

NO TAXATION WITHOUT SEPARATION: THE SUPREME
COURT PASSES ON AN OPPORTUNITY TO END
ESTABLISHMENT CLAUSE EXCEPTIONALISM
Hein v. Freedom From Religion Foundation, Inc.,
127 S. Ct. 2553 (2007)

The Supreme Court generally denies plaintiffs standing to challenge the constitutionality of government expenditures if their only basis for standing is that they pay taxes.¹ The Court, however, has created one exception: for taxpayers challenging alleged Establishment Clause violations.² This Establishment Clause exception has been criticized, challenged, and narrowed by subsequent cases but never overruled.³ Last Term, the Court passed on yet another opportunity to overturn the maligned taxpayer standing exception. In *Hein v. Freedom From Religion Foundation, Inc.*,⁴ a plurality of the Supreme Court held that federal taxpayers lacked standing to challenge conferences and speeches that promoted the Faith-Based and Community Initiatives, a program created by executive order and funded through

1. See, e.g., *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433 (1952) (“[T]he interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure.” (citations omitted)).

2. Except for the Establishment Clause, taxpayer standing has never been extended to alleged violations of any other constitutional provisions. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2569 (2007) (citing *Tilton v. Richardson*, 403 U.S. 672 (1971) (no taxpayer standing to sue under Free Exercise Clause of First Amendment); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348–49 (2006) (no taxpayer standing to sue under Commerce Clause); *United States v. Richardson*, 418 U.S. 166, 175 (1974) (no taxpayer standing to sue under Statement and Account Clause of Article I); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (no taxpayer standing to sue under Incompatibility Clause of Article I)).

3. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (criticizing *Flast v. Cohen*, 392 U.S. 83 (1967)—the case that created the Establishment Clause taxpayer standing doctrine—for failing to recognize the separation of powers component of standing doctrine); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (calling the *Flast* holding a “narrow exception . . . to the general rule against taxpayer standing”); *Richardson*, 418 U.S. at 180–81 (Powell, J., concurring) (criticizing *Flast* for, among other things, purporting to separate the question of standing from the merits, but then looking to the merits of the case for standing purposes to determine whether a logical “nexus” exists between the plaintiff’s status and the claim).

4. 127 S. Ct. 2553 (2007).

general executive branch appropriations.⁵ Although *Hein* denied the plaintiffs standing, the plurality implicitly accepted and perpetuated the premise of the misguided precedents recognizing taxpayer standing: that the nature of the claim can compensate for a plaintiff's otherwise inadequate standing position.

In 2001, President Bush issued executive orders creating the White House Office of Faith-Based and Community Initiatives and Executive Department Centers for Faith-Based and Community Initiatives within several federal agencies and departments.⁶ The White House Office and Executive Department Centers were "created entirely within the executive branch . . . by Presidential executive order."⁷ No congressional legislation authorized their creation, and no law specifically appropriated any money for their activities; the White House Office and Executive Department Centers were "funded [entirely] through general Executive Branch appropriations."⁸

Freedom From Religion Foundation, Inc., a corporation "opposed to government endorsement of religion,"⁹ and three of its members brought a lawsuit against the directors of the White House Office and Executive Department Centers.¹⁰ They argued that the directors "violated the Establishment Clause by organizing conferences at which faith-based organizations allegedly 'are singled out as being particularly worthy of federal funding'" and are favored over secular groups.¹¹ "The only asserted basis for standing was that the individual [plaintiffs were] federal taxpayers . . . 'opposed to the use of Congressional taxpayer appropriations to advance and promote religion.'"¹²

As a general rule, plaintiffs do not have standing to sue the government when the only harm alleged is that their federal taxes are being spent in an unconstitutional manner.¹³ The plaintiffs in *Hein* claimed standing under an exception to the taxpayer standing prohibition that the Supreme Court created

5. *Id.* at 2559–60 (plurality opinion).

