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Establishment Clause Standing: The Not Very Revolutionary Decision at Valley Forge

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ESTABLISHMENT CLAUSE STANDING: THE NOT VERY REVOLUTIONARY DECISION AT *VALLEY FORGE*

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Establishment clause[1] jurisprudence has traditionally involved a unique blend of substantive constitutional law issues and standing issues. *Flast v. Cohen*,[2] for example, remains the only establishment clause case where the Supreme Court has granted standing to taxpayers.[3] In contexts other than taxpayer suits, such as the school prayer cases,[4] the decisions of the Court evoked almost as much controversy with respect to the standing issues as they did with respect to the merits.[5]

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1. "Congress shall make no law respecting an establishment of religion . . . . " U.S. CONST. amend. I.

2. 392 U.S. 83 (1968).

3. In a few cases prior to Frothingham v. Mellon, 262 U.S. 447 (1923), the Court, while not specifically addressing the issue of taxpayer standing, granted standing to federal taxpayers *sub silentio*. *See, e.g.*, Wilson v. Shaw, 204 U.S. 24 (1907) (challenge to payment of federal funds for construction of Panama Canal); Millard v. Roberts, 202 U.S. 429 (1906) (challenge to monetary grant to railroads as revenue measure unconstitutionally originating in Senate). Since *Frothingham*, the Court has consistently refused to grant taxpayer standing where plaintiffs assert generalized grievances in the public interest or allege general unconstitutionality. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (plaintiffs denied citizen and taxpayer standing to challenge armed forces reserve membership of United States congressmen); United States v. Richardson, 418 U.S. 166 (1974) (federal taxpayer denied standing to challenge CIA expenditures reporting).

4. School Dist. v. Schempp, 374 U.S. 203 (1963) (classroom Bible reading held unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (classroom reading of state-prepared prayer held unconstitutional).

5. *Compare* Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 15-33 *with* Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . .* ", 1962 SUP. CT. REV. 1, 19-22. *See generally* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such."); Americans United for Separation of Church and State, Inc. v.

The reason that issues of standing and establishment share a unique heritage is not esoteric. The peculiar generalized nature of the establishment prohibition[6] has led to procedural issues that are not present in circumstances where an individual is more easily discernible as the beneficiary of a constitutional protection.[7] In an establishment clause case, the principal beneficiary is often the society or community as a whole.[8] While in a few cases a litigant may suffer particularized injury as a result of an establishment violation,[9]

HEW, 619 F.2d 252, 255-58 (3d Cir. 1980) (general discussion of complexities and ambiguities inherent in Supreme Court standing cases).

6. A "generalized grievance" has been defined as one in which the harm asserted by the particular litigant as a basis for standing is "shared in substantially equal measure by all or a large class of citizens." Warth v. Seldin, 422 U.S. 490, 499 (1975); *see* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-27 (1974); United States v. Richardson, 418 U.S. 166, 188-97 (1974) (Powell, J., concurring). It is not entirely clear whether a party seeking to litigate such a grievance must be denied standing by the Court on the ground that his claim would not present a justiciable "case or controversy" under article III of the Constitution, *see Schlesinger*, 418 U.S. at 227; *Richardson*, 418 U.S. at 174-80, or whether the Court may, pursuant to article III, hear such a claim, but may also refuse to do so for prudential or self-restraint reasons. *See Warth*, 422 U.S. at 499. The better view, however, is that restraints on standing to litigate generalized grievances are prudentially based. The most recent Court cases discussing the article III-prudential dichotomy have so indicated. *See* Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc., 102 S. Ct. 752, 760 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); *Warth*, 422 U.S. at 499 (citing, *inter alia, Schlesinger* and *Richardson); Richardson*, 418 U.S. at 188-97 (Powell, J., concurring). *See also* Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate?*, 70 GEO. L.J. 1157 (1982) (generalized grievance restriction should be viewed as prudential).

Under this view, the individual injury to the litigant in a generalized grievance case would allow him, standing alone, to clear the "injury-in-fact" standing barrier implicit in the article III "case or controversy" requirement, so that the Court could hear the litigant's claim if it so chose. *See* U.S. CONST. art. III, § 2, cl. 2; Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151-54 (1970). However, the Court may also choose in such a situation to exercise prudential self-restraint and refuse to grant standing. The rationale usually given for doing so in the generalized grievance context is that because the litigant shares his injury with all other members of the particular governmental entity involved the more appropriate forum for redress of his grievance is the political process. *See, e.g., Richardson*, 418 U.S. at 179; *id.* at 191-97 (Powell, J., concurring).

For an examination of the generalized grievance issue as it is implicated in the establishment context, see *infra* notes 122-46 and accompanying text.

7. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 430-31 (1961). *See generally* Bogen, *Standing up for Flast: Taxpayer and Citizen Standing to Raise Constitutional Issues*, 67 KY. L.J. 147, 170-71 (1978) (establishment clause violations may occur without an easily identifiable "victim").

8. *See infra* notes 136-46 and accompanying text.

9. *See, e.g.*, Larson v. Valente, 102 S. Ct. 1673 (1982) (claim of discriminatory treatment by imposition of reporting requirements on certain religious organizations); Epperson v. Arkansas, 393 U.S. 97 (1968) (challenge by public school biology teacher to state law making teaching of evolution in state-supported schools a criminal offense); McGowan v. Maryland,

these cases are the exception rather than the rule.[10]

The application of standing limitations to establishment concerns has serious implications for substantive establishment issues. Stringent standing limitations effectively can undercut the nonestablishment mandate. Similarly, the instances where standing to allege an establishment clause violation has been allowed indicate as much about the Court's understanding of establishment as they do about its concept of standing.[11] Thus, the determination of who has stand-

366 U.S. 420 (1961) (challenge to Sunday closing law based on economic injury to specific storeowners suffered from operation of the law).

10. In the majority of establishment cases, the litigants have been taxpayers or persons advancing generalized claims. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (state taxpayers challenging state financial aid grants to sectarian non-public schools); Meek v. Pittenger, 421 U.S. 349 (1975) (state taxpayer challenging state grant of "auxillary services" and loans of textbooks to sectarian non-public schools); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (state residents and taxpayers challenging various aid programs to sectarian non-public schools); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (city property owner challenging city property tax exemption for property owned by religious organizations); Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayers challenging attempt by Congress to provide financial aid for religious and sectarian schools); School Dist. v. Schempp, 374 U.S. 203 (1963) (state taxpayer challenging state program of Bible reading in public schools); Everson v. Board of Educ., 330 U.S. 1 (1947) (state taxpayer challenging attempt by state to reimburse parents of sectarian non-public school children for transportation costs).

11. The Court's pattern of relaxing standing requirements in order to reach establishment issues indicates the importance with which the Court views the establishment clause. Two cases in particular evidence this approach. In Epperson v. Arkansas, 393 U.S. 97 (1968), the Court allowed a school teacher to challenge the enforcement of a law proscribing the teaching of evolution in the public schools, although the state had never undertaken to enforce the statute and there was no evidence it intended to do so. *Id.* at 109-10 (Black, J., concurring). Additionally, it was unclear at the time the Court heard the case whether the teacher in question was still employed by a school district in the state. *Id.* at 110 (Black, J., concurring). The teacher was joined by a parent who alleged an interest in having his two sons "be informed of all scientfic theories and hypotheses," *id.* (Black, J., concurring), but there was no evidence indicating that the parent-intervenor's sons had not been taught about evolution, nor even that the sons were still in high school. *Id.* (Black, J., concurring). Despite the plaintiffs' apparent failure to allege any injury caused to them by the statute, the Supreme Court agreed to hear the case.

In a more recent case, Larson v. Valente, 102 S. Ct. 1673 (1982), the Court assumed for the purposes of litigation that plaintiffs constituted a religious organization and, therefore, had standing to challenge, as an establishment clause violation, a law which allegedly disfavored certain religious organizations in the granting of exemptions from state law requiring certain filing and reporting of charitable contributions. The Court proceeded on this assumption despite the fact that the organization had not shown that it was, in fact, religious in nature. *Id.* at 1689-90 (Stevens, J., concurring). Indeed, the Court noted that the state could require the organization to prove its religious claim within the meaning of the Act in order to obtain an exemption. *Id.* at 1689 n.30 (plurality opinion).

Reasoning that certain enforcement actions undertaken by the state indicated that the state had considered plaintiff's organization to be religious, the Court held those actions to bind the state in establishing plaintiff's standing to bring the case. *Id.* at 1680-81 (plurality opinion). Even assuming that the state enforcement action had implicitly recognized the liti-

ing to allege such a violation acts as a determination of the reach and meaning of the establishment proscription.

In *Valley Forge v. Americans United for the Separation of Church and State, Inc.*,[12] the Court, for the first time since 1952,[13] denied an establishment clause challenge for lack of standing. The majority opinion in *Valley Forge* was severely criticized by three dissenting Justices for retreating from the nonestablishment constitutional mandate.[14] Whether the dissent was correct in its characterization of the majority opinion is unclear and necessitates an inquiry into both standing and establishment issues.

This article examines the relationship of standing and establishment in the cases prior to *Valley Forge* in order to determine whether that case, in fact, does signify a retreat from the earlier cases. To accomplish this purpose, we will not question the theoretical soundness of the Court's current standing approach in circumstances other than establishment.[15] Rather, we begin with the Court's formulation of the two-part standing inquiry as announced in *Warth v. Seldin*,[16] which requires that in order to be granted standing a litigant must satisfy both prudential and constitutional limitations.[17] We conclude that previous establishment cases and *Valley*

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gant's nature as being religious, the Court's conclusion that such action is binding on the state for standing purposes is surprising; it has been firmly held in other contexts that parties may not avoid the standing requirement by stipulation. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Sosna v. Iowa, 419 U.S. 393 (1975); Richardson v. Ramirez, 418 U.S. 24 (1974).

12. 102 S. Ct. 752 (1982).

13. *See* Doremus v. Board of Educ., 342 U.S. 429 (1952).

