Standing in State Courts, State Law, and Federal Review

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I. INTRODUCTION

What happens when a state’s highest court decides a suit challenging state aid to religion, under circumstances where the plaintiff has standing under state law but not under federal law? If the case is decided under federal law, or it is not clear that there are adequate and independent state grounds for the decision, may the United States Supreme Court review the state court’s decision? The answer is sometimes, depending on which party loses in the state courts. If that asymmetry seems odd, what options are available to remedy this condition? This short essay seeks to explore these issues and their consequences.

II. THE ASYMMETRY PROBLEM

The degree to which the civil state may acknowledge or aid religious institutions is a matter of considerable contest under federal constitutional law, but is also a ripe area of controversy under state constitutions. States, of course, are free to read their own constitutional limits on governmental acknowledgment of or aid to religion more strictly than the United States Supreme Court interprets the limits imposed by the Federal Establishment Clause. Due to the adequate and independent state grounds doctrine, such a reading is insulated from further review by the Supreme Court, so long as the state court clearly states that it is relying solely on state law to

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reach its decision. But if a state court fails to make the grounds of its decision explicit, the Supreme Court will assume that the state court relied on federal law and may review the decision for its conformity with federal law. To compound the problem, states are free to entertain such suits under circumstances where standing would not exist in federal court.

Nor is this problem limited to challenges of state assistance to religion. The problem occurs whenever a state court decides an issue of federal law, statutory or constitutional, and can occur in other instances of state constitutional challenges. For example, should a state constitution specify that individual rights shall be construed to conform with their federal analogs, any decision resting on a state constitutional guarantee of individual rights would be capable of review by the Supreme Court. But such review becomes more complicated if the state court permits litigants to have standing when they would lack standing in federal court.

To frame the issues more concretely, consider the recent case of Duncan v. New Hampshire. New Hampshire enacted the Education Tax Credit program, under which business organizations are entitled to tax credits against New Hampshire’s business profits tax or business enterprise tax of up to eighty-five percent of the their contributions to eligible scholarship organizations. Scholarship organizations are permitted to award scholarships to eligible students “to attend . . . a non-public school.” New Hampshire taxpayers sued in state court, contending that the program violated the New Hampshire Constitution’s requirement that “no money raised by

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2. Id. at 1040–41.
5. In 1990, California voters took precisely this action with respect to the state constitutional rights of accused criminal defendants. Proposition 115, a citizen initiative under article I, section 24 of the California Constitution, added a provision that the state constitutional rights of the accused shall be “construed by the courts of this state in a manner consistent with the Constitution of the United States.” To gild the lily, the measure stated that “this Constitution shall not be construed by the courts to offer greater rights to criminal defendants than those afforded by the Constitution of the United States.” The California Supreme Court subsequently voided this addition because it was a revision of the state constitution, rather than an amendment. Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990). Under California’s Constitution, revisions can only be achieved by legislative proposal and voter ratification. See CAL. CONST. art. XVIII, §§1, 3.
6. This is the necessary result of the Court’s observation in Michigan v. Long, supra, that “when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with . . . federal law . . . we will accept as the most reasonable explanation that the state court decided the case the way it did because . . . federal law required it to do so.” 463 U.S. at 1040.
9. Id.
taxation shall ever be granted or applied for the use of schools or institutions of any religious sect or organization.”¹⁰ Three New Hampshire citizens who desired that their children continue to receive scholarships under the program intervened, along with a non-profit organization that benefitted from the program.¹¹ A trial court ruled that the tax credits were “money raised by taxation” because they were in essence tax expenditures—”[m]oney that would otherwise be flowing to the government.”¹² Because religious schools would use some of that money, the trial court invalidated the program as applied to credits for contributions made to scholarship organizations granting scholarships to religious schools.¹³ The New Hampshire Supreme Court vacated the trial court’s judgment and ordered the case to be dismissed for lack of standing.¹⁴ The plaintiffs lacked standing because their claimed injuries—net fiscal losses incurred by New Hampshire government and reduced funding for public schools—were a generalized grievance suffered indistinguishably by all New Hampshire residents.¹⁵ To reach this conclusion the court relied upon federal constitutional cases governing standing¹⁶ and a similar Rhode Island case,¹⁷ after concluding that a statutory amendment conferring taxpayer standing in such cases was an impermissible attempt to empower the courts to render advisory opinions at the behest of individuals.¹⁸

