

**STANDING IN THE MUD: *HEIN V. FREEDOM FROM
RELIGION FOUNDATION, INC.***¹

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I. INTRODUCTION

In 1968, in *Flast v. Cohen*,² the Supreme Court first set forth the requirements that a plaintiff must satisfy to have standing to challenge a government action in federal court solely based on his or her status as a taxpayer.³ The subsequent history of taxpayer standing is littered with precedents supported by unclear reasoning.⁴ *Hein v. Freedom from*

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

2. 392 U.S. 83 (1968).

3. *Id.* at 102-03. See *infra* Parts II(B)(3) and IV(A) for a description of the test for taxpayer standing set forth in *Flast*.

4. Both legal commentators and members of the judiciary have criticized the Court's decisions on taxpayer standing as being difficult to reconcile and setting forth conflicting rationales. See, e.g., *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it”); *Hein*, 127 S. Ct. at 2573 (Scalia, J., concurring in judgment) (describing the Court’s taxpayer standing jurisprudence as having consistently created “utterly meaningless distinctions” to distinguish plaintiffs who have standing from plaintiffs who do not); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 691 (1990)

Religion Foundation, Inc. represents the Supreme Court's latest effort to address the limits of taxpayer standing in an Establishment Clause⁵ challenge.⁶ Unfortunately, the Court in *Hein* maintained its tradition of providing perplexing decisions in taxpayer standing cases.⁷

In *Hein*, a plurality⁸ of the justices, claiming to have left the holding of *Flast* undisturbed, denied the plaintiffs standing to challenge Executive Branch discretionary expenditures alleged to violate the Establishment Clause.⁹ This note examines the *Hein* decision to determine if the impact of the decision is truly to leave the *Flast* holding unchanged, as the plurality claims, or if, as the author believes, the decision actually modifies the *Flast* holding by adding a new distinction between expenditures of earmarked and generally appropriated funds.¹⁰ Part II provides a brief background on the concept of standing and provides a history of the Court's treatment of taxpayer standing.¹¹ Part III identifies the facts and issues presented in the *Hein* case and describes the Supreme Court's decision and the lower courts' decisions in order to give appropriate context for an examination of the impact of *Hein*.¹² Part IV analyzes the Court's decision to show that in fact a majority of the justices voted to alter the *Flast* holding and that the new distinction introduced by the plurality is not supported by the Court's precedent.¹³ Finally, this note analyzes the impact of the Court's decision on plaintiffs asserting taxpayer standing in future cases and on actions the Federal executive and legislative branches might take to avoid the possibility of judicial challenges to their actions.¹⁴

(describing the distinctions drawn by the *Valley Forge* Court between plaintiffs as "senseless"); Richard M. Elias, Note, *Confusion in the Realm of Taxpayer Standing: The State of State Taxpayer Standing in the Eighth Circuit*, 66 MO. L. REV. 413, 430 (2001) ("The Supreme Court's application of different and unclear standards to different classes of taxpayers is hard to reconcile . . .").

5. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

6. *Hein*, 127 S. Ct. at 2555.

7. See *infra* Parts III, IV.

8. The Court denied the plaintiffs standing with three justices joining the plurality opinion and two justices concurring in the judgment who sought to overrule *Flast* entirely. See *infra* Part III(C).

9. *Hein*, 127 S. Ct. at 2572 ("We leave *Flast* as we found it").

10. See *infra* Part IV. This note does not present a defense of *Flast* or taxpayer standing generally, nor does this note seek to criticize *Flast*'s central holding.

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part IV(C).

