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Standing Room Only: Federal Taxpayers Denied Standing to Challenge President's Faith-Based Programs in *Hein v. Freedom from Religion Foundation, Inc.*

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Standing Room Only: Federal Taxpayers Denied Standing to Challenge President's Faith-Based Programs in *Hein v. Freedom from Religion Foundation, Inc.*

During the 2006-2007 Term, the United States Supreme Court addressed the issue of whether federal taxpayers have standing to challenge the constitutionality of executive expenditures that allegedly violate the First Amendment to the United States Constitution.[1] In *Hein v. Freedom from Religion Foundation, Inc.*,[2] the plaintiffs, asserting standing based on their status as federal taxpayers, objected to the use of congressional appropriations to fund a faith-based program created by President George W. Bush as a violation of the Establishment Clause.[3] Although no single analysis commanded five votes, a majority of the Court agreed to dismiss the case for lack of standing.[4] In so

1. U.S. CONST. amend. I.
2. 127 S. Ct. 2553 (2007).
3. *Id.* at 2559; U.S. CONST. amend. I.
4. Justice Alito delivered the opinion and was joined by Chief Justice Roberts and Justice Kennedy, *Hein*, 127 S. Ct. at 2559, Justice Kennedy also wrote a concurring opinion, *id.* at 2572 (Kennedy, J., concurring), and Justice Scalia, joined by Justice Thomas, concurred in the judgment, *id.* at 2573 (Scalia, J., concurring in the judgment).

holding, the Court interpreted the test for taxpayer standing in a way that treats congressional funds that are distributed pursuant to congressional authority differently than congressional funds that are distributed pursuant to executive authority. This inconsistent treatment of congressional and executive action for standing purposes has both practical implications for practitioners preparing their course of action in First Amendment cases and conceptual implications for those interested in the government's relationship with religion.

I. FACTUAL BACKGROUND

In 2001 the White House Office of Faith-Based and Community Initiatives (the "Office") was created pursuant to an executive order issued by President Bush.[5] The Office's purpose was to make sure that "'private and charitable community groups, including religious ones . . . have the fullest opportunity permitted by law to compete on a level playing field.'"[6] In addition, the President created several Executive Department Centers for Faith-Based and Community Initiatives (the "Centers"), which had the purpose of ensuring that faith-based groups maintained eligibility for federal financial support. The Office and Centers were funded with general congressional appropriations.[7]

Freedom from Religion Foundation, Inc., (the "Foundation"), an organization opposed to government endorsement of religion, filed suit against the directors of the Office and Centers in the United States District Court for the Western District of Wisconsin, claiming the Office and Centers violated the Establishment Clause[8] by promoting religious programs over secular ones.[9] Specifically, the Foundation contended that the directors organized conferences where faith-based organizations were "'singled out as being particularly worthy of federal funding . . ., and the belief in God [was] extolled as distinguishing the claimed effectiveness of faith-based social services.'"[10] The Foundation asserted standing as federal taxpayers opposed to the use of taxpayer funds to advance religion. The district court dismissed the Foundation's claims for lack of standing, finding that claims based on taxpayer standing are

5. Hein v. Freedom from Religion Found., 127 S. Ct. 2553, 2559 (2007).
6. *Id.* (alteration in original) (quoting Exec. Order No. 13, 199, 3 C.F.R. 752 (2002)).
7. *Id.* at 2560.
8. U.S. CONST. amend. I.
9. *Hein*, 127 S. Ct. at 2560-61.
10. *Id.* at 2560 (alteration in original) (quoting Appendix to Petition for Certiorari at 73a, *Hein*, 127 S. Ct. 2253 (No. 06-157).

limited to challenges against exercises of congressional power, not executive power.[11]

