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## THE TAXING LAW OF TAXPAYER STANDING

Eric J. Segall\*

*Today's opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently.*<sup>1</sup>

*The law of taxpayer standing has long been incoherent. Last term, the Supreme Court made matters even worse with its holding in *Hein v. Freedom from Religion Foundation*,<sup>2</sup> which denied standing to federal taxpayers challenging President Bush's faith-based initiative program. Professor Youngin is thoroughly confused but is teaching Federal Courts in the Spring, which everyone knows is the hardest course in law school.<sup>3</sup> In preparation, he enlists the assistance of Professor Tenureitis to help figure out the law of taxpayer standing.*

Professor Tenureitis (PT): I understand you're a little confused about taxpayer standing and would like to learn more in light of the Court's recent decision denying standing to the plaintiffs challenging President Bush's faith-based initiative program.

Professor Youngin (PY): Thanks, I am confused. I have read the cases, and studied the literature, but the *Hein* decision seems to make no sense. It appears to insulate almost all Executive action from Establishment Clause challenge. If the President put a permanent cross or a menorah on the White House, I'm not sure anyone would have standing to challenge it. At the same time, the decision seems to allow taxpayers to challenge congressional action.

PT: That might be the right interpretation of *Hein*, but let me suggest that we start at the beginning with standing requirements generally and then discuss taxpayer standing. Do you know where the notion of standing comes from?

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\* Professor of Law, Georgia State College of Law. I would like to thank Barry Freidman, Neil Kinkopf, and Louise Weinberg for reading and commenting on earlier drafts of this dialogue.

1. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2573 (2007) (Scalia & Thomas, JJ., concurring).

2. 127 S. Ct. 2553.

3. See Eric Segall, *Twenty Questions (Or the Hardest Course in Law School)*, 18 Ga. St. U. L. Rev. 497 (2001) (arguing that Federal Courts is the most difficult law school class).

PY: I think so. Standing derives from Article III's "case or controversy" requirement and separation of powers concerns. Federal courts are not allowed to issue advisory opinions so before there is federal jurisdiction there must be two adverse parties arguing about an issue with real life consequences.

PT: That's correct. The hornbook law is that every plaintiff in federal court has to suffer a personal injury caused by the defendant that can be redressed by a favorable decision. The Court has said that those requirements are the "irreducible constitutional minimum," in every federal case, and cannot be waived by the parties because they're necessary to the subject matter jurisdiction of the federal courts.<sup>4</sup>

PY: Ok, but aren't there other standing requirements as well, beyond those imposed by Article III?

PT: Yes, the Court calls those prudential standing requirements. Generally speaking, a plaintiff is not allowed to assert the rights of third parties, generalized grievances are not permitted (though we're not quite sure whether that is a prudential or constitutional bar, but we'll talk more about that later), and the plaintiff must be in the zone of interests protected by the statute in a case involving rights created by Congress.<sup>5</sup>

PY: Where exactly do those prudential requirements come from?

PT: No one is exactly sure, but our best guess is the Supreme Court's own equitable sense of what cases it should hear.

PY: What's the difference between the source of the prudential requirements and the source of the constitutional ones? Didn't the Court create both?

PT: The Court has said that the constitutional requirements flow directly from Article III.

PY: But the text of Article III doesn't say anything about personal injury, and didn't Professor Berger demonstrate in his famous Yale Law Journal article that the requirement of personal injury has no basis in history or common law?<sup>6</sup>

PT: Maybe, but the Court doesn't agree.

PY: Well, I'm not sure I understand the personal injury requirement anyway. I have read other articles arguing that the idea of judges trying to identify an injury analytically distinct from the claim on the merits is incoherent.

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4. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

5. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

6. Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?* 78 Yale L.J. 816

PT: Who said that?

PY: I think Professor Fletcher said it best.<sup>7</sup> Take a person who is concerned about cutbacks in welfare benefits but doesn't receive those benefits. Because of his concern, he loses sleep and spends money for therapy to help him with his problem. If he filed suit, the Court would hold that he has suffered no injury for standing purposes. But another person who suffers sleep deprivation, maybe from the barking of a neighbor's dog, and spends additional money for ear plugs, would have standing. Their injuries are exactly the same (loss of sleep) but one has standing and one does not.

PT: What's the point?

PY: I think the point is that there is no way a court can make a determination of injury apart from a decision on the merits. Therefore, the personal injury requirement does not somehow stem automatically from Article III as the Court suggests. All the standing requirements, constitutional and prudential, come from the Court's own sense of what cases the Court wants to hear.

PT: That may be right, but lower courts still have to follow the Supreme Court's decisions, which do distinguish between prudential and constitutional requirements. Let's move on. You're here to talk about the Court's taxpayer standing cases, right?

PY: Yes.

PT: Ok, we have to start with *Frothingham v. Mellon*.<sup>8</sup> In that case, the plaintiff challenged a federal law giving the states money to fight maternal and infant mortality. Mrs. Frothingham argued that the law exceeded Congress' enumerated powers and took her money without due process of law.<sup>9</sup>

PY: She wasn't asking for her tax money back though.

