A Remedy for Every Right: 
What Federal Courts Can Learn from 
California’s Taxpayer Standing

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INTRODUCTION

Under current federal taxpayer standing doctrine, the right of citizens to challenge inappropriate government spending is almost entirely unavailable. For example, in the last two years, taxpayers have sought to challenge the record $700 billion in disbursements by the Treasury as a bailout package (or to challenge the use of this bailout money for buying corporate jets or giving bonuses to bankers),¹ and have had their suits dismissed for lack of standing.² These cases follow the 2007 Supreme Court decision in Hein v. Freedom from Religion Foundation, in which the Court ruled that taxpayers have no standing to challenge executive action.³ Whether a taxpayer has standing to bring suit determines his or her ability to seek an injunction against government spending.⁴ Standing doctrine is already murky,⁵ and the Hein decision only

5. William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 221 (1988) (“The structure of standing law in the federal courts has long been criticized as incoherent.”).
added another layer of complexity onto its application to taxpayer plaintiffs.

"Standing" refers to whether a litigant "is entitled to have the court decide the merits of the dispute or of particular issues." Federal standing doctrine prevents those who have not suffered a particularized, personal injury from bringing suit in federal court. Generally, standing doctrine prevents taxpayers who have not suffered individualized injuries from bringing suit. The Court has held that standing doctrine stems from both prudential concerns and the language of Article III, Section 2 of the Constitution, which limits the federal judiciary to resolving "case[s]" or "controvers[ies]." Although the Court has stated that the "fundamental aspect of standing" is its focus on the identity of the plaintiff as opposed to the merits of the claim, the Court has also focused on the nature of the grievance in determining whether a plaintiff may bring a particular claim. The Court itself has recognized that standing doctrine is "one of the most amorphous (concepts) in the entire domain of public law."

The Court has articulated several different purposes for standing doctrine. In his 1988 article The Structure of Standing, now-Judge William Fletcher compiled a list of these purposes as articulated in the Court’s standing cases: ensuring that litigants are truly adverse and effective presenters of the case, that the people most directly concerned are those who litigate the issues at hand, that the issues in front of the court are concrete, and that the counter-majoritarian judicial branch does not intrude upon the role of the representative branches by engaging in policymaking. Federal courts also use standing doctrine to reduce their caseloads.

In contrast with federal restrictions on taxpayer standing, California explicitly authorizes taxpayer suits. California Code of Civil Procedure

8. Hein, 551 U.S. at 593 ("It has long been established, however, that the payment of taxes is generally not enough to establish standing to challenge an action taken by the federal government.").
10. Id. at 99.
11. Mark Gabel, Generalized Grievances and Judicial Discretion, 58 Hastings L.J. 1331, 1332 (2007) (describing how the definition of the doctrine has "fluctuated over time" between focusing on the identity of the plaintiff and the nature of the claim).
12. Flast, 392 U.S. at 99 (internal quotation omitted).
13. Fletcher, supra note 5, at 222.
15. An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent . . . by a citizen resident therein . . . who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.

CAL. CIV. PROC. CODE § 526a (West 2010).
Section 526a grants blanket taxpayer standing, but courts do not decide all taxpayer actions in California on the merits. Courts still filter out taxpayer suits as inappropriate for judicial resolution for a variety of prudential reasons.

This Comment uses California as a "laboratory" to assess whether federal taxpayer standing doctrine need maintain its current restrictiveness to accomplish its purposes. It argues that federal courts could adopt the prudential doctrines California courts have developed, employ a broad grant of taxpayer standing like California's, and preserve all of the purposes of federal taxpayer standing except one: ensuring that the most-affected party be the one to bring suit. California's taxpayer standing jurisprudence demonstrates that an alternative, generous grant of taxpayer standing is workable in tandem with other justiciability doctrines.

Part I traces the development and boundaries of federal standing doctrine, focusing on taxpayer standing in particular, and summarizes pertinent scholarship concerning standing. Part II examines California case law concerning taxpayer standing. It describes the doctrines California courts have developed to weed out cases inappropriate for judicial resolution, and evaluates the effectiveness of these doctrines. Part III looks specifically at California taxpayer cases litigating federal claims. It compares California's treatment of these cases with the treatment they could have expected in federal court. Based upon this comparison, it is apparent that the only question federal courts need ask to serve the purposes of taxpayer standing is whether the taxpayer is the party whose interest is most directly affected by the issues before the court.

Ultimately, this Comment concludes that federal taxpayer standing doctrine is overbroad and unnecessarily convoluted. It does not evaluate whether the purposes behind federal standing doctrine are worthwhile or necessary to satisfy the case or controversy requirement; instead, it recommends that federal taxpayer standing should serve only to weed out cases in which there are potential plaintiffs more directly affected than the taxpayer plaintiff by the challenged conduct.

California's is a workable model of a system that combines a broad grant of standing with multiple tests of justiciability to provide a clearer, more

16. Id.
17. E.g., Cal. Ass'n for Safety Educ. v. Brown, 36 Cal. Rptr. 2d 404 (Ct. App. 1994) (holding that a court may not impose a duty upon the legislature to appropriate money, because appropriations are a legislative function).
18. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
19. In the course of my research I found that cases discussing taxpayer standing, as well as secondary literature on standing, refer to a consistent group of Supreme Court cases as those setting the boundaries of the doctrine. I examined these cases, and have presented them in this Comment, to explain the Court's requirements for and rationales behind taxpayer standing.
rational method of separating justiciable cases from cases where judicial resolution is not appropriate. This Comment argues that the federal system should take a similar approach. The Supreme Court should limit taxpayer standing to the weeding out of cases in which the challenged conduct has injured another potential plaintiff more directly, and should use alternative tests, in tandem with taxpayer standing, to ensure that cases are justiciable.

I

THE EMERGENCE AND EVOLUTION OF FEDERAL TAXPAYER STANDING DOCTRINE

A. The Origin of Taxpayer Standing Doctrine

Taxpayer standing doctrine emerged in the twentieth century as a limit on the ability of citizens to bring suit as concerned taxpayers. As late as 1922 the Court recognized “the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted.” As Cass Sunstein chronicled in detail in his article Standing and the Privatization of Public Law, progressive Justices—Frankfurter and Brandeis in particular—developed standing and other justiciability doctrines to safeguard New Deal administrative regulation from review.

The Supreme Court first articulated the doctrine of taxpayer standing as it is known today in Frothingham v. Mellon. The plaintiff in Frothingham challenged congressional appropriations for the Maternity Act, which gave states funding if they agreed to implement measures to protect the health of mothers and infants. She claimed the Act infringed upon states’ Tenth Amendment right to self-governance and would increase her tax burden in the future, therefore taking her property without due process of law.

The Court dismissed the case for lack of jurisdiction. It dismissed in part because each taxpayer’s interest in the moneys of the Treasury is so small that the taxpayer has no justiciable interest in how her tax dollars are appropriated.

The interest of a single taxpayer “is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation,

20. Flast v. Cohen, 392 U.S. 83, 91 (1968). The Flast Court noted that, prior to the issuance of Frothingham (the first case to articulate taxpayer standing doctrine), the Court “accepted jurisdiction in taxpayer suits without passing directly on the standing question.” Id. at 91 n.5 (citing Wilson v. Shaw, 204 U.S. 24, 31 (1907)); Millard v. Roberts, 202 U.S. 429, 438 (1906); Bradfield v. Roberts, 175 U.S. 291, 295 (1899).
24. Id. at 479.
25. Id. at 480, 486.
26. Id. at 480.
27. Id. at 487.
of any payment out of the funds, [is] so remote, fluctuating and uncertain" that there is no personalized injury sufficient to bring suit. The Court stated that, to invoke the power of the judiciary, the taxpayer must show that he or she suffered or is in imminent danger of suffering a "direct injury," and not "merely that he suffers in some indefinite way in common with people generally." The Court contrasted the interest of a taxpayer in the expenditures of the federal Treasury with the interest of a taxpayer in municipal spending; according to the Court, taxpayers have a more immediate interest in the expenditure of municipal funds. It further reasoned that, unless the plaintiff suffered a private injury, issuing such a decision would invade the province of the legislative branch. The Court found that, because Frothingham sustained merely a generalized injury, to decide this case "would be, not to decide a judicial controversy, but to assume a position of authority" over the legislative branch, which it refused to do. The Court did not, however, explain whether this prohibition on taxpayer standing stems from the requirements of Article III, Section 2, or whether it is a prudential doctrine.

A decade later, the Court affirmed the Frothingham holding in Ex Parte Lévitt, the Court's next major decision on standing. The plaintiff in Lévitt challenged the appointment of Justice Black to the Supreme Court because, as a senator, Justice Black had voted to increase the compensation of the Supreme Court Justices. The plaintiff alleged that Justice Black's appointment therefore violated Article I, Section 6 of the Constitution, which forbids members of Congress from being appointed "to any civil Office ... the Emoluments whereof shall have been increased" while that Congressperson was in office. The Court refused to grant relief because the plaintiff, who sued as a taxpayer, did not sustain a "direct injury" as a result of Justice Black's appointment. Instead, he possessed "merely a general interest common to all members of the public," and so was not "entitle[d] ... to invoke the judicial power to determine the validity of executive or legislative action." The Lévitt Court made its decision against a backdrop of concern about the separation of powers. Mark Gabel suggests that the Lévitt Court did not want to take the confrontational action of ridning the Court of one of President Roosevelt's appointees six months after President Roosevelt proposed his Court-packing plan.