II. BACKGROUND

A. Federal Court Standing

The Supreme Court has long recognized that the power of the federal judiciary “to say what the law is”¹⁵ has limits.¹⁶ The limits that the Court has recognized assure that the judiciary’s determinations regarding the law only occur within the context of a case that is properly resolved in the judicial context.¹⁷ Plaintiff standing is but one of several essential elements needed for a case to be justiciable.¹⁸

Federal court standing doctrine arises from the Article III¹⁹ limitation on the federal judicial power to hear only “cases” and “controversies” as well as prudential limitations the Court has imposed on itself.²⁰ The standing requirements that the Supreme Court has articulated purport to assure that the person asserting the claim is the proper party to bring the suit.²¹ The Court considers a person to be a proper party to bring the suit if he or she has a sufficient “stake in the outcome” to assure that there is adequate adversity between the parties to illuminate both sides of the issues before the court.²² To assure this

15. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

16. *See Vieth v. Jubelirer*, 541 U.S. 267, 302 (2004) (discussing the Court’s recognition of limitations on the judicial power as early as 1793).

17. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

18. *Id.* at 95. The Court has held cases non-justiciable where: (1) the parties request only an advisory opinion, (2) the case involves a political question that is left to the political branches to decide, (3) the case has been mooted, and (4) the plaintiff lacks standing to maintain the action. *Id.* The concept of standing has occasionally been confused with the larger question of justiciability. *Id.* at 98-99.

19. U.S. CONST. art. III. Article III defines the limits on the judicial power of the United States as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. § 2.

20. *See Flast*, 392 U.S. at 94. The prudential limitations include “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” *Allen v. Wright*, 468 U.S. 737, 751 (1984).

21. *Flast*, 392 U.S. at 99-100.

22. *Id.* at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

“stake in the outcome,” the Supreme Court has identified three elements that every plaintiff must show to establish standing in the federal courts: (1) a “concrete and particularized” injury, (2) a “fairly traceable” causal relation between the injury and the defendant’s actions, and (3) a likelihood that a favorable decision by the court would redress the injury.²³ The Supreme Court has reasoned that a plaintiff who can satisfy all three elements has a sufficient stake in the outcome of the proceeding to establish a genuine case or controversy.²⁴

B. Taxpayer Standing²⁵

Although all plaintiffs in federal court must establish standing to have their case heard, this question is often not in dispute.²⁶ However, the issue of standing frequently arises in cases where a plaintiff challenges a governmental action claiming standing based on his or her status as a taxpayer.²⁷ The Supreme Court has acknowledged that the Court has not clearly defined the requirements for federal court standing, but an examination of the Court’s decisions in the area of taxpayer standing helps one understand how the Court has treated the taxpayer plaintiff.²⁸ The following discussion of the history of the Supreme

23. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

24. The requirement to show a “concrete and particularized” injury narrows the population of parties who may bring suit to those directly affected by the alleged unlawful conduct. *See Allen*, 468 U.S. at 755-56. If there were no requirement for a personal injury, essentially any person could bring suit to challenge any alleged wrongful act whether or not the person suffered any harm. *Id.* The requirement to allege an injury “fairly traceable” to defendant’s conduct assures that the causal chain between the plaintiff’s injury and the defendant’s conduct is sufficiently direct to assure that the plaintiff is suing the proper defendant (i.e., the party whose conduct is the source of plaintiff’s injury). *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The question of redressability, which is closely related to the “fairly traceable” inquiry, assures there is a “causal connection between the alleged injury and the judicial relief requested.” *Allen*, 468 U.S. at 753 n.19. The redressability requirement assures that the relief the court may grant will be effective at rectifying the plaintiff’s injury. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 88, 106-07 (1998) (reasoning that environmental group failed to show they had a redressible injury where they filed suit against steel manufacturer for a “historical violation” of a reporting requirement).

25. “Taxpayer standing” is used in this note to refer to the circumstance where a plaintiff asserts standing to challenge a governmental action alleging an injury based on his or her status as a taxpayer.

26. 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.15 (2007) (“the plaintiff has the burden of pleading and proving standing”).

27. *See Nancy C. Staudt, Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771 (2003) (surveying taxpayer challenges in federal courts).

28. *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (“[T]he concept [of standing] cannot be reduced to a one-sentence or one-paragraph definition.”).

Court's decisions illustrates the contours of the standing inquiries that the Court has undertaken in taxpayer suits.

