I. INTRODUCTION

The federal judicial power is defined by Article III of the Constitution, and is limited to the resolution of “cases” and “controversies.”\(^1\) These words act to limit the business of the federal courts to questions presented in an adversary context and therefore capable of resolution through the judicial process.\(^2\) Additionally, these words define the role assigned to the judiciary in a tripartite allocation of power and act to preserve the separation of powers by preventing the federal courts from intruding into areas assigned to the other branches of government.\(^3\)

Justiciability is the legal term of art employed to give expression to the limitations placed upon federal courts by the case-and-controversy doctrine.\(^4\) No justiciable controversy is presented when there is no standing to maintain an action.\(^5\) Standing is the determination of whether a specific individual is the appropriate party to bring suit to a federal court for adjudication.\(^6\) In order to establish standing a plaintiff must show that: (1) an injury-in-fact occurred; (2) there is a causal connection between the injury and the defendant’s conduct; and (3) a favorable decision is likely to redress the injury.\(^7\) The “gist of the question of standing” is whether the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”\(^8\) A proper party is required in order to prevent the federal courts from being asked to decide “ill-defined controversies over constitutional issues”\(^9\) or a case which is of “a hypothetical or abstract character.”\(^10\)

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2. Id. at 95.
3. Id.
4. Id.
5. Id.
7. Id. at 63.
The Supreme Court of the United States has established that an individual’s status as a taxpayer does not generally satisfy the standing requirements, reasoning that it is a “fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm.”\textsuperscript{11} However, in \textit{Flast v. Cohen}, the Court carved out an exception to the general prohibition on taxpayer standing that rejects the “generalized grievances” of taxpayers.\textsuperscript{12} \textit{Flast} upheld taxpayer standing to challenge the constitutionality of an expenditure of federal funds alleged to have violated the Establishment Clause because, under the test presented in the case, the appellant’s complaint contained sufficient allegations to invoke a federal court’s jurisdiction.\textsuperscript{13} Despite \textit{Flast}’s efforts to open the doors of standing to taxpayer plaintiffs, the force of \textit{Flast}’s exception has been recently diminished.

In \textit{Arizona Christian School Tuition Organization v. Winn},\textsuperscript{14} the Supreme Court was again presented with the issue of taxpayer standing.\textsuperscript{15} Specifically, the Court examined whether Respondents (a group of Arizona taxpayers) satisfied the requirements of standing under Article III to obtain a determination on the merits in federal court as to whether Arizona’s tax credit for contributions to School Tuition Organizations (“STOs”), which support religious schools, was a violation of the Establishment Clause principles under the First and Fourteenth Amendments.\textsuperscript{16} Relying almost solely on \textit{Flast}, the majority concluded that (absent special circumstances) standing cannot be based on a respondent’s mere status as a taxpayer, thereby forcing taxpayers to rely solely on the exception provided by \textit{Flast}.\textsuperscript{17} Consequently, the Court reversed the Court of Appeal’s decision, holding that Respondents were not permitted to take advantage of \textit{Flast}’s narrow exception to the general rule against taxpayer standing.\textsuperscript{18} The Court reasoned that Respondents had not adequately alleged an injury for standing purposes.\textsuperscript{19} Further, the Court rejected the idea that, for purposes of the \textit{Flast} exception, a tax credit was a governmental expenditure amounting to a direct appropriation.\textsuperscript{20}

\begin{flushleft}
12. \textit{Flast}, 392 U.S. at 105-06.
13. \textit{Id.}
15. \textit{Id. at} 1442.
16. \textit{Id. at} 1440.
17. \textit{Id.}
18. \textit{Id.}
20. \textit{Id.}
\end{flushleft}
Unfortunately, the majority in Winn failed to use this opportunity not only to provide clarity to the hazy issue of standing, but also to extend Flast to an Establishment Clause challenge to a tax credit that arguably operates in the same economic manner as a direct appropriation or subsidy. The majority’s distinction between tax credits and appropriations clearly threatens to abolish all instances in which a taxpayer may challenge state funding of religion, and will most certainly keep courts, citizens, attorneys, and scholars in the heavy fog that surrounds the issue of standing. Additionally, Winn prescribes a way in which the government may fund religion without the threat of a taxpayer challenge. As a consequence, the value and force of the Establishment Clause, as well as its promise of religious neutrality, will likely be diminished.

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

Section 43-1089 of the Arizona Tax Code provides dollar-for-dollar tax credits for contributions to STOs. With this tax credit, Arizonans are given the option to pay the full amount of their tax liability to the State or to subtract up to $500 per person from their tax bill by contributing that sum to an STO. STOs use the contributions to grant scholarships to students attending private schools, many of which are religious.

Respondents, a group of Arizona taxpayers, challenged section 43-1089 as a violation of Establishment Clause principles under the First and Fourteenth Amendments. The First Amendment prohibits Congress from making any law “respecting the establishment of religion or prohibiting the free exercise thereof.” The Establishment Clause of the First Amendment means that neither a state nor the federal government may establish a church, may pass laws that aid any religion, or prefer one religion over another. Generally speaking, the purpose of the Establishment Clause is to separate the church and State.

Challengers of the Arizona tax credit

23. Id.
24. Id. at 1451.
25. Id. at 1440 (majority opinion).
26. Id.
27. Winn, 131 S. Ct. at 1440.
28. Id. at 1440, 1450 (Kagan, J., dissenting).
29. U.S. CONST. amend. I.
31. Id.
alleged that the provision violated this basic constitutional principle of the Establishment Clause.32

Respondents sought intervention from the federal judiciary after the Arizona Supreme Court rejected a similar taxpayers’ Establishment Clause claim on the merits.33 Such plaintiffs can demonstrate standing in Establishment Clause cases based on direct harm of (what is claimed to be) an establishment of religion, or on the basis that they have incurred a cost or have been denied a benefit because of their religion.34 Such costs and benefits could result from alleged discrimination in the tax code when availability of a tax exemption is conditioned on a religious affiliation.35

