

Narrow Issue of Taxpayer Standing Highlights Wide Divisions Among the Justices

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Not everyone can sue in federal court claiming that a government action is unconstitutional. Among other requirements, the plaintiff must assert personal injury caused by the government's alleged misbehavior. Ordinarily, federal taxpayers are not granted standing to sue merely because they profess injury when their taxes are spent in a way that they believe offends the Constitution. But the Supreme Court has fashioned a narrow exception to the general rule against taxpayer standing. If Congress has exercised its taxing and spending power in a manner that might have violated the First Amendment's prohibition against "laws respecting an establishment of religion," taxpayers can challenge the expenditure. This term, the Court grappled with the following question: Does the taxpayer standing exception in Establishment Clause cases apply only to specific congressional enactments, or does it extend to general appropriations for the executive branch which uses the money to fund its own programs? The Court's answer to that seemingly arcane question could have profound implications for executive branch support of religious institutions.

In *Hein v. Freedom From Religion Foundation, Inc.* the U.S. Supreme Court held, on a 5-4 vote, that taxpayers lacked standing to challenge a decision by the executive branch to finance religiously oriented conferences in support of programs established by the White House Office of Faith-Based Initiatives.¹ The decision produced no majority

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¹127 S. Ct. 2553 (2007).

opinion. Instead, it revealed a gulf between members of the Court's conservative majority on both the Establishment Clause question at issue and on the value of adhering to precedents established by past decisions. Moreover, seven of the nine justices voted to preserve the ability of taxpayers in certain narrowly prescribed circumstances to challenge governmental expenditures in support of religion as a violation of the First Amendment's Establishment Clause.

Justice Samuel Alito wrote the plurality opinion, reversing a decision written by Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, which had found that taxpayers have standing to challenge executive branch expenditures that were made to assist religious organizations in applying for and receiving federal grants. Justice Alito was joined by Chief Justice John Roberts and Justice Anthony Kennedy. Justices Antonin Scalia and Clarence Thomas agreed with the result, but Justice Scalia's concurring opinion, reading more like an unusually tart dissent, would have disposed of the concept of taxpayer standing altogether by overruling the controlling precedent established in *Flast v. Cohen*.² Justice David Souter's dissenting opinion, which would have found taxpayer standing in this case, was joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Steven Breyer.

The plurality and dissenting opinions appeared to have more in common with one another than with the two-justice concurrence that rounded out the majority vote. That fact, plus Justice Scalia's particularly blunt rhetoric, appear to undermine the promise of the Roberts Court to emphasize collegiality and reach broader consensus. *Hein* is one of 24 cases decided by a 5-4 vote during the 2006-07 term—representing fully a third of the Court's docket—and most of these decisions appeared to split along ideological lines.³

In this respect, the decision in *Hein* says far less about the narrow issue of taxpayer standing in Establishment Clause cases than it does about the makeup of the current Supreme Court and the prospects for radical doctrinal change. Although the Court has become more conservative since Chief Justice Roberts was confirmed, a

²392 U.S. 83 (1968).

³See, e.g., Linda Greenhouse, In Steps Big and Small, Supreme Court Moved Right, *New York Times*, July 1, 2007 at p. 1; Robert Barnes, A Rightward Turn and Dissention Define Court This Term, *Washington Post*, July 1, 2007 at A7.

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majority of justices appear committed to preserving existing precedent with only incremental change. The decision in *Hein* illustrates this right-of-middle course. At the same time, the doctrinal importance of the Court's decision to preserve taxpayer standing in Establishment Clause cases as articulated in *Flast v. Cohen* may be overshadowed by its practical effect. That is, the doctrine survived *Hein*, but it may have little real world impact where financial support for religion is initiated by executive action rather than congressional mandate. Accordingly, *Flast* will likely have a much diminished importance.

I. Background

Hein focused solely on the narrow question of when taxpayers are considered to have standing to challenge in court governmental expenditures made in support of religion. The First Amendment to the United States Constitution provides, among other things, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."⁴ This has long been held to prohibit direct or indirect financial support of religion as a violation of the Establishment Clause.⁵ However, this constitutional restriction does not automatically authorize any citizen who disputes a particular spending program to bring a judicial challenge. Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies."⁶

The constitutional limitation of federal court jurisdiction to actual cases or controversies is governed to a large degree by the concept of "standing." That is, federal judicial power is not to be exercised to provide advisory opinions about generalized grievances. A more concrete harm is required. As a consequence, in order to have standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed

⁴U.S. Const., amend. I.

⁵E.g., *Everson v. Board of Education*, 330 U.S. 1, 11 (1947) ("The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [the colonists'] indignation. It was these feelings which found expression in the First Amendment.").

⁶U.S. Const., art. III, § 2.

by the requested relief.”⁷ As the Supreme Court explained in *Frothingham v. Mellon*,

We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. The question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.⁸

The Court in *Frothingham* held that paying taxes alone was insufficient to confer standing on an individual who wanted to challenge the legality of a spending program. A federal taxpayer had sought to challenge federal appropriations for mothers’ and children’s health, arguing that federal involvement in this area intruded on the rights reserved to the states under the Tenth Amendment. With respect to standing, the plaintiff argued that the program would “increase the burden of future taxation and thereby take [the plaintiff’s] property without due process of law.”⁹ However, the Court held that the general payment of taxes was not the kind of particularized injury required for Article III standing. It explained that the added tax burden was “essentially a matter of public and not of individual concern” because it “is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.”¹⁰ Thus, although an individual clearly has standing to challenge a specific tax imposed directly on his exercise of a constitutional right,¹¹ no such “particularized injury”

⁷ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁸ 262 U.S. 447, 488 (1923).