14. *See* 102 S. Ct. at 780 (Brennan, Marshall, Blackmun, JJ., dissenting).

15 Several commentators have criticized the Court's current approach to standing. *See generally* Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (the Court should articulate the policy justifications for its standing determinations); Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41; Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973) (advocating a liberalization of standing rules); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) (arguing that a litigant who can adequately present the case should be allowed standing unless a better plaintiff is available).

16. 422 U.S. 490 (1975).

17. *Id.* at 498. *See also* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80-81 (1978). The constitutional limitation requires a litigant to show that he has suffered some threatened or actual injury resulting from the putatively illegal action, and that judicial action would redress this injury. *See e.g., Warth*, 422 U.S. at 501; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976). According to the *Warth* Court, prudential limitations embody two requirements: First, policies of self-restraint dictate that the court must normally refuse to review a matter in which the asserted harm is a "generalized grievance" shared in substantially equal

Forge may be reconciled under the *Warth* test without signifying a retreat from previous establishment principles. The acknowledged difficulty with this conclusion is that the *Valley Forge* Court did not clearly articulate the theoretical basis for its judgment.

Part I of this article provides a brief overview of the *Valley Forge* opinions. Part II examines the development of taxpayer standing under the establishment clause prior to *Valley Forge*. In Part III, the unique nature of an establishment clause "injury" is explored. Finally, Part IV examines the implications of the *Valley Forge* decision within this context.

I. THE *Valley Forge* OPINIONS

The *Valley Forge* plaintiffs, members of Americans United for the Separation of Church and State ("Americans United"), were a group of federal taxpayers and citizens interested in preserving the constitutional separation of church and state.[18] They challenged a transfer of surplus government property[19] by the Department of Health, Education and Welfare to a religious school.[20] Americans United did not allege injury as residents of Pennsylvania or of the community surrounding the property at issue; they had never used, and did not allege that they ever intended to use, the disputed property.[21] In fact, they only learned of the government's grant of land to Valley Forge through a news release.[22] They instead asserted federal taxpayer standing and claimed injury by "the deprivation of the fair and constitutional use of their tax dollars" in violation of the establishment clause.[23]

The Third Circuit Court of Appeals unanimously agreed that

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measure by all or a large class of citizens. 422 U.S. at 499; *see supra* note 6. Second, the litigant must assert only his own legal rights and interests and may not assert the legal rights or interests of third parties. *Warth*, 422 U.S. at 499-500.

18. Because Americans United had alleged no injury to itself as an organization, the majority in *Valley Forge* made it quite clear that "[the organization's] claim to standing can be no different from those of the members it seeks to represent." *Valley Forge*, 102 S. Ct. at 761 n.14. Thus, for the remainder of this article, discussion will focus on the standing claims of the members of Americans United as individuals.

19. The Department of Health, Education and Welfare (HEW) was authorized by statute to transfer surplus government property to educational institutions at a discount. 40 U.S.C. § 484(K)(1)(A), (C) (1976). Pursuant to this statutory authority, HEW conveyed 77 acres of surplus government real property to Valley Forge Christian College at a 100% discount (free). *See Valley Forge*, 102 S. Ct. at 755-56.

20. 102 S. Ct. at 756-57.

21. *Id.* at 766-67. *See infra* notes 155-60 and accompanying text.

22. *Id.* at 756-57.

23. 102 S. Ct. at 757.

Americans United had standing.[24] The majority predicated standing on a theory of a "shared personal grievance,"[25] holding that the establishment clause vested in the United States citizenry rights of standing not present in other contexts. Anticipating the argument that such a right was simply a generalized grievance, the court stated that the establishment clause "arguably" created a shared individual right to a government that does not establish religion and that the invasion of this right was a shared personal grievance sufficient to meet the article III injury requirement.[26]

Justice Rosenn, concurring, based standing for Americans United on an additional theory. He stated that federal citizens should be granted standing to allege establishment clause violations by the federal government to satisfy the need for an available plaintiff and to insure enforcement of the establishment clause.[27] Moreover, he viewed Americans United as the best available plaintiffs to vindicate the unique establishment clause values at stake, in part because of the organization's promotion of both religious liberty and the constitutional principle of separation of church and state.[28]

The Supreme Court reversed the Third Circuit's decision.[29] First, however, it resolved a preliminary issue before directly ruling on standing. Prior to *Valley Forge*, it was unclear whether the federal taxpayer nexus requirement articulated in *Flast v. Cohen* was a

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24. Americans United for Separation of Church and State, Inc. v. HEW, 619 F.2d 252, 254 (3d Cir. 1980), *rev'd*, 102 S. Ct. 752 (1982). The district court denied standing on the ground that plaintiffs failed to allege an injury beyond a generalized grievance. Civil Action No. 77-1321 (E.D. Pa. December 15, 1978) (unpublished opinion). For a thorough discussion of the Third Circuit opinion, see Frieber, *Americans United for Separation of Church and State, Inc. v. HEW: Standing to Sue Under the Establishment Clause*, 32 HASTINGS L.J. 975 (1981).

25. 619 F.2d at 265.

26. *Id.* This argument was anticipated and rejected by Justice Harlan in Flast v. Cohen, 392 U.S. 83, 129 n.18 (1968) (Harlan, J., dissenting): "Freedom from establishment is a right that inheres in every citizen, thus any citizen should be permitted to challenge any measure that conceivably involves establishment."

27. 619 F.2d at 267-68 (Rosenn, J., concurring).

28. *Id.* at 268. Justice Rosenn's "available plaintiff" approach was rejected by the Supreme Court in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) and in United States v. Richardson, 418 U.S. 166, 179 (1974). Commentators have argued that a well-qualified and interested plaintiff, such as a public interest group, should be granted standing to challenge disputed actions without having to demonstrate injury. *See, e.g.*, Bogen, *supra* note 7, at 154; Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980). An inquiry into the ability or expertise in similar litigation of the putative plaintiff, however, has never been recognized to be a part of the standing inquiry.

29. 102 S. Ct. 752, 768 (1982).

wholly distinct inquiry from the *Warth* standing inquiry or was instead subsumed within the *Warth* framework.[30] The Court, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[31] touched upon but failed to resolve this question.[32] In *Duke*, an environmental organization, a labor union, and a number of individuals who lived near a nuclear power plant challenged the constitutionality of the Price-Anderson Act without alleging taxpayer standing. The issue in *Duke* was whether, in addition to meeting the *Warth* test, the plaintiffs were required to demonstrate a connection between the injuries they claimed and the constitutional rights being asserted—the "nexus" required of federal taxpayers in *Flast*.[33] The *Duke* Court held that the *Flast* standing inquiry had no application outside of taxpayers' suits.[34] There was no discussion in *Duke* about whether

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30. Flast v. Cohen, 392 U.S. 83 (1968). The Court explained the required nexus:

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus v. Board of Education*, 342 U.S. 429 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

Id. at 102-03. The *Flast* decision and its relationship to establishment issues is discussed *infra* notes 79-84 and accompanying text.

Prior to *Valley Forge*, it was unclear whether this *Flast* test was part of the *Warth* constitutional inquiry or a prudential limitation. Professor Tribe opted for the latter view, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-22, at 97 n.2 (1978), as did Professor Frieber, Frieber, *supra* note 24, at 1001 (*Flast* test was exception to prudential limitation against generalized grievances).

31. 438 U.S. 59 (1978).

32. This ambiguity was apparent from the Court's statement:

> We . . . cannot accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the "case or controversy" requirement of Art. III.

Id. at 79 (footnote omitted).

33. *Id.* at 78-79.

34. *Id.* at 79. The Court has recognized that the standing inquiry under both *Flast* and *Warth* is designed to determine whether the litigant has a sufficient personal stake in the outcome of the litigation. The issue was how the Court derived this determination. In Schles-

the *Flast* and *Warth* approaches were two mutually exclusive tests (the former applicable to taxpayer suits and the latter to all other cases) or simply parts of the same inquiry.

In *Valley Forge*, the Court subsumed the *Flast* requirements for taxpayer standing within the first prong of the *Warth* test.[35] The article III injury required by *Warth* and suffered by the taxpayer in a *Flast*-type case, is the increased tax burden, however slight, caused by the allegedly unconstitutional exercise of congressional power under the taxing and spending clause of article I, section 8 of the Constitution.[36] Having reduced *Flast* to a portion of the *Warth* inquiry, the Court then addressed Americans United's claim of taxpayer standing.

The Court accomplished this in short order. It found that Americans United failed the first prong of *Flast* for two reasons: The source of the group's complaint was not Congressional action but an executive decision of HEW, and the transfer of surplus government property was effected pursuant to the "property clause"[37] and not the taxing and spending clause of article 1, section 8.[38] The invitation to extend *Flast* to cases where article 1, section 8 powers were not at issue was declined.[39] According to the Court, the definition of injury in a taxpayer suit must be the harm suffered by a taxpayer

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inger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227-28 (1974), Justice Burger treated the *Flast* inquiry as separate and distinct from the constitutional inquiry. Similarly, the Court in *Valley Forge* recognized this ambiguity:

> [I]t 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.

102 S. Ct. at 758 (citing *Flast*).

35. 102 S. Ct. at 762.

36. U.S. CONST. art. I, § 8. The injury allegation pertinent to the *Warth* article III injury-in-fact requirement was described in *Valley Forge* as the "deprivation of the fair and constitutional use of [Americans United's] tax dollar." 102 S. Ct. at 761. This is appropriate, since it is this type of violation which injures the taxpayer *qua* taxpayer. That is, the plaintiff is harmed as a taxpayer by the increased tax burden, however slight, occasioned by the challenged statute. With respect to the second portion of the *Warth* article III standing test, a decision holding the challenged law unconstitutional presumably would redress the injury by preventing the challenged misuse of the litigant's tax dollars. *See supra* note 17 and accompanying text.

37. "The Congress shall have Power to dispose of . . . the Territory or other Property belonging to the United States. . . . " U.S. CONST. art. IV, § 3, cl. 2.