PT: Right, when we talk about taxpayer standing, we don't mean a person claiming that she wants a tax refund but rather someone who is upset about how the government is spending money and seeking an injunction against that spending.

PY: But Mrs. Frothingham didn't win.

PT: No. The Court said that a taxpayer couldn't challenge a congressional spending law on the grounds that it took her tax money without due process of law. Her interest in the federal treasury was too remote, and if she could sue so could everyone

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7. See William Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988).

8. *Cmmw. v. Mellon*, 262 U.S. 447 (1923) (consolidated action).

else. The Court was concerned with the floodgates of litigation.<sup>10</sup>

PY: Did the Court say whether this bar on taxpayer standing was a constitutional rule or a prudential one? In other words, could Congress have authorized the suit?

PT: No, the Court never answered that question.

PY: Ok, well the next taxpayer standing case is about Justice Black right?

PT: Yes. In *Ex Parte Lévit*,<sup>11</sup> the plaintiff challenged Justice Black's appointment to the Supreme Court because while in the Senate he voted to increase the benefits of the Justices.

PY: Well, isn't it true that Article I, Section 6 forbids any member of Congress from being appointed to any civil office "the Emoluments whereof shall have been [i]ncreased," while he was in office.<sup>12</sup>

PT: You memorized that provision?

PY: I don't have tenure yet.

PT: I understand. The Court said that the plaintiff had no injury because he shared a general interest in common with everyone else. Therefore he couldn't sue.

PY: But Justice Black's appointment might have violated the Constitution.

PT: What does that have to do with standing?

PY: If this plaintiff couldn't sue, who could?

PT: Probably no one. What's your point?

PY: Ok, well at least *Lévit* is consistent with *Frothingham*. What's next?

PT: We have to talk about the *Doremus* case.<sup>13</sup>

PY: The decision about prayer in school?

PT: Yes. The Court held that taxpayers couldn't challenge a New Jersey law which required that five verses from the Old Testament be read at the beginning of each

10. *Id.* at 487.

11. 302 U.S. 633 (1937).

12. U.S. Const. art I, § 6, cl. 2.

13. *Doremus v. Board of Education of the Borough of Hawthorne*, 342 U.S. 429 (1952).

school day.

PY: Why not?

PT: Because there was no pocketbook injury to the plaintiffs. The Court said that to have standing plaintiffs have to be injured in some direct and personal way.<sup>14</sup>

PY: Weren't the children injured by being exposed to the prayers?

PT: The child of record had already graduated.

PY: So the case was really moot. Didn't the Court eventually rule that prayer in schools violates the Establishment Clause? Someone must have had standing.

PT: Yes, the Court ruled that way in both *Engel v. Vitale*,<sup>15</sup> and *School District v. Schempp*.<sup>16</sup> The Court didn't discuss standing in *Vitale*, but in a footnote in *Schempp*, the Court said that the parents and students were "directly affected" by the prayers and therefore could sue.<sup>17</sup>

PY: Is that our new test, whether an Establishment Clause violation "directly affects" the plaintiff?

PT: No, not really, let's talk about *Flast v. Cohen*.<sup>18</sup>

PY: Ok.

PT: The plaintiffs sued the government for giving money to religious schools. They sued as federal taxpayers.

PY: When you say the "government," do you mean the Executive or Congress? I think that becomes important later.

PT: Well, Cohen was in the Executive Branch.

PY: And the plaintiffs were complaining that their tax dollars were being used unconstitutionally, just like Mrs. Frothingham and the plaintiff in *Lévit*. The Court should have denied standing on the same grounds.

PT: The Court took a different approach. Saying that the key issue in determining

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14. *Id.* at 434.

15. 370 U.S. 421 (1962).

16. 374 U.S. 203 (1963).

17. *Id.* at 224 n. 9.

18. 392 U.S. 83 (1968).

standing is whether the plaintiff has the requisite personal stake in the outcome of the case, the Court came up with a new two pronged test to determine whether taxpayers will have standing.

PY: I like tests because they make understanding doctrine easier.

PT: Good, this one asks whether the plaintiff is challenging a law enacted by Congress under its Article I, Section 8 taxing and spending powers, and whether the law violates a specific constitutional limitation on the taxing and spending power. Plaintiffs who meet that test will have the requisite personal stake in the case to be granted standing.<sup>19</sup>

PY: And the plaintiffs satisfied that test.

PT: Sure. The money going to the schools came from Congress' taxing and spending power and the Court found that the Establishment Clause was a specific limitation on that power.

PY: But what actual injury did the plaintiffs suffer?

PT: The knowledge that their tax dollars were being used illegally.

PY: But wasn't that the exact same injury suffered by Mrs. Frothingham? And couldn't the plaintiff in *Lévvitt* have also argued that he was upset that his tax dollars were being used to pay Justice Black's illegal salary? In none of these cases were the plaintiffs asking for their money back. The cases all seem the same to me, including *Flast*.

PT: That's how Justice Harlan saw the problem in his dissent in *Flast*. He said that the Court's two part test didn't remotely measure a plaintiff's personal stake in the case. He argued that if a plaintiff is upset about a constitutional violation, it can't possibly make a difference for standing purposes which provision of the Constitution she alleges is being violated or what was the source of the congressional enactment that allegedly violates the Constitution.<sup>20</sup> Therefore, poor Mrs. Frothingham, and the *Flast* plaintiffs should have been treated the same way. But, he was in dissent.