Respondents initiated the current action in the United Stated District Court for the District of Arizona on February 15, 2000.36 The Director of the Arizona Department of Revenue was initially named as the defendant.37 Respondents claimed that section 43-1089 violated the Establishment Clause of the First Amendment, as incorporated against the States by the Fourteenth Amendment.38 Respondents further alleged that section 43-1089 allowed STOs to use revenue generated from state income tax to pay tuition for students attending religious schools, some of which discriminate on the grounds of religion in selecting students to attend.39 Respondents sought an injunction against the issuance of section 43-1089 tax credits for contributions to religious STOs (among other forms of relief).40 The District Court dismissed the suit, reasoning that it was jurisdictionally barred by the Tax Injunction Act.41 The United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court.42 The Supreme Court of the United States, in *Hibbs v. Winn*,43 affirmed the decision of the Court of Appeals.44

On remand, The Arizona Christian School Tuition Organization and other interested parties joined in the suit.45 The United States District Court

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32. *Winn*, 131 S. Ct. at 1440 (majority opinion).
34. *Winn*, 131 S. Ct. at 1440 (citing School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224 n.9 (1963)).
35. *Id.* (citing Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989) (plurality opinion)).
36. *Id.* at 1441; *Winn v. Hibbs*, 361 F. Supp. 2d at 1118.
38. *Id.*
42. *Winn v. Killian*, 307 F.3d 1011, 1020 (9th Cir. 2002).
44. *Id.* at 112.
45. *Winn*, 131 S. Ct. at 1441.
for the District of Arizona dismissed the suit for failure to state a claim.\textsuperscript{46} The United States Court of Appeals for the Ninth Circuit again reversed the decision of the District Court, holding that Respondents had standing under \textit{Flast} and had stated a claim that section 43-1089 violated the Establishment Clause.\textsuperscript{47} The Court of Appeals concluded that the plaintiffs’ complaint, viewed in the light most favorable to the plaintiffs, sufficiently alleged that the Arizona tax credit “lack[ed] religious neutrality and true private choice in making scholarships available to parents.”\textsuperscript{48} The Court of Appeals reasoned that “[a]lthough scholarship aid is allocated partially through the individual choices of Arizona taxpayers, overall the program in practice ‘carries with it the imprimatur of government endorsement.’”\textsuperscript{49} Subsequently, the full Court of Appeals denied en banc review.\textsuperscript{50} The Supreme Court of the United States again granted certiorari.\textsuperscript{51}

III. THE COURT’S DECISION AND RATIONALE

A. The Majority Opinion

Justice Kennedy, delivering the majority opinion of the Court, first focused on the power vested in the federal judiciary.\textsuperscript{52} Article III of the Constitution vests in the federal judiciary the “power” to resolve “cases” or “controversies,” rather than questions and issues.\textsuperscript{53} The majority noted that this language restricts the power of the federal judiciary “to the traditional role of the Anglo-American courts,” which focused on the need to redress injuries resulting from specific disputes.\textsuperscript{54} Thus, a plaintiff who seeks redress from the federal judiciary must allege more than just the “generalized interest of all citizens in constitutional governance.”\textsuperscript{55} In doing so, the majority adverted to its commitment to observe the power and role assigned to the federal judiciary.\textsuperscript{56}

\begin{itemize}
  \item[46.] Winn v. Hibbs, 361 F. Supp. 2d at 1123.
  \item[48.] Id.
  \item[49.] Id. (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002)).
  \item[50.] Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649 (9th Cir. 2009).
  \item[52.] Winn, 131 S. Ct. at 1441.
  \item[53.] Id.
  \item[54.] Id. (quoting Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148 (2009)).
  \item[55.] Id. at 1441-42 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974)).
  \item[56.] Id. at 1442 (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982)).
\end{itemize}
Next, the majority addressed standing.\textsuperscript{57} Pursuant to the power vested in the federal judiciary, in order to state a “case” or “controversy” under Article III, a plaintiff must establish standing.\textsuperscript{58} The majority listed the minimum constitutional requirements for standing, which were laid out in\textit{Lujan v. Defenders of Wildlife}\textsuperscript{59, 60}:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a casual connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”\textsuperscript{61}

Requiring a particular injury means “that the injury must affect the plaintiff in a personal and individual way.”\textsuperscript{62}

The majority then turned to the issue at hand: whether Respondents satisfied the requisite elements of standing.\textsuperscript{63} The majority concluded that Respondents did not for two reasons.\textsuperscript{64} First, the majority rejected Respondents’ argument that their status as Arizona taxpayers gave them standing to challenge the STO tax credit.\textsuperscript{65} Second, the Court concluded that Respondents’ suit did not fall within the exception to the rule against taxpayer standing established in\textit{Flast}.\textsuperscript{66}

With regard to its first reason for its holding, the majority addressed the rule against taxpayer standing, noting that the Court had previously rejected the general proposition that a taxpayer has a “continuing, legally cognizable interest in ensuring that those funds are not\textit{ used} by the Government in a way that violates the Constitution.”\textsuperscript{67} The majority relied on two cases,
Frothingham v. Mellon\textsuperscript{68} and Doremus v. Board of Education of Hawthorne\textsuperscript{69} as the “doctrinal basis” for the rule against taxpayer standing.\textsuperscript{70} In both cases, the Court determined that plaintiffs lacked standing because the taxpayers could not prove any direct injury as a result of the particular statute.\textsuperscript{71}

The majority found that both Frothingham and Doremus noted the importance of a direct injury.\textsuperscript{72} Frothingham and Doremus stated that:

“The party who invokes the power [of the federal courts] 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, and not merely that he suffers in some indefinite way in common with people generally.”\textsuperscript{73}

The majority then focused on the notion that claims of taxpayer standing rest on unjustifiable economic and political speculation.\textsuperscript{74} The conclusion that a governmental expenditure or tax benefit injunction “would result in any actual tax relief” for a taxpayer-plaintiff would be “pure speculation.”\textsuperscript{75} The Court noted that finding injury requires speculation “that elected officials will increase a taxpayer-plaintiff’s tax bill to make up a deficit.”\textsuperscript{76} Additionally, finding redressability requires speculation that if the remedy that the taxpayers seek is allowed, “legislators will pass along the supposed increased revenue in the form of tax reductions.”\textsuperscript{77}