38. 102 S. Ct. at 762. The Court stated that according to *Flast*, taxpayer standing was confined to challenges to exercises of congressional power. *Id.*

39. *Id.* at 762-63. Specifically, it was argued that taxpayer standing should be available to challenge governmental action under the property clause, art. IV, § 3, cl. 2. *See supra* note 37.

qua taxpayer when his tax burden is increased. The Court dismissed the attempt to construe the government's grant of surplus property as an increased tax burden, observing that any effect on the plaintiffs' taxes was "at best speculative and at worst nonexistent."[40]

After narrowly construing the *Flast* taxpayer requirements as requiring an additional tax burden, the Court considered whether Americans United had standing apart from their taxpayer status based on the unique nature of the establishment injury alleged. The Supreme Court rejected the lower court's construction of a shared personalized right created by the establishment clause.[41] It held that no new analytic tools need be formulated to decide the citizen standing issue; the only tools to be utilized were the article III and prudential requirements first announced in *Warth*.[42] The argument that a broader rule should be fashioned for establishment claims was squarely rejected by Justice Rehnquist, writing for the Court, who stated that there was no "hierarchy of constitutional values or . . . 'sliding scale' of standing."[43] Nothing inherent in the establishment clause, according to Rehnquist, dictated an exemption to allow standing where no injury to the taxpayer was shown.[44] Thus, the *Flast* case did not allow specialized rules of establishment standing in the absence of actual injury.

It was undoubtedly critical to the Court's treatment of *Flast* that *Flast* was incorporated within the *Warth* framework. In *Flast*, the taxpayer claim survived the constitutional hurdle because the allegation of unconstitutional government conduct under the establishment clause was coupled with the necessary allegation that the plaintiff/taxpayer suffered a financial injury, however slight, in his status as taxpayer as a result of the challenged expenditure.[45] The fact that there was an additional tax levy in *Flast* which satisfied the *Warth* injury requirement, and no such injury in *Valley Forge*[46] was deter-

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40. 102 S. Ct. at 763 n.17.

41. *Id.* at 763-67. The Court declared that the "assertion of a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.* at 764.

42. *Id.* at 765-66.

43. *Id.* at 765.

44. The Court expressly rejected the Third Circuit's "view of standing under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases." *Id.* at 764-65. For a discussion of why the ideology embodied in the establishment clause may merit special treatment, see Frieber, *supra* note 7, at 1005-08.

45. Flast v. Cohen, 392 U.S. 83, 103 (1968).

46. The transfer of surplus property may have actually *saved* the federal government

minative for standing. That both cases concerned the establishment clause was inapposite. Justice Rehnquist observed that the establishment clause violation alleged by Americans United amounted to no more than an assertion of the plaintiff's right to have the government comply with the establishment mandate.[47] He did not see that Americans United had "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing."[48]

The dissenters in *Valley Forge* took issue with the majority's application of *Flast*. Justice Brennan, joined by Justices Marshall and Blackmun, began by noting that the existence of an article III injury "often turns on the nature and source of the claim asserted."[49] In Brennan's view, the majority erred by failing to consider whether the establishment clause itself defined an injury and created a cause of action for the redress of that injury.[50] Summarizing *Flast* and *Frothingham v. Mellon*,[51] Brennan concluded that "*[t]he taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion*,"[52] and as such was "a singularly 'proper and appropriate party to invoke a federal court's jurisdiction' to challenge a federal bestowal of largesse as a violation of the Establishment Clause."[53] Brennan then strongly criticized the majority's attempt to distinguish *Flast* as involving congressional action, rather than the executive action complained of in *Valley Forge*, finding that "[t]he First Amendment binds the Government as a whole."[54] The majority's attempted distinction of *Flast* based on the difference between the taxing and spending clause and the property clause was dismissed as equally unpersuasive.[55] Brennan observed that there

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money, *see Valley Forge*, 102 S. Ct. at 763 n.17. In any event, no allegation of spending was made.

47. "Although [Americans United] claim that the Constitution has been violated, they claim nothing else." *Id.* at 765.

48. *Id.* at 766 (emphasis in original) (footnote omitted).

49. *Id.* at 769 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting) (citing *Warth*, 422 U.S. at 500).

50. The Court makes a fundamental mistake when it determines that a plaintiff has failed to satisfy the two-pronged "injury-in-fact" test, or indeed any other test of "standing," without first determining whether the Constitution or a statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstance presented to the Court.

Id. (Brennan, J., dissenting).

51. 262 U.S. 447 (1923).

52. 102 S. Ct. at 775 (Brennan, J., dissenting) (emphasis in original) (footnote omitted).

53. *Id.* at 778 (Brennan, J., dissenting).

54. *Id.* at 779 (Brennan, J., dissenting).

55. *Id.* (Brennan, J., dissenting).

could be no constitutional difference between the government's gift of cash to a religious group to build a facility, and the government's gift of a facility already constructed.[56]

Justice Stevens' dissent also sharply criticized the majority's attempted distinction of *Flast*.[57] Stevens stated: "For the Court to hold that plaintiffs' standing depends on whether the Government's transfer was an exercise of its power to spend money, on the one hand, or its power to dispose of tangible property, on the other, is to trivialize the standing doctrine."[58] Stevens' dissent went even further than Brennan's, reasoning that *Flast* attached special importance to establishment values which negated any artificial distinction between grants of money under the spending clause and grants of property under the property clause.[59]

Thus, the question that remains unanswered in *Valley Forge* is whether the opinion heralded a new retreat from judicial enforcement of the nonestablishment mandate. The majority did not characterize its opinion as a retreat and purported to distinguish and not overrule cases such as *Flast*.[60] In order to evaluate the majority opinion we must begin with an understanding of earlier doctrine in the establishment clause area. It is to these cases that we now turn.

II. PRE-*Valley Forge* ESTABLISHMENT STANDING

The Court first recognized establishment clause standing in *Bradfield v. Roberts*.[61] In *Bradfield*, the Court recognized standing in a municipal taxpayer to challenge on establishment grounds the use of federal funds to construct a religiously affiliated hospital in the District of Columbia. Treating the District of Columbia as a municipality,[62] the Court found that allegations of unconstitutional expenditures of funds provided a sufficiently direct and immediate injury to the taxpayer to warrant standing.[63] *Bradfield*, however, broke

56. *Id.* (Brennan, J., dissenting).

57. *Id.* at 780 (Stevens, J., dissenting).

58. *Id.*

59. *Id.* at 781 (Stevens, J., dissenting).

60. *Id.* at 761-63.

61. 175 U.S. 291 (1899). The paucity of establishment and free exercise cases resulted because, until Cantwell v. Connecticut, 310 U.S. 296 (1940), the free exercise clause was held inapplicable to the states; the establishment clause was first applied to the states in Everson v. Board of Educ., 330 U.S. 1 (1947).

62. The explanation of *Bradfield* as a municipal taxpayer case is articulated more clearly in Frothingham v. Mellon, 262 U.S. 447, 486 (1923), than it is in *Bradfield* itself.

63. 175 U.S. at 295. Brennan's dissent in *Valley Forge* argued that *Bradfield* did not depend upon this characterization. The taxpayer in *Bradfield* was a federal taxpayer; thus,

no new ground. The Court's treatment of taxpayer standing for a District of Columbia resident in the establishment context was consistent with municipal taxpayer standing in other contexts which have established a litigant's peculiar concern in the affairs of his community.[64]

The Court began to expand establishment standing concepts in *Everson v. Board of Education.*[65] In *Everson*, the Court recognized that a school district taxpayer had standing[66] to challenge a New Jersey statute that authorized the Board of Education to reimburse parents for money spent to bus their children to parochial schools.[67] *Everson* was the first case in which taxpayer standing was recognized based upon allegations of unconstitutional state governmental expenditures in violation of the establishment clause.[68] As such, the case was a minor expansion of the rule in *Bradfield*, extending establishment standing to state as well as municipal taxpayers. *Everson* was significant, however, in its efforts to relate taxation to establishment concerns. The Court stated: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[69]

After *Everson*, the Court expanded state taxpayer standing to

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Brennan argued, federal taxpayer standing was established. 102 S. Ct. at 770 n.7 (Brennan, J., dissenting).

64. *See, e.g.*, Donnelly v. Lynch, 51 U.S.L.W. 2289 (1st Cir., Nov. 11, 1982) (upholding municipal taxpayer's right, after *Valley Forge*, to contest on establishment grounds the city's construction of a religious nativity display on private property); Frothingham v. Mellon, 262 U.S. 447, 486 (1923) (taxpayer's interest in municipal expenditures is sufficiently direct and immediate to warrant standing); Crampton v. Zabriskie, 101 U.S. 601, 609 (1879) (recognizing taxpayers' right to invoke the jurisdiction of a court of equity to prevent an illegal disposition of municipal monies).

65. 330 U.S. 1 (1947).

66. The Court accepted jurisdiction of an appeal from the state supreme court's decision upholding the validity of the statute. Nothing in the Court's decision intimates the slightest doubt that the Court had jurisdiction to review the case. *See id.* at 4.

67. The funds actually expended were part municipal and part state revenues. Since the *Everson* plaintiff was a municipal taxpayer and since municipal revenues were expended, *Everson* was, in fact, only a slight expansion of *Bradfield*. *See Everson*, 330 U.S. at 5 n.3.

68. State taxpayer actions were heard by the Court in other contexts prior to *Everson*. *See, e.g.*, Hawke v. Smith, 253 U.S. 221 (1920) (Court expressing no reservation of the question of standing when a taxpayer sued the Secretary of the State of Ohio to enjoin the printing of ballots for a referendum as a wasteful expenditure of public funds); Heim v. McCall, 239 U.S. 175, 187 (1915) (Court explicitly assuming that the state taxpayer had "a right of suit" and passing to the merits of a claim challenging the constitutionality of a state statute which provided that only American citizens could be employed in the construction of public works).