6. *Id.*

7. *Id.* at 2560 (citation omitted).

8. *Id.*

9. *Id.* (citation omitted).

10. *Id.*

11. *Id.* at 2560–61.

12. *Id.* at 2561 (quoting Amended Complaint ¶ 10, *Freedom From Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006) (No. 04-C-381-S)).

13. See *supra* note 1.

in *Flast v. Cohen*.¹⁴ In *Flast*, the Supreme Court held that federal taxpayers had standing to challenge exercises of congressional power under the Taxing and Spending Clause of Article I, Section 8 that allegedly violate the Establishment Clause of the First Amendment.¹⁵

The United States District Court for the Western District of Wisconsin held that the taxpayer-plaintiffs in *Hein* did not meet the *Flast* exception for standing and dismissed their claims.¹⁶ The taxpayers, the court reasoned, were not challenging an exercise of congressional power, because the government directors acted “at the President’s request and on the President’s behalf” and were not “charged with the administration of a congressional program.”¹⁷ Insofar as the defendants’ “actions did not represent congressional power,” the *Flast* exception did not apply.¹⁸

The Seventh Circuit reversed.¹⁹ Judge Posner authored the majority opinion, which held that the plaintiffs did have standing under the *Flast* exception because the challenged activities were “financed by a congressional appropriation.”²⁰ Judge Posner reasoned that the *Flast* exception applied in all cases in which the allegedly unconstitutional government actions resulted in a net marginal cost to the taxpayer greater than zero.²¹ Judge Ripple, in dissent, called the majority’s position “a dramatic expansion of current standing doctrine.”²² The Court of Appeals denied en banc review, with Chief Judge Flaum noting that “the obvious tension which has evolved in this area of jurisprudence . . . can

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

15. *See id.* at 87–88.

16. Petition for a Writ of Certiorari app. A, at 34a–35a, *Freedom From Religion Found., Inc. v. Towey*, 433 F.3d 989 (7th Cir. 2006) (No. 04-C-381-S), available at <http://www.usdoj.gov/osg/briefs/2006/2pet/7pet/2006-0157.pet.aa.pdf>.

17. *Id.* at 33a–34a.

18. *Id.* at 34a.

19. *Freedom From Religion Found., Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006).

20. *Id.* at 997.

21. *See id.* at 995. Thus, in Judge Posner’s formulation, taxpayers would lack standing to challenge references to religion in a State of the Union address, because the marginal cost of the references to the public is zero. *Id.* For Justice Alito’s critique of Judge Posner’s “zero-marginal-cost test,” see *Hein*, 127 S. Ct. at 2570–71 (plurality opinion) (asserting that Judge Posner’s solution is unworkable).

22. *Chao*, 433 F.3d at 997 (Ripple, J., dissenting).

only be resolved by the Supreme Court.”²³ The Supreme Court granted certiorari to consider the standing question.²⁴

In a 5-4 decision, the Supreme Court reversed the Seventh Circuit, holding that the taxpayer-plaintiffs lacked standing.²⁵ Justice Alito wrote for a plurality of the Court, joined by Chief Justice Roberts and Justice Kennedy.²⁶ Justices Scalia and Thomas concurred only in the judgment.²⁷

Justice Alito first described why taxpayer status is generally an insufficient basis for standing. To have standing, he explained, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”²⁸ It is not enough for a plaintiff to allege a constitutional violation; the plaintiff must also have suffered some direct injury.²⁹ A federal taxpayer’s interest in the expenditure of Treasury funds is “too generalized and attenuated to support Article III standing.”³⁰ The injury is not particularized because “the interests of the taxpayer [in the allegedly unlawful expenditure] are, in essence, the interests of the public at large.”³¹ Accordingly, a taxpayer-plaintiff’s claims are not justiciable because relief, if granted, would not be relief particular to the plaintiff.³²

Justice Alito next examined whether the plaintiffs might still qualify for standing under the *Flast* exception to the “general constitutional prohibition against taxpayer standing.”³³ *Flast* set

23. *Freedom From Religion Foundation, Inc. v. Chao*, 447 F.3d 988, 988 (7th Cir. 2006) (denying rehearing en banc) (Flaum, C.J., concurring).