28. Id.
29. Id. at 488.
30. Id. at 486.
31. Id. at 488.
32. Id. at 489.
34. Id. at 633–34.
35. Id. at 635.
37. Levitt, 302 U.S. at 636.
38. Id.
39. Gabel, supra note 11, at 1336.
The Court reaffirmed these requirements later in *Doremus v. Board of Education of Borough of Hawthorne.*\(^{40}\) In *Doremus*, the plaintiff sued to invalidate a New Jersey statute requiring that each public school day begin with the reading of five Old Testament verses.\(^{41}\) The Court found that Doremus did not have standing, because "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect" to create standing to invoke the power of the judicial system.\(^{42}\) Instead, a party must be able to show direct injury.\(^{43}\)

**B. Flast and the Creation of Limited Taxpayer Standing**

In *Flast v. Cohen* the Court made a narrow exception to its general denial of taxpayer standing.\(^{44}\) The taxpayer plaintiff in *Flast* sought to challenge federal spending on textbooks and instructional materials for religious schools.\(^{45}\)

The *Flast* Court determined that standing "is related only to whether the dispute . . . will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."\(^{46}\) The Court developed a two-pronged test for determining if taxpayers have standing.\(^{47}\) The first prong of the test asks whether there is a logical link between the plaintiff's taxpayer status and the type of legislative enactment challenged.\(^{48}\) The enactment must be a true exercise of the taxing and spending power, and not an incidental expenditure of tax funds for an essentially regulatory purpose.\(^{49}\) The second prong asks if there is a nexus between the challenged statute and a specific constitutional limitation on the taxing and spending power.\(^{50}\)

The Court found that the case at hand satisfied the test: the challenged act implicated Congress's spending power, and the expenditures violated the Establishment and Free Exercise Clause.\(^{51}\) The Court found that the Establishment Clause specifically limited government spending, and so provided a basis for taxpayer standing.\(^{52}\)

As Justice Harlan recognized in his dissent, however, there is disconnect between the two-part test the majority developed and the question whether a federal taxpayer is sufficiently adverse.\(^{53}\) In his dissent, Justice Harlan

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41. *Id.* at 430.
42. *Id.* at 433.
43. *Id.* at 434.
45. *Id.* at 85–86.
46. *Id.* at 101.
47. *Id.* at 102.
48. *Id.*
49. *Id.*
50. *Id.* at 102–03.
51. *Id.*
52. *Id.* at 104.
53. *Id.* at 122–23 (Harlan, J., dissenting).
criticized this two-pronged test as having nothing to do with the intensity of the plaintiff's interest. According to Justice Harlan, neither prong measures the interest of a taxpayer.  

Judge Fletcher contextualizes the change in standing doctrine in Flast as the product of a shift in the 1960s and 1970s to enforcing public rights and values through litigation brought by plaintiffs with no particularized interest. He attributes the holding in Flast to the Court sensing, "without being able to articulate it fully, that a broad grant of standing was an appropriate mechanism to implement the establishment clause interest at stake." This view of Flast reflects the majority's statement, articulated for the first time in federal taxpayer standing cases, that "if . . . a taxpayer will be a proper and appropriate party to seek judicial review of federal statutes, the taxpayer's access to federal courts should not be barred." This language demonstrates the Court's willingness to open the door somewhat to taxpayer suits.

C. Narrowing the Basis for Taxpayer Standing

Under Flast, taxpayer standing is only available in very limited circumstances. At the same time the Court decided Flast, it also decided United States v. Richardson and Schlesinger v. Reservists Committee to Stop the War, significantly limiting the availability of taxpayer standing.

In Richardson, the plaintiff was a federal taxpayer who claimed that the CIA Act of 1949 prevented him from making informed decisions as a voter and violated Article I, Section 9, Clause 7 of the Constitution, which requires that "a regular Statement and Account of Receipts and Expenditures of all public Money shall be published from time to time." The Act allows the CIA to account for its expenditures "solely on the certificate of the Director" of the CIA. This measure provides for the secrecy of individual CIA expenditure items. Richardson sought a permanent injunction preventing Congress from representing its "Combined Statement of Receipts, Expenditures, and Balances of the United States Government" as fulfilling its requirement without including data on CIA expenditures. The Court found that Richardson had no standing under the Flast test for three reasons: his challenge was not addressed

54. Id.
55. Id.
56. Fletcher, supra note 5, at 227.
57. Id. at 228.
58. Flast, 392 U.S. at 98 n.17.
61. Richardson, 418 U.S. at 168–70.
63. Richardson, 418 U.S. at 169 (quoting 50 U.S.C. § 403j(b) (2006)).
65. Richardson, 418 U.S. at 169.
to the taxing and spending power, he invoked no specific limitation on the taxing and spending power, and the injury he suffered was general to the public.\textsuperscript{66} The Court emphasized that \textit{Flast}'s new grant of standing did not eliminate the requirement of personal, concrete injury.\textsuperscript{67}

The Court also denied standing in \textit{Schlesinger}, in which plaintiff Schlesinger sought an order to strike members of Congress from the payrolls of the Military Reserves, a permanent injunction preventing any member of Congress from simultaneously holding a position in the Reserves, and a declaration that Congresspersons may not be members of the Reserves.\textsuperscript{68} Schlesinger claimed that allowing Congresspersons to double as reservists violated the Constitution's Incompatibility Clause, which prevents members of Congress from holding offices in the executive branch.\textsuperscript{69} The Court denied standing because Schlesinger did not challenge an exercise of power under the Taxing and Spending Clause, and because his injury was common to the public.\textsuperscript{70} The Court reasoned that the resolution of questions of general interest is a legislative rather than judicial function, and so federal courts require the presentation of a case based upon concrete injury.\textsuperscript{71}

The Court further narrowed the \textit{Flast} grant of standing in \textit{Valley Forge Christian College v. Americans United for Separation of Church and State}.\textsuperscript{72} The plaintiff organization sued the federal government under the Establishment Clause for granting property to Valley Forge Christian College.\textsuperscript{73} The Court denied standing, distinguishing \textit{Flast} because plaintiffs here challenged an executive, as opposed to legislative, disbursement of property, and because the Taxing and Spending Clause did not govern the property transfer.\textsuperscript{74} The Court also declared that the federal government is bound to honor all provisions of the Constitution equally, but rejected as potentially limitless the proposition that "all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions."\textsuperscript{75}

Despite \textit{Valley Forge}'s implicit rejection of the \textit{Flast} principles, the Court again affirmed the \textit{Flast} in \textit{Bowen v. Kendrick}.\textsuperscript{76} The Court's decision granted standing to plaintiffs to challenge the Adolescent Family Life Act of 1981 as a violation of the Establishment Clause.\textsuperscript{77} Plaintiffs satisfied \textit{Flast}'s two-prong

\begin{itemize}
\item \textsuperscript{66} \textit{Id.} at 175–77.
\item \textsuperscript{67} \textit{Id.} at 179–80.
\item \textsuperscript{68} \textit{Schlesinger}, 418 U.S. at 211.
\item \textsuperscript{69} \textit{Id.} at 212.
\item \textsuperscript{70} \textit{Id.} at 217–20, 228.
\item \textsuperscript{71} \textit{Id.} at 221.
\item \textsuperscript{72} \textit{Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.}, 454 U.S. 464 (1982).
\item \textsuperscript{73} \textit{Id.} at 469.
\item \textsuperscript{74} \textit{Id.} at 479–80.
\item \textsuperscript{75} \textit{Id.} at 485.
\item \textsuperscript{76} \textit{Bowen v. Kendrick}, 487 U.S. 589, 618 (1988).
\item \textsuperscript{77} \textit{Id.} at 618–20.
\end{itemize}
test because they challenged Congress’s spending power—Congress authorized funding for the program, so the Act was “at heart” a program funded pursuant to Congress’s taxing and spending power—and because there is a logical link between the plaintiffs’ taxpayer status and their challenge to the Act under the Establishment Clause.  

Although Flast left open the possibility of challenges based upon other constitutional limitations, Flast’s grant of standing has been confined to suits challenging Congress’s taxing and spending power under the Establishment Clause. In DaimlerChrysler Corp. v. Cuno the Court rejected the contention that the Commerce Clause imposes a specific limit upon congressional taxing and spending. It held that taxpayers’ rights under the Commerce Clause are fundamentally unlike the right against being forced to “contribute three pence . . . for the support of any one [religious] establishment.” It found that allowing taxpayer standing under the Commerce Clause would “leave no principled way of distinguishing those other constitutional provisions” that constrain taxing and spending but do not support taxpayer standing.

The Court reaffirmed Flast’s grant of taxpayer standing in its most recent decision on the subject, Hein v. Freedom from Religion Foundation. Hein upheld Flast but also held definitively that taxpayers lack standing to challenge executive spending made pursuant to legislative appropriations. In Hein, the Freedom from Religion Foundation claimed that President George W. Bush’s Faith-Based and Community Initiatives Program violated the Establishment Clause. According to the Hein Court, allowing taxpayers to challenge executive action would “effectively subject every federal action . . . to Establishment Clause challenge by any taxpayer in federal court.” The Court also introduced a separation of powers component to federal taxpayer standing doctrine, observing that relaxing standing requirements would lead directly to the expansion of judicial power over the other branches of government. This added component creates the possibility of courts denying standing despite the existence of concrete adverseness.

