LEADING CASES

I. CONSTITUTIONAL LAW

A. First Amendment

1. Establishment Clause — Taxpayer Standing. — The Supreme Court has long held that a taxpayer's injury from the operation of an allegedly unconstitutional expenditure is too remote and generalized to support taxpayer standing to challenge the law.[1] However, in *Flast v. Cohen*,[2] the Court held that because a defining purpose of the Establishment Clause was to prevent government spending in favor of religion, a taxpayer would have standing to challenge a government spending program under the Establishment Clause.[3] Last Term, in *Arizona Christian School Tuition Organization v. Winn*,[4] the Supreme Court held that Arizona taxpayers did not have standing to challenge a state law that granted tax credits to residents who donated to private charities that funded private education, including religious education.[5] The Court determined that the plaintiffs lacked a cognizable injury under *Flast* because the tax credit did not involve taxpayers' money being "extracted and spent" on religion.[6] The Court substantially reduced the scope of Establishment Clause taxpayer standing by introducing an extraction requirement. Although previous decisions laid the foundation for this decision, *Winn* signals an increased level of scrutiny of Establishment Clause plaintiffs' standing. Should this increased scrutiny continue, the logic of *Winn* could lead the Court to narrow Establishment Clause standing in other contexts. Such restrictive standing could collaterally impact Establishment Clause doctrine, weakening the Establishment Clause's ban on religious preferences.

In 1997, the Arizona legislature passed an act[7] — eventually codified at section 43-1089 of the Arizona Revised Statutes[8] — that grants each taxpayer a credit that reduces her state tax bill by the amount the taxpayer contributes to a school tuition organization (STO).[9] An STO

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1 *See* Frothingham v. Mellon, 262 U.S. 447, 487 (1923).

2 392 U.S. 83 (1968).

3 *Id.* at 103–06.

4 131 S. Ct. 1436 (2011).

5 *Id.* at 1440.

6 *Id.* at 1447 (quoting *Flast*, 392 U.S. at 106) (internal quotation marks omitted).

7 1997 Ariz. Sess. Laws 549.

8 ARIZ. REV. STAT. ANN. § 43-1089 (2005) (current version at ARIZ. REV. STAT. ANN. § 43-1089 (2010)). Although section 43-1089 was most recently amended in 2010, the most relevant text for the purposes of this comment came from the 2005 amendment. Accordingly, subsequent citations will reference the 2005 version of the statute.

9 *Id.* § 43-1089(A).

is a private charitable organization that allocates at least ninety percent of its annual revenue to scholarships or tuition grants for private schools.[10] STOs can — and many do — limit scholarships to schools of a particular religious sect.[11] A taxpayer donating $500 to an STO has her tax burden reduced by $500, making the donation costless to the taxpayer.[12] Arizona estimates that the credits granted under the program have totaled nearly $350 million since its inception.[13]

Arizona residents have challenged the constitutionality of section 43-1089 in multiple rounds of state and federal litigation. First, the Arizona Supreme Court rejected an Establishment Clause challenge, finding that the law did not have the purpose or effect of advancing religion.[14] A group of Arizona taxpayers then raised an Establishment Clause challenge in federal court, but the district court dismissed the claim, holding that the Tax Injunction Act[15] (TIA) barred their suit.[16] The Ninth Circuit reversed and remanded.[17] The Supreme Court affirmed the Ninth Circuit's remand, holding that the TIA did not bar the complaint because the complaint sought to prospectively invalidate the tax credit rather than to enjoin the present collection of taxes.[18] This remand gave rise to the present action. Neither the Ninth Circuit nor the Supreme Court mentioned the plaintiffs' standing.[19]

On remand, the District Court for the District of Arizona granted the defendants' motion to dismiss for failure to state a claim under the Establishment Clause.[20] The Ninth Circuit reversed and remanded.[21] Writing for the panel, Judge Fisher[22] held that the taxpayer plaintiffs had standing and had stated a valid claim for an Establishment

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[10] *Id.* § 43-1089(G)(3).

[11] *See* Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1006 (9th Cir. 2009) (noting that the three largest STOs allegedly fund scholarships only at schools of particular Christian denominations).

[12] *Id.* at 1008.