The majority then applied these conclusions to the case at hand.\textsuperscript{78} Although the cost of education would make up a significant part of the state budget, the STO program could relieve the burden placed on Arizona’s public schools by encouraging attendance and scholarships at private schools.\textsuperscript{79} However, the Court recognized that even if the STO tax credit produces an adverse effect on Arizona’s annual budget, problems would remain.\textsuperscript{80} First, to find a particular injury would require speculation that

\begin{itemize}
\item 68. 262 U.S. 447 (1923).
\item 69. 342 U.S. 429 (1952).
\item 70. Winn, 131 S. Ct. at 1443.
\item 71. See Frothingham v. Mellon, 262 U.S. at 480; see also Doremus v. Board of Ed. of Hawthorne, 342 U.S. at 434-35.
\item 72. See Winn, 131 S. Ct. at 1443.
\item 73. Doremus, 342 U.S. at 434 (quoting Frothingham, 262 U.S. at 488).
\item 74. Winn, 131 S. Ct. 1443.
\item 75. Id. at 1444 (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 614 (1989)).
\item 76. Id. (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006)).
\item 77. Id. (citing DaimlerChrysler, 547 U.S. at 344).
\item 78. Id.
\item 79. Winn, 131 S. Ct. 1444.
\item 80. Id.
\end{itemize}
Arizona lawmakers react to revenue shortfalls by raising Respondents’ tax liability.\footnote{Id. (citing \textit{DaimlerChrysler}, 547 U.S. at 344).} Second, a finding of causation would depend on the additional assumption that any tax increase would be linked to the STO tax credits.\footnote{Id.} Thus, the majority found that Respondents did not establish that an injunction against the application of the STO tax credit would prompt Arizona legislators to “‘pass along the supposed increased revenue in the form of tax reductions.’”\footnote{Id. (quoting \textit{DaimlerChrysler}, 547 U.S. at 344).} The majority found that Respondents’ interest was of a general character, rather than particular to certain persons.\footnote{\textit{Winn}, 131 S. Ct. at 1444.} As such, the majority concluded that the rule against taxpayer standing must apply to Respondents’ suit, forcing them to rely solely on the exception to the rule established by \textit{Flast}.\footnote{Id. at 1445.}

Next, with regard to its second reason for its holding, the majority addressed the narrow exception to the rule against taxpayer standing laid out in \textit{Flast} and concluded that Respondents’ suit did not fall under the exception.\footnote{See \textit{id.}} The majority dissected the \textit{Flast} opinion, concluding that “the STO tax credit is not tantamount to a religious tax . . . and does not visit the injury identified in \textit{Flast}.”\footnote{See \textit{id.} at 1445-47.} In \textit{Flast}, the taxpayer plaintiffs had standing to assert that a statute (which allowed expenditures of federal funds to support the purchase of textbooks and other materials for use in religious schools) violated the Establishment Clause.\footnote{Id. at 1445.} To qualify for the exception and have standing under \textit{Flast}, a taxpayer must prove two conditions: (1) a “‘logical link’ between the plaintiff’s taxpayer status ‘and the type of legislative enactment attacked’ . . . [and (2)] ‘a nexus’ between the plaintiff’s taxpayer status and the ‘precise nature of the constitutional infringement alleged.’”\footnote{\textit{Winn}, 131 S. Ct. at 1445 (quoting \textit{Flast}, 392 U.S. at 102).} Considering the two conditions together, “individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of ‘the taxing and spending power,’ their property is transferred through the Government’s Treasury to a sectarian entity.”\footnote{Id. at 1445-46 (quoting \textit{Flast}, 392 U.S. at 105-106).} \textit{Flast} found that this type of injury was sufficient to establish standing because it was beyond a “‘generalized grievanc[e] about the conduct of the government.’”\footnote{Id. at 1446 (quoting \textit{Flast}, 392 U.S. at 106).}
The majority expressly rejected Respondents’ argument that the foregoing principles in *Flast* demonstrate their standing to challenge the STO tax credit because it was, for purposes of *Flast*, best described as a governmental expenditure.92 The majority conceded that tax credits and governmental expenditures can demonstrate similar economic consequences, but quickly noted that not both implicate individual taxpayers in sectarian activities.93 The majority made this distinction by pointing out that a dissenter whose tax dollars are “‘extracted and spent’” is aware that he has been made to contribute to an establishment in violation of his conscience in some way, albeit small.94 Thus, the taxpayer’s connection with the establishment does not depend on economic speculation.95 Conversely, any financial injury remains speculative when the government refuses to impose a tax because there is no such connection between dissenting taxpayers and the alleged establishment.96 The majority concluded that the STO tax credit is unlike that which the Framers of the Establishment Clause sought to prevent because it does not “‘extract[ed] and spen[d]’” a conscientious dissenter’s funds in service of an establishment, or “‘force a citizen to contribute’” to a sectarian organization.97 Rather, the majority opined that Respondents and other Arizona taxpayers are free to pay their taxes without contributing to any STOs.98 The majority concluded its standing analysis by expressing that Respondents failed to allege an injury, as required to establish standing generally, and failed to meet the *Flast* exception.99

Nevertheless, the majority continued to support its final conclusion.100 The majority noted that even if Respondents had established an injury, the requirements of causation and redressability would not be satisfied.101 First, the majority addressed the causal connection between any injury dissenters may suffer and the government.102 The majority concluded that any injury of the dissenters would not be fairly traceable to the government because the STO tax credit system is employed by private action and with no state intervention.103 The situation would be different, as in *Flast*, if

92. *Id.* at 1447.
93. *Id*.
95. *Id*.
96. *Id.* (citing *DaimlerChrysler Corp.*, 547 U.S. at 348-49).
97. *Id.* (quoting *Flast*, 392 U.S. at 103).
98. *Id*.
100. See *id*.
101. *Id*.
102. See *id.* at 1447-48.
103. *Id.* at 1448.
governmental choices were responsible for the transfer of wealth when the government collects and spends taxpayer money.\textsuperscript{104} Second, the majority addressed the likelihood that a favorable decision for Respondents would redress the alleged injury.\textsuperscript{105} The majority conceded that an injunction would likely reduce contributions to STOs; however, such a remedy would not affect noncontributing taxpayers or their tax payments.\textsuperscript{106} The majority therefore concluded that any injury suffered by Respondents would not be redressed through an injunction.\textsuperscript{107}