⁹ *Id.* at 486.

¹⁰ *Id.* at 487.

¹¹ See, e.g., *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (invalidating tax on preaching on First Amendment grounds).

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is associated with paying taxes generally, even when some portion of the collections is spent illegally.

In *Flast v. Cohen*, the Supreme Court carved out a narrow exception to the general constitutional prohibition against taxpayer standing. The taxpayer-plaintiff in that case challenged the distribution of federal funds to religious schools under the Elementary and Secondary Education Act of 1965, alleging that such aid violated the Establishment Clause. The Court set out a two-part test for determining whether a federal taxpayer has standing to challenge an allegedly unconstitutional expenditure. First, the taxpayer must establish “a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.” Second, the taxpayer must establish

a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.¹²

The Court recognized this exception to the prevailing rule with respect to taxpayer standing because the use of tax dollars to support religion is the very type of injury the Establishment Clause was designed to prevent. Although “[a] large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support . . . government favored churches,” many settlers suffered from the “practices of the old world” even in the colonies.¹³ Such abuses of the power to tax and spend “aroused . . . indignation” and engendered “the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions.” In the Virginia Assembly, “Thomas Jefferson and James Madison led the fight” against taxation

¹²*Flast v. Cohen*, 392 U.S. 83, 102–03 (1968).

¹³*Everson v. Board of Educ.*, 330 U.S. 1, 8–9 (1947).

that supported Virginia's established church.¹⁴ In his *Memorial and Remonstrance Against Religious Assessments*, James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, stated that the taxing and spending power has the potential to injure taxpayers because "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."¹⁵ Renewal of the tax was defeated in committee, and the Virginia Assembly squarely condemned taxation that supports religion by enacting Thomas Jefferson's Virginia Bill for Religious Liberty, which proclaimed that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."¹⁶

Like the Virginia Bill for Religious Liberty, the Establishment Clause "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out."¹⁷ Animated by concern that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general," the Establishment Clause was "designed as a specific bulwark against such potential abuses of governmental power."¹⁸ It exists to ensure that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions."¹⁹

Nevertheless, the *Flast* exception to the rule against taxpayer standing has been construed narrowly. For example, in *Valley Forge College v. Americans United for Separation of Church and State*, the Court held that there was no taxpayer "injury" (and, therefore, no standing) where the Department of Health, Education, and Welfare donated property to a Christian college under the Federal Property and Administrative Services Act of 1949, which allows the federal

¹⁴*Id.* at 11–12.

¹⁵*Flast*, 392 U.S. at 103. (quoting 2 Writings of James Madison 183, 186 (Hunt ed. 1901)).

¹⁶*Everson*, 330 U.S. at 12.

¹⁷*Id.* at 8.

¹⁸*Flast*, 392 U.S. at 103–04.

¹⁹*Everson*, 330 U.S. at 16.

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government to dispose of “surplus property” that has “outlived its usefulness.”²⁰ The Court observed that the only direct expenditure even remotely related to the case was the money the government originally spent to acquire the property approximately 30 years before the transfer at issue. Moreover, if the government had not donated the “surplus property” to a religious organization, it might well have donated the property to some other non-profit entity, in which case taxpayers would not have benefited.²¹ In other words, there was no reason to believe that the government would have sold the property, realized a financial windfall, and used the proceeds to reduce taxes. Years later, in a 2006 case, the Court again drew a line that separates *Valley Forge* from *Flast*: In cases that do not involve direct expenditures, “a litigant may not assume a particular disposition of government funds in establishing standing.”²²

By contrast, when direct expenditures appropriated by Congress are at issue, the injury may consist of the “‘very extract[ion] and spen[ding]’ of ‘tax money,’” and that injury can suffice to confer standing.²³ Thus, in *Bowen v. Kendrick*, the Court held that taxpayers had standing to challenge the Adolescent Family Life Act, which authorized federal grants to private community service groups, including religious organizations. Although the funds were administered by executive branch officials, the Court focused on the disbursement of funds flowing from Congress’ taxing and spending power and the fact that the legislature contemplated a partnership between governmental and religious institutions.²⁴

Hein presented the further question of whether discretionary spending by executive departments to fund religious activities may independently support taxpayer standing to bring an Establishment Clause claim. The Court was asked to decide whether a series of conferences funded by the federal government in support of the White House program of faith-based initiatives is more akin to the spending program in *Kendrick* than to the property giveaway in *Valley Forge*.

²⁰ 454 U.S. 464, 466 (1982).

²¹ *Id.* at 480 n.17.

²² *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1865 (2006).

²³ *Id.* (quoting *Flast*, 392 U.S. at 106).

²⁴ *Bowen v. Kendrick*, 487 U.S. 589, 595–96, 619–20 (1988).