24. *Hein*, 127 S. Ct. at 2561–62.

25. *Id.* at 2559.

26. *Id.*

27. *Id.* at 2573 (Scalia, J., concurring in the judgment).

28. *Id.* at 2562 (plurality opinion) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

29. *Id.* (citations omitted).

30. *Id.* at 2563.

31. *See id.*

32. *Id.* 2563–64 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–574 (1992) (“[A] plaintiff . . . seeking relief that no more directly and tangibly benefits him than it does the public at large . . . does not state an Article III case or controversy.”)). Justice Alito expended considerable ink driving this point home, quoting generously from six Supreme Court precedents spanning nine decades in support of the proposition that “generalized grievances brought by concerned citizens . . . are not cognizable in the federal courts.” *Id.* at 2564 n.2 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) (opinion by Kennedy, J.)).

33. *Hein*, 127 S. Ct. at 2564 (plurality opinion).

out a two-part test for determining whether taxpayers have standing to challenge allegedly unconstitutional expenditures: "First, the taxpayer must establish a logical link between that [taxpayer] status and the type of legislative enactment attacked Secondly, the taxpayer must establish a nexus between that [taxpayer] status and the precise nature of the constitutional infringement alleged."³⁴ In *Flast*, the Court held that the taxpayer-plaintiffs had standing to challenge the expenditure of federal funds to religious schools under the Elementary and Secondary Education Act of 1965 that allegedly violated the Establishment Clause.³⁵ The *Flast* Court found the first part of the test was met because the plaintiffs challenged "an exercise by Congress of its power under Article I, Section 8, to spend for the general welfare, and the challenged program involve[d] a substantial expenditure of federal tax funds."³⁶ The Court found the second part of the test was also met because the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."³⁷ To reach this conclusion, Chief Justice Warren cited James Madison's writings as evidence that the Founders adopted the Establishment Clause for fear that "the taxing and spending power would be used to favor one religion over another or to support religion in general."³⁸

Justice Alito's analysis focused on the first part of the *Flast* test. The conferences complained of were funded through "general appropriations to the Executive Branch to fund its day-to-day

34. *Flast*, 392 U.S. at 102.

35. *Id.* at 85–86, 103.

36. *Id.* at 103.

37. *Id.* at 104.

38. *Id.* at 103. Chief Justice Warren quoted *Madison's Memorial and Remonstrance Against Religious Assessment*: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." *Id.* (quoting 2 WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901)). Professor Carl H. Esbeck has argued that the Court in *Flast* viewed the Establishment Clause as providing a structural limit on government rather than conferring individual rights. Because it was structure-based and not rights-based, individual plaintiffs alleging government violation of the Establishment Clause would have difficulty meeting standing requirements. Therefore, the *Flast* Court, "in order that the courts could entertain the lawsuit and proceed to a resolution on the merits. . . . created a legal fiction of individualized 'taxpayer injury.'" Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. L. & POL. 445, 456–58 (2002).

activities.”³⁹ Thus, the taxpayers in *Hein* were not challenging any “specific congressional action or appropriation,” but, rather, general appropriations that Congress provided to the executive branch.⁴⁰ Because the allegedly unconstitutional expenditures were the result of “executive discretion, not congressional action,” Justice Alito concluded that the *Flast* exception did not apply.⁴¹ Having distinguished *Flast*, Justice Alito declined Justice Scalia’s invitation to reconsider that decision: “We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.”⁴²