The majority next responded to Respondents’ contrary position, sparked by their resistance to the majority’s conclusion.\textsuperscript{108} Respondents suggested that Arizonans benefiting from the tax credit are, in effect, paying their state income tax to STOs.\textsuperscript{109} The majority rejected Respondents’ position as wrongly assuming that all income is government property, even if that income has not come into the tax collector’s hands.\textsuperscript{110} The majority conceded that this might seem at odds with other Supreme Court decisions that reached the merits in Establishment Clause cases involving tax benefits as opposed to government expenditures.\textsuperscript{111} However, the majority distinguished those cases by noting that the previous cases did not mention standing and therefore are not contrary to the present conclusion, as they do not stand for the proposition that no jurisdictional defects exist.\textsuperscript{112}

The majority concluded by expressing that the present suit serves as an illustration of the principle that courts must take more care to insist on the formal rules of standing.\textsuperscript{113} Any less care would ultimately undermine the public’s confidence in the “neutrality and integrity of the Judiciary.”\textsuperscript{114} The Court reiterated, “[t]o alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III.”\textsuperscript{115} In a 5-4 split, the Court reversed the judgment of the Court of Appeals.\textsuperscript{116}

\begin{itemize}
\item \textsuperscript{104} Winn, 131 S. Ct. at 1447-48.
\item \textsuperscript{105} See id. at 1448.
\item \textsuperscript{106} Id. at 1448.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Winn, 131 S. Ct. at 1448.
\item \textsuperscript{110} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id. at 1449.
\item \textsuperscript{114} Winn, 131 S. Ct. at 1449.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} See id.
\end{itemize}
B. Concurring Opinion by Justice Scalia

In a brief concurring opinion, Justice Scalia\textsuperscript{117} noted that the majority and dissent unnecessarily struggle with whether Respondents’ challenge to the STO tax credit falls within \textit{Flast}‘s narrow exception.\textsuperscript{118} Justice Scalia opined that \textit{Flast} is “an anomaly in our jurisprudence,” and conflicts with the Article III restrictions on federal judicial power.\textsuperscript{119} Further, he stated that he “would repudiate that misguided decision and enforce the Constitution,” thereby eliminating the disparity between the majority and dissent.\textsuperscript{120} Justice Scalia concluded by agreeing with the majority, reasoning that the majority found that Respondents lacked standing on principled grounds.\textsuperscript{121}

C. Dissenting Opinion by Justice Kagan

Justice Kagan\textsuperscript{122} departed from the majority on two major points.\textsuperscript{123} First, she disagreed with the majority’s break “from almost half a century” of precedent in which taxpayer litigants, like Respondents, have obtained judicial review of Establishment Clause claims.\textsuperscript{124} Second, she disagreed with the majority’s “arbitrary” distinction between appropriations and tax credits (or “tax expenditures”).\textsuperscript{125}

Justice Kagan commenced her dissenting opinion by recognizing the consequences of the majority’s decision.\textsuperscript{126} She observed the similarity that cash grants and targeted tax breaks share in accomplishing the same government objective—to provide financial support to select individuals and organizations.\textsuperscript{127} In either circumstance, the government is funding religious activity.\textsuperscript{128} Distinguishing the two “threatens to eliminate all occasions for a taxpayer to contest the government’s monetary support of religion” and “enables the government to end-run \textit{Flast}’s guarantee of access to the Judiciary.”\textsuperscript{129} She suggested that in order to prevent taxpayers

\begin{itemize}
  \item \textsuperscript{117} Justice Scalia was joined by Justice Thomas in his concurring opinion.
  \item \textsuperscript{118} \textit{Winn}, 131 S. Ct. at 1449-50 (Scalia, J., concurring).
  \item \textsuperscript{119} \textit{Id.} at 1450.
  \item \textsuperscript{120} \textit{Id.} (citing \textit{Hein}, 551 U.S. at 618).
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{122} Justice Kagan was joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor in her dissenting opinion.
  \item \textsuperscript{123} \textit{Winn}, 131 S. Ct. at 1450 (Kagan, J., dissenting).
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} \textit{Id.}
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} \textit{Winn}, 131 S. Ct. at 1450 (Kagan, J., dissenting).
  \item \textsuperscript{129} \textit{Id.}
\end{itemize}
from challenging state funding of religion in the future, the government will simply subsidize through the tax system.\textsuperscript{130} Consequently, that result will “diminish the Establishment Clause’s force and meaning.”\textsuperscript{131}

The dissent sought to refocus the attention on what “this case is instead about[:]"\textsuperscript{132} Flast’s exception to the rule against taxpayers standing.\textsuperscript{132} She believed that Respondents satisfied both Flast conditions, as “they attack a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution’s taxing and spending clause (Flast nexus, part 1),” and “they allege that this provision violates the Establishment Clause (Flast nexus, part 2).”\textsuperscript{133} She suggested that finding standing in Respondents’ case is as simple as applying Flast.\textsuperscript{134} She concluded this portion of her dissenting opinion by expressing that she would have affirmed the Court of Appeals’ decision.\textsuperscript{135}

Next, the dissent discussed the most significant flaws in the majority’s conclusion and reasoning. The majority indicated that a taxpayer only suffers an injury (and therefore has standing to challenge state subsidies to religion) only when taxpayer funds are appropriated, not when they are a result of a tax credit.\textsuperscript{136} Justice Kagan expressed three rationales for disagreeing with the majority’s conclusion.\textsuperscript{137} First, she noted that this distinction between an appropriation and a tax credit was not supported by case law.\textsuperscript{138} Courts in the decades since Flast have not made this distinction.\textsuperscript{139} Second, she suggested that, for purposes of Flast, taxpayers experience the same injury whether government subsidies of religion are in the form of a cash grant or tax expenditure.\textsuperscript{140} Finally, she noted the majority’s only rationale for this distinction was that grants, not tax expenditures, come from a dissenting taxpayer’s personal wallet.\textsuperscript{141}

With regard to her first major contention, Justice Kagan focused on the majority’s departure from established precedent.\textsuperscript{142} She stressed that the Court had previously faced “the identical situation five times,” and had consistently resolved the cases without questioning the plaintiffs’
standing. Additionally, she noted fourteen cases in which lower federal courts adjudicated taxpayer challenges to tax credits that allegedly violated the Establishment Clause. The dissent then closely considered the five cases in which the Court considered taxpayer suits alleging such a violation. Justice Kagan noted that none of the five cases questioned the litigants’ standing. She then turned to a statement made by the Solicitor General during oral arguments in which he conceded that, “under the Federal Government’s—and now the Court’s—view of taxpayer standing, each of these five cases should have been dismissed for lack of jurisdiction.” She opined that these five “decisions on their face reflect the Court’s recognition of what gave the plaintiffs standing; in each, [the Court] specifically described the plaintiffs as taxpayers who challenged the use of the tax system to fund religious activities.” The dissent criticized the majority for “shrugging off” what were later referred to as “exemplars of jurisdiction” “because they did not discuss what was taken as obvious”—the Court “considered and decided all of these cases because [it] thought taxpayer standing existed.”