A divided panel of the United States Court of Appeals for the Seventh Circuit reversed the district court's ruling and held that the Foundation had standing as federal taxpayers. According to the panel, the programs provided a basis for taxpayer standing because they were ultimately financed by congressional appropriations, even if not according to a specific congressional mandate. Subsequently, the court denied en banc review.[12] The United States Supreme Court granted certiorari to resolve the issue of whether a taxpayer has standing to challenge executive expenditures funded by general congressional appropriations.[13] Ultimately, the Court reversed and held that the Foundation lacked standing to bring the claims.[14]

II. LEGAL BACKGROUND

A. *Introduction*

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion."[15] Before the Establishment Clause was interpreted by the Supreme Court, some scholars believed that "at the time of the adoption of the [C]onstitution, and of the amendment to it, . . . the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state."[16] In one of the earliest cases concerning the Establishment Clause, the Supreme Court rejected this interpretation and concluded that the Establishment Clause "was intended to erect 'a wall of separation between Church and State.'"[17] This separation was subsequently described by the Court as "far from being a 'wall,' [but] a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[18]

One such circumstance is the issue of standing, which is a procedural device used by courts to dismiss cases regardless of their merit.

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11. *Id.* at 2561.
12. *Id.*
13. *Id.* at 2559.
14. *Id.* at 2562.
15. U.S. CONST. amend. I.
16. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 700 (Carolina Academic Press 1987) (1833).
17. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).
18. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

Depending on whether the Court interprets the test for standing broadly or narrowly, standing can be generally available to plaintiffs or only available in unique circumstances. Consequently, standing has had a substantial impact on the development of Establishment Clause jurisprudence, and the Court has struggled over the years to develop a satisfactory test to determine the Establishment Clause standing requirements. The *Hein* case is the Court's latest attempt to define standing.

B. Taxpayer Status and Standing

In *Frothingham v. Mellon*,[19] decided in 1923, the Supreme Court considered for the first time whether an individual's status as a federal taxpayer was enough to maintain standing in a suit challenging the constitutionality of federal appropriations.[20] In *Frothingham* the plaintiff challenged a federal statute that provided congressional funding to state agencies for the purpose of reducing maternal and infant mortality and protecting the health of mothers and infants.[21] The plaintiff, an individual taxpayer, alleged that "the effect of the statute will be to take [the plaintiff's] property, under the guise of taxation, without due process of law."[22] In determining whether it had jurisdiction, the Court explained that it could review acts of Congress "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."[23] The Court concluded that an individual's status as a federal taxpayer does not by itself establish standing; otherwise, the courts would be flooded with claims from millions of taxpayers challenging "every other appropriation act and statute whose administration requires the outlay of public money."[24] Nevertheless, rather than totally barring federal taxpayers from ever challenging the constitutionality of federal appropriations, the Court articulated a standard to determine whether a taxpayer has standing:

> The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement,

19. 262 U.S. 447 (1923).
20. *Id.* at 486.
21. *Id.* at 479.
22. *Id.* at 480.
23. *Id.* at 488.
24. *Id.* at 487.

> and not merely that he suffers in some indefinite way in common with people generally.[25]

Applying this standard to the plaintiff's claim, the Court held that the plaintiff did not identify a direct injury and dismissed the case for lack of standing.[26]

C. *Federal Taxpayers and the Establishment Clause*

In *Doremus v. Board of Education*,[27] the Court applied the *Frothingham* standard in a case in which the plaintiffs alleged that a statute violated the Establishment Clause.[28] The New Jersey statute at issue in *Doremus* required the reading, without comment, of five verses of the Old Testament of the Bible at the beginning of each public school day.[29] In applying the *Frothingham* standard, the Court elaborated on the kind of injury a taxpayer must demonstrate: "a direct dollars-and-cents injury."[30] The Court held that even when the taxpayer is primarily motivated by a religious interest, he or she must possess a "financial interest that is, or is threatened to be, injured by the unconstitutional conduct" to establish standing.[31] In *Doremus* the Court could not identify a direct financial injury and dismissed the plaintiffs' claim for lack of standing.[32]

