
Putting State Courts in the Constitutional Driver's Seat: State Taxpayer Standing After *Cuno* and *Winn*

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I. Introduction

Ohio provided a franchise tax credit to corporations which invested in “manufacturing machinery and equipment” within the Buckeye State.¹ In *DaimlerChrysler Corp. v. Cuno*, the Supreme Court unanimously held that Ohio taxpayers lack standing in the federal courts to challenge this state tax credit as a violation of the dormant Commerce Clause.² Similarly, Arizona provides an income tax credit for contributions to school tuition organizations.³ In *Arizona Christian School Tuition Organization v. Winn*, a narrowly divided Court held that Arizona taxpayers also lack standing in the federal courts to mount an Establishment Clause challenge to this state tax credit.⁴ Taken together, *Cuno* and *Winn* definitively terminated the possibilities of taxpayer standing previously opened by *Flast v. Cohen*.⁵

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1. OHIO REV. CODE ANN. § 5733.33 (2012).
2. 547 U.S. 332 (2006).
3. ARIZ. REV. STAT. ANN. § 43-1089 (2012).
4. 131 S.Ct. 1436 (2011).
5. 392 U.S. 83 (1968).

I write to evaluate state taxpayer standing after *Cuno* and *Winn*.⁶ In particular, I write to explore state taxpayers' standing to mount the kind of federal constitutional challenges to state taxes and expenditures raised in those two cases. I come to three principal conclusions. First, because the states have more liberal taxpayer standing rules than do the federal courts, *Cuno* and *Winn* will not terminate taxpayers' constitutional challenges to state taxes and expenditures, but will instead channel such challenges from the federal courts (where taxpayers do not have standing) to the state courts (where they do). Second, municipal taxpayer standing in the federal courts, which persists after *Cuno* and *Winn*, is an historic anomaly, given what is now a near-absolute bar in the federal courts on state taxpayer standing. Third, as a result of the channeling caused by *Cuno* and *Winn*, in the future, state courts will develop a body of law under the U.S. Constitution governing state taxes and outlays. This body of law will be beyond direct Supreme Court review because of that Court's rejection of state taxpayer standing in the federal courts. At least at the margins, and perhaps more fundamentally, state court judges will be more inclined than their federal counterparts to uphold state tax and expenditure policies against constitutional challenges. Consequently, these state-friendly cases premised on the U.S. Constitution, as developed by the state courts and unsupervised by the Supreme Court, will be more permissive toward state policies than would a comparable corpus of cases decided by federal judges. This result will be untidy, but potentially manageable.

The first section of this Article outlines the Supreme Court's pre-*Cuno* taxpayer standing case law, from its origins in *Frothingham v. Mellon*⁷ through *ASARCO v. Kadish*.⁸ This is a circuitous story of negation, followed by expansion, and culminating in disorderly

6. Unfortunately, we do not have a convenient phrase to distinguish a taxpayer's standing for a particularized challenge to the taxpayer's own individual tax liability from a taxpayer's standing to mount a more generalized, public interest-type challenge to taxes and public outlays in the absence of such particularized harm. Taxpayer standing of the latter sort is the focus of this Article. Thus, the phrase "taxpayer standing" in this Article refers to a taxpayer's ability to contest, not his own individualized tax liability, but taxes and expenditures as they generally affect all taxpayers. This Article makes clear when it refers to taxpayer standing as an objection to individual tax liability.

7. 262 U.S. 447 (1923).

8. 490 U.S. 605 (1989). After *Cuno*, the Court decided *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007). While important for purposes of federal standing doctrine, *Hein* was not part of the background against which the Court decided *Cuno*.

retreat as the U.S. Supreme Court moved from a rule of no-state-taxpayer-standing to a more expansive approach, but then reverted back to a restrictive view of state taxpayer standing, accompanied by continuing dissent advocating the broader standing possibilities raised by *Flast*. Against this background, the second section of this Article discusses *Cuno* and *Winn*. These decisions ended the disorder of the post-*Flast* retreat by firmly establishing that state taxpayers lack standing in the federal courts and that there is no longer a dissenting strain seeking the broader possibilities for taxpayer standing raised by *Flast*. *Winn* and *Cuno* have brought federal taxpayer standing law full circle, back to *Frothingham* and *Doremus* and the denial of standing in the federal courts to both federal and state taxpayers.

The third section of this Article reviews state taxpayer standing rules. These rules generally grant state taxpayers the standing they now lack in the federal courts. The fourth section of this Article concludes that, because of states' more liberal standing rules, *Cuno* and *Winn* will shift state taxpayers' constitutional challenges to state tax and budgetary policies from the federal courts (where state taxpayers do not have standing) to the state courts (where they typically do). The fifth section argues that municipal taxpayer standing to contest local taxes and expenditures in the federal courts is today an historic anomaly, given the virtual extinction of state taxpayer standing in the federal courts after *Cuno* and *Winn*.

The sixth section of this Article predicts that, as a result of *Cuno*, *Winn*, and the states' more liberal taxpayer standing rules, there will emerge a body of constitutional law over which the U.S. Supreme Court will have no direct supervisory authority—namely, the decisions of state courts resolving state taxpayers' challenges under the U.S. Constitution to state tax and spending policies. Taxpayers will have standing to bring such constitutional challenges in the state courts, but the U.S. Supreme Court will lack the ability to review these decisions of the state courts because there is no taxpayer standing in these cases in the federal courts. At least at the margins and perhaps more fundamentally, this body of law, developed by the state courts under the U.S. Constitution, will be more state-friendly than would a comparable corpus of cases formulated by the federal judiciary. As previously stated, this result will be messy, but potentially workable.

II. The Background to *Cuno* and *Winn*: The Circuitous Path From *Frothingham* to *ASARCO*

A. Early Cases Denying Taxpayer Standing: *Frothingham* and *Doremus*

The circuitous path from *Frothingham* to *Asarco* is a path of negation, then expansion, and ultimately disorderly retreat as the Supreme Court, over consistent dissent, returned toward the restricted view of state taxpayer standing it started with early in the 20th century.⁹

In *Frothingham*, the Supreme Court “first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in federal court . . .”¹⁰ In that case, Mrs. Frothingham, as “a taxpayer of the United States,”¹¹ claimed that the expenditures authorized by the federal Maternity Act violated the Tenth Amendment¹² and would “increase the burden of future taxation and thereby take her property without due process of law.”¹³ In denying her standing to sue, the Court contrasted a federal taxpayer’s “minute and indeterminable”¹⁴ interest in the national fisc with the “direct and immediate”¹⁵ interest of a local taxpayer in a locality’s public outlays, an interest resembling “that subsisting between stockholder and private corporation.”¹⁶ To invoke the power of the federal courts to challenge a federal appropriations statute, the party “must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement . . .”¹⁷ In contrast to a municipal taxpayer’s significant interest in local expenditures, a federal taxpayer’s interest in the nation’s fisc “is shared with millions

9. As part of a broader reconsideration of standing doctrine, Judge Fletcher is skeptical of the concept of taxpayer standing. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 267–272 (1988) (“In sum, *Flast*, *Valley Forge*, *Richardson* and *Schlesinger* should not be seen as a group of ‘federal taxpayer cases.’”). Whatever the merits of this broader reconsideration, *Winn* and *Cuno* make clear that “taxpayer standing” is a deeply embedded federal concept. This article therefore proceeds from that concept.

10. *Flast*, 392 U.S. 83, 91 (1968).

11. *Frothingham*, 262 U.S. at 486.

12. *Id.* at 479.

13. *Id.* at 486.

14. *Id.* at 487.

15. *Id.* at 486.

16. *Id.* at 487.

17. *Id.* at 488.

of others [and] is comparatively minute and indeterminable.”¹⁸ Any particular federal appropriation’s “effect upon future taxation” is too “remote, fluctuating and uncertain”¹⁹ to provide a basis for a lawsuit challenging the constitutionality of the federal statute authorizing such appropriation.²⁰

Moreover, the *Frothingham* Court observed, “[t]he administration of any statute” like the Maternity Act “is essentially a matter of public and not of individual concern.”²¹ If Mrs. Frothingham, as a federal taxpayer, could challenge this Act, “then every other taxpayer may do . . . the same” as to any other federal appropriations statute.²² The “attendant inconveniences” of this conclusion indicated that Mrs. Frothingham’s suit as a federal taxpayer “cannot be maintained.”²³ In the absence of a plaintiff asserting “some direct injury suffered or threatened,”²⁴ for the courts to entertain litigation like Mrs. Frothingham’s “would not be to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.”²⁵

In denying Mrs. Frothingham’s standing as a federal taxpayer, *Frothingham* propounds the themes that the Court later explored in taxpayer standing cases: Any federal taxpayer has a small and uncertain interest in any particular federal outlay. That minute interest, shared in common with myriad other federal taxpayers, is best addressed politically, rather than judicially. Even if a federal taxpayer could get a particular federal expenditure enjoined, there is no guarantee that this would redress the harm to the taxpayer since Congress might use the money saved for purposes other than the reduction of the plaintiff-taxpayer’s taxes. Permitting lawsuits like Mrs. Frothingham’s would open the floodgates to similar lawsuits and would upset the separation of powers. Hence, a federal taxpayer, in contrast to her local counterpart, cannot challenge a federal expenditure in the federal courts. She can, of course, contest her own particularized tax liability, but cannot challenge taxes and

18. *Id.* at 487.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 488.

25. *Id.* at 489.

governmental outlays as they affect the general public of which she is a part.

A generation after *Frothingham*, in *Doremus v. Board of Education*²⁶ Justice Jackson, writing for himself and five of his colleagues,²⁷ extended the no-taxpayer-standing rule of *Frothingham* from federal to state taxpayers, while reiterating the different standing status of municipal taxpayers in the federal courts. *Doremus* involved a New Jersey state statute requiring “the reading, without comment, of five verses of the Old Testament at the opening of each public-school day.”²⁸ The *Doremus* plaintiffs challenged the statute as “citizen[s]” and as “taxpayer[s].”²⁹ Despite doubts about the plaintiffs’ standing, the New Jersey Supreme Court reached the merits of the case and upheld the Garden State’s statute under the First Amendment.³⁰ The U.S. Supreme Court, however, reversed, holding that the citizen/plaintiff-taxpayers in *Doremus* had no “direct and particular financial interest” affording them standing to challenge the New Jersey law in the federal courts.³¹ The *Doremus* Court quoted with approval *Frothingham*’s observation that municipal taxpayers have “direct and immediate” interests which give them standing as such to challenge local outlays.³² However, state taxpayers as such do not have standing in the federal courts to challenge state statutes.

The *Doremus* taxpayers, like Mrs. Frothingham, did not contest their particular tax liabilities. Rather, in this case also, the plaintiffs asserted that their status as taxpayers enabled them to challenge state statutes in the federal courts on constitutional grounds without demonstrating individualized consequences unique to them. This, Justice Jackson wrote, was not “a good-faith pocketbook action” in which the plaintiffs “established the requisite special injury necessary to a taxpayer’s case or controversy.”³³

The teaching of *Doremus* is that the U.S. Supreme Court cannot review state court decisions raising federal questions when the state

26. 342 U.S. 429 (1952).

27. Justices Reed and Burton joined Justice Douglas in dissent. *Id.* at 435 (Douglas, J., dissenting).

28. *Id.* at 430.

29. *Id.* at 431.

30. *Id.* at 431–432.

31. *Id.* at 435 (Douglas, J., dissenting).

32. *Id.* at 433–34 (quoting *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923)).

33. *Id.* at 434.

courts grant standing to a state taxpayer under rules more liberal than the federal standing rules. Thus, after *Frothingham* and *Doremus*, a clear set of guidelines governed taxpayer standing in the federal courts: Absent a particularized claim specific to a federal or state taxpayer, such a taxpayer lacks standing in the federal courts. In contrast, a municipal taxpayer has standing to mount a generalized challenge to municipal outlays or taxes in federal court by virtue of his status as such a local taxpayer.³⁴ When a state taxpayer like Mr. Doremus establishes standing in the state courts to challenge under the U.S. Constitution a state program or expenditure, the decision of the state supreme court is final since the taxpayer lacks standing to seek certiorari in the U.S. Supreme Court.

In his *Doremus* dissent, Justice Douglas presaged two issues that would subsequently recur in the Court's taxpayer standing jurisprudence. Justice Douglas would have granted the *Doremus* taxpayers standing since, if such taxpayers "were right in their [Establishment Clause] contentions on the merits, they would establish that their public schools were being deflected from the educational program for which the taxes were raised."³⁵ This observation foreshadows the Court's conclusion in *Flast* that taxpayers as such, notwithstanding *Frothingham*, can have standing to challenge congressional appropriations in the federal courts. Moreover, Justice Douglas wrote, once New Jersey granted the *Doremus* taxpayers standing, "the clash of interests [was] . . . real and . . . strong."³⁶ Consequently, there was a "case or controversy within the meaning of Art[icle] III, [Section] 2 of the Constitution."

34. Of particular interest was Justice Jackson's characterization in *Doremus* of the New Jersey court's decision as "advisory." *Id.* at 434. The import of this label is, at best, unclear. The U.S. Supreme Court did not reverse or vacate the *Doremus* decision of the New Jersey Supreme Court. That state court decision on the merits, left intact by the U.S. Supreme Court's refusal to hear the case, presumptively controls as a matter of *stare decisis* in the future decisions of the New Jersey Supreme Court. See *Flomerfelt v. Cardiello*, 202 N.J. 432, 463 (2010) (concurring opinion of LaVecchia, J.) ("That respect for *stare decisis* is the simple, and sole, reason for my concurrence in the judgment reached today."). Moreover, the *Doremus* decision of the New Jersey Supreme Court binds the lower New Jersey courts. *Glaser v. Downes*, 126 N.J. SUPER 10, 16 (1973) (New Jersey trial court "is bound by the [state] Supreme Court decision in that case."). As the U.S. Supreme Court later observed in *ASARCO*, state courts "possess the authority . . . to render binding judicial decisions that rest on their own interpretations of federal law." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (citing, *inter alia*, 28 U.S.C. §1738). It is thus at best unclear what it means to characterize the New Jersey Supreme Court's decision in *Doremus* as "advisory."

35. *Doremus*, 342 U.S. at 435 (Douglas, J., dissenting).

36. *Id.* at 436.

Justice Douglas thereby framed the choices when a case arrives in the high court from a state with a more liberal taxpayer standing rule than the federal rule: To declare that there is no standing for federal purposes in such a setting turns away from the courthouse parties involved in a quite genuine “clash of interests” and leaves intact a state court decision that the U.S. Supreme Court might have reversed had it reached the merits.

B. *Flast* and the Promise of Broad Taxpayer Standing

A straightforward understanding of federal and state taxpayer standing emerges from *Frothingham* and *Doremus*: There is none. This bright line rule was subsequently upset in *Flast v. Cohen*,³⁷ a decision which purported to inaugurate an expansion of taxpayer standing in the federal courts. In *Flast*, the Supreme Court held that, notwithstanding *Frothingham*, federal taxpayers had standing in the federal courts to challenge under the Establishment Clause of the First Amendment the expenditure of federal funds “to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools.”³⁸

Writing for the *Flast* Court, Chief Justice Warren suggested that *Frothingham* was unclear whether that decision “establishes a constitutional bar to taxpayer suits or whether the [*Frothingham*] Court was simply imposing a rule of self-restraint which was not constitutionally compelled.”³⁹ In constitutional terms, “the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”⁴⁰ Under this Article III standard, the Chief Justice wrote, “[a] taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the case.”⁴¹ There is “no absolute bar in Article III [of the U.S. Constitution] to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.”⁴² Rather, the relevant constitutional inquiry for standing

37. 392 U.S. 83 (1968).

38. *Id.* at 85–86.

39. *Id.* at 92.

40. *Id.* at 101.

41. *Id.*

42. *Id.* Article III, § 1 of the Constitution describes “[t]he judicial Power” of the federal courts in terms of “Cases” and “Controversies.”

purposes is whether under the particular circumstances “a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness” required by Article III and its case and controversy requirement.⁴³

With that observation, the Chief Justice opened to taxpayer standing the door *Frothingham* had closed: “[I]ndividuals who assert only the status of federal taxpayers” may have standing in federal court to “challenge the constitutionality of a federal spending program” if “they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III [standing] requirements.”⁴⁴

Chief Justice Warren then characterized taxpayer standing as requiring two “nexuses”⁴⁵: “a logical link between [taxpayer] status and the type of legislative enactment attacked” and “a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged.”⁴⁶ “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.”⁴⁷

Moving to the opinion’s denouement, Chief Justice Warren concluded that, under these tests, the *Flast* taxpayers had standing to maintain their litigation in the federal courts since they contested “an exercise by Congress of its power under Article I, Section 8, to spend for the general welfare,”⁴⁸ “the challenged program involve[d] a substantial expenditure of federal tax funds,”⁴⁹ and the taxpayers “alleged that the challenged expenditures violate[d] the Establishment and Free Exercise Clauses of the First Amendment.”⁵⁰

To discern the drafter’s intent behind the First Amendment, the Chief Justice invoked James Madison’s “famous Memorial and Remonstrance Against Religious Assessments”⁵¹: “[T]he same authority which can force a citizen to contribute three pence only of

43. *Flast*, 392 U.S. at 101.

