Fall 2008

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Recommended Citation

Carl H. Esbeck, What the Hein Decision Can Tell Us About the Roberts Court and the Establishment Clause, 78 Miss. L.J. 199 (2008)

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ESSAY

WHAT THE HEIN DECISION CAN TELL US ABOUT THE ROBERTS COURT AND THE ESTABLISHMENT CLAUSE

Carl H. Esbeck*

The United States Supreme Court handed down its much-anticipated decision in *Hein v. Freedom From Religion Foundation*¹ on June 25, 2007, in the final week before summer recess. This is the first case involving church-state relations to come before the Supreme Court with the two newest Justices in place, Chief Justice Roberts and Justice Alito. Additionally, in this and other cases, Justice Kennedy was being closely watched to see if he would move to a “new middle” since Justice O’Connor is no longer on the Court. There were no church-state cases on the docket for the 2007 Term, and *Hein* could prove to be the last word on Establishment Clause matters for some time.²

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¹ 127 S. Ct. 2553 (2007) (plurality opinion).

² On March 31, 2008, the United States Supreme Court granted a writ of certiorari in *Pleasant Grove City v. Summum*, 128 S. Ct. 1737 (2008). The case will be argued during the Court’s 2008 Term. The record in *Pleasant Grove* presents an interesting issue concerning how to distinguish private religious speech from government religious speech. The Free Speech Clause is relevant only if the expression is private religious speech, whereas the Establishment Clause is of relevance only if the expression is government religious speech. Should the Supreme Court find (contrary to the circuit court) that the expression is government religious speech, then the case will be remanded to the lower court to consider, as a matter of first impression, whether the
Justice Alito announced the judgment of the Court in *Hein* and delivered an opinion joined by Chief Justice Roberts and Justice Kennedy. In this controlling opinion, Justice Alito said federal taxpayers lacked standing to pursue a claim that certain discretionary actions by executive branch officials were in violation of the Establishment Clause. The officials sued were members of the staff working on President George W. Bush's faith-based initiative. These officials were staging conferences throughout the country that were alleged by plaintiffs to promote the initiative in a manner that favored religious over secular social service providers. The conferences were not specifically authorized by Congress, but were paid from monies appropriated for the normal operating expenses of the Executive Office of the President (hereinafter EOP). Either President Bush or a cabinet secretary would keynote these conferences, and the plaintiffs (although not personally present) further complained that conference speeches included remarks that endorsed religion or theism over nonreligion or atheism. The speech violates the Establishment Clause. Accordingly, the question before the High Court in *Pleasant Grove* does not call for a decision concerning an alleged violation of the Establishment Clause. For more about the proceedings below, see *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007), petitions for reh'g and reh'g en banc denied, 499 F.3d 1170 (10th Cir. 2007).

3 127 S. Ct. at 2559.

4 When the Supreme Court fails to issue a majority opinion, the opinion of the members who concur in the judgment on the narrowest grounds is controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977). Soon after *Hein* was handed down, there was debate about whether Justice Alito's plurality or Justice Kennedy's concurring opinion was on the narrowest grounds and thus the controlling opinion. *See*, e.g., Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 130 (2008). However, there is little to no difference between the two opinions in either substance or tone. They are nowhere inconsistent. Justice Kennedy wrote separately to illustrate additional ways in which extending taxpayer standing to the facts in *Hein* would be harmful to the doctrine of separation of powers. The lower federal courts will almost certainly draw upon and follow both opinions, with Justice Alito's plurality being regarded as controlling.

5 The Establishment Clause provides as follows: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

6 *Hein*, 127 S. Ct. at 2560 (plurality opinion).

7 *Id.* at 2566.

8 *Id.* at 2559-61.
plaintiffs were the Freedom From Religion Foundation, Inc. (hereinafter FFRF) and three of its members. Located in Madison, Wisconsin, FFRF is a nonprofit public-interest organization of agnostics and atheists dedicated to a strict separation of church and state.\(^9\)

Justice Kennedy fully joined the plurality but filed a concurring opinion.\(^10\) Justice Scalia filed an opinion concurring in the judgment, which was joined by Justice Thomas.\(^11\) Justice Souter filed a dissenting opinion, in which Justices Stevens, Ginsburg, and Breyer joined.\(^12\) Thus the split was 3-2-4, with five Justices voting to reverse the United States Court of Appeals for the Seventh Circuit.\(^13\)

The 1968 decision of *Flast v. Cohen*\(^14\) was the first occasion for the Supreme Court to permit taxpayer standing, but two conditions had to be met.\(^15\) In *Hein*, Justice Alito said that *Flast*

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\(^9\) Information about FFRF is available at its website, http://www.ffrf.org/purposes.

\(^10\) *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring).

\(^11\) *Id.* at 2573 (Scalia, J., concurring).

\(^12\) *Id.* at 2584 (Souter, J., dissenting).

\(^13\) A divided panel of the Seventh Circuit had earlier held that plaintiffs had standing to sue as federal taxpayers. Freedom From Religion Found. v. Chao, 433 F.3d 989 (7th Cir. 2006), *rev'd sub nom.* Hein v. Freedom From Religion Found., 127 S. Ct. 2553 (2007). The panel's majority opinion was written by a jurist of note, Judge Richard Posner. A petition for rehearing en banc was denied by a vote of seven to four. Freedom From Religion Found. v. Chao, 447 F.3d 988 (7th Cir. 2006). An opinion concurring in the denial of a rehearing was written by another prominent jurist, Judge Frank Easterbrook, who urged the Supreme Court to grant a review of the matter and clear up the "arbitrariness ... built into the doctrine" of taxpayer standing. *Id.* at 990.

\(^14\) 392 U.S. 83 (1968).

\(^15\) In what has come to be called the "double-nexus test," *Flast* said that taxpayer standing was allowed if the following test was satisfied. "First, the taxpayer must establish a logical link between [taxpayer] status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." *Id.* at 102. Between *Flast* and *Hein*, two Supreme Court cases examined assertions of taxpayer standing where the underlying claim on the merits was brought under the Establishment Clause. In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Court held that taxpayers lacked standing to challenge a decision by a federal executive agency to declare certain government-owned real estate as surplus and then transfer the real estate free of charge under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, to a Christian college. *Valley Forge*, 454 U.S. at 466-69. *Flast* permitted taxpayer standing only when the taxpayer-plaintiff was challenging Congress' use of its Taxing and Spending Power, U.S. CONST. art. I, § 8, cl. 1. *Valley
should be applied according to its terms, but its scope is not to be expanded to the facts presently before the Court. The Court in *Flast* permitted taxpayer standing for an Establishment Clause challenge to an exercise by Congress of its taxing and spending power. Justice Alito wrote in *Hein* that for there to be federal taxpayer standing a plaintiff must challenge expenditures "funded by a specific congressional appropriation" and disbursed in support of religion "pursuant to a direct and unambiguous congressional mandate." The *Flast* test did not fit the situation in *Hein* because, in Justice Alito's view, "[t]hese appropriations [to the EOP] did not expressly authorize, direct, or even mention the [faith-based initiative] expenditures of which [plaintiffs] complain." Rather, FFRF's challenge was to how officials within the Office of Faith-Based and Community Initiatives were exerting their efforts and using EOP financial resources to stage faith-based conferences in pursuit of the President's policy initiative. In short, executive branch officials were said to be unconstitutionally promoting the work of faith-based social service providers over secular providers, and to be otherwise endorsing religion. Such activity was not attributable to Congress.