69. 330 U.S. at 16.

reach a situation involving minimal, if any, tax expenditure.[70] In *Illinois ex rel. McCollum v. Board of Education*,[71] a litigant challenged a release time program in his community's public school. Weekly religion classes taught by private religious teachers were held during the release time on public school premises for students whose parents requested the instruction; nonparticipating students received secular instruction in other parts of the building. Standing purportedly was based upon the plaintiffs' status as taxpayers, residents of the community and parents of school children attending the public school.[72] Justice Black dispensed with the standing issue in one sentence: "A second ground for the motion to dismiss is that the appellant lacks standing to maintain the action, a ground which is also without merit."[73] The absence of any showing that the program actually required financial expenditure was overlooked by the majority but did not fail to escape the attention of Justice Jackson in his concurrence. He observed, "Any cost of this plan to the taxpayers is incalculable and negligible . . . . "[74] In a later case,[75] the Court explained *McCollum* as having involved actual expenditures, but the record in the case itself is not clear and the existence or nonexistence of any expenditure clearly was not crucial to the finding of standing.

Despite any suggestion in *McCollum* to the contrary, *Everson* later was limited briefly to cases involving actual expenditures.[76] In *Doremus v. Board of Education*,[77] the Court refused to grant standing to a taxpayer challenging the practice of Bible reading in a public high school. The Court distinguished *Doremus* from *Everson* on the ground that the Bible reading in *Doremus* had involved no ex-

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70. *See supra* note 40 and accompanying text.

71. 333 U.S. 203 (1948).

72. *Id.* at 205.

73. *Id.* at 206 (citation omitted).

74. *Id.* at 234 (Jackson, J., concurring). Justice Jackson concurred in the opinion despite his conclusion that the taxpayer *qua* taxpayer suffered negligible harm. *Id.*

75. Zorach v. Clauson, 343 U.S. 306, 309 (1952). The characterization in *Zorach* was not made pursuant to a standing inquiry, but was part of the effort of the *Zorach* majority to distinguish *McCollum* on the merits.

76. *See supra* notes 54-62 and accompanying text.

77. 342 U.S. 429 (1952). Plaintiffs had challenged as violative of the establishment clause a New Jersey statute in the New Jersey state courts. No trial was held and the New Jersey Supreme Court disposed of the case on the merits, despite "jurisdictional doubts." *Id.* at 430-31. The New Jersey Supreme Court observed that the plaintiffs had failed to allege that implementation of the statute resulted in any additional expenditures, or that participation in the statutory scheme violated the plaintiffs' religious beliefs. 5 N.J. 435, 439, 75 A.2d 880, 881-82 (1950).

penditure of state funds.[78] Thus, the message of *Doremus* was clear: Actual expenditures levying an actual burden on the taxpayer litigant were necessary to create taxpayer standing.

The establishment injury to the taxpayer as taxpayer received its most expansive acknowledgment in *Flast v. Cohen*.[79] The plaintiffs in that case were granted standing as federal taxpayers to challenge the disbursement of funds to religious and sectarian schools by federal officials pursuant to the Elementary and Secondary Education Act of 1965.[80] It is incorrect to view *Flast* itself as a leading establishment opinion.[81] Almost all of the *Flast* majority opinion was concerned with the permissiblity of federal taxpayer suits generally.[82] But the Court, as it had done previously in *Everson*, emphasized the essential relationship between tax expenditures and establishment. The Court's discussion of establishment is as follows:

> [A]ppellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that 'the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.' 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation

78. 342 U.S. at 434.

79. 392 U.S. 83 (1968).

80. *Id.* at 85, 106. The two-part nexus standing requirement for federal taxpayers articulated in *Flast* is set out *supra* note 30.

81. The majority's discussion of establishment was limited to a very brief overview of the history of the establishment clause. 392 U.S. at 103-06. The peculiar nature of establishment was discussed in the concurrence by Justice Fortas. *Id.* at 115-16 (Fortas, J., concurring).

82. *Flast* also addressed the propriety of convening a three-judge court under the circumstances presented. *Id.* at 88-91.

upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.[83]

Despite the Court's caution in tying taxpayer standing to actual expenditures in *Everson, Doremus*, and *Flast*, this line eventually began to break down in subsequent non-federal establishment taxpayer cases.[84] In *Walz v. Tax Commission*,[85] the Court granted standing, without discussion, to a property owner to challenge the property tax exemption of religious organizations. No governmental expenditure was involved in the *Walz* case; indeed, the Court made a point in reaching its decision on the merits to distinguish such a tax exemption from an actual expenditure.[86] The fact that no expenditure was involved was critical to the Court's finding that the exemption was constitutional.[87] The Court did not explain why the fact that the challenged action was a tax exemption as opposed to an expenditure was constitutionally significant with respect to the merits but was not constitutionally significant to the standing issue.

If the line drawn by *Everson, Doremus*, and *Flast* is the line between expenditures and non-expenditures, then *Walz* presents a modification of this theory. It may be argued that the program in *Walz* resulted in an economic benefit to the religious organization.[88] But the fact that the religious organization enjoys an economic benefit is unimportant for taxpayer standing purposes. The focus for standing purposes in *Doremus, Flast*, and *Everson* was on the expenditure by the state, and its resultant burden on the taxpayer, not on the purported benefits received by the religious institution.

A further expansion of taxpayer standing occurred in *Hunt v. McNair*.[89] The plaintiff, a South Carolina taxpayer, challenged the validity of a statutory scheme that provided for the issuance of reve-

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83. *Id.* at 103-04 (footnotes omitted).

84. Individual Justices, including Justice Fortas concurring in *Flast*, had suggested that the fact that the constitutional claim was establishment would be enough to break down traditional standing barriers. 392 U.S. at 115. This, however, was not the rationale announced by the *Flast* majority, a point which Justice Rehnquist recognized, *see Valley Forge*, 102 S. Ct. at 767 n.25.

85. 397 U.S. 664 (1970).

86. *Id.* at 675, (Brennan, J., concurring).

87. *Id. See also id.* at 690-91 (Brennan, J., concurring). The Court distinguished between a passive benefit, which is equated with benevolent neutrality, and an actual affirmative grant which would implicate the establishment concern. This distinction was also noted by Justice Brennan in *Valley Forge*, 102 S. Ct. at 775 n.15.

88. Indeed, the Court in *Walz* recognized that such an economic benefit would result. 397 U.S. at 674-75.

89. 413 U.S. 734 (1973).

nue bonds for construction projects.[90] The challenged law prohibited grants to construct buildings that would be used by sectarian institutions for sectarian instruction or as a place for religious worship. The statute also prohibited grants for any facility that was to be used primarily in connection with any part of the program of a divinity school or department for any religious denomination. Under the statutory scheme, bonds could be issued, however, to a sectarian college for the construction of buildings not devoted to sectarian purposes. In applying this program, South Carolina approved a revenue bond for a Baptist college at Charleston, South Carolina. Holding the law constitutional on the merits, the Court relied heavily on the fact that the issuance of this revenue bond involved no state expenditure. The Court explained the program as follows:

> The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit.[91]

Since there was no expenditure of funds in *Hunt*, and therefore no increased burden on the taxpayers, the case did not meet the *Everson-Doremus-Flast* framework for standing. One might expect, therefore, that this very basis upon which the *Hunt* Court found the law constitutional on the merits might have been used to deny standing. The Court, however, ignored the standing issue.

Another indication that the Supreme Court had relaxed the *Everson-Doremus-Flast* rule in taxpayer cases is implicit in the parochial aid cases.[92] If one begins with the assumption, as the Court seemed to do in *Committee for Public Education and Religious Liberty v. Nyquist*,[93] that parochial aid programs encourage parents to

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90. *Id.* at 735-36.

91. *Id.* at 745 n.7.

92. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

A parochial aid case involves a challenge to a program designed to aid, through grants, loans, gifts of valuable property, or other pecuniary assistance, sectarian non-public schools; such aid is normally state or municipally funded.

93. 413 U.S. 756, 775 (1973). The Court stated, "Of course, it is true [that financial aid programs] . . . served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools . . . . " *Id.*

send their children to parochial schools, then an immediate question develops as to whether taxpayers as taxpayers are harmed at all by such programs;[94] it is at least possible that such programs might ease the strain on public school enrollment and, thus, would save the taxpayer money in the long run. If the theoretical basis for allowing taxpayer standing in establishment cases is the drain upon the taxpayer's pocketbook caused by the allegedly unconstitutional expenditure, then the parochial aid cases seemingly would not support a finding of standing. Nonetheless, the right of a state taxpayer to challenge parochial programs at this time is unquestioned.

What is most significant about these establishment clause-state taxpayer cases is that the Court has not expanded standing to similarly situated litigants in other nonestablishment contexts. Except for *Walz*, the Supreme Court has never recognized the right of a taxpayer to attack the favorable tax treatment of another taxpayer.[95]

It also is questionable whether the parochial aid cases such as *Nyquist* and *Sloan v. Lemon* survive the current standing test. In *Warth v. Seldin*,[96] and *Simon v. Eastern Kentucky Welfare Rights Organization*,[97] the Court stringently required the litigant to show that he was actually harmed by the challenged action.[98] If the harm recognized in the state taxpayer cases is an unconstitutional increase in the tax burden, then it would appear that the litigant would have to show this harm under the *Warth-Simon* test. Yet it is clear that in establishment cases such as *Nyquist, Sloan, Hunt* and *Walz*, no

94. *Id.* at 765. *See also* Sloan v. Lemon, 413 U.S. 825, 829 (1973) (citing legislative findings of the state of Pennsylvania that the parochial aid program would result in a saving of taxpayer money).