44. *Id.*

45. *Id.* at 103.

46. *Id.* at 102.

47. *Id.* at 103.

48. *Id.* at 103. Art. I, Section 8, cl. 1 reads as follows: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . .”

49. *Flast*, 392 U.S. at 103.

50. *Id.*

51. *Id.* See also RICHARD BROOKHISER, JAMES MADISON 42 (2011).

his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.”⁵² From this vantage, the Chief Justice observed, the Establishment Clause “operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art[icle] I, [Section] 8.”⁵³

“[T]he taxpayer in *Frothingham* attacked a federal spending program”⁵⁴ and thereby established the first kind of nexus necessary for taxpayer standing, i.e., “a logical link between [taxpayer] status and the type of legislative enactment attacked.”⁵⁵ However, Chief Justice Warren continued, Mrs. Frothingham lacked the second form of nexus necessary for taxpayer standing, as she alleged no breach of “a specific limitation upon [Congress’s] taxing and spending power.”⁵⁶ Rather, Mrs. Frothingham, as a federal taxpayer, asserted harm under the less specific Tenth Amendment and the Due Process Clause of the Fifth Amendment.⁵⁷

Finally, the *Flast* Court observed that the Establishment Clause is not the only “specific . . . limitation [on Congress’s] taxing and spending power.”⁵⁸ In “future cases,” federal taxpayers might have standing to challenge federal spending under other “specific limitations” in the U.S. Constitution.⁵⁹ Chief Justice Warren thereby indicated that *Flast* did not establish a limited standing rule for taxpayers mounting Establishment Clause challenges to taxes and spending. Rather, *Flast* opened the door as well to taxpayers contesting taxes and spending under similarly “specific limitations” of the Constitution.

In their concurrences, Justices Stewart and Fortas rejected this broad approach. Justice Stewart understood *Flast* as recognizing taxpayer standing “only [for] a federal taxpayer . . . to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment.”⁶⁰ Justice Fortas similarly would have limited *Flast* to recognizing “the proposition that a taxpayer may

52. *Flast*, 392 U.S. at 103 (internal quotation marks omitted).

53. *Id.* at 104.

54. *Id.* at 104–05.

55. *Id.*

56. *Id.* at 105.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 114 (Stewart, J., concurring).

maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause.”⁶¹ As we shall see below, the restricted view of *Flast* advanced by Justices Stewart and Fortas has ultimately prevailed over the broader standing possibilities embraced by the *Flast* majority.

Dissenting alone in *Flast*, Justice Harlan critiqued virtually every aspect of the Chief Justice’s opinion, including the distinction between the Establishment Clause (a sufficiently specific constitutional limitation on congressional spending to buttress taxpayer standing) and the Due Process Clause and the Tenth Amendment (insufficiently specific to give Mrs. Frothingham such standing). Rejecting this distinction, Justice Harlan asserted that there is no “historical evidence that properly permits the Court to distinguish, as it has here, among the Establishment Clause, the Tenth Amendment, and the Due Process Clause of the Fifth Amendment as limitations upon Congress’[s] taxing and spending powers.”⁶² With literary flare, Justice Harlan continued, “only in some Pickwickian sense are any of the provisions with which the Court is concerned ‘specific[ally]’ limitations upon spending.”⁶³

Moreover, according to Justice Harlan, the taxpayers in *Flast* asserted the kind of generalized grievances that are insufficient for standing in the federal courts. “[T]axpayers’ suits under the Establishment Clause are not in these circumstances meaningfully different from other public actions” in which the litigants seek to advance the public interest rather than remedy individualized harm.⁶⁴ The *Flast*

appellants challenge an expenditure, not a tax. Where no such tax is involved, a taxpayer’s complaint can consist only of an allegation that public funds have been, or shortly will be, expended for purposes inconsistent with the Constitution.⁶⁵

The interests he represents, and the rights he espouses, are, as they are in all public actions, those held in common by all citizens. To describe those rights and interests as personal,

61. *Id.* at 115 (Fortas, J., concurring). Professor Bittker, with his customary comic flair, also criticized *Flast*. Boris I. Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer’s Suit Twenty Years After Flast v. Cohen*, 36 U. CHI. L. REV. 364 (1969).

62. *Flast*, 392 U.S. at 126.

63. *Id.* at 127.

64. *Id.* at 128.

65. *Id.*

and to intimate that they are in some unspecified fashion to be differentiated from those of the general public, reduces constitutional standing to a word game played by secret rules.⁶⁶

“[P]ublic actions” like *Flast*, while “within the jurisdiction conferred upon the federal courts by Article III of the Constitution . . . might well alter the allocation of authority among the three branches of the Federal Government.”⁶⁷

Justice Harlan’s lonely *Flast* dissent would prove prescient as the Court subsequently and awkwardly retreated from that decision’s full ramifications. At the time, however, Justice Harlan’s arguments were given the most credence by Justice Douglas who, in his separate concurrence, drew the opposite inference from those arguments than did Justice Harlan. Whereas Justice Harlan would have rejected taxpayer standing in *Flast* on the basis of *Frothingham*, Justice Douglas, invoking “the reasons stated by my Brother Harlan,” would have used *Flast* to get “rid of *Frothingham* here and now.”⁶⁸

Writing in support of “liberal”⁶⁹ rules for taxpayer standing, Justice Douglas stated that “[t]axpayers can be vigilant private attorneys general” notwithstanding interests which are “*de minimis* by financial standards.”⁷⁰ Equally important is “the role that the federal judiciary was designed to play in guarding basic rights against majoritarian control.”⁷¹ Furthermore, “[t]here need be no inundation of the federal courts if taxpayers’ suits are allowed. There is a wise judicial discretion that usually can distinguish between the frivolous question and the substantial question . . .”⁷²

C. The Disorderly Post-*Flast* Retreat

While Chief Justice Warren’s *Flast* opinion raised the possibility of broad taxpayer standing in the federal courts, that possibility did not materialize. Instead, the Court awkwardly retreated from the expansive notion of federal taxpayer standing articulated in *Flast*, ultimately limiting *Flast* to its particular facts, i.e., taxpayers’

66. *Id.* at 128–29.

67. *Id.*

68. *Id.* at 107 (Douglas, J., concurring).

69. *Id.* at 114 (Stewart, J., concurring).

70. *Id.* at 109 (Douglas, J., concurring).

71. *Id.* at 110.

72. *Id.* at 112.

Establishment Clause challenges to congressional appropriations. Throughout this awkward retreat, significant minorities of the Court (often four justices) kept alive the promise of broader taxpayer standing promised by *Flast*.

The disorderly retreat from a broader application of *Flast* started with the Court's simultaneous decisions in *United States v. Richardson*⁷³ and *Schlesinger v. Reservists Committee to Stop the War*.⁷⁴ In *Richardson*, a federal taxpayer asserted that the secrecy of the Central Intelligence Agency's budget violates the constitutional requirement of Article I, Section 9, Clause 7 that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." For himself and four of his colleagues, Chief Justice Burger concluded that Mr. Richardson "falls short of the standing criteria of *Flast*"⁷⁵ and instead "neatly . . . falls within the *Frothingham* holding left undisturbed" by *Flast*, i.e., no standing for federal taxpayers suing without asserting individualized harm.⁷⁶ Mr. Richardson, unlike the plaintiff-taxpayers in *Flast*, did not contest Congress's exercise of "the taxing and spending power"⁷⁷ but, rather, attacked the statute that kept the CIA's budget secret. "[T]here is," Chief Justice Burger reasoned, "no 'logical nexus' between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of" the CIA.⁷⁸ This claim failed "the standards for taxpayer standing set forth in *Flast*"⁷⁹ since the taxpayer merely sought "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government."⁸⁰

The taxpayer's inability to obtain information about the CIA's budget is an alleged harm that is "plainly undifferentiated and common to all members of the public."⁸¹ In short, a five justice majority concluded that Mr. Richardson lacked standing since "he has not alleged that, as a taxpayer, he is in danger of suffering any

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

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

75. *Richardson*, 418 U.S. at 174.

76. *Id.* at 174-75.

77. *Id.* at 175.

78. *Id.*

79. *Id.*

80. *Id.* (internal quotation marks omitted).

81. *Id.* at 177 (internal quotation marks omitted).

particular concrete injury as a result of the operation of [the] statute” which hides the CIA’s expenditures from public view.⁸² If that conclusion means that “no particular individual or class [can] litigate these claims,”⁸³ that suggests that “the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”⁸⁴

Justice Powell joined Chief Justice Burger’s *Richardson* opinion and also concurred separately to urge the Court to “lay to rest the approach undertaken in *Flast*.”⁸⁵ While he begrudgingly accepted *Flast* as having “settled that federal taxpayer standing exists in Establishment Clause cases,”⁸⁶ Justice Powell decried “the doctrinal confusion inherent in the *Flast* two-part ‘nexus’ test.”⁸⁷ “The lack of real meaning and of principled content in the *Flast* ‘nexus’ test renders it likely that it will in time collapse of its own weight.”⁸⁸

The four dissenters in *Richardson* produced three separate opinions and demonstrated the continuing hold on a significant minority of the Court of *Flast*’s promise of broad taxpayer standing. Justice Douglas reprised the theme, expressed in his *Flast* concurrence, of judicial solicitude for claims like Mr. Richardson’s: Rather than being forced to pursue his inquiry politically through Congress and the Executive branch, the courts should protect Mr. Richardson’s “stake in the integrity of constitutional guarantees rather than turning him away without even a chance to be heard.”⁸⁹ Justice Stewart, joined by Justice Marshall, contended that Mr. Richardson had standing to litigate the “asserted duty” under Article I, Section 9, Clause 7 because that alleged duty was “particularized, palpable, and explicit.”⁹⁰ Justice Brennan wrote a dissent covering both *Richardson* and *Schlesinger*.⁹¹

Simultaneously with *Richardson*, Chief Justice Burger also wrote for a six-justice majority in *Schlesinger*.⁹² In that case, the plaintiffs, as citizens and taxpayers, sued the Secretary of Defense and the

82. *Id.*

83. *Id.* at 179.

84. *Id.*

85. *Id.* at 180.

86. *Id.*

87. *Id.*

88. *Id.* at 184.

89. *Id.* at 202.

90. *Id.* at 204.

91. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 235 (1974).

92. Justice Stewart dissented in *Richardson*, but joined the majority in *Schlesinger*.

secretaries of the Army, Navy, and Air Force. Writing for the Court, the Chief Justice held that these citizens and federal taxpayers lacked standing as such to contend in federal court that “Article I, Section 6, Clause 2 of the Constitution renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office.”⁹³ As citizens, the *Schlesinger* plaintiffs merely asserted an interest “held in common by all members of the public.”⁹⁴ In contrast, standing in federal court requires “[c]oncrete” and “particular injury,”⁹⁵ a “personal stake”⁹⁶ in the outcome of the litigation.

Similarly, there was no taxpayer standing under *Flast* since the plaintiffs “did not challenge an enactment under Art[icle] I, [Section] 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status.”⁹⁷

Concurring separately, Justice Stewart, who favored taxpayer standing in *Richardson*, distinguished Mr. Richardson from the *Schlesinger* taxpayers on the ground that those taxpayers, unlike Mr. Richardson, “do not allege that the petitioners” have refused to perform an affirmative duty imposed upon them by the Constitution.”⁹⁸ Justice Stewart also distinguished the *Flast* taxpayers (who had standing) from the *Schlesinger* taxpayers (who did not) on the ground that *Flast* only conferred standing if a taxpayer “challenge[s] . . . an exercise of [Congress’s] taxing and spending power.”⁹⁹

Consistent with his *Flast* concurrence and his *Richardson* dissent, Justice Douglas, joined by Justice Marshall, repudiated the notion of standing altogether, dismissing standing, *inter alia*, as a doctrine which “protects the status quo by reducing the challenges that may be made to it and to its institutions” in federal court.¹⁰⁰ Justice Brennan

93. *Schlesinger*, 418 U.S. at 209 (internal quotation marks omitted). That clause of the Constitution reads: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

94. *Id.* at 220.

95. *Id.* at 221.

96. *Id.*

97. *Id.* at 228.

98. *Id.* at 228–29 (Stewart, J., concurring).

99. *Id.* at 229.

100. *Id.* at 229 (Douglas, J., dissenting).

contended that both the taxpayer in *Richardson* and the taxpayers in *Schlesinger* “alleged injury in fact”¹⁰¹ and thus had standing to sue. Justice Marshall, writing for himself, claimed that the *Schlesinger* taxpayer-plaintiffs possessed standing since they asserted “a claim of direct and concrete injury to a judicially cognizable interest,”¹⁰² namely, their right to lobby against the Vietnam War before “Congressmen not subject to a conflict of interest by virtue of their positions in the Armed Forces Reserves.”¹⁰³

The divisive retreat from *Flast’s* expansive view of taxpayer standing continued in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*¹⁰⁴ In that case, federal taxpayers challenged on First Amendment grounds the free transfer of surplus federal property to a nonprofit religious school. Unlike the federal expenditure at issue in *Flast*, which was authorized by Congress under Article I, Section 8 of the Constitution, the property conveyance challenged in *Valley Forge* was authorized by Congress under the Property Clause of Article IV, Section 3, Clause 2 of the Constitution.¹⁰⁵ For a five-justice majority, that distinction proved controlling: Because the federal legislation authorizing the challenged transfer “was an evident exercise of Congress’ power under the Property Clause,”¹⁰⁶ *Flast* did not apply. Moreover, unlike the *Flast* taxpayers, the plaintiffs in *Valley Forge* challenged, not the constitutionality of federal legislation, but an administrative “transfer [of] a parcel of federal property.”¹⁰⁷ For these two reasons, the *Valley Forge* taxpayers, unlike their *Flast* counterparts, lacked standing in federal court.

Writing for the *Valley Forge* majority, then-Justice Rehnquist characterized standing as “a blend of constitutional requirements and prudential considerations.”¹⁰⁸ A key requirement for standing is that the plaintiff allege “actual injury redressable by the court.”¹⁰⁹ The *Valley Forge* taxpayer-plaintiffs failed this test:

101. *Id.* at 237 (Brennan, J., dissenting).

102. *Id.* at 239 (Marshall, J., dissenting).

103. *Id.* at 239.

104. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464 (1982).

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

106. *Valley Forge*, 454 U.S. at 480.

107. *Id.* at 479.

108. *Id.* at 471.

109. *Id.* at 473.

The complaint in this case shares a common deficiency with those in *Schlesinger* and *Richardson*. Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[T]hat concrete adverseness which sharpens the presentation of issues," *Baker v. Carr*, 396 U.S. at 204, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.¹¹⁰

This restricted view of standing means that, in some potential Establishment Clause situations, there will be no plaintiff with standing to sue. "But the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."¹¹¹

Reflecting the continuing adherence of many justices to the broader taxpayer standing envisioned in *Flast*, Justice Brennan wrote a *Valley Forge* dissent in which Justices Marshall and Blackmun joined.¹¹² Among his other objections, Justice Brennan identified an issue which would be important both to the critics of *Valley Forge* and to the *Winn* dissenters: fungibility.¹¹³ "It can make no

110. *Id.* at 485–86

111. *Id.* at 489 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

112. *Id.* at 490.

