

Hein v. Freedom From Religion Foundation: Sitting This One Out – Denying Taxpayer Standing to Challenge Faith-Based Funding

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I. INTRODUCTION

Less than two weeks into his presidency, George W. Bush created the White House Office of Faith-Based and Community Initiatives (OFBCI), designed to increase the involvement of “faith-based” religious groups in federal social services and to aid these religious groups in receiving federal grants.¹ On the same day, he also created centers within various executive agencies to further these goals.² Since the creation of OFBCI, its agency offices have spent at least \$24 million on “administrative activities,”³ including hosting over 350 workshops and financing over 28 conferences.⁴ OFBCI has also steadily increased both the number and the percentage of grants received by faith-based organizations.⁵ Although the funding for these

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¹ See White House Office of Faith-Based and Community Initiatives within the Executive Office of the President, Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001) [hereinafter White House Office of Faith-Based Initiatives].

² See *id.*; see also Agency Responsibilities with Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001) [hereinafter Agency Responsibilities]. Subsequent Executive Orders expanded the program. See Equal Protection of the Laws for Faith-Based and Community Organizations, Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002) [hereinafter Equal Protection for Faith-Based Organizations]; Responsibilities of the Department of Agriculture and the Agency for International Development With Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (Dec. 12, 2002) [hereinafter Responsibilities of the Department of Agriculture]; Responsibilities of the Departments of Commerce and Veterans Affairs and the Small Business Administration With Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (June 1, 2004) [hereinafter Responsibilities of the Departments of Commerce and Veterans Affairs]; Responsibilities of the Department of Homeland Security With Respect to Faith-Based and Community Initiatives, Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (Mar. 7, 2006) [hereinafter Responsibilities of the Department of Homeland Security].

³ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 6 (2006), available at <http://www.gao.gov/new.items/d06616.pdf>.

⁴ White House, *WHOFBCI Accomplishments in 2006*, Jan. 15, 2007, <http://www.whitehouse.gov/government/fbci/2006-accomplishments.html>.

⁵ See Office of the White House Press Secretary, *Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need*, Mar. 9, 2006, <http://www.whitehouse.gov/news/releases/2006/03/20060309-3.html> (last visited Oct. 30, 2007) [hereinafter *Compassion*].

programs comes from executive appropriations rather than direct congressional expenditure pursuant to a statute, Congress approved the funding and remained involved throughout the appropriations process.⁶

In the recently decided case of *Hein v. Freedom From Religion Foundation*, the plaintiff-taxpayers argued that the conferences that OFBCI funded, organized, and held violate the Establishment Clause of the Constitution.⁷ However, the Supreme Court held that the taxpayer-plaintiffs did not have standing to have the merits of their case heard in court.⁸ The Supreme Court held that taxpayers lacked standing to challenge such federal expenditures that favor religious groups, despite precedent indicating that standing was appropriate in this case. It dismissed the case based on a formalistic and artificial distinction between executive expenditures statutorily mandated or authorized by Congress and executive expenditures from congressional budget appropriations directly to the executive branch.⁹

Although *Hein* dealt only with the threshold question of standing rather than the merits under the Establishment Clause, the case is important for the future of claims challenging executive actions promoting religion. Under *Hein*, regardless of the egregiousness of the allegations, plaintiffs will not be able to bring suit if a court deems the action to be “executive” rather than “congressional.” This Recent Development argues that this distinction is false and supported by neither precedent nor logic. Moreover, by abdicating its responsibility to interpret the constitutionality of the actions of the other branches, the Court has weakened the separation of powers doctrine that it claimed to be upholding in *Hein*, effectively deciding that the judiciary will sit this one out. This Recent Development concludes that while *Hein* clearly limits the opportunity to bring cases that challenge executive action, it left many key questions unanswered, further muddling an already murky doctrine. Future litigants in similar cases should use these unanswered questions to maximize the public’s ability to challenge executive action that violates the Establishment Clause.

II. BACKGROUND

A. *Traditional Taxpayer Standing Doctrine*

Article III of the Constitution grants the courts jurisdiction only over “cases” and “controversies.”¹⁰ The Supreme Court has repeatedly empha-

in Action] (“Since 2003, HHS, HUD, DOJ, DOL, and Education have seen a 38% increase in the number of grants to faith-based groups - an increase of 616 grants over 2003; and a 21% increase in grant money awarded to faith-based organizations - an increase of more than \$239 million.”).

⁶ See *infra* nn. 125-130.

⁷ *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. ___, 127 S. Ct. 2553 (2007).

⁸ See *id.*

⁹ See *id.*

¹⁰ U.S. CONST. art. III, § 2.

sized that “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”¹¹ Although determinations of standing play a “critical role” in federal jurisprudence,¹² standing doctrine is widely considered to be one of the most complex and “confused” areas of law.¹³ This confusion is likely due, at least in part, to the “many remarkable twists and turns”¹⁴ that the doctrine has taken over the years.¹⁵ As a result, standing doctrine is often criticized as being “incoherent” and has been “described as ‘permeated with sophistry’ as ‘a word game played by secret rules,’ and . . . a largely meaningless ‘litany’ recited before ‘the Court . . . chooses up sides and decides the case.’”¹⁶ While the particulars are ambiguous, the thrust of modern standing doctrine is that “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”¹⁷ Standing doctrine prevents the Court from deciding “abstract, hypothetical or contingent questions” or general grievances.¹⁸ In recent cases, the Court has also read separation of powers concerns into standing doctrine because denying standing to certain litigants keeps the judiciary from overstepping its Constitutional role vis-à-vis the other branches of government.¹⁹

There are two strands of standing jurisprudence: “Article III standing, which enforces the Constitution’s case or controversy requirement . . . and prudential standing, which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction.’”²⁰ The Court struggles to make sense of which aspects of the doctrine are the former and which are the latter, in part

¹¹ *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (citing *Raines v. Byrd*, 521 U.S. 811, 818 (1997)); see also *Allen v. Wright*, 468 U.S. 737, 750 (1984).

¹² *Id.*

¹³ Michael A. Cohen, *Plaintiffs’ Standing in Lee v. Oregon: The Judicially Assisted Demise of the Oregon Death with Dignity Act*, 74 OR. L. REV. 741, 743 (1995); see also, e.g., *Judicial Review: Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 89th Cong. 498 (1966) (statement of Paul A. Freund) (characterizing the concept of standing as “among the most amorphous in the entire domain of public law”); ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 57 (5th ed. 2007) (“Standing frequently has been identified by both justices and commentators as one of the most confused areas of the law.”).

¹⁴ Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suit, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 168 (1992).

¹⁵ See Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650-51 (1985).

¹⁶ William A. Fletcher, *Structure of Standing*, 98 YALE L.J. 221, 221 (1988); see also Nichol, *supra* note 16, at 651; Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1400 (1995).

¹⁷ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

¹⁸ *Ala. State Fed’n. of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

¹⁹ See, e.g., Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 304 (1996).

²⁰ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

because the seminal taxpayer standing case, *Frothingham v. Mellon*,²¹ appeared to rely on prudential concerns while nominally indicating its reliance on Article III.²²

In denying standing, the *Frothingham* Court noted that it had never expressly recognized the right of a taxpayer *qua* taxpayer to challenge “the execution of a federal appropriation act on the ground that it is invalid and will result in taxation for illegal purposes” because there is no direct injury to the taxpayer.²³ Because it had consistently held that resident taxpayers could sue municipalities for such reasons,²⁴ the Court was forced to make a weak distinction between municipal and federal taxpayers, basing its determination of whether the taxpayer’s interest was sufficiently direct and immediate solely on the size of the tax base in question.²⁵ The Court’s failure to identify the point at which a tax base is small enough for taxpayer standing to be appropriate, as well as its disregard for other potentially significant factors, later contributed to the Court’s struggle to find logical consistency among its subsequent taxpayer standing cases.²⁶

Frothingham also briefly touched upon the concern of “invas[ing] the province” of the other branches, noting that it can consider the constitutionality of Congressional acts only “when the justification for some direct injury suffered or threatened, present[s] a justiciable issue.”²⁷ As a result, the Court reasoned that because the plaintiff-taxpayer had failed to show such an injury, “and not merely that [s]he suffers in some indefinite way in common with people generally,” she did not have standing to sue.²⁸

In *Doremus v. Board of Education*,²⁹ the Court developed this doctrine in the context of the Establishment Clause. The challenged statute “provide[d] for the reading, without comment, of five verses of the Old Testament” at the beginning of the school day.³⁰ The Court dismissed the case for lack of standing, reasoning that the taxpayer has standing “only when it is a

²¹ 262 U.S. 447 (1923). The plaintiff-taxpayer in *Frothingham* challenged the Federal Maternity Act of 1921, a statute that provided for federal money to be given to the states in order to improve the health and mortality rates of infants and mothers. *Id.* at 478, 480.