[13] *Winn*, 131 S. Ct. at 1450 (Kagan, J., dissenting).

[14] Kotterman v. Killian, 972 P.2d 606, 612, 616 (Ariz. 1999) (en banc). The court also held that the law did not violate the Arizona Constitution. *Id.* at 616–25.

[15] 28 U.S.C. § 1341 (2006).

[16] Winn v. Killian, 307 F.3d 1011, 1013 (9th Cir. 2002). Under the TIA, federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

[17] *Winn*, 307 F.3d at 1020.

[18] *See* Hibbs v. Winn, 542 U.S. 88, 93 (2004).

[19] *See id.* at 92–112; *Winn*, 307 F.3d at 1013–20.

[20] Winn v. Hibbs, 361 F. Supp. 2d 1117, 1123 (D. Ariz. 2005). Judge Carroll held that section 43-1089 did not have the impermissible effect of aiding religion because, as with the Cleveland school voucher program upheld by the Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), aid could only reach religious schools "after being filtered through multiple layers of private choice." *Winn*, 361 F. Supp. 2d at 1120.

[21] Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1023 (9th Cir. 2009).

[22] Judge Fisher was joined by Judges Nelson and Reinhardt.

Clause violation.[23] Addressing standing, the court determined that the plaintiffs fell within the *Flast* exception for taxpayer standing because the dollar-for-dollar tax credit had a comparable economic effect to direct spending.[24] Addressing the merits, the court held that the plaintiffs had stated a claim that section 43-1089 lacked a secular purpose and had the effect of advancing religion.[25] The court held that the plaintiffs pled sufficient facts to allege that the provision's ostensibly secular purpose of increasing school choice was a sham that obscured a religious purpose.[26] In holding that the program had the primary effect of aiding religion, the court noted that taxpayers' donations to STOs that fund scholarships only at religious schools constrain parents' choice to apply for scholarships at secular schools.[27] The Ninth Circuit then denied rehearing en banc, with eight judges dissenting.[28]

The Supreme Court reversed.[29] Writing for the Court, Justice Kennedy[30] held that the plaintiffs lacked standing to challenge the law.[31] To have standing, a plaintiff must allege an "injury in fact" that is "concrete and particularized," traceable to the defendant's conduct, and likely to be redressed by a favorable result.[32] Thus, as the Court held in *Frothingham v. Mellon*,[33] a taxpayer generally lacks standing to challenge a law because the effect of allegedly unconstitutional spending on the taxpayer's tax burden is "remote, fluctuating and uncertain,"[34] while the taxpayer's interest is "necessarily 'shared with millions of others.'"[35] According to the Court, these general objections to taxpayer standing apply with full force to the Arizona tax credit.[36]

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[23] *Winn*, 562 F.3d at 1011, 1023.

[24] *See id.* at 1008.

[25] *Id.* at 1012–23.

[26] *Id.* at 1012.

[27] *Id.* at 1016.

[28] Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 649 (9th Cir. 2009) (denial of rehearing en banc). Judge O'Scannlain, writing for himself and seven others, dissented from the denial, arguing that the law had a valid secular purpose and lacked the forbidden effect of advancing religion. *See id.* at 658–70 (O'Scannlain, J., dissenting from denial of rehearing en banc). The original panel concurred in the denial, reiterating arguments from the panel opinion and responding to the dissent. *See id.* at 650 (Nelson, Reinhardt, and Fisher, JJ., concurring in the denial of rehearing en banc). While these opinions strenuously debated the merits of the constitutional issue, none mentioned the plaintiffs' standing.

[29] *Winn*, 131 S. Ct. at 1440.

[30] Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

[31] *Winn*, 131 S. Ct. at 1440.

[32] *Id.* at 1442 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)) (internal quotation marks omitted).

[33] 262 U.S. 447 (1923).

[34] *Winn*, 131 S. Ct. at 1443 (quoting *Frothingham*, 262 U.S. at 487).

[35] *Id.* (quoting *Frothingham*, 262 U.S. at 487).

[36] *Id.* at 1444.