113. See, e.g., Mark C. Rahdert, *Forks Not Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. DE NOVO 1009, 1039 (2011) (discussing *Valley Forge* and "the functional equivalence between grants of money and grants of marketable property.") and *id.* at 1065–67 ("Government donations of valuable resources (such as real property) to religion and grants of government funds to religion are relatively fungible methods for providing religion with financial support. If one means is prohibited by the Establishment Clause, the other ought to be equally so . . ."); see also Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing*

constitutional difference in the case before us whether the donation to the petitioner here was in the form of a cash grant to build a facility or in the nature of a gift of property including a facility already built.”¹¹⁴ The difference between cash and property, embraced by the *Valley Forge* majority, “is a meaningless distinction.”¹¹⁵

Writing separately in dissent, Justice Stevens reiterated that, for purposes of taxpayer standing, the fungibility of money and property eroded the majority’s distinction between them:

[The Court’s] decision rests on the premise that the difference between a disposition of funds pursuant to the Spending Clause and a disposition of realty pursuant to the Property Clause is of fundamental jurisprudential significance. With all due respect, I am persuaded that the essential holding of *Flast v. Cohen* attaches special importance to the Establishment Clause and does not permit the drawing of a tenuous distinction between the Spending Clause and the Property Clause.¹¹⁶

In *Bowen v. Kendrick*, the Court found standing in a way that confirmed *Flast*’s increasingly limited ambit.¹¹⁷ In *Kendrick*, federal taxpayers mounted both facial and as-applied challenges to the Adolescent Family Life Act (“AFLA”) under the Free Exercise and Establishment Clauses.¹¹⁸ No one disputed the taxpayers’ standing under *Flast* to challenge the AFLA facially.¹¹⁹ The as-applied challenge, the Court also held, fell squarely within “the narrow exception [*Flast*] created to the general rule against taxpayer standing established in *Frothingham v. Mellon*.”¹²⁰ That is to say, the taxpayers in *Kendrick*, like the taxpayers in *Flast*, contested under the Establishment Clause a congressional exercise of the legislative

Doctrine, 52 EMORY L.J. 771, 798 (2003) (criticizing *Valley Forge* for making “distinctions [with *Flast*] that seemed hollow at best and insincere at worst . . . [R]egardless of which constitutional provision authorized Congress to spend public money—the Taxing and Spending Clause or the Property Clause—the net result was exactly the same: a religious institution benefitted from government largesse.”).

114. *Valley Forge*, 454 U.S. at 511–12 (internal citation omitted).

115. *Id.* at 512.

116. *Id.* at 515 (Stevens, J., dissenting).

117. 487 U.S. 589 (1988).

118. *Id.* at 597.

119. *Id.* 487 U.S. at 618.

120. *Id.*

“taxing and spending power [under] Article I, [Section] 8, of the Constitution.”¹²¹ Because this challenge to the AFLA was indistinguishable from the taxpayers’ claims in *Flast*, the *Kendrick* taxpayer-plaintiffs had standing to pursue this as-applied challenge in the federal courts. However, writing for another five-justice majority, then Chief Justice Rehnquist made clear that the broader possibilities of *Flast* had been cabined by *Richardson*, *Schlesinger*, and *Valley Forge*.

For himself and three of his colleagues, Justice Blackmun dissented on the merits, but agreed with the majority that the *Kendrick* taxpayers had standing to sue in the federal courts.¹²² Thus, the *Kendrick* Court, while narrowly divided on the underlying validity of the taxpayers’ claims, unanimously agreed that, per *Flast*, the taxpayers as such had standing in federal court to pursue those claims.

The U.S. Supreme Court’s final pre-*Cuno* case on taxpayer standing was *ASARCO Inc. v. Kadish*.¹²³ In *ASARCO*, Arizona state taxpayers alleged in the state courts that “Arizona’s statute governing mineral leases on state lands” violated “the federal laws that originally granted those lands from the United States to Arizona.”¹²⁴ While the taxpayers’ suit was filed against various state defendants, the lessees, including ASARCO, were permitted to intervene as defendants.¹²⁵ On the merits, the state taxpayers prevailed in the Arizona courts.

On appeal from the Arizona Supreme Court, the U.S. Supreme Court held that the taxpayer-plaintiffs, who had standing in the Arizona courts to challenge the Arizona statute, lack standing in the federal courts per *Frothingham* and *Doremus*. In contrast to municipal taxpayers who have a “direct and immediate” interest in municipal revenues,¹²⁶ state taxpayers are like federal taxpayers who, to establish standing, must assert “personal injury” rather than “generalized grievances” which are “purely abstract.”¹²⁷ The Arizona taxpayers did not assert “the kind of particular, direct, and concrete injury that is necessary to confer standing to sue in the federal

121. *Id.*

122. *Id.* at 630 n.4 (Blackmun, J., dissenting).

123. 490 U.S. 605 (1989).

124. *Id.* at 609.

125. *Id.* at 610.

126. *Id.* at 613 (quoting *Frothingham v. Mellon*, 262 U.S. 447,487 (1923)).

127. *Id.* 615–16.

courts.”¹²⁸ It was “pure speculation” whether a taxpayer victory in this case would have “result[ed] in any tax relief for respondents” since the legislature could have responded to such a victory in a way which denied the taxpayers “direct pecuniary relief.”¹²⁹ A legislature can spend the money obtained for the state treasury by a taxpayer lawsuit for what the legislature wants, rather than on the spending or tax reduction the taxpayer-plaintiff seeks.¹³⁰ Thus, the *ASARCO* plaintiffs flunked “the redressability prong of federal standing requirements,”¹³¹ since an injunction invalidating the challenged mineral leases would not necessarily cause a reduction of the plaintiffs’ tax burdens.

However, *ASARCO* and the other lessees had effectively lost in the Arizona courts as intervening defendants. This loss invalidated their leases by voiding the Arizona statute under which their leases were issued. The decisions of the Arizona courts had thus imposed upon these intervening defendants “specific” and “direct injury” by nullifying their leases.¹³² This “distinct and palpable” injury gave the lessee-defendants standing to appeal to the U.S. Supreme Court even though the taxpayer-plaintiffs who started the lawsuit lacked standing in the federal courts.¹³³ Moreover, the *ASARCO* Court observed, failing to permit these defendant-lessees to appeal the adverse decision of the Arizona Supreme Court would erode the principle “that the binding application of federal law is uniform and ultimately subject to control by [the U.S. Supreme] Court.”¹³⁴

When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.¹³⁵

128. *Id.* at 616.

129. *Id.* at 614.

130. *Id.*

131. *Id.* at 615.

132. *Id.* at 617–18.

133. *Id.* at 618 (quoting *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975)) (internal quotation marks deleted).

134. *Id.* at 622.

135. *Id.* at 623–24.

Chief Justice Rehnquist, joined by Justice Scalia, dissented on the basis of *Doremus*: “[S]o far as Article III standing is concerned,”¹³⁶ the relevant inquiry is the injury alleged by the plaintiffs when they sue, not the injury to the defendants when they lose. “[A]ll that the [Supreme] Court has before it in the present case” are plaintiffs with “a generalized grievance about governmental action.”¹³⁷ Moreover, the inability of the U.S. Supreme Court, in situations like *ASARCO*, to review state court interpretations of the U.S. Constitution is “a largely imaginary problem.”¹³⁸ In particular, the Chief Justice noted, “[s]ome state courts render advisory decisions on federal law of no binding force even within the State” and this practice has not proved troublesome.¹³⁹

In short, over dissent, the *ASARCO* Court affirmed and elaborated *Doremus*. While state taxpayers cannot challenge state policies in the federal courts, particular beneficiaries of those policies, like the *ASARCO* lessees, having lost in the state courts, have standing if they can get the U.S. Supreme Court to grant certiorari.

To summarize: On the eve of *Cuno*, the taxpayer standing case law of the U.S. Supreme Court manifested a circuitous pattern of negation, followed by expansion, and then disorderly retreat. By the time of *ASARCO*, the Court, over significant and continuing dissent, had pulled back from the broader implications of *Flast*, returning toward the earlier restrictions of *Frothingham* and *Doremus*: Absent particularized injury, federal taxpayers have no standing to pursue generalized claims in the federal courts except in situations corresponding to *Flast*, namely, Establishment Clause challenges to congressional exercises of its tax and spending powers. The same rule applied to state taxpayers challenging state taxation and expenditures, though certain defendants might be able to overturn in the U.S. Supreme Court taxpayer victories in the state courts if those defendants are injured by state court decisions obtained by the taxpayers. In contrast, a municipal taxpayer has standing to challenge municipal taxes and outlays in the federal courts even in the absence of individualized harm.

136. *Id.* at 635 (Rehnquist, J., dissenting).

137. *Id.* at 636.

138. *Id.* at 637.

139. *Id.* at 636. See also Jonathan D. Persky, Note, “Ghosts That Slay”: A Contemporary Look at State Advisory Opinions, 37 CONN L. REV. 1155 (2005) (discussing historical and current practice of state advisory opinions).

However, through *ASARCO*, the prospect of broader taxpayer standing articulated in *Flast* was kept alive by a strong current of dissent. In both *Valley Forge* and *Richardson*, four-justice minorities would have found taxpayer standing. There was also significant dissent in *Schlesinger* (where the dissenting justices would have found taxpayer standing) and in *ASARCO* (where they would not).

III. *Cuno* and *Winn*

A. *Cuno*

Against this disorderly background, the U.S. Supreme Court decided *DaimlerChrysler v. Cuno*.¹⁴⁰ In *Cuno*, a unanimous Court made clear that the retreat from a broader application of *Flast* was complete. Along with *Winn*, *Cuno* definitively terminated the broader possibilities of taxpayer standing envisioned in *Flast* and kept alive in post-*Flast* dissent.

The provenance of *Cuno* can be understood in three mutually compatible ways. First, *Cuno* was a classic public interest lawsuit. As many commentators have noted, Ralph Nader played a critical role in stimulating the *Cuno* litigation.¹⁴¹

Second, *Cuno* was also a response to the (quite accurate) perceptions that corporations have become adept at extracting state and local tax benefits, and that state and municipal officials have grown increasingly prone to grant such benefits. The upshot has been a prisoner's dilemma in which public officials opposing corporate tax benefits feel they must offer them to remain competitive in the face of the tax benefits extended to corporations by other states and localities.¹⁴² As a consequence of this interjurisdictional competition,

140. 547 U.S. 332 (2006).

141. See, e.g., Morgan J. Holcomb & Nicholas Allen Smith, *Community Efforts to Attract and Retain Corporations: Legal and Policy Implications of State and Local Tax Incentives and Eminent Domain: The Post-Cuno Litigation Landscape*, 58 CASE W. RES. L. REV. 1157, 1159 (2008) (describing the role of "consumer activist Ralph Nader"); Matt Kitchen, *The Ohio Investment Tax Credit: Impermissible Burden or Necessary Benefit? Cuno v. DaimlerChrysler, Inc.*, 73 U. CIN. L. REV. 1685, 1686 (2005) ("Consumer advocate Ralph Nader had been looking for a test case to challenge the constitutionality of state investment tax credits (ITCs)."); Bradford C. Spencer, *Evaluating Kentucky's Investment Tax Credits in Light of Cuno v. DaimlerChrysler, Inc.*, 94 KY. L.J. 161, 165 n.26 (2005) ("The [Cuno] plaintiffs were a group of homeowners and small businesses who were encouraged to file suit by Ralph Nader's Center for the Study of Responsive Law.").

142. Edward A. Zelinsky, *Tax Incentives for Economic Development: Personal (and Pessimistic) Reflections*, 58 CASE W. RES. L. REV. 1145, 1149-50 (2008).

state and local tax bases have eroded and local tax rates have risen in light of diminished tax bases.¹⁴³

Finally, *Cuno* manifests the belief of important commentators in the robust application of the dormant Commerce Clause's nondiscrimination principle. The lead attorney for the *Cuno* plaintiffs, Professor Peter Enrich, had attracted Nader's attention through an article in which Enrich argues that the prisoner's dilemma posed by state and local tax competition for industry can be resolved through the courts' invocation of the dormant Commerce Clause.¹⁴⁴ While others are skeptical of this claim on the legal merits,¹⁴⁵ Enrich's article reflects the optimistic outlook of prominent dormant Commerce Clause commentators that the nondiscrimination principle articulated under that clause can play a coherent and constructive role in policing state taxes.¹⁴⁶

The underlying facts of *Cuno* were straightforward and typical: "[T]o induce [DaimlerChrysler] to remain in Toledo, Ohio,"¹⁴⁷ the City of Toledo and two local school districts extended to DaimlerChrysler a package of property tax exemptions authorized by

143. *Id.* at 1145.

144. Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives For Business*, 110 HARV. L. REV. 377, 396 (1996) ("the states find themselves caught in a classic prisoners' dilemma.").

145. I was among the doctrinal skeptics in light of the fungibility of tax benefits, cash grants and in-kind subsidies. Edward A. Zelinsky, *Ohio Incentives Decision Revisited*, 37 STATE TAX NOTES 859 (2005), reprinted at 108 TAX NOTES 1569 (2005); Edward A. Zelinsky *Cuno v. DaimlerChrysler: A Critique*, 34 STATE TAX NOTES 37 (2004), reprinted at 105 TAX NOTES 225 (2004).

146. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) is the most commonly cited authority for the proposition that state taxes may not discriminate against interstate commerce. For more on *Complete Auto*, see Walter Hellerstein, Kirk J. Stark, John Swain & Joan M. Youngman, CASES AND MATERIALS ON STATE AND LOCAL TAXATION (9th ed. 2009) 119–20; Richard D. Pomp & Oliver Oldman, 1 STATE AND LOCAL TAXATION 1–19 (5th ed. 2005).

There has been much interesting debate on the viability of the dormant Commerce Clause nondiscrimination principle. For the views of prominent proponents, see Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541 (2010); Brannon P. Denning, *Is The Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 MISS. L.J. 623 (2007); Brannon P. Denning & Edward A. Zelinsky, *The Future of the Dormant Commerce Clause: Abolishing the Prohibition on Discriminatory Taxation*, 155 U. PA. L. REV. 196 (2007). For my contrary views, see Edward A. Zelinsky, *The Incoherence of Dormant Commerce Clause Nondiscrimination: A Rejoinder to Professor Denning*, 77 MISS. L.J. 653 (2007).

147. *Cuno v. DaimlerChrysler Inc.*, 154 F. Supp. 2d 1196, 1198 (N.D. Ohio, West. Div. 2001).

Ohio law.¹⁴⁸ In addition, for its new investment in a Toledo plant, DaimlerChrysler received a tax credit against its Ohio franchise tax liability.¹⁴⁹ The *Cuno* plaintiffs originally challenged these tax provisions in the Lucas County Court of Common Pleas.¹⁵⁰ The defendants removed the litigation to the federal District Court which rejected the plaintiffs' subsequent motion to remand the case back to the Ohio state courts.¹⁵¹ Ironically in light of subsequent events, the *Cuno* plaintiffs argued for remand, *inter alia*, on the ground that, as state taxpayers, their claim to standing was stronger in the Ohio courts than in the federal courts.¹⁵² On the merits, the District Court ruled that the state tax credit and the municipal property tax exemption violated neither Equal Protection nor the dormant Commerce Clause.

On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed the District Court's Equal Protection conclusions as well as the trial court's approval of the municipal property exemption under the Commerce Clause.¹⁵³ However, in a dramatic ruling (at least to Commerce Clause mavens), the Sixth Circuit Court of Appeals held that the Ohio investment tax credit failed muster under the dormant Commerce Clause. This ruling engendered enormous controversy¹⁵⁴ and, ultimately, a writ of certiorari from the U.S. Supreme Court.¹⁵⁵

The high court, however, did not address the merits of the case but, rather, unanimously dismissed *Cuno*¹⁵⁶ on the grounds that the plaintiffs, as state taxpayers, lacked standing in the federal courts to challenge Ohio's state investment tax credits—even though it was the defendants who insisted on the removal of the case from the state courts.¹⁵⁷ There was in *Cuno* none of the dissent which had occurred

148. *Id.* (citing OHIO. REV. CODE ANN. §§ 5709.62(C)(1) and 5709.631).

149. *Id.* (citing OHIO. REV. CODE ANN. § 5733.33).

150. *Cuno*, 154 F. Supp.2d at 1198.

151. *Id.* at 1201–04.

152. The plaintiffs' position ultimately proved correct. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339 (2006).

153. 386 F.3d 738 (6th Cir. 2004).

154. As I observe in notes 142 and 145, *supra*, as a matter of tax policy, I agree with the concerns raised by the *Cuno* plaintiffs but disagree with their dormant Commerce Clause analysis. A useful excellent compendium of *Cuno* commentary is Kristin E. Hickman & Sarah L. Bunce, *Symposium: DaimlerChrysler v. Cuno and the Constitutionality of State Tax Incentives for Economic Development*, 4 GEO. J.L. & PUB. POL'Y 15 (2006).

155. *DaimlerChrysler Corp. v. Cuno*, 545 U.S. 1165 (2005) (granting certiorari).

156. *Cuno*, 547 U.S. 332 (2006).