²² See, e.g., *Flast v. Cohen*, 392 U.S. 83, 92 (1968); Simard, *supra* note 19, at 309-10.

²³ *Frothingham*, 262 U.S. at 486.

²⁴ *Id.*

²⁵ *Id.* at 486-87.

²⁶ See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 497-98 (1982) (Brennan, J., dissenting).

²⁷ *Frothingham*, 262 U.S. at 488. This idea is in reference to the prohibition against issuing advisory opinions.

²⁸ *Id.* There has been considerable disagreement over whether this denial of standing was constitutionally mandated, or based only on judicial self-restraint. See *Flast*, 392 U.S. at 92 n.6; see also discussion *infra* Part II.

²⁹ 342 U.S. 429 (1952).

³⁰ *Id.* at 430.

good-faith pocketbook action.”³¹ Because there was no “direct dollars-and-cents” injury, standing as a taxpayer was insufficient.³²

B. *Flast v. Cohen: Recognizing Taxpayer Standing in Establishment Clause Challenges*

Against this backdrop, the Supreme Court decided the seminal case of *Flast v. Cohen*, holding that the plaintiff-taxpayer had standing to challenge an appropriation that allegedly violated the Establishment Clause.³³ In *Flast*, taxpayers argued that federal funds appropriated under an education act were being used to finance secular instruction in religious schools, and to purchase textbooks and other instructional materials, in violation of the Establishment Clause.³⁴ The act established a program to give financial assistance for the education of low-income families to local agencies, which in turn had to submit a plan to the state education agency for approval; the state agency granted approval based on “basic criteria as the [appellee United States Commissioner of Education] may establish.”³⁵ The challenged criterion required local agencies to provide services to private schools, including “religious and sectarian schools.”³⁶

The *Flast* Court began its analysis by noting that “[*Frothingham*] has been the source of some confusion and the object of considerable criticism.”³⁷ The Court noted that it was unclear whether *Frothingham* established a constitutional bar to taxpayer suits or whether it articulated a rule imposed on the basis of judicial self-restraint alone; the Court stated that the *Frothingham* opinion “can be read to support either position.”³⁸ The Court indicated that the prevailing view was that *Frothingham*’s bar on taxpayer suits was based on discretionary prudential concerns as opposed to mandatory Article III requirements.³⁹ Moreover, the *Flast* Court observed that because the *Frothingham* opinion “suggests that the petitioner . . . was denied standing not because she was a taxpayer but because her tax bill was not large enough” and “spoke of the ‘attendant inconveniences’ of entertaining that taxpayer’s suit,” the case was decided based on “pure policy considerations.”⁴⁰ The Court further noted that *Frothingham* had been “criticized

³¹ *Id.* at 434.

³² *Id.* at 433. Although Justice Scalia rightly points out that the fraction of teachers’ salaries that this represents could, in fact, be calculated, the plaintiffs in *Doremus* would have failed under *Flast*’s first nexus as an incidental expenditure. *See Hein*, 127 S. Ct. at 2582 n.4.

³³ *Flast v. Cohen*, 392 U.S. 83 (1968).

³⁴ *Id.* 392 U.S. at 85-86.

³⁵ *Id.* at 86 (alteration in original) (quoting 20 U.S.C. § 241(e) (1965)).

³⁶ *Id.* at 87.

³⁷ *Id.* at 92.

³⁸ *Id.* at 93. This difference is critical. If the rule in *Frothingham* was the latter, the Court could decline to follow it when “compelling reasons for assuming jurisdiction over a taxpayer’s suit exist.” *Id.*

³⁹ *See Flast*, 392 U.S. at 92 n.6; *see also* discussion *infra* Part II.

⁴⁰ *Flast*, 392 U.S. at 93.

as depending on assumptions not consistent with modern conditions,” such as the subsequent emergence of corporate taxpayers and the availability of class actions and joinder under Federal Rules of Civil Procedure.⁴¹ Thus, the Court “undert[ook] a fresh examination” of limits on taxpayer standing.⁴²

The Court then explained that both the meaning of the Article III cases and controversies provision and the concept of justiciability, are vague and have changed over time.⁴³ As a result, the doctrine of taxpayer standing has become “a blend of constitutional requirements and policy considerations.”⁴⁴ The Court rejected the Government’s contention that there should be an absolute bar on taxpayer suits based on separation of powers, noting that “[t]he ‘gist of the question of standing’ is whether the [plaintiff] has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions,’” and not whether the particular issue is justiciable.⁴⁵ The relevant question, according to the Court, was “whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.”⁴⁶

This nexus has two aspects. First, there must be a “logical link between that status and the type of legislative enactment attacked”; in other words, the allegedly unconstitutional act must be exercised under Article I, Section 8, the congressional Taxing and Spending Clause.⁴⁷ It is not enough to “allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.”⁴⁸ Second, there must be a nexus between the plaintiff’s status as a taxpayer and the alleged constitutional violation, and the action must exceed the specific constitutional limits on taxing and spending.⁴⁹

The Court found that the plaintiffs met these requirements because the challenge was made to an exercise of the taxing and spending power and “the challenged program involves a substantial expenditure of federal tax funds.”⁵⁰ Also, the Court noted that “[t]he Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power . . . [that] operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I,

⁴¹ *Id.* at 94.

⁴² *Id.*

⁴³ *Id.* at 94-95.

⁴⁴ *Id.* at 97.

⁴⁵ *Id.* at 99 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)). For a history of the evolution of the Court’s denial of standing on separation of powers grounds, see Dana S. Treister, Note, *Standing to Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689 (1994).

⁴⁶ *Flast*, 392 U.S. at 102. This analysis is logical, given that the *Flast* Court treated *Frothingham*’s taxpayer standing holding as prudential.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 102-03.

⁵⁰ *Id.* at 103.

§ 8.”⁵¹ For this reason, *Flast* was “quite different” from *Frothingham* because although the taxpayer in *Frothingham* alleged that Congress had exceeded its general powers under Article I, Section 8, the Due Process Clause does not protect taxpayers against increased taxation or spending.⁵² Therefore, the *Frothingham* plaintiff’s alleged injury was not related to her status as a taxpayer because she was not alleging a violation of a constitutional provision related to taxing and spending.⁵³

In *Flast*, however, the plaintiff alleged a violation of the Establishment Clause, which specifically protects taxpayers.⁵⁴ Thus, the Court held that taxpayer standing exists under Article III when the taxpayer “alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.”⁵⁵ Although critics, including Justice Scalia in his *Hein* dissent,⁵⁶ have argued that *Flast* is unclear and overbroad, the nexus test viewed in light of the prudential basis for denial of taxpayer standing provides a framework for judges to decide whether standing is appropriate.

C. Taxpayer Standing After *Flast*

Although *Flast* itself did not foreclose taxpayer standing in challenges to provisions other than those under the Establishment Clause, the Court has not found federal taxpayer standing in any such cases.⁵⁷ It has, however, elaborated on the *Flast* nexus test. Read together, the subsequent cases of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*⁵⁸ and *Bowen v. Kendrick*⁵⁹ can be interpreted to indicate that the challenged program or action must also be “at [its] heart a program of disbursement of funds pursuant to Congress’ taxing and spending powers,” as opposed to a mere incidental expenditure that, although it may be beneficial to a religious organization, is not central to the statutorily mandated or approved activity.