The Court next addressed the applicability of *Flast*, which it characterized as a "'narrow exception' to 'the general rule against taxpayer standing.'"[37] Under *Flast*, a taxpayer has standing to challenge a law when she can satisfy two conditions: First, "there must be a 'logical link' between the plaintiff's taxpayer status 'and the type of legislative enactment attacked.'"[38] That is, the focus of the challenge must be a legislative spending program.[39] Second, the plaintiff must allege violation of the Establishment Clause.[40] The Court stated that these two conditions work together to identify an injury of "the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion" that render it sufficiently particularized to give rise to standing.[41]

The Court reasoned that unlike a direct spending program, the Arizona tax credit does not involve taxpayer dollars being "extracted and spent," so the taxpayer's injury remains speculative.[42] The Court cited the Framers' view that forcing a citizen to financially support religious beliefs she disagrees with fundamentally violates the taxpayer's conscience.[43] According to the Court, even though the tax credit has "similar economic consequences" to those of a spending program, it lacks the element of extraction that forms the core of the violation.[44] The Court also found that its frequent exercise of jurisdiction in previous cases involving challenges to religious tax benefits lacked precedential value because these cases did not discuss standing.[45]

Justice Scalia concurred, but he noted that he would prefer to overrule *Flast*.[46] Although he characterized *Flast* as "an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power,"[47] he joined the Court's opinion because it "[found] respondents lack standing by applying *Flast* rather than distinguishing it away on unprincipled grounds."[48]

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[37] *Id.* at 1445 (quoting Bowen v. Kendrick, 487 U.S. 589, 618 (1988)).

[38] *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)).

[39] *See id.*

[40] *See id.* (citing *Flast*, 392 U.S. at 102). Although *Flast* applies to all alleged violations of constitutional limitations on Congress's taxing and spending power, Justice Kennedy noted that the Establishment Clause is the only such limitation the Court has recognized. *Id.*

[41] *Id.* at 1446 (alterations in original) (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006)).

[42] *Id.* at 1447.

[43] *Id.* at 1446–47.

[44] *Id.* at 1447.

[45] *Id.* at 1448–49.

[46] *Id.* at 1450 (Scalia, J., concurring). Justice Scalia was joined by Justice Thomas.

[47] *Id.* For Justice Scalia's full argument against *Flast*, see *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2573–79 (2007) (Scalia, J., concurring in the judgment).

[48] *Winn*, 131 S. Ct. at 1450 (Scalia, J., concurring). In *Hein*, Justice Scalia had criticized the plurality for distinguishing *Flast* on the basis that the spending in *Hein* derived from general congressional appropriations to the executive branch rather than express allocation by a specific congressional enactment. *See* 127 S. Ct. at 2579–81 (Scalia, J., concurring in the judgment).

Justice Kagan dissented, arguing that plaintiffs had standing under "any fair reading of [*Flast*]."[49] The Court had decided five cases involving Establishment Clause challenges to tax benefits — including the prior incarnation of this dispute — without a single Justice questioning standing[50] because it "was taken as obvious" that taxpayers have standing to challenge religious tax benefits.[51] In Justice Kagan's opinion, as tax benefits and government spending are each forms of "subsidy" that "accomplish[] the same government objective — to provide financial support,"[52] taxpayers "experience the same injury for standing purposes whether government subsidization of religion takes the form of a cash grant or a tax measure."[53]

Justice Kagan attacked the majority's reliance on an extraction requirement, arguing that the relevant Establishment Clause injury is not the extraction of "specific dollars"[54] but rather the use of Congress's taxing and spending power "to favor one religion over another or to support religion in general."[55] According to Justice Kagan, the extraction requirement is incoherent because "[n]o taxpayer can point to an expenditure (by cash grant or otherwise) and say that her own tax dollars are in the mix."[56]

Winn narrowed the scope of Establishment Clause taxpayer standing by introducing an extraction requirement into the *Flast* doctrine. The Court's major shift, though, was not in constricting standing doctrine but rather in closely scrutinizing standing where it had previously ignored the issue. If the Court continues this close scrutiny in other Establishment Clause contexts, as seems likely, then *Winn*'s formalism and requirement of a specific, tangible injury could lead the Court to further reduce taxpayer standing and to deny standing to plaintiffs challenging religious displays unless they allege some form of coercion. In this way, restrictive standing could shape substantive Establishment Clause doctrine, weakening the clause's ban on religious preferences.