Left unspoken was the question of whether the New Hampshire Constitution’s separation of powers requires a litigant to prove a personalized, concrete injury in fact in order to have standing. If

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¹⁰ N. H. CONST. part II, art. 83.
¹¹ Duncan, 102 A.3d at 917.
¹² Id. at 918.
¹³ Id. at 918.
¹⁴ Id. at 917.
¹⁵ Id. at 926.
¹⁸ N. H. CONST. part II, art. 74 limits advisory opinions to those requested by either the Governor or the Legislature. The statute, N.H. REV. STAT. ANN. 491:22 (I), provided in relevant part that any taxpayer “shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government . . . ; therefore any taxpayer . . . shall have standing” to allege that a “taxing district . . . has engaged, or proposes to engage, in conduct that is unlawful or unauthorized “and need not “demonstrate that his or her personal rights were impaired or prejudiced.” The New Hampshire Supreme Court read this provision to eliminate the requirement that a litigant prove personalized concrete injury in fact in order to have standing, thus creating a private right to seek an advisory opinion.
so, the legislature could not dispense with this requirement. Implicitly, that is what the New Hampshire Supreme Court said. Suppose, however, that the injury in fact requirement is not mandated by the state’s constitution, and that the plaintiffs in Duncan, on a rehearing, succeed in so persuading the court. Or suppose that the Governor requests the state supreme court to render an advisory opinion concerning the validity of the tax credit program.

Now the court must proceed to the merits. For purposes of this hypothetical Duncan Redux, assume that the New Hampshire Supreme Court upholds the validity of the Education Tax Credit program, perhaps by concluding that the tax credits are not “money raised by taxation” or that the scholarships given to students at religious schools are not for the use of religious schools but for use by the private recipient in choosing where to redeem the scholarship. The losing plaintiffs think this result offends the Federal Establishment Clause, even if it comports with New Hampshire’s Constitution. But do they have standing to petition the Supreme Court for review?

According to ASARCO, Inc. v. Kadish, the plaintiffs lack standing to pursue review in the U.S. Supreme Court. In ASARCO, individual taxpayers and an association of public school teachers contended in state court that an Arizona law, governing mineral royalties from state lands, violated the Federal Enabling Act, admitting Arizona as a state, and the Arizona Constitution. Both the federal law and the Arizona Constitution required that leases of public land be at the full-appraised value; the Arizona statute dispensed with that requirement. Because the royalties were to be in trust for the support of public schools, the plaintiffs contended that they were injured by lower payments to the school trust “resulting in unnecessarily higher taxes.” While states are free to set their own

19. By ruling that the legislature acted unconstitutionally in its attempt to confer upon private individuals the power to obtain an advisory opinion, the court declared a constitutional requisite for standing. Of course, there might be cases, which are not advisory, but in which standing depends on other limits imposed by separation of powers.


22. Id.

23. Id.

24. Id. at 614.
standing rules independent of the Article III limits on standing applicable to federal courts, the taxpayers’ injury was not sufficiently personal for standing in federal court; all citizens shared the same interest in levels of taxation.\textsuperscript{26} Moreover, the injury, even if countenanced, was not capable of redress by courts.\textsuperscript{27} If the Arizona law was voided, it was entirely speculative whether the state’s contribution to public schools would be increased, or whether taxes would be lowered.\textsuperscript{28} These outcomes lay within the discretion of Arizona’s elected politicians, not the courts.\textsuperscript{29} For the same reason, the association had no standing under Article III because its injury—an “adverse economic impact”—was not capable of judicial redress.\textsuperscript{30}

But the claims were made in the Arizona courts, which permitted standing where Article III would deprive the federal courts of jurisdiction. The Arizona Supreme Court voided the statute, and the mineral lessees sought certiorari.\textsuperscript{31} Unlike the plaintiff taxpayers, the mineral lessees had standing to seek review in the U.S. Supreme Court.\textsuperscript{32} Even though the case had come to a final judgment in the state courts without federal standing, the mineral lessees had standing because the state court judgment caused “direct, specific, and concrete injury” to the mineral lessees, who were the first to invoke federal jurisdiction at a time when the Article III case or controversy requirement was met.\textsuperscript{33}