⁵¹ *Id.* at 104.

⁵² *Id.* at 104-05.

⁵³ *Id.* at 105.

⁵⁴ *Id.*

⁵⁵ *Id.* at 105-06.

⁵⁶ *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2583-84 (2007) (Scalia, J., concurring in the judgment).

⁵⁷ *See, e.g.*, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (holding that a challenge under the Incompatibility Clause failed the second nexus of the *Flast* test because it did not implicate taxing and spending power of Article I, Section 8); *United States v. Richardson*, 418 U.S. 166, 175 (1974) (holding that taxpayer did not have standing to compel publication of the CIA’s accounting because there was no “logical nexus” between taxpayer status and “the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency”).

⁵⁸ 454 U.S. 464 (1982).

⁵⁹ 487 U.S. 589 (1988).

The plaintiffs in *Valley Forge* challenged a donation by the Secretary of Health, Education, and Welfare of “surplus property” to a religious college. The Secretary disposed of the property pursuant to a federal act under which he was responsible for transferring surplus real property to nonprofit, tax-exempt educational institutions.⁶⁰ The Court held that the taxpayers lacked standing to bring suit under the Establishment Clause for two reasons. First, the plaintiffs failed *Flast*’s first prong because they alleged a violation of the Property Clause, and thus the property transfer “was not an exercise of authority” under Article I, Section 8.⁶¹ The connection between the property transfer and plaintiffs’ tax burden was “at best speculative and at worst non-existent” because the government had acquired the land and built the facilities three decades prior.⁶² Second, the plaintiffs did not identify “any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.”⁶³

Perceiving a link between Article III standing and separation of powers, the Court created a new requirement of Article III. Following *Valley Forge*, a dispute must “confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.”⁶⁴ The *Valley Forge* Court articulated this requirement because “repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either.”⁶⁵ In *Valley Forge*, the Court used such a separation of power rationale when denying standing.⁶⁶ Prior to *Hein*, however, it had not explicitly rejected an Establishment Clause taxpayer standing suit on separation of powers grounds.

The effect that *Valley Forge* had on *Flast* is contested. *Valley Forge* has been interpreted as clarifying, narrowing, confusing, or even being entirely

⁶⁰ *Valley Forge*, 454 U.S. at 466-68.

⁶¹ *Id.* at 479-80.

⁶² *Id.* at 480 n.17.

⁶³ *Id.* at 485 (emphasis in original); *see also id.* at 486 (indicating that the taxpayers failed to allege “an *injury of any kind, economic or otherwise, sufficient to confer standing*”); *id.* at 487 (indicating that the taxpayers lived in Maryland and Virginia, that they read about the transfer of the land at issue in a news release, and that “[t]heir claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.”).

⁶⁴ *Valley Forge*, 454 U.S. at 472 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)). Oddly, this was a quotation from *Flast* in which the Court was discussing Article III’s separation of powers-based prohibition of advisory opinions on “the validity of actions by the Legislative and Executive Branches of the Government,” while *Flast* itself refutes the claim that separation of powers concerns are the basis for the doctrine of taxpayer standing. *See Flast*, 392 U.S. at 92, 96-98.

⁶⁵ *Id.* at 474 (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

⁶⁶ *See Simard, supra* note 19, at 318-23.

inconsistent with *Flast*.⁶⁷ One reason for this is that the Court's basis for its decision in *Valley Forge* is not clear.⁶⁸ On the other hand, the most recent Establishment Clause taxpayer standing case to be decided by the Supreme Court, *Bowen v. Kendrick*,⁶⁹ affirmed the viability of taxpayer standing in "as applied" Establishment Clause cases. In *Bowen*, the plaintiffs challenged an application of the Adolescent Family Life Act that authorized grants to community service groups, including religious ones.⁷⁰ The Court found "a sufficient nexus" between the taxpayer status and a congressional taxing and spending action even though "the funding authorized by Congress ha[d] flowed through and been administered" by the Executive Branch.⁷¹ Although the government argued that it was really a challenge to executive action rather than congressional spending, the Court dismissed this argument stating

We do not think . . . that [the government's] claim that ALRA funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [Since *Flast*] we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively made grants.⁷²

The Court stated that *Valley Forge* was distinguishable because in that case the challenged action allegedly violated the Property Clause of Article IV, Section 3.⁷³ In addition, *Bowen* was not simply a challenge to "an incidental expenditure of tax funds in the administration of an essentially regulatory statute" because "AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pur-

⁶⁷ See, e.g., Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C. L. REV. 798, 801 (1983) ("By reading its prior taxpayer cases in an unduly literal fashion and by claiming to eschew constitutional citizen standing entirely, the Court [in *Valley Forge*] managed to render the law of standing even more arbitrary and incomprehensible than it had been prior to the decision.") (internal citations omitted); Michael Wells, *Positivism and Antipositivism in Federal Courts Law* 29, GA. L. REV. 655, 675 (1995) ("[*Valley Forge*] purported to distinguish *Flast* by denying standing to object to an executive department grant to a religious school. The distinction was, at best, contrived."); Bradley Thomas Wilders, Note, *Standing on Hallowed Ground: Should the Federal Judiciary Monitor Executive Violations of the Establishment Clause?*, 71 MO. L. REV. 1199, 1205-07 (2006) ("The Court reinforced and clarified *Flast* doctrine in *Valley Forge*.").

⁶⁸ See, e.g., William P. Marshall & Maripat Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at Valley Forge*, 11 HOFSTRA. L. REV. 63, 67 (1982).

⁶⁹ 487 U.S. 589, 618-20 (1988).

⁷⁰ *Id.* at 589. Although the Court held that the taxpayers had standing, it later found that there was no Establishment Clause violation.

⁷¹ *Id.* at 619-20.

⁷² *Id.* at 619 (internal citations omitted).

⁷³ *Id.* at 618-19.

suant to the AFLA's statutory mandate."⁷⁴ Thus, the Court held that the nexus existed, "notwithstanding the role the Secretary plays in administering the statute."⁷⁵ Accordingly, *Valley Forge* and *Bowen* may be seen as refining the nexus requirement, allowing taxpayers to challenge Congressional taxing and spending even if the executive branch committed the challenged act.⁷⁶

III. HEIN

A. *The Facts and Procedural History of Hein*

In his second week in office, President George W. Bush issued an Executive Order creating the White House Office of Faith-Based and Community Initiatives ("OFBCI"). The OFBCI was to use federal funding in order to "expand the role" and "increase [the] capacity" of religious organizations by "coordinat[ing] a national effort to expand opportunities" for such groups.⁷⁷ On the same day, President Bush ordered five federal agencies to establish faith-based agency centers within each department in order to maximize the involvement of religious organizations.⁷⁸ To further this goal, the OFBCI organized, held, and financed a series of conferences for the express purpose of "provid[ing] participants with information about the government grants process and available funding opportunities" and presenting "various grant-writing tutorials."⁷⁹ These conferences were designed specifically for faith-based groups, and they led to many well-crafted grant applications from religious groups. As a result, there have been a greater number of grants to religious organizations than ever before.⁸⁰

The plaintiffs, Freedom From Religion Foundation and three of its taxpayer members, filed suit in the Western District of Wisconsin, alleging that the conferences organized and funded under OFBCI "were designed to promote, and had the effect of promoting, religious community groups over

⁷⁴ *Id.* at 619-20 (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

⁷⁵ *Id.* at 620.

⁷⁶ The issue in *Valley Forge* was one specific transfer made pursuant to the guidelines of a large land transfer program with a secular purpose. This transfer was "an incidental expenditure of tax funds in the administration of an essentially regulatory statute" of the kind that *Flast* excepted from its coverage. *Flast*, 392 U.S. at 102. As discussed in Part IV.C *infra*, this incidental expenditure is not the same as a White House program designed to systematically spend millions of dollars to benefit religious groups.