In a series of cases leading up to *Hein*, the Supreme Court addressed taxpayer standing as it relates to challenges to federal governmental actions under the Establishment Clause²⁹ and other constitutional provisions.³⁰ After initially formulating a rule against taxpayer standing,³¹ the Court eventually recognized a path for taxpayer plaintiffs to establish federal court standing.³² These earlier decisions are critical to the Court's decision in *Hein* and are necessary to understand the full impact of *Hein* on future plaintiffs.³³

1. The General Rule Against Taxpayer Standing - *Frothingham v. Mellon*³⁴

The Supreme Court first took up the issue of taxpayer standing in *Frothingham v. Mellon*.³⁵ The plaintiff alleged that the Maternity Act³⁶ was unconstitutional and sought an injunction to prevent the Secretary of the Treasury from enforcing the law.³⁷ The claimed injury was the increase in future taxes due to expenditures in violation of the Constitution.³⁸ The Court recognized that local taxpayers had a right to sue a municipal corporation to prevent unlawful expenditures, but denied that such a right extended to the federal taxpayers' interest in federal funds.³⁹

29. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

30. *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2563-65 (2007) (reviewing these cases).

31. *Frothingham v. Mellon*, 262 U.S. 447, 487-88 (1923) (holding that taxpayers could not establish standing to challenge federal appropriations).

32. *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (recognizing an exception to *Frothingham* in which taxpayers may establish standing).

33. *See infra* Parts III, IV.

34. 262 U.S. 447 (1923).

35. *Id.* at 486.

36. Maternity Act of 1921, Pub. L. No. 67-97, 42 Stat. 224 (1921). The Maternity Act appropriated money to each state conditioned upon each state's acceptance of the act's provisions for reducing maternal and infant mortality. *Frothingham*, 262 U.S. at 479.

37. *Frothingham*, 262 U.S. at 486. The plaintiff alleged the act was unconstitutional in that it invaded the states' powers reserved under the Tenth Amendment. *Id.* at 479; U.S. CONST. amend. X ("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.").

38. *Frothingham*, 262 U.S. at 486.

39. *Id.* at 487.

The Court identified several reasons for its conclusion.⁴⁰ First, it reasoned that a taxpayer's interest in the federal treasury was "minute and indeterminable" and that the impact of the expenditures on future taxes was too "remote, fluctuating and uncertain" to state a valid claim.⁴¹ Second, the Court expressed its belief that the taxpayer's claim was a question of public policy and not a matter to be tried by an individual in court.⁴² Third, the Court was concerned about the possible flooding of the courts with taxpayer suits if such claims were allowed.⁴³ Finally, the Court saw the hearing of taxpayer claims as a potential invasion of the province of the co-equal branches.⁴⁴

The Court held that a person challenging the validity of a statute must show that enforcement of the statute has caused him or her a direct injury and not just that he or she "suffers in some indefinite way in common with people generally."⁴⁵ The Court provided no guidance as to what circumstances, if any, would give a taxpayer standing to challenge a federal act.⁴⁶

2. Taxpayer Standing and the Establishment Clause - *Doremus v. Board of Education*⁴⁷

The Court first considered whether taxpayer status would be sufficient to sustain a challenge to the Establishment Clause in *Doremus v. Board of Education*.⁴⁸ In *Doremus*, two individuals brought suit in state court for a declaratory judgment that a state law⁴⁹ requiring reading

40. *Id.*

41. *Id.*

42. *Id.* The justification of the issue being a public matter extends beyond the notion of standing and is best considered an alternative ground for holding the question to be non-justiciable, namely a "political question" dedicated to the Legislative and Executive Branches. See *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968); see *supra* note 18.

43. *Frothingham*, 262 U.S. at 487.

44. *Id.* at 488.

45. *Id.*

46. *Id.* at 488-489.

47. 342 U.S. 429 (1952).

48. *Id.* at 430-431.