PY: But the Court didn't overrule *Frothingham*?

PT: No, the Court said that Mrs. Frothingham met the first part of the test, but not the second because the Due Process Clause is not a specific limitation on the taxing and spending power, unlike the Establishment Clause.

19. *Id.* at 102–03.

20. <http://digitalcommons.ilb.edu/dissertations3/4>

PY: You mean Congress can pass a law to spend money in violation of the Due Process Clause and taxpayers won't have standing to challenge that law, but if Congress spends money in violation of the Establishment Clause, then there is standing.

PT: I'm afraid so.

PY: So the Establishment Clause is special?

PT: We'll talk about that when we get to the *Valley Forge* case.

PY: Let me get this straight. Mrs. Frothingham was mad that the government was violating the law by spending tax money illegally but she had no standing. The plaintiff in *Ex Parte Lé vitt* was mad that the government was spending money illegally, and he didn't have standing either. The *Flast* plaintiffs were mad that the government was spending tax dollars illegally but they had standing. None of the three asked for their money back, and all just wanted an injunction. The difference has to be that the Establishment Clause is different.

PT: Do you want to talk about *Valley Forge*?

PY: Not yet. I take it after *Flast* the ban on taxpayer standing had to be prudential not constitutional?

PT: The Court never directly answered that question. Justice Harlan, who wouldn't have granted standing in this case, did discuss the issue. He said that Congress could authorize what he called public actions, which would include taxpayer and citizen suits. He said that the bar was a prudential one, and if Congress granted standing in such a case the separation of powers issues implicated by public actions would dissipate.<sup>21</sup>

PY: That at least makes sense. Let's move on, what's next?

PT: On the same day in 1974, the Court interpreted *Flast* narrowly and denied taxpayer standing in the *Richardson* and *Schlesinger* cases.<sup>22</sup> In *Schlesinger*, the plaintiffs were upset that members of Congress were serving as officers in the Armed Forces Reserves which they claimed led to a conflict of interest regarding the Viet Nam War.

PY: Doesn't the Constitution say that no person can hold an Office in the Executive Branch while being a member of Congress?

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21. *Id.* at 130–31.

22. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *U.S. v. Richardson*, 418 U.S.



PT: Yes, that would be Article I, Section 6.<sup>23</sup>

PY: Isn't the purpose of that Clause to stop potential conflicts of interests?

PT: Yes, but the Court said the plaintiffs didn't meet the *Flast* test because they were not challenging a law passed under Article I, Section 8, but rather a decision by the Executive Branch to allow members of Congress to serve in the reserves.<sup>24</sup>

PY: But the plaintiffs were mad that the Constitution was being violated just like the *Flast* plaintiffs. What's the difference?

PT: They had no concrete injury.

PY: But neither did the plaintiffs in *Flast*.

PT: That's true.

PY: Why is concrete injury important?

PT: The Court said that requiring the plaintiff to suffer concrete injury insures that the case will be presented in a specific factual context and that difficult constitutional issues won't be decided unnecessarily by the Court.<sup>25</sup>

PY: But that doesn't make sense. Couldn't the ACLU bring a case on ideological grounds and present it to the Court in as vigorous and helpful a way as a plaintiff who has a large monetary stake in the case but is not represented by adequate counsel.

PT: The Court didn't see it that way.

PY: And didn't the Court in *Schlesinger* specifically find that the case was presented well; that the issues were sharply focused, and that the parties were sufficiently adverse?<sup>26</sup>

PT: Yes, yes, and yes.

PY: Ok, so is there really a relationship between concrete injury and the ability to decide a case in a specific factual context?

PT: Apparently the Court thinks so. Do you want to talk about *Richardson*?

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23. Article I, Section 6 provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6.

24. *Schlesinger*, 418 U.S. at 228.

25. *Id.* at 220–21.

26. *See* *id.* at 225.

PY: That's the case about the CIA right?

PT: Yes, they refused to make public how much money they spend every year.

PY: I can understand that. But doesn't Article I, Section 9 require that "a regular Statement of and Account" of all government expenditures must be published "from time to time."<sup>27</sup> There's no exception for the CIA or the military. Maybe there should be, but there isn't. Shouldn't the text of the Constitution matter?

PT: Have you read the Court's Eleventh Amendment cases recently?

PY: Good point, but that's for another day.

PT: Right. The Court held that the plaintiff in *Richardson* didn't meet the *Flast* test because he wasn't challenging government expenditures under Article I, Section 8, but simply arguing that the CIA's budget had to be disclosed.<sup>28</sup>

PY: But wasn't he arguing that the Constitution prohibited the CIA from spending money unless it made public its expenditures, and isn't that the same thing? In other words, the CIA was spending money illegally because Congress allowed it to do so secretly. That allegation sounds like it should meet the *Flast* test.

PT: The Court didn't think so. Also, everyone suffered the same injury as the plaintiff so it was a generalized grievance and thus could not give rise to standing.<sup>29</sup>

PY: What the Court is really saying is that when everyone is injured, no one is injured.