⁷⁷ White House Office of Faith-Based Initiatives, *supra* note 1.

⁷⁸ See Agency Responsibilities, *supra* note 2; Equal Protection for Faith-Based Organizations, *supra* note 2; Responsibilities of the Department of Agriculture, *supra* note 2; Responsibilities of the Departments of Commerce and Veterans Affairs, *supra* note 2; Responsibilities of the Department of Homeland Security, *supra* note 2.

⁷⁹ The White House, White House Faith-Based & Community Initiative, available at <http://www.whitehouse.gov/government/fbci/president-initiative.html> (last visited October 31, 2007).

⁸⁰ See *Compassion in Action*, *supra* note 5.

secular ones” in violation of the Establishment Clause.⁸¹ The District Court dismissed the case, reasoning that the plaintiffs lacked standing under *Flast* because the defendant executive branch officials acted “at the President’s request and on the President’s behalf” and were not “charged with the administration of a congressional program,” so the challenged activities were “not ‘exercises of congressional power’” sufficient to confer taxpayer standing.⁸²

The Seventh Circuit reversed, granting taxpayer status to challenge federal programs on Establishment Cause grounds when the activities are “financed by a congressional appropriation.”⁸³ The majority held that this is the case even when “there is no statutory program” enacted by Congress and the funds are “from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary power.”⁸⁴ The Seventh Circuit held that a taxpayer has standing as long as “the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause” is greater than “zero.”⁸⁵ The Appeals Court denied an en banc review,⁸⁶ and the Supreme Court granted certiorari.⁸⁷

B. *The Decision in Hein*

The Supreme Court held that the plaintiffs in *Hein* did not have standing to challenge the activities of the OFBCI. Justice Alito was joined in his plurality opinion by Chief Justice Roberts and Justice Kennedy, who also wrote a concurring opinion. Justices Scalia and Thomas concurred in the judgment. Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer.

1. *The Plurality*

The plurality opinion, written by Justice Alito, held that the plaintiffs had no standing because *Flast* limited taxpayer standing to challenges directed only at “specific congressional action or appropriation.”⁸⁸ It charac-

⁸¹ *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2561 (2007).

⁸² *Id.* at 2561 (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1942)).

⁸³ *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 997 (7th Cir. 2006). It is certainly possible to argue that the Seventh Circuit’s test went unnecessarily beyond the second part of the *Flast* nexus test, which this Recent Development argues properly balanced the Court’s essential role of upholding the Establishment Clause with the practical concerns that form the basis of standing doctrine, including justiciability and caseload management. The Seventh Circuit, however, clearly recognized the importance of the availability of taxpayer suits to challenge Establishment Clause violations.

⁸⁴ *Id.* at 994.

⁸⁵ *Id.* at 995.

⁸⁶ *Freedom From Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006).

⁸⁷ *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 722 (2006).

⁸⁸ *Hein*, 127 S. Ct. at 2566.

terized the challenged expenditures as “not [having been] made pursuant to any Act of Congress,” and indicated that “[r]ather, Congress provided general appropriations to the Executive Branch to fund day-to-day activities.”⁸⁹ The plurality rejected the argument that these expenditures should be covered by *Flast* because they were appropriated by Congress. “Because almost all Executive Branch activity is ultimately funded by some congressional appropriation,” covering these expenditures under *Flast* would “effectively subject every federal action — be it a conference, proclamation, or speech — to Establishment Clause challenge by any taxpayer in federal court,” particularly if the Seventh Circuit’s marginal cost test was adopted.⁹⁰ The plurality considered the funding in question to be “an incidental expenditure of tax funds in the administration of an essentially regulatory statute.”⁹¹ In addition, it expressed concern about the workability of the “fairly traceable” test, particularly as applied to speeches.⁹² Finally, the Court raised the separation of powers concern that if the plaintiff’s rule would “enlist the federal courts to superintend . . . the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials” and “would deputize federal courts as ‘virtually continuing monitors of the wisdom and soundness of Executive action.’”⁹³

2. Justice Kennedy’s Concurrence

Justice Kennedy emphasized that *Flast* was correctly decided. He argued that the *Flast* line of cases “must be interpreted as respecting separation-of-powers principles” although sometimes these principles must “accommodate” the Establishment Clause, which expresses the Constitution’s “special concern that freedom of conscience not be compromised by government taxing and spending in support of religion.”⁹⁴ But he noted that “the Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns.”⁹⁵ Thus, allowing “any and all taxpay-

⁸⁹ *Id.*

⁹⁰ *Id.* at 2569.

⁹¹ *Id.* at 2569 (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

⁹² *Id.* at 2571 (quoting Brief for Appellee-Respondent at 17, *Hein*, 127 S. Ct. 2553 (No. 06-157)). The plurality chose to emphasize the content of the speeches made at the conference, rather than discuss the funds spent directly on financing and running the conferences. *See, e.g., id.*

⁹³ *Id.* at 2570 (quoting *Laird v. Tatum*, 308 U.S. 1, 15 (1972)). However, such a characterization of the challenge in *Hein* ignores the requirement that the expenditure not be incidental to an essentially regulatory statute, as religious imagery used in a political speech would certainly be.

⁹⁴ *Id.* at 2572 (Kennedy, J., concurring).

⁹⁵ *Id.*

ers” to challenge the content of the Executive Branch’s speech would exceed the constitutional power of the Judiciary.⁹⁶

3. *Justice Scalia’s Concurrence*

Justices Scalia and Thomas concurred in the judgment but stated that *Flast* should be overruled as contrary to Article III.⁹⁷ Justice Scalia criticized the plurality opinion, stating that it “offers no explanation as to why the factual differences between this case and *Flast* are material,” and that “[w]hether the challenged government expenditure is expressly allocated by a specific congressional enactment is not relevant to the Article III criteria of injury in fact, traceability, and redressability.”⁹⁸ Justice Scalia also criticized the taxpayer’s legal position, suggesting that it is no more coherent than the plurality’s, because it “logically implies that *every* expenditure of tax revenues that is alleged to violate the Establishment Clause is subject to suit under *Flast*.”⁹⁹

Justice Scalia noted that he believed the *Flast* line of cases to be “notoriously inconsistent” due to their different descriptions of the relevant injury.¹⁰⁰ Distinguishing between what he called “Psychic Injury” and “Wallet Injury,” Justice Scalia wrote that *Flast* and its progeny focus on “the taxpayer’s *mental displeasure*” that his tax money is spent illegally, rather than the economic harm itself.¹⁰¹ If this “Psychic Injury” is “concrete and particularized enough” to be an injury in fact, Justice Scalia stated, then *Flast* should be applied to “*all* challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power.”¹⁰² If this injury is not enough, then *Flast* should be overturned.¹⁰³ That the expenditures are expressly authorized by specific acts of Congress was immaterial in his view.¹⁰⁴

4. *The Dissent*

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, focused on the artificial distinction between congressional and executive acts. Justice Souter relied on *Bowen*, which recognized the equivalence between an Establishment Clause challenge to a congressional spending bill and executive expenditure of an appropriation.¹⁰⁵ Because the taxpayers challenged

⁹⁶ *Id.* Expenditures for speeches and the like would be incidental expenditures and thus would still not be covered.

⁹⁷ *Id.* (Scalia, J., concurring in the judgment).

⁹⁸ *Id.* at 2579-80.

⁹⁹ *Id.* at 2581.

¹⁰⁰ *Id.* at 2574.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2574.

¹⁰³ *Id.* at 2579.

¹⁰⁴ *Id.* at 2577.