Applying these principles to the certiorari petition of the losing taxpayers in \textit{Duncan Redux} produces the result that the taxpayers lack standing to press a claim that the Education Tax Credit violates the Federal Establishment Clause. They lack a personalized injury in fact and the judiciary is arguably unable to redress the

\textsuperscript{25} \textit{Id.} at 620 (explaining that “state courts are not bound by Article III and yet have it within their power and proper role to render binding judgments on issues of federal law, subject only to review by this Court.”).
\textsuperscript{26} \textit{Id.} at 608.
\textsuperscript{27} \textit{Id.} at 614–15.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.} at 614 (quoting the associations’ complaint).
\textsuperscript{31} \textit{Id.} at 610.
\textsuperscript{32} \textit{Id.} at 623–24.
\textsuperscript{33} \textit{Id.}
alleged injury.\textsuperscript{34} Indeed, \textit{Arizona Christian School Tuition Organization v. Winn},\textsuperscript{35} is precisely on point.

But what if the New Hampshire Supreme Court in the hypothetical \textit{Duncan Redux} ruled that the tax credit was unconstitutional. Would the intervenors or New Hampshire have standing to seek review in the United States Supreme Court? The answer depends on whether the New Hampshire Supreme Court would have decided the case solely on the grounds that the tax credit scheme violated the state constitution. So long as the state supreme court makes a “plain statement in its judgment or opinion that . . . federal cases . . . do not themselves compel the result [and] clearly and expressly [declares that the decision is] based on bona fide separate, adequate, and independent [state law] grounds,”\textsuperscript{36} the United States Supreme Court “will not undertake to review the decision.”\textsuperscript{37} In that event there is no recourse in the Supreme Court for the losing intervenors. If, however, the state court relies on federal precedents or interweaves them with its discussion of state law and fails to make the clear statement of its reliance solely on state law, the adequate and independent state grounds doctrine is no obstacle to review. The Supreme Court will assume “that the state court decided the case the way it did because it believed that federal law required it to do so.”\textsuperscript{38} And because the intervenors are the first party in this case to seek federal jurisdiction they have the opportunity to prove they meet the Article III requirements. The intervenors have a personalized concrete injury in fact—the loss of their children’s eligibility for tax credit subsidized scholarships—the injury is caused by the state court’s decision, and the injury can be redressed by a holding that federal law does not invalidate the scheme.

This phenomenon is not unique to suits challenging state aid to religion. Of course, given the shrunken applicability of taxpayer

\textsuperscript{34} There is an unlikely possibility of review in the U.S. Supreme Court. Suppose the state’s attorney general and governor conclude, after a change of heart, that the Education Tax Credit violates the Federal Constitution. They might assert, perhaps in an independent federal suit, that the state has standing as \textit{parens patriae} to assert the generalized grievance that an ordinary citizen could not assert. \textit{Cf.} \textit{Massachusetts v. Environmental Protection Agency}, 549 U.S. 497 (2007). One feature of state authority might be the power to assert the undifferentiated public rights of their citizens—in this case, the right to have their state government conform to the Federal Constitution. \textit{See, e.g.}, Calvin Massey, \textit{State Standing After Massachusetts v. EPA}, 61 Fla. L. Rev. 249, 277–78 (2009).

\textsuperscript{35} 131 S. Ct. 1436 (2011) (holding Arizona taxpayers lacked standing to challenge an Arizona tax credit for private contributions to school tuition organizations that granted scholarships to students attending religious schools).

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.}
standing to challenge such aid in federal courts, there is a greater possibility that state courts will grant taxpayer standing, whereas the federal courts would be closed to taxpayer standing. Taxpayer standing under *Flast v. Cohen* is virtually chimerical, so litigants have an incentive to bring suits challenging state aid to religion in state courts, where standing rules may be less settled and more fluid. There is no reason why state courts must adhere to federal principles of standing, but if they expand standing beyond the limits of Article III, they must consider the consequences of their expansion.