49. The challenged act stated:

At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled.

of Bible verses in public schools violated the Establishment Clause.⁵⁰ The two plaintiffs asserted taxpayer status as their basis for standing.⁵¹ The Court dismissed their claim, finding no justiciable case or controversy.⁵² The Court found that the plaintiffs had not alleged injuries as taxpayers sufficient to establish standing.⁵³ The plaintiffs failed to allege that the challenged act had added to their tax burden or even that the Bible readings affected the cost of running the school.⁵⁴ The Court stated that plaintiffs can establish standing in their taxpayer capacity, but they must show an actual or threatened financial injury.⁵⁵ The Court further noted that if a taxpayer could show financial injury then the fact that his or her principal motivation for bringing suit may be non-financial would not deprive the taxpayer of standing.⁵⁶

Three justices in dissent believed that an individual taxpayer's interest in taxes being "deflected from the educational program for which the taxes were raised" was sufficient injury to establish standing.⁵⁷ The dissent claimed the clash of interests was sufficient to hold that there was a real case or controversy.⁵⁸

3. An Exception to the *Frothingham* Rule - *Flast v. Cohen*⁵⁹

Flast v. Cohen first cracked the barrier that had prevented taxpayer plaintiffs from asserting standing to challenge federal action as

Doremus v. Bd. of Educ., 71 A.2d 732, 733 (N.J. Super. Ct. Law Div. 1950) (quoting N.J. STAT. ANN. § 18:14-77 (West 1937)). The statute itself did not impose a tax nor did it specify any expenditure of funds for the activity.

50. *Doremus*, 342 U.S. at 430-31. The case was before the Court on appeal from the Supreme Court of New Jersey. *Id.* at 430. The New Jersey courts rejected the plaintiffs' claims and upheld the challenged act on the merits. *Id.* The New Jersey courts were not bound by Article III's case and controversy requirements, but the Supreme Court's jurisdiction over cases appealed from state courts, even if they present cognizable subject matter, are still subject to the Article III standing restrictions. *See id.* at 431, 433.

51. *Id.* at 432. One of the individuals had a daughter at a public school, but there was no assertion that the daughter was injured by the practice of Bible reading. *Id.* Additionally, the daughter had graduated prior to the appeal, rendering moot the individual's status as a father of a possibly affected student. *Id.* at 432-33.

52. *Id.* at 435.

53. *Id.* at 434-35.

54. *Id.* at 433.

55. *Id.* at 434-35.

56. *Id.*

57. *Id.* at 435 (Douglas, J., dissenting).

58. *Id.* at 436.

59. 392 U.S. 83 (1968).

unconstitutional.⁶⁰ The *Flast* plaintiffs challenged a congressional act that provided federal grants to finance education in religious schools.⁶¹ The plaintiffs rested their standing solely on their federal taxpayer status.⁶²

The Court first examined whether its earlier refusal to recognize taxpayer standing was grounded in the constitutional limitations on judicial power or rather on prudential grounds of self-restraint.⁶³ The Court found indications in its *Frothingham* decision to suggest that the earlier refusal to recognize taxpayer standing was based on prudential and not purely constitutional grounds.⁶⁴ The Court determined that there was sufficient confusion underlying the *Frothingham* decision to warrant reexamination of the hard-line approach adopted in *Frothingham*.⁶⁵

In analyzing the “cases” and “controversies” language of Article III, the Court noted two complementary limitations that arise: (1) a need for adversariness in resolution of the dispute in the judicial process and (2) a restriction on the judiciary intruding into the territory of the co-equal branches of the government.⁶⁶ The Court stated that the standing inquiry, as opposed to other elements of justiciability,⁶⁷ focuses solely on the first of these limitations and not on the separation-of-powers

60. *Id.* at 102-04; *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2564-65 (2007) (explaining the significance of the *Flast* decision in justiciability jurisprudence).

61. *Flast*, 392 U.S. at 85. The plaintiffs challenged the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27. *Id.* The Act permitted the United States Commissioner of Education to provide grants to local educational agencies that served areas with high concentrations of low-income families. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 202, 79 Stat. 27, 27. The challenged section permitted a local education agency to receive a grant provided

that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in *private* elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate.