¹⁰⁵ *Id.* at 2586 (Souter, J., dissenting).

the statute as applied, they were objecting to its implementation rather than the underlying congressional action.¹⁰⁶ Therefore, the distinction between “congressional mandate” and “executive discretion . . . is at once arbitrary and hard to manage: if the statute itself is constitutional . . . all complaints must be about the exercise of executive discretion.”¹⁰⁷ In addition, the injury to the taxpayer is the same regardless of whether Congress directly mandated the action.¹⁰⁸ Countering the plurality’s separation of powers argument, Justice Souter noted that there is no difference between judicial review of an executive decision and a congressional one because the Court owes the *same* respect to both branches.¹⁰⁹ In addition, he stated that “if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.”¹¹⁰

In response to Justice Scalia’s Psychic versus Wallet distinction, Justice Souter reiterated “the ‘injury’ alleged in Establishment Clause challenges to federal spending” is “the very ‘extract[ion] and spend[ing]’ of ‘tax money’ in aid of religion.”¹¹¹ He emphasized that to avoid this kind of injury, the State must “not ‘force a citizen to contribute three pence only of his property for the support of any one establishment’ of religion.”¹¹² Justice Scalia’s distinction misses the mark, because the concept of “conscience” is different from the kind of simple “bad feeling” that Justice Scalia describes as a Psychic Injury. The extraction of money is so injurious to the conscience that it is grounds for standing. Justice Souter also argued that because “[c]ognizable harm takes account of the nature of the interest protected, . . . the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition.”¹¹³ The question, ultimately, concerns whether the alleged injury is “too abstract, or otherwise not appropriate, to be considered judicially cognizable” —in other words, whether the legal system is capable of redressing it.¹¹⁴ Justice Souter noted that the Court has found standing in other cases with intangible harm, such as racial gerrymandering and discrimination, suggesting that abstractness is not always the essential issue.¹¹⁵ Regardless, the injury at bar is not too abstract because, unlike in other cases such as *Doremus*, “[h]ere, there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion.”¹¹⁶ Thus, the injury

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2585 (citing *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (2006)).

¹¹² *Id.* (quoting 2 WRITINGS OF JAMES MADISON 183, 186 (G. Hunt ed. 1901)).

¹¹³ *Id.* at 2587.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

suffered is “indisputably ‘traceable’ to the spending,” and “likely to be redressed by” an injunction prohibiting it.¹¹⁷

In response to the concern that similar cases might overwhelm the courts, Justice Souter pointed out that even if there is standing, frivolous suits will be dismissed on the merits.¹¹⁸ Furthermore, the fear that there will be too many suits “does not provide a compelling reason, much less a reason grounded in Article III, to keep them from being heard.”¹¹⁹

IV. ANALYSIS

A. *Hein Was Wrongly Decided*

Although the plurality claimed that it was leaving *Flast* undisturbed,¹²⁰ *Hein* is inconsistent with the Court’s prior interpretations of *Flast* and its progeny, mischaracterizes the taxpayers’ allegations, and does not square with the spirit of the Establishment Clause. Neither precedent nor the original intent of the Establishment Clause supports the distinctions that *Hein* made between “congressional” and “executive” action. Moreover, Congress was intimately involved in the process of creating and funding OFBCI, so the executive action was not simply a day-to-day executive expenditure void of any real connection to Congressional decision-making. In addition, while the plurality characterized the spending as only incidentally related to a regulatory aim, there were direct and traceable expenditures for the creation, organization, and operation of the conferences, as well as other aspects of the OFBCI. Furthermore, allowing standing would be more protective of separation of powers. Finally, concerns about the courthouse doors being flung open to frivolous suits challenging any government expenditure are unfounded; plaintiffs would still be held to the high standards set in *Flast*.

1. *The History and Purpose of the Establishment Clause Do Not Indicate That Only Congress Can Be Held Accountable for Establishment Clause Violations*

There is no clear historical basis for treating executive spending differently than congressionally-mandated spending. James Madison’s “Proposal for a Bill of Rights” indicates that at least some of the Framers were less concerned with the risk of abuse by the executive branch because it was considered to be the weakest branch; they were more concerned with the legislative branch, which was seen as “the most powerful and most likely to

¹¹⁷ *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)); see also *DaimlerChrysler*, 126 S. Ct. at 1865 (“[A]n injunction against the spending would of course redress *that* injury.”) (emphasis in original).

¹¹⁸ *Hein*, 127 S. Ct. at 2586 n.1 (Souter, J., dissenting).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2572 (plurality opinion).

be abused.”¹²¹ Nonetheless, due to the expanded role of government and the rise of the massive federal bureaucracy, the executive branch has assumed many “legislative” tasks.¹²² In the modern era, Congress cannot practically provide specific instructions regarding the purpose and the amount of money it appropriates to the Executive. Nevertheless, “Congress retains, as it must, ultimate control over how much an agency can spend.”¹²³ Had the Framers foreseen today’s complex administrative state, it is likely that they would have expressly indicated that the executive branch is covered by the Establishment Clause, which was designed to cover all federal expenditures for religious purposes.¹²⁴

2. *Because Congress was Intimately Involved in Creating and Funding OFBCI, Characterizing This Program as Purely Executive was Inaccurate*

Congress deliberately funded the OFBCI programs after President Bush issued the Executive Orders establishing them. In every year since the founding of the OFBCI, the budget submitted to Congress clearly explained the goal of the program.¹²⁵ Agency budgets¹²⁶ and congressional hearings¹²⁷ clearly indicated to Congress how the funds were being used. Annual pro-

¹²¹ See James Madison, *Proposal for a Bill of Rights, in A SECOND FEDERALIST: CONGRESS CREATES A GOVERNMENT* (Charles Hyneman & George Carey, eds., 1967) (“In our government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker.”).

¹²² For an in-depth discussion of this issue and its attendant problems, see, for example, Tara L. Branum, *Article: President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1 (2002). As amici curiae argued, at the time that the Establishment Clause was written, the Legislature was designed as the sole branch for taxing and spending. Therefore, the executive branch would not have had the ability to spend and create a program like OFBCI because the President lacked discretionary funds. See Brief for Legal and Religious Historians and Law Scholars Paul Finkelman, et. al., as Amici Curiae Supporting Respondents, *Hein*, 127 S. Ct. 2553 (2007) (No. 06-157). At the time of the founding, the President would have had to specifically request money to create OFBCI, which would have been denied on Establishment Clause grounds. *Id.*

¹²³ GENERAL ACCOUNTING OFFICE, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-5 (3d ed. 2006).

¹²⁴ See *Valley Forge*, 454 U.S. 464 (1982) (Brennan, J., dissenting).

¹²⁵ Brief for The Center for Inquiry and The Council for Secular Humanism as Amici Curiae Supporting Respondents, *Hein*, 127 S. Ct. 2553 (2007) (No. 06-157), 2007 WL 386930 at *7; see United States Government, *FY 2002 Budget 56* (2001), available at <http://www.gpoaccess.gov/usbudget/fy02/browse.html> (“With this budget, the President commits our Nation to mobilizing the armies of compassion charities and churches, communities and corporations, ministers and mentors – to transform lives.”); see also UNITED STATES GOVERNMENT, *FY 2007 BUDGET 115-16* (2006), available at <http://www.gpoaccess.gov/usbudget/fy07/browse.html> (last visited Oct. 13, 2007); UNITED STATES GOVERNMENT, *FY 2006 BUDGET 41* (2005), available at <http://www.gpoaccess.gov/usbudget/fy06/browse.html> (last visited Oct. 13, 2007); UNITED STATES GOVERNMENT, *FY 2005 BUDGET 145* (2004), available at <http://www.gpoaccess.gov/usbudget/fy05/browse.html> (last visited Oct. 13, 2007); UNITED STATES GOVERNMENT, *FY 2004 BUDGET 118* (2003), available at <http://www.gpoaccess.gov/usbudget/fy04/browse.html> (last visited Oct. 13, 2007); UNITED STATES GOVERNMENT, *FY 2003 BUDGET 141* (2002), available at <http://www.gpoaccess.gov/usbudget/fy03/browse.html> (last visited Oct. 13, 2007).