II. Faith-Based Initiatives and Taxpayer Standing in *Hein*

On January 29, 2001, nine days after his inauguration as president of the United States, George W. Bush issued an executive order that created the White House Office of Faith-Based and Community Initiatives (“OFBCI”) for the express purpose of using federal funds to “expand the role” of religious organizations and “increase their capacity.”²⁵ The executive order directed OFBCI to “coordinate a national effort to expand opportunities” for religious organizations and undertake “a comprehensive effort to enlist, equip, enable, empower and expand the work” of religious organizations.²⁶ That same day, in a separate executive order, President Bush directed five federal agencies to establish Executive Department Centers for Faith-Based and Community Initiatives (“Faith-Based Agency Centers”), and instructed the Faith-Based Agency Centers to incorporate religious organizations “in department programs and initiatives to the greatest extent possible.”²⁷ On December 12, 2002, President Bush signed Executive Order 13,279, which reduced the separation between federally-funded services and inherently religious activities, allowing religious organizations to provide federally-funded services in facilities adorned with “religious art, icons, scriptures, or other symbols.”²⁸

In 2002, OFBCI began to orchestrate a series of faith-based conferences and by the end of 2006 had held 28 such events.²⁹ The stated goal of the conferences was to promote community organizations whether secular or religious.³⁰ However, the conferences were operated as training and recruiting grounds primarily to support religious applicants for government grants that give such groups an

²⁵ Exec. Order No. 13,199, § 3(a), 66 Fed. Reg. 8,499 (2001).

²⁶ *Id.* at Preamble & § 2.

²⁷ Exec. Order No. 13,198, § 3(b), 66 Fed. Reg. 8,497 (2001). In subsequent executive orders, President Bush directed other federal agencies to establish similar Faith-Based Agency Centers. Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (2002); Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (2004).

²⁸ Exec. Order No. 13,279, § 2(f), 67 Fed. Reg. 77,141 (2002).

²⁹ White House, WHOFBCI Accomplishments in 2006 (“White House, WHOFBCI Accomplishments”), http://www.whitehouse.gov/government/fbci/2006_accomplishments.html (last visited July 5, 2007); White House, Logistics, Washington, D.C., September 24, 2007 (“White House, Logistics”), <http://www.dtiassociates.com/FBCI/logisticsDC.cfm?location=DC> (last visited July 5, 2007).

³⁰ See White House Conferences on Faith-Based and Community Initiatives, www.dtiassociates.com/FBCI/ (last visited July 5, 2007).

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advantage over secular organizations in the application process. The conferences generate federal grant applications from religious groups by “provid[ing] participants with information about the government grants process and available funding opportunities” and offering “various grant writing tutorials.”³¹ Thousands of individuals attended the conferences,³² which have trained 26,000 “new and potential federal grantees” since 2002.³³

Apart from the grants themselves, the conferences require substantial expenditures of government funds entirely separate from any costs attributable to the salaried time of executive branch officials who organize, manage, and attend.³⁴ Expenses include renting ballrooms, meeting rooms, and overflow space for the massive conferences at hotels across the nation,³⁵ sending mailings prior to the conferences “to every church, synagogue, mosque, and social service organization within two hundred miles [of the conference location], about 20,000 invitations” per conference;³⁶ and allowing thousands of individuals to attend each conference. Attendance at the conferences is without charge to the participants, so that taxpayers and the public fisc bear the full financial burden of the events.³⁷

The faith-based conferences tend to promote religious messages, which include prayer and performances of “All Hail, King Jesus” by religious choirs.³⁸ At one typical conference, for example, President Bush opened his remarks by assuming that there was not a single atheist or agnostic in an audience of over one thousand: “You love God with all your heart and all your soul and all your

³¹ White House, Faith-Based & Community Initiative, www.whitehouse.gov/government/fbci/president-initiative.html (last visited Jan. 29, 2007).

³² David Kuo, *Tempting Faith* 209 (2006); United States Department of Justice, E-Alert, www.ojp.usdoj.gov/fbci/newsletters/ealert002.htm (last visited Jan. 29, 2007).

³³ White House, WHOFBCI Accomplishments.

³⁴ Kuo, *Tempting Faith*, at 231.

³⁵ *Id.* at 211; Amy Sullivan, “Patron Feint,” *New Republic*, Apr. 3, 2006.

³⁶ Kuo, *Tempting Faith*, at 209.

³⁷ White House, Logistics (stating that the conferences are free for attendees).

³⁸ Adelle M. Banks, “Bush Touts His Faith-Based Initiative Despite Congressional Foot-Dragging,” *Religion News Service*, June 2, 2004, pewforum.org/news/display.php?NewsID=3481 (last visited Jan. 29, 2007).

strength.”³⁹ The president’s assumption evidently was correct, for the audience responded enthusiastically to his speech by shouting “Preach on, brother!”⁴⁰ In remarks at another such conference, then–Attorney General John Ashcroft, after identifying “faith” as a “fundamental value[] that define[s] our nation,” made the same assumption as had the president, telling the audience “through the message of faith, you uphold our values.”⁴¹