Seven of the Justices in *Hein* said that they will continue to apply the *Flast* test for taxpayer standing. A somewhat

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*Forge*, 454 U.S. at 478-82. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court held that taxpayer-plaintiffs had standing to challenge a congressional social service program that provided grant funding to secular and religious counseling centers promoting teen chastity. *Id.* at 618-20. The Court went on to uphold the constitutionality of the program on its face, but remanded for further proceedings with respect to "as applied" challenges. *Id.* at 600-18, 620-22.

16 *Hein*, 127 S. Ct. at 2565-68, 2571-72 (plurality opinion).

17 The Taxing and Spending Clause provides in relevant part: "The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

18 *Hein*, 127 S. Ct. at 2565 (plurality opinion).

19 *Id.* at 2566.

20 *Id.* at 2561.

21 *Id.* at 2566.

22 Chief Justice Roberts, along with Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and Alito would continue to apply *Flast*. See *id.* at 2568; see also *id.* at 2587-88 (Souter, J., dissenting).
different group of five Justices would not expand the scope of *Flast.* The Justices Scalia and Thomas would overrule *Flast* and never permit taxpayer standing.

While the matter directly at hand is the scope of taxpayer standing first permitted in *Flast,* this extended essay uses the "injury in fact" requirement for standing to delve into the manner by which the four opinions in *Hein* give insight into how the Roberts Court approaches the Establishment Clause and hence the judiciary's role in policing government support for religion. The essay also demonstrates how a "generalized grievance," for which standing is generally denied, necessarily involves a claim where a structural clause of the Constitution is said to be violated rather than a rights-based claim. The above questions are all the more interesting because *Hein* is the first church-state case to come before the Supreme Court since the two newest Justices, Chief Justice Roberts and Justice Alito, were appointed. Getting to those questions requires that we first examine the nature of standing, the subject of Part I.

### I. STANDING TO SUE

Standing is a doctrine of justiciability derived from the Cases or Controversies Clause in Article III of the Constitution. It implicates separation of powers in the sense of being a limit on the federal judiciary's subject matter jurisdiction. Standing has three requirements: "injury in fact," causation, and redressability. "Injury in fact" means that the plaintiff has suffered some actual or imminent harm.

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23 Chief Justice Roberts, along with Justices Kennedy, Scalia, Thomas, and Alito would not expand *Flast.* See id. at 2568 (plurality opinion); see also id. at 2584 (Scalia, J., concurring).

24 See id. at 2573-74, 2584 (Scalia, J., concurring).

25 The Constitution provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under [federal law, and] – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; [and to certain other cases]." U.S. CONST. art. III, § 2, cl. 1.

26 Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992) (holding, *inter alia,* that a congressional grant of standing to all U.S. citizens to challenge certain regulatory actions was unconstitutional).

27 *Id.* at 560.
Causation means that the harm is fairly traceable to the defendant. Finally, redressability means that the harm can be redressed by a remedy traditionally known to Anglo-American courts of law and equity.

Just because the United States Constitution is alleged to be violated does not give a plaintiff standing to sue. Rather, the complainant must be someone who is specifically injured by the putative violation. A claim that the government is not following the Constitution, without more, is what the Supreme Court calls a "generalized grievance." A "generalized grievance" is one suffered by the entire body politic when the government does not follow the law. A "generalized grievant" is thus without standing because he or she is without concrete injury. It is not a numbers game. That is, it is not that the plaintiff lacks standing because many others also suffer the same injury. Rather, it is that the judicial branch has no jurisdiction to hear a claim that the government is violating the law without the complainant having some specific injury attributable to the alleged violation. How is it that the Constitution can be violated and yet no one is individually harmed? That is the subject of Part II.

II. GENERALIZED GRIEVANCES

The United States Constitution is composed of rights and structure. Rights vest in people, as well as the organizations they form. Structure is usefully envisioned as the

28 Id.
29 See id. at 560-61.
30 See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982). In Valley Forge, the Court stated:

Although [plaintiffs] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by [plaintiffs] as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485-86.
31 See Fed. Election Comm’n v. Akins, 524 U.S. 11, 23-25 (1998) (stating that a “generalized grievance” lacks the necessary concreteness, not because the alleged injury is widespread, but because of the abstract nature of the asserted interest or injury).
organizational framework of the national government, which is that of a federal republic.

The presence of a "generalized grievance" never occurs when a plaintiff's claim is that an individual constitutional right has been violated by the government. Rights violations always produce a victim. This is because rights run in favor of people. Thus, when a right is violated, there is always someone or some group that is specifically harmed. And this individualized harm satisfies the "injury in fact" requirement for standing. Of course, the victim may choose to waive his or her constitutional rights and just quietly suffer the harm. However, if the right is not waived but asserted, it cannot be said that the harmed plaintiff has no standing to sue because the claim is a "generalized grievance."

This is not the situation with respect to a violation of a structural clause in the United States Constitution. The nature of a structural clause speaks to the government's powers and duties. The national government is one of limited, delegated powers. There are checks and balances running between and among the three branches. These limits on power are structural in nature, and the checks run against the government or the branches and officials thereof. These limits or checks on the power of the various branches of the government yield individual liberty, but this liberty comes only as a consequence of the structural clauses working to check and balance the power of the government's various branches and officials. Accordingly, sometimes (not always) structure can be violated but no person or organization suffers a concrete injury; that is, there is no individualized "injury in fact." When this occurs, no person or group has standing to sue. Instead, there is a "generalized grievance."

*Ex parte Levitt* is an early example of a structural violation where no one was specifically injured, so no one had

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32 This was implicit in the Constitution of 1787. It was then made explicit in the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

33 302 U.S. 633 (1937) (per curiam).
standing to sue. The case involved President Franklin D. Roosevelt's appointment of Justice Hugo Black to the United States Supreme Court. Albert Levitt, in his capacity as a citizen and as a member of the Supreme Court's bar, petitioned the Court to delay the appointment because, when nominated, Hugo Black was a member of the United States Senate. Congress had recently voted to increase the retirement benefits of members of the Supreme Court. Albert Levitt argued that the Appointments Clause\(^3\) prohibits a member of Congress from immediately assuming an appointment in the judicial branch when, during the member's elected term, "the Emoluments" of the office were increased via retirement benefits for the Court's Justices. The purpose of this structural clause is a good one, namely, to prevent members of Congress from using their offices for personal financial gain. And Albert Levitt's claim that the Constitution was violated certainly appeared to have some merit. Instead of reaching the merits, however, the Supreme Court dismissed for lack of standing.\(^3\) The Court said that to invoke its jurisdiction a petitioner "must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action[,] and it is not sufficient that he has merely a general interest common to all members of the public."\(^3\) Albert Levitt was a "generalized grievant."