D. Lujan and the Requirement of Injury-in-Fact

Although Lujan v. Defenders of Wildlife is not a taxpayer standing case, it altered extant standing doctrine by setting forth the “irreducible constitutional
minimum of standing" as injury to a legally protected right that is "concrete and particularized," "actual or imminent," caused by the defendant’s conduct, and redressable by a favorable decision.\textsuperscript{88} Writing for the majority, Justice Scalia found invalid Congress’s grant of standing to all citizens to enforce an environmental statute.\textsuperscript{89} Instead, the Court found that when the plaintiff is not himself the object of the regulation, standing is substantially more difficult to establish.\textsuperscript{90} This invalidated many statutory grants of citizen-suit standing.\textsuperscript{91} Commentators such as Daniel Farber have argued that Justice Scalia’s restrictive approach to standing rests upon a foundation unsupported by text and history.\textsuperscript{92} Regardless of its merit, \textit{Lujan}'s injury-in-fact test creates a high barrier to standing for concerned citizens and taxpayers.\textsuperscript{93}

Even after \textit{Lujan}, however, the Court has shown itself willing to recognize widespread injury as justiciable in some forms.\textsuperscript{94} In \textit{Federal Election Commission v. Akins}, for example, the Court granted standing to voters challenging the Federal Election Commission’s decision not to require the American Israel Public Affairs Committee to report political contributions under the Federal Election Campaign Act.\textsuperscript{95} The Court found that the plaintiffs suffered injury-in-fact because they were denied access to a list of donors to and members of the Committee that the plaintiffs claimed should have lawfully been public information.\textsuperscript{96} Without this information, the plaintiffs were hindered in their ability to evaluate candidates for public office.\textsuperscript{97} The Court found injury-in-fact because, although this harm was widely shared, it was an informational injury related to voting, and so was sufficiently concrete and specific to create standing.\textsuperscript{98}

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\item \textsuperscript{89} \textit{id.} at 573–78.
\item \textsuperscript{90} \textit{id.} at 561–62.
\item \textsuperscript{92} Daniel A. Farber, \textit{A Place-Based Theory of Standing}, 55 UCLA L. Rev. 1505, 1509 (2008).
\item \textsuperscript{93} See \textit{Lujan}, 504 U.S. at 562.
\item \textsuperscript{95} \textit{id.} at 13.
\item \textsuperscript{96} \textit{id.} at 20–21.
\item \textsuperscript{97} \textit{id.} at 21. Although it did not find this point controlling, the Court also distinguished this case from \textit{Richardson} in part because the \textit{Akins} plaintiffs sued as voters, while Richardson sued as a taxpayer. The "logical nexus" test therefore did not apply, and the "legal logic" comprising the \textit{Richardson} decision did not apply. \textit{id.} at 22–23.
\item \textsuperscript{98} \textit{id.} at 23–25. The Court distinguished cases in which plaintiffs lacked standing because the harm they alleged was not only widely shared, but "of an abstract and indefinite nature . . . ." \textit{id.} at 23.
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E. Scholarly Criticism of Taxpayer Standing

Scholars have criticized federal standing doctrine extensively for being incoherent, inconsistent, and harmful to the interests of the public. It is unclear whether reform of the doctrine is possible, however, because the Court has not been clear about whether the doctrine is constitutionally required by Article III or is prudential in nature.

Articles criticizing standing doctrine focus primarily on the flaws of the theory behind standing. For example, Judge Fletcher has been one of the leading critics of federal standing doctrine, arguing in his seminal article The Structure of Standing that standing should depend upon the right to relief inherent in a substantive claim. He criticizes the development of standing as a “preliminarily jurisdictional requirement, formulated at a high level of generality and applied across the entire domain of law” responsible for causing the “apparent lawlessness of many standing cases when the wildly vacillating results in those cases are explained in the analytic terms made available by the current doctrine.” Cass Sunstein also posits that standing should depend upon whether the substantive law creates a cause of action, and that Congress should therefore have the power to create citizen standing where it so chooses.

These flaws in taxpayer standing theory have consequences detrimental to the public good. Susan Bandes argues that the Court’s private-rights idea of what constitutes a “case” has led it, wrongly, to ignore collective harms and rights. In Fair Measure: The Legal Status of Underenforced Constitutional Norms, Lawrence Gene Sager details how constitutional norms are often under-enforced because of limitations on judicial enforcement, leading to a widespread belief that the scope of the legal right is the same as the reach of judicial enforcement.

A major hurdle to reforming federal taxpayer standing doctrine is that the Supreme Court has not clearly stated whether the bar against taxpayer standing


101. Fletcher, supra note 5, at 223–24, 229.

102. Id. at 223.

103. Sunstein, supra note 91, at 235–36.


106. Sager, supra note 104, at 1220–21, 1226.
is a constitutional requirement or a flexible prudential rule.\textsuperscript{107} If the requirement stems directly from the language of Article III, it is a constitutional mandate theoretically unalterable by the Court.\textsuperscript{108} If it instead stems from the “perceived need for judicial self-restraint,” it is a prudential limitation the Court developed to limit its own jurisprudence and thus can be changed.\textsuperscript{109}

Scholars have examined this confusion in the doctrine and determined there is no clear line between constitutional and prudential standing requirements. Erwin Chemirinsky opines that the “only apparent answer” to why some standing requirements are constitutional and others merely prudential is that “a requirement is constitutional if the Court says it is, and it is prudential if the Court says it is that.”\textsuperscript{110} Craig Stern states that the requirement that a grievance not be generalized has “repeatedly resist[ed] stable classification,” appearing sometimes as a prudential requirement and sometimes as a constitutional one.\textsuperscript{111}

Authors have begun to evaluate federal standing doctrine through a comparative lens. Paul Katz has looked at how standing doctrine affects the relationship between state and federal courts, and found that state courts that hear federal claims without importing federal standing requirements distort the enforcement of substantive rights.\textsuperscript{112} Daniel Garnaas-Holmes looked specifically at taxpayer standing, comparing U.S. federal taxpayer standing doctrine with that of South Africa.\textsuperscript{113} Garnaas-Holmes discovered that South Africa grants taxpayer standing liberally, and argues that the United States can do the same.\textsuperscript{114}

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\item \textsuperscript{107} See Gottlieb, supra note 100, at 1066–68 (1994).
\item \textsuperscript{108} See id. at 1066–67. (“With respect to constitutional considerations,” standing cannot be created that contravenes constitutional restrictions.).
\item \textsuperscript{109} See id. (“The prudential limitations, however, are ‘subject to elimination by the Court or by Congress.’”).
\item \textsuperscript{110} Erwin Chemerinsky, A Unified Approach to Justiciability, 22 CONN. L. REV. 677, 692 (1990).
\item \textsuperscript{111} Craig A. Stern, Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?, 12 LEWIS & CLARK L. REV. 1169, 1173 (2008). He ultimately concludes that the prudential test for generalized grievances migrated into the Court’s constitutional requirements of standing. Id. Several other scholars have critiqued the arbitrary distinction between constitutional and prudential standing. Raoul Berger has shown that attempts to ground standing doctrine in requirements of Article III are ahistorical, and that neither the separation of powers nor advisory opinions doctrines require insistence on a personal stake in a case as the basic element of standing. Raoul Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?, 78 YALE L.J. 816, 817–18 (1969). Joshua Sohn argues that because the supposedly constitutional standing requirements rely on prudential justifications, the Court should deem all standing requirements prudential and maintain the flexibility of the doctrine. Joshua L. Sohn, The Case for Prudential Standing, 39 U. MEM. L. REV. 727, 728 (2009).
\item \textsuperscript{114} Id. at 325.
\end{itemize}
South Africa generally allows taxpayers to challenge administrative actions, but limits justiciability by narrowing the definition of "administrative action" and by precluding challenge of legislative and executive political decisions.115

Nancy Staudt studied the empirical effects of standing doctrine upon taxpayer suits filed in federal court and found that, in practice, federal courts' application of standing doctrine to federal taxpayer suits is overly restrictive.116 She examined a wide body of standing cases and concluded that "many judges are willing to deny standing to federal taxpayers even when they could easily and legitimately interpret Supreme Court precedent to allow the case into court."117 Staudt found only a few cases in which courts granted standing to taxpayers outside the bounds of Flast.118 However, she also noted that, despite widespread assumption to the contrary, not all standing decisions are political in nature.119

This Comment combines a case-sampling approach with a theoretical comparison of different standing doctrines. The next Part examines decisions emerging from California, a judicial system that employs an alternative model of taxpayer standing, to see whether there is a viable alternative to the Supreme Court's approach to standing doctrine.120 In so doing, I seek not just to criticize standing doctrine, but to illustrate that a more liberal grant of standing is truly practicable despite constitutional limitations upon federal courts.

II
CALIFORNIA JUSTICIABILITY DOCTRINE AS AN EFFECTIVE SUBSTITUTE FOR FEDERAL TAXPAYER STANDING DOCTRINE

In Justice Douglas's Flast concurrence, he predicted that if taxpayers were granted standing to sue, a "wise judicial discretion" could distinguish between

115. Id. at 322.
117. Id. at 807–10.
118. Id. at 809–10.
120. As Staudt observed, "to understand judicial motives, it is essential to go beyond stated rationales." Id. at 615–16. For this reason, in addition to looking at cases cited frequently in California standing case law, I randomly selected roughly half of the California cases I examined in order to determine how courts apply standing doctrine in practice. This was meant to ensure that cases both setting and applying precedent were included in the sample.

