S. 727 (1972), found general allegations of a "public interest" in the "conservation and the sound maintenance of the national parks, game refuges and forests" by "a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage" insufficient to warrant standing to challenge construction of a proposed road through a National Park. *Id.* at 730, 739. The *SCRAP* Court distinguished *Sierra Club* on the adequacy of the pleadings. 412 U.S. at 687-90.

48. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 291-94 (1958 & Supp. 1982).

49. *See, e.g.*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Linda R.S. v. Richard D., 410 U.S. 614 (1973). *See also Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L. J. 213 (1975-76).

50. 410 U.S. 614 (1973).

51. *Id.* at 615.

52. *Id.*

53. *Id.* at 618-19.

54. *Id.* at 618.

55. Warth v. Seldin, 422 U.S. 490 (1975).

56. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

Seldin[57] the Court emphasized the necessity of pleading causation in terms of the ability of the requested relief to remove the challenged barriers.[58] The Court viewed the redressability of the claims as a guideline to whether the needed causation was established.[59] This requirement was deemed in *Simon v. Eastern Kentucky Welfare Rights Organization*[60] to define the constitutional demands of article III for a case or controversy.[61] Subsequent cases found standing in situations similar to that in *Warth* when the allegations were sufficiently specific to indicate that judicial intervention could provide relief from the challenged conduct.[62]

The liberalizing effect of *Data Processing* was obscured by this use of redressability to evaluate causation as an article III standing requirement.[63] At about the same time, the Court decided two cases which placed renewed emphasis on the separation of powers by refusing to hear generalized grievances based on the assertion that government conduct was unconstitutional.[64] *United States v. Richardson*[65] and *Schlesinger v. Reservists Committee To Stop The War*[66] made it clear that *Flast* would be narrowly construed,[67] and that

57. 422 U.S. 490 (1975).

58. *Id.* at 501-02. The petitioners brought an action against the town of Penfield, N.Y., claiming the town's zoning ordinance, as written and as enforced, excluded low to moderate income persons from living in Penfield, in violation of 42 U.S.C. §§ 1981-1983 (1976 & Supp. IV 1980).

59. 422 U.S. at 504-05.

60. 426 U.S. 26 (1976). Low income individuals and organizations sued the Secretary of the Treasury and Commissioner of Internal Revenue to challenge Rev. Rul. 69-545, which extended favorable tax treatment to hospitals that did not extend certain services to indigents. The ruling was also claimed to violate the Administrative Procedure Act, 5 U.S.C. § 702 (1976 & Supp. IV 1980).

61. 426 U.S. at 38, 41-42.

62. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

63. See the analysis of the redressability issue in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). The Court found that the environmental injuries complained of were fairly traceable to the limitations on liability of the Price-Anderson Act because its legislative history indicated the construction of private nuclear facilities would not have taken place as it did "but for" the Act. The Court determined that the injuries asserted were likely to be redressed by a decision favorable to the plaintiffs. *Id.* at 72-81.

64. Schlesinger v. Reservists Comm. To Stop The War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

65. 418 U.S. 166 (1974).

66. 418 U.S. 208 (1974).

67. From 1968 to 1974 the Supreme Court occasionally cited *Flast* for general propositions of standing, but did not directly apply its nexus test. The lower courts, however, used the *Flast* rule to deny standing in a variety of taxpayer cases. *See, e.g.*, Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Atlee v. Laird, 339 F. Supp.

standing would remain a significant barrier to citizen challenges to the conduct of government.[68]

In *Richardson* the plaintiff sought information about the annual expenditures of the CIA[69] and asked the district court to declare the Central Intelligence Agency Act[70] unconstitutional as a violation of the accounts clause.[71] The Third Circuit held that the plaintiff had standing under *Flast*, finding a sufficient nexus between his taxpayer status and the failure to report CIA expenditures, and determining that the accounts clause was a specific limitation on the congressional power to tax and spend.[72] The Supreme Court reversed and denied standing.[73] The Court found neither prong of the *Flast* test satisfied[74] and emphasized the narrowness of *Flast's* holding.[75]

Schlesinger v. Reservists Committee To Stop The War arose under the incompatibility clause[76] of the Constitution. The plaintiffs sought a declaration that this provision was violated by members of Congress who held commissions in the armed forces reserves.[77] Standing was asserted as taxpayers and as citizens.[78]

1347 (E.D. Pa. 1972); Richardson v. Kennedy, 313 F. Supp. 1282 (W.D. Pa. 1970); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968).