Justice Kennedy concurred, noting that he “join[ed] [Justice Alito’s] opinion in full.”⁴³ Justice Kennedy focused on separation of powers concerns that he believed would be raised by extending *Flast*. Granting taxpayers standing to challenge public events and speeches by executive branch officials, he asserted, would stifle the “exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies [that] sustains a free society.”⁴⁴ Such far-reaching judicial intervention would lead to “a real danger of judicial oversight of executive duties.”⁴⁵

Justice Scalia, joined by Justice Thomas, concurred in the judgment.⁴⁶ He criticized the plurality for creating “utterly meaningless distinctions.”⁴⁷ He called on his fellow Justices to “choose sides” by either applying *Flast* to “all challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power,” or by overturning *Flast*.⁴⁸

Justice Scalia criticized the *Flast* exception for departing from the “concrete and particularized injury” requirement for stand-

39. *Hein*, 127 S. Ct. at 2566 (plurality opinion).

40. *Id.*

41. *Id.*

42. *Id.* at 2571–72.

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

44. *Id.* at 2572–73.

45. *Id.*

46. *Id.* at 2573.

47. *Id.* at 2573 (Scalia, J., concurring in the judgment). Whereas the plurality limited *Flast* to expenditures “expressly authorized or mandated by . . . specific congressional enactment,” *id.* at 2568 (plurality opinion), Justice Scalia saw “no intellectual justification” for the distinction because it had “nothing to do with whether the plaintiffs have alleged an injury in fact that is fairly traceable and likely to be redressed,” *id.* at 2579 (Scalia, J., concurring in the judgment).

48. *Id.* at 2573–74 (Scalia, J., concurring in the judgment).

ing.⁴⁹ According to Justice Scalia, *Flast* created a new kind of injury.⁵⁰ A taxpayer no longer had to show that a government action affected his tax liability. Instead, the taxpayer's assertion of mental displeasure at "his tax money . . . being extracted and spent in violation of specific constitutional protections against such abuses of legislative power" would be sufficient.⁵¹ Justice Scalia decried the use of this "Psychic Injury" for two reasons. First, *Flast* did not adequately explain why this type of injury sufficed to establish Article III standing.⁵² Second, the Court "never explained why Psychic Injury was *insufficient* in the cases in which standing was denied."⁵³ Because Justice Scalia believed Psychic Injury to be inconsistent with Article III standing, he called for overturning *Flast*.⁵⁴

49. *Id.* at 2574.

50. *See id.* at 2574, 2576. Focusing on the "injury in fact" prong of standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (listing three minimal elements for standing, the first being a concrete and personalized "injury in fact"), Justice Scalia described two concepts of injury: "Wallet Injury" and "Psychic Injury," *id.* A plaintiff claiming Wallet Injury alleges that his "tax liability is higher than it would be, but for the allegedly unlawful government action." *Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring in the judgment). By contrast, Psychic Injury "consists of the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner." *Id.* Standing doctrine has typically rejected Psychic Injury because it is neither concrete nor particular. *Id.* Taxpayer plaintiffs, left to Wallet Injury, have typically failed the "traceability and redressability prongs of standing": the taxpayer's tax bill is probably not higher because of the forbidden expenditure, and an injunction against the alleged misconduct would probably not result in any lower tax burden. *Id.* But *Flast* changed that by allowing Psychic Injury to be the basis for standing for the first time. *Id.* at 2576.

51. *Hein*, 127 S. Ct. at 2576 (Scalia, J., concurring in the judgment) (quoting *Flast*, 392 U.S. at 106).

52. *Id.* at 2575.

53. *Id.* at 2575 (emphasis added). Justice Scalia analyzed two pre-*Flast* cases in which taxpayer standing was denied. *See id.* at 2575–76. In *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), the Court denied standing to taxpayers on the grounds that the party seeking to demonstrate standing "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury[,] . . . and not merely that he suffers in some indefinite way in common with people generally." In *Doremus v. Board of Education*, 342 U.S. 429, 434–35 (1952), taxpayers were denied standing to challenge alleged Establishment Clause violations which *Flast* would later construe as involving the "incidental expenditure of tax funds in the administration of an essentially regulatory statute" (as opposed to a challenge to a taxing and spending statute). *Flast*, 392 U.S. at 102–03.