In *Flast v. Cohen*,[33] the Court considered another statute that allegedly violated the Establishment Clause.[34] In *Flast* the plaintiffs complained that funds appropriated under a federal statute were being used improperly to finance instruction in parochial schools. The Government encouraged the Court to adopt a position that absolutely barred taxpayer suits challenging the validity of federal spending programs.[35] In rejecting this position, the Court identified circumstances when a taxpayer would be "a proper and appropriate party to seek judicial review of federal statutes."[36] According to the Court, federal

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25. *Id.* at 488.
26. *Id.* at 488-89.
27. 342 U.S. 429 (1952).
28. *Id.* at 430.
29. *Id.*
30. *Id.* at 434.
31. *Id.* at 435.
32. *Id.*
33. 392 U.S. 83 (1968).
34. *Id.* at 85-86.
35. *Id.* at 98.
36. *Id.* at 98 n.17. For example, the Court noted that a taxpayer would have standing to challenge "such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects." *Id.*

taxpayers maintain standing to challenge federal spending programs by fulfilling a two-pronged test.[37]

The first prong identified in *Flast* required the taxpayer to "establish a logical link between [his or her] status [as a taxpayer] and the type of legislative enactment attacked."[38] The Court explained that this prong reinforced the principle that taxpayers must identify a financial injury and thus were limited to challenges against exercises of congressional power under the Taxing and Spending Clause.[39] The direct financial injury the Court identified in this case was that the taxpayer's "tax money [was] being extracted and spent in violation of specific constitutional protections against such abuses of legislative power."[40] Under the second prong, "the taxpayer must establish a nexus between [the taxpayer's] status and the precise nature of the constitutional infringement alleged."[41] Applying this test, the Court concluded that the taxpayers in *Flast* satisfied both prongs and had standing to maintain their challenge against the statute at issue.[42]

Of particular importance to the Court in *Flast* was the plaintiffs' allegation that the expenditures violated the Establishment Clause.[43] The Court noted that the drafters of the Establishment Clause feared that "the taxing and spending power would be used to favor one religion over another or to support religion in general."[44] Accordingly, the Establishment Clause functions as a "specific constitutional limitation" on congressional spending power.[45] Therefore, the Court held that "a taxpayer will have standing . . . when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power."[46] In illustrating this point, the Court distinguished *Frothingham* and explained that the plaintiff in *Frothingham* "failed to make any additional claim that the harm she alleged resulted from a breach by Congress of the specific constitutional limitations imposed upon an exercise of the taxing and spending power."[47]

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37. *Id.* at 102.
38. *Id.*
39. *Id.*; U.S. CONST. art. I, § 8.
40. *Flast*, 392 U.S. at 106.
41. *Id.* at 102.
42. *Id.* at 103.
43. *Id.*
44. *Id.*
45. *Id.* at 104.
46. *Id.* at 105-06.
47. *Id.* at 105.

D. Flast Applied to Executive Decisions

The Court applied the *Flast* test in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[48] in which the plaintiffs challenged a decision of the Secretary of the Department of Health, Education, and Welfare as a violation of the Establishment Clause. The Secretary conveyed government property to Valley Forge Christian College, which acquired the seventy-seven-acre tract with an appraised value of $577,500 without making any financial payments.[49] The plaintiffs asserted standing as federal taxpayers and contended that the conveyance deprived them "of the fair and constitutional use of [their] tax dollar[s]."[50] The United States Court of Appeals for the Third Circuit concluded that the plaintiffs lacked standing as taxpayers under the *Flast* test but nevertheless held that the plaintiffs had standing as a result of their status as "citizens, claiming 'injury in fact to their shared individuated right to a government that shall make no law respecting the establishment of religion.'"[51] The Court granted certiorari to correct the lower court's "unusually broad and novel view of standing."[52]

Applying the *Flast* test, the Court agreed with the court of appeals that the plaintiffs failed the first prong of the test because their challenge was not directed toward an exercise of congressional power under the Taxing and Spending Clause; rather, the challenge was directed to an exercise of congressional power under the Property Clause.[53] The Court disagreed with the court of appeals, however, concerning whether plaintiffs can establish standing on the basis "'that the Establishment Clause creates in each citizen a personal constitutional right to a government that does not establish religion.'"[54] In rejecting this approach, the Court explained that "assertion of a right . . . cannot alone satisfy the requirements" of standing.[55] In addition to a claim that the Constitution has been violated, the Court held that a plaintiff must "identify [a] personal injury suffered by [the plaintiff] *as*

48. 454 U.S. 464 (1982).