95. The Court expressly found this to be an open question in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 36-37 (1976). *See also* Louisiana v. McAdoo, 234 U.S. 627 (1914) (denying standing to the state of Louisiana to challenge the allegedly too-favorable tariff rates imposed on imported sugar by the federal government). The Court also denied standing in a case not involving an establishment claim but otherwise factually similar to Hunt v. McNair, *supra* notes 89-91 and accompanying text. *See* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938) (taxpayer does not have standing to challenge the constitutionality of a federal program of grants and loans to municipal corporations). In *Ickes*, the Court reasoned that, absent a showing of injury, a federal taxpayer has no standing to challenge federal expenditures on the ground that the expenditures are for an unconstitutional purpose. *Id.* at 478. *Ickes* thus may be viewed as inconsistent with *Flast*, in which the Court held that a federal taxpayer will have standing to challenge federal expenditures as unconstitutional where the taxpayer satisfies the two-part nexus showing articulated in *Flast*. *See supra* notes 30, 74-78 and accompanying text.

96. 422 U.S. 490 (1975).

97. 426 U.S. 26 (1976).

98. 426 U.S. at 38-39; 422 U.S. at 498-501.

such showing was made. Thus, some cognizable injury other than a higher tax burden or unconstitutional tax expenditure must be inherent in these cases.

The search for this "other injury" begins with another group of establishment cases in which the harm suffered by the litigant is not immediately clear. These are the cases where the Court has authorized standing for parents of public school children to challenge practices within the public school that allegedly violate the establishment clause.

Parent standing was initiated in *Illinois ex rel. McCollum v. Board of Education*[99] and in *Zorach v. Clauson.*[100] In those two cases, litigants attacked the constitutionality of release time programs in schools attended by their children, basing their standing claim on their status as taxpayers and as parents of school children. *McCollum* is ambiguous as to which of the two bases supported standing.[101] *Zorach* apparently was based on parental standing since the Court, in its only discussion of standing, simply distinguished *Doremus* on the ground that parents of school children were not plaintiffs in that case;[102] it is unclear what harm suffered by the parents in *McCollum* and *Zorach* justified standing. Indeed, the statement by Justice Jackson in *McCollum* that no compulsion was placed on the non-participating student and that no penalty was applied to such a student was not questioned by the majority.[103] Nonetheless, the Court granted standing to parents in *McCollum* and in *Zorach* despite the apparent failure of the parents in either case to allege specific injury in their status as parents.

Parental standing reached its most dramatic impact in the school prayer cases. In *Engel v. Vitale*,[104] the Court invalidated a voluntary school prayer program in which a nondenominational prayer composed by the New York Board of Regents was recited in New York's public schools.[105] The *Engel* plaintiffs were parents of

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99. 333 U.S. 203 (1948).

100. 343 U.S. 306 (1952).

101. The Court summarily dismissed the standing argument without discussion. 333 U.S. at 206. For a discussion of *McCollum* and taxpayer standing, see *supra* notes 71-75 and accompanying text.

102. The discussion of standing in *Zorach* was confined to a footnote. The Court stated, "No problem of this Court's jurisdiction is posed in this case since, unlike the appellants in [*Doremus*] appellants here are parents of children currently attending schools subject to the released time program." 343 U.S. at 309 n.4.

103. 333 U.S. at 233 (Jackson, J., concurring).

104. 370 U.S. 421 (1962).

105. *Id.* at 436. The prayer at issue was: "Almighty God, we acknowledge our depen-

children attending the public schools, as well as citizens of New York and taxpayers of the school district where the specific challenged acts took place.[106] The plaintiffs' standing was not challenged, and the Court was silent on the subject.[107] In the lower court, standing was predicated on a free exercise claim that the children and parents were being coerced in violation of their religious beliefs.[108] The free exercise claim, dismissed summarily by the lower court, was abandoned upon appeal,[109] however, and the only issue remaining was the alleged violation of the establishment clause principle of separation of church and state.[110] With respect to this issue, the parents failed to allege any injury to themselves or their children and did not charge that the prayer program involved any expenditure of state funds. The Court's willingness to reach the merits of their establishment claim, despite the parents' failure to allege specific injury, raises a question as to the basis on which standing was granted.[111]

That question remained unanswered in 1963 when the Court faced a challenge to a Bible reading program in Pennsylvania's and

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dence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

106. *See In re* Engel v. Vitale, 10 N.Y.2d 174, 179, 176 N.E.2d 579, 579-580, 218 N.Y.S.2d 659, 660 (1961), *rev'd*, 370 U.S. 421 (1962).

107. *See* 370 U.S. at 421-26. For a discussion of the possible bases for standing in *Engel*, see Brown, *supra* note 5; Sutherland, *Establishment According to* Engel. 76 HARV. L. REV. 25 (1962).

108. *In re* Engel v. Vitale, 10 N.Y.2d 174, 179-80, 176 N.E.2d 579, 579-80, 218 N.Y.S.2d 659, 660 (1961), *rev'd*, 370 U.S. 421 (1962).

109. *See* Brief for Petitioners at 3, Engel v. Vitale, 370 U.S. 421 (1962) (free exercise claim not included as a "question presented").

110. 370 U.S. at 424.

111. Professor Kurland has observed that *Engel* apparently established a new standing rule:

> [W]here the alleged violation of the separation clause has occurred by reason of activities within the public school, a parent of a child attending the school has standing to raise the issue in the federal courts without showing any compulsion exerted on his child to comply with or to participate in the activities about which complaint is made. The result is perhaps desirable, for it permits a very limited class to exert the powers of a watchdog to keep the schools . . . free from the imposition of religious indoctrination. It is hard to see, however, why the parents are a better group to exercise this power of surveillance than other citizens. . . . To state a requirement of direct, individual, economic interest and, nevertheless, to sustain jurisdiction where no such interest is shown is to forswear a major function of judicial opinions: to enlighten the litigants and those who may follow them about the rules that the Court is applying.

Kurland, *supra* note 5, at 22. *See also* Frieber, *supra* note 24, at 986-87 (*Engel* represents a liberalized view of standing); Sutherland, *supra* note 107, at 27. (*Engel* indicates a relaxation of establishment standing requirements, since the *Engel* plaintiffs suffered no palpable injury).

Maryland's public schools in the consolidated cases of *School District v. Schempp*[112] and *Murray v. Curlette*.[113] The *Schempp* plaintiffs were parents of public school children and the Murrays were atheists. The Court sustained jurisdiction and struck down the programs.[114] The standing issue was relegated to a footnote. The text of the footnote is as follows:

> It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. The parties here are school children and their parents, who are *directly affected* by the laws and practices against which their complaints are directed. These interests *surely suffice* to give the parties standing to complain.[115]

The Court distinguished *Doremus*, "which involved the same substantive issues presented here,"[116] by stating that the school child involved in *Doremus* had graduated, thus denying the appellants parental standing; in addition, the *Doremus* appellants had failed to establish taxpayer standing.[117] The statement in the *Schempp-Murray* majority's footnote[118] that no coercion was needed to trigger the litigants' standing was critical to the granting of standing there since there was no finding in either case that the challenged Bible reading actually coerced the litigants' children. The fact that no coercion was found, however, would seem to indicate that whatever harm was suffered by the plaintiffs' children was undifferentiated from that of other members of the involved communities. As Professor Brown has explained, the litigants may have had a grievance due to a difference of opinion with respect to the prayer requirement[119]—a disagreement so marked that the litigants incurred the expense of a lawsuit. But if this was the sole ground for litigation, it is, as Professor Brown explains, a " 'reason' [which] disclosed nothing of significance for standing."[120] The undifferentiated nature of such a claim apparently

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112. 374 U.S. 203 (1963).
113. *Id.*
114. *Id.* at 205.
115. *Id.* at 224 n.9 (emphasis added) (citations omitted).
116. *Id.*
117. *Id.*
118. *Id.*
119. Brown, *supra* note 5, at 23.
120. *Id. See* United States v. Richardson, 418 U.S. 166, 176-77 (1974) (organization's

would fail the prudential "generalized grievance" barrier erected by *Warth*.[121]

Thus, the question why standing was allowed for the school children's parents in these cases and in the *Walz-Hunt* line of cases, where the challenged enactment levied no additional tax burden on the litigant taxpayer, remains unanswered. Because no injury was shown in either the parent or the non-expenditure taxpayer cases, it would seem that a dismissal for lack of standing would be required under article III.[122]

Even if there is some injury implicit in the recognition of standing in the above cases sufficient to satisfy the article III requirement, the claims in all of these cases, including *Flast* and *Everson*, by their very nature are generalized grievances. As Justice Harlan has explained, taxpayer's suits such as *Flast* and *Everson* "under the establishment clause are not in these circumstances meaningfully different from other public actions. . . . The interests (the taxpayer) represents, and the rights he espouses, are, as they are in all public actions those held in common by all citizens."[123] This raises the question of why standing was not denied in all of these cases because of prudential concerns.[124] In order to answer these constitutional and

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mere interest in issue, no matter how long-standing or fervent, is insufficient for standing); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225-26 (1974) (litigants' motivation to bring suit is irrelevant to standing inquiry); Sierra Club v. Morton, 405 U.S. 727, 737 (1972) (organization whose only interest in the litigation is its status as a "special interest" group may not, absent actual injury to members, have standing).

Some commentators have disputed the Court's denial of standing to ideological plaintiffs. *See generally* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-38 (1968) (uninjured, ideological plaintiff may present factual context which satisfies Court's need for concrete adverseness); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673-74 (1973).

121. *See supra* note 6.

122. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976); Warth v. Seldin, 422 U.S. 490, 499 (1975).

Professor Brown contrasted standing in nonestablishment cases with standing in the school prayer cases and noted the Court's liberality in the latter context. He questioned "whether there is any reason to support specially tenuous standing in establishment cases, and to modify the accepted orthodoxy accordingly." Brown, *supra* note 5, at 18.

123. Flast v. Cohen, 392 U.S. 83, 128-29 (1968) (Harlan, J., dissenting). *See also Valley Forge*, 102 S. Ct. at 778 (1982) (Brennan, J., dissenting) ("Each, and indeed every, federal taxpayer suffers precisely the injury that the Establishment Clause guards against when the Federal Government directs that funds be taken from the pocketbooks of the citizenry and placed into the coffers of the ministry."); Bogen, *supra* note 7.