With regard to her second major contention, Justice Kagan addressed what she believed was an unnecessary distinction between appropriations and tax credits. Previous taxpayer standing cases failed to make this distinction because it is “one in search of a difference.” She employed an example to compare taxpayers’ reaction to such a distinction: if the government decided to bail out insolvent banks by paying them hundreds of billions of dollars, would the millions of dissenting taxpayers be calmed if Congress allowed the banks to subtract an amount from their tax bill rather than give the banks the same amount of money via appropriations? She suggested that most taxpayers would surely respond by recognizing that the “subsidy is a subsidy” one way or another. The Court has even recognized in several cases that targeted tax breaks are often “economically

144. *Id.* at 1453.
145. *Id.*
146. *Id.* at 1454.
147. *Id.*
149. *Id.* at 1455.
150. *See id.*
151. *Id.*
152. *Id.*
154. *Id.* at 1455-56.
and functionally indistinguishable from a direct monetary subsidy,”155 and “can be viewed as a form of government spending.”156

Consequently, Justice Kagan opined that taxpayers challenging tax expenditures should be permitted to allege the same harm because both tax expenditures and appropriations result in the same bottom line.157 She noted that the key is “[w]henever taxpayers have standing under Flast to challenge an appropriation, they should also have standing to contest a tax expenditure.”158 In this case, “form prevails over substance, and differences that make no difference determine access to the Judiciary.”159

Finally, the dissent addressed the sole reason that the majority distinguished tax expenditures from appropriations.160 The majority reasoned that a taxpayer suffers an injury, for purposes of standing, only when the government “extracts and spends” the taxpayer’s own tax dollars to aid religion.161 Justice Kagan noted that the majority relied on Flast to support this “extraction” requirement by declaring that the three words, “extrac[t] and spen[di]” severely limit the decision’s scope.162 She restated the holding and primary reasoning of Flast to demonstrate that Flast actually “cuts against the majority’s position.”163 Flast held that “‘a taxpayer will have standing consistent with Article III to invoke federal judicial power when he allege[s] that congressional action under the taxing and spending clause is in derogation of’ the Establishment Clause.”164 She noted that there is nothing in this “straightforward sentence” that suggests that taxpayers are limited to challenging only when the government directly appropriates their tax dollars to religion.165 Moreover, she noted that Flast justified its holding by stating that “‘one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.’”166 Justice Kagan opined that the “evil arises even if the specific tax dollars that the government uses do not

155. Id. at 1456 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 859 (1995) (Thomas, J., concurring)).
156. Id. (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 589-90 n.22 (1997)).
157. Id. at 1457.
159. Id. at 1458.
160. See id. (citing majority opinion).
161. Id. (Kagan, J., dissenting) (quoting id. at 1447 (majority opinion)).
162. Id. at 1459 (Kagan, J., dissenting).
164. Id. (quoting Flast, 392 U.S. at 105-06).
165. Id.
166. Id. at 1459 (quoting Flast, 392 U.S. at 103).
come from citizens who object to the preference.”  Additionally, she observed that *Flast’s* two-part nexus test contains no indication of an “extraction” requirement.

The dissent noted that the majority’s decision is not only at odds with *Flast*, but also previous cases baring taxpayer standing generally. Additionally, the majority’s “extraction” requirement fails to measure what matters under the Establishment Clause. For example, if the government in this instance kept “yes” money from taxpayers separate from “no” money, and then subsidized religious activity using only the “yes” money, she noted that the majority’s analysis suggests that no taxpayer would have standing to allege an Establishment Clause violation because the funds would not have been “extracted from a citizen and handed to a religious institution in violation of the citizen’s conscience.” However, the Court has never suggested that a state may prevent legal challenges to subsidies of religious organizations by obtaining the consent of some of the taxpayers.

Justice Kagan concluded her dissenting opinion by suggesting that the majority’s decision “devastates” taxpayer standing in Establishment Clause cases because the Court lays out a roadmap to any government that wishes to insulate its financing of religion from legal challenge. She suggested that the government simply must “[s]tructure the funding as a tax expenditure, and *Flast* will not stand in the way.” Finally, this decision “damages one of this Nation’s defining constitutional commitments[;]” that “Congress shall make no law respecting an establishment of religion.”

IV. ANALYSIS

A. Introduction

In *Flast*, the Supreme Court of the United States opened the doors of standing to taxpayer plaintiffs alleging statutory violations of the Establishment Clause. However, *Winn* has (in essence) locked the doors to standing once again, leaving the only key to group of taxpayers whose

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167. *Id.*
168. *Id.* at 1459 (Kagan, J., dissenting).
169. *Id.* at 1460
170. *Id.*
171. *Id.* at 1461.
172. *Id.*
174. *Id.*
175. *Id.*
injuries are indistinguishable from those who have been permanently locked out. The dissent properly criticized the majority for this drawback.

Winn failed to provide much needed clarity and consistency to the shifting issue of taxpayer standing. The Court, having previously recognized that tax credits and direct appropriations have the same economic result, was poised to extend Flast and hold that a taxpayer plaintiff has standing to challenge a statute alleged to violate the Establishment Clause regardless of whether the funding for religious activities occurs through direct appropriations or tax credits. By failing to give the economic equivalence of a tax credit and direct appropriation a legal effect, the majority has betrayed the specific evil that the Framers of the Establishment Clause sought to prevent—“that the taxing and spending power would be used to favor one religion over another or to support religion in general.”\textsuperscript{177} Winn demonstrates the majority’s willingness to promote only the prevention of governmental spending power to promote religion. Additionally, the majority’s reliance on Flast is undercut by a simple restatement of the Flast test and holding. This analysis focuses on: (1) the weaknesses of the majority’s decision in Winn, and (2) how Winn will affect the future of taxpayer standing to challenge Establishment Clause violations.