Similarly, in United States v. Richardson,\(^3\) the Court denied standing to a plaintiff who claimed the Account Clause\(^3\) required Congress to disclose the appropriation of all public monies. The purpose of this structural clause is also a good one because it compels Congress to be transparent in how public funds are appropriated. The plaintiff sought disclosure of the

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\(^3\) The Appointments Clause provides in relevant part: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . the Emoluments whereof shall have been encreased during such time . . . ." U.S. CONST. art. I, § 6, cl. 2.

\(^3\) 302 U.S. at 634.

\(^3\) Id.

\(^3\) 418 U.S. 166 (1974).

\(^3\) The Account Clause provides in relevant part: "[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.
Central Intelligence Agency (CIA) budget, which, if brought to light, would have revealed covert operations and other state secrets.\textsuperscript{39} Although the government ostensibly violated a structural duty by classifying as secret all appropriations to the CIA, no one suffered a concrete injury. The absence of a personalized injury required dismissal for lack of standing.\textsuperscript{40} Richardson's assertions of standing both as a citizen and as a taxpayer were rejected,\textsuperscript{41} and the claim was dismissed as a “generalized grievance.”

Schlesinger v. Reservists Committee to Stop the War\textsuperscript{42} was decided the same day as Richardson. Plaintiffs claimed that members of Congress who also drew pay as reserve officers in the armed forces violated a structural clause prohibiting members of Congress from simultaneously holding positions in the executive branch.\textsuperscript{43} The structural clause is a good one, seeking to prevent conflicts of interest when members of Congress have divided loyalties because they also hold paid jobs in the executive branch. But no one was specifically injured as a result of the ostensible violation, so again the Supreme Court dismissed the matter because it was a “generalized grievance.”\textsuperscript{44}

Levitt, Richardson, and Schlesinger illustrate well the idea of a “generalized grievance.” A rights violation will always produce a victim, and thereby a person or organization with individualized “injury in fact.” That is not the case with a violation of a structural clause. It necessarily follows that when a “generalized grievance” occurs, the nature of the constitutional clause alleged to be violated is structural as opposed to rights-based. This has implications for the Roberts Court and its view of the Establishment Clause, as will become evident in Parts III and IV.

\textsuperscript{39} Richardson, 418 U.S. at 175 & n.8.
\textsuperscript{40} Id. at 180.
\textsuperscript{41} Id. at 176-80.
\textsuperscript{42} 418 U.S. 208 (1974).
\textsuperscript{43} The Constitution provides in relevant part: “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” U.S. CONST. art. I, § 6, cl. 2.
\textsuperscript{44} Schlesinger, 418 U.S. at 216-27.
III. THE RULE AGAINST TAXPAYER STANDING AND FLAST'S EXCEPTION

The general rule is that there is no standing to sue as a federal taxpayer when alleging a violation of the United States Constitution.\(^{45}\) When one sues asserting taxpayer standing, the plaintiff is not asking for a portion of his or her taxes to be lowered or refunded. Nor is the focus of the plaintiff on the lawfulness of the tax. Rather, the focus is on some generalized constitutional violation that the plaintiff wants stopped. However, for a federal court to enjoin the alleged constitutional violation the plaintiff must first have standing to sue; hence, one must have "injury in fact." The complaint is a "generalized grievance."\(^{46}\)

In 1968, the Court handed down Flast v. Cohen,\(^ {47}\) which made an exception to the foregoing rule. At issue in Flast was the Elementary and Secondary Education Act of 1965,\(^ {48}\) a provision of which provided federal funding to nonpublic schools for educational equipment, as well as for classes in reading and arithmetic.\(^ {49}\) Funding was available to K-12 nonpublic schools without regard to possible religious affiliation. Insofar as funding was made available to religious and religiously affiliated schools, plaintiffs sued under the Establishment Clause alleging a violation of church-state separation.\(^ {50}\)

\(^{45}\) Massachusetts v. Mellon, 262 U.S. 447 (1923). Of course, the rule against taxpayer standing does not apply to situations where the claimant is suing as a taxpayer because she is due a tax refund or because she is the victim of an illegal tax. In these latter instances, there is individualized "injury in fact."

\(^{46}\) Justice Alito said as much in Hein when he wrote that "if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus." Hein v. Freedom From Religion Found., 127 S. Ct. 2553, 2559 (2007) (plurality opinion).


\(^{48}\) Flast, 392 U.S. at 85-86.

\(^{49}\) Id. at 85-88. The plaintiffs in Flast also brought a claim under the Free Exercise Clause, U.S. Const. amend. I. Flast, 392 U.S. at 85, 103. However, in remanding for further proceedings, the Court only permitted the taxpayer-plaintiffs to proceed with their claim under the Establishment Clause. Id. at 103-05. That makes sense. The Free Exercise Clause is rights-based. If there was a rights violation, there would be a victim,
Plaintiffs were not individually harmed by the federal funding. Rather, they remained at liberty to exercise their own religion (if they had one), as well as any other constitutional right they might have. They had no specific "injury in fact" and thus no standing to sue. Indeed, no one had "injury in fact." For example, the public schools were not harmed. Just because some religious schools were funded did not mean that public schools would get less money; government aid to education is not a zero sum game. And nonpublic schools receiving federal funding were not harmed because the funding was optional; no nonpublic school was being forced to take the government aid. Because plaintiffs had no specific harm, the complainants in Flast sued in their capacity as federal taxpayers.51

Following longstanding precedent, the lower federal courts dismissed for lack of standing.52 The Supreme Court reversed. The plaintiffs in Flast sought no tax refund or reduction in their taxes, thus tax money was not their "injury in fact."53 Rather, the plaintiffs' alleged injury was that the government's money went in support of religion, a "generalized grievance." So the Court adopted a legal fiction. The fiction is that every taxpayer has an individualized interest, vested in the Establishment Clause understood as a power-denying restraint on congressional appropriations being directed in aid of religion.54

When Flast permitted taxpayer standing the claim on the

and thereby a plaintiff with "injury in fact" and standing to sue. Taxpayer standing is never needed for claims under the Free Exercise Clause. For this reason, the Court has twice rejected taxpayer standing claims brought under the Free Exercise Clause. See Tilton v. Richardson, 403 U.S. 672, 689 (1971) (federal taxpayers lacked the requisite burden on religion to pursue free exercise claim); Bd. of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (same holding with respect to state taxpayers).