157. *Id.* at 342 n.3.

in *Valley Forge*, *Richardson*, and *Schlesinger* and which kept alive the broader standing possibilities raised in *Flast*. Joined by seven of his colleagues,¹⁵⁸ Chief Justice Roberts wrote that the no-taxpayer-standing rule of *Forthingham*, affirmed in these later decisions, applies, not only “to taxpayer challenges to expenditures that deplete the treasury,”¹⁵⁹ but as well “to taxpayer challenges to so-called ‘tax expenditures,’ which reduce amounts available to the treasury by granting tax credits or exemptions.”¹⁶⁰

The injury asserted by the *Cuno* taxpayers is inadequate for standing in the federal courts because such injury is not “concrete and particularized,” but rather constitutes a generalized grievance shared “in common with people generally.”¹⁶¹ Moreover, for two reasons, such taxpayer injury is “conjectural or hypothetical.”¹⁶² Challenged tax benefits might actually augment “government revenues” by “spur[ring] economic activity.”¹⁶³ This possibility belies any harm to the fisc and its taxpayers. Moreover, even if the elimination of a challenged tax benefit increases tax collections, the plaintiff-taxpayer has no right to insist that the resulting revenues be used to reduce his taxes or to “bolster . . . programs that benefit him.”¹⁶⁴ Thus, the *Cuno* plaintiffs, as taxpayers, failed to assert injury “redressabl[e]” by an injunction against the Ohio tax credit.¹⁶⁵ Per *Doremus* and *ASARCO*, this “rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers”¹⁶⁶ such as the *Cuno* plaintiffs. Affording such taxpayers the opportunity in federal court to challenge state “tax and spending provisions” is “contrary to the . . . modest role Article III envisions for federal courts.”¹⁶⁷

To establish standing in the federal courts, the *Cuno* taxpayer-plaintiffs argued that their dormant Commerce Clause challenge to Ohio’s investment tax credit was analogous to the Establishment Clause claim asserted by the *Flast* taxpayer-plaintiffs. Chief Justice

158. See Justice Ginsburg’s separate concurrence, *Id.* at 354 (Ginsburg, J., concurring). This concurrence is discussed *infra* at notes 178–180 and accompanying text.

159. *Id.* at 343.

160. *Id.* at 343–44.

161. *Id.* (internal quotation marks omitted).

162. *Id.* (internal quotation marks omitted).

163. *Id.*

164. *Id.* at 344–345.

165. *Id.* at 344.

166. *Id.* at 345.

167. *Id.* at 346.

Roberts characterized this argument as “misguided”¹⁶⁸ since taxpayers’ rights “under the Commerce Clause . . . are fundamentally unlike the[ir] right[s]”¹⁶⁹ under the Establishment Clause:

[S]uch a broad application of *Flast*’s exception to the general prohibition on taxpayer standing would be quite at odds with its narrow application in our precedent and *Flast*’s own promise that it would not transform federal courts into forums for taxpayers’ generalized grievances.¹⁷⁰

The *Cuno* plaintiffs attempted in two ways to buttress their standing as state taxpayers by means of their standing as municipal taxpayers.¹⁷¹ First, the taxpayer-plaintiffs asserted that the investment tax credit extended to DaimlerChrysler, by diminishing Ohio’s revenues, left less state revenue available to distribute as state aid to municipalities. Thus, the state income tax credit hurt the *Cuno* plaintiffs as municipal taxpayers by diminishing state assistance to localities.

Rejecting this argument, the Chief Justice observed that this argument assumes that, if the Court invalidated Ohio’s investment tax credit, “the state government will choose to direct the supposed revenue from the restored franchise tax to municipalities. This is precisely the sort of conjecture we may not entertain in assessing standing.”¹⁷² That is to say, the additional revenues potentially obtained by the judicial invalidation of Ohio’s investment credit might be used by the legislature for other state spending or to reduce other state taxes, rather than being directed to the Buckeye State’s localities.

The *Cuno* plaintiffs’ second effort “to leverage”¹⁷³ their standing as municipal taxpayers invoked the rule “that federal-question jurisdiction over a claim may authorize a federal court to exercise jurisdiction over state-law claims that may be viewed as part of the same case because they derive from a common nucleus of operative fact as the federal claim.”¹⁷⁴ From this vantage, the plaintiffs’

168. *Id.* at 347.

169. *Id.*

170. *Id.* at 348 (internal quotation marks omitted).

171. *Id.* at 349.

172. *Id.* at 350.

173. *Id.* at 349.

174. *Id.* at 351 (internal quotation marks omitted).

challenge to the municipal property tax exemption (a federal question because the plaintiffs have federal standing as local taxpayers) allows the federal courts “to exercise supplemental jurisdiction” over the plaintiffs’ challenge to the Ohio state income tax credit.¹⁷⁵

For the Court, Chief Justice Roberts said “no”: Federal courts do not have “supplemental jurisdiction”¹⁷⁶ absent “constitutional standing”¹⁷⁷—which the *Cuno* plaintiffs lacked as state taxpayers merely asserting generalized grievances:

Plaintiffs failed to establish Article III injury with respect to their *state* taxes, and even if they did so with respect to their *municipal* taxes, that injury does not entitle them to seek a remedy as to the state taxes . . . [S]tanding is not dispensed in gross.¹⁷⁸

Concurring, Justice Ginsburg described the denial of federal taxpayer standing to the *Cuno* plaintiffs as “solidly grounded” in *Frothingham* and *Doremus*.¹⁷⁹ She also indicated that, despite her reservations about other standing cases including *Valley Forge*, she “accept[s] . . . the nonjusticiability of *Frothingham*-type federal and state taxpayer suits in federal court . . .”¹⁸⁰

Cuno extinguished the current of dissent found in earlier post-*Flast* decisions. Concurring separately, Justice Ginsburg also returned the Court’s standing doctrine back to its restrictive roots in *Frothingham* and *Doremus*. *Cuno* thus definitively closed the door to the broader taxpayer standing possibilities articulated by *Flast* and kept alive by post-*Flast* dissent.

It is instructive to identify, in the context of *Cuno*, what Professor Rahdert has aptly called the roads not taken.¹⁸¹ In light of the U.S. Supreme Court’s decision in *Cuno*, the *Cuno* plaintiffs’ argument to the District Court was correct: The case should have been remanded to the state courts, given the absence of federal taxpayer standing. Assuming that the *Cuno* litigation had progressed

175. *Id.*

176. *Id.*

177. *Id.* at 352.

178. *Id.* at 353 (Ginsburg, J, concurring) (internal citations and quotation marks deleted).

179. *Id.* at 354.

180. *Id.* at 355.

181. Rahdert, *supra*, note 113.

through the Ohio state courts, *ASARCO* indicates that, had the *Cuno* taxpayers lost in the Ohio courts, they would have lacked standing to press further. However, DaimlerChrysler (like the *ASARCO* lessees) would have had standing, had it lost in the Ohio courts, to apply for certiorari to the U.S. Supreme Court. Had the *Cuno* plaintiffs wanted to be in federal court, they could have pressed in federal court their Equal Protection and dormant Commerce Clause claims against the municipal property tax exemption while leaving the state tax credit for separate litigation in the state courts. As I argue below, this possibility is today an historic anomaly since the State of Ohio was intimately involved in the municipal property tax exemption extended to DaimlerChrysler.

B. Winn

In *Winn*, Arizona taxpayers mounted an Establishment Clause challenge to Arizona's income "tax credits for contributions to school tuition organizations, or STOs. STOs use these contributions to provide scholarships to students attending private schools, many of which are religious."¹⁸² These Arizona taxpayers claimed standing under *Flast* and its rule that taxpayers who might otherwise lack standing nevertheless have the right to challenge in the federal courts government outlays which violate the Establishment Clause.¹⁸³ Writing five years after *Cuno* for a five-justice majority, Justice Kennedy rejected this standing claim, holding that *Flast* grants taxpayers standing in federal court only to contest cash appropriations under the Establishment Clause, not to challenge tax benefits such as the Arizona tax credits.

Justice Kennedy started *Winn* with familiar themes from the Court's standing case law. Article III of the Constitution limits the federal courts' power to resolving "Cases" and "Controversies."¹⁸⁴ This limitation is integral to "[t]he concept and operation of the separation of powers."¹⁸⁵ "To state a case or controversy under Article III, a plaintiff must establish standing . . . [which] requir[es] a particular injury."¹⁸⁶ Citing *Frothingham*, *Doremus*, *Cuno*, *ASARCO* and the Court's post-*Cuno* decision in *Hein*,¹⁸⁷ the *Winn* Court

182. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. at 1440 (2011).

183. *Id.*

184. *Id.* at 1441

185. *Id.*

186. *Id.* at 1442.

187. *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007).

declared that the general “rule against taxpayer standing, a rule designed both to avoid speculation and to insist on particular injury, applies to respondents’ lawsuit.”¹⁸⁸

The obvious exception to this rule, invoked by the taxpayer-plaintiffs, is *Flast*. The *Winn* plaintiffs argued that the Arizona “tax credit is, for *Flast* purposes, best understood as a governmental expenditure.”¹⁸⁹ Thus, as Arizona taxpayers, they had standing to challenge the credit on Establishment Clause grounds. However, Justice Kennedy wrote, “[t]hat is incorrect.”¹⁹⁰

It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit. Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are extracted and spent knows that he has in some small measure been made to contribute to an establishment in violation of conscience. In that instance the taxpayer’s direct and particular connection with the establishment does not depend on economic speculation or political conjecture. The connection would exist even if the conscientious dissenter’s tax liability were unaffected or reduced. When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.¹⁹¹

Justice Kennedy’s first observation in this passage—the “similar economic consequences” of tax credits and cash outlays for those receiving them—is today common ground. Consider, for example, an Arizona taxpayer who, before taking any tax credit, owes the state treasury \$1,000 in income taxes. Suppose that Arizona either gives this taxpayer a credit of \$200 against his tax liability or, alternatively, collects the \$1,000 in tax but simultaneously mails the taxpayer a cash

188. *Winn*, 131 S.Ct. at 1444–45.

189. 131 S.Ct. at 1447.

190. *Id.*

191. *Id.* (internal quotation and citations deleted).

grant of \$200. Today, largely as a result of the influence of tax expenditure analysis, it is widely accepted that, under either alternative, the result from the taxpayer's perspective is the same because of the fungibility of money.¹⁹² Whether the state collects \$800 in tax net of the \$200 credit or collects \$1,000 in tax and then returns \$200 as a cash grant, the taxpayer makes a net payment to the state of \$800. As Justice Kennedy observed, the credit and the cash grant produce the same final financial result for the taxpayer.

It is at the next stage in his analysis that Justice Kennedy entered contested waters. Consider now two Arizona taxpayers, A and B, both of whom owe \$1,000 in income taxes but only one of whom, B, will receive either a \$200 grant or a \$200 tax credit from the state. Suppose further that the grant or credit rewards activity by B to which A objects. If Arizona's assistance to B takes the form of a \$200 grant, Justice Kennedy concludes that some small fraction of that \$200 is attributable to A's tax payment. This is Madison's "three pence," a small, but cognizable, subsidy from A's tax payment to B.¹⁹³ Hence, A has standing under *Flast* to challenge this grant under the Establishment Clause.

If, however, Arizona gives B a tax credit rather than a cash grant, Justice Kennedy concludes, none of the \$200 credit has any "connection" with A's tax payment. The credit, according to Justice Kennedy, merely "allows [B] to retain control over [her] own funds . . . Any financial injury [to A] remains speculative."¹⁹⁴

Underlying this conclusion is the premise that, if Arizona were forbidden from offering the credit to B, the Arizona legislature might use the resulting revenues of \$200 for purposes other than reducing A's taxes. The legislature might instead use that \$200 to fund other programs or to reduce taxes for taxpayers other than A. Thus, there is no "connection" between A's taxes and B's credit. This thought

192. The literature on tax expenditure analysis is voluminous. For two recent contributions, compare Edward D. Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1 (2010) with J. Clifton Fleming, Jr. and Robert J. Peroni, *Can Tax Expenditure Analysis Be Divorced from a Normative Tax Base?: A Critique of the "New Paradigm" and Its Denouement*, 30 VA. TAX REV. 135 (2010). See also Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25 (2011); Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and The Paradox of Tax Expenditure Analysis*, 24 VA. TAX REV. 797 (2005).

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

194. *Winn*, 131 S.Ct. at 1447.

has a strong provenance in the earlier standing case law and has often been articulated by the Court under the heading of “redressability.”¹⁹⁵

If, on the other hand, one concludes that the Arizona legislature would respond to the judicial invalidation of the challenged credit by reducing A’s state tax liability or if one concludes (as do the *Winn* dissenters) that that legislative response is irrelevant, then the analogy between the *Winn* situation and *Flast* becomes stronger. This issue divides the *Winn* majority from the dissenters, i.e., the willingness to assume the response of the Arizona legislature to the invalidation of the challenged tax credit and to conclude that this assumed response is relevant the issue of standing.

To buttress the distinction for standing purposes between a cash grant and a tax credit, Justice Kennedy noted that, “[w]hen Arizona taxpayers contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers.”¹⁹⁶ This observation highlights another disagreement between the *Winn* majority and the dissenters who would instead characterize STO contributors as receiving from the Arizona treasury a matching grant for their contributions in the form of the tax credit.

As Justice Kennedy noted, the Court’s standing case law has often been framed in terms of “causation and redressability.”¹⁹⁷ Since STO contributors are donating their own funds, “any injury the [taxpayers] may suffer [are not] fairly traceable to the government.”¹⁹⁸ Moreover, an injunction proscribing Arizona’s tax credits “would not affect noncontributing taxpayers or their tax payments.” In short “what matters under *Flast* is whether sectarian STOs receive government funds drawn from general tax revenues, so that moneys have been extracted from a citizen and handed to a religious institution in violation of the citizens’ conscience. Under that inquiry, respondents’ argument fails.”¹⁹⁹ The *Winn* dissenters dismiss this “extract[ion]”-based analysis as privileging form over economic substance.²⁰⁰

In his final theme in *Winn*, Justice Kennedy noted the apparent “tension”²⁰¹ between, on the one hand, the conclusion that the *Winn*

195. See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006).

196. *Winn*, 131 S. Ct. at 1447.

197. *Id.*

198. *Id.* at 1448.

199. *Id.*

200. *Id.* at 1450.

201. *Id.* at 1448.

taxpayers lack standing to challenge the Arizona tax credit in the federal courts and, on the other, such decisions as *Mueller v. Allen*,²⁰² *Committee for Public Education & Religious Liberty v. Nyquist*,²⁰³ *Hunt v. McNair*,²⁰⁴ and *Walz v. Tax Commission of City of New York*.²⁰⁵ In these cases, taxpayers were permitted to challenge state income tax deductions (*Mueller, Nyquist*), municipal property tax exemptions (*Walz*) and a state's issuance of tax-favored bonds (*Hunt*).

To the extent these cases permitted taxpayers to challenge tax benefits under the Establishment Clause without asserting individualized harm, these cases, Justice Kennedy concluded, represent “nonbinding *sub silentio* holdings” which “left [the standing issue] unexplored.”²⁰⁶ Moreover, “the plaintiffs in those cases could have advanced arguments for jurisdiction independent of *Flast* . . .”²⁰⁷ Thus, for Justice Kennedy and his four colleagues, “the case-or-controversy limitation on federal jurisdiction imposed by Article III” denies the Arizona taxpayers standing to challenge the income tax credit offered by the Grand Canyon State.²⁰⁸

Justice Scalia, joined by Justice Thomas, wrote briefly and separately in the spirit of Justice Harlan's *Flast* dissent.²⁰⁹ Justice Scalia joined the Court's *Winn* opinion which distinguishes *Flast* as affording standing only to taxpayers who challenge direct cash outlays (rather than tax benefits). However, the ultimate solution, Justice Scalia argued, is to recognize that “*Flast* is an anomaly,” a “misguided decision” which should be “repudiate[d].”²¹⁰

In contrast, for herself and three of her dissenting colleagues, Justice Kagan embraced *Flast* and asserted that the *Winn* majority “breaks from . . . precedent” by denying the plaintiff/taxpayers standing to challenge the Arizona tax credit for contributions to STOs.²¹¹ Moreover, the *Winn* majority's distinction between cash grants (which taxpayers can challenge in federal court on

202. 463 U.S. 388 (1983).

203. 413 U.S. 756 (1973).

204. 413 U.S. 734 (1973).

205. 397 U.S. 664 (1970).

206. *Winn*, 131 S.Ct. at 1449.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 1450.

211. *Id.*

Establishment Clause grounds) and tax credits (which they cannot) is unprincipled.

The novel distinction in standing law between appropriations and tax expenditures has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.²¹²

Tax benefits and direct outlays are fungible; “the government can easily substitute one for the other.”²¹³ “From now on, the government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion.”²¹⁴ Thus, *Winn*, Justice Kagan concludes, is “the effective demise of taxpayer standing.”²¹⁵

As I discuss below, for two reasons, this overstates the impact of *Winn*. First, municipal taxpayers still have standing in the federal courts to challenge local taxes and expenditures.

Second, taxpayers typically have standing to challenge state taxes in the state courts under more liberal standing rules. Thus, *Cuno* and *Winn* will shift litigation to the state courts rather than stop such litigation altogether.