124. *See supra* note 6. Indeed, Professor Brown has suggested that the Court might have been wise to decline review on prudential grounds in the school prayer cases. Brown, *supra* note 5, at 14-15.

prudential questions, we must first examine the establishment clause itself.

III. NON-SPECIFIC INJURY UNDER THE ESTABLISHMENT CLAUSE: HARMS TO TAXPAYERS AND COMMUNITIES

The dilemma that the Court has recognized with respect to the establishment clause is that violation of the clause does not require coercion on specific individuals.[125] Thus, requiring specific individualized injury, such as economic loss, is not appropriate in all establishment cases because, in some establishment contexts, the establishment clause is not concerned with this type of injury.[126] Rather, it would follow that the harms against which the nonestablishment directive is leveled, in the contexts identified by the previous cases, are inherently generalized.

The first of these contexts is the establishment concern implicated in the improper use of tax monies for religious purposes. While it has been shown that there is no article III standing problem in the *Flast* and *Everson* cases because the increased tax burden necessarily injures the taxpayers involved, the prudential limitation is decidedly implicated by the generalized nature of the injury in such cases.[127] Yet whether the Court is correct in its historical understanding or not, it held in *Flast* and in *Everson* that the flow of tax monies to religious entities was one of the specific evils that the establishment clause was designed to cure.[128] Thus, it is inappropriate to use prudential concerns of judicial self-restraint to frustrate what

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125. Engel v. Vitale, 370 U.S. 421, 430 (1962). *See supra* notes 116-18 and accompanying text.

126. It has been asserted that "to require coercive effect for standing might render the [establishment] clause unenforceable." Frieber, *supra* note 24, at 987.

Thus, Justice Brennan's principal argument for granting standing to parents of school children in *Schempp* was that "to deny [a parent] standing either in his own right or on behalf of his child might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment." School Dist. v. Schempp, 374 U.S. 203, 266 n.30 (1963) (Brennan, J., concurring). The Court, however, has consistently and firmly rejected the notion that the probability that an unconstitutional act will otherwise escape judicial review is alone a sufficient ground on which to predicate standing for a particular complainant. *Valley Forge*, 102 S. Ct. at 767; Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974); United States v. Richardson, 418 U.S. 166, 179 (1974). As Professor Brown noted, Justice Brennan's position "undercuts the whole orthodoxy of standing" and more significantly, may suggest that "judicial review is an end in itself." Brown, *supra* note 5, at 24. The Court described this "available plaintiff" approach as "a departure from the limits on judicial power contained in Art. III." *Valley Forge*, 102 S. Ct. at 768.

127. *See supra* notes 6, 123 and accompanying text.

128. *See supra* notes 65-69, 79-83 and accompanying text.

the Court has found to be the framers' intent, for failure to allow taxpayer standing on prudential grounds will effectively insulate such proscribed disbursements from review.

This is not to say that the Court has recognized that all purportedly unconstitutional action must be susceptible to judicial review. Indeed, it has expressly rejected that notion.[129] However, in establishment cases, where the injury often does not create specifically aggrieved plaintiffs, *and* the constitutional provision at issue is directed at non-specific injuries, standing has been allowed.[130] This is the lesson of *Flast v. Cohen.*[131]

The harm at issue in the non-expenditure cases (including the parent and taxpayer cases) is more amorphous than is the injury to taxpayer *qua* taxpayer, but it is this harm that apparently satisfies both the article III standing requirements and militates against the Court's exercise of its prudential restraint in establishment cases. The harm in question is the harm to religious freedom and governmental integrity that occurs in a community[132] when the community is not free from establishment influences.[133] Standing is predicated on the interest a litigant has in removing vestiges of establishment from his community. This principle was explicitly noted by Justice Fortas concurring in *Flast.* Noting the interest that "the taxpayer and *all other citizens* have in the church-state issue," he stated: "In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and *fundamental impact* upon the *life* of the taxpayer—and *upon the life of all citizens.*"[134]

In addition to Justice Fortas, several commentators have recognized harm to the community as meeting the article III "injury in fact" standing requirement. Frieber notes, "[t]hose who live near public land that is being used for religious purposes suffer a personal affront and may be regarded as having an individual right to avoid exposure to governmentally sponsored religious 'messages' and the

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129. *See supra* note 126.

130. *See supra* notes 120, 127-28 and accompanying text.

131. *See supra* note 123 and accompanying text.

132. "Community" as used here does not refer only to small geographical entities; rather, it is the area purportedly affected by the establishment clause violation. In this sense, the term may be used in reference to an entire state. *See supra* notes 65-78 and accompanying text.

133. A comparable "community" harm was recognized in a racial discrimination case in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

134. 392 U.S. at 115 (Fortas, J., concurring) (emphasis added).

subtle indoctrination that may result. . . . [The alleged establishment] is thrust upon them as a part of their community environment."[135] And Professor Tribe has stated:

> [T]he fact of symbolic governmental identification with a religious activity must be understood to constitute a separate evil in a system that regards matters of religious concern as ultimately delegated to individual and community conscience. . . . The only way . . . to make sense of the Court's conclusion in *Flast v. Cohen*, is to recognize in the religion clauses a fundamental personal right not to be a part of a community whose official organs endorse religious views that might be fundamentally inimical to one's deepest beliefs.[136]

The notion of harm to the community, although never explicitly discussed by the Court, is inherent in some of its other decisions. In *McGowan v. Maryland*,[137] the plaintiffs challenged a Sunday closing law on establishment and free exercise grounds. The Court rejected standing based on the free exercise claim, noting that the plaintiffs claimed only economic injury from operation of the law, and not an infringement of *their own* religious freedom.[138] The Court then stated:

> If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion, then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true [with regard to the establishment clause.] However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.[139]

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135. Frieber, *supra* note 24, at 991 (footnote omitted).

136. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 868-69 (1978) (footnote omitted). Even the defendant college in *Valley Forge* admitted that "a direct offense to the plaintiff's right to live and learn in a religion-free environment has been held to constitute a personal stake." *Valley Forge*, Brief for Petitioners at 17 (available on LEXIS, Genfed library, Sup. Ct. file). *See also* Brilmayer, *supra* note 15, at 312-13 (community interest should be recognized in some instances).

137. 366 U.S. 420 (1961).

138. *Id.* at 429.

139. *Id.* at 430 (footnote omitted). Involvement of civil government with religion harms both the civil community and the religious community. "When the secular and religious institutions become [impermissibly] involved . . . there inhere [sic] in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the stength of a system of secular government." School Dist. v. Schempp, 374 U.S. 203, 295 (1963) (Brennan, J., concurring). As Justice Brennan pointed out in *Schempp*, for example, "public schools serve a . . . uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any

Again, in the parental standing cases such as *Schempp* and *Engel*, the Court implicitly recognized this substantive harm to the community. No actual establishment of a specific religion was found in the school prayer cases,[140] nor were those persons who did not ascribe to the prayers at issue held to have been in any way coerced or inhibited in their own religious beliefs.[141] Yet the Court, by reaching the establishment claim on the merits in those cases, seems to be saying that there is an establishment injury to community members when a community is pervaded by a church-state relationship. A direct measurable harm to specific persons may not occur in such cases, but the community itself suffers, perhaps symbolically,[142] and perhaps also in the subtle effect that religious influence may have on later generations.[143] The community is also affected by the unwarranted influence of the church and state working together upon those in the community who are not members of the established religion. As the Court recognized in *Engel*, an establishment of one religion necessarily affects the rights of others even if it did not actually

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sort—an *atmosphere* in which children may assimilate a heritage *common to all American groups and religions*." *Id.* at 241-42 (emphasis added) (citations omitted). Interference with this function is an interference with the *community's* right to have only a common heritage taught in the public schools. Similarly, history shows, as the Court has noted, that religions relying on government support to spread their faiths have lost many persons' respect, *see* Engel v. Vitale, 370 U.S. 421, 431 (1962), the harm may be to the established religion itself, rather than to a particular individual.

140. School Dist. v. Schempp, 374 U.S. at 281-82 (1963) (Brennan, J., concurring); Engel v. Vitale, 370 U.S. at 430. Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970), interpreted *Schempp* as recognizing standing based upon a spiritual stake in the outcome.

141. *Schempp*, 374 U.S. at 228-29 (Douglas, J., concurring); *Engel*, 370 U.S. at 430.

142. [T]he very symbolism of conspicuous governmental aid to identifiably religious enterprise is regarded as an independent evil. . . . [N]othing short of a concern with such symbolism could distinguish those cases of aid to the religious enterprise which the Court has deemed impermissible from those which the Court has readily tolerated.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 868 (1978). It has been judicially recognized, at least in the school context, that even the appearance of official sponsorship of religious beliefs or practices is a symbolic harm, one to which the establishment clause is directed. "To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit." Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980). *See also* Engel v. Vitale, 370 U.S. at 431; Allen v. Morton, 495 F.2d 65, 72-73 n.13 (D.C. Cir. 1973).

143. The parochial aid distinction between aid to colleges as opposed to aid to elementary and secondary schools appears to turn on the notion that students in the latter institutions are more susceptible to indoctrination by religious teachings. *See* Tilton v. Richardson, 403 U.S. 672, 686 (1971) (plurality opinion).

serve to coerce or inhibit those persons.[144] Changes in religious belief, or eventual religious indoctrination because of pervasive religious influence, may be undetectable, but they are injuries decried by the establishment mandate nonetheless. Thus, the establishment clause extends beyond the individual's right to have his or her religious views respected. It encompasses the right, *as a member of the community*, to a civil authority untainted by religious influence.[145]

This harm to the community may be seen as justifying the Court's grant of standing in the taxpayer-non-expenditure and parent cases. In recognizing that state or community citizens have standing to bring these cases, the Court implicitly is stating that its understanding of establishment means that the adverse community effect created by unconstitutional establishment (the constitutional injury under *Warth*) extends to community and state boundaries.[146]

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144. 370 U.S. at 430-31.