The overall religious focus of the faith-based initiative has had a predictable impact on the ways in which grants have been awarded and implemented. According to David Kuo, a former special assistant to President George W. Bush for faith-based programs, the grants process has been infused with religious discrimination.⁴² For example, in awarding grants from the Compassion Capital Fund, a grants program created by Congress in 2002, the Department of Health and Human Services convened “an overwhelmingly Christian group of wonks, ministers, and well-meaning types” whose “biases were transparent.” The group was tasked with rating organizations on a scale from 1 to 100, and these ratings determined which organizations would receive grants.⁴³ According to Kuo, “[i]t was obvious that the ratings were a farce.” In fact, one of the raters stated that “when [she] saw one of those non-Christian groups in the set [she] was reviewing,” she “just stopped looking at them and gave them a zero.” She further stated that such behavior was typical among the raters. Under this rating system, “Jesus and Friends Ministry from California, a group with little more than a post office box” scored much higher than Big Brothers/Big Sisters of America and other leading national charities.⁴⁴

Not surprisingly, the combination of using faith-based conferences to instruct religious organizations in applying for grants and then

³⁹George W. Bush, Remarks at the White House Conference on Faith-Based and Community Initiatives, Philadelphia, Pennsylvania (Dec. 12, 2002).

⁴⁰*Id.*

⁴¹Prepared Remarks of Attorney General John Ashcroft, White House Faith-Based Conference, Tampa, Florida (Dec. 5, 2003).

⁴²Kuo, *Tempting Faith*, *supra* note 32, at 212–16.

⁴³*Id.* at 213–15. See also Government Accountability Office, Faith-Based and Community Initiative 6 (June 2006) (GAO Report) (stating that the decisions to award grants “were generally based on applicants’ scores” assigned by raters).

⁴⁴Kuo, *Tempting Faith*, *supra* note 32, at 213–16.

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selecting grantees on the basis of religion vastly increased the flow of federal funds to sectarian organizations. According to the congressional testimony of the Department of Housing and Urban Development (HUD), the conferences contributed to a major increase in HUD funding for religious organizations between fiscal years 2002 and 2004.⁴⁵ In fiscal year 2005, religious organizations received \$2.1 billion in federal grants, nearly twice what they received in fiscal year 2003.⁴⁶ The White House announced that “[d]ue to the President’s leadership, more faith-based organizations are participating in the Federal grants process,” and that the Department of Health and Human Services has nearly doubled the number of grants to religious organizations since fiscal year 2002.⁴⁷

In addition to channeling unprecedented levels of monetary aid to religious organizations, the executive branch was less than vigilant when recipients diverted funds to inherently religious activities. According to the grant conditions, a religious organization is not allowed to misuse federal funds by conducting religious activities during government-funded services, such as counseling.⁴⁸ However, the Government Accountability Office (GAO) has found that religious organizations often ignore such restrictions.⁴⁹ It found that in many cases federal agencies fail to monitor the use of grant money and neglect even to inform religious organizations of their legal obligations.⁵⁰ In this regard, most federal agencies that provide grants to religious organizations do not even tell grant recipients that they

⁴⁵See Federal Agencies and Conference Spending, Hearings Before the Subcomm. on Federal Financial Management, Government Information and International Security of the S. Comm. on Homeland Security and Government Affairs, 109th Cong. 58 (2006) (statement of James M. Martin, Acting Deputy Chief Financial Officer, HUD).

⁴⁶White House, Fact Sheet: Compassion in Action (March 2005) (“White House, Fact Sheet”), www.whitehouse.gov/news/releases/2005/03/20050301-1.html (last visited July 5, 2007); White House, WHOFCI Accomplishments.

⁴⁷White House, Fact Sheet, *supra* note 46.

⁴⁸See Exec. Order No. 13,279, § 2(e) (“[O]rganizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance . . .”).

⁴⁹GAO Report, *supra* note 43, at 6–7, 34–36.

⁵⁰*Id.* at 30–34.

cannot discriminate on the basis of religion in providing social services.⁵¹

According to GAO, several federal agencies fail to visit more than five to ten percent of grant recipients in a given year.⁵² GAO further stated that “[f]ew government agencies administering [grant] programs monitor organizations to ensure compliance with [] safeguards” regarding inherently religious activities.⁵³ GAO reviewed financial and performance reports submitted to federal agencies by religious organizations that received federal grants, but “none of the reports . . . contained any questions related to compliance with the safeguards” that prohibit the use of government funds in inherently religious activities.⁵⁴ GAO also reported that the Department of Justice’s Community Corrections Contracting program contained “no reference to the prohibition on inherently religious activities,” which “could be read as allowing all providers of social services in [correctional] settings to engage in worship, religious instruction, or proselytization.”⁵⁵ In sum, GAO concluded that “the government has little assurance” that safeguards surrounding the use of federal funds are enforced.⁵⁶

As a consequence, compliance with funding restrictions has been haphazard. After surveying thirteen organizations that receive federal grants and offer voluntary religious services, GAO found that four “did not appear to understand the requirement to separate [inherently religious] activities in time or location from their program services funded with federal funds.” One official of a religious organization told GAO “that she discusses religious issues while providing federal funded services,” and others stated that they “pray with beneficiaries during program time.” Another official acknowledged that she began government-funded social services for children by reading from the Bible.⁵⁷

⁵¹ *Id.* at 29.

⁵² *Id.* at 37.

⁵³ *Id.* at 6–7, 29.

⁵⁴ *Id.* at 36.

⁵⁵ *Id.* at 32. See also 28 C.F.R. § 38.2(b)(2).

⁵⁶ GAO Report, *supra* note 43, at 52.

⁵⁷ *Id.* at 7, 35.