Amplifying her theme that the *Winn* majority ignored precedent, Justice Kagan declared that “all agree” that there is a “general prohibition on taxpayer standing.”²¹⁶ This broad statement indicates greater consensus on the Court than the 5-4 vote in *Winn* might suggest. Indeed, this broad statement heralds the end of the retreat from *Flast*. The dissenting themes articulated earlier in the Court’s history (abolish taxpayer standing, extend taxpayer standing more broadly beyond Establishment Clause challenges) are indeed now history. According to Justice Kagan, *Flast* today is a narrow “exception to the rule” of no-taxpayer-standing, an exception which only applies if “government actions [are] alleged to violate the

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1451.

216. *Id.*

Establishment Clause.”²¹⁷ Thus, the Fortas-Stewart interpretation of *Flast* as limited to Establishment Clause challenges has prevailed over the more expansive standing possibilities which were presaged (incorrectly as it now turns out) by the *Flast* majority and which, until *Cuno* and *Winn*, were kept alive by post-*Flast* dissent. Today, “all agree” that there is a “general prohibition on taxpayer standing.” *Frothingham* and its narrow conception of taxpayer standing again controls.

Turning to the facts of *Winn*, Justice Kagan contended that “[f]inding standing here is merely a matter of applying *Flast*.”²¹⁸ Invoking the doctrine of tax expenditure analysis,²¹⁹ Justice Kagan argued that Justice Kennedy’s “distinction [between cash grants and tax benefits] finds no support in case law, and just as little in reason.”²²⁰ “Taxpayers experience the same injury for standing purposes whether government subsidization of religion takes the form of a cash grant or a tax measure.”²²¹

Moreover, “for a simple reason,” the Court has been correct in the past to treat appropriations and tax expenditures as both giving rise to taxpayer standing under *Flast*.²²² “Here, as in many contexts, the distinction [between cash grants and tax incentives] is one in search of a difference.”²²³ “[A] subsidy is a subsidy.”²²⁴ From this vantage, the concern the Court has called “redressability” does not matter: It is of no moment how the Arizona legislature might respond (or not) to the judicial invalidation of the STO tax credit. That credit is indistinguishable from an equivalent cash grant; both channel public largesse from the taxpayers to the recipient. Indeed, Justice Kagan argued, the federal tax expenditure budget and the tax expenditure budgets of the various states (including Arizona) reflect the fact that tax benefits and cash grants “result in the same bottom line.”²²⁵ Consequently, taxpayers’ “access to the federal courts should not depend on which type of financial subsidy the State has

217. *Id.*

218. *Id.* at 1452.

219. *Id.* I am skeptical of the constitutionalization of tax expenditure analysis. Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25 (2011).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1455.

224. *Id.*

225. *Id.* at 1457.

offered.”²²⁶ Under the *Winn* majority’s opinion, “form prevails over substance, and differences that make no difference determine access to the Judiciary. And the casualty is a historic and vital method of enforcing the Constitution’s guarantee of religious neutrality.”²²⁷

For Justice Kagan and her dissenting colleagues, “[t]he injury to taxpayers that *Flast* perceived arose whenever the legislature used its taxing-and-spending power to channel tax dollars to religious activities.”²²⁸ From this vantage, it does not matter for standing purposes whether the expenditure of a particular public dollar can be traced back to the plaintiff/taxpayer, or whether the challenged expenditure occurs through the tax system or by means of cash spending, or whether the invalidation of a challenged tax benefit would reduce the plaintiff’s individual tax burden. In the Establishment Clause context, per *Flast*, “[t]axpayers have standing . . . despite their foreseeable failure to show that the alleged constitutional violation involves their own tax dollars, not because the State has used their particular funds.”²²⁹

Because, under the majority’s opinion, tax expenditures do not give rise to taxpayer standing, Justice Kagan concluded, “the government may violate the Establishment Clause [but] taxpayers cannot gain access to the federal courts” to challenge such a violation.²³⁰ However, as I discuss further below, this is not quite right as municipal taxpayers still have standing to challenge municipal policies and practices in the federal courts.

In short, *Cuno* and *Winn* complete the retreat from the broader standing possibilities raised in *Flast* and kept alive in post-*Flast* dissent. Particularly instructive is Justice Kagan’s *Winn* dissent which makes clear that the Roberts Court is today divided on the relatively narrow question whether *Flast* authorizes taxpayer standing for Establishment Clause challenges to tax benefits. Even the *Winn* dissenters have now abandoned the broader standing possibilities raised by *Flast*. *Frothingham*, *Doremus* and their no-taxpayer-standing rule again control.

226. *Id.*

227. *Id.* at 1458.

228. *Id.* at 1459.

229. *Id.* at 1460.

230. *Id.* at 1462.

III. State Taxpayer Standing in the State Courts

The states' taxpayer standing rules are generally more liberal than the federal approach which, after *Cuno* and *Winn*, unreservedly bars standing to federal and state taxpayers.²³¹ Some states recognize taxpayer standing in cases deemed by the courts to be particularly important. Other states grant taxpayer standing more broadly, without first assessing the significance *vel non* of any particular case. Often, the state courts characterize either of these approaches as "waiving" the requirement of standing for taxpayers. Some states' taxpayer standing rules are exclusively judge-made. In other states, statutes authorize taxpayer suits to challenge state or municipal expenditures. The states' standing case law and statutes frequently link taxpayer status to citizen status. Under all of these variations, state taxpayers challenging state taxes and outlays have greater access to the state courts than to the federal courts because, via case law, statutes, or both, the states generally look more favorably on taxpayer standing than do the federal courts.

A. State Taxpayer Standing for Important Cases

Arizona is among the states which grant taxpayer standing for cases deemed to be of particular importance. In *ASARCO Inc. v. Kadish*, Arizona taxpayers successfully challenged in the state courts an Arizona statute under which Arizona had granted mineral leases to various mining companies.²³² While the U.S. Supreme Court held that these Arizona taxpayers lacked standing in the federal courts, these state taxpayers had been allowed to litigate in the courts of the Grand Canyon State.²³³

In its decision before *ASARCO* reached the U.S. Supreme Court, the Arizona Supreme Court did not discuss the standing of the plaintiff/taxpayers. Rather, Arizona's highest court took that standing for granted, declaring that "[t]he individual petitioners are taxpayers who allege that their taxes support public education in Arizona."²³⁴ On that basis, the Arizona court adjudicated the taxpayers' claims against the state statute governing mineral leases.

231. To reiterate the point made in footnote 6, *supra*, we do not have a convenient phrase to distinguish between a taxpayer's standing to challenge individually his own particular tax liability and a taxpayer's standing to challenge taxes and outlays more generally. It is the latter sense in which this Article uses the phrase "taxpayer standing."

232. 490 U.S. 605 (1989).

233. *Id.*

234. *Kadish v. Arizona State Land Dep't*, 747 P.2d 1183, 1184 (Ariz. 1987).

Sixteen years later, in *Bennett v. Napolitano*, the Arizona Supreme Court explicitly addressed the status of taxpayer standing under Arizona law. In *Bennett*, four leaders of the Arizona legislature challenged the constitutionality of the governor's use of her item veto.²³⁵ Belatedly, the four legislators claimed standing as Arizona taxpayers in addition to their standing as legislators.²³⁶ The Arizona Supreme Court rejected this claim of taxpayer standing in a fashion which confirmed a more liberal approach in cases determined to be particularly important.

The plaintiff/legislators in *Bennett* cited *Ethington v. Wright* to support their standing as Arizona taxpayers.²³⁷ However, the *Bennett* Court distinguished *Ethington* on the grounds that "*Ethington* allowed a taxpayer to challenge a legislative act that expended monies for an unconstitutional purpose."²³⁸ In contrast, the legislator/taxpayers in *Bennett* challenged the manner in which the governor deployed her veto power.²³⁹

The *Bennett* Court stated that Arizona's standing rules are not constitutionally required, but rather reflect "prudential concerns."²⁴⁰ "[I]n exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur," the Court will "waive[] the standing requirement."²⁴¹ *Bennett*, the Court decided, was not such a case of "exceptional" significance justifying waiver of the standing requirement for state taxpayers.²⁴²

Bennett implicitly indicates that, in retrospect, *ASARCO* was "the rare case in which waiver of standing is proper."²⁴³ Thus, unlike the federal courts, which define standing as the *sine qua non* of the right to sue in those courts, the Arizona courts characterize standing as a prudential requirement which the courts may forgo in important cases, thereby permitting taxpayers like the *ASARCO* plaintiffs to sue in their capacities as taxpayers.

235. 81 P.3d 311, 313 (Ariz. 2003).

236. *Id.* at 318. ("The 'taxpayer' argument was first raised in petitioners' reply brief . . .").

237. *Ethington v. Wright*, 189 P.2d 209 (Ariz. 1948).

238. *Bennett*, 81 P.3d at 318.

239. *Id.* at 313.

240. *Id.*

241. *Id.* (quoting *Sears v. Hull*, 961 P.2d 1013, 1019 (Ariz. 1998)).

242. *Id.* at 320.

243. *Id.* at 318.

The standing tests articulated by the Alaska courts are similar: “To establish citizen-taxpayer standing, a litigant must show that the issues raised are of public significance and that it is an appropriate litigant to seek adjudication of those issues.”²⁴⁴ Applying these criteria, the Alaska Supreme Court held that “[a] non-profit public interest law firm” lacked standing “to establish constitutional standards that must be met before compelling minors to take psychotropic medications”²⁴⁵ since the minors themselves “would be the appropriate litigant[s].”²⁴⁶ However, in a case similar to *ASARCO*, “a coalition of environmental, Native, and fishing groups”²⁴⁷ did have citizen-taxpayer standing to challenge Alaska’s “mineral leasing system.”²⁴⁸

In *Godfrey v. State*, the Iowa Supreme Court declared that “Iowa, like many states, essentially follows the federal doctrine on standing.”²⁴⁹ Nevertheless, Iowa will grant standing to “citizens who seek to resolve certain questions of great public importance and interest in our system of government.”²⁵⁰ Ms. Godfrey, who claimed standing “as a citizen, taxpayer, and a potential workers’ compensation claimant,”²⁵¹ “failed to present an issue of great public importance.”²⁵² Consequently, the Iowa court was not “convince[d that it] should waive the requirement of standing” for her.²⁵³ However, the *Godfrey* Court made clear that, in appropriate cases, such waivers will be forthcoming for taxpayers raising questions “of great public importance.”²⁵⁴

To the same effect is the decision of the South Carolina Supreme Court in *ATC South, Inc. v. Charleston County*.²⁵⁵ ATC South, Inc. (“ATC”) challenged a favorable zoning change granted to a competitor.²⁵⁶ The court rejected ATC’s claim to taxpayer standing.²⁵⁷

244. Law Project for Psychiatric Rights, Inc. v. State, 239 P.3d 1252, 1255 (Alaska 2010).

245. *Id.* at 1253.

246. *Id.* at 1256.

247. Trustees for Alaska v. State, 736 P.2d 324, 326 (Alaska 1987).

248. *Id.* at 327.

249. 752 N.W.2d 413, 424 (Iowa 2008).

250. *Id.*

251. *Id.* at 417.

252. *Id.* at 428.

253. *Id.*

254. *Id.*

255. ATC S., Inc. v. Charleston Cnty., 669 S.E.2d 337 (S.C. 2008).

256. *Id.* at 339.

Under South Carolina law, “general standing requirements” will be waived when a plaintiff raises “an issue [] of such public importance as to require its resolution for future guidance.”²⁵⁸ ATC flunked this test and therefore lacked standing to pursue its litigation.²⁵⁹ However, other South Carolina litigants have passed the “public importance” test and have thus been able to sue, despite failing more stringent criteria for standing.²⁶⁰

Ohio case law indicates that citizens who fail traditional tests for standing may nevertheless litigate in the state courts “when the issues sought to be litigated are of great importance and interest to the public”²⁶¹—though no reported case grants standing to an Ohio taxpayer under this rationale.²⁶² In a similar vein, the Pennsylvania Supreme Court recognizes state taxpayer standing when, *inter alia*, “the governmental action would otherwise go unchallenged,” “judicial relief is appropriate,” and “no other persons are better situated to assert the claim.”²⁶³ Likewise, the Wyoming Supreme Court “recognize[s] a more expansive or relaxed definition of standing when a matter of great public interest or importance is at stake.”²⁶⁴

B. Broader Taxpayer Standing

In contrast to those state courts that grant taxpayer standing for cases of particular importance, other state courts articulate a broader approach to taxpayer standing. Under this more expansive approach, taxpayer standing is recognized without an assessment of the relative importance of the case being brought by the plaintiff-taxpayer. For example, in *Britnell v. Alabama State Board of Education*, Alabama taxpayers challenged a \$4,000 salary raise for the Superintendent of the State Board of Education.²⁶⁵ Before reaching the merits of this challenge, the Alabama Supreme Court declared “a plaintiff suing in

257. *Id.* at 341.

258. *Id.* (internal quotation marks omitted).

259. *Id.* at 341–42.

260. *Id.* at 341 n.2.

261. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1082 (Ohio 1999).

262. See, e.g., *Brinkman v. Miami Univ.*, 2007 Ohio 4372 (2007) at ¶ 60 (rejecting taxpayer’s “argument that he possesses public-right standing because his lawsuit involves a matter of great public interest.”).

263. *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 329 (Pa. 1986).

264. *Jolley v. State Loan and Inv. Bd.*, 38 P.3d 1073, 1077 (Wyo. 2002).

265. 374 So. 2d 282, 283 (Ala. 1979).

his capacity as a citizen and taxpayer has standing to attack the constitutionality of expenditures.”²⁶⁶

Britnell, in turn, relied on *Zeigler v. Baker* decided two years earlier.²⁶⁷ In *Zeigler*, an Alabama taxpayer challenged the pensions granted to former governors.²⁶⁸ Confirming the taxpayer’s standing to bring his suit in the state courts, the Alabama Supreme Court specifically rejected the federal rule against taxpayer standing as articulated in *Schlesinger* and *Richardson*.²⁶⁹ As previously mentioned, in Alabama, a person “suing in his capacity as a citizen and taxpayer, has standing to attack the constitutionality” of state expenditures.²⁷⁰

Like the Alabama courts, the Florida courts grant taxpayer standing without first determining whether the case being brought is of particular importance. In *Brown v. Firestone*, the plaintiffs “as citizens and taxpayers” challenged the constitutionality of several gubernatorial vetoes of state appropriations legislation.²⁷¹ While “their stake in the outcome of this controversy rest[ed] on an extremely slender reed,” these citizen/taxpayers had standing in the Florida courts to “mount a constitutional attack upon the legislature’s taxing and spending power without having to demonstrate a special injury.”²⁷² Of course, “special injury” is critical to the federal concept of standing.²⁷³

Eleven years later, in *Chiles v. Children A, B, C, D, E, and F*, Florida foster children, “in their capacity as taxpayers,” challenged the constitutionality of legislation authorizing an executive branch commission to reduce state expenditures to avoid a state budget deficit.²⁷⁴ Gone from the Florida Supreme Court’s discussion of taxpayer standing was the earlier rhetoric about “slender reed[s].”²⁷⁵ Rather, citing *Brown*, the court in broad terms affirmed “that a

266. *Id.* at 285.

267. 344 So. 2d 761 (Ala. 1977).

268. Baker was also an Alabama state senator, but did “not rely upon [this] status” for standing. *Id.* at 763.

269. *Id.*

270. *Id.* at 764.

271. 382 So. 2d 654, 657 (Fla. 1980).

272. *Id.* at 662.

273. See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (standing in federal court requires injury which is “concrete and particularized” rather than injury “in common with people generally.”).

274. *Chiles v. Children A, B, C, D, E and F*, 589 So. 2d 260, 263 n.5 (Fla. 1991).

275. *Brown*, 382 So. 2d 654, 662.

citizen and taxpayer can challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury."²⁷⁶

In *McKee v. Likins*, the Minnesota Supreme Court similarly affirmed that, under Minnesota law, "a state or local taxpayer has sufficient interest to challenge illegal expenditures."²⁷⁷ Mr. McKee was a property taxpayer of Ramsey County who opposed abortion.²⁷⁸ Under Minnesota law, he had standing to challenge Medicaid-financed abortions: "[T]he right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied."²⁷⁹

Colorado's Supreme Court has likewise affirmed "broad taxpayer standing in the trial and appellate courts."²⁸⁰ In particular, "taxpayers [of the Centennial State] have standing to seek to enjoin an unlawful expenditure of public funds."²⁸¹ Standing for taxpayers to challenge public expenditures has been recognized as well by the courts of Missouri,²⁸² Montana,²⁸³ North Carolina,²⁸⁴ Nebraska,²⁸⁵

276. *Chiles*, 589 So. 2d at 263, n.5. See also *Coal. for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 403 (Fla. 1996) ("This Court has held that a citizen and taxpayer can challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury. Furthermore, in Florida, unlike the federal system, the doctrine of standing has not been rigidly followed.") (internal citations and quotation marks deleted).