51 Flast, 392 U.S. at 85, 88.
53 Flast, 392 U.S. at 85-88.
54 Id. at 105 ("We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8."). The Flast Court had earlier characterized the Establishment Clause as, inter alia, having two purposes, the second being implicated here: "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." Id. at 103.
merits was not that the plaintiffs were individually coerced against their religious conscience to pay taxes to support the religion of others—for that would be attempting to assert a rights-based violation where the Supreme Court has consistently ruled that there is no such right.\textsuperscript{55} Rather, damages in the form of an indeterminate (and surely \textit{de minimis}) amount of taxes paid are a surrogate in \textit{Flast} for what is otherwise a "generalized grievance" caused by an improper relationship between church and state (here, a relationship in the form of the government funding K-12 religious schools).

Taxpayer standing under \textit{Flast} is not characterized as a legal fiction to disparage the case. Nor is it called a fiction because \textit{Flast} over-reads the Establishment Clause. Rather, \textit{Flast} standing is called a legal fiction simply as an apt description. Indeed, Justice Alito candidly acknowledged the fiction, stating in \textit{Hein} that "[i]n light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm."\textsuperscript{56}

\textsuperscript{55} The Court has taken up a violation-of-conscience claim brought under the Free Exercise and Establishment Clauses and rejected both of them. The plaintiffs in \textit{Flast} claimed that payment of a general federal tax, the monies of which were appropriated to religious schools, was religious coercion in violation of the Free Exercise Clause. \textit{Flast}, 392 U.S. at 103, 104 n.25. The Court chose to defer deciding whether that averment stated a claim, and declined to decide whether a federal taxpayer even had standing to raise such a claim. In \textit{Tilton}, the Court returned to the issue and held that a federal taxpayer's claim of religious coercion did not state a claim for which relief can be granted under the Free Exercise Clause. \textit{Tilton} v. Richardson, 403 U.S. 672, 689 (1971). \textit{See also supra} note 50. In \textit{Valley Forge}, claimants challenged the transfer of government property at no charge to a religious college as violative of the Establishment Clause. \textit{Valley Forge Christian Coll.} v. \textit{Ams. United for Separation of Church & State}, 454 U.S. 464 (1982). Several asserted bases for standing were unsuccessful because claimants lacked the requisite "injury in fact." \textit{Id.} One of the rejected bases was that claimants had a "spiritual stake" in not having their government give away property for a religious purpose or to act in any other way contrary to no-establishment values. The Court held that a "spiritual stake" in having one's government comply with the Establishment Clause is not a cognizable injury. \textit{Id.} at 486 n.22.

\textsuperscript{56} \textit{Hein} v. \textit{Freedom From Religion Found.}, 127 S. Ct. 2553, 2559 (2007) (plurality opinion). \textit{See also Louis Henkin, Forward: On Drawing Lines, 82 HARV. L. REV. 63, 74 (1968)} ("And it is a fiction that a taxpayer like Flast is asserting a personal stake or interest based on his reluctance to have his tax money expended for the purpose to which he objects.").
Flast's adoption of the legal fiction of taxpayer standing permitted the Supreme Court to reach the merits in the absence of a complainant suffering specific "injury in fact" or actual harm. This is unique, for no claim on the merits other than one brought under the Establishment Clause has ever been permitted in a federal court by a plaintiff asserting taxpayer standing.\(^5\) Referencing the period 1776-1786 when the State of Virginia disestablished the Anglican Church,\(^5\) the Flast Court said that the "concern of [James] Madison and his [Virginia] supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers" to directly aid religion.\(^5\) The principles behind the Virginia disestablishment were then equated by the Court in Flast with the meaning of the Establishment Clause. And the meaning, in the Court's view, was that the Establishment Clause was a restraint "designed as a specific bulwark against such potential abuses of governmental power, and that [the] clause... operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."\(^6\)

In his dissent in Hein, Justice Souter characterized the taxpayers' claim in Flast as "the protection of liberty of

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\(^5\) See Hein, 127 S. Ct. at 2568-69 (plurality opinion), 2587 n.4 (Souter, J., dissenting) (conceding that taxpayer standing has been recognized only in claims brought under the Establishment Clause); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347-49 (2006) (denying taxpayer standing in complaint alleging a violation of the Dormant Commerce Clause).


\(^5\) Flast, 392 U.S. at 103-04.

\(^6\) Id. at 104. This attribution of the ideas behind the Virginia experience of 1776-1786 to the intended meaning of the Establishment Clause as drafted by the First Congress in 1789, and its subsequent ratification by the states during 1789-1791, is dubious as a matter of history. However, the Court in Flast was following a path the Court had already traveled twenty years earlier in Everson v. Bd. of Educ., 330 U.S. 1, 11-13 (1947). See Carl H. Esbeck, The 60th Anniversary of the Everson Decision and America's Church-State Proposition, 23 J.L. & RELIGION 15, 17-26 (2007-2008).
conscience," whereas Justice Scalia characterized the plaintiffs' claim as protection from "psychic injury." Both are wrong. A taxpayer who is highly separationist on church-state matters is no more "injured" in her conscience when general tax revenues are appropriated from the public treasury to support religion than is a racial minority "injured" when general tax revenues are appropriated from the public treasury to support a white segregationist academy. Yet, according to the Court, there is standing in the former case brought under the Establishment Clause but not in the latter case brought under the Equal Protection Clause. This is not logical. That is because there is no actual injury in Flast, and the sooner we all stop looking for it the better off we will be. The logic of the Court's thinking in Flast is to be found elsewhere, namely in the difference between a claim brought under the modern Establishment Clause and a rights-based claim such as one brought under the Equal Protection Clause.

Like all legal fictions, the fiction in Flast was adopted for instrumental purposes. If the Flast Court had not entertained the fiction, legislative bodies everywhere (federal, state, and local) could appropriate money for general aid-to-education programs, allow religious schools to be equally eligible for the programs, and no one will have standing to challenge the programs as being in violation of the Establishment Clause. A starker example would be Congress appropriating money to pay the salaries of all religious ministers or clergy who applied for the funds. Without taxpayer standing under Flast, no one would have standing to challenge such a law in federal court which surely strikes at the core of the American church-state settlement.

Flast allowed the suit to go forward where there was a mere "generalized grievance." Flast thus enabled a more expansive judicial enforcement of the Establishment Clause. Indeed, after Flast a complainant may also assert state or local taxpayer

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61 Hein, 127 S. Ct. at 2585 (Souter, J., dissenting) (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 711 n.22 (2002) (Souter, J., dissenting)).
62 Id. at 2574 (Scalia, J., concurring).
standing in order to pursue a claim that the Establishment Clause is violated. The decision in Flast is not the particular government promulgating the tax, but that the claim on the merits is a legislative appropriation said to be in violation of the Establishment Clause. On the other hand, by allowing the legal fiction, the Court in Flast weakened the requirement of standing to sue, which in turn weakened the doctrine of separation of powers. It was a trade-off. The Flast Court believed that there was a compelling need for such a trade-off, and this tells us something very important about the character of the modern Establishment Clause, the subject of Part IV.