gram and accountability reports provided further information.¹²⁸ Moreover, Congress informally directed that money it appropriated to executive agencies be used to fund the programming of OFBCI,¹²⁹ and gave explicit instruction as to the disposition of the funds through the Conference Reports for appropriations bills.¹³⁰ By providing such guidance and approving budgets that expressly included funding for OFBCI, Congress chose to fund this program through its taxing and spending powers, albeit through general appropriations.¹³¹ Thus, as in *Bowen*, the executive spending at issue in *Hein* was approved, and in some instances directed, by Congress under “a program of disbursement of funds pursuant to Congress’ taxing and spending powers.”¹³²

The argument that standing exists only where Congress has appropriated money to the Executive for an express purpose, rather than when the President uses general funds in a way that violates the Establishment Clause, is contrary to the intent of the Clause. The fundamental purpose of the Establishment Clause is to prevent the expenditure of tax money to fund religious activities. The Establishment Clause is not primarily concerned with the identity of the branch most directly responsible for the expenditure.¹³³ In addition, as Justice Souter noted in his dissent, “as-applied” challenges relate to the implementation of a statute by the executive, rather than to the congressional action of enacting the statute.¹³⁴ The implementation of a facially neutral statute is a matter of executive discretion, just as was the creation, funding, and management of the activities were in the OFBCI. Thus, the distinction that Justice Alito made between executive and legislative action is not only counter to the purpose of the Establishment Clause,

¹²⁶ See Brief for Amici Curiae The Center for Inquiry et al. as Amici Curiae Supporting Respondents, *Hein*, 127 S. Ct. 2553 (2007) (No. 06-157) 2007 WL 386930, *7-8.

¹²⁷ See *id.* at 11.

¹²⁸ See *id.* at 8-10.

¹²⁹ GOVERNMENT ACCOUNTABILITY OFFICE, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 21 (2006), available at 2006 WL 2007191 (“[Some agencies] received guidance from Congress . . . on the amount of resources to allocate to their [faith-based] centers.”) [hereinafter GAO, IMPROVEMENTS IN MONITORING].

¹³⁰ Brief for the Center for Inquiry, *supra* note 126, at *13-15; see, e.g., H.R. REP. NO. 108-792, at 1198 (2004) (Conf. Rep.); H.R. REP. NO. 108-10, at 550, 1425 (2003) (Conf. Rep.); H.R. REP. NO. 108-401, at 1003 (2003) (Conf. Rep.); H.R. REP. NO. 107-342, at 108 (2001) (Conf. Rep.).

¹³¹ The plurality claimed that this sort of “informal ear-marking” is irrelevant. To make this claim, they relied on precedent indicating courts have avoided judicial review of agency decisions by emphasizing formal appropriations. See *Hein*, 127 S. Ct. at 2567 n.7. Those cases are inapposite where, as here, there were so many clear and specific earmarks and communications, and so much apparent Congressional support for the OFBCI. It is also not clear why this issue would be dispositive.

¹³² *Bowen v. Kendrick*, 487 U.S. 589, 619-20 (1988).

¹³³ See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (We must keep in mind, however, that “application of the constitutional standing requirement [is not] a mechanical exercise.”).

¹³⁴ *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2586 (2007) (Souter, J., dissenting).

but it is also a false distinction because as-applied challenges are necessarily concerned with the action and discretion of the executive rather than the legislature.

3. *The Alleged Injury to the Taxpayer Was Not Merely Incidental or Psychic*

The funding in question, totaling at least \$24 million dollars from 2002-2005,¹³⁵ is not only incidental to a regulatory aim. In *Hein*, the regulatory aim of the OFBCI was to increase the involvement and support of religious organizations by many executive agencies. As in *Bowen*, and as distinguished from the spending at issue in *Valley Forge*, the expenditures for conferences at issue in *Hein* went to the heart of the regulatory purpose. Justice Alito suggested that *Hein* concerned incidental expenditures for speeches that may have contained religious rhetoric, but this mischaracterization of the alleged violation contributes to the flawed logic of his opinion. The funding for the OFBCI is traceable to the money appropriated by Congress. Some of it was even directly, although unofficially, earmarked for this purpose by Congress.¹³⁶

Even if the actual economic cost for the conferences were not large, the extraction of money spent to favor religion is itself the injury against which the Establishment Clause guards. No threshold per capita cost must be reached. Justice Scalia's *Wallet versus Psychic injury* distinction mischaracterized the real nature of the injury in cases such as *Hein* and *Flast*. As Justice Souter explained in his dissent, Justice Scalia failed to recognize that the Establishment Clause does not guard against mere "mental displeasure" of a citizen when his tax money is used to support religion;¹³⁷ rather it protects against the fundamental violation of one's conscience. Justice Souter elaborated, "[a]s a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause."¹³⁸ This history separates Establishment Clause cases from other taxpayer standing suits: violation of this fundamental right is so damaging to the conscience that it must be redressed, regardless of whether the sum is only "three-pence."¹³⁹ The "Wallet Injury" that Justice Scalia discussed was also necessary under *Flast* and its progeny because the Establishment Clause was designed to prevent the specific injury of improper spending to favor

¹³⁵ This sum was the amount that five of the faith-based agency offices spent on "administrative activities," but it does not include all of their costs. GOVERNMENT ACCOUNTABILITY OFFICE, FAITH-BASED AND COMMUNITY INITIATIVE: IMPROVEMENTS IN MONITORING GRANTEES AND MEASURING PERFORMANCE COULD ENHANCE ACCOUNTABILITY 16 (2006), available at 2006 WL 2007191.

¹³⁶ See GAO, IMPROVEMENTS IN MONITORING, *supra* note 129, at 21.

¹³⁷ *Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring in the judgment).

¹³⁸ *Id.* at 2585 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 n.22 (2002) (Souter, J., dissenting)).

¹³⁹ 2 WRITINGS OF JAMES MADISON 183, 186 (Hunt ed. 1901).

religious groups.¹⁴⁰ Although Justice Scalia characterized the *Flast* nexus test as “*entirely unrelated* to the purported goal of ensuring that the plaintiff has a sufficient stake in the outcome of the controversy,”¹⁴¹ both parts of the test are essential to that goal given the history and intent of the Establishment Clause.¹⁴²

4. *By Making Presidential Establishment Clause Claims Unreviewable, Hein Weakens the Separation of Powers it Claims to be Protecting*

Despite separation of powers concerns of the plurality and concurrences, *Hein* creates opportunity for increased and unchecked executive power. Under *Hein*, the President may be able to use federal taxpayer money to actively endorse and promote religion and religious groups. She may do so with congressional approval, and perhaps guidance, as long as Congress funds such activities through general appropriations to the Executive. Separation of powers doctrine is based on the concept of three co-equal branches that serve as checks on each other’s power.¹⁴³ That the Court believes the Executive is somehow above judicial scrutiny leaves the Executive more powerful than the other two branches to the point of being unaccountable.¹⁴⁴

Although the plurality argued that “*Flast* itself gave too little weight” to separation of powers concerns,¹⁴⁵ it mischaracterized the nature of the allegation at hand. While Justice Alito cited to precedent indicating generally that standing can also have a basis in separation of powers,¹⁴⁶ his opinion failed to explain the relevance of these cases to the allegation in *Hein*. Justice Alito cited to Justice Powell’s concurrence in *United States v. Richardson*, arguing that “lowering the taxpayer standing bar to permit challenges of purely executive actions ‘would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.’”¹⁴⁷ Nonetheless, as discussed above, the allocation and dis-

¹⁴⁰ See *Flast*, 392 U.S. at 106; see also Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 35-36 (1998).

¹⁴¹ *Hein*, 127 S. Ct. at 2576-77 (quoting *Flast*, 392 U.S. at 121-24 (Harlan, J., dissenting)).

¹⁴² “The right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause are therefore not to be split off from one another.” *Id.* at 2553, 2587 (Souter, J., dissenting) (quoting *Allen*, 498 U.S. at 751).