68. In *Richardson* the Court addressed the requirement of citizen standing as "a direct injury" which the party "has sustained or is immediately in danger of sustaining." 418 U.S. at 177-78 (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937)). Furthermore, the injury must be more than "generalized grievance[s] about the conduct of government." 418 U.S. at 175 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

69. 418 U.S. at 167-68.

70. 50 U.S.C. § 403 (1976 & Supp. III 1979).

71. U. S. CONST. art. I, § 9, cl. 7 provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

72. Richardson v. United States, 465 F.2d 844 (3d Cir. 1972).

73. United States v. Richardson, 418 U.S. 166 (1974).

74. The Court deemed Richardson's challenge addressed, not to the taxing or spending power, but to a congressional statute regulating the CIA. *Id.* at 175. In addition, the Court found "no claim that appropriations were being spent in violation of a 'specific constitutional limitation on the . . . taxing and spending power. . . .'" since Richardson only sought information concerning how funds were spent. *Id.*

75. The Court stated that while *Flast* had "slightly lowered" the *Frothingham* barrier to taxpayer suits, it remained clear that *Frothingham* still precluded hearing "generalized grievances." *Id.* at 173.

76. U. S. CONST. art. I, § 6, cl. 2 provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

77. 418 U.S. 208, 210-11 (1974).

78. *Id.* at 211-12.

The Supreme Court summarily rejected the claim of taxpayer standing on the authority of *Flast*[79] but dealt with the claim of citizen standing more extensively.[80] The Court found the claimed injury to be "abstract" and held that when only the generalized interest of all citizens in constitutional governance is involved, the "concrete adverseness" necessary for "authoritative presentations" of claims is lacking.[81] The Court's denial of citizen standing was also predicated on the need to refrain from unnecessary "constitutional adjudication, the most important and delicate of its responsibilities."[82]

By 1980 the potential for liberal application of the *Data Processing-Barlow* standards seemed to have been greatly diminished by the *Richardson* and *Schlesinger* decisions. In that year, however, the Court heard a challenge to a district court ruling in the absence of any showing of actual injury to the plaintiffs.[83] In *Bryant v. Yellen*[84] the Court recognized standing without considering either the "zone of interests" or the redressability of the claims presented. Instead, the Court simply concluded that residents of Imperial Valley, California, who desired to purchase farmlands in the valley had standing to pursue an appeal challenging a district court's decision that section 46 of the Omnibus Adjustment Act of 1926[85] did not impose acreage limitations on landowners who already had vested or present rights to Colorado River waters.[86] The Court held "that respondents had a sufficient stake in the outcome of the controversy to afford them standing" because it was "unlikely that any of the 800 owners of excess lands would sell land at below current market price absent the applicability of § 46 and it being likely that excess lands would become available at less than market price if § 46 were

79. *Id.* at 227-28.

80. *Id.* at 216-27.

81. *Id.* at 218-21.

82. *Id.* at 221.

83. Bryant v. Yellen, 447 U.S. 352 (1980).

84. 447 U.S. 352 (1980). The case was originally filed by the United States for a declaratory judgment that the provisions of § 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e (1976), which limited irrigation water deliveries from reclamation projects to 160 acres under single ownership, applied to all private lands in the Imperial Irrigation District whether or not they had vested or present rights to Colorado River waters. When the district court ruled against the United States, residents of the Valley were allowed to intervene and pursue the appeals process in place of the United States. The residents wanted § 46 to apply to the District because, if the section applied, excess lands might become available for purchase below market value for irrigated land.

85. 43 U.S.C. § 423e (1976).