IV. THE ESTABLISHMENT CLAUSE IS REGARDED AS STRUCTURAL IN NATURE

How is it that there can be a colorable claim that the Establishment Clause is violated but no one is harmed? If the Supreme Court regards the modern Establishment Clause as structural, then we know that structural violations can occur, and yet the complainant is a "generalized grievant." Because the Court deems the fiction of taxpayer standing as necessary in

63 Compare Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) (rejecting assertion of state taxpayer standing to challenge a state law authorizing devotional Bible reading in public schools because "the grievance which [the plaintiff] sought to litigate [i.e., their unwanted exposure to the Bible reading] . . . is not a direct dollars-and-cents injury [to a taxpayer] but is a religious difference."), with Sch. Dist. v. Ball, 473 U.S. 373, 380 n.5 (1985) (collecting cases in which state taxpayer standing was allowed).

64 When Flast permits state or local government taxpayer standing the trade-off is not with the doctrine of separation of powers but with federalism. That is, federal court jurisdiction results in judicial intervention into the affairs of legislative bodies at the state and local level. Justice Kennedy noted this in Hein, 127 S. Ct. at 2573 (Kennedy, J., concurring) ("The Court has refused to establish a constitutional rule that would require or allow 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.'" (emphasis added) (quoting Garcetti v. Ceballos, 547 U.S. 410, 423 (2006)).

65 In his concurring opinion, Justice Kennedy was candid about this trade-off in Flast: "The Court's decision in Flast and in later cases applying it, must be interpreted as respecting separation-of-powers principles but acknowledging as well that these principles, in some cases, must accommodate the First Amendment's Establishment Clause." Hein, 127 S. Ct. at 2572 (Kennedy, J., concurring) (citation omitted).
certain claims under the Establishment Clause, it follows that the Court regards the modern Establishment Clause as structural (or jurisdictional) in its nature and operation—that is, the clause is about the separation of church and government.

Since *Everson v. Board of Education*, the Supreme Court has read the Establishment Clause as embodying a particular understanding of the separation of church and state. In the first half of the nineteenth century the principle was called (and spelled) "voluntaryism." Voluntaryism means religion is to be supported voluntarily, if at all, by those in the private sector—which is to say, not affirmatively supported by government. Voluntaryism goes well beyond prohibiting attempts by the government to force religious belief on individuals or to coerce religiously informed conscience. Voluntaryism is about rejecting government support for religion, whether or not that support results in coercion of conscience. Voluntaryism is also about protecting organized religion from government interference. Hence, church-state separation—rightly understood—is reciprocal. The proper ordering of church-state relations is to the mutual benefit of both the body politic and organized

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66 330 U.S. 1, 15 (1947) (holding, *inter alia*, the Establishment Clause is applicable to state and local governments via the Due Process Clause of the Fourteenth Amendment).

67 See Esbeck, supra note 60, at 20-27.

68 The state-by-state disestablishment of the Anglican Church in the American South and later the Congregational Church in New England, along with the emergence of voluntaryism during the early national period, 1776-1830s, is surveyed in Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1448-1540.

69 To be sure, coerced religious belief or observance is a violation of conscience. But such coercion is generally a matter for the Free Exercise Clause. Relieving religious coercion is a rights function. That is not what the Court's post-*Everson* Establishment Clause is about. Rather, the modern Establishment Clause is about patrolling the boundary between church and state. That is a structural function. This understanding is reflected in the Supreme Court's cases that distinguish the modern Establishment Clause from the Free Exercise Clause on the basis that the no-establishment principle (unlike free exercise) does not require a showing of coercion of religion-based conscience or other religious harm. See *Sch. Dist. v. Schempp*, 374 U.S. 203, 221 (1963) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962))).
religion. Statements observing this mutuality are common in Supreme Court opinions.\textsuperscript{70}

The separation of church and state is, by its nature, a structural relationship.\textsuperscript{71} Its operation is roughly parallel to the Constitution's structural relationship among the executive, legislative, and judicial branches—which we call separation of powers. The task of the post-\textit{Everson} Establishment Clause is to police the boundary between government and organized religion, thereby keeping these two centers of authority in their proper role or relationship to each other. This is also why legislative appropriations can be thought to undermine the principle of no-establishment—like the federal education payments to religious K-12 schools at issue in \textit{Flast}—yet there is no individual or organization with "injury in fact," and thus no one with traditional standing to sue.

This is not to say that there is never individuated "injury in fact" when the Establishment Clause is violated. Sometimes there is. On occasion, the Establishment Clause has provided redress for individual harms: economic harm or loss of property;\textsuperscript{72} constraints on academic freedom and inquiry by

\textsuperscript{70} See, e.g., Ill. ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").

\textsuperscript{71} That the Supreme Court has regarded the modern Establishment Clause as ordering relations between church and state is manifest in the Court's case law, not just in reduced-rigor standing rules but in several additional ways. See Carl H. Esbeck, \textit{The Establishment Clause as a Structural Restraint: Validations and Ramifications}, 18 J.L. & Pol. 445, 456-71 (2002) (discussing relaxed standing rules; remedies for non-religious harm and class-wide remedies, not just relief for the claimants before the court; dismissals for lack of subject matter jurisdiction; two definitions of religion, one for the Free Exercise Clause and one for the Establishment Clause, reflecting the different purposes of each clause; and remedies that protect organized religion from its own harmful choices). If \textit{Hein} had overruled \textit{Flast}, the treatment of the Establishment Clause as structural would still be validated by these other features in the Court's case law.

teachers and students;\textsuperscript{73} restraints on free-thinking atheists;\textsuperscript{74} and unwanted exposure to government-sponsored religious expression.\textsuperscript{75} The same is true with structural violations generally: sometimes there are persons with "injury in fact," but not always. However, the complaint in \textit{Flast} was an example of an alleged structural violation where no one was individually harmed, and thus no one had traditional standing to sue.\textsuperscript{76} So is


\textsuperscript{74} Torcaso v. Watkins, 367 U.S. 488 (1961) (ruling in favor of atheist, who by self-profession had no religion and thus no harm to his religion, but who was desirous of holding public office without taking theistic oath).

\textsuperscript{75} In the case of government-sponsored religious symbols and other government religious expression, the Establishment Clause protects those necessarily exposed to the unwanted expression. In these unwanted exposure-to-religion cases, the Supreme Court has a reduced-rigor standing requirement. The requisite "injury in fact" for standing is lowered, albeit not eliminated altogether as in \textit{Flast}. See, e.g., O'Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005), cert. denied, 547 U.S. 1003 (2006); Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995), cert. denied, 517 U.S. 1201 (1996). In \textit{Robinson}, the circuit court permitted the claimant standing to challenge, under the Establishment Clause, a city seal that included a Latin cross. 68 F.3d at 1230 n.6. The plaintiff averred that he lived and worked in the city but did not allege that he was directly exposed to the seal on a regular basis. \textit{Id.} at 1228. Three of the Court's Justices dissented from the denial of certiorari, noting a split in the circuits concerning how much unwanted exposure to a religious symbol was required for standing to raise a no-establishment claim. \textit{Robinson}, 517 U.S. at 1202-03 (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, J.J.) (collecting authorities from the circuits, a majority of which permit standing, without more, upon direct but unwanted exposure to the religious symbol in question). In \textit{O'Connor}, the circuit court granted standing to a student and a professor both of whom had to regularly walk by an offending statue on the university's campus. 416 F.3d at 1222-23. The reduced-rigor standing in exposure-to-religion cases is additional evidence that the Court regards the Establishment Clause as structural. There is now concern by some commentators that \textit{Hein} will embolden government lawyers and judges to challenge reduced-rigor standing. See Lupu & Tuttle, \textit{supra} note 4, at 162-63.