277. 261 N.W.2d 566, 570 (Minn. 1977).

278. *Id.* at 568.

279. *Id.* at 571.

280. *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008) (internal quotation marks deleted).

281. *Id.* (internal quotation marks deleted).

282. *Manzara v. State*, 343 S.W. 3d 656, 659 (Mo. 2011) (For standing, "a taxpayer must establish that one of three conditions exists: (1) a direct expenditure of funds generated through taxation; (2) an increased levy in taxes; or (3) a pecuniary loss attributable to the challenged transaction of a municipality."). However, the Missouri Supreme Court holds that a state tax credit is not an expenditure of public funds and thus cannot be challenged in court by taxpayers. *Id.*

283. *Butte-Silver Bow Local Gov't v. State*, 768 P.2d 327, 329 (Mont. 1989) ("a taxpayer will have standing to question the validity of a tax, or the expenditure of tax monies, provided the issue(s) presented directly affect the constitutional validity to collect or use the proceeds of the tax by the state or a local government entity.") (parenthetical in original).

284. *Goldston v. State*, 637 S.E.2d 876, 881 (N.C. 2006) ("the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied.") (internal quotation marks and citations deleted).

285. *Chambers v. Lautenbaugh*, 644 N.W.2d 540, 548 (Neb. 2002) ("A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.")

Oklahoma,²⁸⁶ Texas,²⁸⁷ and Utah.²⁸⁸ Under Tennessee's case law, a taxpayer of the Volunteer State has "standing to challenge the legality of the expenditure of public funds" if the taxpayer "allege[s] a specific illegality" and has "made a prior demand on the governmental entity asking it to correct the alleged illegality."²⁸⁹

C. State Taxpayer Standing by Statute

Instead of (or in addition to) judge-made rules permitting taxpayers to sue as such, some states establish taxpayer standing by statute. A California statute, for example, authorizes actions to stop "any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county."²⁹⁰ Such actions may be maintained by citizens residing in the defendant municipality or "by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax" in such municipality.²⁹¹ While the California statute on its face is limited to suits challenging municipal expenditures, the California courts have interpreted the statute to authorize "taxpayer action[s] . . . against the State."²⁹² In *Vasquez v. State of California*, for example, a California taxpayer successfully challenged the failure of the California Department of Corrections to "ensure [the] payment of prevailing wages to the inmates" working for a private manufacturer²⁹³ since some of those wages were owed to the state to

286. *Oklahoma Pub. Emp's Ass'n v. Oklahoma Dep't of Cent. Serv's*, 55 P.3d 1072, 1078 (Okla. 2002) ("a taxpayer possesses standing to seek equitable relief when alleging that a violation of a statute will result in an illegal expenditure of public funds or the imposition of an illegal tax.").

287. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 556 (Tex. 2000) ("a taxpayer has standing to sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury.").

288. *Jenkins v. Swan*, 675 P.2d 1145, 1153 (Utah 1983) ("We have also extended the taxpayer's right to sue concerning illegal use of public monies to include an action against the state.").

289. *Lewis v. Cleveland Mun. Airport Auth.*, 289 S.W.3d 808, 816 (Tenn. Ct. App. 2008).

290. CAL. CIV. PROC. CODE § 526a (2012).

291. *Id.*

292. *Vasquez v. State of California*, 105 Cal App 4th 849, 852 (2003). *See also id.* at 854 ("The individual citizen must be able to take the initiative through taxpayers' suits to keep government accountable on the state as well as on the local level.") (internal citations and quotations omitted).

293. *Id.* at 853.

reimburse the public treasury for the cost of the inmates' board and room.²⁹⁴

Another statutory basis for taxpayer standing in California is the law which allows anyone who is "beneficially interested"²⁹⁵ to obtain a "writ of mandate"²⁹⁶ when "there is not a plain, speedy, and adequate remedy, in the ordinary course of law."²⁹⁷ "The beneficial interest standard is so broad, even citizen or taxpayer standing may be sufficient to obtain relief in mandamus."²⁹⁸

New York's State Finance Law Section 123-b(1) authorizes "a citizen taxpayer" to "maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication or any other illegal or unconstitutional disbursement of state funds or state property . . ." A "citizen taxpayer" may maintain such an action "whether or not such person is or may be affected or specially aggrieved by [such] . . . expenditure, misappropriation, misapplication or . . . disbursement . . ."²⁹⁹

In *Saratoga County Chamber of Commerce, Inc. v. Pataki*, New York's highest judicial tribunal, the Court of Appeals, held that Section 123-(b)(1) granted standing to "citizen-taxpayers" to challenge the use of public funds to implement the 1993 Compact between New York's governor and the St. Regis Mohawk Tribe.³⁰⁰ That Compact authorized the Tribe to operate a casino and had been signed by the Empire State's governor without legislative approval.³⁰¹ The plaintiffs, including the citizen-taxpayers, challenged the Compact and the use of state funds to implement the Compact. The Compact, they contended, violated the constitutional separation of powers as the governor lacked authority to execute the Compact absent legislative authorization of the Compact. On the merits, the Court of Appeals agreed.³⁰²

294. *Id.* at 856.

295. CAL. CIV. PROC. CODE. § 1086 (2012).

296. CAL. CIV. PROC. CODE. § 1085(a) (2011).

297. CAL. CIV. PROC. CODE. § 1086 (2012).

298. *Doe v. Albany Unified Sch. Dist.*, 190 Cal. App. 4th 668, 685 (2010) (internal quotations and citations deleted).

299. N.Y. STATE FIN. LAW §123-b(1) (2012).

300. 798 N.E.2d 1047 (N.Y. 2003).

301. *Id.* at 1049.

302. *Id.* at 1061.

Before reaching the substance of the lawsuit, the Court held that Section 123-(b)(1) gave the plaintiff/citizen/taxpayers standing to pursue their claim. According to the Court, that section requires the court “to distinguish between cases that present a challenge to the expenditure of money and those that use the expenditure of money as a pretense to challenge a governmental decision.”³⁰³ As to the former, citizen/taxpayers have statutory standing; as to the latter, they do not. In this case, the Court of Appeals held, the citizen/taxpayers “have sufficiently alleged a challenge to the expenditure of state money” to have standing to sue.³⁰⁴

A contrary ruling, the Court of Appeals stated, would mean that “an important constitutional issue would be effectively insulated from judicial review” since no one would have standing to sue.³⁰⁵ As we have seen, the dominant view in the case law of the U.S. Supreme Court is different, namely, that, if no one has standing, this means the issue in question is appropriately assigned to the political branches of government.³⁰⁶

The Court of Appeals in *Saratoga County Chamber of Commerce* distinguishes its prior decision in *Matter of Colella v. Board of Assessors*.³⁰⁷ In *Colella*, the Court of Appeals held that local property taxpayers lacked standing to challenge a property tax exemption extended to the Yun Lin Temple, a Buddhist religious corporation.³⁰⁸ There is, the Court held in *Colella*, no taxpayer standing to contest the “religious use tax exemption [of] a single parcel of real estate.”³⁰⁹ In contrast, the issue presented in *Saratoga County Chamber of Commerce* was “fundamental and of immense public significance.”³¹⁰ “Standing is properly satisfied here, lest

303. *Id.* at 1053.

304. *Id.*

305. *Id.*

306. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 489 (1982) (“But the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”) (internal quotation marks deleted); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (If the absence of standing means that “no particular or class [can] litigate these claims,” that suggests that “the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”).

307. 741 N.E.2d 113 (N.Y. 2000).

308. *Id.* at 114.

309. *Id.* at 116.

310. 798 N.E.2d at 1054.

procedural hurdles forever foreclose adjudication of the underlying constitutional issue.”³¹¹

The *Colella* Court had distinguished its denial of taxpayer standing in that case from *Dudley v. Kerwick* in which property owners challenged “the enrollment, *en masse*, of 88% of the town’s landowners as officers in an allegedly religious denomination known as the Universal Life Church.”³¹² This enrollment exempted from property taxation the bulk of the town’s property with “the remaining landowners . . . pay[ing] the full \$500,000 annual governmental expense of the town.”³¹³ While the *Dudley* Court did not expressly use the term “standing,” it allowed the plaintiffs to challenge this “exemption from taxation in wholesale fashion.”³¹⁴ The property owners refusing to join the Universal Life Church “allege[d] a broad perversion of the entire process of granting exemptions, with the resulting deterioration of the tax base and imposition on petitioners of a hugely disproportionate share of municipal expenses.”³¹⁵

A Massachusetts statute authorizes “twenty-four taxable inhabitants of the commonwealth, not more than six of whom shall be from any one county” to sue prospectively to prevent any “department, commission, board, officer, employee or agent of the commonwealth” from illegally or unconstitutionally “expend[ing] money or incur[ring] obligations purporting to bind the commonwealth.”³¹⁶ A South Dakota statute authorizes “[a]ny citizen and taxpayer residing within a municipality [to] maintain an action or proceeding to prevent, by proper remedy, a violation of any provision of” the title governing municipalities in the Mount Rushmore State.³¹⁷

Ohio’s statutes on taxpayer standing embody a derivative approach under which local taxpayers may sue on behalf of a locality if such taxpayers first demand of appropriate government officials that they sue and these officials decline. At the county level, Ohio Revised Code section 309.12 authorizes “the prosecuting attorney” to sue to protect the county treasury from a variety of financial improprieties.³¹⁸ In particular, the prosecuting attorney may sue to

311. *Id.*

312. *Dudley v. Kerwick*, 421 N.E.2d 797, 798 (N.Y. 1981).

313. *Id.*

314. *Id.* at 800.

315. *Id.* at 799–800.

316. MASS. GEN. LAWS ANN. ch. 29, § 63 (2012).

317. S.D. CODIFIED LAWS § 9-1-6 (2012).

318. OHIO REV. CODE ANN. § 309.12 (2012).

prevent or to recover, *inter alia*, if county funds “are about to be or have been misapplied,” “public moneys have been illegally drawn or withheld from the county treasury,” an illegal contract “has been executed or is about to be entered into,” or an illegal “contract was procured by fraud or corruption . . .”³¹⁹ If “a taxpayer of the county” makes a “written request” to the prosecuting attorney to file such an action and the prosecuting attorney “fails” to do so, the taxpayer may then file on behalf of the county.³²⁰ Similar rules authorize municipal taxpayers in Ohio to sue to protect municipal funds if, after the taxpayer’s written request, “the village solicitor or city director of law fails” to file such a suit “on behalf of the municipal corporation.”³²¹

Arizona also has a derivative-style statute which permits a taxpayer to sue “in the name of the state to enjoin the illegal payment of public monies . . . or if the monies have been paid, to recover such monies”³²² if the taxpayer first requests the attorney general to sue and he “fails” to do so.³²³

D. Summary

In short, whether by statute or case law, most states have more liberal taxpayer standing rules than prevail in the federal courts. A minority of states emulates the federal approach and thus always denies standing to taxpayers absent individualized harm.³²⁴ However, the majority rule is that, by case law and/or statutes, state taxpayers generally have standing to challenge state taxes and expenditures in the state courts even if such taxpayers lack the kind of individualized harm necessary for standing in the federal courts.

IV. *Cuno* and *Winn* Channel Litigation to the State Courts

Since state taxpayers who lack standing in the federal courts typically have standing to raise federal constitutional questions in the state courts, *Cuno* and *Winn* do not foreclose state taxpayers’

319. *Id.*

320. *Id.*

321. OHIO REV. CODE ANN. § 733.59 (2012).

322. ARIZ. REV. STAT. ANN. § 35-212(A) (2012).

323. ARIZ. REV. STAT. ANN. § 35-213(A) (2012).

324. See, e.g., *Baer v. New Hampshire Department of Education*, 160 N.H. 727, 731 (2010) (“taxpayer status, without an injury or an impairment of rights, is not sufficient to confer standing to bring a declaratory judgment action . . .”); *W. Farms Mall, LLC v. Town of W. Hartford*, 279 Conn. 1, 23 (2006) (Despite many states’ case law, “we decline to determine expressly whether a taxpayer has standing to assert a claim predicated on misappropriation of public funds . . .”).

constitutional challenges to state taxes and spending. Rather, *Cuno* and *Winn* channel such litigation to the state courts where state taxpayers have the standing they lack in the federal courts.

To see this, let us revisit *Nyquist*, *Hunt* and *Mueller*. Both the majority³²⁵ and minority³²⁶ opinions in *Winn* suggest that *Winn*, by denying taxpayer standing for Establishment Clause challenges to tax expenditures, precludes taxpayer/plaintiffs from pursuing these kinds of cases in federal court. A review of these decisions yields a more complete conclusion, namely, that state taxpayers foreclosed from the federal courts can often pursue in the state courts their challenges to state spending and taxes under the U.S. Constitution.

Consider first *Nyquist*, an Establishment Clause case brought by “an incorporated association . . . and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools.”³²⁷ The *Nyquist* plaintiffs successfully challenged monetary grants from the New York State treasury to private schools as well as state grants and income tax deductions given to parents sending their children to private schools.³²⁸ The original *Nyquist* defendants were executive branch officials of the State of New York.³²⁹ Status as intervening defendants was granted to leaders of the New York state senate and “to a group of parents with children enrolled in nonpublic schools.”³³⁰

After *Winn*, the *Nyquist* taxpayers still have *Flast* standing in federal court to challenge under the First Amendment the Empire State’s monetary grants to private schools as well as the state’s monetary grants to parents sending their children to such schools. However, under *Winn*, the *Nyquist* taxpayers today lack federal standing to challenge the tax deductions bestowed by New York upon private school parents. *Cuno* further confirms that the *Nyquist* taxpayers’ standing in the federal courts to contest New York’s direct monetary grants does not produce supplemental standing to litigate in federal court the tax benefits also offered by the Empire State.³³¹

325. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1448–49 (2011). The *Winn* majority and minority made similar observations about *Waltz* which I discuss below in the context of municipal taxpayer standing.

326. *Id.* at 1453–54.

327. *Comm. For Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 762 (1973).

328. *Id.* at 763–764.

329. *Id.* at 762.

330. *Id.*

331. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349–353 (2006).

As an alternative to the federal courts, the *Nyquist* plaintiffs had (and have today) standing in New York's courts under New York's State Finance Law Section 123-b(1) to challenge the state grant programs. The *Nyquist* plaintiffs were "citizen taxpayer[s]" attacking each of the grant programs as "a wrongful expenditure, misappropriation, misapplication or any other illegal or unconstitutional disbursement of state funds . . ."³³² Thus, under Section 123-b(1), the *Nyquist* plaintiffs have standing to pursue their First Amendment claims in the New York courts against New York's monetary grants to private schools and to private school parents.

It is likely that under Section 123-b(1) these taxpayer/plaintiffs could today also challenge in the state courts the New York State income tax deductions for parents sending their offspring to private schools. From the widely-accepted vantage of tax expenditure theory,³³³ such deductions constitute "expenditure[s]."³³⁴ Moreover, denying "citizen taxpayer[s]" the ability to litigate the constitutionality of these state income tax deductions would result in "an important constitutional issue . . . be[ing] effectively insulated from judicial review."³³⁵ It thus seems likely that the New York courts would construe Section 123(b)-1 to permit First Amendment challenges in the New York State courts to state tax benefits such as the deduction at issue in *Nyquist*. If so, the net effect of *Cuno* and *Winn* is to route future *Nyquist*-type First Amendment challenges to New York state tax benefits to the New York state courts.

Hunt v. McNair was decided simultaneously with *Nyquist* and was brought by a South Carolina taxpayer who challenged on Establishment Clause grounds revenue bonds issued by an authority of the Palmetto State.³³⁶ The proceeds of these state-sponsored bonds were used to refinance and construct facilities for the Baptist College at Charleston. The college was ultimately responsible for paying the interest and principal owed on these state-issued bonds.³³⁷

Nyquist had been litigated in the lower federal courts before going to the U.S. Supreme Court. In contrast, *Hunt* was brought in the South Carolina courts. In *Hunt*, the U.S. Supreme Court affirmed

332. N.Y. STATE FIN. LAW §123-b(1) (McKinney 2012).

333. See *supra* notes 192 and 219.

334. N.Y. STATE FIN. LAW §123-b(1) (McKinney 2012).

335. *Saratoga County Chamber of Commerce Inc. v. Pataki*, 798 N.E.2d 1047, 1053 (N.Y. 2003).

336. *Hunt v. McNair*, 413 U.S. 734 (1973).