49. *Id.* at 468.

50. *Id.* at 469 (internal quotation marks omitted).

51. *Id.* at 470 (internal quotation marks omitted) (quoting Ams. United for Separation of Church & State v. U.S. Dep't of Health, Educ. & Welfare, 619 F.2d 252, 261 (3d Cir. 1980)).

52. *Id.*

53. *Id.* at 480; U.S. CONST. art. IV, § 3, cl.2.

54. *Valley Forge*, 454 U.S. at 483 (internal quotation marks omitted) (quoting *Ams. United*, 619 F.2d at 265).

55. *Id.*

a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."[56]

In analyzing whether a personal injury existed in *Valley Forge*, the Court noted several facts: the property at issue was located in Pennsylvania, the named plaintiffs resided in Maryland and Virginia, the plaintiffs' organizational headquarters was located in Washington, D.C., and the plaintiffs learned about the property conveyance through a news release.[57] The Court distinguished these facts from the facts described in *School District of Abington Township v. Schempp*,[58] in which the plaintiffs' children were directly affected by the law in question because they were "subjected to unwelcome religious exercises" while attending public school.[59] In light of this comparison, the Court concluded that the plaintiffs did not "allege[] an injury of any kind, economic or otherwise, sufficient to confer standing" and reversed the lower court's decision.[60]

In another notable case, *Bowen v. Kendrick*,[61] the Court held that a group of federal taxpayers had standing to challenge the Adolescent Family Life Act[62] ("AFLA") as a violation of the Establishment Clause.[63] Pursuant to AFLA, the Secretary of Health and Human Services distributed federal funds for the purpose of providing care to pregnant adolescents and adolescent parents.[64] In applying the *Flast* test, the Court contrasted *Bowen* and *Valley Forge*.[65] Unlike the plaintiffs in *Valley Forge*, who asserted standing based on their challenge to an exercise of executive authority pursuant to the Property Clause, the plaintiffs in *Bowen* asserted standing based on their challenge to an exercise of executive authority pursuant to the Taxing and Spending Clause. The Government argued that the plaintiffs lacked standing because they challenged an executive decision and not a specific exercise of congressional authority under the Taxing and Spending Clause.[66] In rejecting this argument, the Court explained that it was arbitrary to distinguish between specific acts of Congress and

56. *Id.* at 485.
57. *Id.* at 487.
58. 374 U.S. 203 (1963).
59. *Valley Forge*, 454 U.S. at 487 n.22.
60. *Id.* at 486 (emphasis omitted).
61. 487 U.S. 589 (1988).
62. 42 U.S.C. § 300z (2000).
63. *Bowen*, 487 U.S. at 618.
64. *Id.* at 594.
65. *Id.* at 618-19.
66. *Id.*

executive decisions when the program at issue was "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers."[67] Accordingly, the Court identified "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute" and held that the taxpayers had standing to challenge the constitutionality of AFLA.[68]

The decision in *Bowen* essentially resolved the issue of *mandated* executive expenditures but left open the issue of *discretionary* executive expenditures. Two decades after *Bowen*, this issue was addressed in *Hein v. Freedom From Religion Foundation, Inc.*,[69] when the Court granted certiorari to consider another case concerning executive decisions that allegedly violated the Establishment Clause.[70] In *Hein* the plaintiffs, asserting standing based on their status as federal taxpayers, objected to discretionary executive expenditures financed by congressional appropriations.[71] A majority of the Court agreed to dismiss the plaintiffs' claims for lack of standing,[72] but the Court's fractured analysis demonstrates that *Hein* was anything but a straightforward decision.