\textsuperscript{76} \textit{Flast} showed just how determined the post-\textit{Everson} Court was to enforce voluntaryism. Even now we see the logic of voluntaryism being pressed with respect to government displays of the Ten Commandments and the "under God" language in the Pledge of Allegiance. Compare McCreary County v. ACLU, 545 U.S. 844 (2005) (holding that recent depiction of the Ten Commandments in a county building display violates Establishment Clause), \textit{with} Van Orden v. Perry, 545 U.S. 677 (2005) (plurality opinion) (determining that a stone monument on the grounds of a state capitol building depicting the Ten Commandments that had been in place for several years did not violate the Establishment Clause); \textit{see also} Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (holding that plaintiff did not have standing to maintain a claim that voluntary
the complaint in *Hein*. What we should make of the *Hein* decision is taken up in Part V.

V. WHAT TO MAKE OF THE HOLDING IN *HEIN*?

The decision in *Flast* worked to undermine the doctrine of separation of powers. It gave federal courts jurisdiction to pass on the merits of a church-state claim where there was no actual standing to sue, that is, no case or controversy. On the other hand, *Flast* enabled broader judicial enforcement of the modern Establishment Clause, which since *Everson* the Court has read to be the policing of the boundary between church and state—a structural relationship by its nature.

The fiction of taxpayer standing in *Flast* can be justified because the proper structuring of church and state intrinsic to the modern Establishment Clause is *sui generis*, that is, it is unlike other constitutional structures which either run horizontally between the three federal branches (separation of powers) or vertically between the federal government and the governments of the several states (federalism). When either separation of powers or federalism is transgressed, there will be some other government branch eager to defend against the encroachment on its turf. This is not so with violations of church-state separation, especially those involving the appropriation of large sums of money from the public treasury. A religious organization receiving a grant out of general tax revenues (and potentially entangling funding regulations that

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77 In *Hein*, Justice Alito took care to link traditional standing back to its roots in separation of powers:

[Expanding *Flast*] would also raise serious separation-of-powers concerns. As we have recognized, *Flast* itself gave too little weight to these concerns. By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* “failed to recognize that this doctrine has a separation-of-powers component, which keep courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not.” [Plaintiffs'] position, if adopted, would repeat and compound this mistake.

may compromise the autonomy of the religious organization) is not going to complain about the funding or the accompanying regulatory entanglement. This is because the receipt of the funds is voluntary. In *Flast*, of course, the religious organizations in question were religious K-12 schools, and such schools will not complain about receiving the grant monies or the burden of complying with the accompanying regulations. If the regulations became unbearable or compromised the autonomy of the religious school, then the school would simply refuse the funding. Such behavior is to be expected of any private-sector organization, religious or nonreligious, awarded scarce government funding.

The Court in *Hein* had before it a choice. The Court could have expanded *Flast* standing, and thus enhanced the Court’s role in policing the structural relationship between church and state. Or the Court could have reversed *Flast*, and thus restored matters to a traditional view of standing, one which checks federal judicial power and thereby buttresses the doctrine of separation of powers. Both the proper structuring of church-state relations and the faithful adherence to traditional separation of powers are high-value constitutional principles. Either the Court makes a purist’s choice between one principle or the other, or the Court is willing to operate in the realm of logical inconsistency in pursuit of deriving some benefit from both purist positions.

In *Hein*, the three-Justice plurality chose neither purist position. It steered the middle road of not overruling *Flast* but also not expanding *Flast*. While not undoing the past, Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, was clear about not wanting to do more damage to the doctrine of separation of powers:

> The rule [plaintiffs] propose would enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials. This would... “open the Judiciary to an arguable charge of providing ‘government by injunction[.]’” It would deputize federal courts as “virtually continuing monitors of the wisdom
and soundness of Executive action,"...\(^{78}\)

Justice Kennedy's concurring opinion is even more forthcoming concerning the danger of expanding taxpayer standing to the facts in *Hein*.\(^{79}\) He said that taxpayer standing should not be extended to situations where congressionally authorized discretionary spending is performed by agencies or officers of the executive branch.\(^{80}\) In one sense, everything said or done by an agency or officer of the executive branch is made possible only by the expenditure of taxpayer monies for salaries and other general operations. If the judicial branch were to review all such executive branch actions with an eye to church-state boundary transgressions, then the Article III branch would be superintending the day-to-day work of the Article II branch.\(^{81}\)

As stated above, the legal fiction of *Flast* taxpayer standing is instrumental. Legal fictions seek to do more good than harm. *Flast* had apparently delivered on that promise, for in *Hein* the United States Solicitor General did not argue that the work and independence of the legislative branch had been impeded by the many lawsuits made possible only by the fiction in *Flast*. But if all executive branch utterances and actions were judicially reviewable in a search for church-state boundary violations—and at the behest of hundreds of millions of taxpayers, federal, state, and local—then we would have a clear case of doing more harm than good.

As Justice Kennedy noted, the President of the United States is elected to pursue certain policies favored by the electorate. Vexatious litigation with its extensive discovery requirements can easily derail policy initiatives.\(^{82}\) Given today's

\(^{78}\) *Id.* at 2570 (citations omitted).

\(^{79}\) *Id.* at 2572 (Kennedy, J., concurring).

\(^{80}\) *Id.* at 2572-73.

\(^{81}\) Justice Kennedy wrote:

The Court should not authorize the constant intrusion upon the executive realm that would result from granting taxpayer standing in the instant case. ... The separation-of-powers concerns implicated by intrusive judicial regulation of day-to-day executive operations reinforce [Justice Alito's] interpretation of *Flast's* framework.

*Id.* at 2573.

\(^{82}\) Justice Kennedy wrote:
rough-and-tumble politics, a President's opponents would surely use litigation to get their way, where earlier these same opponents had failed to defeat the President at the ballot box. To expand the scope of taxpayer standing beyond Flast is to risk considerable harm to separation of powers, with the judicial branch used as an offensive weapon by opponents of the President. That would be destroying the village in order to save it.

Hein preserved but did not expand Flast. What this tells us about the modern Establishment Clause from the perspective of the two newest members of the Court is the subject of Part VI.