III. Judicial Challenge to the Faith-Based Conferences

Freedom From Religion Foundation, Inc. and three of its members filed suit in their capacity as federal taxpayers, alleging that the faith-based conferences violated the First Amendment's Establishment Clause. The government filed a motion to dismiss, which the United States District Court for the Western District of Wisconsin granted, concluding that the plaintiffs lacked standing because the conferences were established by discretionary executive action, not by congressional enactment. The United States Court of Appeals for the Seventh Circuit reversed this decision by a vote of 2-1 in a decision written by Judge Richard Posner.⁵⁸

Although he found that many of the allegations in the complaint lacked merit, Judge Posner concluded that it was "not entirely frivolous, for it portrays the conferences organized by the various Centers as propaganda vehicles for religion." If this allegation were proven, he noted, "one could not dismiss the possibility that the defendants are violating the establishment clause." He acknowledged that money to fund the conferences came from appropriations for general administrative expenses, over which the president and other executive branch officials have a degree of discretionary power, rather than from directed congressional appropriations. But Judge Posner concluded that the lack of a specific congressional spending mandate was not dispositive on the question of taxpayer standing. Otherwise, he reasoned, the executive branch would have unfettered authority to use discretionary funds appropriated by Congress to aid religion, even to the point of allowing "the Secretary of Homeland Security . . . to build a mosque and pay an Imam a salary to preach in it."⁵⁹

At the same time, Judge Posner explained that "the fact that almost all executive branch activity is funded by appropriations does not confer standing to challenge violations of the establishment clause that do not involve expenditures." Rather, in order for government action to "involve expenditures," there must be a "marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause." Although a speech by the president entails "preparations, security arrangements, etc.," and although "an accountant could doubtless estimate the cost," the court of appeals

⁵⁸Freedom from Religion v. Chao, 433 F.3d 989, 994 (7th Cir. 2006).

⁵⁹*Id.* at 994.

held that such expenses, without more, do not confer taxpayer standing. The court reasoned that such costs, like official salaries, would be incurred regardless of whether the president “mentioned Moses rather than John Stuart Mill,” and hence, the decision to mention Moses would inflict no injury on taxpayers.⁶⁰ Judge Kenneth Ripple dissented, describing the majority opinion as “a dramatic expansion of current standing doctrine.” He disagreed with Judge Posner’s opinion, which he believed would make “virtually any executive action subject to a taxpayer suit.”⁶¹

IV. The Supreme Court’s Decision

Without issuing a majority opinion, the Supreme Court voted 5-4 to reverse the Seventh Circuit, holding that the plaintiffs lacked standing to challenge the faith-based conferences. Justice Alito’s plurality opinion, joined by Justice Kennedy and Chief Justice Roberts, focused on the fact that the conferences were not established by a specific congressional spending program, and therefore the matter did not fall within the narrow exception for taxpayer standing established in *Flast v. Cohen*. The plurality observed that “[t]he Court of Appeals did not apply *Flast*; it extended *Flast*.” Noting that “*Flast* focused on congressional action,” the Court “decline[d] this invitation to extend its holding to encompass discretionary Executive Branch expenditures.”⁶²

Justice Alito’s opinion started from the premise that a federal taxpayer may have standing to challenge the collection of a specific tax as being unconstitutional—*e.g.*, a tax on a particular exercise of free speech—but that a general interest in ensuring that treasury funds are spent in accordance with the Constitution is not the type of redressable “personal injury” necessary to establish Article III standing.⁶³ Because the interests of the taxpayer are identical to those of the public at large, he reasoned, deciding a constitutional claim with standing based solely on the plaintiffs’ status as taxpayers would not decide a judicial case or controversy, but instead would

⁶⁰ *Id.* at 945.

⁶¹ *Id.* at 997, 1000 (Ripple, J., dissenting).

⁶² *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553, 2568, 2571–72 (2007).

⁶³ *Id.* at 2563. Compare *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (invalidation tax against preaching on First Amendment grounds).

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extend judicial power generally over acts of the legislative branch. Where the interests of the taxpayer are so indeterminable, remote, uncertain, and indirect, they cannot serve as the basis of the Court's jurisdiction.⁶⁴

The plurality opinion emphasized that the expenditures at issue in *Flast* were made pursuant to an express congressional mandate and a specific congressional appropriation. By contrast, the expenditures in *Hein* were not made pursuant to a specific act of Congress, but were drawn from general appropriations for the executive branch to fund its day-to-day activities. As a consequence, Justice Alito concluded that the funding for the faith-based conferences came from discretionary executive spending, not congressional action, notwithstanding the fact that Congress appropriated the general funds.⁶⁵ Tracing the Court's case law regarding taxpayer standing, the plurality noted that the plaintiffs could "cite no statute whose application they challenge." To emphasize that point, Justice Alito observed that "[w]hen a criminal defendant charges that a federal agent carried out an unreasonable search and seizure, we do not view that claim as [a] challenge to the constitutionality of the statute appropriating funds for the Federal Bureau of Investigation." Accordingly, he was unwilling to permit a taxpayer challenge to executive programs "funded by no-strings, lump-sum appropriations."⁶⁶

The plurality opinion essentially limited the *Flast* exception to its facts where Congress exercised its taxing and spending power. To do otherwise, Justice Alito wrote, would give too little weight to concerns over the proper allocation of power among the branches of government. He noted that "almost all Executive Branch activity is ultimately funded by some congressional appropriation [and that] extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, a proclamation or a speech—to Establishment Clause challenge by any taxpayer in federal court."⁶⁷ Accordingly, the plurality declined to "deputize federal courts as 'virtually continuing monitors of the

⁶⁴*Id.*

⁶⁵*Id.* at 2565–66.