III. THE COURT'S RATIONALE

A. *The Plurality Opinion*

In *Hein v. Freedom from Religion Foundation, Inc.*,[73] the plurality, led by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy, reversed and dismissed the Foundation's claims for lack of standing.[74] The plurality rejected the Foundation's argument that it had standing based on taxpayer status on the ground that "the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government."[75] Instead, the plurality stated that the Foundation could maintain standing only by demonstrating a "'personal injury fairly traceable to the defendant's allegedly

67. *Id.* at 619-20.
68. *Id.* at 620.
69. 127 S. Ct. 2553 (2007).
70. *Id.* at 2561-62.
71. *Id.* at 2559.
72. *Id.* at 2572.
73. 127 S. Ct. 2553 (2007).
74. *Id.* at 2559.
75. *Id.*

unlawful conduct.'"[76] The plurality explained that this requirement screens out taxpayers who "seek 'to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers.'"[77] According to the plurality, "the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required."[78]

Next, the plurality explained that the *Flast*[79] test required the plaintiffs to "'establish a logical link between [the plaintiffs'] status and the type of legislative enactment attacked'" and "a nexus between that status and the precise nature of the constitutional infringement alleged.'"[80] The plurality noted that the expenditures in *Flast* were distributed to schools "pursuant to a direct and unambiguous congressional mandate."[81] On the other hand, the expenditures at issue in *Hein* "resulted from executive discretion, not congressional action."[82] Unlike the plaintiffs in *Flast*, the Foundation did "not challenge any specific congressional action or appropriation; nor [did] they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional."[83] Therefore, because "[t]he link between congressional action and constitutional violation . . . [was] missing," the Foundation did not satisfy the first requirement of the *Flast* test.[84]

To further illustrate the factual differences between *Flast* and *Hein*, the plurality distinguished *Hein* from *Bowen v. Kendrick*.[85] In *Bowen* the Court held that the plaintiffs satisfied the *Flast* test because the expenditures at issue were disbursed by an executive official pursuant to a congressional mandate.[86] In contrast, the expenditures at issue in *Hein* were not disbursed pursuant to any congressional mandate; rather, the expenditures were funded by general congressional appropriations set aside for the Executive Branch.[87]

Next, the plurality addressed the Foundation's argument that it was "'arbitrary' to distinguish between money spent pursuant to congressio-

76. *Id.* at 2562 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).
77. *Id.* (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989)).
78. *Id.* at 2563.
79. *See* Flast v. Cohen, 392 U.S. 83 (1968).
80. *Id.* at 2564 (quoting *Flast*, 392 U.S. at 102-03).
81. *Id.* at 2565.
82. *Id.* at 2566.
83. *Id.*
84. *Id.*
85. *Id.* at 2567; 487 U.S. 589 (1988).
86. *Hein*, 127 S. Ct. at 2567.
87. *Id.*

nal mandate and expenditures made in the course of executive discretion, because 'the injury to taxpayers in both situations is the very injury targeted by the Establishment Clause.'"[88] In response, the plurality maintained that the *Flast* test was initially developed to address specific congressional actions that violated the Establishment Clause, and a narrow interpretation of the *Flast* test was consistent with the Court's previous application of the test.[89] Specifically, the plurality noted that the Court previously declined to apply the *Flast* test to cases that did not involve an alleged Establishment Clause violation[90] and refused to extend *Flast* to permit taxpayer standing in cases that did not implicate the Taxing and Spending Clause.[91] Recognizing that the Court had never extended *Flast* to executive expenditures, the plurality decided to "leave *Flast* as [it] found it."[92] Furthermore, in declining to extend the *Flast* test to include executive expenditures, the plurality sought to prevent the Court from functioning as "'monitors of the wisdom and soundness of Executive action.'"[93]