Id. § 205(a)(2), 79 Stat. at 30-31 (emphasis added).

62. *Flast*, 392 U.S. at 85.

63. *Id.* at 92.

64. *Id.* at 93 (“The concluding sentence of the [*Frothingham*] opinion states that, to take jurisdiction of the taxpayer’s suit, ‘would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.’ Yet the concrete reasons given for denying standing to a federal taxpayer suggest that the Court’s holding rests on something less than a constitutional foundation.”).

65. *Id.* at 93-94.

66. *Id.* at 95.

67. *See supra* note 18 (listing the other elements of justiciability).

concerns raised by the second limitation.⁶⁸ For a party to show the necessary stake in the outcome of the proceeding, the party must show a “logical nexus” between his or her asserted status and the claim.⁶⁹ For a taxpayer suit, the Court defined a two-prong test to show this “logical nexus.”⁷⁰ First, the plaintiff must show a logical link between his or her taxpayer status and the type of congressional enactment being challenged.⁷¹ Second, the plaintiff must show a link between the taxpayer status and the alleged constitutional infringement.⁷²

The first prong nexus required the plaintiff to challenge an exercise of Congress’s taxing and spending power.⁷³ The first prong also required that the challenged exercise of the spending power not be merely “an incidental expenditure of tax funds in the administration of an essentially regulatory statute.”⁷⁴ The second prong required the plaintiff to show the expenditure exceeded a “specific constitutional limitation[.]” on the spending power.⁷⁵

The Court found that the plaintiffs had satisfied both parts of the test.⁷⁶ The plaintiffs satisfied the first prong by challenging, as taxpayers, an exercise of Congress’s taxing and spending power involving a “substantial expenditure of federal tax funds.”⁷⁷ The Court found the second prong satisfied because the Establishment Clause was a specific limitation on Congress’s taxing and spending power,⁷⁸ noting that the injury to the taxpayer was “that his tax money [was] being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.”⁷⁹

Justice Harlan, the lone dissenting justice, criticized the majority’s two-part test as establishing criteria that in no way impacted the plaintiff’s actual stake in the outcome of the case.⁸⁰ In arguing against

68. *Flast*, 392 U.S. at 100-01. The standing question focuses on the person, and whether he or she is a proper party. *Id.* A plaintiff is a proper party to bring suit if he or she has a sufficient stake in the outcome and an adverse interest to the defendant. *Id.* at 101. “[I]t is not relevant that the substantive issues in the litigation might be nonjusticiable.” *Id.*

69. *Id.* at 102.

70. *Id.* See *infra* Part IV(A) for a detailed analysis of the *Flast* test.

71. *Id.* at 102.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 102-03.

76. *Id.* at 103.

77. *Id.*

78. *Id.* at 105-06.

79. *Id.* at 106.

80. *Id.* at 121-22 (Harlan, J., dissenting).

the first prong of the test, Justice Harlan stated that a plaintiff's interest in the outcome of a suit is not affected by the nature of the governmental expenditure.⁸¹ Justice Harlan specifically noted the taxpayer's interest arose from the unlawful expenditure regardless of whether the expenditure was a grant to a religious organization or incidental to a regulatory program.⁸² Justice Harlan also disagreed with the second prong of the test, finding no basis to distinguish between specific restrictions on the spending power, such as the Establishment Clause, and other constitutional limitations on the spending power.⁸³

Justice Harlan saw a taxpayer's right to challenge the expenditure of funds as no greater than that of any citizen.⁸⁴ Although Justice Harlan believed a taxpayer's or citizen's challenges to unconstitutional expenditures to be within the case and controversy requirements of Article III, he nonetheless thought that the Court should refuse to hear such claims on prudential grounds.⁸⁵ Specifically, Justice Harlan saw taxpayer suits as leading to an intrusion by the judiciary into the authority of the Legislative and Executive Branches.⁸⁶

4. Applying the *Flast* Test

The Court's first application of the *Flast* test to other facts occurred in two cases, decided on the same day, that involved non-Establishment Clause challenges: *United States v. Richardson*⁸⁷ and *Schlesinger v. Reservists Committee to Stop the War*.⁸⁸ These cases are particularly illustrative of the Court's rigid application of the *Flast* test.