145. Recognition of the community interest as a basis for standing also is seen in establishment cases predicated upon a beneficial interest theory. Beneficial interest centers on a plaintiff's right to have government property used for permissible, i.e., public, purposes. In Allen v. Hickel, 424 F.2d 944, 946-47 (D.C. Cir. 1970), the court granted standing to plaintiffs to challenge the construction of a crèche, erected as part of a Christmas pageant, on federal park land, holding that "a claim that park land which plaintiff has a beneficial right be maintained for public purposes is being devoted to the use of an established religion is sufficient personal involvement to provide standing." *Id.* at 947. Plaintiffs were residents of the District of Columbia metropolitan area, the area specifically served by the park lands involved. *Id.* Thus, the court allowed community members to complain of an establishment violation simply as members of the affected community entitled "to enjoy the park land and its devotion to permissible public use," *id.*, with no further allegation of injury. (The court, having found standing on a beneficial interest theory, did not reach plaintiffs' assertion of taxpayer standing. *Id.* at 946.) *Cf.* Baird v. White, 476 F. Supp. 442, 445 (D. Mass. 1979) (standing granted to plaintiff "as a resident of Boston" to challenge city's permitting Archdiocese of Boston to limit access to Boston Commons during papal visit to those holding tickets issued by the Archdiocese). It is not required in beneficial interest cases that the litigant allege that his actual use of the property is being denied. If such deprivation of use were alleged, standing would be predicated on direct injury such as that found in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

146. This grant of standing to community residents is in turn consistent with the community notions of standing recognized in the early municipal taxpayer cases. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 486-87 (1923); Hawke v. Smith, 253 U.S. 221 (1920); Cramptom v. Zabriskie, 101 U.S. 601 (1879). These cases apparently recognized a special concern that a citizen has in the activites of his community over and above that which a citizen might have in the actions of the national government generally. The cases also recognize that the affected community may depend upon the type of violation alleged. If the measure in question is authorized by state law or otherwise has a statewide scope, then standing normally has been granted to residents of the state generally. *See* Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion) (standing granted to Connecticut residents attacking expenditures made *within the state* under a federal statute). If however, the practice in question is localized within a specific community, only those community residents or those in proximate relation to the community would have standing. *See*

In addition, in not exercising its prudential restraint despite the generalized nature of the grievances in such cases, the Court is recognizing, as it did in *Flast*, that prudential limitations are inappropriate when such limitations would necessarily frustrate the purposes of the constitutional enactment.[147] Since the purpose of nonestablishment is to protect the community generally, standing should not be denied simply because the litigant suffered a harm undifferentiated from those suffered by other members of that community.

IV. *Valley Forge*: An Attempt at Reconciliation

The pre-*Valley Forge* establishment cases discussed in the previous section show that the Court has found actual injury sufficient to satisfy article III standing requirements in two circumstances where differentiated injury to specific individuals was not alleged. The Court found actual harm (1) to taxpayers, when revenues raised in part from that taxpayer were expended in violation of the establishment clause, and (2) to a taxpayer-resident or parent-resident of a community when a purportedly unconstitutional establishment occurred in that resident's community. Further, it apparently was recognized that given the intrinsic generalized nature of an establishment claim, it would be inappropriate to exercise prudential standing limitations in such cases, because to do so would mean that the establishment clause would be rendered unenforceable in the very situations in which the provision was designed to apply.

Given this analysis, one might easily wonder why standing was denied in *Valley Forge*. The answer with respect to taxpayer standing is not difficult. *Valley Forge* took the majority opinion in *Flast* at its word. The requisite injury in federal taxpayer cases, according to *Flast*, is a harm to the taxpayer *qua* taxpayer—a burden levied on the taxpayer by the illegal expenditure of funds by Congress from

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Doremus v. Board of Educ. 342 U.S. 429 (1952). In the public school cases, the aggrieved community appears to be the students attending the public schools and their parents. *See* School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). Although the school prayers at issue in *Doremus* were authorized by a state statute, standing was not granted to state taxpayers. *Doremus* may be seen either as a definition of affected community or as an indication that the Court, in some circumstances, may require that a plaintiff be from a narrowly defined community, even though under the analysis presented here a broader community (e.g., a state) might satisfy article III concerns.

147. The Court's decision whether to exercise its prudential restraint to deny standing often turns on consideration of the policies involved, unlike the Court's standing inquiry under article III. *See supra* note 6. In the establishment context, this means that the Court should consider the policies underlying the establishment clause and refuse to exercise prudential restraint where those policies would be frustrated.

tax revenues raised from the litigant-taxpayer.[148] Since the disposition of surplus property in *Valley Forge* did not involve any tax expenditures by Congress, the *Flast* test was not satisfied.[149]

It is less clear why the *Valley Forge* Court denied standing with respect to the litigants' interest in assuring that their community would be free of establishment influence. Much depends on whether the Court's basis in denying standing was constitutional or prudential. This distinction is critical,[150] yet the Court is highly ambiguous on this point. For example, at some points in the opinion the Court appears to base its decision on the litigants' failure to allege "an injury of any kind."[151] This language, together with the Court's frequent references to article III,[152] seem to indicate that Americans

148. *Valley Forge*, 102 S. Ct. at 762.

149. *Id.*

150. A brief aside is appropriate at this point. For purposes of brevity and clarity it has been assumed that the simple interest in having the government act constitutionally does not amount to harm sufficient to maintain standing under article III. A strong argument can be made, however, that this type of harm is another variation of what the courts have referred to as a "generalized grievance" and that limits on standing to bring such a grievance as a claim generally are derived from prudential concerns. This argument is best supported by a reference to the two cases that the Court most often points to as examples of generalized grievances, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), and United States v. Richardson, 418 U.S. 166 (1974). In *Schlesinger* particularly, the plaintiffs' interest appears to be no more than that the government act constitutionally. (Justice Stewart dissenting in *Richardson* points out that in that case another interest may have been at issue as well—the right to receive information regarding CIA expenditures. 418 U.S. at 203). Yet the Court, despite language to the contrary in the cases themselves, has viewed *Schlesinger* and *Richardson* as prudential cases. *See* Warth v. Seldin, 422 U.S. at 499-500.

Even if the interest in having the government act constitutionally is construed as a "generalized grievance" that does satisfy article III requirements, this type of generalized grievance is distinguishable qualitatively from the taxpayer or community harm recognized in the establishment cases. The harms present in the latter circumstances, while generalized, are peculiarly establishment injuries. They are less abstract than the generalized interest in having the government act constitutionally, an interest presumably present in every constitutional case, establishment or otherwise. This "injury" has never been held sufficient to grant standing, even in establishment cases, regardless of whether the denial of standing can be described as based upon prudential or article III concerns. Thus, even assuming that the interest in having the government act constitutionally does state a generalized grievance sufficient to satisfy article III, the Court could not exercise its prudential restraint in this type of "generalized" case without intruding upon previous cases. Actual injury to the plaintiff's taxpayer or community interests would not be implicated, only the "psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 102 S. Ct. at 765.

151. *Id.* at 765.

152. "[T]he 'cases and controversies' language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums." *Id.* at 759. "The Court of Appeals was surely correct in recognizing that the Art. III requirements of standing are not satisfied by 'the abstract injury in nonobservance of the Constitution asserted by . . . citizens.' " *Id.* at 764 *quoting* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208,

United would not have had standing based upon the constitutional concerns. On the other hand, the Court heavily relies upon *United States v. Richardson*[153] and *Schlesinger v. Reservist Committee to Stop the War*[154] in its holding. Both *Richardson* and *Schlesinger* have been held to have rested on the prudential standing limitation.[155] Thus, if *Valley Forge* was based upon these decisions, it would appear that *Valley Forge* was a prudential limitation case.

A finding that the *Valley Forge* plaintiffs did not meet article III standing requirements would not be a retreat from previous decisions. The only claim present in *Valley Forge* was the claim that the surplus property had been distributed in violation of the establishment clause. The plaintiffs had no relationship with the purportedly unconstitutional granting of property other than reading about it in the newspaper.[156] No desire to use the disputed property was alleged;[157] no injury to residents of the community where the disputed property was located was alleged;[158] no claim of improper use of tax dollars was at issue.[159] Americans United alleged merely that they were federal taxpayers and citizens attacking a federal action that was not national in scope and that did not result in an added tax burden. No establishment claim had ever succeeded on this basis.[160]

As noted previously, earlier comparable establishment cases,

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223 n.13 (1974). *See also* 102 S. Ct. at 759, 760, 766 n.24, 768.

153. 418 U.S. 166 (1974).

154. 418 U.S. 208 (1974).

155. Warth v. Seldin, 422 U.S. 490, 499-500 (1975). *See supra* note 6.

156. 102 S. Ct. at 756-57.

157. *Id.* at 757.

158. Americans United did claim that some of its members resided in Pensylvania but did not allege that those members suffered a cognizable injury as residents of Pennsylvania which differed in any way from the injury they or any of the non-resident members allegedly suffered as federal citizens. *Id.* at 76 n.23.

159. The plaintiffs did allege that their members would be "depriv[ed] of the . . . constitutional use" of their tax dollars by the conveyance, *id.* at 761, but the Court rejected this claim as failing the first prong of the *Flast* nexus test because the transfer did not actually involve any expenditure of tax dollars. *Id.* at 762.