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[49] *Winn*, 131 S. Ct. at 1451 (Kagan, J., dissenting). Justice Kagan was joined by Justices Ginsburg, Breyer, and Sotomayor.

[50] *See id.* at 1453–54 (citing Hibbs v. Winn, 542 U.S. 88 (2004); Mueller v. Allen, 463 U.S. 388 (1983); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970)).

[51] *Id.* at 1455.

[52] *Id.* at 1450.

[53] *Id.* at 1452. Justice Kagan illustrated her point with a topical thought experiment. She suggested that if the federal government decided to support banks by reducing their tax bills by hundreds of billions of dollars, rather than through a direct cash transfer, angered taxpayers would "respond by saying that a subsidy is a subsidy (or a bailout is a bailout), whether accomplished by the one means or by the other." *Id.* at 1455–56.

[54] *Id.* at 1459.

[55] *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 103 (1968)).

[56] *Id.* at 1460.

Although the result in *Winn* seems in tension with *Flast*, the discrepancy can be explained by decades of intervening precedent that narrowed the scope of standing.[57] *Flast* intimated that the *Frothingham* rule against taxpayer standing may be merely prudential rather than constitutional[58] and phrased its exception in broad terms,[59] suggesting that the Court was embarking down a path toward eroding the *Frothingham* rule.[60] Instead, the opposite occurred, and the Court narrowed *Flast* in subsequent opinions. The Court rejected taxpayer challenges based on constitutional clauses other than the Establishment Clause[61] and found *Flast* inapplicable to actions other than exercises of the legislature's taxing and spending power,[62] thus "limit[ing] [*Flast*] strictly to its facts."[63] Furthermore, in *Lujan v. Defenders of Wildlife*,[64] the Court elevated the requirement of a "concrete and particularized" injury — rather than a "generalized grievance" — to a core element of Article III standing.[65] This move further counseled against broad taxpayer standing because an expansive reading of *Flast* by the Court could transgress constitutional limitations on the Court's jurisdiction rather than merely signal a potential shift in the Court's prudential standing policy. The Court thus conceptualized *Flast* as a

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[57] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–69 (1992) (noting that Court discussions of constitutional standing limitations became frequent in the 1970s despite being almost nonexistent before then).

[58] *See Flast*, 392 U.S. at 92 n.6 (noting that the "prevailing view of the commentators is that *Frothingham* announced only a nonconstitutional rule of self-restraint"). While some standing doctrines form constitutional requirements under Article III, "[s]tanding doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction," which form the "prudential component" of standing. Allen v. Wright, 468 U.S. 737, 751 (1984).

[59] The Court did not limit taxpayer standing to Establishment Clause injuries; it granted taxpayers standing to challenge the violation of any "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Flast*, 392 U.S. at 103.

[60] Several years before *Flast*, a prominent scholar wrote: "If our constitutional notions of proper judicial business are grounded to a significant degree in history it is next to impossible to conclude — as was attempted in *Frothingham* — that a taxpayer's action does not fulfill the constitutional requisites of case or controversy." Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961). In the wake of *Flast*, another scholar predicted that the case "seems destined to become a long-term cornerstone of the law of standing." Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 601 (1968).

[61] *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 208 (1974) (Incompatibility Clause); United States v. Richardson, 418 U.S. 166, 179 (1974) (Statement and Account Clause).

[62] *See* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2565–66 (2007) (plurality opinion) (executive actions promoting religion); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982) (property transfer).

[63] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 898 (1983).

[64] 504 U.S. 555 (1992).

[65] *Id.* at 560, 575. Justice Scalia, who wrote the Court's opinion in *Lujan*, had advocated for constitutionalizing the concrete injury requirement since before he joined the Court. *See* Scalia, *supra* note 63, at 895 ("'[C]oncrete injury' . . . is the indispensable prerequisite of standing.").