86. 447 U.S. at 366-68.

applied . . . ."[87]

The diversity of the Supreme Court's standing decisions paved the way for the Third Circuit's determination that Americans United had standing to challenge HEW's conveyance of property to Valley Forge Christian College. However, the Supreme Court in *Valley Forge* rejected the idea that Americans United had suffered any injury which presented a "case or controversy" sufficient to confer standing to pursue the action.[88] The emphasis was on the constitutional mandate of article III, couched in terms of the judicial power, not as "an unconditioned authority to determine the constitutionality of legislative or executive acts," but as "legitimate only in the last resort . . . in the determination of real, earnest and vital controversy."[89]

While conceding that confusion exists regarding which features of the standing doctrine are constitutionally required and which are imposed by the Court for its own governance,[90] the Court considered that the recent line of decisions had identified the "irreducible minimum" of article III requirements for standing.[91] A party is required to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct"[92] and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."[93] The Court said the existence of an actual injury redressable by the court was the

87. *Id.* at 368. Despite the respondents' failure to plead financial capacity to buy the land, the Court stated "the absence of detailed information about respondents' financial resources does not defeat respondents' claim of standing." *Id.* at 367 n.17. The Court in *Bryant* distinguished Warth v. Seldin, 422 U.S. 490 (1975), by saying

> [w]hile the prospect of windfall profits could attract a large number of potential purchasers of the excess lands, respondents' interest is not 'shared in substantially equal measure by all or a large class of citizens,' *Warth v. Seldin*, because respondents are residents of the Imperial Valley who desire to purchase the excess land for purposes of farming.

447 U.S. at 367 n.17 (citation omitted).

88. 102 S. Ct. at 752.

89. *Id.* at 758 (quoting Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892)).

90. The term "standing" subsumes a blend of constitutional requirements and prudential considerations, see *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and it has not always been clear in the opinions of this Court whether particular features of the "standing" requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution. *See* Flast v. Cohen, 392 U.S. at 97.

102 S. Ct. at 758.

91. 102 S. Ct. at 758.

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

93. *Id.* (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

only appropriate circumstance for exercise of the Court's power to review the constitutionality of acts of the coequal branches of the government.[94]

The Court initially reviewed Americans United's complaint as a taxpayer suit and, relying on *Frothingham*, said that the alleged unconstitutional expenditure of public funds was not a sufficient injury to confer standing.[95] Moving to an evaluation under the *Flast* nexus test, the Court distinguished *Flast* by saying that Americans United failed the first prong of the nexus test in two respects:[96] first, the claim was directed at an executive rather than a congressional action,[97] and second, the property transfer did not occur as an exercise of the taxing and spending power, but pursuant to the property clause of article IV, section 3, clause 2 of the Constitution.[98]

The Court commented that "[a]ny doubt that once might have existed concerning the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied should have been erased by this Court's recent decisions in *United States v. Richardson* and *Schlesinger v. Reservists Committee To Stop The War*."[99] The Court's determination that the respondent lacked taxpayer standing was apparently in accord with the court of appeals' decision.[100]

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94. *Id.* at 759. The Court also identified a set of prudential principles bearing on standing:

> [T]his Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. at 499. In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Id.* at 499-500. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Data Processing Service v. Camp, 397 U.S. 150, 153 (1969) [sic].

102 S. Ct. at 759-60 (footnotes omitted).

95. 102 S. Ct. at 761. The Court also relied on Doremus v. Board of Educ., 342 U.S. 429 (1952).

96. 102 S. Ct. at 762.

97. *Id.* The source of the complaint was held to be the decision by HEW to transfer a parcel of federal property rather than the congressional authorization of such transfers contained in the Federal Property and Administrative Services Act of 1949. For a different view, see *id.* at 778 (Brennan, J., dissenting).

98. U. S. CONST., art. IV, § 3, cl. 2 provides in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .

99. 102 S. Ct. at 763 (citations omitted).

100. The Third Circuit had stated:

The Supreme Court differed with the lower court on the issue of plaintiff's standing as citizens, however. The Court did not accept the appeals court's determination that the establishment clause creates in each citizen a " 'personal constitutional right' to a government that does not establish religion."[101] The Court specifically rejected the idea that the establishment clause was in any way more fundamental than the accounts or incompatibility clauses, or diminished the article III requirement for standing.[102] In the Court's view, the "generalized grievance" raised in *Valley Forge* shared the common deficiency of *Schlesinger* and *Richardson*—no personal injury.[103] The Court denied standing as citizens and reversed the judgment of the lower court.[104]

In a dissenting opinion joined by Justices Marshall and Blackmun, Justice Brennan criticized the majority for ignoring the substantive issues and dealing only with the threshold problem of standing.[105] Justice Brennan asserted that article III "was designed to provide a hospitable forum in which persons enjoying rights under the Constitution could assert those rights."[106]

> Inasmuch as litigants suing in the capacity of taxpayers must show that the activity in question involves substantial taxing and spending, it may well be that the plaintiffs here lack *taxpayer* standing. We do question, however, the assumption by the district court that the *only* basis advanced by the plaintiffs . . . is, or must be, alleged injury to their interest as taxpayers.