54. *Hein*, 127 S. Ct. at 2582, 2584 (Scalia, J., concurring in the judgment) ("[A] taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner [is never] sufficiently concrete and particularized to support Article III standing . . .").

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented.⁵⁵ He argued that the plurality rested its decision on an arbitrary distinction between injury caused by the executive branch and injury caused by the legislative branch.⁵⁶ The injury in *Flast* was the “extraction and spending of tax money in aid of religion”; therefore, granting plaintiffs standing in such cases protects the “liberty of conscience,” the dissent contended.⁵⁷ In the present case, taxpayer money was funding conferences “alleged to have the purpose of promoting religion.”⁵⁸ Because Justice Souter believed the taxpayers “alleged the type of injury” that satisfies the *Flast* test, the dissent would have affirmed the Seventh Circuit’s decision to grant standing.⁵⁹

The Supreme Court in *Hein* neither fully embraced taxpayer standing, as the dissenters urged, nor wholly abandoned the doctrine, as Justices Scalia and Thomas suggested. Instead, the Court took a minimalist approach that relied on a distinction between legislative and executive action.⁶⁰ The plurality claimed to find support for the legislative-executive distinction in the language of *Flast*, and advanced several policy arguments in defense of its position. In light of *Flast*’s broad language, however, the plurality’s narrow, minimalist interpretation of the taxpayer standing exception is ultimately unconvincing. Further, no amount of narrowing can resolve the *Flast* exception’s fundamental inconsistency with the Article III “case or controversy” requirement.⁶¹ Unfortunately, although

55. *Id.* at 2584 (Souter, J., dissenting).

56. *Id.*

57. *Id.* at 2585 (citations omitted).

58. *Id.*

59. *Id.* at 2588.

60. Although the Court held that the plaintiffs in *Hein* fell on the executive side of the executive-legislative distinction, future cases will have to resolve where the line will be drawn. Such litigation likely will focus on whether there has been sufficient congressional involvement and awareness. See Ira C. Lupu & Robert W. Tuttle, *Jay Hein, Director of the White House Office of Faith-Based and Community Initiatives v. Freedom From Religion Foundation, Inc.*, THE ROUNDTABLE ON RELIGION AND SOC WELFARE POL’Y, July 2, 2007, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=60.

61. See, e.g., James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 122 (2001) (“Taxpayer standing is inconsistent with the Framers’ concept that the courts should be limited to judging individual grievances.”).

six of the nine Justices rejected the legislative-executive distinction⁶² as arbitrary,⁶³ that distinction controls after *Hein*.⁶⁴

The *Hein* Court focused on whether the taxpayer-plaintiffs satisfied the first part of the *Flast* test, the “logical link between [taxpayer] status and the type of legislative enactment attacked.”⁶⁵ Justice Alito used the facts of *Flast* to define the limits of what could be considered a sufficient logical link. The allegedly unconstitutional actions in *Flast* were “express congressional mandate[s]” and “specific congressional appropriation[s].”⁶⁶ By con-

62. It may be more accurate to describe the distinction as an “express-implied” distinction, see *Hein*, 127 S. Ct. at 2580 (Scalia, J., concurring in the judgment), because what the plurality actually held is that taxpayers do not have standing to challenge government action absent a *specific* congressional appropriation and an *express* congressional mandate, *id.* at 2565–66 (plurality opinion). Nonetheless, the term “legislative-executive distinction,” while perhaps lacking precision, is more accessible inasmuch as it focuses on the reason why the plaintiffs in the instant case failed: because they were challenging “executive discretion, not congressional action.” *Id.* at 2566.