"narrow exception" to a "constitutional prohibition against taxpayer standing."[66]

Understood in this context, Justice Kennedy's majority opinion in *Winn* is at least an arguably faithful reading of precedent. Under modern standing doctrine, *Flast* could no longer be understood as an Establishment Clause exception to the rule against adjudicating generalized grievances;[67] rather, *Flast* could remain valid only to the degree that it presented a particularized injury. Thus, to arrive at an injury that was sufficiently particularized, Justice Kennedy described the *Flast* injury in the most narrow, specific, and tangible terms possible: the extraction of taxpayer dollars and the spending of those dollars on religion.[68] In dissent, Justice Kagan offered a compelling argument that the *Flast* injury is government subsidization of religion rather than extraction of specific dollars, and thus that the distinction between a spending program and a tax benefit is not constitutionally significant.[69] But even if Justice Kagan was correct about the proper outcome, she was incorrect in describing *Winn* as a major shift in standing doctrine.[70] That shift occurred years earlier.

Still, *Winn* does signal a shift from the Court's prior practices in an important respect: it marks a reversal of the Court's habit of ignoring standing in religious tax-benefit cases and a tipping point in the Court's emerging trend of scrutinizing standing in Establishment Clause cases generally. In two major categories of Establishment Clause cases, the Court has regularly exercised jurisdiction without even mentioning standing. First, as Justice Kagan noted in her dissent, the Court has heard five taxpayer challenges to tax-benefit programs that allegedly aided religion, including the same tax credit at issue in this case.[71] Second, the Court has regularly heard challenges seeking to invalidate religious displays and monuments as impermissible government endorsements of religion.[72]

Winn confirms and expands upon a trend in recent Supreme Court opinions of taking Establishment Clause standing more seriously. One case, *Elk Grove Unified School District v. Newdow*,[73] held that the

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[66] *Hein*, 127 S. Ct. at 2564 (plurality opinion).

[67] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 35 (1998) (arguing that in *Flast*, the Court "radically depart[ed] from its rule of requiring personalized injury" and "carved out an exception to the 'injury in fact' requirement").

[68] *See Winn*, 131 S. Ct. at 1445–46.

[69] *Id.* at 1452 (Kagan, J., dissenting).

[70] *See id.* at 1455 (contending that the majority "reache[d] a result against all precedent").

[71] *See id.* at 1453–54 (citing cases).

[72] *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

[73] 542 U.S. 1 (2004).

prudential standing limitation against intruding into family affairs barred a father's challenge to the recital of the Pledge of Allegiance at his daughter's school when he lacked custody.[74] Another, *Hein v. Freedom from Religion Foundation, Inc.*,[75] declined to allow a taxpayer challenge to religiously themed presidential speeches.[76] Last year, in *Salazar v. Buono*,[77] the Court briefly addressed standing in an endorsement-based challenge to a religious display, finding standing based on a procedural technicality.[78] Yet while *Newdow*, *Hein*, and *Buono* arguably presented sui generis situations, the Court in *Winn* held that federal courts lacked jurisdiction to hear an entire class of claims that formed a cornerstone of the Court's Establishment Clause jurisprudence. Moreover, the Court explicitly denied any persuasive authority to the Court's previous exercises of jurisdiction.[79] *Winn* therefore signals that *Newdow*, *Hein*, and *Buono* were not aberrations but rather were early signs of a trend that could significantly remake Establishment Clause standing.

Should the increased scrutiny of plaintiffs' standing in Establishment Clause cases persist, the logic of *Winn* could lead to the further narrowing of Establishment Clause standing in multiple contexts. For example, the Court could sharply curtail standing to challenge religious displays. Like the injury to taxpayers caused by religious subsidies, the injury caused by religious displays is intangible and widely dispersed. Under the Court's leading articulation of this injury, when a government "endorse[s]" religion, it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[80] Just as the Court added concreteness to the taxpayer injury with its "extract and spend" requirement, so could it impose more stringent requirements on standing to challenge religious displays. Given that thousands or even millions of people may come into contact with a display, mere exposure to a display could be insufficient to confer standing.[81] Some lower courts have denied standing based on endorsement injuries unless either the plaintiff's home or work location forces her into regular, direct contact

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[74] *Id.* at 12–18. The Court also summarily dismissed the plaintiff's claim of taxpayer standing because he did not "reside in or pay taxes to the [s]chool [d]istrict." *Id.* at 18 n.8.

[75] 127 S. Ct. 2553 (2007).

[76] *Id.* at 2559 (plurality opinion).