Americans United For Separation of Church and State, Inc. v. United States Dep't. of HEW, 619 F.2d 252, 260 (3d Cir. 1980) (emphasis in original).

101. 102 S. Ct. at 764. (quoting, Americans United For Separation of Church and State, Inc. v. United States Dep't. of HEW, 619 F.2d 252, 265 (3d Cir. 1980)).

102. *Id.* The Court said, "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States." *Id.* at 765 (footnote omitted).

103. *Id.* at 765.

104. *Id.* at 767-68.

105. *Id.* at 768. While recognizing that standing is a jurisdictional matter for article III courts, Justice Brennan noted that there "is an impulse to decide difficult questions of substantive law" only on that basis. The dissent cited Warth v. Seldin, 422 U.S. 490, 500 (1975), for the proposition that the existence of an article III injury often turned "on the nature and source of the claim asserted." 102 S. Ct. at 769. According to Justice Brennan the Court "waxes eloquent" on "our misguided 'standing' jurisprudence" but "*not one word is said about the Establishment Clause right that the plaintiff seeks to enforce.*" 102 S. Ct. at 768 (emphasis in original).

106. 102 S. Ct. at 770. Compare Justice Rehnquist's comment for the majority:

> Proper regard for the complex nature of our constitutional structure requires neither that the judicial branch shrink from a confrontation with the other two coequal branches of the federal government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

The dissent characterized the reasoning of *Frothingham* as "obscure"[107] and identified its unstated premise as a conviction that a federal taxpayer has no continuing legal interest in the affairs of the Treasury.[108]

Justice Brennan viewed the *Flast* decision as recognizing a direct interest of taxpayers in government expenditures claimed to violate the establishment clause.[109] The nexus test "sought to maintain necessary continuity with prior cases"[110] but "did not depart from the principle that no judgment about standing should be made without a fundamental understanding of the rights at issue."[111] The dissent found *Valley Forge* indistinguishable from *Flast* and criticized the distinctions made by the majority.[112] The appellants in *Flast* also challenged the action of HEW (found to be "executive" by the majority) in disbursing funds pursuant to congressional authorization,[113] and the majority's distinction between the spending clause and the property clause failed to recognize that a complaint concerning "distribution of government largesse" met "the essential requirement of taxpayer standing" in *Doremus v.*

Id. at 759.

107. *Id.* at 771. Justice Brennan stated:

> The question apparently remains open whether *Frothingham* stated a prudential limitation or identified an Article III barrier . . . . Perhaps the case is most usefully understood as a 'substantive' declaration of the legal rights of a taxpayer with respect to government spending, coupled with a prudential restriction on the taxpayer's ability to raise the claims of third parties.

Id. at n.8 (citations omitted).

108. The *Frothingham* bar to taxpayer suits was deemed to have given way to the establishment clause challenge in *Flast* because the Court had previously recognized that provision as a "definite restriction on the power to tax." 102 S. Ct. at 773 (footnote omitted). After citing Everson v. Board of Educ., 330 U.S. 1 (1947) and Reynolds v. United States, 98 U.S. 145 (1898), Justice Brennan concluded that *"[t]he taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion."* 102 S. Ct. at 775 (emphasis in original).

109. 102 S. Ct. at 776-77.

> It is at once apparent that the test of standing formulated by the Court in *Flast* sought to reconcile the developing doctrine of taxpayer "standing" with the Court's historical understanding that the Establishment Clause was intended to prohibit the Federal Government from using tax funds for the advancement of religion, and thus the constitutional imperative of taxpayer standing in certain cases brought pursuant to the Establishment Clause.

Id. at 777.

110. Particularly *Frothingham* and Doremus v. Board of Educ., 342 U.S. 429 (1952).

111. 102 S. Ct. at 777 (citing *Flast*, 392 U.S. at 102).