I used a sample of thirty-two taxpayer standing cases in total, which comprise roughly 10 percent of the total California taxpayer standing cases in the Lexis database. I concentrated mainly on cases decided relatively recently (most of them post-1960), because I wanted to present an accurate picture of taxpayer standing and justiciability doctrines in California in modern times. I used both California Supreme Court and court of appeal cases to determine if lower courts screen cases effectively in accordance with the California Supreme Court's justiciability doctrines. I only examined published cases, focusing on decisions actually composing California's body of positive law concerning taxpayer standing. Although this sample of cases is neither exhaustive nor perfect, it does offer a representative sample of California's modern standing doctrine and its applications.
suits appropriate for judicial resolution and those that should be dismissed. California case law confirms this prediction. In tandem with its broad grant of standing to taxpayers, California has developed alternative judicial tests that satisfy all but one of the purposes of standing catalogued by Judge Fletcher. These alternative tests ensure that litigants are truly adverse and effective, that issues are concrete, and that the anti-majoritarian judicial branch does not intrude upon the representative branches by engaging in policymaking. In addition, taxpayer suits have not overburdened the California judicial system. The only goal of federal standing doctrine that California justiciability doctrines do not meet is ensuring that those persons most directly affected by contested actions are the parties who actually litigate the legality of these actions.

A. California’s Standing Doctrine Has Not Led to an Overloaded Docket

One of the rationales behind restrictive taxpayer standing doctrine is that granting such standing would lead to a flood of lawsuits in federal court. The statistics concerning taxpayer suits in California show that this fear is unfounded, as taxpayer suits constitute a negligible fraction of all civil suits filed in California. According to California’s 2007 Judicial Workload Assessment, nearly 9 million cases were filed in California between February 2003 and April 2005. Of these, just over 1.6 million were civil suits. During this period, an average of about half a million civil suits were filed per year. Furthermore, as of 2004 California intermediate appellate courts issued over 12,000 decisions a year, and the California Supreme Court issued over 100 opinions.

Since California Civil Procedure Code Section 526a first granted taxpayer standing in 1909, over three hundred appellate decisions have cited the section, with the cases spaced fairly evenly throughout the century. The California

121. Flast v. Cohen, 392 U.S. 83, 112 (1968). (Douglas, J., concurring) (“There 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, between cases ripe for decision and cases that need prior administrative processing, and the like.”).
122. Fletcher, supra note 5, at 222.
123. See T.W. by Enk v. Brophy, 124 F.3d 893, 896 (7th Cir. 1997) (Posner, J.) (suggesting that without standing doctrine as a limitation upon federal suits, federal courts would “be flooded by ‘cause’ suits (really flooded”) (emphasis in original).
125. Id. I reached this figure by subtracting suits classified as felonies, misdemeanors, and infractions from the total number of lawsuits filed.
126. Id.
128. The exact number of cases filed under section 526a in California superior court is inaccessible by traditional means. LEXIS does not feature superior court decisions. Neither
Supreme Court first cited the section in 1915 and subsequently issued section 526a opinions, on average, every one to five years, except during the Great Depression. In total, the court has authored forty-nine opinions concerning the section. The published courts of appeal cases were mostly decided after World War II, with a few decided each year.

Given the vast number of cases filed and appealed in California each year, and the extremely limited number of taxpayer standing cases available in the Lexis database, it appears that the broad grant of taxpayer standing given to Californians by section 526a has not resulted in an oppressive or burdensome number of taxpayer suits. Taxpayers have not stormed the courthouse to challenge every action taken by the government.

This indicates that, were federal taxpayers to have broad standing to sue, taxpayer challenges would not overburden federal dockets either. It is possible that federal taxpayers would be more active litigants than California taxpayers, because of the opportunity to affect policy that applies to the entire country. The state economy of California, however, is one of the ten largest economies in the world. This probably makes filing a taxpayer suit in California almost as, if not equally, attractive as filing such a suit in federal court. As a result, California seems to be a good laboratory for testing whether a broad grant of taxpayer standing would lead to overloaded federal dockets.

B. California Standing Doctrine Requires Presentation of a Concrete Case

Federal standing doctrine requires that plaintiffs show that they have suffered a concrete, personal injury. In all but Establishment Clause cases, the Court has found that a harm borne by the public at large is merely "abstract." It does not create the specific conflicts and facts necessary to ensure that federal courts do not become a "debating society." Consequently, the Court does not recognize such harm to the public as the basis for a justiciable case or controversy.

By contrast, the California court system operates on the philosophy, at least with regard to taxpayers' interests, that when a public right involving public financial interests is violated, "a great many individuals are all injured

Westlaw nor PACER provide an accurate tally of such cases at the superior court level. The number of appellate cases listed in a Shepard's search of section 526a is therefore the best measure of the total number of cases filed.

133. Valley Forge, 454 U.S. at 472.
134. Hein, 551 U.S. at 600–01.
by some small but perceptible amount." Code of Civil Procedure Section 526a, which grants taxpayers standing to sue for injunctive relief, accords with the traditional role of courts of equity, which allowed plaintiffs to amalgamate small interests and enforce them jointly. Under section 526a, the illegal expenditure of public funds constitutes small but concrete injuries to taxpayers that create a concrete factual setting appropriate for judicial resolution, regardless of the size of the expenditure.

California’s broad view of justiciable injury is opposed to that of the U.S. Supreme Court. California courts take the approach that suits based upon public grievances may satisfy the case or controversy requirement. Blair v. Pitchess demonstrates this: the Blair plaintiffs argued that California’s claim and delivery law, which established a procedure for the recovery of property by a plaintiff pursuant to legal action, violated the Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution, as well as article I, sections 13 and 19 of the California Constitution. The Blair plaintiffs sued, as residents and taxpayers, the County of Los Angeles and some of its officials.

The California Supreme Court held that taxpayers do not need a “special, personal interest in the outcome” of the case to have standing to sue. The court held that the action in question met the requirements of section 526a, and thus presented a case or controversy. Had the claim not satisfied section 526a, plaintiffs would not have had standing as taxpayers. This decision relies on the premise that the injury a taxpayer suffers from the illegal spending of tax funds creates the potential for the adverseness necessary for judicial resolution.

To a degree, California’s grant of taxpayer standing recognizes Judge Fletcher’s assertion that “anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint.” Section 526a recognizes that a taxpayer is injured if she can prove tax funds are or will be used illegally, and so grants standing to any such taxpayer who wishes to sue.

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136. See id.
139. Blair, 486 P.2d at 1246–47.
140. Id. at 1247.
141. Id. at 1250.
142. Id.
143. Id.
144. Id.
145. See CAL. CIV. PROC. CODE § 526a (West 2010); Fletcher, supra note 5, at 231.
146. See CAL. CIV. PROC. CODE § 526a (West 2010).
California courts ensure that litigants bring suit over concrete harms by allowing taxpayers to challenge only illegal spending. Federal courts can adopt the same system, granting standing generally to taxpayers challenging illegal spending while weeding out cases in which there is no actual adverseness or effectiveness of litigation.

C. California’s Standing Doctrine Requires Adverse and Effective Presentation of the Case

For federal courts to resolve a case or controversy, litigants must be adverse as well as injured. Adverseness is not a required constitutional element of standing doctrine itself. The Court has found, however, that “honest and actual antagonistic assertion of rights” is “a safeguard essential to the integrity of the judicial process . . . and . . . indispensable to adjudication of constitutional questions.” Although adverseness is not an element of the test for whether plaintiffs have standing, the Court has emphasized the value of adverseness in its standing evaluations. The Flast Court noted that adverseness ensures oppositional controversy instead of questions presented hypothetically or in the abstract. Flast and Valley Forge characterize adverseness as intense interest resulting in the sharp and thorough presentation of issues.

Federal taxpayer standing doctrine relies upon the existence of personalized injury to ensure the existence of adverseness. Personal injury and concrete adverseness are separate but tightly interrelated concepts. Although the Court sometimes blends adverseness and injury into one

149. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (defining injury in fact traceable to the challenged conduct and redressable by a favorable judicial decision as the “irreducible constitutional minimum of standing”).
151. Flast, 392 U.S. at 99–100.
152. See Valley Forge, 454 U.S. at 486; Flast, 392 U.S. at 99–100.
153. Flast, 392 U.S. at 99–100.
154. See Valley Forge, 454 U.S. at 486; Flast, 392 U.S. at 99–100. The Court’s discussions of injury and concrete adverseness are confusing in part because it uses the word “concrete” to describe both adverseness and injury. In Lujan the Court found that the plaintiffs did not suffer actual injury because the challenged government conduct did not interfere with “concrete plans.” Lujan, 504 U.S. at 564. The Lujan Court also referred to a “concrete interest,” “concrete injury,” and “concrete private interest.” Id. at 572–73.
requirement,155 Flast stated that personal injury is not synonymous with adverseness, but instead such injury "assure[s] . . . concrete adverseness."156 The Valley Forge Court confirmed that injury and concrete adverseness are not interchangeable, holding that the "concrete adverseness which sharpen[es] the presentation of issues 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."157

The Valley Forge Court also found that "adverse parties sharply conflicted in their interests and views and . . . supported by able briefs and arguments" do not have standing without sufficient injury.158 In this statement the Court acknowledged implicitly that intensity and thoroughness in pleadings and briefs are signs that cases are being litigated adversely in practice, although this measure of adverseness alone is not sufficient to confer standing upon the parties.159

The Court's insistence that adverseness is the product of personal injury does not necessarily reflect the realities of litigation. As Cass Sunstein has pointed out, "It is expensive to initiate a lawsuit, and those who do so without meeting the standing requirements are especially committed."160 He has noted that institutions may be more effective advocates than individuals who have suffered injury in fact.161

California case law demonstrates that generalized grievances shared among all taxpayers may in fact give rise to claims presented adversely and effectively.162 California courts evaluate the quality and extensiveness of the parties' filings as a mechanism for measuring adverseness.163 This is borne out by the actual adverseness in the Blair plaintiffs' briefs.164 The Blair court found that the plaintiffs' "extensive" briefs demonstrated a "sufficiently personal interest . . . to become dedicated adversaries," and that "there is no danger in such circumstances that the court will be misled by the failure of the parties adequately to explore and argue the issues."165 The rigor of the litigation on both sides supports the conclusion that the dispute was a case or controversy.