PT: That's right.

PY: Didn't the plaintiff also say he couldn't vote intelligently because he didn't know how much money the government was spending? That's more than just complaining that the government is violating the law. The denial of the right to vote often gives rise to standing—like in those cases where whites claim that districts have been apportioned to help African-Americans.<sup>30</sup> How come his voting claim didn't give him standing?

PT: Those two words again—generalized grievance.

PY: In other words, the Court didn't want to hear the case.

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27. U.S. Const. art. I, § 9.

28. See *Richardson*, 418 U.S. at 175.

29. *Id.* at 176–77.

30. See *Shaw v. Reno*, 509 U.S. 630 (1992).

PT: Would you want to decide whether the Constitution requires the CIA to publish its spending?

PY: Ok, ok, did the Court in either *Schlesinger* or *Richardson* say whether the generalized grievance requirement was constitutional or prudential?

PT: Nope.

PY: Did the Court overturn *Flast*?

PT: Nope.

PY: All right, what's next?

PT: *Valley Forge*.<sup>31</sup>

PY: That's the case where the government gave a hospital to a religious university, right?

PT: Yes, the old Department of Housing, Education and Welfare gave a piece of property worth over half a million dollars to the Valley Forge Christian College, a school that trained ministers.

PY: Who sued?

PT: Americans United for Separation of Church and State, as federal taxpayers, arguing that the transfer violated the Establishment Clause.

PY: Then *Flast* should have controlled the case, and the plaintiffs had standing.

PT: *Flast* didn't control for two reasons. The Court said that the plaintiffs didn't meet the first part of the *Flast* test because the decision to give the property away was made by the Executive Branch, not by Congress, and second, even if the decision was made by Congress, it was pursuant to Article IV's property clause not the taxing and spending power of Article I, Section 8.<sup>32</sup>

PY: Let me see if I have this correct. The plaintiffs in *Flast* challenged the federal government's decision to give money to religious schools, and they had standing. The plaintiffs in *Valley Forge* challenged the federal government's decision to give property to a religious school, and they didn't have standing.

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31. *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

32. *Id.*, at 479-80.

PT: That's correct.

PY: The Court didn't say there was a difference between land and money did it?

PT: No.

PY: And, doesn't the Establishment Clause apply to the entire federal government?

PT: Yes.

PY: So what difference does it make whether it is the Congress or the President who violates the Clause for purposes of standing and why would it matter whether the source of governmental authority is Article I or Article IV? How could either of those things affect the plaintiff's personal stake in the case, which is what *Flast* said was so important.

PT: Many trees have been laid to waste by scholars trying to answer those questions.

PY: Any good answers.

PT: Nope, just a lot of dead wood.

PY: Did the Court overrule *Flast*?

PT: Not explicitly.

PY: Ok, so it was on the road to doing so?

PT: Not really, as you'll see when we discuss the *Bowen* case.

PY: Wait, what did the Court of Appeals hold in *Valley Forge*? Based on *Flast*, it must have found standing.

PT: It did, but it wasn't crazy about the two-pronged *Flast* test so it also said that the Establishment Clause was special for standing purposes and gave everyone an individual right to sue.

PY: That sounds like the best interpretation of *Flast*.

PT: Except the *Valley Forge* Court specifically said that the Establishment Clause is not special for standing purposes, that the Court would not create a hierarchy of constitutional values, and that the fact that no one would have standing to challenge this

gift was not a reason to find standing.<sup>33</sup>

PY: If the Establishment Clause is not special, and there was no standing in *Frothingham*, *Lévit*, *Schlesinger*, *Richardson*, and *Valley Forge*, then *Flast* can't be good law anymore. It just can't be.

PT: Well, just wait until *Hein*.

PY: Ok, I assume the Court said that the generalized grievance requirement was constitutionally based.

PT: Not explicitly, no.

PY: Well is it?

PT: We'll talk about that after we discuss the *Lujan* case. But first we have to talk about *Bowen v. Kendrick*,<sup>34</sup> which implicates *Valley Forge* and *Flast*.

PY: *Bowen* was also an Establishment Clause case, right?

PT: Yes. Congress decided it would be a good idea to spend money to fight teenage pregnancy so it authorized the Executive Branch to give money to charitable groups, including religious organizations, for that worthy cause.

PY: Let me guess, some of the money went to Catholic organizations who counseled against abortion.

PT: Yes.

PY: Who sued?

PT: Various groups claiming they had standing as federal taxpayers because they satisfied the *Flast* test.

PY: I'm guessing the government claimed that *Valley Forge* had implicitly overruled *Flast*.

PT: Yes. And in the alternative, it argued that *Flast* was not satisfied because the money was being spent by the Executive not by Congress.

PY: Those arguments make sense given *Valley Forge*.

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33. *Id.* at 484–85, 489.

PT: They do but the Court went in another direction and said that even though the challenge was to executive discretion, as opposed to the law itself, because the money flowed from Congress to the Executive, the plaintiffs satisfied the *Flast* test.<sup>35</sup>

PY: But didn't the Congress also authorize the disposal of property in *Valley Forge*, and the unsuccessful challenge there was also to executive discretion.

PT: Yes.