B. The Concurring Opinions

Both Justice Kennedy and Justice Scalia filed concurring opinions. Justice Kennedy fully supported the plurality opinion on the ground that the plaintiffs failed to challenge a specific congressional mandate.[94] Nevertheless, Justice Kennedy filed an opinion to emphasize the plurality's separation of powers concerns.[95] According to Justice Kennedy, if taxpayers were permitted to challenge discretionary executive expenditures, the Court would participate in "intrusive and unremitting judicial management of the way the Executive Branch performs its duties."[96]

Unlike Justice Kennedy, Justice Scalia, joined by Justice Thomas, did not support the plurality's analysis and only concurred in the judgment.[97] Characterizing the Court's development of the *Flast* test as a series of "utterly meaningless distinctions," Justice Scalia declared that

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88. *Id.* at 2568 (quoting Brief for Respondents at 13, *Hein*, 127 S. Ct. 2553 (No. 06-157)).
89. *Id.* at 2568-69.
90. U.S. CONST. amend. I.
91. *Hein*, 127 S. Ct. at 2569; U.S. CONT. art. I. § 8.
92. *Hein*, 127 S. Ct. at 2572.
93. *Id.* at 2570 (internal quotation marks omitted) (quoting *Allen*, 468 U.S. at 760).
94. *Id.* at 2572 (Kennedy, J., concurring).
95. *Id.*
96. *Id.* at 2573.
97. *Id.* (Scalia, J., concurring in the judgment).

the *Flast* test should be abandoned.[98] Despite his disagreement with the plurality's analysis, Justice Scalia concurred in the judgment of the plurality because "[t]he logical consequence of respondents' position finds no support in this Court's precedents or our Nation's history."[99]

The primary downfall that Justice Scalia identified in the cases concerning taxpayer standing was the Court's inconsistent understanding of taxpayer injury.[100] Justice Scalia classified two types of injuries: "'Wallet Injury'" and "'Psychic Injury.'"[101] According to Justice Scalia, a Wallet Injury involves "a claim that the plaintiff's tax liability is higher than it would be, but for the allegedly unlawful government action."[102] On the other hand, a Psychic Injury involves "the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner."[103] Justice Scalia explained that in *Frothingham v. Mellon*[104] and *Doremus v. Board of Education*,[105] the Court flatly denied standing based on Psychic Injury.[106] In contrast, the Court relied on Psychic Injury to support standing in *Flast*.[107] In light of this inconsistency, Justice Scalia posed a question: "If the taxpayers in *Flast* had standing based on Psychic Injury, . . . why did not the taxpayers in *Doremus* and *Frothingham* have standing on a similar basis?"[108] Justice Scalia observed that the Court's acceptance of Psychic Injury in *Flast* was fundamentally at odds with its rejection of Psychic Injury in *Frothingham* and *Doremus*.[109] Criticizing the Court for failing to explain why Psychic Injury was sufficient in some cases but not in others, Justice Scalia noted that the Court's inconsistent treatment of taxpayer injury had resulted in a "chaotic set of precedents."[110] In fact, the court of appeals declined to review this case en banc "simply because they found [the Court's] cases so lawless that there was no point, in quite literally, second-guessing the panel."[111]

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98. *Id.* at 2573-74.
99. *Id.* at 2581.
100. *Id.* at 2574.
101. *Id.*
102. *Id.*
103. *Id.*
104. 262 U.S. 447 (1923).
105. 342 U.S. 429 (1952).
106. *Hein*, 127 S. Ct. at 2575 (Scalia, J., concurring in the judgment).
107. *Id.* at 2576.
108. *Id.*
109. *Id.* at 2579.
110. *Id.* at 2584.
111. *Id.*

C. *The Dissenting Opinion*

In dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, criticized the plurality's narrow application of the *Flast* test.[112] According to Justice Souter, it was "arbitrary" to distinguish between executive and legislative expenditures in determining whether the taxpayer had suffered an injury sufficient to provide a basis for standing.[113] Justice Souter explained that taxpayers suffer the same injury "[w]hen executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing."[114] Unlike the plurality, which focused on the *source* of the expenditures, the dissent examined the *purpose* of the expenditures. Justice Souter noted that "there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion."[115]