156. Flast, 392 U.S. at 99.
157. Valley Forge, 454 U.S. at 486.
158. Id. at 486 n.21.
159. Taxpayers may actually litigate cases too thoroughly for some courts. The California Court of Appeal in Knoff v. City and County of San Francisco commented wryly that the parties were quite thorough and adverse, having submitted over fifteen hundred pages worth of briefs on appeal. Knoff v. City & County of S.F., 81 Cal. Rptr. 683, 686–87 (Ct. App. 1969).
160. See Sunstein, supra note 22, at 1448.
161. Id.
163. E.g., Blair, 486 P.2d at 1250; Connerly, 112 Cal. Rptr. at 17–18.
164. Blair, 486 P.2d at 1250.
165. Id.
The California Court of Appeal decision in Connerly v. State Personnel Board provides more evidence that taxpayers without a personalized injury can present their cases adversely and effectively. In Connerly, the taxpayer plaintiff sued the State Personnel Board for maintaining an affirmative action program that allegedly violated state and federal equal protection principles. The court found that Connerly had standing to sue as a taxpayer, despite not pleading personalized injury. It found that Connerly presented an actual adverse controversy, having litigated the case "intensely." There was "no danger" that the court would "be misled by the failure of the parties to adequately explore and argue the issues" because the court made its decision in the context of a thoroughly adverse dispute.

The Van Atta v. Scott court also found that the taxpayer litigants had demonstrated the adverseness necessary for it to decide the case. The court referenced the "extensive" briefs and trial record of the case, which "demonstrated no danger that the court [would] be misled by the failure of the parties adequately to explore and argue the issues." The court voiced this conclusion in a summary manner, indicating that it had no difficulty concluding, based upon the record of the case, that the parties were adverse.

The U.S. Supreme Court has found that "determining whether respondent's complaint has the 'heft' to state a claim is a task well within an appellate court's core competency." The Federal Rules of Civil Procedure are preexisting mechanisms through which federal courts can dispose of cases in which plaintiffs do not actually state a claim. For example, Rule 8(a) requires that a pleading stating a claim for relief must contain "a short and plain statement of the grounds for the court's jurisdiction," "a short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for the relief sought." Rule 12(b)(6) states that "failure to state a claim upon which relief can be granted" constitutes a defense to a claim for relief. In order to state a claim that can survive a rule 12(b)(6) motion, the plaintiff must "state a claim to relief that is plausible on its face."

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166. 112 Cal. Rptr. 2d 5.
167. Id. at 15–16.
168. Id. at 17.
169. Id. at 17.
170. Id.
172. Id. at 224–25 (citing Blair v. Pitchess, 486 P.2d 1242, 1250 (Cal. 1971)).
173. See id. (briefly stating that the record and briefs submitted by the parties demonstrated the existence of the requisite adverse interest).
175. FED. R. CIV. P. 8(a).
176. FED. R. CIV. P. 12(b)(6).
entitlement to relief,” whereas a claim that is “no more than conclusions” is not entitled to a presumption of truth.\textsuperscript{178}

Likewise, under Federal Rule of Civil Procedure 56(c) a party may be granted summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”\textsuperscript{179} A party may be awarded summary judgment if “the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.”\textsuperscript{180} In ruling upon motions for summary judgment, therefore, federal courts must make determinations on the efficacy of the pleadings and motions submitted by plaintiffs.\textsuperscript{181}

By using California’s approach and evaluating adversity based upon sufficiency of the record, federal courts can detangle adverseness of interest and effectiveness of presentation from the nature of the injury itself. Federal courts already dismiss cases presented ineffectively or without adverseness using the Federal Rules of Civil Procedure. Federal taxpayer standing doctrine should rely on these existing standards to measure adverseness, instead of looking to the nature of the plaintiff’s injury.

D. California’s Standing Doctrine Prevents Policymaking by Courts

Though taxpayer standing doctrine developed in the twentieth century and is relatively new, the refusal of federal courts to issue advisory opinions is perhaps “the oldest and most consistent thread in the federal law of justiciability.”\textsuperscript{182} In 1792, the Court famously refused to evaluate the pension claims of widows and orphans, because this would draw it impermissibly into a legislative role.\textsuperscript{183} It found that federal courts “cannot be warranted . . . by virtue of that part of the constitution delegating judicial power . . . in exercising . . . any power not in its nature judicial.”\textsuperscript{184} A year later, the Court, refusing to answer questions posed it by then–Secretary of State Thomas Jefferson, opined that “the lines of separation drawn by the Constitution between the three departments of the government . . . are considerations which afford strong arguments against the propriety of extrajudicially deciding” the questions.\textsuperscript{185} The Justices refused to answer Jefferson’s questions because doing so would

\begin{itemize}
  \item \textsuperscript{178} Id. at 1950.
  \item \textsuperscript{179} Fed. R. Civ. P. 56(c)(2).
  \item \textsuperscript{180} Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
  \item \textsuperscript{181} See id.
  \item \textsuperscript{182} Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 65 (5th ed. 1994).
  \item \textsuperscript{183} Hayburn’s Case, 2 U.S. 408, 410 (1792).
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} 3 John Jay, The Correspondence and Public Papers of John Jay 488–89 (Henry P. Johnston ed., 1891).
\end{itemize}
infringe upon the role of the executive.\textsuperscript{186}

Although taxpayer suits provide a different context for separation of powers concerns, the same underlying rationale has prompted the Supreme Court to consistently deny standing to taxpayer plaintiffs. The Court has repeatedly found that granting standing would move it out of the realm of deciding cases or controversies and into that of performing a legislative function.\textsuperscript{187} Most recently, the Court denied taxpayer standing in \textit{Hein}, in part because granting standing in such cases would be "to assume a position of authority over the governmental acts of another and co-equal department."\textsuperscript{188} It based this statement upon the premise that the interest of the taxpayer is that of the general public, and that making decisions regarding the general public is the province of the legislature.\textsuperscript{189}

The \textit{Hein} Court did not, however, eliminate taxpayer standing altogether. It upheld \textit{Flast}'s grant of taxpayer standing for Establishment Clause challenges to legislative appropriations.\textsuperscript{190} Specifically, it found that judicial resolution of taxpayer standing cases does not always intrude upon the functions of the coequal branches.\textsuperscript{191} Where a taxpayer suffers an injury, and is able to show that Congress has exceeded a specific constitutional limitation upon the taxing and spending power, the case is appropriate for judicial resolution.\textsuperscript{192}

Despite the recognition of this principle in \textit{Flast}, the Court has only granted standing for claims based upon congressional action pursuant to the Taxing and Spending Clause. In \textit{Valley Forge}, for example, the Court denied the plaintiff taxpayers standing because they challenged a grant of property to a religious college.\textsuperscript{193} It did so even though the challenge was made under the Establishment Clause, because the property was not given pursuant to the Taxing and Spending Clause.\textsuperscript{194}

The Court has also denied standing for claims based on the violation of clauses other than the Establishment Clause.\textsuperscript{195} The Incompatibility Clause also provides a specific limitation upon government, as it prohibits members of

\textsuperscript{186.} \textit{Id.}


\textsuperscript{188.} \textit{Hein}, 551 U.S. 587 at 600.

\textsuperscript{189.} \textit{Id.}

\textsuperscript{190.} \textit{Id.} at 605–11.

\textsuperscript{191.} \textit{Flast}, 392 U.S. at 101 ("A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.").

\textsuperscript{192.} \textit{Id.} at 102–03 (summarizing the \textit{Flast} two-prong test).


\textsuperscript{194.} \textit{Id.} at 480.

\textsuperscript{195.} Schlesinger \textit{v.} Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974).
Congress from holding offices in another branch simultaneously. The Court denied standing in Schlesinger, however, in part because the claim was made under the Incompatibility Clause as opposed to the Establishment Clause.

The Court has not put forth a detailed explanation why Establishment Clause claims are justiciable, while the Incompatibility Clause and other clauses specifically limiting government action are not. It has stated that taxpayers' right not to "contribute three pence . . . for the support of any one [religious] establishment" is unlike other rights. It stated that Establishment Clause claims are appropriate for judicial resolution because the Establishment Clause was passed to guard against "specific evils" resulting from the government spending tax dollars to support religion, and so injunctions issued for violations of this clause will redress taxpayer injures. The Court did not, however, engage the premise that other clauses, such as the Incompatibility Clause, were passed to guard against specific evils, and so did not sufficiently explain its rationale for only allowing suit under the Establishment Clause.

Even absent specific constraints akin to the Establishment Clause requirement, California courts have proven able to weed out cases that would result in judicial infringement upon the role of the legislature. Courts have interpreted California Civil Procedure Code Section 526a as creating a cause of action only in the case of the illegal use of funds, not the improvident or inefficient use of funds. To state a claim under section 526a, a plaintiff taxpayer must claim spending or failure to collect revenue in contravention of the law.