PY: And *Valley Forge* wasn't overturned?

PT: No.

PY: But it can't be reconciled with *Bowen*.

PT: Probably not.

PY: So basically *Bowen v. Kendrick* implicitly overturned *Valley Forge* which we thought had implicitly overruled *Flast*?

PT: You got it. Except that *Valley Forge* is going to be reaffirmed in *Hein*.

PY: But so is *Flast*!

PT: True.

PY: And you expect me to teach these cases to law students?

PT: Why do you think I gave up federal courts so you could teach it?

PY: All right, so after *Bowen*, the *Flast* test is still alive and kicking, we don't really understand *Valley Forge*, and we still don't know whether this whole scheme is constitutionally required or prudentially based.

PT: That's about to change with the *Lujan* case.<sup>36</sup>

PY: Which involved endangered animals, right?

PT: Yes, but if we go on, you have to promise me you absolutely will not write a law review article that tries to be cute by talking about whether animals have standing.

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35. *Id.* at 619–20.

36. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

There are, believe it or not, at least nine of them already out there.<sup>37</sup>

PY: Really, can animals have standing?

[Silence]

PY: Ok, I promise no cute articles about animals.

PT: *Lujan* involved a law requiring all agencies of the United States Government to consult with the Secretary of Interior if one of their projects threatened endangered animals.

PY: Sounds sensible, what was the problem?

PT: The President interpreted the law to only apply to agency action in the United States and not overseas, and various environmental groups thought that interpretation violated Congress's intent.

PY: How were they injured?

PT: There were several different theories. Two members of the environmental group said they had plans to visit foreign counties where U.S. funded projects were endangering animals. The Court said they didn't have standing because their plans weren't "imminent" enough.<sup>38</sup> We can discuss environmental standing if you like, but it isn't part of the problem of taxpayer standing and it will get us off track.

PY: No, thank you. I'm getting a headache.

PT: Ok, the other standing theory was based on a citizen suit provision in the law that gave any person a right to sue the United States for any violation of the law, including the consultation requirements.<sup>39</sup>

PY: That's a true congressional authorization of a citizen suit. Justice Harlan would have said that was perfectly constitutional based on his dissent in *Flast*, right?

PT: Yes, he said Article III doesn't bar public actions, but the Court shouldn't hear them without congressional authorization, which does make sense. If the people's representatives in Congress authorize a public action against the government, then why

37. See e.g. Lauren Magnotti, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 St. John's L. Rev. 455 (2006); Cass Sunstein, *A Tribute to Kenneth Karst: Standing for Animals (With Notes On Animal Cases)*, 47 UCLA L. Rev. 1333 (2000).

38. *Lujan*, 504 U.S. at 563–64.

39. *Id.* at 572 (The Endangered Species Act provided that "any person may commence a civil suit on his own behalf to enjoin a violation of the law").

should the Court say no?

PY: So, the Court should have upheld the provision and finally said that the bar on generalized grievances was prudential.

PT: Maybe, but the Court actually said the ban on generalized grievances was based on Article III. Therefore, Congress cannot change it and the law was unconstitutional.<sup>40</sup>

PY: Scalia wrote the opinion, right?

PT: Yes.

PY: Did he rely on history?

PT: Not a word.

PY: Text?

PT: Nope.

PY: Case law?

PT: Not really, this issue had never been presented squarely to the Court before.

PY: Then what?

PT: He said that the concrete injury requirement talked about in *Frothingham*, *Richardson*, etc., came directly from Article III because standing is all about separation of powers, and it was that requirement that distinguished the work of the Judicial Branch from that of the other two branches.

PY: But none of those cases involved a right created by Congress?

PT: He said that was irrelevant. He also said that if the Court were to allow Congress to authorize suits by citizens who didn't suffer concrete injury, there would be an unconstitutional shift in power from the Executive Branch to the Judicial Branch.<sup>41</sup>

PY: But since Congress created the right, can't it define the right any way it wants, including requiring the Executive to follow certain procedures?

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40. *Id.* at 573–74.

41. *Id.* at 577.  
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PT: Yes, and that was the point of Justice Kennedy's concurrence. He said that the problem with the Endangered Species Act was simply that as a matter of drafting, Congress didn't clearly define the right and its related injury.<sup>42</sup>

PY: I'm a little at a loss here. There were two adverse parties fighting over the Executive's interpretation of the law and the resolution would affect how the Executive Branch conducted its business—and Congress authorized the suit. What was missing?

PT: Concrete injury, apparently.

PY: Ok, so at least we now know, once and for all, that the ban on generalized grievances, and the concrete injury requirement are constitutionally based and Congress cannot change those requirements.

PT: Maybe.

PY: Excuse me.

PT: We have to talk about the *Akins* case.<sup>43</sup>

PY: Wait, in *Lujan* did Scalia talk about *Flast* or *Bowen*? If the concrete injury requirement is constitutional, how could those cases still be good law?

PT: He didn't discuss them at all.

PY: For good reason. Ok, remind me about *Akins*.

PT: A group of voters sued the Federal Election Commission because it didn't require a pro-Israeli lobbying group to publish its membership and expenditures pursuant to federal law. The plaintiffs claimed that they couldn't vote intelligently without that information.