112. See *supra* text accompanying notes 97-98.

113. The difference in result may be attributable (as is not uncommon in standing decisions) to the adequacy of the pleadings. 102 S. Ct. at 778 (Brennan, J., dissenting).

Board of Education[114] whether it concerned a grant of cash or property.[115]

Justice Stevens dissented separately because the plaintiff's invocation of the establishment clause in *Flast v. Cohen* was "of decisive importance in resolving the standing issue in that case."[116]

The jurisprudence of standing has been announced in many inconsistent and wide-ranging Supreme Court decisions. If anything is discernible about these decisions, it is the reluctance of the Court to resolve the issue solely on the basis of an injury in fact, presumably because it too strongly implicates the merits. Perhaps that is why the Court has fashioned a second "prong" to the standing determination, sometimes identified as a "prudential" consideration.[117] The difficulty of consistent application of these undefined criteria is evidenced by the Court's disregard of the tests it announces.[118]

If the nexus test of *Flast* has lowered the procedural barriers to standing in taxpayer or citizen suits, it appears to have done so only slightly. *Flast* ushered in a decade of widely divergent standing decisions, devoid of any unifying principle. *Valley Forge* may prove to be simply one of that genre, but it is hard to escape the conclusion that therein lies an implicit constitutional judgment which constitutes a major repudiation of *Flast*.

As Justice Stevens so aptly pointed out in his dissent in *Valley Forge*, it is hard to read the majority and concurring opinions in *Flast* without concluding that the Court viewed the fact that the challenge arose under the establishment clause of "decisive importance."[119] The *Valley Forge* Court distinguished *Flast* by suggesting dual reasons why Americans United failed the first prong of the nexus test.[120] The assertion that there was no injury because only

114. 342 U.S. 429 (1952).

115. 102 S. Ct. at 779 (Brennan, J., dissenting).

116. *Id.* at 780.

117. At various times the Court has spoken in terms of "redressability," Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); "causation," Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Linda R. S. v. Richard D., 410 U.S. 614 (1973); "zone of interests," Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970); "nexus," Flast v. Cohen, 392 U.S. 83 (1968); and "legal rights," Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

118. For instance, Professor Davis reports that from 1970 to 1982 there have been 30 major decisions on standing. Only five of those decisions have mentioned the "zone" test of *Data Processing*. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.00 (Supp. 1982).

119. 102 S. Ct. at 780.

120. *Id.* at 762. See *supra* text accompanying notes 95-97.

executive, not congressional, action was involved can be understood only as a highly technical consideration based on the pleadings, since the plaintiffs in *Flast* also challenged HEW disbursements.[121] So, too, the premise that the property clause may legitimately authorize a disposition of property potentially violative of the first amendment is untenable.[122] Resolving the constitutional issue by summarily finding no "*injury* of *any* kind,"[123] the Court has necessarily made a determination of the scope of establishment clause protections.

If the rule of *Flast* retains any vitality after *Valley Forge*, it will probably do so only in fact situations so identical to *Flast* as to be simply indistinguishable from it. What is most unfortunate about *Valley Forge* is that the substantive issue is subordinated to the confused and misunderstood rubric of standing doctrine. Even if it be determined that the establishment clause was not meant to reach the conveyance involved here, the substantive issues should have been considered.

Despite indications to the contrary in *Valley Forge*, it remains hard to believe that the concept of separation of church and state embodied in the first amendment was of no more importance to the framers of the Constitution than provisions prohibiting the holding of dual offices by members of Congress or providing for public statements of federal expenditures.

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121. The plaintiffs challenged the actions of HEW officials under the Elementary and Secondary School Act of 1965. Flast v. Cohen, 392 U.S. 83, 87 (1968). They claimed that the expenditures to religious schools were either not authorized by the Act or, if they were, that the Act was unconstitutional. *Id.* In *Valley Forge* the respondents challenged the HEW action in transferring the property, but did not specifically seek a declaration that the Federal Property and Administrative Services Act was unconstitutional. 102 S. Ct. at 778 (Brennan, J., dissenting).

122. *See* 102 S. Ct. at 780-81 (Stevens, J., dissenting) (citing Flast v. Cohen, 392 U.S. 83, 115-16 (1968) (Fortas, J., concurring)).

123. *Id.* at 766 (emphasis in original).