81. *Id.* at 122-23. Justice Harlan distinguished between taxpayer challenges to the validity of their personal tax obligations for which he had no problem finding a justiciable issue and taxpayer challenges to expenditures from the treasury where there was no allegation that the plaintiff's tax obligation was actually greater. *Id.* at 118.

82. *Id.* at 123.

83. *Id.* at 126.

84. *Id.* at 119.

85. *Id.* at 130-31.

86. *Id.* at 130. Justice Harlan noted, "the other branches of the Government 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree of as the courts.'" *Id.* at 131 (quoting *Missouri, Kansas, & Texas Ry. Co. of Texas v. May*, 194 U.S. 267, 270 (1904)). He would have allowed taxpayer or citizen suits only in cases where legislation had authorized the federal courts to hear such suits. *Id.* at 131-32.

87. 418 U.S. 166 (1974).

88. 418 U.S. 208 (1974).

a. *United States v. Richardson*⁸⁹

In *United States v. Richardson*, the Court addressed a plaintiff's challenge to the Central Intelligence Agency Act of 1949.⁹⁰ The plaintiff challenged the act as violating the Constitution's Statement and Account Clause⁹¹ and asserted his taxpayer status as basis for his standing.⁹² Specifically, the plaintiff claimed that the act's provision protecting against public disclosure of an account of Central Intelligence Agency expenditures violated the constitutional requirement for periodic publication of an account of government expenditures.⁹³

In denying the plaintiff standing, the Court found that the plaintiff failed to satisfy the *Flast* test because the plaintiff made "no claim that appropriated funds [were] being spent in violation of a 'specific constitutional limitation upon the . . . taxing and spending power.'"⁹⁴ Since the plaintiff failed to establish the nexus between his taxpayer status and his claim, the Court found the plaintiff's claim to be a non-justiciable "generalized grievance" common to all citizens.⁹⁵

b. *Schlesinger v. Reservists Committee to Stop the War*⁹⁶

At the same time it decided *Richardson*, the Court also denied standing to a group of plaintiffs who challenged several congressmen's membership in the Armed Forces Reserve.⁹⁷ The plaintiffs alleged that the Constitution's Incompatibility Clause⁹⁸ rendered members of Congress ineligible for participation in the Armed Forces Reserve.⁹⁹ In addressing the plaintiffs' claim of standing based on their status as taxpayers, the Court found that the plaintiffs failed to challenge an

89. 418 U.S. 166 (1974).

90. *Id.* at 167; Pub. L. No. 81-110, 63 Stat. 208.

91. U.S. CONST. art. I, § 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

92. *Richardson*, 418 U.S. at 167-68.

93. *Id.* at 168.

94. *Id.* at 175 (quoting *Flast v. Cohen*, 392 U.S. 83, 104 (1968)). The injury alleged by the plaintiff was that he was deprived information that he needed to fulfill his duties as an elector of public officials. *Id.* at 176.

95. *Id.* at 176-77. In addition to denying the plaintiff standing as a taxpayer, the Court recognized that no taxpayer would likely be able to bring a suit to challenge the constitutionality of the act and left the question for the political process to resolve. *Id.* at 179.

96. 418 U.S. 208 (1974).

97. *Id.* at 210-11.