[77] 130 S. Ct. 1803 (2010).

[78] *Id.* at 1814–15.

[79] *See Winn*, 131 S. Ct. at 1448–49.

[80] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[81] *Cf. Hein*, 127 S. Ct. at 2582 (2007) (Scalia, J., concurring in the judgment) (arguing that a plaintiff's "purely psychological displeasure" at allegedly unconstitutional actions "plainly" never suffices to support standing).

with the display, or the plaintiff has been forced to alter her behavior to avoid contact with the display.[82] *Winn*'s explicit willingness to bar a class of claims it previously heard further suggests that the Court may similarly enact stringent limitations on endorsement standing.

Likewise, in the taxpayer context, the Court could recognize additional formalistic distinctions as constitutionally significant, thus further constricting the scope of taxpayer standing.[83] The dissent suggested that under the majority's logic, a government could avoid extracting and spending objectors' dollars by putting objectors' tax dollars in a separate bank account and funding religion from the nonobjectors' account.[84] Alternatively, a government could fund a religious program from a source completely apart from general tax revenue, such as sales of surplus property.

Greater scrutiny of Establishment Clause standing could weaken the clause's force as a protection against religious preferentialism.[85] Well-established Court precedent dictates that the Establishment Clause bars government religious preferentialism — either of one religion over another, or of religion in general.[86] The two primary ways

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[82] *See* Note, *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 2004 (2010); *see also* Catholic League for Religious & Civil Rights v. City & Cnty. of S.F., 624 F.3d 1043, 1072–73 (9th Cir. 2010) (Graber, J., concurring in the judgment and dissenting in part), *cert. denied*, 131 S. Ct. 2875 (2011).

[83] It should be noted that the *Winn* plaintiffs' claim likely would have lost on the merits. *See* Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 658–71 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing en banc). Indeed, since the Court held that governments can financially support religious organizations on a neutral basis with secular organizations, most challenges to religious funding have failed. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489–90 (1986). However, curtailing taxpayer standing would do more than eliminate losing claims. For example, suppose the Arizona law stated that STOs could give scholarships only to Christian schools. Such a program would undoubtedly violate the Establishment Clause, yet taxpayers would still lack standing under *Winn*. However, it is possible that some potential plaintiffs, such as applicants to schools of other religions, would have standing. *Cf.* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 7–8 (1989) (plurality opinion) (allowing challenge to tax exemption for religious publications by secular publication subject to the tax).

[84] *Winn*, 131 S. Ct. at 1460–61 (Kagan, J., dissenting).

[85] *See* William P. Marshall & Maripat Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at* Valley Forge, 11 HOFSTRA L. REV. 63, 65 (1982) ("The application of standing limitations to establishment concerns has serious implications for substantive establishment issues. Stringent standing limitations effectively can undercut the nonestablishment mandate.").

[86] *E.g.*, Everson v. Bd. of Educ. of the Twp. of Ewing, 330 U.S. 1, 15 (1947) ("The [Establishment Clause] means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."). By contrast, some Justices and scholars have argued that the Establishment Clause should bar only coercion. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment) ("The traditional 'establishments of religion' to which the Establishment Clause is addressed necessarily involve actual legal coercion."); Michael W. McConnell, *Coercion: The Lost*

that government enacts religious preferences are financial (by funding religion) and expressive (by conveying a message of endorsement). If the Court eviscerates taxpayer standing, then only victims of direct financial discrimination will have standing to challenge financial preferences.[87] However, for certain religious funding actions, it is not clear that any person or group could claim to be discriminated against.[88] Similarly, restrictive standing analysis in the context of religious displays would eliminate challenges to many expressive religious preferences.[89] To survive, a plaintiff may need to recast an endorsement injury as a sort of coercive injury — being forced to either view a display or alter her behavior to gain standing. Even then, under restrictive standing doctrine, there may be some government endorsements of religion that no one would have standing to challenge.[90]

The Establishment Clause has long stood as a bulwark against government religious preferences. As such, the Court has regularly heard taxpayer challenges to religious financial preferences while denying taxpayer challenges in all other contexts. In addition, the Court has heard challenges based on psychological, intangible injuries caused by expressive religious preferences while refusing challenges based on the expressive effects of other forms of discrimination, even racial discrimination.[91] In *Winn*, the Court exercised close scrutiny of Establishment Clause standing, signaled that the Court will be just as stringent in rejecting intangible and generalized injuries in the Establishment Clause context as it is in other contexts, and foreclosed a class of challenges against religious preferences that had been a core of the Court's Establishment Clause jurisprudence. Should the Court

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Element of Establishment, 27 WM. & MARY L. REV. 933, 937 (1986) ("If Madison's explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment.").