In criticizing the plurality's inconsistent treatment of executive and legislative spending decisions, Justice Souter pointed out that "no one has suggested that the Establishment Clause lacks applicability to executive uses of money."[116] In fact, Justice Souter suggested otherwise: "if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away."[117] In comparing *Hein* and *Bowen*, Justice Souter observed that the Court had previously "recognized the equivalence between a challenge to a congressional spending bill and a claim that the Executive Branch was spending an appropriation, each in violation of the Establishment Clause."[118] Seeing no difference between congressional funds that are distributed according to a specific mandate and congressional funds that are distributed according to executive discretion, the dissent insisted the Foundation had taxpayer standing to challenge the President's faith-based program as a violation of the Establishment Clause.[119]

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112. *Id.* at 2584 (Souter, J., dissenting).
113. *Id.* at 2586.
114. *Id.* at 2585.
115. *Id.*
116. *Id.* at 2586.
117. *Id.*
118. *Id.*
119. *Id.*

IV. IMPLICATIONS

Although *Hein v. Freedom from Religion Foundation, Inc.*,[120] is a fractured decision, it is very informative. The Court effectively created a constitutional barrier to a certain class of Establishment Clause[121] claims by declining to include executive expenditures under the *Flast* test.[122] Because seven Justices agreed that *Flast* was the appropriate test to apply in cases involving taxpayer standing and the Establishment Clause, *Flast* still stands as good law; in fact, it remains undisturbed by this decision.[123] Even though Justices Scalia and Thomas took the position that the *Flast* test should be abandoned, they agreed with the plurality that the requirements for standing should be interpreted narrowly.[124] Therefore, in future cases concerning standing, lower courts should apply a narrow interpretation of the requirements for taxpayer standing.

Flast and its progeny provide some assistance to practitioners concerned about structuring a successful claim under a narrow interpretation of taxpayer standing. In future cases, a claim must include at least the following characteristics for the taxpayer to maintain standing: (1) the challenged appropriations must have been distributed pursuant to a specific congressional mandate; (2) the congressional mandate at issue must have been created according to Congress's taxing and spending power; (3) the challenged appropriations must have violated the Establishment Clause in some way; and (4) the taxpayer must have alleged a distinguishable personal injury. As indicated by the legal history, most claims fail to satisfy these narrow requirements and are dismissed for lack of standing. As a result, practitioners will have to search for other grounds for standing to challenge executive expenditures under the Establishment Clause.

The most important implication of this case concerns the Court's troublesome distinction between congressional funds distributed by the Executive Branch and congressional funds distributed by the Legislative Branch. The plurality's assertion that this distinction was necessary to prevent judicial oversight of executive duties is unsatisfactory—why is judicial oversight of legislative decisions permissible but not judicial oversight of executive decisions? As noted by Justice Souter in dissent, the Court's uneven system of review of executive and legislative

120. 127 S. Ct. 2553 (2007).
121. U.S. CONST. amend. I.
122. *Hein*, 127 S. Ct. at 2572.
123. *Id.*
124. *Id.* at 2573 (Scalia, J., concurring in the judgment).

decisions allows the Executive Branch to accomplish through the exercise of discretion exactly what Congress is forbidden from accomplishing though legislation.[125] That is, unlike Congress, the Executive Branch may use congressional funds to finance programs designed to promote religion. Consequently, Congress has an incentive to distribute congressional funds as general appropriations to the Executive Branch with the understanding that those funds will be used to finance religious programs. In those circumstances, the Executive Branch, mostly consisting of appointed officials, would be making the kind of policy decisions the Legislative Branch has traditionally made. This consequence not only distorts the proper role of the branches of government, but also threatens the original purpose of the Establishment Clause, which was to prevent the taxing and spending power from being used to favor religion or establish a national religion.[126]

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125. *Hein*, 127 S. Ct. at 2586 (Souter, J., dissenting).
126. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

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