\textbf{B. Discussion}

\textit{1. Lack of Consistency}

The Court has expressed that the essence of standing is “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”\textsuperscript{178} However, despite the ability to clearly define standing, judicial behavior with regard to decisions on standing has been characterized as “erratic, even bizarre.”\textsuperscript{179} The Court itself has observed, “[w]e need not mince words when we say that the concept of Art. III standing has not been defined with complete consistency in all of the various cases decided by this Court.”\textsuperscript{180}

Some believe that this broad scope of inconsistency is a result of the Court’s manipulation of the standing rules based on its views of the merits

\begin{itemize}
  \item \textsuperscript{177} \textit{Id.} at 103 (emphasis added).
  \item \textsuperscript{178} CHEMERINSKY, supra note 6, at 60 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).
  \item \textsuperscript{179} \textit{Id.} (quoting JOSEPH Vining, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 1 (1978)).
  \item \textsuperscript{180} \textit{Id.} n.3 (quoting Valley Forge v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982)).
\end{itemize}
of particular cases. The Court itself has conceded that constitutional avoidance plays a role in standing, as the “standing inquiry is especially rigorous [because of separation of power concerns] when reaching the merits of a dispute would force [it] to decide whether an action taken . . . was unconstitutional.” However, “the Court . . . in Winn did not leave the Establishment Clause issue to be resolved another day.” Rather, the Court has taken a more extreme route by essentially insulating this “Establishment Clause [issue] from being judicially addressed by concluding that there was no government action . . . [.]” but rather only private action.

Justice Kagan, in her dissenting opinion, noted that the majority’s decision “breaks from [almost a half century of] precedent.” She suggested that the Court had previously dealt with precisely the same issue presented in Winn, under the same factual circumstances, and expressly held that taxpayers standing exists. The “precedent” to which Justice Kagan referred does express that taxpayer standing exists under the circumstances presented in Winn, though in a subtler manner than she has suggested.

As Justice Kagan noted, “[w]e have faced the identical situation five times . . . and we have five times resolved the suit without questioning the plaintiffs’ standing.” First, in Walz v. Tax Commission of City of New York, the Supreme Court affirmed the constitutionality of “property tax exemptions to religious organizations for religious properties used solely for religious worship” without questioning the taxpayer plaintiff’s standing. Second, in Hunt v. McNair, the Supreme Court held that the South Carolina Educational Facilities Authority Act, which issued income tax exempt bonds to religious institutions, did not violate the Establishment Clause without questioning whether the South Carolina taxpayer plaintiff had standing. Third, in Committee for Public Education and Religious Liberty v. Nyquist, the Court held that a New York state tax deduction for


182. Id. (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997)).


184. Id.


186. See id. at 1452-53.

187. Id. (emphasis added).


189. Id. at 666-67.

190. 413 U.S. 734 (1973).

191. Id. at 735-36, 738-39.

parents who paid tuition at religious and private schools was unconstitutional as violating the Establishment Clause without questioning the taxpayer plaintiffs’ standing. Fourth, in *Mueller v. Allen*, the Court rejected a similar Establishment Clause challenge brought by taxpayers who alleged that a state tax deduction for expenses incurred by attending private and religious schools violated the Establishment Clause without questioning the standing of the taxpayer plaintiffs. Finally, the Court decided a preliminary issue in this very case, holding that the Tax Injunction Act did not prevent the taxpayer plaintiffs from bringing their Establishment Clause claim, and the Court again ruled on the case without questioning their standing.

Notably, the Court considered the aforementioned cases (all filed by taxpayers and all alleging that tax expenditures unlawfully subsidized religion in violation of the Establishment Clause), made determinations on the merits of the cases, and failed to question whether the taxpayer plaintiffs had standing. The majority recognized the inconsistency in the previous cases but provided no guidance for a resolution. Rather, the majority provided a weak rationale by distinguishing those cases as failing to mention standing and therefore not technically contrary to the conclusion reached. As Justice Kagan advised, these cases suggest that the taxpayer plaintiffs did have standing to bring their suits since the Court ultimately made determination of their cases on the merits.

The fact that these cases did not confront the issue of standing should not suggest that these cases should not be considered or followed; to the contrary, they should have been more pressing on the minds of the majority when making their determination, especially considering the previous Supreme Court determination of a preliminary issue of this very case. These cases clearly demonstrate the Court’s inconsistency on recognizing and determining taxpayer standing.

Even more perplexing is the Court’s decision to affirm a lower court decision adjudicating a taxpayer challenge to a tax expenditure alleged to violate the Establishment Clause without any explanation. In *Public Funds for Public Schools of New Jersey v. Byrne*, the Court, without

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193. *Id.* at 789-794.
195. *Id.* at 390-91.
196. *Hibbs*, 542 U.S. at 112.
197. *Winn*, 131 S. Ct. at 1448 (majority opinion).
198. *Id.*
199. *Id.* at 1454-55 (Kagan, J., dissenting).
discussion, affirmed the lower court’s holding that “plaintiffs, as taxpayers, have standing under Flast . . . .” to challenge a tax deduction for dependents attending private and religious schools.\textsuperscript{202} If cases presenting the issue of taxpayer standing are to be treated so differently, the Court should articulate a reason for distinguishing the cases, thus providing much needed clarity.

This inconsistency and lack of concrete explanation leaves potentially injured citizens completely in the dark of what the Court’s views on standing will be on any particular day. The Court acts carelessly when it ignores the issue of standing simply because the issue has not been challenged by the parties.\textsuperscript{203} Furthermore, the Court’s decisions are ineffective when it decides controversial issues without explanation.

2. Arbitrary Distinction Between Tax Expenditure and Direct Appropriations

The majority’s greatest pitfall in the Winn decision was distinguishing tax credits, or “tax expenditures,” from direct appropriations.\textsuperscript{204} The Court, on numerous occasions, (including this decision) has recognized that tax expenditures and direct appropriations have the same economic impact.\textsuperscript{205} Nevertheless, the Winn decision further constrained the Flast test and taxpayer standing by bypassing the similar economic effects of tax expenditures and appropriations and differentiating the two in legal effect.\textsuperscript{206} The majority insisted that in order to challenge legislation under the Establishment Clause, the legislation must “‘extrac[t] and spen[d] a conscientious dissenter’s funds.’”\textsuperscript{207} The majority concluded that a tax credit does not injure objecting taxpayers because its “does not ‘extrac[t]...
and spen[d]‘ [their] funds in service of an establishment.”