337. *Id.* at 737-738.

the ruling of the South Carolina Supreme Court that state-sponsored revenue bonds did not violate the First Amendment even though the proceeds of such bonds benefitted a religious institution of higher learning.³³⁸

In its two opinions in *Hunt*, the South Carolina Supreme Court reached the merits of Mr. Hunt's Establishment Clause claim without considering his standing to bring the case. As we have seen, under South Carolina law, "general standing requirements" will be waived when a plaintiff raises "an issue of such public importance as to require its resolution for future guidance."³³⁹ It is thus unsurprising that Mr. Hunt's ability to bring his First Amendment case was taken for granted *sub silentio* in the South Carolina courts.

Winn today still grants Mr. Hunt *Flast* taxpayer standing in the U.S. Supreme Court. As the U.S. Supreme Court observed, the Baptist College benefitted from the tax-exempt status of the bonds issued by the South Carolina authority.³⁴⁰ Since these bonds yielded tax exempt interest, the bonds carried and the college paid a lower rate of interest than if the college had issued taxable bonds without the state's involvement.

However, Mr. Hunt objected, not to the bonds' tax-exempt status, but, rather, to state involvement in the financing of the religious college's facilities. Mr. Hunt's Establishment Clause argument would have applied if South Carolina had issued on the Baptist College's behalf taxable bonds bearing market rates of interest. Mr. Hunt complained not about the tax benefits associated with the state-sponsored bonds, but about the bonds themselves. *Winn* does not preclude Mr. Hunt's *Flast*-type challenge in the federal courts, a challenge to state support for a religious college, not to tax benefits for state bonds.

On the other hand, the *Nyquist* taxpayers, if they challenged the Empire State's income tax deduction in the state courts, would today lack standing to appeal to the U.S. Supreme Court because of the *Winn* decision. For these state taxpayers, New York's highest court, the Court of Appeals, would be the end of the line if that court were to uphold New York's tax deduction against an Establishment Clause challenge. In contrast, if the New York Court of Appeals were to rule against the deduction (as the U.S. Supreme Court actually did),

338. *Id.* at 749.

339. *ATC S., Inc. v. Charleston Cnty.*, 669 S.E.2d 337, 341 (S.C. 2008) (internal quotation marks omitted).

340. *Id.*

then the private school parents thereby denied the deduction, like the *ASARCO* lessees, would have individualized injury and would thus have standing to appeal to the U.S. Supreme Court.

Mueller, like the *Nyquist* challenge to the Empire State's income tax deductions, is today foreclosed from the federal courts by *Winn* and its rule that taxpayers lack *Flast* standing to mount Establishment Clause challenges to tax benefits.³⁴¹ *Mueller* was brought in the federal courts by "certain Minnesota taxpayers"³⁴² who objected on Establishment Clause grounds to a Minnesota income tax deduction for "tuition, textbooks and transportation"³⁴³ outlays expended in connection with "elementary or secondary" education.³⁴⁴ The Minnesota deduction is the kind of tax benefit which, per *Winn*, can no longer be contested by state taxpayers in the federal courts.

Will the Minnesota courts grant standing for a *Mueller*-type challenge to state tax deductions? Again, the answer depends upon whether tax expenditures are treated in the same way as traditional cash expenditures. Tax expenditure theory indicates that a tax deduction is a "use of public funds."³⁴⁵ If so, then the Minnesota taxpayers in *Mueller* could bring their Establishment Clause challenge in the Minnesota courts. In that scenario, a Minnesota Supreme Court ruling upholding the state income tax deduction under the U.S. Constitution would be final since Minnesota taxpayers now lack standing in the U.S. Supreme Court in light of *Winn*'s rejection of state taxpayer standing to contest tax benefits. On the other hand, if the Minnesota Supreme Court were to strike a state income tax deduction on First Amendment grounds, the Minnesota parents using the deduction (again, like the *ASARCO* lessees) would have standing to appeal to the U.S. Supreme Court which, in *Mueller* as it actually happened, upheld the Minnesota income tax deduction under the Establishment Clause.

In short, by shutting the federal courts to most state taxpayer challenges, *Cuno* and *Winn* do not foreclose constitutional challenges to state taxes and expenditures. Rather, *Cuno* and *Winn* instead channel those challenges to the state courts with their more liberal taxpayer standing rules. *Nyquist*- and *Mueller*-type challenges to the constitutionality of state income tax deductions, today foreclosed

341. *Mueller v. Allen*, 463 U.S. 388 (1983).

342. *Id.* at 392.

343. *Id.* at 391 (n. 1, quoting MINN. STAT. § 290.09, subd. 22 (1983)).

344. *Id.*

345. *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977).

from the federal courts for lack of taxpayer standing, can still be brought in the state courts with their generally more expansive notions of taxpayer standing.

This conclusion is reinforced by consideration of the alternative courses *Cuno* might have taken in light of the U.S. Supreme Court's decision in that case. This counterfactual demonstrates again that *Cuno* and *Winn* do not foreclose state taxpayers' constitutional litigation against state taxes and expenditures but, rather, route such litigation to the state courts.

The *Cuno* plaintiffs wanted to litigate in the Ohio state courts the constitutionality of the state income tax credits and of the municipal property tax exemptions extended to DaimlerChrysler for building its new plant in Toledo. The *Cuno* plaintiffs had plausible claims to standing in the Ohio courts under the Ohio derivative-style statute for municipal taxpayers³⁴⁶ and under the Ohio case law granting standing to taxpayers raising issues "of great importance and interest to the public."³⁴⁷ Had the Ohio courts upheld the Ohio income tax credits granted to DaimlerChrysler, that would have been the end of the road as the *Cuno* plaintiff-taxpayers lacked standing under federal law to proceed in the federal courts in general and in the U.S. Supreme Court in particular. However, had the courts of the Buckeye State agreed with the plaintiff-taxpayers and held unconstitutional the Ohio income tax credits granted to DaimlerChrysler, DaimlerChrysler would, like the *ASARCO* lessees, have suffered particularized injury from the state courts' invalidation of the credits and would thus have had standing to appeal to the U.S. Supreme Court.

Alternatively, the *Cuno* plaintiffs could have bifurcated their litigation, challenging the constitutionality of the state tax credits in the Ohio state courts while simultaneously contesting the constitutionality of the local property tax exemptions in the federal courts. In this scenario also, the denial of state taxpayer standing in the federal courts routes the constitutional challenge to the Ohio income tax credits to the Ohio state courts—where the actual *Cuno* plaintiffs started their litigation and wanted to stay.

As to *Winn*, we need not speculate about the alternative of state court litigation since such litigation in fact occurred. Before the *Winn* plaintiffs began their lawsuit in the federal courts, an essentially

346. OHIO REV. CODE ANN. § 733.59 (West 2012).

347. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999).

identical challenge to the Arizona tax credits for STOs was brought in the Arizona state courts.³⁴⁸ When the Arizona Supreme Court declared those credits compliant with the federal constitution, the plaintiffs sought certiorari in the U.S. Supreme Court and were rejected.³⁴⁹ The *Winn* taxpayer/plaintiffs then pursued their parallel litigation in the federal courts. Today the decision of the Arizona Supreme Court, upholding the STO tax credits under the U.S. Constitution, marks the end of the road since the Arizona taxpayer/plaintiffs lack standing to seek certiorari in the U.S. Supreme Court or to commence litigation in the U.S. District Court.

In sum, *Cuno* and *Winn* only foreclose state taxpayer standing in the federal courts. Since state taxpayers often possess standing in the state courts to challenge state taxes and expenditures under the U.S. Constitution, *Cuno* and *Winn* will channel state taxpayers' constitutional challenges to state taxes and expenditures to the state courts where such taxpayers have the standing they lack in the federal courts.

V. Municipal Taxpayer Standing as Historical Anomaly

Except for the limited area still governed by *Flast*, i.e., Establishment Clause challenges to direct outlays, there is today no federal or state taxpayer standing in the federal courts to mount constitutional challenges to federal or state taxes and expenditures. On the other hand, municipal taxpayers have plenary standing to contest local taxes and budgetary outlays in the federal courts.

Frothingham first stated that municipal taxpayers have standing in the federal courts to challenge local expenditures and taxes.³⁵⁰ This proposition has subsequently been confirmed.³⁵¹ Neither *Cuno* nor *Winn* change this result or otherwise impair the standing in federal courts of local taxpayers challenging local government policies.

For three reasons, it is anomalous to grant taxpayer standing in the federal courts to municipal taxpayers while simultaneously denying federal court standing to state taxpayers. First, as Professor Staudt observed even before *Cuno* and *Winn*, "many local taxpayers reside in cities and localities that are far more populous and have

348. *Kotterman v. Killian*, 193 Ariz. 273 (1999).

349. *Kotterman v. Killian*, 528 U.S. 921 (1999).

350. *Frothingham v. Mellon*, 262 U.S. 447, 487–87 (1923).

351. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (quoting *Frothingham*).

bigger budgets than many states.”³⁵² It is unpersuasive to characterize for standing purposes a resident of New York City as having a “direct” interest in the tax and budgetary practices of the City of New York (pop. 8,175,133) while declaring that a state taxpayer in Wyoming (pop. 532,981) has too remote an interest in her state’s taxes and expenditures to justify standing in federal court. In this vein, Judge Sutton of the U.S. Court of Appeals for the Sixth Circuit recently criticized municipal taxpayer standing in the federal courts:

Thirty-two cities currently have populations larger than at least one State, and New York City, the largest municipality in the country, holds more people than 39 States. If the point of limiting taxpayer standing is to avoid the resolution of generalized grievances in federal court, why does a New Yorker have standing based on an injury shared with 8,275,000 others while a resident of North Dakota lacks standing based on an injury shared with 647,000 others?³⁵³

However, this is where federal law stands today.

Second, the premises underlying municipal taxpayer standing are no longer valid, even if they once were. Underlying *Frothingham*’s approval of municipal taxpayer standing is a vision of local government as a small-scale enterprise resembling similarly small-scale private corporations. *Frothingham*’s vision of both municipalities and corporations is today quaint to the point of irrelevance.

In 1923, *Frothingham* declared that a municipal taxpayer has standing in the federal courts because a local taxpayer has a “direct and immediate”³⁵⁴ interest in local government resembling “that subsisting between stockholder and private corporation.”³⁵⁵ Whether or not that vision of localities and corporations as similar, small-scale enterprises was still realistic in 1923, it is not today.

For the justices of the *Frothingham* Court, the analogy between local governments and corporations likely resonated because of the historic origins of local governments in corporate law.³⁵⁶ However,

352. Staudt, *supra* note 113 at 841.

353. *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, 641 F.3d 197, 221 (6th Cir. 2011) (Sutton, J., concurring).

354. *Frothingham*, 262 U.S. at 486.

355. *Id.* at 487.

356. *Id.*

the analogy is today unpersuasive. While local governments are today still labeled “municipal corporations,” no one now understands that label as meaning that local governments are legally comparable to commercial corporations.³⁵⁷ Localities today are governments, not quasi-business corporations. And most local governments and publicly traded corporations today lack the intimate relationships with their taxpayers and shareholders perceived by the *Frothingham* Court in 1923.

It is accordingly an historic anomaly in the contemporary world to declare that a municipal taxpayer has a corporate-style, “direct and immediate” interest in his local taxes and budgets, unlike his more remote interest in federal and state taxes and outlays. This, however, is the premise underlying municipal taxpayer standing in the federal courts.

Third, municipal government, a creature of state law, is often deployed as an instrument of state policymaking. Frequently, for example, states bestow funds upon municipalities³⁵⁸ and mandate that localities provide specific public services.³⁵⁹ Among other concerns, the *Winn* dissent focused on the fungibility of tax benefits and cash distributions³⁶⁰ just as the *Valley Forge* dissents focused on the fungibility of property and cash.³⁶¹ In similar fashion, from the perspective of state decision makers, municipal and state policies are often close substitutes for one another. It is accordingly unpersuasive for the federal courts to entertain constitutional challenges to the actions of state policymakers when such policymakers act through municipal law, while foreclosing constitutional challenges to the actions of those same policymakers when they utilize state taxes and outlays.

Consider in this context the local property tax exemption at issue in *Cuno*. That municipal exemption was authorized and governed by

357. *Id.*

358. See *Smith*, 641 F. 2d at 222 (“Perhaps in 1923 it was easy to speak of city and state treasuries as distinct. Yet today, particularly in the context of a public school case, it is pure fiction to think of municipal (or county) treasuries as holding money raised only through local taxes.”) (Sutton, J., concurring) (parenthesis in original).

359. Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741 (1997); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation and the Tenth Amendment: On Public Choice, Public Interest and Public Services*, 46 VAND. L. REV. 1355 (1993).

360. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1450–51 (2011).

361. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 511–12, 515 (1982).

Ohio state law.³⁶² As an alternative to this local property tax exemption, Ohio could instead have offset DaimlerChrysler's property tax burden on its new plant by granting a state income tax credit for such property taxes. From the vantages of DaimlerChrysler, the Ohio treasury and the affected municipalities, this alternative would have been, in economic terms, largely indistinguishable from the municipal property tax exemption actually authorized by state law and granted to DaimlerChrysler.³⁶³ DaimlerChrysler's ultimate economic position is the same whether it pays no property taxes or pays such taxes and receives an offsetting income tax credit.

It is unpersuasive for current federal standing law to dispense different treatment to the taxpayers questioning these economically identical approaches, i.e., to grant standing in federal court for a municipal taxpayer to challenge the local property tax exemption while denying standing in federal court for that same individual, in his capacity as an Ohio state taxpayer, to challenge an economically equivalent Ohio income tax credit for local property taxes.

Consider as well a variant on the state income tax credits at issue in *Winn*. Suppose that, in lieu of such credits, Arizona had authorized (or mandated) municipal governments to give matching grants to any resident of the municipality contributing to an STO. From the vantages of the donors receiving this match and of the STOs receiving contributions, this alternative would have been economically indistinguishable from the state income tax credits Arizona actually adopted. An Arizona taxpayer contributing to an STO is in the same economic position if his contribution triggers a municipal grant to him or a state income tax credit. However, under current law, a municipal taxpayer has standing in the federal courts to challenge the constitutionality of municipal matching grants, though that same individual, as a state taxpayer, lacks standing in the federal courts to challenge an economically equivalent state income tax credit.

As we have seen, *Winn* and *Cuno* do not bar state taxpayers from bringing constitutional challenges to state taxes and expenditures; rather, they channel such challenges to the state courts where state taxpayers typically have the standing they lack in the

362. OHIO. REV. CODE. ANN. §§ 5709.62(C)(1), 5709.631.

363. To make this hypothetical state tax credit perfectly indistinguishable from the municipal property tax exemption, it would be necessary for Ohio to reduce state assistance to the locality and school districts in which the new DaimlerChrysler plant was to be located.

federal courts. Just as the states provide more liberal standing to state taxpayers, the states afford generous standing to municipal taxpayers.³⁶⁴ Since state taxpayers must now bring their generalized constitutional challenges to state taxes and outlays in the state courts, it is anomalous to permit municipal taxpayers to bring similar constitutional challenges to local taxes and expenditures in the federal courts; the state courts are available to municipal taxpayers as well.

Instructive in this context is a comparison of *Nyquist* and *Walz*. Today, under *Winn*, the *Nyquist* taxpayers must mount their constitutional challenge to New York State tax deductions in the courts of the Empire State while Mr. Walz, a New York City property taxpayer, has standing in the federal courts to object to the New York tax exemption for church property. By such criteria as population and the size of its governmental budget, New York City is larger than most states.³⁶⁵ *Frothingham*'s premise for municipal taxpayer standing in the federal courts is that, in contrast to a federal or state taxpayer, a local taxpayer has a "direct and immediate"³⁶⁶ interest in municipal outlays, an interest resembling "that subsisting between stockholder and private corporation."³⁶⁷ While that premise may be plausible today for a local taxpayer who lives in a small town or in a modestly-sized suburban community, it is unconvincing as applied to Mr. Walz and the residents of other large cities.

Moreover, New York State's Constitution mandated the municipal property tax exemption for church properties to which Mr. Walz objected. There is no reason for permitting local taxpayers like Mr. Walz to litigate in the federal courts against the municipal tax rules promulgated by governors and legislators now that, per *Cuno* and *Winn*, those courts have been closed to challenges to the state tax policies formulated by those same state officials.

VI. The Problem (or Not) of Federal Constitutional Law Unsupervised by the U.S. Supreme Court

As a result of *Cuno*, *Winn* and the states' more liberal taxpayer standing rules, there will emerge a body of federal constitutional law

364. See, e.g., CAL. CIV. PROC. CODE § 526a; OHIO REV. CODE ANN. §§ 309.12, 309.13 and 733.59; S.D. CODIFIED LAWS § 9-1-6.