63. See *Hein*, 127 S. Ct. at 2580 (Scalia, J., concurring in the judgment) (“Whether the challenged government expenditure is expressly allocated by a specific congressional enactment *has absolutely no relevance* to the Article III criteria of injury in fact, traceability, and redressibility.”); *id.* at 2584 (Souter, J., dissenting) (finding no support in logic or precedent for “clos[ing] the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury”); see also Posting of Steven K. Green to ACSBlog, <http://www.acsblog.org/bill-of-rights-guest-blogger-supreme-court-gives-the-president-immunity-from-many-establishment-clause-suits.html> (June 26, 2007, 09:54 EDT) (“[The plaintiffs were] successful in convincing six of the justices that limiting taxpayer standing to actions authorized by express congressional appropriations made no constitutional sense. Ironically, that argument which was the crux of the case, both won and lost.”).

64. Justice Alito’s opinion, because it supports the result and is decided on the narrowest grounds, is the controlling opinion. See *Marks v. United States*, 430 U.S. 188, 193 (1977); *Hein*, 127 S. Ct. at 2584 (Souter, J., dissenting) (referring to the plurality opinion as the “controlling” opinion). Justice Alito’s opinion is narrower than Justice Scalia’s concurrence because it does not overturn Supreme Court precedent. Justice Kennedy’s concurrence cannot be the controlling opinion because it purports to join Justice Alito’s opinion in full. See *id.* at 2572 (Kennedy, J., concurring). But see *Lupu & Tuttle*, *supra* note 60 (arguing that lower courts may treat Justice Kennedy’s opinion as the controlling opinion because it affirms *Flast*, while Justice Alito strongly suggests that *Flast* was wrongly decided).

65. *Flast*, 392 U.S. at 102.

66. *Hein*, 127 S. Ct. at 2565 (plurality opinion). Justice Alito used the phrases “express congressional mandate” and “specific congressional appropriation” (or their equivalents) three times to describe the facts of the *Flast* case, before ever applying them to the facts of *Hein*. “The expenditures at issue in *Flast* were made pursuant to an *express congressional mandate* and a *specific congressional appropriation*.” *Id.* (emphasis added). “The expenditures challenged in *Flast*, then, were funded by a *specific congressional appropriation* and were disbursed . . . pursuant to a *direct and unambiguous congressional mandate*.” *Id.* (emphasis added). “Given that the alleged . . . violation . . . was funded by a *specific*

trast, Justice Alito contended that the plaintiffs in *Hein* were challenging only *general appropriations* to the executive branch that “did not expressly authorize, direct, or even mention the expenditures of which respondents complain[ed].”⁶⁷

As mentioned above, *Flast* should not be so narrowly construed. The *Flast* opinion itself did not seize on the presence of an “express congressional mandate” and “specific congressional appropriation” to hold that the first part of its two-part test was satisfied; it merely stated that “[the plaintiffs’] constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and that the challenged program involves a substantial expenditure of federal tax funds.”⁶⁸

Flast was self-consciously ambiguous about the contours of its two-part test, leaving it to future courts to define the limits of the taxpayer standing doctrine.⁶⁹ *Flast*’s statement explaining the first part of the test is broad: “[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.”⁷⁰ Although general appropriations from Congress to the White House would seem to satisfy this requirement, Justice Alito found them insufficient to qualify as exercises of congressional power.⁷¹

Justice Alito supported his extrapolation of the *Flast* legislative-executive distinction, criticized by other Justices as tenuous,⁷² with three additional arguments. First, confining the *Flast*

congressional appropriation and was undertaken pursuant to an *express congressional mandate*, the Court concluded that the taxpayer-plaintiffs had established the requisite ‘logical link’” *Id.* (emphasis added).

67. *Id.* at 2566.

68. *Flast*, 392 U.S. at 103.

69. *See id.* at 105 (“Whether the Constitution contains other specific limitations [beyond the Establishment Clause] can be determined only in the context of future cases.”).

70. *Id.* at 102.

71. *Hein*, 127 S. Ct. at 2566 (plurality opinion).