The court of appeal in Humane Society of the United States v. State Board of Equalization emphasized the section 526a requirement that taxpayers be able to show the contested expenditure was in fact contrary to law. The Humane Society plaintiffs sought to bar California from awarding tax exemptions to farmers who kept chickens in allegedly cruel and inhumane cages. They alleged that such a practice violated criminal laws against cruelty to animals,

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196. U.S. Const. art. I, § 6, cl. 2 ("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 increased 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.").

197. Schlesinger, 418 U.S. at 228.


199. Id. at 348–49.


201. CAL. CIV. PROC. CODE § 526a (West 2010). Wasteful spending is spending in contravention of the law. Sundance, 729 P.2d at 103. As discussed below, the bar for what constitutes wasteful spending is high: spending is not wasteful "unless no reasonable person could find that it has any possible benefit." Id.

202. Humane Soc'y, 61 Cal. Rptr. 3d at 281–82.

203. Id. at 278.
and that the government should therefore not give tax exemptions to individuals or organizations keeping chickens in such a manner.\textsuperscript{204}

The Humane Society court denied section 526a relief because the government itself was not acting illegally in granting tax exemptions.\textsuperscript{205} Though the court recognized that keeping chickens in overly small cages might be illegal, it denied relief because the government had not itself performed any illegal action by giving tax exemptions to farmers potentially keeping chickens in illegal conditions.\textsuperscript{206} The court resisted the plaintiffs' attempt to use the court system to impose a new duty upon the state to evaluate farm conditions before awarding tax exemptions. Instead, it encouraged the plaintiffs to lobby the California Legislature to create such a statutory duty.\textsuperscript{207} It held that creating such a duty is "manifestly . . . the job of the Legislature, and not the judicial branch."\textsuperscript{208}

In addition to granting standing to challenge illegal spending, section 526a also allows taxpayers to bring suit to enjoin "wasteful" spending.\textsuperscript{209} The California Supreme Court found in Sundance v. Municipal Court for the Los Angeles Judicial District of Los Angeles County that spending is not wasteful under section 526a unless no reasonable person could find that it has any possible benefit.\textsuperscript{210} In Sundance, a taxpayer joined four public inebriates in challenging California's drunk-in-public statute, which permitted police officers to arrest publicly inebriated persons criminally, or to divert them into treatment facilities.\textsuperscript{211} The taxpayer challenged the statute under section 526a, on the grounds that it wasted public money because the trial court had found civil detoxification to be less expensive and more effective than those alternatives authorized by the statute.\textsuperscript{212}

The California Supreme Court found that the statute, though perhaps unwise, was not wasteful for the purposes of section 526a.\textsuperscript{213} The Sundance court emphasized that the judiciary should not interfere with the legislature's exercise of bad judgment in spending, as long as these judgments can be seen reasonably as producing some public benefit.\textsuperscript{214} The Court found that the public inebriation statute had the benefit of removing inebriates from the street, even if it did so in an unnecessarily costly manner, and so was not wasteful.\textsuperscript{215}

\begin{flushleft}
204. \textit{Id.} at 279–80.
205. \textit{Id.} at 285–86.
206. \textit{Id.}
208. \textit{Id.} at 286.
211. \textit{Id.} at 82–84.
212. \textit{Id.} at 102–03.
213. \textit{Id.} at 102–03.
214. \textit{Id.}
215. \textit{Id.}
\end{flushleft}
The California Court of Appeal has articulated a pleading standard that plaintiffs must meet to claim that a government body has wasted funds in contravention of section 526a. In Sagaser v. McCarthy, the court of appeal found that a plaintiff suing the Department of Corrections as a taxpayer had failed to plead facts and allegations sufficient to show the potential illegal waste of public funds under section 526a. The plaintiffs alleged that the Department of Corrections had, among other things, wasted public funds in its choice of location for a prison in Kings County, California.

The court ruled that plaintiffs must allege specific facts and reasons supporting a belief that the state may be guilty of illegally spending public funds, as opposed to basing a claim upon "innuendo and legal conclusions." It required plaintiffs to allege concrete facts supporting a claim of illegal waste to avoid "trespassing into the domain of legislative or executive discretion." It also recognized the risk that public officials performing their duties would be "harassed constantly" if taxpayers were allowed to sue based upon their own notion of waste, as opposed to the legal definition of waste as put forth by the courts. In Sagaser, the plaintiff had not alleged sufficient facts to support a section 526a violation, and so the court of appeal affirmed that the Department of Corrections had not committed waste. California taxpayers may sue for cases involving fraud, collusion, or other violations of the law. In Gogerty v. Coachella Valley Junior College District, the California Supreme Court reversed a motion to dismiss a section 526a claim that was based on the fraudulent use of tax moneys. Gogerty, a taxpayer and resident of Coachella Valley Junior College District, sued the District, alleging that it had chosen the site for its new junior college fraudulently. The plaintiff alleged that the noise and danger caused by proximity to an airport made the site unsuitable and that more suitable sites had been available for lower prices, but the District purposefully failed to give consideration to them. Gogerty had standing to sue because he alleged fraud.

Not only are taxpayers limited under California doctrine from bringing suit without alleging specific facts, but the remedies available to them are limited to avoid judicial policymaking. Courts cannot award affirmative remedies based on "innuendo and legal conclusions."
injunctions to taxpayers wishing to challenge the failure to spend discretionary funds. For example, in *California Association for Safety Education v. Brown*, the court of appeal found that it had no power to order the Legislature to make an appropriation. It held that the California Constitution’s separation of powers provision prevents courts from ordering appropriations, because appropriations are a legislative function. In a separate case, the court of appeal recognized its ability to declare spending unconstitutional, but refused to redress the legislature’s failure to appropriate funds. This opinion is evidence that courts are able to differentiate between redressing the violation of clear legal limits and intruding upon the functions of the other branches of government. In its own way, California doctrine makes this differentiation just as well as federal taxpayer standing doctrine.

Though California courts will not order the legislature to make appropriations, they do require the government to collect moneys pursuant to its mandatory duties. In *Vasquez v. State*, for example, Vasquez, as a taxpayer, claimed that the state had a mandatory duty under Proposition 139, to require that private sector manufacturers pay prevailing wages to prison inmates. The court of appeal found for Vasquez because the state had no discretion to allow employers to pay inmates less than the prevailing wage. It so held only because Proposition 139 constituted a legally measurable duty.

The language of Proposition 139 created an affirmative, mandatory duty for the Director of Corrections to ensure compliance with it by stating that he or she “shall prescribe . . . provisions governing the operation and implementation of joint venture programs.” The Director of Corrections therefore had a duty to follow these regulations in creating and enforcing contracts with contractors. The statutory language also dictated that the inmates’ wages “shall” be subject to deductions not to exceed 80 percent of the inmates’ gross salary. Given that inmates are to pay a percentage of their wages to the State of California, the failure to enforce the wage standard resulted in an injury to state funds under section 526a. By confining itself to ruling on an issue where such a mandatory and specific duty existed, the court did not infringe upon the role of the executive branch, but instead appropriately resolved a

228. *See id.* (providing a cause of action only in the case of illegal expenditure of funds).
230. *Id.* at 416. Article III, section 3 of the California Constitution states, “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”
233. *Id.* at 707.
234. *Id.* at 704 (emphasis added).
235. *Id.* at 707.
236. *Id.* at 707.
237. CAL. PENAL CODE § 2717.8 (West 2010).
238. *Vasquez*, 129 Cal. Rptr. 2d at 853.
concrete dispute.

Other litigants have successfully demanded that the state collect public moneys due to it. In Cates v. California Gambling Control Commission, the court of appeal concluded that plaintiff Cates had the right to require the California Gambling Control Commission to show that it had collected gambling moneys as required by law. In 2003, Governor Gray Davis signed an executive order stating that the California Gambling Control Commission “shall collect . . . all contributions under Section 5.1 of the Tribal-State Gaming Compacts.” The Commission agreed that its duty to collect the funds in full was mandatory. The court found that Cates could proceed at trial to determine whether the Commission had complied with its mandatory duties.

In contrast to cases in which the government failed to perform its mandatory duties, taxpayers are denied relief if they attempt to exercise a cause of action on behalf of a governmental body that has used its discretion to choose not to take action. In Elliott v. Superior Court of Solano County, the plaintiffs sought to restrain a judge from presiding over a pending case because California Civil Code Section 170 disqualified the judge for a conflict of interest. The court of appeal looked past this question and instead answered whether the taxpayer plaintiffs could sue gas field operators for unlawful restraint of trade and for improper construction and operation practices on behalf of both the local drainage district and lands commission. It ruled against the taxpayer plaintiffs because the drainage district and lands commission had used their rightful discretion in declining to take action against the gas operators. Recognizing that taxpayers challenging discretionary government action “could lead to chaos,” the court of appeal found that, in the absence of fraud or abuse of discretion, a court cannot interfere with state officials exercising their discretion.