⁶⁶*Id.* at 2567–68.

⁶⁷*Id.* at 2569.

wisdom and soundness of Executive action.”⁶⁸ In addition, Justice Alito faulted the Seventh Circuit for failing to articulate a workable test for determining when the cost of an executive action could reasonably be identified as a harm to taxpayers.

At the same time, the plurality discounted the example, set forth by Judge Posner, that “a federal agency could use its discretionary funds to build a house of worship or to hire clergy of one denomination and send them out to spread their faith.” It noted that neither this, nor other examples in a “parade of horrors” had occurred, notwithstanding the fact that *Flast* had not been extended to cover discretionary executive spending. But if such things happened, wrote Justice Alito, “Congress could quickly step in” or such improbable abuses could be “challenged in federal court by plaintiffs who would possess standing based on grounds other than taxpayer standing.” Accordingly, the plurality decided neither to extend nor to overrule the taxpayer standing exception of *Flast*, but instead to “leave *Flast* as we found it.”⁶⁹

Although he joined the plurality opinion, Justice Kennedy wrote separately to stress the danger to separation of powers principles that an expansion of *Flast* would entail. “The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative new responses to address governmental concerns,” he wrote, and if more extensive judicial intervention and supervision were permitted based on taxpayer suits arising from general appropriations, “the courts would soon assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold.” Nevertheless, Justice Kennedy cautioned against executive and legislative actions that strain Establishment Clause concerns. He stressed that government officials are obligated to obey the Constitution whether or not their acts can be challenged in court. Finally, Justice Kennedy stressed that “the result reached in *Flast* is correct and should not be called into question.”⁷⁰

⁶⁸*Id.* at 2570 (quoting *Allen*, 468 U.S. at 760, quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

⁶⁹*Id.* at 2571–72.

⁷⁰*Id.* at 2572–73 (Kennedy, J., concurring).

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Contrasting sharply with the plurality's promise to "leave *Flast* as we found it," and Justice Kennedy's amplification of that pledge, Justice Scalia's concurring opinion argued strenuously that *Flast* should be overruled and the taxpayer standing exception eliminated. Joined by Justice Thomas, the opinion disparaged the Court's taxpayer standing cases as part of a "shameful tradition" based on "utterly meaningless distinctions" that lack "coherence and candor" and that lead to "demonstrably absurd results."⁷¹ Justice Scalia wrote that attempts to apply such unprincipled doctrine "deaden the soul of the law, which is logic and reason."⁷² As a consequence, he argued that "[i]f this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast* . . . should be applied to (at a minimum) all challenges to the government expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated."⁷³

For Justice Scalia and Thomas, at least, "the choice is easy." Describing *Flast* as "damaged goods," a "blot on our jurisprudence," and a "jurisprudential disaster," they argued that the Court should have seized the opportunity to "erase" it, but instead "simply smudged it."⁷⁴ Justice Scalia blamed this outcome on "the plurality's pose of minimalism" as shown by its disinclination to overrule established precedent. In this regard, he used Justice Alito's plurality opinion as a vehicle for mocking Chief Justice John Roberts' announced goal of judicial restraint. "Minimalism is an admirable judicial trait," Justice Scalia wrote, "but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future."⁷⁵

In analyzing whether there is a showing of some concrete and particularized "injury in fact" in taxpayer standing cases, Justice Scalia observed that the Court alternately has relied on two entirely distinct conceptions of harm, which he characterized as "Wallet

⁷¹*Id.* at 2573, 2577–78, 2580 (Scalia, J., concurring).

⁷²*Id.* at 2582.

⁷³*Id.* at 2573.

⁷⁴*Id.* at 2583–84.

⁷⁵*Id.* at 2580, 2582.

Injury” and “Psychic Injury.” He reasoned that “Wallet Injury” is the only legitimate basis for standing, since “Psychic Injury” stems solely from “the taxpayer’s *mental displeasure* that money extracted from him is being spent in an unlawful manner.”⁷⁶ In this regard, Justice Scalia noted that taxpayer standing in *Flast* was based in fact on “Psychic Injury,” whether or not the Court was willing to acknowledge it. But he found that the approach in *Flast* was “peculiarly restricted” because it permitted “taxpayer displeasure over unconstitutional spending to support standing *only if* the constitutional provision allegedly violated is a specific limitation on the taxing and spending power.”⁷⁷ In his view, logic requires that the Court either permit standing in all cases in which “Psychic Injury” is alleged, or limit standing to cases in which there is a concrete showing of “Wallet Injury.”