72. *See Hein*, 127 S. Ct. at 2580–81 (Scalia, J., concurring in the judgment) (“[T]he Court’s holding flatly contradicts *Kendrick*, . . . [which involved an] attack[] on executive discretion rather than congressional decision: Congress generally authorized the spending of tax funds for certain purposes but did not explicitly mandate that they be spent in the *unconstitutional* manner challenged by the taxpayers.”) (citing *Bowen v. Kendrick*, 487 U.S. 589, 620–22 (1988)). *But see* *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 218–19 (D.C. Cir. 1976) (arguing that *Flast* opened the door for standing to challenge “taxing and appropriation statutes” but

exception to express congressional mandates and specific congressional appropriations would be consistent with the Court's pattern of construing the exception narrowly.⁷³ Second, the executive branch should not be subjected to a "wide swathe" of Establishment Clause challenges that would be judicially unworkable.⁷⁴ And third, allowing standing in *Hein* would "raise serious separation-of-powers concerns."⁷⁵

These rationales fail to justify the legislative-executive distinction. First, dicta in various Supreme Court opinions calling for a narrow and rigorous interpretation of the taxpayer standing doctrine do not justify the imposition of an arbitrary limit.⁷⁶ Second, the standing doctrine is not a mechanism intended to limit frivolous lawsuits; rather, it is a device intended to ensure that the plaintiff is properly situated to bring his claim.⁷⁷ Even the *Flast* Court recognized this when it stated that "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."⁷⁸ Third, although judicial respect for the executive branch is a legitimate concern, that argument proves too much: deference is owed to both po-

not "mere executive activity that entails some expenditures"); Debra L. Lowman, *A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action*, 30 SEATTLE U. L. REV. 651, 679 (2007) ("There is . . . a direct, reciprocal relationship between a taxpayer's status and Congress's exercise of its taxing and spending powers [that does not exist for the Executive Branch].").

73. "[W]e have repeatedly emphasized that the *Flast* exception has a 'narrow application in our precedent,' that only 'slightly lowered' the bar on taxpayer standing, and that must be applied with 'rigor.'" *Hein*, 127 S. Ct. at 2568 (plurality opinion) (citations omitted) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 481 (1982); *United States v. Richardson*, 418 U.S. 166, 173 (1974)).

74. See *Hein*, 127 S. Ct. at 2569 (plurality opinion).

75. *Id.* at 2569–70.

76. See, e.g., *id.* at 2580 (Scalia, J., concurring in the judgment) (criticizing the plurality for failing to explain how its efforts to distinguish this case based on the facts in *Flast* are material to the question of taxpayer standing).

77. See *id.* at 2586 n.1 (Souter, J., dissenting) ("If these claims are frivolous on the merits, I fail to see the harm in dismissing them for failure to state a claim instead of for lack of jurisdiction. To the degree the claims are meritorious, fear that there will be many of them does not provide a compelling reason, much less a reason grounded in Article III, to keep them from being heard.")

78. *Flast*, 392 U.S. at 99.

litical branches.⁷⁹ Nonetheless, under *Flast*, such deference to separation of powers considerations does not negate standing in cases where the relevant money is specifically appropriated by the legislature. Justice Alito did not explain why separation of powers concerns were sufficient to preclude standing in *Hein* but were insufficient to overrule *Flast*.

Justice Alito appears to have strong reservations about the *Flast* exception. In addition to quoting precedent that called for limiting its holding,⁸⁰ he emphasized the precedent to which *Flast* was an exception.⁸¹ Justice Alito criticized *Flast* for failing to recognize the separation of powers implications of its taxpayer standing doctrine.⁸² Further, he suggested that *Flast* was a flawed decision by declining to “extend it to the limits of its logic.”⁸³ Justice Kennedy, perhaps fearing that the plurality opinion could be read as a criticism and even rejection of *Flast*, felt the need to declare that he believes “*Flast* is correct and should not be called into question.”⁸⁴

All of which raises the question: if Justice Alito disagrees with the holding in *Flast*, why did he go to such great pains to argue that it did not apply, instead of closing the door on the taxpayer standing doctrine altogether? His opinion is a classic example of “judicial minimalism.”⁸⁵ Rather than overrule *Flast*,⁸⁶ Justice

79. See *Hein*, 127 S. Ct. at 2586 (Souter, J., dissenting) (arguing that the plurality’s separation of powers concerns apply no more to “Judicial Branch review of an executive decision [than they do] judicial evaluation of a congressional one”).