PY: Sounds like *Richardson*. Didn't the plaintiff in that case argue that he couldn't vote intelligently unless the CIA disclosed its expenditures?

PT: Yes, except *Richardson* involved a constitutional claim. Here Congress said that anyone aggrieved by a violation of the Federal Election Campaign Act could sue in federal court to require the FEC to require registration and disclosure under the Act.

PY: But didn't *Lujan* hold that Congress doesn't have the power to convert a generalized grievance into a valid claim for purposes of Article III standing?

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42. *Id.* at 580 (Kennedy & Souter, JJ., concurring in part and concurring in the judgment) (quoting the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(A) (2000)).

43. *Fed. Election Comm. v. Akins*, 524 U.S. 11 (1998).

PT: Yes.

PY: So the Court should have denied standing in *Akins*.

PT: Yes, but as you know the Court actually granted standing.

PY: I'm glad I'm sitting down.

PT: The Court distinguished between “abstract” generalized grievances which don't give rise to standing, and “concrete” generalized grievances which can support standing.<sup>44</sup>

PY: You're kidding right?

PT: Nope.

PY: Ok, I hate to ask but what's the exact difference between an “abstract” generalized grievance and a “concrete” generalized grievance?

PT: The Court wasn't exactly clear but it appears that an abstract generalized grievance is where the plaintiff simply says that the government is violating the law and I am angry; whereas a concrete generalized grievance is one where many people suffer the same or similar injuries.<sup>45</sup>

PY: That might actually make sense. What was the injury in this case?

PT: The Court said it was the lack of information directly related to voting.

PY: So the Court overturned *Richardson*, which involved exactly the same injury.

PT: No, the Court said that *Richardson* only involved taxpayer standing, not the kind of informational injury at issue in *Akins*.

PY: That's simply not true.

PT: So said Justice Scalia in dissent. This won't surprise you, but he was very upset.

PY: I can understand that. Is it possible the Court was saying that the difference between *Akins* and *Richardson* was that Congress created the cause of action in one but not the other.

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44. *Id.* at 23–24.

45. *See id.*  
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PT: That's possible. The Court did say that the generalized grievance requirement had been styled by previous Courts as both prudential and constitutional.<sup>46</sup>

PY: In other words, we still don't know whether that requirement is based on Article III, or the Court's own sense of what cases it should hear.

PT: That is correct.

PY: And the Court didn't answer that question in *Hein* either, did it?

PT: No, afraid not. Do you want to talk about *Hein*?<sup>47</sup>

PY: I think it's time.

PT: Well as you know, federal taxpayers challenged Executive Orders issued by President Bush creating centers within federal agencies to make sure that faith-based community groups would be eligible to compete for federal financial support as long as those groups didn't use the money to support inherently religious activities like worship, religious instruction, or prayer.<sup>48</sup>

PY: And no congressional act supported the President's orders?

PT: Not a one. The President funded the agency's actions out of general funds and there was no congressional involvement at all. He also directed that religious groups couldn't be discriminated against in federal funding opportunities simply because they were religious.<sup>49</sup>

PY: And the plaintiffs relied on *Flast* and *Bowen*.

PT: Yes.

PY: I've read the case, and I'm a little confused by the number of different opinions.

PT: Yes. Justices Alito, Kennedy, and Roberts denied standing but reaffirmed *Flast*. Scalia and Thomas would have overruled *Flast* and denied all taxpayer standing, and Souter, Breyer, Ginsburg, and Stevens would have said that taxpayers always have standing to bring Establishment Clause challenges to federal governmental actions.

PY: How could the plurality opinion deny standing in this case and not overturn

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46. *Id.* at 23.

47. *Hein*, 127 S. Ct. 2553.

48. *Id.* at 2560–61.

49. *Id.* at 2560.

*Flast*?

PT: It said that *Flast* was an extremely narrow exception to the bar on taxpayer standing, and the plaintiffs didn't meet the *Flast* test because there was no challenge to a law passed under Article I, Section 8, or in fact to any congressional action.<sup>50</sup>

PY: But didn't Justice Scalia point out in no uncertain terms what we and everyone on the planet knows—that the *Flast* test is incoherent. He made his point by arguing that the Court usually requires some kind of “Wallet Injury” for standing, but that *Flast* made an exception for “Psychic Injury,” when taxpayers bring Establishment Clause challenges to congressional action under Article 1, Section 8.<sup>51</sup> The problem, according to Scalia, is how to explain why a plaintiff who meets the *Flast* test has more “Psychic Injury” than any other taxpayer plaintiff, like poor Mrs. Frothingham, who claims the government is spending money in violation of the Constitution?<sup>52</sup> How could the *Hein* plurality ignore that problem?

PT: It relied on *Valley Forge* for the distinction between challenges to congressional action and challenges to executive action. In fact, the *Hein* plurality said this case was even further from *Flast* than *Valley Forge* because at least in *Valley Forge* the decision to transfer property was delegated by Congress pursuant to Article IV's property clause. In *Hein*, there was no congressional delegation at all.<sup>53</sup>

PY: That's not true. All of the Executive's money comes from Congress. Remember Article I, Section 9, “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>54</sup> In any event, what is the relationship between personal injury and whether it is Congress or the Executive spending money illegally?