Justice Scalia chided the majority for being “unwilling to acknowledge that the logic of *Flast* (its Psychic Injury rationale) is simply wrong.” And he agreed with the four dissenters, that “*Flast* is *indistinguishable* from this case for purposes of Article III.”⁷⁸ Justice Scalia explained that the plurality’s decision “flatly contradicts *Kendrick*,” and confessed to “shar[ing] the dissent’s bewilderment” as to the plurality’s explanation.⁷⁹ Unlike the dissent, however, he would confront “*Flast*’s adoption of Psychic Injury . . . head-on.” *Flast* should either “be accorded the wide application that it logically dictates,” according to Justice Scalia, or it “must be abandoned in its entirety.”⁸⁰

He did not hesitate to embrace the latter course, regardless of the fact “that it is the alleged violation of a specific constitutional limit on the taxing and spending power that produces the taxpayer’s mental angst.” Justice Scalia found it to be “of no conceivable relevance to this issue whether the Establishment Clause was originally conceived of as a specific limitation on the taxing and spending power.”⁸¹ To find otherwise, he reasoned, would transform courts into “ombudsmen of the general welfare” in Establishment Clause

⁷⁶ *Id.* at 2574 (emphasis in original).

⁷⁷ *Id.* (emphasis in original).

⁷⁸ *Id.* at 2580 (emphasis in original).

⁷⁹ *Id.* at 2580–81.

⁸⁰ *Id.* at 2582.

⁸¹ *Id.* at 2583.

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cases.⁸² To apply the logical consequence of *Flast* in this case, he explained, would permit any taxpayer to sue whenever tax funds were used in an alleged violation of the Establishment Clause. “So, for example, any taxpayer could challenge the fact that the Marshall of our Court is paid, in part, to call the courtroom to order by proclaiming ‘God Save the United States and this Honorable Court.’”⁸³ Such generalized grievances affecting the public at large should only have a remedy in the political process, he concluded, and not in the courts.

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. He identified the injury in Establishment Clause cases as “the very ‘extract[ion] and spen[ding]’ of ‘tax money’ in aid of religion.”⁸⁴ Citing the deep historical roots underlying the concept that imposing taxes in support of religion conflicted with individual freedom of conscience, Justice Souter disputed the characterization that it could be dismissed as a mere “Psychic Injury” whenever “a congressional appropriation or executive expenditure raises hackles of disagreement with the policy supported.” He distinguished this from a “generalized grievance,” and noted that “[w]hen executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury.”⁸⁵

Echoing the hypothetical situation initially described by Judge Posner, the dissent posited that

[i]t would surely violate the Establishment Clause for the Department of Health and Human Services to draw on a general appropriation to build a chapel for weekly church services (no less than if a statute required it), and for good reason: if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.⁸⁶

⁸²*Id.* at 2582 (quoting *Valley Forge*, 454 U.S. at 487).

⁸³*Id.*

⁸⁴*Id.* at 2584–85 (Souter, J., dissenting) (quoting *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (2006)).

⁸⁵*Id.* at 2585.

⁸⁶*Id.* at 2586.

Accordingly, Justice Souter wrote that the injury raised by the case was not too abstract to be judicially cognizable.

V. Implications of the Decision

Hein represents a unique situation where a majority of six justices stated their belief that current Establishment Clause jurisprudence supports a ruling against the government, yet five justices rejected the taxpayer challenge to the expenditure of tax dollars to support religious activities. The primary casualties of this decision include not just the unsuccessful challengers in *Hein*, but also Chief Justice Roberts' stated goal of presiding over a less polarized Court. Justice Scalia's caustic dissent shattered such aspirations and directly challenged the chief justice's judicial philosophy of adhering to precedent and making only incremental changes. Joined by Justice Thomas, Justice Scalia would have seized the opportunity to overrule *Flast* and to eliminate taxpayer standing in Establishment Clause challenges, claiming that there are "few cases less warranting of *stare decisis* respect"⁸⁷—that is, the Court's tendency not to disturb settled points of law.

Even though Justice Alito's plurality opinion took the more moderate course of "leav[ing] *Flast* as we found it," the decision as a practical matter will further marginalize the concept of taxpayer standing in Establishment Clause cases.⁸⁸ To the extent standing may still be found in cases where Congress enacts a program to support religious activities pursuant to its taxing and spending power, judicial oversight may easily be avoided using the road map articulated in *Hein*. As in this case, general appropriations can be provided to executive departments that, in their exercise of discretion, may be used to support religious programs. Accordingly, the Court may have decided not to plow *Flast* under, but it constructed a convenient bypass that routes around it.

The plurality stopped short of embracing Justice Scalia's premise that the Court should "apply *Flast* to all challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power" or else it "should overturn *Flast*."⁸⁹ But it accepted his reasoning that to allow taxpayer

⁸⁷ *Id.* at 2584 (Scalia, J., concurring).

⁸⁸ *Id.* at 2572 (plurality op.).

⁸⁹ *Id.* at 2579–80 (Scalia, J., concurring) (emphasis in original). See also *id.* at 2582 ("Either *Flast* was correct, and must be accorded the wide application that it logically dictates, or it was not, and must be abandoned in its entirety.'").

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standing in this case would permit virtually any citizen to “challenge the fact that the Marshall of our Court is paid, in part, to call the courtroom to order by proclaiming ‘God Save the United States and this Honorable Court.’”⁹⁰ The plurality agreed that permitting taxpayer standing would effectively subject every federal action to Establishment Clause challenges, including conferences, proclamations or speeches.⁹¹ Thus, although it rejected Justice Scalia’s “all or nothing” proposition with respect to *Flast*, the plurality accepted an “all or very little” resolution of the matter.