Therefore, pursuant to this decision, in order to establish standing as a taxpayer under *Flast* the legislation challenged must be a direct appropriations rather than a tax credit.

Justice Kagan, and the three other Justices joining her dissenting opinion, believed this was an unnecessary distinction that will pose damaging effects on injured taxpayers that seek to challenge government funding of religion. Thus, four of the nine Justices understood that because these two mechanisms result in the “same bottom line, taxpayers who challenge them can allege the same harm.” The majority therefore allows form to prevail over substance. Additionally, scholars have recognized this understanding as “tax expenditure analysis,” which acknowledges the economic equivalence of tax breaks and direct government subsidies. The central message of tax expenditure analysis suggests that tax cut provisions perform the same functions as spending provisions and should therefore be analyzed in the same manner.

Moreover, some suggest that the Court should hold tax expenditures to the same standards as direct spending in order to be consistent, not only with their own expressions, but also with other areas of law. For example, when taxpayers have challenged benefits distributed through the Internal Revenue Code as violating equal protection, the Court has acknowledged that tax expenditures are the equivalent of direct spending. Additionally, the Court has equated direct spending and tax expenditures in racial discrimination cases. The Court’s inconsistency in acceptance and application of tax expenditure analysis creates differences in evaluating benefits granted through the tax code. This selective logic permits constitutional norms and standards to be undercut simply by labeling funding as a tax break rather than an appropriation. The majority argues that because the taxpayer money funding religion is never in the hands of the government, the funding does not qualify as government “spending” or

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208. *Id.* at 1447 (majority opinion) (quoting *Flast*, 392 U.S. at 106).
210. *See id.* at 1450.
212. *Id.* at 1458.
214. *Id.* at 416.
216. *Id.* at 874.
217. *Id.* at 875.
218. *Id.* at 911.
“appropriations.” However, just because the taxpayer dollars never passed through the government’s hands does not mean that the government is not funding religion—the government is allowing the religious organizations or institutions to keep tax money that they would otherwise be required to pay to the government.

The majority’s decision suggests that if the legislature had appropriated the funding for STOs, rather than directed it as a tax expenditure, the Respondents would have standing. If the economic effect is the same, why distinguish the legal effect? A bailout of big banks is no different if it is labeled as “tax break” or a “direct appropriation.” As Justice Kagan suggested, taxpayers would surely recognize that a subsidy is a subsidy (or a bailout is a bailout) either way the funding is carried out. However, the distinction that the Court has made in *Winn* enables the government to support religious institutions by disguising spending as tax breaks. In either circumstance, the government is directing funds to religious institutions. The Establishment Clause was designed to prevent the “specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.” As a result, the Court’s decision suggests that a tax break designed to provide financial support to religious institutions or organizations does not qualify as part of the government’s “taxing . . . power . . . used to favor . . . or to support religion in general.” The decision in *Winn* is far from averting the “specific evils” the Establishment Clause was designed to prevent.

The key is that “[w]henever taxpayers have standing under *Flast* to challenge an appropriation, they should also have standing to contest a tax expenditure. Their access to the federal courts should not depend on which type of financial subsidy the State has offered.”

### 3. Misapplication of the Flast Test

The majority’s opinion not only misapplied the two-pronged *Flast* test to the circumstances of the case, but the majority’s reliance on *Flast*’s holding undercuts the support for the decision. First, as Justice Kagan opined in her dissent, “[f]inding standing here is merely a matter of

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220. *Id.* at 1458 (Kagan, J., dissenting).
221. *See id.* at 1455.
222. *Id.* at 1455-56.
223. *DaimlerChrysler Corp.*, 547 U.S. at 348 (quoting *Flast*, 392 U.S. at 103 (emphasis added)).
225. *Id.* at 1457.
226. *See id.* at 1451-52, 1459-60.
applying *Flast.*”\(^{227}\) *Flast* held that taxpayers have standing when they allege that a statute enacted pursuant to the legislature’s taxing and spending power violated the Establishment Clause.\(^{228}\) In this situation, a taxpayer plaintiff can determine a two-part nexus “between the [taxpayer] status asserted and the claim sought to be adjudicated.”\(^{229}\) First, by contesting an action taken by the legislature under the taxing and spending clause, the taxpayer shows “‘a logical link between [her] status and the type of . . . enactment attacked.’”\(^{230}\) Second, by invoking the Establishment Clause the taxpayer shows “‘a nexus between [her] status and the precise nature of the constitutional infringement alleged.’”\(^{231}\) Thus, *Flast* held that, given these connections, taxpayers are “‘proper and appropriate part[ies]’” and have “‘the necessary stake . . . in the outcome of the litigation to satisfy Article III.’”\(^{232}\)

The taxpayers in *Winn* satisfied the first part of the *Flast* nexus because they challenged the constitutionality of a provision of the Arizona tax code that the legislature enacted pursuant to the State Constitution’s Taxing and Spending Clause.\(^{233}\) Additionally, the taxpayers in *Winn* satisfied the second part of the *Flast* nexus because they alleged that the provision violated the Establishment Clause.\(^{234}\) Consequently, because the taxpayers in *Winn* demonstrated both of the *Flast* requirements, Respondents have established their “stake as taxpayers.”\(^{235}\) As the Justice Kagan noted in her dissenting opinion, the “simple restatement of the *Flast* standard should be enough to establish that the Plaintiffs have standing.”\(^{236}\)

Finally, the majority relies on *Flast* to support its new “extraction” requirement.\(^{237}\) However, taking a closer look at *Flast*’s clear language in the holding and reasoning suggests that the majority’s reliance on *Flast* actually undercuts their position.\(^{238}\) *Flast*’s holding is as follows: “[W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of” the Establishment Clause.\(^{239}\)