PT: The plurality never answered that question. It just said *Flast* was a narrow exception to the ban on taxpayer standing; that the plaintiffs didn't meet the elements of that exception; and that the Court would neither extend nor overrule *Flast*.

PY: Let me see if I have this right. Under *Flast* and *Bowen*, plaintiffs are allowed to bring Establishment Clause challenges to congressional laws enacted under Article I, Section 8, but under *Valley Forge* and now *Hein*, plaintiffs cannot bring Establishment Clause challenges to Executive action unless the action was taken with specific congressional authorization of allocated funds.

PT: That seems about right.

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50. *Id.* at 2564–66.

51. *Id.* at 2574 (Scalia & Thomas, JJ., concurring).

52. *Hein*, 127 S. Ct. at 2574.

53. *Id.* at 2566.

54. U.S. Const. art. I, § 9.

PY: What if the President decided to fund weekly Christian prayers out of general funds or passed an executive order calling the United States a Judeo-Christian country?

PT: The plurality addressed those kinds of hypotheticals.

PY: Good, what did it say?

PT: First, none of those things has ever happened; second, Congress could always “step in” and prohibit the practice; and third, such “improbable abuses,” could be challenged by other plaintiffs who would have standing because they were personally injured.<sup>55</sup>

PY: But none of that explains the faulty logic of the plurality opinion. As Scalia said, if Congress gave the President money to distribute to worthy hospitals but the President decided to give all the money to Catholic hospitals, plaintiffs would fail the plurality’s test because there would be no link “between congressional action and [the] constitutional violation.”<sup>56</sup> But those plaintiffs would have exactly the same injuries as the plaintiffs in *Flast* and *Bowen*, who had standing.

PT: Exactly. In *Bowen*, the plaintiffs alleged that the Executive Branch had chosen improper grant recipients and the Court unanimously found standing based on *Flast* even though Congress didn’t mandate that allocation. In other words, the challenge was to the use of executive discretion. *Hein* actually reduces *Flast* to less than it was before because it undercuts *Bowen*.

PY: But *Flast* is still good law and means something.

PT: Yes, plaintiffs can challenge laws passed under Article I, Section 8 which themselves allegedly violate the Establishment Clause. But if there is executive discretion, *Hein* says no standing.

PY: Which basically means that the President can violate the Establishment Clause and no one can sue, at least not under *Flast*.

PT: Right. Of course Justices Scalia and Thomas would reach that same result by overturning *Flast* all together. Then both congressional and executive action would be immunized unless the challenged law or practice actually cost the plaintiff money, or threatened her life or liberty.

PY: So under Scalia’s and Thomas’s approach, the Congress and President together could declare the United States a Christian country, and because “Psychic

55. *Hein*, 127 S. Ct. at 2571.

56. *Id.* at 2580 (Scalia & Thomas, JJ. concurring).

Injury,” isn’t actionable, no one would have standing to challenge that declaration unless Congress spent some money.

PT: That would be their view. It may or may not make sense from a standing perspective, but it would be consistent with Scalia’s position that the Establishment Clause only prohibits coercive governmental action.<sup>57</sup>

PY: But we have the Free Exercise Clause to protect us from governmental action that coerces us based on our religious beliefs or practices. Scalia’s view of the Establishment Clause reduces it to simply what the Free Exercise Clause already prohibits.

PT: Right, which is why Justices Souter, Breyer, Ginsburg, and Stevens dissented in *Hein*, and said that the Establishment Clause is different than other constitutional provisions, that no one should be forced to contribute their tax dollars for religious purposes, and that all taxpayers should have standing to challenge any governmental expenditure.<sup>58</sup> You should notice by the way that as you suggested at the beginning, the Justices’s views on standing are somewhat determined by their view on the merits of what the Establishment Clause prohibits.

PY: Thanks for the nod. Of course, as the *Hein* plurality pointed out, under the dissent’s approach, taxpayers would have standing to challenge virtually every thing the government does and every speech the President or any of his officers make because the Executive’s actions are almost always supported in some way by our tax dollars.

PT: That’s why this area of the law is so difficult. There are only three possible answers to the question whether taxpayers should be allowed to sue the federal government for spending their tax dollars unconstitutionally: Never, always, and sometimes. The Court has chosen sometimes, which may not be all that bad.

PY: Yes it is because the “sometimes” it has chosen, the *Flast* test, makes absolutely no sense at all.

PT: Do you have a better answer?

PY: Well . . . maybe . . . but I am only a lowly associate professor.

PT: That’s Ok, give it to me.

PY: Well, to start, the answer can’t be that taxpayers have standing to sue the

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57. See *Lee v. Wiseman*, 505 U.S. 577, 641 (1992) (Scalia, J., Rehnquist, C.J., White & Thomas, JJ., dissenting).

58. *Hein*, 127 S. Ct. at 2584–88 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).  
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Congress for violating the Establishment Clause but they don't have standing to sue the President. The Establishment Clause applies to the whole government.

PT: Ok, go on.