In doing so, it dismissed the Seventh Circuit’s reasoning regarding how broadly to apply taxpayer standing under *Flast*. Judge Posner rejected the claim that permitting a challenge in this case would open the courthouse door to anyone who disagreed with even the smallest expenditures in support of religion. He wrote that incidental executive expenditures—such as the costs associated with giving a speech—without more, do not confer taxpayer standing. The Seventh Circuit reasoned that such costs, like official salaries, would be incurred regardless of whether the president discussed religious or secular topics. However, Judge Posner’s opinion would have permitted taxpayer standing where the alleged Establishment Clause violation resulted in a marginal or incremental cost to the taxpaying public even when funds were the product of discretionary executive expenditures.⁹²

It undoubtedly would create a difficult line-drawing exercise to determine when an expenditure would involve a “marginal or incremental cost to the taxpaying public,” as both the Supreme Court plurality and concurring opinions noted. But doing so on the facts presented by *Hein*—where a series of expensive conferences was organized specifically to support a massive executive program dedicated to funneling grants to religious organizations with scant oversight—seems less problematic. The controversy the Court was asked to decide is far removed from hypothetical scenarios involving a potential challenge to the clerk invoking a deity while calling the Court to order or the president’s stray reference to a supreme being. Accordingly, recognizing taxpayer standing in this case would have

⁹⁰*Id.* at 2581.

⁹¹*Id.* at 2569 (plurality op.).

⁹²*Freedom From Religion v. Chao*, 433 F.3d 989, 995 (7th Cir. 2006).

been unlikely to open the floodgates to challenges for all other conceivable expenditures.

At the same time, the Court's decision to deny taxpayer standing lacks a good answer to Judge Posner's concern that the executive branch would be able to use discretionary funds appropriated by Congress to aid religion, even to the point of allowing the secretary of homeland security to build and fund a church or mosque.⁹³ No such thing has happened, the plurality explained, and if it did, Congress could quickly intervene. Additionally, Justice Alito noted that the respondents had failed to show that other plaintiffs would lack standing based on grounds other than as taxpayers.⁹⁴ Justice Kennedy, by contrast, simply chose to hope for the best. Explaining his vote against standing so as to avoid "constant intrusion upon the executive realm," he observed that "[g]overnment officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations."⁹⁵

Justice Kennedy did not explain what, in his experience, justified the optimistic belief that executive officials would carefully identify, much less assiduously adhere to, the constitutional limitations of the Establishment Clause. Similarly, Justice Alito neglected to describe the real-world circumstances in which Congress might "step in" to block an executive program designed to fund religious enterprises. Neither the plurality, nor Justice Kennedy's concurring opinion, offered any assurance that courts would have jurisdiction to address such executive abuses. For his part, Justice Scalia seemed quite comfortable with the notion that no judicial remedy would be available, finding it to be entirely irrelevant that the Establishment Clause was enacted as a specific limitation on the taxing and spending power.⁹⁶ He brushed aside Madison's *Memorial and Remonstrance Against Religious Assessments* and instead relied on Alexis de Tocqueville's observation that some laws "can never give rise to the sort of clearly formulated dispute that one calls a case."⁹⁷ Thus, in the name of

⁹³ *Id.* at 944.

⁹⁴ Hein, 127 S. Ct. at 2571 (plurality op.).

⁹⁵ *Id.* at 2573 (Kennedy, J., concurring).

⁹⁶ *Id.* at 2583 (Scalia, J., concurring).

⁹⁷ *Id.* (quoting and adding emphasis to A. de Tocqueville, *Democracy in America* 97 (H. Mansfield & D. Winthrop trans. and eds. 2000)).

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divining original intent, Justice Scalia found the views of a French tourist to be more authoritative than those of the Framers themselves.

Justice Scalia may well be correct—particularly following *Hein*—that no judicial remedy exists to challenge an Establishment Clause violation predicated on the misuse of discretionary funds by an executive official. Contrary to the plurality’s assumption, no one else but a taxpayer may be in a position to assert standing in such a case. As Judge Ripple explained in his dissent to the Seventh Circuit panel decision, in such cases “[b]eneficiaries of such spending have no incentive to sue, and non-beneficiary outsiders cannot show direct injury.” He described this vacuum in jurisdiction as the very reason that taxpayer standing exists in Establishment Clause cases. Judge Ripple took note of a specific grant program that had been created by congressional enactment (that had been a part of an earlier phase of *Hein*) and noted that “the district court, quite properly, allowed taxpayer standing to challenge the grant.” Judge Ripple further acknowledged that “[w]ithout the *Flast* exception, it is unlikely that anyone would have had standing to sue in such a situation.” However, he declined to join the Seventh Circuit’s majority opinion in extending this reasoning to discretionary executive spending because, in his view, it “simply cuts the concept of taxpayer standing loose from its moorings.”⁹⁸ According to this logic, no one would have standing to challenge a grant program created and funded by the executive, even if it is otherwise identical to an unconstitutional program created by Congress.

In the end, the Court in *Hein* left *Flast* “as we found it,” but with a significant reservation. It created a road map by which the executive may circumnavigate judicial standing in Establishment Clause cases altogether, simply by supporting religious institutions on its own initiative. *Flast* may yet be good law, but there likely will be few occasions to apply it in the future.

⁹⁸Chao, 433 F.3d at 998–99 (Ripple, J., dissenting).