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227. *Id.* at 1452.
228. *Id.* at 1451 (citing *Flast*, 392 U.S. at 105-06).
230. *Id.* (quoting *Flast*, 392 U.S. at 102).
231. *Id.* (quoting *Flast*, 392 U.S. at 102).
232. *Id.* (quoting *Flast*, 392 U.S. at 102).
233. *Id.* at 1451.
235. *Id.* at 1452 (citing *Flast*, 392 U.S. at 102).
236. *Id.* at 1451.
237. *Id.* at 1459.
238. *Id.*
As Justice Kagan opined, nothing about this holding suggests that a taxpayer can challenge only legislative action that that disburses his or her tax money to the state treasury.\textsuperscript{240} The majority in \textit{Flast} supported their conclusion by noting the specific evil feared by the Framers of the Establishment Clause “was that the tax[ing and spending] power would be used to favor one religion over another or to support religion in general.”\textsuperscript{241} Yet this evil occurs even if the money that the government utilizes does not come from dissenting citizens.\textsuperscript{242} Furthermore, the heart of \textit{Flast} (the two-part nexus) contains no hint of an “extraction” requirement.\textsuperscript{243}

Moreover, the majority’s reasoning does not justify the conclusion that the taxpayer plaintiffs in \textit{Winn} lack standing.\textsuperscript{244} In fact, Arizona’s STO tax credit program necessitates the direct expenditure of funds from the state treasury.\textsuperscript{245} Justice Kagan noted in her dissenting opinion that the statute requires the Arizona Department of Revenue to certify STOs, maintain a registry, make the registry available by website, collect annual reports, and send written notices to STOs that have failed to comply with certain requirements under the statute.\textsuperscript{246} Theoretically, these activities, needed to keep the STOs running, require support—i.e. money—from the state treasury.\textsuperscript{247} Therefore, using the majority’s own extraction theory, the Arizona government has “extract[ed] and spen[t]” the Respondents’, and other taxpayers’, dollars in order to execute the STO program.\textsuperscript{248} As Justice Kagan suggested, “[c]an anyone believe that the Plaintiffs have suffered injury through the costs involved in administering the program, but not through the far greater costs of granting the tax expenditure in the first place?”\textsuperscript{249}

\textbf{4. The Future of Taxpayer Standing}

In light of the \textit{Winn} decision, the future of taxpayer standing for Establishment Clause violations continues to be significantly restrained. As a result, when may a taxpayer bring an Establishment Clause challenge? Even more generally, when may a taxpayer have standing at all to bring claim in federal court? A series of taxpayer standing cases have provided

\textsuperscript{240} Id. at 1459.
\textsuperscript{241} Id. (quoting \textit{Flast}, 392 U.S. at 103).
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} \textit{Winn}, 131 S. Ct. at 1458 n.9 (Kagan, J., dissenting).
\textsuperscript{245} Id.
\textsuperscript{246} Id. (citing Ariz. Rev. Stat. Ann. §§ 43-1502(A)-(C), 43-1506 (West Supp. 2010)).
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} \textit{Winn}, 131 S. Ct. at 1458 n.9 (Kagan, J., dissenting).
an answer by extensively narrowing the scope of taxpayer standing. The answer is simple: when you are Flast. In other words, a taxpayer may only have standing in federal court consistent with Article III when challenging a specific congressional appropriation (rather than a tax credit) under the taxing and spending power as being violative of the Establishment Clause. If the Court seeks to loosen its grip on taxpayer standing in the future, Winn (and other foundational taxpayer standing cases) will innately be in jeopardy.

Building on the foundation laid in previous decisions, Winn represents an emerging trend of increased scrutiny of standing in Establishment Clause cases, and possibly signals the end of the Court’s habit of ignoring standing. Some suggest that the Court’s major shift in this case was not further constricting of the standing doctrine, but rather closely scrutinizing standing where it had often previously been ignored. The fear generated by this increased scrutiny is that Winn will affect the Court’s future decisions and act to narrow Establishment Clause standing in other contexts. Additionally, such a restrictive view of standing may weaken the Establishment Clause’s ban on religious preferences.

Nevertheless, the trend of increased scrutiny of standing may continue—or, it may not. The Court’s inconsistent examination and view of standing has hardly been resolved. However, what is clearer is that the Court’s vow to adhere to more “formal rules of standing” signals the strengthening of the concept of separation of powers and the Court’s respect for the tripartite allocation of power among the branches of government—that is, if the Court practices what it preaches.

250. See Flast, 392 U.S. at 105-06 (limited a taxpayer’s challenge to that of an Establishment Clause violation of the First Amendment); Hein, 551 U.S. at 593 (limited a taxpayer’s challenge to only that of congressional action taken under the Taxing and Spending Clause that violates the Establishment Clause, refusing to extend challenges to action taken by the executive); Valley Forge, 454 U.S. 464 (syllabus) (limited a taxpayer’s challenge to only that of congressional action taken under the Taxing and Spending Clause that violates the Establishment Clause, refusing to extend challenges to action taken by the U.S. Department of Health, Education and Welfare); Winn, 131 S. Ct. at 1447 (majority opinion) (limited a taxpayer’s challenge only to that of a congressional appropriation rather than a tax credit).

251. See id.

252. See e.g. Winn, 131 S. Ct. at 1452-53 (Kagan, J., dissenting) (As Justice Kagan noted in her dissent, the Court had recently been presented with five similar taxpayer challenges to tax-benefit programs that allegedly aided religion, including the tax credit at issue in this case, and had resolved all of the suits without questioning the plaintiffs’ standing); The Supreme Court, 2010 Term—Leading Cases, 125 HARV. L. REV. 172, 176 (2011).

253. The Supreme Court, 2010 Term—Leading Cases, supra note 252, at 178.

254. Id. at 172.

255. Id.
V. CONCLUSION

Winn not only represents a significant step back in the Court’s willingness to find taxpayer standing, but also illustrates that “the concept of Art. III standing has not been defined with complete consistency in all of the various cases decided by th[e] Court.”256 A trend of increased scrutiny of standing has emerged along with Winn; however, this trend too could likely be susceptible to the Court’s inconsistencies.

More significantly, Winn has provided a blueprint for government to fund religion without “funding religion,” and deceitfully bypassing Flast’s guarantee of taxpayer access to the judiciary to challenge Establishment Clause violations.257 The government is free to fund religion through tax credits and tax expenditures without fear of taxpayer challenges to state funding of religion.258 Consequently, Winn threatens to abolish all occasions for a taxpayer to contest the government’s monetary support of religion.259 This fall of taxpayer standing will only serve to reduce the strength and significance of the Establishment Clause and its fundamental promise of religious neutrality.260

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256. Chemerinsky, supra note 6, at 60 n.3 (3rd ed. 2006) (citing Valley Forge, 454 U.S. at 475).
258. Id.
259. Id.
260. Id. at 1451.