¹⁴³ See, e.g., *Clinton v. Jones*, 520 U.S. 681, 699 (1997); *Touby v. United States*, 500 U.S. 160, 167-68 (1991); *Buckley v. Valeo*, 424 U.S. 1, 122-23 (1976).

¹⁴⁴ For more on the rise of Presidential power beyond the original separation of powers framework, and the dangers of a judicially unchecked executive power, see Jonathan Macey, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power, Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2423-24 (2006).

¹⁴⁵ *Hein*, 127 S. Ct. at 2569.

¹⁴⁶ *Id.* at 2570.

¹⁴⁷ *Id.* (citing *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

bursement of funds for OFBCI activities cannot be accurately described as “purely executive.” Moreover, the plurality’s prediction that such a decision would “enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, her staff, and other Executive Branch officials”¹⁴⁸ misconstrues both the allegation in *Hein* and the plurality’s distinction between executive and legislative actions.

By mischaracterizing the plaintiff’s challenge to substantial funds being spent to benefit religious groups at OFBCI conferences as simply complaints of religious speech or daily activities, Justice Alito fails to explain how such a large and concerted disbursement of funds to benefit religious groups will lead to the Court censoring every word and action of the executive branch. The plurality focused on expenditures for Presidential speeches, rather than the cost of the direct benefit that “faith-based” groups received as a result of OFBCI conferences. These were not merely mentions of Moses or speeches on holidays; according to the plaintiffs’ allegations, large sums of money were spent on these conferences to systemically provide support and training for faith-based groups so that they could in turn receive more federal grant money.¹⁴⁹

Moreover, the plurality failed to explain why allowing standing in *Hein* would have disastrous effects, since no such catastrophes have occurred under *Flast*. The availability of taxpayer challenges to direct legislative activity has not led to a large volume of challenges against congressional speech, further weakening the plurality’s prediction that allowing standing in *Hein* would “deputize federal courts as virtually continuing monitors of the wisdom and soundness of Executive action.”¹⁵⁰ If opening up Congress to taxpayer challenges in Establishment Clause cases had resulted in a flood of litigation, Justice Scalia’s call to overturn *Flast* would almost surely have prevailed. What, then, makes “executive action” challenges so likely to “transform federal courts into forums for taxpayers’ ‘generalized grievances’ about the conduct of government”?¹⁵¹ The plurality never explains this phenomenon, nor does Justice Kennedy convincingly do so in his concurrence.¹⁵² The resulting executive immunity is not based on history, precedent, or logic. Permitting the executive branch to violate the Establish-

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., Amended Complaint at 9, reprinted in Brief of Appellants at A-9, Freedom from Religion Foundation, 433 F.3d 989 (7th Cir. 2006) (No. 05-1130); Brief of Appellants at 17-21, Freedom from Religion Foundation, 433 F.3d 989 (7th Cir. 2006) (No. 05-1130).

¹⁵⁰ *Hein*, 127 S. Ct. at 2570.

¹⁵¹ See *id.* at 2570, (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S., at ___, 126 S. Ct. 1854, 1865 (2006) (quoting *Flast v. Cohen*, 392 U.S. 83, 106)).

¹⁵² Although Justice Kennedy argued that Article III separation of powers concerns “counsel[ed] against recognizing standing in a case brought . . . to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties,” he too relied on non-Establishment Clause cases and focused on “day-to-day executive operations” rather than the allegation at hand. See *Hein*, 127 S. Ct. at 2572 (Kennedy, J. concurring).

ment Clause without judicial scrutiny elevates the executive to a more powerful position than the other two branches in contravention of the Constitution's aspiration towards separation of powers.

5. *Fear of Frivolous Litigation is Not Sufficient Reason to Deny Standing in Hein*

The concern that allowing taxpayer standing to challenge executive actions would result in a flood of litigation is unfounded. Just as plaintiffs in challenges to congressionally mandated spending must meet the nexus test in *Flast*, suits challenging executive action would still need to meet the high bar the nexus test sets. Frivolous claims would be dismissed on the merits, even in cases where standing does exist.¹⁵³ Standing is a threshold issue to ensure that the party bringing the suit has an injury that can be redressed through the legal process. It is not an impenetrable barrier erected to protect the courts from a heavy or ideologically uncomfortable docket. If many plaintiffs meet the standing requirement to challenge executive action, then there are Establishment Clause cases that need to be heard. Such cases should not be shut out to save the courts' time. The decision in *Hein* is counter to the intent of the Establishment Clause and will only serve to encourage collusion between the Executive and Congress in order to circumvent accountability for unconstitutional acts.

B. *Practical Considerations After Hein*

As discussed above, *Hein* creates serious problems for federal taxpayers desiring to challenge executive actions, particularly the OFBCI. However, the impact of *Hein* will likely be felt beyond this subset of cases. The plurality's failure to deal directly with *Flast* further muddled an already unclear taxpayer standing doctrine.¹⁵⁴ First, *Hein* does not give lower courts much guidance in determining how much and what kind of congressional involvement is sufficient to confer standing, and it sends mixed messages about the meaning of "incidental expenditures." Second, the *Hein* plurality failed to explain *Valley Forge* and the type of injury sufficient to confer standing, and it also remained silent on how courts should deal with state and municipal taxpayer suits. Despite these open issues, *Hein* clearly closed the door on federal taxpayer suits challenging the White House's OFBCI.

¹⁵³ In many cases, a violation is not found, even where the plaintiff has standing. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Winkler v. Gates*, 481 F.3d 977 (7th Cir. 2007); *Kurtz v. Baker*, 829 F.2d 1133 (D.C. Cir. 1987). Also, states that have recognized taxpayer standing have not been overwhelmed by the volume of such claims. See Brief for American Jewish Congress and American Jewish Committee as Amici Curiae Supporting Respondents at 18, *Hein*, 127 S. Ct. 2553 (2007) (No-06-157), 2007 WL 320996 at 18.

¹⁵⁴ In addition, with only three Justices signing on to the plurality opinion, two concurring in the judgment only, and four dissenters, it will be unclear to lower courts how this opinion fits in with other Establishment Clause taxpayer standing precedent.

Nevertheless, future litigants of similar cases might be able to use *Hein's* ambiguities to their advantage.

Hein clearly denies standing in cases challenging direct executive action and only incidental expenditure. But it is unclear how lower courts will apply *Hein* in potentially analogous cases because *Hein* did not articulate criteria for the directness or formality of Congressional appropriation or earmarking. In a case where Congress passed legislation requiring the Executive to give money to religious groups, a taxpayer has standing to challenge the action. However, *Hein* does not advise lower courts regarding a case where there is no formal earmarking but there is more Congressional involvement than in *Hein*. For example, what if Congress were merely to suggest that the Executive use some of its funds to erect a crucifix on top of the White House, and subsequently granted the exact amount necessary in a supplementary "general" appropriation?¹⁵⁵

In addition, it is not certain how judges will interpret the emphasis that the plurality and Justice Kennedy placed on the words spoken at the conference, rather than the tax dollars spent on the conference. Some lower courts may understand this to indicate that *Hein* was based more on the incidental expenditure nexus than on the directness of Congressional action or influence. *Flast* might not apply in a case where there is no religious speech component or Congress has provided slightly more explicit direction.

Moreover, while the plurality claimed to be upholding the central tenet of *Flast*, the opinion treats *Flast* dismissively, suggesting that the Court may later overrule *Flast* once and for all. Although the plurality in *Hein* did not address the underlying issue of the breadth of standing in Establishment Clause cases, some lower courts, already unsure how to apply the Court's taxpayer standing doctrine, could read *Hein's* overall narrowing tone to signal that in close cases, standing should be denied.¹⁵⁶ *Hein* has therefore narrowed *Flast*, the extent of this modification remains unclear.