VI. WHAT DOES HEIN TELL US ABOUT THE ROBERTS COURT AND THE ESTABLISHMENT CLAUSE?

Led by Justice Souter, the four dissenting Justices evidenced strong backing for an Establishment Clause

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. The exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies sustains a free society. Permitting any and all taxpayers to challenge the content of these prototypical executive operations and dialogues would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real danger of judicial oversight of executive duties. The burden of discovery to ascertain if relief is justified in these potentially innumerable cases would risk altering the free exchange of ideas and information. And were this constant supervision to take place the courts would soon assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold.

Id. at 2572-73.

83 Filed in Hein was Brief for Legal and Religious Historians and [Certain Named] Law Scholars as Amici Curiae in Support of Respondents, Hein v. Freedom From Religion Found., 127 S. Ct. 2553 (2007) (No. 06-157), 2007 WL 320997. The brief amici makes the point that for the American founders, the King of England as much as Parliament made use of an established church to abuse the religious freedom of dissenters. Id. at *5-8. Assuming this historical claim is true, it nonetheless misses the concern that drives the controlling plurality in Hein. In the view of the plurality, to extend Flast standing to discretionary actions by officials in the executive branch would do major damage to the doctrine of separation of powers. Flast adopted the legal fiction that legislative appropriations caused "injury in fact" to the proper ordering of church-state separation. The fiction is a surrogate to permit the justiciability of Establishment Clause claims while doing minimal damage to separation of powers. But the extension of the legal fiction to discretionary executive spending—as amici urged—would come at too high a price.
understood as giving rise to a claim in every taxpayer to conscientiously object to any aid to religion from general tax revenues.\textsuperscript{84} This is consistent with their voting pattern on prior no-establishment matters.\textsuperscript{85} The dissenters sought to expand taxpayer standing, so that the federal courts could enforce the post-\textit{Everson} Establishment Clause in other circumstances. If \textit{Flast} had been extended to the facts in \textit{Hein}, then hundreds of millions of taxpayers (federal, state, and local) would have standing to bring an Establishment Clause claim over public funding of any and all character. That stance can only be described as aggressive. As Justice Kennedy wrote in \textit{Hein}, "[t]o find standing in the circumstances of this case would make the narrow exception [of \textit{Flast}] boundless."\textsuperscript{86}

Contrariwise, the three Justices that comprise the plurality were prepared to stay the course with \textit{Flast} and, thus, continue

\textsuperscript{84} \textit{Hein}, 127 S. Ct. at 2585-88 (Souter, J., dissenting).

"The judgment [in \textit{Flast}] of sufficient injury takes account of the Madisonian relationship of tax money and conscience, but it equally reflects the Founders' pragmatic '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'..."

\textit{Id.} at 2587-88 (quoting \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 11 (1947)). For a critique of Justice Souter's historical assertion that James Madison's position on church and state supports the claim that every taxpayer has a right to conscientiously object to tax revenues being appropriated to religious organizations, see Vincent Blasi, \textit{School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance}, 87 CORNELL L. REV. 783, 789-91 (2002).

\textsuperscript{85} See, e.g., McCreary County v. ACLU, 545 U.S. 844, 850 (2005) (Souter, J., for the Court, joined by Stevens, O'Connor, Ginsburg, and Breyer, JJ.) (holding that posting of Ten Commandments as part of a larger historical display at two county courthouses had the purpose of advancing religion and thus violated the Establishment Clause); Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) (objecting to the majority opinion which upheld a school voucher plan open to religious schools); Mitchell v. Helms, 530 U.S. 793, 867 (2000) (Souter, J., dissenting, joined by Stevens and Ginsburg, JJ.) (objecting to the plurality opinion which upheld direct federal aid to K-12 schools, including religious schools); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.) (objecting to majority opinion which said that where a state university paid for printing expenses of student newspapers, which payments partly defined the scope of a limited public forum to enlarge student writing, the subsidy did not violate the Establishment Clause when received by a student Christian newspaper).

\textsuperscript{86} \textit{Hein}, 127 S. Ct. at 2572 (Kennedy, J., concurring).
the federal judiciary's middling to ambitious enforcement of the modern Establishment Clause. This is a remarkable position for Chief Justice Roberts and Justice Alito. These two newest Justices on the Court were faced with what for them must have been a highly appealing argument in 
Hein, namely, that the judiciary must carefully attend to its doctrines of justiciability and not reach out to decide constitutional questions when the Court's Article III jurisdiction is doubtful. Justice Scalia made that argument in 
Hein. The Chief Justice and Justice Alito were not only unconvinced, but they vigorously defended 
Flast's application as doing useful work over its forty-year history.

An alternative scenario is that Chief Justice Roberts sought to steer the Court into ruling narrowly, so as to hand down a five-Justice majority opinion. Such an opinion could not overrule 
Flast if it was to retain Justice Kennedy's vote, for Kennedy expressly said 
Flast was correctly decided. With that as a given, for Justices Scalia and Thomas to join such a majority opinion, the author would have had to say that the Seventh Circuit should be reversed without overruling 
Flast—thus leaving reconsideration of 
Flast for another day. But Justices Scalia and Thomas were unwilling to leave 
Flast in place, and they concurred separately. This scenario, however, does not explain why, once it was clear that no majority opinion was possible, Chief Justice Roberts and Justice Alito did not form a four-Justice plurality with Justices Scalia and Thomas and state that they would expressly overrule 
Flast. Instead, Chief Justice Roberts and Justice Alito stayed with Justice Kennedy, indicating they both sincerely believe the Court should continue to adhere to 
Flast.

Some commentators have said Justice Alito's plurality

\[87\] Id. at 2571-72 (plurality opinion).

\[88\] Id. at 2573 (Scalia, J., concurring, joined by Thomas, J.).

\[89\] Id. at 2565-69 (plurality opinion).

\[90\] The virtue of the Supreme Court reaching a majority opinion is that it creates more certainty as to the rule of law and hence more clarity for lawyers giving advice to their clients, as well as less confusion among the lower federal and state courts.

\[91\] Id. at 2572 (Kennedy, J., concurring) (“In my view the result reached in 
Flast is correct and should not be called into question.”).

\[92\] Indeed, the plurality is just such an opinion.
opinion strongly suggests Flast was wrongly decided or was being adhered to only out of stare decisis. That is not the case. Justice Alito did not say Flast was wrongly decided or that it must be followed out of duty to precedent. Justice Alito’s only criticism of Flast was unremarkable, in that he joined prior opinions of the Court in noting that Flast did not give sufficient weight to separation of powers. Perhaps the best evidence that Justice Alito’s plurality did not think the rule in Flast was wrong is that the three Justices stayed the course in the face of a withering attack by Justice Scalia. In any case, the plurality’s approach was that Flast from the outset proved to be a useful but narrow exception to the rule against taxpayer standing and that the Court’s subsequent decisions have repeatedly turned back attempts to broaden its scope.