Likewise, in Silver v. Watson, plaintiffs brought suit as taxpayers to require Los Angeles County to collect property taxes that a company had illegally underreported in past years. The court found that the plaintiffs were

240. Id.
243. Id. at 519–20.
245. Id. at 118. The dispute was over real property in Solano County, and CAL. CIV. PROC. CODE § 170(6) (West 2010) states that “In an action . . . brought . . . against . . . any public agency . . . , affecting or relating to any real property . . . , a judge of the superior court of the county in which such real property is situated shall be disqualified to sit or act . . . .”
246. Elliot, 5 Cal. Rptr. at 118.
247. Id. at 119.
248. Id. at 118.
"asking the court to substitute its own discretion for that of the supervisors with respect to a particular claim."²⁴⁰ It refused to find for the plaintiffs because the municipality had exercised its rightful discretion in not collecting those taxes.²⁴¹

These California cases demonstrate that courts are capable of exercising restraint and acting in accordance with the proper role of the judiciary by "expounding and interpreting," as opposed to creating, law.²⁴² Though the Supreme Court has in practice limited taxpayer standing to violations of the Establishment Clause, on its face the Flast nexus test suggests only that courts are restricted to deciding cases involving "specific constitutional limitations" to government action.²⁴³ A literal application of this test could confine the judiciary to its proper role while leaving room to create a more expansive doctrine of standing along the lines of the California model. The Court should therefore grant federal courts the ability to hear cases based upon any specific limitation upon government, including and in addition to the Establishment Clause.

Admittedly, granting taxpayers standing to challenge illegal governmental action could increase the power of the judiciary by allowing unprecedented judicial review of politically sensitive executive decisions. It may in these cases be the best policy to prevent courts from even reviewing the legality of executive action. Given that the separation of powers concern related to standing is that the judiciary would create policy as opposed to interpreting the law,²⁴⁴ standing doctrine seems to be an inappropriate tool for culling cases in which the judiciary is interpreting the law in a politically sensitive area. Courts can, and should, dismiss these questions using political question doctrine.²⁴⁵ The Court has recognized that political question doctrine can be an appropriate tool for dismissing a suit where standing is proper, if the claim is inappropriate for judicial resolution.²⁴⁶

²⁴⁰ Id. at 580.
²⁴¹ Id. at 579–80.
²⁴² See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Those who apply the rule [of law] to particular cases, must of necessity expound and interpret that rule.").
²⁴⁵ Political question doctrine provides federal courts with a mechanism to avoid deciding politically sensitive questions. It asks if the issue involves the resolution of questions committed by the Constitution to a specific branch of government, if resolving the question would require that the court move beyond areas of judicial expertise, and whether prudential considerations indicate that the court should not decide the case. Baker v. Carr, 369 U.S. 186, 217 (1962).
E. California’s Standing Doctrine Fails to Ensure that the People Most Directly Concerned Litigate the Issues

The only purpose of federal taxpayer standing doctrine that California courts have not satisfied is ensuring that the people most directly concerned in a conflict are those who litigate the issues. The Valley Forge Court found that plaintiffs must be themselves adversely affected and therefore have a “direct stake in the outcome” to bring suit.257 It emphasized that Article III standing requirements guarantee that persons most likely affected by a judicial order will be allowed to litigate cases themselves, unbound by decisions resulting from cases pressed by “concerned bystanders.”258

California offers no such guarantee. The California Supreme Court stated outright in Van Atta v. Scott that the existence of individuals directly affected by the governmental action in question does not impede taxpayers’ standing to bring suit.259 In Van Atta, a taxpayer challenged San Francisco’s pretrial release and detention system for using tax dollars to hold pretrial defendants wrongfully.260 The court acknowledged that pretrial detainees had a weightier interest in challenging the pretrial release and detention system than taxpayers who had never been detained.261 Despite this hierarchy of interests, the court emphatically affirmed that the taxpayers had standing to sue.262

The taxpayer plaintiffs in Blair are another example of litigants who were granted standing to sue despite the existence of persons more directly affected.263 The Blair plaintiffs challenged California’s “claim and delivery law,” which authorized a plaintiff in an action for the recovery of personal property to use a county sheriff, constable, or marshal to take the property in question from the defendant.264 The plaintiffs claimed that their tax dollars were being used to pay the county officials executing the claim and delivery law.265 Their injury was based upon the use of tax money to fund a procedure allegedly in violation of the United States and California Constitutions.266 Civil defendants in claim and delivery procedures, however, suffered the more direct loss of property in violation of their Fourth, Fifth and Fourteenth Amendment rights.267

258. Id.
259. Van Atta v. Scott, 613 P.2d 210, 222 (Cal. 1980) ("[N]umerous decisions have affirmed a taxpayer’s standing to sue despite the existence of potential plaintiffs who might also have had standing to challenge the subject actions or statutes.").
260. Id. at 222 n.20.
261. See id. at 222–23.
262. Id.
264. Id.
265. Id.
266. Id. at 1247.
267. Id. at 1261–62.
In contrast, federal taxpayer standing doctrine ensures that those people directly affected by a governmental action have the chance to file suit themselves. California has no such mechanism to ensure that the persons who are most directly affected by an issue will be the ones able to litigate that issue.

Although the question whether a plaintiff’s injury is sufficiently direct seems amorphous, Eric Segall distinguishes between the injury caused by the violation of structural provisions of the Constitution and other provisions. As Segall points out, “[A]s opposed to violations of structural provisions, governmental violations of most of the Bill of Rights will cause specific injury to individuals. If the government violates the First or Fourth Amendments, for example, someone will usually lose liberty, speech, or money. But that’s not true for structural provisions.”

Comparing the directness of injury for the purposes of standing therefore boils down to whether an injury is particularized as opposed to general. If someone has suffered a particularized injury as a result of a violation of the law, then her interest is more direct than that of a mere taxpayer enforcing the law that has been violated.

Admittedly, this evaluation does peek at the merits of a claim by looking at the nature of the injury itself. The focus, however, remains ultimately on the plaintiff, as this peek serves solely to determine whether a taxpayer is an appropriate plaintiff to bring suit, or if a “better” plaintiff exists. This inquiry is very general. It does not involve comparing two particularized injuries to determine which is more severe. Instead, it asks only if a particularized injury exists at all, in order to determine if a more suitable plaintiff exists.

Despite the Court’s stated intention of ensuring that those most likely affected by an order have the opportunity to litigate, Jonathan Siegel has opined that federal standing doctrine does not actually guarantee this result. As Professor Siegel noted,

If a possibly unlawful governmental action highly impacts individual A, has a trifling impact on B, and has no impact whatsoever on C, a justiciability doctrine might protect A from waking up to discover that her rights have been affected by a suit brought by C, but she may wake up to discover that her rights have been affected by a suit brought by

268. Segall, supra note 4, at 694–95. Segall uses the Twenty-Seventh Amendment as an example of a “structural” constitutional provision. Segall, supra note 4, at 694–95. The Twenty-Seventh Amendment requires that “No law, varying the compensation of the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” U.S. Const. amend. XXVII. This is a structural provision of the Constitution because, if it is violated, no individual is injured more than anyone else. Segall, supra note 4, at 694.

269. Segall, supra note 4, at 694.

270. See id. at 694–95.

271. Id.

B. If this is a protection for A, it is not much of a protection. Instead of ensuring that the plaintiff most affected is allowed to challenge a governmental activity, federal justiciability requirements ensure only that plaintiffs are somewhat affected.

Daniel Meltzer has pointed out that, in certain situations, those parties who have been injured directly are particularly unsuitable plaintiffs for enforcing their constitutional rights. Professor Meltzer discussed this concept specifically in the context of individuals who have suffered violations of their rights under the Fourth Amendment. Such potential plaintiffs are often individuals with criminal records who may have little incentive to sue or may garner little sympathy as plaintiffs. They are therefore particularly unsuccessful at enforcing the Fourth Amendment, although they are the individuals most affected by its violation. This leads to the underenforcement of constitutional norms.

The debate over whether it is desirable to ensure that the individual most directly affected be able to sue, however, lies outside the scope of this analysis. Therefore, for the purposes of this Comment I accept the rationale for standing expressed in Valley Forge, that a "due regard [must be given to] . . . the autonomy of those persons likely to be most directly affected by a judicial order." California courts consciously give no such regard to the autonomy of individuals most directly affected by a judicial opinion. Courts in California adjudicate cases brought by taxpayers even when there are people who have sustained much more substantial and direct injury from the expenditure in question.

III

ILLUSTRATIONS OF TAXPAYER STANDING AT WORK IN CALIFORNIA

The Court can reverse its general prohibition against taxpayer suits and still achieve the goals of standing. I propose that the Court revise standing doctrine, heeding Judge Fletcher's call to break what is now "a single, general question into discrete and particular questions." Standing should no longer

273. Id.
274. See id.
276. Id.
277. Id.
278. Id.
279. Id.
282. See id.
283. Fletcher, supra note 5, at 290.
be a black box from which grants or (more frequently) denials of the right to sue emerge with little explanation. The Court should follow California’s approach and evaluate the issues of adversity, concreteness, and policymaking separately from the question of taxpayer standing. Taxpayer standing doctrine should ask only, as California courts do not, whether a plaintiff exists who has been directly affected by the alleged violation of the law.284

Under this structure, the claim itself would determine whether the taxpayer is the most appropriate party to bring suit.285 If the alleged violation were to harm an individual or class of individuals directly, then those directly harmed would be the parties most appropriate to bring suit.286 If the violation were only to result in generalized harm, however, the taxpayer would be the most appropriate party to bring suit.287

To illustrate the practical effects of the difference between federal taxpayer standing doctrine and California’s broad grant of taxpayer standing, I selected for analysis three cases: Blair, Connerly, and Cates.288 These cases were adjudicated in the California state-court system, in which taxpayer plaintiffs brought federal claims. If these cases had been brought in the federal system, they would have been dismissed for lack of taxpayer standing. Each case, however, was adjudicated on the merits in California. I propose a model of taxpayer standing under which federal courts could decide Cates but not Blair or Connerly.