PY: It also seems to me that Article III is satisfied by taxpayer actions, and the plurality in *Hein* must agree with that idea, otherwise *Flast* could not be affirmed.

PT: All right.

PY: But it also seems to me that allowing all taxpayer suits every time anyone feels the government is spending money illegally raises separation of powers concerns and potential floodgates of litigation problems.

PT: Sure.

PY: So we should allow taxpayer suits in only two circumstances: When they are authorized by Congress, because we have already agreed it is a prudential bar, or when absolutely necessary to the functioning of our democracy.

PT: And when would that be?

PY: When the government is allegedly violating the Constitution and it is unlikely that anyone will be injured differently than anyone else.<sup>59</sup> For example, the 27th Amendment prohibits Congress from giving itself a pay raise effective before the next term,<sup>60</sup> but if Congress were to do so, no one would be injured more than anyone else. There are many other structural constitutional provisions that would lose all coercive force if they could not be enforced by the courts, but which will rarely if ever give rise to unique injury.

PT: Like the Accounts Clause in *Richardson*, and the Incompatibility Clause in *Schlesinger*.

PY: Right. As opposed to violations of structural provisions, governmental violations of most of the Bill of Rights will cause specific injury to individuals. If the government violates the First or Fourth Amendments, for example, someone will usually lose liberty, speech, or money. But that's not true for structural provisions like the 27th

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59. This argument was discussed and supported in more detail in Eric J. Segall, *Standing Between the Courts and the Commentators: A Necessity Rationale for Public Actions*, 54 U. Pitt. L. Rev. 351 (1993). Apparently, the argument did not make a great impression on the Supreme Court. In that article, the author also pointed out that noted Federal Courts scholar Donald Doernberg had made a similar argument (albeit for different reasons), again to no avail, in Donald Doernberg, *We the People: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 Cal. L. Rev. 52 (1985).

60. U.S. Const. amend. XXVII ("No law, varying the compensation of the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.").

Amendment, and that is why we need taxpayer suits to enforce those provisions.

PT: Ok, well assuming all of that, what about the Establishment Clause? Is that a structural provision enforceable by taxpayers or a right that only someone personally injured can enforce?

PY: That's a hard question because it seems like the Establishment Clause, located in the First Amendment, protects individual rights, but in fact, the Free Exercise Clause does all of that work for us. If a person is taxed, punished, or injured because of her religious beliefs, the Free Exercise Clause provides protection. The framers must have meant something different by the Establishment Clause and, whatever that is, it should be different than the protection of individual rights already protected by the Free Exercise Clause. What the Establishment Clause protects is a question on the merits, but for standing purposes, it is hard to see how non-coercive governmental recognition of religion will ever injure anyone personally other than in a "psychic" way, and that is why we need taxpayer standing to enforce it.

PT: So how do you get around the *Hein*'s plurality concern that anyone at any time could bring an Establishment Clause challenge to any governmental action, including every speech given by any public actor?

PY: That's a tough one, but I think Justice Souter answered this fully in dissent. If the claim is frivolous, it will be dismissed for failure to state a claim, which is really no different than denying it for lack of standing. If the claim has merit, then it probably should be heard, and there is nothing in Article III to the contrary.<sup>61</sup> In other words, if the claim can withstand a motion to dismiss, and there is reason to believe the government is violating the Establishment Clause, whatever the Court eventually decides that means, then the Court should hear the case.

PT: You seem to have it all figured out.

PY: I wouldn't say that (sheepish smile).

PT: Except that your answer to my question about the floodgates of Establishment Clause challenges would apply equally to all taxpayer suits. If they are frivolous, the Court can dismiss them under Section 10(b)(6), and if they have merit, the Court should hear them. And then we are back to the problem of any taxpayer being able to sue anytime he or she feels the government is spending money illegally.

PY: I understand your point. My answer is that this is exactly where the Court's prudential view of standing should come in. We don't need taxpayers to enforce the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth amendments because there will



inevitably be people personally injured when the government violates those provisions. Look at any Supreme Court docket. As a matter of sound judicial policy, and maybe even respect for the other branches and the states, there is no compelling reason for the Court to exercise judicial review in those cases at the behest of a taxpayer who simply doesn't want the government spending her money illegally. But when it comes to constitutional provisions that will be rendered unenforceable if we prohibit taxpayer standing, fidelity to the Constitution, checks and balances, and separation of powers counsels in favor of hearing those cases. The basis of my argument, of course, is that the ban on taxpayer standing does not come from Article III. But there are seven Justices on the Court who would affirm *Flast*, so they must believe that too. Being a prudential ban, the bar on taxpayer standing should be lifted when failing to do so would render a constitutional provision unenforceable.

PT: So the Courts would have to decide in every taxpayer standing case whether a constitutional provision is a "structural" one or a provision that protects "individual" rights.

PY: That's true, and there may be some close cases but that line is much sharper than many others the Court draws in constitutional law. If you want to discuss the "endorsement test," or "reasonable time, place an manner" restrictions, I'd be happy to make my case. Plus, my approach is at least honest and coherent, unlike the *Flast-Valley Forge-Bowen-Hein* travesty.

PT: How many years have you been on our faculty?

PY: Five.

PT: I look forward to your tenure vote later this year. . . .