Justice Kennedy is equally interesting to observe in Hein. When Justice O’Connor was on the Court, she and Justice Kennedy were often the “swing votes” on social-issue cases. They frequently took middle positions on the Establishment Clause, but did not join one another’s opinions. With a void

93 Lupu & Tuttle, supra note 4, at 130 (“Alito strongly suggests that Flast was wrong, but is not being overruled because a decision in the government’s favor in Hein does not require such overruling.”).


95 Hein, 127 S. Ct. at 2569 (plurality opinion).

96 Id. at 2568-69 (plurality opinion) (“It is significant that, in the four decades since its creation, the Flast exception has largely been confined to its facts.”).

97 Justices Kennedy and O’Connor often reached the same judgment in church-state cases but one or both wrote or joined separate opinions. See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (O’Connor, J., concurring) (the majority opinion, which both Justices O’Connor and Kennedy joined, upheld K-12 school vouchers); Mitchell v. Helms, 530 U.S. 793, 836 (2000) (O’Connor, J., concurring) (the plurality opinion, which Justice Kennedy joined, upheld a federal aid program to K-12 schools, including religious schools); Lee v. Weisman, 505 U.S. 577, 580 (1992) (Kennedy, J., for the Court, held that prayer at public school commencement ceremony violated the Establishment Clause); id. at 599 (Blackmun, J., concurring, joined by Stevens and O’Connor, JJ.); id. at 609 (Souter, J., concurring, joined by Stevens and O’Connor, JJ.); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 623 (1989) (O’Connor, J., concurring in part and concurring in the judgment, in Part II of which is joined by Brennan and Stevens, JJ.); id. at 655 (Kennedy, J., concurring in the judgment in part and dissenting
at the center left by the retirement of Justice O'Connor, there was speculation that Justice Kennedy might move to occupy the new "ideological middle" and thereby enhance his "swing vote" power even more. Justice Kennedy, to his credit, did not do so in *Hein*. His concurring opinion is consistent with his earlier refusal to limit the substantive reach of the Establishment Clause to cases where there is religious coercion.\(^9\)

**VII. Conclusion**

Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, took a Goldilocks stance in *Hein*, in that the decision was not too hot but not too cold. One would have to say that this bodes well for those wanting little change in the Supreme Court's current level of enforcement of the Establishment Clause. *Everson* and *Flast*, as well as the three-Justice plurality in *Hein*, implicitly recognize that the modern Establishment

\(^9\) For example, Justice Kennedy routinely votes to uphold religiously neutral government aid programs having a secular purpose when some of the aid goes to religious organizations. He was in the majority or part of the plurality in the following cases: *Zelman*, 536 U.S. 639 (holding that school voucher plan did not violate the Establishment Clause); *Mitchell*, 530 U.S. 793 (holding that direct aid to K-12 schools, including religious schools, does not violate the Establishment Clause); *Bowen*, 487 U.S. 589 (holding that direct aid to teen counseling centers, including religious centers, does not violate Establishment Clause). Justice O'Connor also generally voted to uphold such aid programs, but it was not uncommon for her to concur separately placing additional qualifications on the aid or on the administration of the program. See *Zelman*, 536 U.S. at 663 (O'Connor, J., concurring); *Mitchell*, 530 U.S. at 836 (O'Connor, J., concurring in the judgment, joined by Breyer, J.); *Bowen*, 487 U.S. at 622 (O'Connor, J., concurring).

\(^9\) In *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Kennedy for the majority held that where prayers were part of a pubic school commencement exercise they were unconstitutional. It did not matter that plaintiff-student's absence from the exercise carried no penalty. A direct and unavoidable coercion of conscience need not be shown. The optional nature of the exercise did not prevent a student and her parent from being able to state a claim under the Establishment Clause. *Id.* at 586-89. *Cf.* *id.* at 631-32, 636-41 (Scalia, J., dissenting), calling Justice Kennedy's standard "a boundless test . . . of psychological coercion" and mere "peer-pressure coercion."
Clause functions as a structural clause—keeping in proper order two centers of authority, church and government. Beyond that, it would over-read *Hein* to say that Chief Justice Roberts and Justice Alito have committed to any fixed view of church-state relations—whether it is one allowing no financial aid for pervasively religious organizations, permitting only indirect aid to religious organizations, or one that permits direct as well as indirect aid to religious organizations, so long as the aid is part of a larger program that administers the assistance on a religion-neutral basis.

*Hein* does mean, however, that public-interest organizations with an ideological devotion to strict no-aid separationism, organizations such as Freedom From Religion Foundation, will continue to have taxpayer standing to litigate their grievances with respect to legislative appropriations. And this is true not only with respect to congressional appropriations, but also appropriations at the state and local level. Thus the courthouse door continues to remain open—but only by half—to bruising culture war litigation where the claimant’s only averred injury is abstract and ideological.

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100 See *Zelman*, 536 U.S. 639, which upheld a school voucher plan as not in violation of the Establishment Clause. Justice Souter dissented stating that he regards the appropriations for vouchers for schooling, including religious schooling, as violative of taxpayers' liberty of conscience. *Id.* at 711, 715 (Souter, J., dissenting). In his reading of the history that gave rise to the Establishment Clause, not "three pence" in tax monies were to make their way into the coffers of K-12 religious schools or other pervasively religious organization. *Id.* at 711-16. See also *supra* note 84.

101 See, e.g., *Zelman*, 536 U.S. 639, holding school voucher plan did not violate the Establishment Clause because, *inter alia*, the plan directed the funds to the parents who had free choice where to redeem their voucher. *Id.* at 651-56. This is often called indirect funding because the government funds find their way to religious schools only via the parents. It is also called beneficiary choice assistance.

102 In *Mitchell*, the four-Justice plurality said that it should not make any difference whether the aid was paid by the government directly to the religious school or whether the aid was paid to the parents of students who in turn freely choose to use the aid at a religious school. 530 U.S. at 815-20. The former is often called direct funding. *Id.* at 816.

103 For a survey of taxpayer standing cases in the lower federal courts since *Hein* was decided, see Lupu & Tuttle, *supra* note 4, at 138-51.

104 We can anticipate an increase in lawsuits by plaintiffs ideologically devoted to strict church-state separationism asserting reduced-rigor standing based on claims of unwanted exposure to religious expression attributable to the government. See *supra*
note 75. These unwanted exposure claims are a variant on the role coercion can play in an Establishment Clause violation. It is, however, a watered-down notion of coercion more akin to the injury of being offended or made to feel like an outsider. See the discussion of Lee v. Weisman, supra note 99. Although proof of coercion is not required to make out a claim under the Establishment Clause (see supra note 69), religious coercion may nonetheless be present. We can also anticipate an increase in lawsuits by these same types of plaintiffs alleging discrimination among religions or religious denominations. See Larson v. Valente, 456 U.S. 228 (1982) (holding that state regulatory legislation requiring only certain religious organizations to make reports concerning their contributions and solicitation activities was a violation of the Establishment Clause). Neither of these types of cases requires taxpayer standing, and thus Hein does not apply.