III. CONSEQUENCES OF ASYMMETRY

The foremost consequence of asymmetry is that expanded state standing will provide a powerful incentive for resolving disputes, whenever possible, explicitly under the state constitution or some rule of state law that is both adequate for the disposition and wholly independent of federal law. The failure to do so would produce the asymmetrical result that the original plaintiff would lack standing in federal court to seek review of an adverse state judgment in the United States Supreme Court, while the original defendant would have standing to seek federal review of an adverse state judgment. State courts could prevent this asymmetry by ruling on exclusively state grounds, but they may not be able to do so in every case. When federal law does not stipulate exclusive federal jurisdiction, state courts will have occasion to entertain and decide issues of federal law. When state courts conclude that a challenged governmental action does not violate the state constitution, it will usually be forced to decide the question of whether the same action violates the Federal Constitution. In either of these circumstances a state employing expanded standing will create an asymmetrical standing result once review is sought in the federal courts.

Expanded standing in state courts also creates incentives for strategic behavior. Suppose that a state grants financial aid to individual drug addicts in the form of a voucher redeemable at nonprofit drug rehabilitation organizations, including those that use


40. 392 U.S. at 83.
religious teachings as part of the rehabilitation process. A litigant asserts in state court only the generalized grievance that the vouchers redeemable at facilities using religious teaching offend the state constitution and the Federal Establishment Clause. The state then removes the case to federal court,\(^4\) where the state constitutional claim is severed and remanded to state court.\(^5\) The federal action is then dismissed for lack of standing, but the state action continues. A voucher recipient who is a devout religious believer successfully intervenes in the state action. If the state’s highest court rules that the vouchers violate the state constitution the intervenor has standing to seek federal review, based on a claimed violation of the Free Exercise Clause,\(^6\) as he has suffered injury in fact caused by the ruling and that injury is redressable by the courts if his free exercise claim is successful. If the court upholds the voucher plan under the state constitution, the losing plaintiff lacks standing to seek federal review. Moreover, the religious intervenor might intervene in the parallel federal action, where his federal claim rooted in the Free Exercise Clause will receive the hearing that may not be obtained by seeking review of the state court judgment in the United States Supreme Court. Under these circumstances, a litigant with a generalized grievance would be well advised to assert in state court only the state constitutional issue. If he wins he risks only the possibility that the religious intervenor’s petition for certiorari will be granted. The odds are in the original plaintiff’s favor. But if he combines his federal and state claims he risks a hearing on the intervenor’s claim and a possible adverse outcome in that forum.

What happens if a state expands standing for all questions of state constitutional law or other issues that involve only issues of state law, but adheres to a clone of Article III standing for any case that involves federal law? A state would surely be free to read its constitutional provisions mandating separation of powers to allow standing whenever the legislature has conferred standing. If this reading of state constitutional limits on standing had been in place in the actual Duncan case, the plaintiffs would have had standing.

41. See 28 U.S.C. § 1441(a) (“Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”).

42. See 28 U.S.C. § 1441(c) (providing that cases presenting a federal claim and a pendent state claim removable, with state claim to be severed and remanded to state court).

43. The free exercise claim may lack merit. See Locke v. Davey, 540 U.S. 712 (2004). But the intervenor has standing to seek review.
Even in the absence of such legislation, a state supreme court would be free to find generalized grievances of the sort raised in *Duncan* sufficient for standing. The difference between these two modes of expanding state standing lies in the ability of the state supreme court to restrict standing to the Article III requisites in cases involving federal law. For example, if the legislature has validly exercised its state constitutional authority to permit any citizen to assert a generalized grievance, the state judiciary cannot contravene this directive. But if expanded standing is the product of a judicial decision that such standing does no violence to the state’s doctrine of separation of powers, the state supreme court may credibly declare its prudential reasons for limiting standing in cases in which federal law is at issue. The principal prudential reason is, of course, to remove the possibility of asymmetrical standing when review is sought in the federal courts.

Another consequence of expanded standing in state courts, at least with respect to state constitutional claims or issues of pure state law, is that state courts will become a forum for deciding many public policy issues that are stripped of the adversarial quality that has traditionally defined the limits of the judicial role. This choice means that the state judiciary will likely resolve state law issues more broadly than it would in adversarial litigation. If any person can bring suits challenging the validity of state actions, those suits will almost necessarily be claims that the action is facially invalid. Without personalized injury in fact, there is scarcely any ground to limit decision to a particular application of the law or practice. If injury in fact is eliminated as a requirement for standing, then there is no need to consider causation or redressability. The judiciary will become a frequent, if not almost automatic, reviewer of the validity of executive and legislative action. Taken to an extreme, the familiar process of legislation—approval by legislature and governor—will be supplemented by a further approval of the judiciary. Although states are free to make these alterations, they should consider these costs, which are in addition to the asymmetry problems presented when federal issues are resolved in the state courts.