87 *See Tex. Monthly*, 489 U.S. at 7–8 (plurality opinion); Larson v. Valente, 456 U.S. 228, 238–45 (1982) (allowing challenge to law that imposed onerous financial reporting requirements on plaintiff church but not on other religious groups); *see also Winn*, 131 S. Ct. at 1440 ("Other plaintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion.").

88 For example, if a government funds a church as a one-time expenditure — rather than as part of a regular taxing and spending program that explicitly classifies based on religion — it is not clear whether a local synagogue or mosque would have standing to sue.

89 Some judges have gone as far as to conclude that a member of a disfavored religion lacks standing to challenge a government proclamation condemning his religion or endorsing another religion. *See* Catholic League for Religious & Civil Rights v. City & Cnty. of S.F., 624 F.3d 1043, 1062 (9th Cir. 2010) (Graber, J., concurring in the judgment and dissenting in part).

90 A federal judge recently found that when Texas Governor Rick Perry issued an official prayer proclamation that specifically referenced Jesus, "it may well be that there is *no one* with standing to sue in this case." Freedom from Religion Found., Inc. v. Perry, No. H-11-2585, 2011 WL 3269339, at *6 (S.D. Tex. July 28, 2011).

91 *See* Allen v. Wright, 468 U.S. 737, 755 (1984) ("Neither do [plaintiffs] have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination.").

continue these trends, it could significantly reduce the force of the Establishment Clause's protection against religious preferences.

2. Freedom of Speech — Categorical Exclusions. — First Amendment jurisprudence has long been receptive to new mediums of communication. The Supreme Court has emphatically stated that changes in technology cannot alone justify otherwise impermissible content discrimination.[1] But the Court has been less clear about when new technologies might not qualify as mediums of expression at all, and it has noted the unique harms that new forms of communication can cause, particularly to children.[2] Last Term, in *Brown v. Entertainment Merchants Ass'n*,[3] the Supreme Court struck down a California law that limited minors' access to violent video games, holding that the law restricted protected speech without a sufficiently compelling interest in protecting minors from psychological harm. Although the Court identified several fatal flaws in the statute, its analysis failed to address whether particular aspects of the video game medium might prevent video games from being "expressive" in the first place or might justify categorically excluding them from the First Amendment when they are directed at minors.

In 2005, California passed a law forbidding the sale or rental of a "violent video game" to a minor without the consent of a parent or other guardian.[4] The statute covered only games in which a player's "range of options" included "killing, maiming, dismembering, or sexually assaulting an image of a human being."[5] Furthermore, the ban was limited to depictions of violence which (i) "appeal[] to a deviant or morbid interest of minors," as found by a "reasonable person, considering the game as a whole"; (ii) are "patently offensive to prevailing standards in the community" for minors; and (iii) prevent the game as a whole from having "serious literary, artistic, political, or scientific value for minors."[6] A coalition of video game companies challenged the statute. The district court struck down the statute under strict scrutiny: the State had not shown that preexisting industry standards were ineffective at protecting minors or that violent video games were more harmful to minors than other depictions of violence.[7]

The Ninth Circuit affirmed.[8] Writing for the panel, Judge Callahan[9] first found that violent video games fell outside the constitution-

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1 *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

2 *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

3 131 S. Ct. 2729 (2011).

4 CAL. CIV. CODE § 1746.1 (West 2009).

5 *Id.* § 1746(d)(1).

6 *Id.* § 1746(d)(1)(A).

7 Video Software Dealers Ass'n v. Schwarzenegger, No. C-05-04188, 2007 WL 2261546, at *10–11 (N.D. Cal. Aug. 6, 2007).

8 Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009).

9 Judge Callahan was joined by Chief Judge Kozinski and Judge Thomas.