Adding to this lack of clarity is the plurality's treatment of *Valley Forge*. Some courts have relied on it to deny standing on the basis of the sort of psychological versus palpable injury that Justice Scalia discussed in his concurrence,¹⁵⁷ although, as discussed above, the *Valley Forge* opinion did not explicitly lay out which factors were dispositive. The plurality in *Hein*, however, only addressed *Valley Forge* insofar as it related to the distinction be-

¹⁵⁵ Of course, it is likely that in the crucifix example there would be potential plaintiffs with non-taxpayer standing, such as those who would have frequent contact with it due to employment in or near the White House. See, e.g., *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249-53 (9th Cir. 2007); *Books v. Elkhart County, Ind.*, 401 F.3d 857, 861-62 (7th Cir. 2005).

¹⁵⁶ Although Justice Kennedy's concurrence appears to see *Flast* in a more positive light, this is not likely to have much effect because he joined Justice Alito's opinion.

¹⁵⁷ See, e.g., *Barnes-Wallace v. City of San Diego*, 471 F.3d 1038, 1051 (9th Cir. 2006); *Newdow v. Bush*, 391 F. Supp. 2d 95, 104 (D.D.C. 2005); *Liddle v. Corps of Eng'rs of U.S. Army*, 981 F. Supp. 544, 556 (M.D. Tenn. 1997).

tween congressional and executive action.¹⁵⁸ Therefore, *Hein* does not clarify this confusion regarding the nature of the relevant injury, and it is unclear how this will play out in lower courts. The only clear limits from *Hein*, in order for *Flast* standing to apply, are that Congress must have directly appropriated the funding or formally earmarked funds for the purpose in question.

In addition, *Hein* does not explain how lower courts should apply its holding to state and municipal taxpayers. The lower courts will likely hear these cases because several states now have their own OFBCIs and many more have liaisons to the federal OFBCI.¹⁵⁹ Because the *Flast* nexus test, which the plurality explicitly stated it was “leaving as is”¹⁶⁰ is based on constitutional standing to challenge action pursuant to Article I, Section 8, it is unclear how the Court’s already confusing taxpayer standing doctrine should be applied when a state or local government action is challenged.¹⁶¹

Although the scope of *Hein* remains unclear, it is evident that in the future, taxpayers will be unlikely to succeed in challenging the White House’s OFBCI activities funded through general appropriations without formal earmarking. It is hard to imagine another basis for standing in these cases, since it would be difficult for an organization that was denied grant money to provide sufficient evidence that it was illegally denied the funds in favor of a religious-based group. The lack of alternative plaintiffs unfortunately plays no formal role in taxpayer standing doctrine.¹⁶² However, because *Hein* further muddled the *Flast* doctrine, befuddled lower court judges might be persuaded to find standing in the face of such an alleged violation that has no clear plaintiff to seek judicial redress.¹⁶³

Given the questions that *Hein* leaves unanswered, there are several ways to maximize the success of challenges to the constitutionality of OFBCI actions specifically and alleged Establishment Clause violations generally. First, advocates should locate plaintiffs whose standing claim is not based solely on their taxpayer status. Second, state and local taxpayer standing are likely to be less affected by *Hein*, and thus challenges to state or local government action may prove more successful. Third, if advocates must rely on federal taxpayer standing, cases where Congress has had more influence on the expenditure of funds may be more successful than *Hein*. Finally, future litigants relying on taxpayer standing must emphasize the nar-

¹⁵⁸ See *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. ___, 127 S. Ct. 2553, 2565 (2007).

¹⁵⁹ See Amicus Brief of the States of Indiana, et al., *Hein*, 127 S. Ct. 2553 (2007) (No. 06-157) 2007 Westlaw CITE at *4-5.

¹⁶⁰ See *Hein*, 127 S. Ct. at 2565, 2571-72.

¹⁶¹ Ira C. Lupu and Robert W. Tuttle, *Legal Analysis*, *Hein v. Freedom From Religion Foundation, Inc.*, THE ROUNDTABLE ON RELIGION & SOCIAL WELFARE POLICY (ROCKEFELLER INSTITUTE ON GOVT., STATE U. N.Y.) (July 2, 2007), available at http://www.religionand-socialpolicy.org/legal/legal_update_display.cfm?id=60#_edn22 (last visited Oct. 9, 2007).

¹⁶² *Id.*

¹⁶³ *Id.*

rowness of the holding in *Hein*. Litigants must focus on the plurality's nominal acceptance of *Flast* and its declaration that it was leaving *Flast* as it found it. In addition, the explicit approval of *Flast* in both Justice Kennedy and Justice Souter's opinions will maximize litigants' chances of convincing a lower court that standing is appropriate.

V. CONCLUSION

Given the facts of *Hein*, the plurality's argument that Congress can quickly step in if the Executive acts with egregious disregard for the Establishment Clause¹⁶⁴ is absurd. Congress was a willing and active partner in the executive actions relating to the OFBCI. Even in the best case scenario, Congress cannot *quickly* step in, because it was designed to move slowly and deliberately.¹⁶⁵ The judiciary is the branch empowered to interpret the law, and ignoring that role leaves taxpayers without the ability to challenge unconstitutional spending in violation of the Establishment Clause. With its decision in *Hein*, the Court gave Congress and the President the green light to violate the Constitution, so long as they do so through backdoor deals. Despite Justice Kennedy's reminder that "even where parties have no standing to sue, [the Government is] not excused from making constitutional determinations in the regular course of their duties," the Constitution was not designed to be implemented on the honor system.

Religious beliefs and discourse play an increasing role in political speech and action, making essential the oversight of executive actions endorsing or promoting religious groups to the exclusion of secular groups. After *Hein*, however, there is less opportunity for challenges to such unconstitutional actions. Given the lack of political accountability for the unelected bureaucracy,¹⁶⁶ taxpayer standing suits are an important check on Executive overreach. The Supreme Court has now deemed this check unavailable, at least in the Establishment Clause context.

Nevertheless, *Hein* was not a total defeat for taxpayer standing; the plurality did not overrule *Flast*, as Justice Scalia and various *amici* had urged. In addition, the splintering of the five justices in favor of dismissal may

¹⁶⁴ *Hein*, 127 S. Ct. at 2571 ("Respondents set out a parade of horrors In the unlikely event that any of these executive actions did take place, Congress could quickly step in.").

¹⁶⁵ See, e.g., THE FEDERALIST NO. 62 (James Madison); Akhil Reed Amar & Brian C. Kalt, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 878 (1994).

¹⁶⁶ These agency officials and bureaucrats are unelected, and the Executive exerts significant influence over them, more so than Congress. See generally Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 954-55 (2000); see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 499-511 (1989) ("Whatever supervision 'the political branches' will exert over agencies' exercise of the authority to interpret regulatory statutes is most likely to emanate from the Chief Executive, not from the legislature.").

signal that, despite the fears of some commentators, Justices Roberts and Alito may not be as willing to increase the strength of an already powerful executive as much as some of the Court's veteran conservatives.¹⁶⁷ Although it could have been worse, the Court's decision in *Hein* has considerably narrowed and arguably muddled the logic of *Flast* and will make it difficult for courts to even hear future Constitutional challenges against executive action. Therefore, future litigants will maximize their success in similar suits by capitalizing on the many ambiguities in *Hein*.

The exact ramifications of *Hein* are still unclear. It is evident, however, that in narrowing *Flast*, the Court has made it much more difficult for citizens to challenge Executive action violating the Establishment Clause. Instead of assuming the proper role of the judiciary and protecting the rights of Americans against such unconstitutional government actions, the Court was satisfied in *Hein* to leave the other branches to check themselves. As a result, *Hein* will only encourage the President to continue to encroach on this country's civil rights and liberties, while the Court uses a formalistic, illogical, and historically questionable formulation of taxpayer standing as an excuse to sit such cases out.

¹⁶⁷ See, e.g., Jeffrey Rosen, *Samuel Alito, Executive Asst. Uncle Sam*, THE NEW REPUBLIC, January 30, 2006; Harry Weinstein, *Never Mind Abortion, Court Watchers Say Executive Power is the Real Issue*, L.A. TIMES, August 14, 2005, at 25A.