**IV. A HYPOTHETICAL SOLUTION**

How could a state expand standing yet stay within the Article III limits, thus preserving possible Supreme Court review of federal issues decided by the highest state court? This might seem oxymoroncic, or perhaps quixotic, but there exist some theoretical possibilities. First, it appears that the Article III requirements of causation
and redressability may be relaxed when a litigant asserts a “procedural right.” In a footnote in his majority opinion for the Court in \textit{Lujan v. Defenders of Wildlife},\textsuperscript{44} Justice Scalia conceded that “procedural rights are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.”\textsuperscript{45} But a concrete injury is still necessary to assert the procedural right. Or is it? Justice Kennedy, concurring in the judgment in \textit{Lujan}, noted that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before [but] Congress at the very least must identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”\textsuperscript{46} In theory, if a state were to identify a concrete injury and limit assertion of that injury to a class of people so injured, it might have created standing that would satisfy Article III, should a litigant seek further review in the U.S. Supreme Court.

Consider the following possibility in the context of \textit{Duncan}. Suppose New Hampshire enacts a law that gives any taxpayer the right to request from the revenue department of the state an estimate of the amount of reduction in state spending for other purposes that will occur by state expenditures (including tax expenditures) that might be expended in aid of religion, assuming no new revenue. Suppose that the law further provides that if the estimated total reduction, multiplied by the requesting taxpayer’s tax payments as a percentage of state revenue, exceeds $100, the taxpayer is provided the right to sue the state by calling into question the validity of any such expenditure under the state and federal constitutions. Under federal standing law “informational injury” is sufficient to establish the injury in fact requirement. For example, the Freedom of Information Act gives “any person” the right to receive certain government records.\textsuperscript{47} In \textit{EPA v. Mink}, the Supreme Court read the FOIA to confer “a judicially enforceable public right to secure such information from . . . official hands.”\textsuperscript{48} In \textit{FEC v. Akins}, the Court upheld the standing of plaintiffs claiming that, under the Federal Election Campaign Act of 1971,\textsuperscript{49} a lobbying organization should be classified as a political committee and subject to disclosure of its

\textsuperscript{44} 504 U.S. 555 (1992).
\textsuperscript{45} \textit{Id.} at 572 n.7.
\textsuperscript{46} \textit{Id.} at 580.
\textsuperscript{48} 410 U.S. 73, 80 (1973).
\textsuperscript{49} 2 U.S.C. § 431(4).
political contributions.\textsuperscript{50} The reason this claim was not a generalized grievance—as in \textit{United States v. Richardson},\textsuperscript{51} where the plaintiffs claimed that the CIA’s refusal to disclose its expenditures violated the public accounts clause—was that Congress had specifically created a new informational right that authorized the suit.\textsuperscript{53} Thus, the hypothetical scheme, validly created under state law, would also constitute sufficient informational injury to support Article III standing. The addition of a cause of action for those taxpayers whose proportionate share of reduced state expenditures on matters apart from aid to religion exceeds $100 is, to paraphrase Justice Kennedy, a defined injury and an articulation of a chain of causation that produces a case or controversy in the federal courts (when it arrives there) where none existed before. The state has identified the injury it seeks to vindicate and has related that injury to the class of persons entitled to bring suit. Perhaps this is a gimmick but, if so, it calls into question such cases as \textit{FEC v. Akins}.

\textbf{V. Conclusion}

States face some hard choices in deciding upon their standing rules. If they permit standing under circumstances impermissible in the federal courts, they must confront the consequences of the asymmetry produced by the differences between federal and state standing rules. If they limit standing to the requirements under Article III they have effectively foregone their independence. There are several gambits that states might employ to blunt or eradicate asymmetry. One is to permit expanded standing for questions of pure state law, but adhere to Article III standards for cases involving pure federal law or mixed questions of federal and state law. Another is to replicate the differing standards under Article III that permit somewhat expanded standing where procedural rights are invoked. All of these possibilities, however, simply highlight the difficult policy choices that states must make given the reality of asymmetrical standing.

\textsuperscript{51} 418 U.S. 166 (1974).
\textsuperscript{52} U.S. CONST. art I, § 9, cl. 7.
\textsuperscript{53} Akins, 524 U.S. at 20.