365. The 2010 census put New York City's population at 8,175,133, a population larger than 39 of the states.

366. *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923).

367. *Id.* at 487.

over which the U.S. Supreme Court lacks direct supervisory authority, namely, decisions of the state courts upholding state tax and spending policies in the face of state taxpayers' *Cuno*- and *Winn*-type constitutional challenges to those policies. Since the state taxpayers bringing these cases will lack individualized harm, they will lack standing in the federal courts. Hence, the resulting constitutional decisions of the state courts will not be reviewable by the U.S. Supreme Court when these taxpayers lose in the state courts.

On balance, state court judges, elected or appointed for a term of years, will be more inclined to uphold state taxes and expenditures against constitutional challenges than will life-tenured federal judges. Consequently, this body of constitutional law, developed in the state courts, will be more permissive toward state tax and expenditure policies than would a comparable body of constitutional case law constructed in the federal courts.

Moreover, this state-friendly constitutional case law will be smaller quantitatively than a comparable body of decisions in the federal courts would be. As it becomes clear that state courts are less receptive to claims brought under the U.S. Constitution by state taxpayers against state expenditures and tax policies, fewer taxpayers will bring such claims.

Recall in this context the litigation in the Arizona state courts challenging the constitutionality of the Grand Canyon state's income tax credit for contributions to STOs.³⁶⁸ Today, as a result of *Cuno* and *Winn*, that litigation would end with the decision of the Arizona Supreme Court upholding the Arizona tax credit under the First Amendment. Because Arizona state taxpayers have standing in the state but not the federal courts to bring generalized challenges to state tax benefits, such taxpayers, when they lose in the state courts, will have no recourse to the federal judiciary. The same is also true today of *Cuno*-type constitutional challenges to state tax credits and *Nyquist*- and *Mueller*-type challenges to state tax deductions. These cases will be brought in the state courts where state taxpayers have standing—and will end in the state courts if such courts uphold the contested tax benefits under the U.S. Constitution. The state taxpayers bringing these suits claim no individualized harm and thus lack standing to go further into the federal courts including the U.S. Supreme Court.

368. *Kotterman v. Killian*, 193 Ariz. 273 (1999).

At least at the margins and perhaps more fundamentally, state judges, generally elected³⁶⁹ or appointed³⁷⁰ for fixed terms of office, will be more inclined to sustain state taxes and expenditures against constitutional challenges than would life-tenured federal judges. Cases like *Cuno*, *Winn*, *Muller*, *Nyquist*, *Hunt*, and *Walz* rarely involve the straightforward application of settled law. More typically, adjudicating constitutional cases like these entails the exercise of some (often a significant) measure of judicial volition since these cases are seldom controlled “by the unambiguous language of authoritative documents.”³⁷¹ In the exercise this volition, some, perhaps many, state judges will be inclined to uphold the policies enacted by the governors and legislators whose electoral support such judges need for reelection or whose political support such judges need for reappointment and confirmation. Even if state judges are not affected by the prospects of reelection or reappointment, they are situated in the culture of state government and will thus generally be more predisposed to support the decisions of state legislators and governors than will be federal judges, who are not so situated. Thus, the body of law developed under the U.S. Constitution by the state courts after *Cuno* and *Winn* will, on balance, likely be more state-friendly than a comparable body of decisions crafted by life-tenured federal judges.

Instructive in this context is the literature which assesses whether judges decide cases differently depending upon the method by which such judges are selected (e.g., gubernatorial appointment v. partisan election) or the nature of their tenures (e.g., short v. long-terms of office).³⁷² What emerges from this literature is, in many ways, a

369. See, e.g., ILL. CONST. art. VI, § 10 (“The terms of office of Supreme and Appellate Court Judges shall be ten years; of Circuit Judges, six years; and of Associate Judges, four years.”); ILL. CONST. art. VI, §12(a) (“Judges shall be elected at general or judicial elections . . .”).

370. See, e.g., CONN. CONST. art. V, §2 as amended by CONN. CONST. amend. art. XXV (judges are “nominated by the governor from candidates submitted by the judicial selection commission” and “appointed by the general assembly” “for the term of eight years.”).

371. Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 9 (2006).

372. See, e.g., Stephen J. Choi, G. Mitu Gulati and Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* at 8 (“The literature, taken as a whole, provides evidence that selection and retention institutions influence judicial outcomes—by influencing who becomes a judge, or how judges decide cases, or both. The literature also confirms that judges are influenced by political factors.”).

nuanced picture. Reassuringly, legal norms and doctrines constrain judicial decision-making. A simple story is too simple: In some areas of the law, there is no discernible difference in the decisions of elected and appointed judges.³⁷³

However, in other areas, particularly in matters relating to criminal law and procedure,³⁷⁴ it appears that, holding other variables constant, elected judges decide against criminal defendants more readily than do appointed judges. This may be because there are electoral incentives to appear tough on crime at reelection time or because pro-prosecution candidates are more likely to be selected by the electorate—or both.

Similarly, it is likely that some, perhaps many, state court judges, confronted with taxpayers' challenges to state policies and expenditures under the U.S. Constitution, will, at least at the margins, be more supportive of such policies and expenditures than the federal judiciary would be.

Among the countervailing considerations, elected judges can plausibly conclude that no countermajoritarian difficulty exists when they invalidate state laws on constitutional grounds since these judges have their own electoral mandates from the voters. A state court judge in her final term of office will be unconcerned about reelection or reappointment and consequently will be more likely to strike the tax and expenditure legislation enacted by her contemporaries in the statehouse and the Governor's Mansion.³⁷⁵ Other state court judges may be early in their terms of office and can thus comfortably assume that the incumbent governor and legislators will be out of office when these judges seek reappointment or reelection. Or such judges, early in their respective terms of office, may conclude that, with the passage of time, those incumbents will move on to other issues. Moreover, tax and expenditure policies currently being challenged by state

373. See, e.g., DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY* at 130 (1995) ("family-law policies provide no insight into selection-method impact, revealing no significant correlations.").

374. *Id.* at 131 ("elected judges, directly controlled by popular opinion, weigh in on the side of order, and against freedom, by rejecting a due-process model of criminal justice in favor of a crime-control model."); Paul Brace and Brent D. Boyea, *Judicial Selection Methods and Capital Punishment in the American States* in MATTHEW J. STREB (ed.), *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* (2007) at 197 ("state supreme court judges in capital punishment cases may vote with an eye toward the next election.").

375. Brace and Boyea, *id.* at 194 ("There is a remarkable similarity of the frequency of reversal voting between retiring judges and judges in appointive courts.").

taxpayers today may have been adopted by earlier legislators and governors; the current incumbents might be indifferent to (or hostile towards) these policies and thus be unconcerned about (or supportive of) judicial decisions to strike such policies as unconstitutional. Even the research which concludes that judicial behavior is affected by the method by which judges are selected and by their terms of office suggests that these factors do not alone explain such behavior: Legal norms and doctrines matter.³⁷⁶

However, on balance, state courts, in contrast to federal courts, will be more likely to uphold state taxes and expenditures against constitutional challenge, given the incentives such state judges face to secure reelection or reappointment as well as the culture of state government in which such judges are situated. When constitutional principles and case law give reasonable scope for the exercise of judicial volition, we can expect that, everything else being equal, state court judges will be more inclined than their federal counterparts to uphold state law against the constitutional challenges mounted by state taxpayers.

Cuno and *Winn* will reinforce the state courts' greater tendency to uphold state law by denying U.S. Supreme Court review of state courts' decisions sustaining state taxes and expenditures against challenges under the U.S. Constitution brought by state taxpayers with generalized grievances. Since, absent individualized injury, state taxpayers who lose in the state courts lack standing in the federal courts, the state court decisions on the constitutionality of state taxes and expenditures, unreviewable by the U.S. Supreme Court, will be more state-friendly than would a comparable set of decisions by federal judges.

For the long run, this will discourage some, perhaps many, state taxpayers from bringing such challenges. Thus, the body of case law developed by the state courts post-*Cuno*, post-*Winn* will both be

376. Consider, for example, the research of Professors Brace and Boyea, which demonstrates that elected judges in states with strong popular support for the death penalty "reverse death sentences 20 percent of the time." *Id.* at 192. In contrast, appointed judges in states with strong popular support for the death penalty reverse capital punishment verdicts "29 percent of the time." *Id.* That statistically higher reversal rate can plausibly be attributed to the different incentives faced by elected and appointed judges. On the other hand, elected and appointed judges come to similar decisions in capital cases 91 percent of the time, i.e., the 20 percent of overlapping cases when both types of judges reverse death sentences and the 71 percent of cases when both elected and appointed judges affirm such sentences. Thus, in 91 percent of these capital cases, something explains the similarity of outcomes. Commonly accepted legal norms and doctrine are the best explanation for these similar outcomes.

more state-friendly (since state court judges will be more inclined than federal judges to uphold state policies and expenditures under the U.S. Constitution) and smaller (since fewer state taxpayers will mount challenges, given their reduced odds of success in the state, as opposed to the federal, courts).

For those who prefer a tidy legal system (I am one of these), this prospect is, at first blush, unsettling. On a second take, however, four considerations caution that this outcome, while messy, is potentially manageable.

First, as Chief Justice Rehnquist noted in *ASARCO*, there is already federal constitutional law beyond the direct supervision of the U.S. Supreme Court, namely, the advisory opinions issued by certain state courts on questions of federal constitutional law.³⁷⁷ Second, our constitutional order survives often-lengthy disagreements among the lower courts. Circuit-splits may persist for years before the U.S. Supreme Court resolves them.³⁷⁸

Third, given how few cases the U.S. Supreme Court hears today, that Court's direct supervision of the state courts is already quite attenuated.³⁷⁹ In the tax context, that supervision is attenuated further by the Tax Injunction Act which channels most particularized claims for state and local tax relief into the state courts and thereby precludes consideration of such claims by the lower federal courts, likely to be more responsive to the teachings of the U.S. Supreme Court than will their state counterparts.³⁸⁰

Finally, when state courts declare state tax laws and expenditures unconstitutional, the state, as the injured party, has standing to seek certiorari in the U.S. Supreme Court. When the state courts strike state tax and expenditure policies as unconstitutional and the state does not seek a writ of certiorari, there will often be *ASARCO*-type defendants who benefit from the stricken laws. These defendants will, per *ASARCO*, have particularized injury and thus standing in the U.S. Supreme Court. Consequently, the Court will have the opportunity to develop constitutional principles and decisional law relative to state taxes and expenditures whenever a state court rules

377. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 636–37 (1989).

378. *Id.*

379. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 *DUKE L.J.* 1439, 1445–50 (2009).

380. U.S.C. § 1341 (“The district 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.”). See *Hibbs v. Winn*, 542 U.S. 88 (2004).

against the state and a beneficiary of the stricken state policy or the state itself asks the U.S. Supreme Court to review the state court's decision under the U.S. Constitution. To create a thicker network of cases constraining the state courts, the U.S. Supreme Court can elect to hear more of these cases.

As a tactical matter, the state courts might become adept at denying intervening defendant status to *ASARCO*-type parties to reduce the (already small) chance that the U.S. Supreme Court will be the final adjudicator. But, that prospect, for now at least, seems tenuous. In short, as to state taxpayers' constitutional challenges to state taxes and expenditures, the post-*Cuno*, post-*Winn* world will be messy but not unmanageably so.

Instructive in this context is *Freedom From Religion Foundation v. Geithner*, which challenged under the federal and California constitutions the parsonage allowance exclusions of the federal and California income taxes.³⁸¹ *FFRF* was brought by individuals who are federal and California taxpayers and was filed in the U.S. District Court prior to the U.S. Supreme Court's decision in *Winn*. The *FFRF* taxpayers do not assert any individualized injury to themselves. They thus now lack standing to continue this litigation in the federal courts. However, these taxpayers have a strong claim to standing under California law for their challenge to the California version of the parsonage allowance, a challenge premised both on the Establishment Clause of the U.S. Constitution and the equivalent provisions of the California Constitution.

On the merits, the claim of the *FFRF* taxpayer/plaintiffs that the parsonage allowance unconstitutionally entangles church and state is unpersuasive since either alternative, i.e., taxing parsonage allowances or not, enmeshes church and state.³⁸² For present purposes, however, the relevant issue is the standing of the *FFRF* taxpayer/plaintiffs to continue their litigation in the California state courts now that *Winn* denies state taxpayers standing in the federal courts. It appears that these plaintiff/taxpayers have state court

381. No. 2:09-CV-02894 (E.D. Cal., Sacramento Div., Oct. 16, 2009), 2009 TNT 201-10. See also *Freedom from Religion Foundation, Inc. v. Geithner*, 715 F. Supp. 2d 1051 (E.D. Cal. 2010) (holding pre-*Winn* that taxpayers have standing).

382. Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause?* 33 *CARDOZO L. REV.* 1633 (2012). However, while I conclude that the parsonage allowance is constitutional, I also conclude that it is unwise as a matter of tax policy since recipients of the allowance have the cash to pay the income tax and there is no valuation issue as there is with housing provided in-kind.

standing to mount a “taxpayer action . . . against the State”³⁸³ or to seek a writ of mandamus as persons who are “beneficially interested”³⁸⁴ in the exclusions provided by the California income tax.

Suppose, then, that the California Supreme Court ultimately holds (as I think it should) that the parsonage allowance does not violate the First Amendment’s Establishment Clause of the U.S. Constitution.³⁸⁵ Such a decision will be the terminus of the *FFRF* litigation since the *FFRF* taxpayer/plaintiffs, lacking individualized harm, lack standing in the federal courts and thus cannot obtain a writ of certiorari in the U.S. Supreme Court.

Suppose that, instead, the Golden State’s Supreme Court strikes California’s income tax exclusion for parsonage allowances under the First Amendment of the U.S. Constitution. In that case, the state, as an injured party, could seek a writ of certiorari to salvage its tax statute. However, the current officers of California’s executive branch might instead prefer to accept the court’s decision and collect the income tax revenues which result from the court’s invalidation of the state’s parsonage allowance exclusion. In the federal courts, clergy benefitting from the allowance were denied status in the *FFRF* litigation as intervening defendants.³⁸⁶ If that remains the case and if the current officeholders were to accept a decision of the California Supreme Court nullifying the Golden State’s parsonage allowance exclusion under the First Amendment, there would be no *ASARCO*-type defendant to seek certiorari in the U.S. Supreme Court. Thus, the U.S. Supreme Court could not review this First Amendment decision of the California court.

383. *Vasquez v. California*, 105 Cal App 4th 849, 852 (2003). *See also id.* at 854 (“The individual citizen must be able to take the initiative through taxpayers’ suits to keep government accountable on the state as well as on the local level.”) (internal citations and quotations omitted).

384. CAL. CIV. PROC. CODE § 1086.

385. This issue only need be addressed if the California Supreme Court sustains the parsonage allowance against challenge under the equivalent provisions of the California Constitution. *See* CAL. CONST. art I, §4 (“The Legislature shall make no law respecting an establishment of religion.”) and art. XVI, §5 (“Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall even make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose . . .”).

386. *See Freedom from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836 (9th Cir. 2011) (affirming in part and reversing in part with respect to clergyman’s motion to intervene).

For those who prefer fastidious outcomes and processes, this potentially messy result would be disconcerting. However, this possibility, while untidy, is manageable.

VII. Conclusion

Cuno and *Winn* definitively end the broader standing possibilities raised by *Flast* and confirm that, in the absence of individualized harm, state taxpayers lack standing in the federal courts to challenge state expenditures and taxes. *Frothingham*, *Doremus* and their no-taxpayer-standing rule again control the Court's jurisprudence. Because the states generally have more liberal taxpayer standing rules than do the federal courts, *Cuno* and *Winn* will not terminate taxpayers' constitutional challenges to state taxes and expenditures, but will instead channel such challenges from the federal courts (where taxpayers do not have standing) to the state courts (where they do). In the aftermath of *Cuno* and *Winn*, municipal taxpayer standing in the federal courts is an historic anomaly, given the now near-absolute bar in the federal courts on state taxpayer standing. As a result of the channeling caused by *Cuno* and *Winn*, there will in the future develop in the state courts a body of law under the U.S. Constitution governing state taxes and outlays.

This body of law will be beyond the review of the U.S. Supreme Court because of that Court's rejection of state taxpayer standing in the federal courts. State court judges will be more inclined than their federal counterparts to uphold state tax and expenditure policies against constitutional challenge. Consequently, this body of constitutional law developed by the state courts, lacking direct supervision by the U.S. Supreme Court, will be more state-friendly than would a comparable corpus of cases decided by federal judges under the U.S. Constitution—at least at the margins, perhaps more fundamentally. This outcome, while untidy, is potentially manageable.