Blair v. Pitchess illustrates the differences between federal and California taxpayer standing. Blair, decided by the California Supreme Court in 1971, is one of California’s seminal taxpayer standing cases. Los Angeles taxpayers sued the County of Los Angeles, its sheriff, marshal, and deputy sheriff, and the Malibu Justice Court constable for an injunction against the execution of California’s claim and delivery law.289 The taxpayers alleged that California’s claim and delivery law violated both the California and United States Constitutions.290 They did not allege that their property had been taken subject to the claim and delivery law.291 Instead, they brought their challenge under Code of Civil Procedure Section 526a, alleging that, as the claim and delivery

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284. See Segall, supra note 4, at 696 ("[W]hen it comes to constitutional provisions that will be rendered unenforceable if we prohibit taxpayer standing, fidelity to the Constitution, checks and balances, and separation of powers counsels in favor of hearing those cases.").
285. Id. at 694–95.
286. See id.
287. See id. I propose that taxpayer standing doctrine only distinguish between direct injuries and injuries to the taxpayer qua taxpayer. My proposed model of standing does not distinguish between different degrees of direct injury.
289. Blair, 486 P.2d at 1246–47.
290. Id. at 1246.
291. Id. at 1247.
law was unconstitutional, compensating public officials for time spent enforcing it was unconstitutional as well.\(^{292}\)

If this claim had been brought in federal court, it would have been dismissed for lack of standing.\(^{293}\) The Court made clear in *Hein* that taxpayers *qua* taxpayers may only bring challenges in federal court based upon Congressional taxing and spending in violation of the Establishment Clause.\(^{294}\) In contrast, the taxpayers in *Blair* based their federal-law challenge upon the Fourth, Fifth, and Fourteenth Amendments, rather than the Establishment Clause.\(^{295}\) In California, however, the taxpayers could enjoin the government from spending money on the enforcement of the claim and delivery laws under section 526a, because the laws were unconstitutional.\(^{296}\)

In practice, the conflict in *Blair* satisfied all but one of the articulated purposes behind federal taxpayer standing doctrine. The taxpayer plaintiffs had an interest, albeit a small one, in challenging the legality of state expenditures.\(^{297}\) The Supreme Court in *Flast* recognized that it is possible for taxpayers to suffer concrete injury sufficient to support standing.\(^{298}\) In California the illegal expenditure of public funds creates an interest sufficient to support standing.\(^{299}\) Furthermore, the parties advocated their positions effectively and adversely, as the “extensive” briefs submitted by both sides demonstrated.\(^{300}\) The California Supreme Court found that the Fourth, Fifth, and Fourteenth Amendments provided specific limitations upon the government’s actions in executing the claim and delivery laws.\(^{301}\) This ensured that the court was confined in its decision to ordering compliance with the law, as opposed to substituting its judgment for that of the legislature.

The only purpose of federal taxpayer standing doctrine that *Blair* did not meet was ensuring that the party most directly harmed was the one who has the opportunity to litigate, as required by *Valley Forge*.\(^{302}\) Those persons whose property had been confiscated under the claim and delivery laws suffered a more direct injury as a result of the unconstitutional laws than the taxpayer plaintiffs who brought suit. The former would have been more affected by a

\(^{292}\) *Id.*


\(^{294}\) *Id.*

\(^{295}\) *Blair*, 486 P.2d at 1246.

\(^{296}\) *Id.* at 1249–50.

\(^{297}\) *Id.* at 1250.


\(^{299}\) *Blair*, 486 P.2d at 1249–50.

\(^{300}\) *Id.*

\(^{301}\) See *id.* at 1261–62. The California Supreme Court found that the claim and delivery law was an unreasonable search and seizure under the Fourth Amendment. *Id.* at 1252. It further found that the law was a taking in violation of the Fifth and Fourteenth Amendments’ due process requirements. *Id.* at 1256–58.

binding decision on the validity of the laws. Despite this, the California Supreme Court granted standing to the taxpayers, stating that they were proper plaintiffs though they had not been subject to the claim and delivery process.  

A similar situation played out in the California Court of Appeal in Connerly v. State Personnel Board. In Connerly, a taxpayer plaintiff challenged five statutory schemes creating preferential treatment in state expenditures on the basis of race, ethnicity, and gender on the grounds that they violated state and federal principles of equal protection. Connerly did not himself suffer any particularized harm; instead, he sued as a taxpayer. Like the Blair plaintiffs, he would not have had standing to sue as a taxpayer in the federal system because he did not challenge legislative appropriations based upon a violation of the Establishment Clause.

The court of appeal found, however, that Connerly had suffered justiciable injury based upon the illegal expenditure of tax funds. The court also found that the case was an actual controversy, litigated with intensity and vigor. Principles of equal protection provided a definite limit on the government conduct in question. Such conduct could not be interpreted as valid, and so the court enjoined the government from using express racial classifications in the statutory schemes at issue. As in Blair, the only purpose of standing doctrine that California courts did not satisfy in hearing the Connerly case was to ensure that the individuals most affected by the illegal government action be the ones allowed to file suit. The Connerly court found explicitly that taxpayers may sue, regardless of the existence of other potential plaintiffs who might have standing on other grounds.

Likewise, in Cates v. California Gambling Control Commission, the court of appeal granted plaintiff Cates standing to proceed at trial to determine if the California Gambling Control Commission complied with its admittedly mandatory duty to collect gambling moneys. Like the Blair and Connerly plaintiffs, Cates could not have sued as a federal taxpayer in the federal system because she did not sue under the Establishment Clause. The court found that section 526a authorized Cates to sue to challenge “wasteful government action that otherwise would go unchallenged.” The court did not mention the

305. See id. at 15, 17–18.
307. Connerly, 112 Cal. Rptr. 2d at 17–18.
308. Id. at 17–18.
309. Id. at 17.
310. Id. at 32, 35–36, 38–39, 41–42.
311. Id. at 17–18.
314. Cates, 65 Cal. Rptr. 3d at 519.
adverseness with which Cates presented her case.

Having compared the practical effects of federal and California taxpayer standing doctrine, I advocate that the Supreme Court adopt an approach to taxpayer standing under which federal courts could decide *Cates*, but would find that the plaintiffs in *Blair* and *Connerly* lack standing to sue.

Under this system, federal courts could decide cases where there are no potential plaintiffs suffering direct injury. The *Blair* plaintiffs fail my proposed test of taxpayer standing because they were not injured personally by California's claim and delivery law, unlike individuals whose property was seized under this law.\(^{315}\) The existence of potential plaintiffs who suffered direct injury would prevent federal courts from hearing the claim of plaintiffs suing as taxpayers. The *Connerly* plaintiffs would fail my proposed test because they themselves were not subject to discriminatory hiring procedures, whereas some job applicants did suffer direct injury as a result of these procedures.\(^{316}\) The plaintiff in *Cates*, however, would pass my proposed test, because there is no party more directly injured than the taxpayer by California's failure to collect moneys owed the state.

This approach to taxpayer standing ensures that structural provisions of the Constitution and federal law do not go un- or under-enforced. California's broad grant of standing allows California courts, unlike federal courts, to fully enforce structural legal norms. Under current federal taxpayer standing doctrine, many provisions of the Constitution are de facto unenforceable, because violations of many structural provisions "rarely if ever" give rise to particularized injury.\(^{317}\) If taxpayers are not allowed to bring claims based upon violations of structural constitutional and statutory provisions, then these provisions will effectively be unenforceable.\(^{318}\) In contrast, California's grant of taxpayer standing makes constitutional and statutory provisions fully enforceable, and so enforces legal norms to their limits.\(^{319}\) Indeed, California courts interpret Code of Civil Procedure Section 526a "liberally" so that citizens may seek to enforce laws that would otherwise be unenforceable because of standing requirements.\(^{320}\) This proposal would not affect the enforcement of constitutional provisions that create individual rights, because violations of these provisions cause direct injuries.\(^{321}\)

This analysis of California case law has sought to demonstrate that California courts have achieved most of the purposes of federal taxpayer

\(^{318}\) See *id.* Sager discusses only structural constitutional provisions, but the theory behind his analysis applies to structural provisions of federal statutory law as well.
\(^{319}\) See *id.*
standing through alternative, non-standing doctrines. California courts have taken a much more clear and predictable approach to ensuring that they hear cases in which injury and adverseness are actually present, and that they do not take on legislative or executive roles. California's success here indicates that federal courts can remove these factors from their standing analysis, deal with them separately, and still achieve the purposes of current standing doctrine. The Supreme Court can create a comprehensible, consistent doctrine of taxpayer standing if it treats taxpayer cases in a manner similar to that employed by California.

CONCLUSION

As things stand, federal standing doctrine is an "amorphous" concept. The Court's standing decisions are "wildly vacillating" and even, to some, "apparently lawless." Justice Harlan viewed standing as "a word game played by secret rules." In addition, as I have concluded in this Comment, federal taxpayer standing doctrine is overly restrictive, disposing of cases that are appropriate for judicial resolution. This is detrimental to the public good because it leads to the underenforcement of constitutional norms.

My proposal would allow federal courts to satisfy the purposes behind standing doctrine, while upholding the fundamental principle, articulated in Marbury v. Madison, that "where there is a legal right, there is also a legal remedy . . . whenever that right is invaded." A more transparent approach to standing that upholds the purposes behind standing doctrine while allowing taxpayers to enforce legal norms is increasingly important, as the government spends tax dollars in unprecedented quantities, at an unprecedented rate.

323. Fletcher, supra note 5, at 222–23.
324. Flast, 392 U.S. at 129 (Harlan, J., dissenting).
325. See Sager, supra note 104, at 1226.