80. See *supra* note 73.

81. See *supra* note 32.

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

83. *Id.* at 2572.

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

85. For a thorough description and defense of “minimalism” as a form of judicial decision-making, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Justice Alito’s opinion is minimalist for two reasons. First, it is decided narrowly rather than broadly insofar as it neither extends *Flast* nor overrules it. See Cass R. Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15 (1996). Second, it is not decided on basic standing principles. See *id.* at 20 (“[M]inimalists generally try to avoid issues of basic principle and instead attempt to reach *incompletely theorized agreements*.”). Justice Alito, in ruling that *Flast* does not apply, did not appeal to the principles of standing doctrine. Rather, he took a fact-specific view of *Flast* and then refused to extend it beyond its facts. In this way, he brought Justice Kennedy on board, who made it clear in his concurrence that he would not agree to an overruling of *Flast*, but, primarily because of separation of powers concerns, would be uncomfortable finding standing in this case. See *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring).

86. Overruling *Flast* may have been impossible because of Justice Kennedy’s position. See *Hein*, 127 S. Ct. 2572 (Kennedy, J., concurring).

Alito was content to allow lower courts to continue narrowly applying the *Flast* exception. After a few more minimalist Supreme Court decisions, taxpayer standing may finally suffer death by a thousand cuts. But minimalism in this case comes at a price—continued confusion regarding taxpayer standing.⁸⁷ For the foreseeable future, then, lower courts will continue to labor under two separate taxpayer standing doctrines: one for challenges to alleged congressional violations of the Establishment Clause, and one for all other constitutional challenges.⁸⁸

The Establishment Clause exception to the general denial of taxpayer standing to challenge the constitutionality of government expenditures lives on as a peculiar anomaly wherein a plaintiff's individual stake in the outcome does not determine standing. The Court in *Hein* refused to require plaintiffs to meet the standing requirements that every other constitutional challenge must meet. In so doing, the Court missed an opportunity to bring much-needed consistency to taxpayer standing doctrine.

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87. Justice Alito maintained that his opinion would leave *Flast* untouched: "Over the years, *Flast* has been defended by some and criticized by others. But the present case does not require us to reconsider that precedent. . . . We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it." *Id.* at 2571–72 (plurality opinion). But the Seventh Circuit disagreed with Justice Alito's characterization of *Hein*: "Although the Supreme Court's plurality characterized its opinion as effecting no change in *its* view of the law of taxpayer standing," in fact *Hein* "clarified significantly the law of taxpayer standing for the lower federal courts." *Hinrichs v. Speaker of House of Representatives of In. Gen. Assembly*, 506 F.3d 584, 599 (7th Cir. 2007).

88. Referring to *Hein* and the Supreme Court's taxpayer standing jurisprudence, one federal judge has contended:

The Supreme Court cannot continue to speak out of both sides of its mouth if it intends to provide real guidance to federal courts on this issue. That is, it cannot continue to hold expressly that the injury in fact requirement is no different for Establishment Clause cases, while it implicitly assumes standing in cases where the alleged injury, in a non-Establishment Clause case, would not get the plaintiff into the courthouse. This double standard must be corrected because, contrary to the standing rules cited above, it opens the courts' doors to a group of plaintiffs who have no complaint other than they dislike any government reference to God.

Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 500 (5th Cir. 2007) (DeMoss, J., concurring).