160. One might argue that this did occur in Tilton v. Richardson, 403 U.S. 672 (1971) (plurality opinion), where the Court accorded standing to challenge federal construction grants and loans to church-related colleges where a portion of the statute did not involve expenditures. However, the portion of the statute which did not involve expenditures—it allowed the property built with the grant or loan to revert to the school after 20 years, even if the conditions of the grant or loan were unfulfilled at that point—may simply have been seen by the Court as tied to the challenged expenditures so as to allow the taxpayers standing to challenge both. 102 S. Ct. at 779 (Brennan, J., dissenting). In *Valley Forge*, petitioners made no challenge whatsoever to the original expenditure that resulted in the government's ownership of the disputed land.

where no injury to taxpayer *qua* taxpayer was shown, had required a showing of harm to the litigant as a member of the community actually affected by the unconstitutional action. Americans United, therefore, could only have suffered the requisite harm if they had alleged injury caused to them as members of an affected community. The sole community in which they alleged status, however, was the federal community. Thus, they were asking the Court to hold that any federal action implicating the establishment clause affected the entire nation and, derivatively, all its citizens, regardless of localized nature of the action. This holding would be an expansion from previous establishment cases that had recognized only local or state communities as the aggrieved entities.[161] Although the Court could have held that the affected community was the nation as a whole, it apparently chose not to do so.

If *Valley Forge* rests on article III grounds, the opinion may be read as simply stating that the national community did not have a cognizable interest in localized establishment clause violations. Once this was established, the conclusion followed that the *Valley Forge* plaintiffs' claim was not in any way distinguishable from the claim of a citizen expressing an interest in having the government act constitutionally.[162] The Court was correct, therefore, according to precedent in characterizing the only injury of the *Valley Forge* plaintiffs as the psychological injury caused by the "observation of conduct with which one disagrees."[163]

There are problems with this limited reading of *Valley Forge*. A serious criticism is that such a reading of the breadth of the affected community in an establishment case turns the historical understanding of the establishment clause on its head. The clause as originally enacted was intended to apply only to the federal government and not to the states.[164] Thus, describing the community affected by the establishment as being the state and not the nation

161. *See supra* notes 65-78 and accompanying text.

162. *See supra* note 150.

163. *Valley Forge*, 102 S. Ct. at 765.

164. *See* School Dist. v. Schempp, 374 U.S. 203, 253 (1963) (Brennan, J., concurring) ("No one questions that the Framers of the First Amendment intended to restrict exclusively the powers of the Federal Government."); McGowan v. Maryland, 366 U.S. 420, 465 (1961) (opinion of Frankfurter, J.) ("The purpose of the Establishment Clause was to assure that the *national* legislature would not exert its power in the service of any purely religious end.") (emphasis added). *See also* Permoli v. New Orleans, 44 U.S. (3 How.) 588, 609 (1845); Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

seems clearly contradictory to the intent of the framers.[165] Moreover, the action at issue in *Valley Forge* was an action taken by the federal government. This suggests the arbitrariness of construing state lines as the boundary for those persons who will be adversely affected for standing purposes.

Still, there is support for the position that the state or community resident, and not the federal taxpayer, is the proper plaintiff even when federal action is at issue. The resident's concern in the activities of his municipality, over and above his interest in the actions of the federal government, was a cornerstone of the Supreme Court's distinction of *Bradfield v. Roberts* in the *Frothingham* opinion.[166] An expansion of the concept of community to include the state in certain, but not all, contexts[167] may be viewed as a limited outgrowth of the *Bradfield* rule.[168] This limited expansion of *Bradfield* is consistent with *Tilton v. Richardson.*[169] In *Tilton*, standing was not questioned when a federal expenditure which occurred in Connecticut was attacked as an establishment violation by federal taxpayers who additionally alleged standing as Connecticut residents.[170] Further, this position may explain why in *Roemer v. Board of Public Works*,[171] the same plaintiffs as in *Valley Forge*—Americans United for the Separation of Church and State—were dismissed by the district court from an action challeng-

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165. *See Valley Forge*, 102 S. Ct. at 776 n.17 (Brennan, J., dissenting); Scott, *supra* note 120, at 662.

166. *See* Frothingham v. Mellon, 262 U.S. 447, 486-87 (1923) (distinguishing Bradfield v. Roberts, 175 U.S. 291 (1899)).

167. For examples of cases where the state has been included in the community concept, see Hunt v. McNair, 413 U.S. 734 (1973) (granting taxpayer standing to challenge state's authority to issue revenue bonds benefiting Baptist-controlled college); Everson v. Board of Educ., 330 U.S. 1 (1947) (granting taxpayer standing to challenge state statute authorizing reimbursement to parents for transportation of children attending parochial schools). For an example of where the state has not been included in the community concept, see Doremus v. Board of Educ., 342 U.S. 429 (1952) (denying standing to parents and taxpayers to challenge state statute providing for Bible reading in public schools).

168. *See supra* notes 61-64 and accompanying text.

169. 403 U.S. 672 (1971).

170. Tilton v. Finch, 312 F. Supp. 1191, 1194 (D. Conn. 1970) (standing granted), *rem. sub nom.* Tilton v. Richardson, 403 U.S. 672, 676 (1971). If the program attacked in *Valley Forge* had been national in scope, such as a nationwide religious school tuition tax deduction scheme, or a national bill requiring prayer in the public schools, injury to a federal resident as resident that would at least satisfy the article III injury requirement could not be doubted. However, there is merit to the common sense notion that an out-of-state resident who has no relationship to a particular community is not injured by, and thus has no standing to litigate, an issue which is the peculiar concern of that community.

171. 426 U.S. 736 (1976).

ing the constitutionality of a state law under the establishment clause although standing was granted to in-state taxpayers.[172] The dismissal was noted by the Supreme Court, without comment, when it decided the *Roemer* case.[173]

The *Valley Forge* opinion would become more troubling if the Court had found that the plaintiffs' interest was more than simply the interest in having the government act constitutionally. This finding would indicate that the plaintiffs actually were harmed as members of an affected community. If the Court then exercised its prudential restraint by holding that the plaintiffs, because of the generalized nature of their alleged injury, should not be granted standing, it would be retreating from precedents such as *Flast* and *Everson* which can be read as recognizing that judicial self-restraint in establishment cases is not warranted.[174]

In terms of fulfilling the nonestablishment mandate, the conclusion that *Valley Forge* was decided on article III grounds is the better course. If *Valley Forge* is viewed as an article III decision, a member of Americans United might have been granted standing if he had alleged injury specifically as a member of a community proximate to the property at issue.[175] Indeed, if such a plaintiff alleged that he had actually used, or desired to use, the property in question, then *United States v. SCRAP*,[176] and *Sierra Club v. Morton*[177] sug-

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172. Roemer v. Board of Pub. Works, 387 F. Supp. 1282, 1284 n.1 (D. Md. 1975), *aff'd*, 426 U.S. 736 (1976) (plurality opinion). Americans United were denied standing along with the American Civil Liberties Union. They alleged only that they "share[d] as common objectives the preservation of separation of church and state and opposition to use of public funds for the support of sectarian, educational institutions." Appendix to Jurisdictional Statement at 7.

173. Roemer v. Board of Pub. Works, 426 U.S. 736, 744 n.8 (1976) (plurality opinion).

174. In both cases, which involved what seem clearly to be "generalized grievances", the Court reached the merits. Flast v. Cohen, 392 U.S. 83 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947). *See supra* notes 65-69, 79-83 and accompanying text.

175. Although the Supreme Court has never considered this question in the context of the establishment clause, several lower federal courts have granted standing to local residents residing near the site of an alleged establishment violation. *See* Allen v. Hickel, 424 F.2d 944, 946-47 (D.C. Cir, 1970) (granting standing to challenge use of public property for religious purposes based on the theory that the plaintiffs had a beneficial interest in the use of the property); Anderson v. Salt Lake City Corp., 475 F.2d 29, 31 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973); Baird v. White, 476 F. Supp. 442 (D. Mass. 1979); *See supra* note 140. *See also* Frieber, *supra* note 24, at 1007-08.

176. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-87 (1973) (standing appropriate where plaintiffs allege they will be injured in their use of the property at issue). The Court "made it clear that standing is not to be denied simply because many people suffer the same injury". *Id.* at 687.

177. 405 U.S. 727, 735 (1972) (denying standing to challenge government action that

gest that standing would have been found on the basis of a direct harm without implicating prudential concerns. In any event, the *Valley Forge* Court itself indicated that these factors would be relevant:

> Respondants complain of a transfer of property located in Chester County, Pennsylvania. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.[178]

If, in fact, standing could be rectified by inclusion of a plaintiff who had a direct relationship with the Valley Forge community, then *Valley Forge* may be explained as the definition of community in establishment clause cases as something less than the federal community and not as a retreat from the Court's previous decisions in enforcing the nonestablishment mandate. Unfortunately, on this critical point, the *Valley Forge* opinion is unclear; thus further clarification of this point by the Court will be necessary.

V. CONCLUSION

On the one hand, the *Valley Forge* majority opinion can be read as a clear signal that the Court has not retreated from the injury-in-fact requirement for standing in the establishment context. The Court assumed that a showing of injury-in-fact was necessary to establish a "case or controversy" under article III, and implicitly recognized the importance of a consistent interpretation of "case or controversy" that would not vary with the right or constitutional provision at issue. The Court refused to expand previous cases to hold that a federal taxpayer-citizen might be injured by a localized federal establishment violation. Earlier cases that had recognized establishment injury to federal taxpayers and/or local community members had never found injury to plaintiffs in circumstances similar to those in *Valley Forge.*

On the other hand, the *Valley Forge* Court's opinion was deficient in its failure to clearly articulate the grounds for the holding. There is at least the implication in *Valley Forge* that the Court, ex-

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allegedly resulted in environmental injury to certain property where plaintiffs alleged no use of the property at issue).

178. 102 S. Ct. at 766 (footnotes omitted).

ercising its prudential restraint, has elected not to enforce the nonestablishment mandate even though it would be constitutionally permissible to do so. Viewed from this perspective, the decision would represent a significant retreat from precedent. The earlier cases were correct in not applying prudential limitations to establishment issues since to do so would effectively preclude judicial review of injuries at the heart of the establishment proscription.

In summary, consistency and policy require that *Valley Forge* be read as stating that the plaintiffs were not injured by the challenged action, rather than as stating that, although injured, prudential concerns precluded judicial review. Under this reading, the Supreme Court's enforcement of the establishment clause would retain its vitality.