98. U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

99. *Schlesinger*, 418 U.S. at 210-11.

exercise of the taxing and spending power.¹⁰⁰ The Court characterized the claim as a challenge to “the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status.”¹⁰¹ Since the plaintiffs’ claim was not a challenge to the taxing and spending power, the Court found that the plaintiffs had failed to satisfy *Flast*’s first prong.¹⁰²

c. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*¹⁰³

Both *Richardson* and *Schlesinger* showed the Court’s respect for *Flast*’s first prong requirement that a taxpayer plaintiff challenge an exercise of the taxing and spending power in non-Establishment Clause cases.¹⁰⁴ If there were any doubt that the Court would also rigidly apply *Flast*’s first prong to challenges brought under the Establishment Clause, that doubt was dispelled in *Valley Forge*.¹⁰⁵ In *Valley Forge*, the plaintiffs challenged the Secretary of Health, Education, and Welfare’s transfer of property owned by the federal government to a private Christian college for allegedly less than adequate consideration.¹⁰⁶ The plaintiffs alleged that the Federal Property and Administrative Services Act of 1949¹⁰⁷ as applied to the particular property transfer was unconstitutional in that it violated the Establishment Clause.¹⁰⁸

The Court applied the *Flast* two-prong test to reject the plaintiffs’ assertion of taxpayer standing.¹⁰⁹ First, the Court found that the act of which they complained was not an act of Congress.¹¹⁰ Rather, it was a

100. *Id.* at 228.

101. *Id.*

102. *Id.*

103. 454 U.S. 464 (1982).

104. *United States v. Richardson*, 418 U.S. 166, 175 (1974); *Schlesinger*, 418 U.S. at 228.

105. *See Valley Forge*, 454 U.S. at 481 (“Any doubt that once might have existed concerning the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied should have been erased by this Court’s recent decisions . . .”).

106. *Id.* at 468.

107. Pub. L. No. 81-152, 63 Stat. 377. The Act permitted the Secretary to dispose of surplus property by selling it to private parties. *Valley Forge*, 454 U.S. at 467. The price of the sale could be reduced based on a “public benefit allowance” if the subsequent use of the property would benefit the United States. *Id.* For the challenged transfer, a one hundred percent allowance was provided in exchange for a condition in the grant requiring that the property be used solely for educational purposes for thirty years. *Id.* at 468.

108. *Valley Forge*, 454 U.S. at 469. “The complaint asserted that each member ‘would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution.’” *Id.*

109. *Id.* at 479.

110. *Id.*

decision by the Executive Branch.¹¹¹ Second, the Court found the source of authority for the transfer was the Property Clause¹¹² and not the Taxing and Spending Clause.¹¹³ The Court focused on the plaintiffs' failure to allege a concrete injury and raised many of the same prudential considerations raised in *Frothingham v. Mellon*.¹¹⁴

d. *Bowen v. Kendrick*¹¹⁵

After *Valley Forge*, there was reason to believe that the allowance for taxpayer standing was effectively dead even though *Flast* had not been overruled.¹¹⁶ However, *Bowen v. Kendrick* showed that taxpayer plaintiffs still had a path to federal court standing under *Flast*.¹¹⁷ In *Bowen*, taxpayers claimed that grants made under the Adolescent Family Life Act¹¹⁸ violated the Establishment Clause.¹¹⁹ The government challenged the plaintiffs' standing on the grounds that the challenged grants were administered and authorized by the Executive Branch and therefore did not involve an exercise of Congress's taxing and spending power.¹²⁰ The Court rejected the government's contention, holding that

111. *Id.*

112. U.S. CONST. art. IV, § 3 cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . .").

113. *Valley Forge*, 454 U.S. at 480.

114. *Id.* at 472-76. The Court considered the requirement for an actual injury necessary to provide a "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* at 472. The Court also expressed concern about converting the courts into forums for hearing public grievances. *Id.* at 473. The Court raised the issue of intrusion onto the provinces of the Legislative and Executive Branches, finding that declaring an act of a co-equal branch unconstitutional is a "tool of last resort" that should not be done unless "in the proper performance of a judicial function." *Id.* at 473-74.

115. 487 U.S. 589 (1988).

116. See Eric B. Schnurer, Note, "More than an Intuition, Less than a Theory": Toward a Coherent Doctrine of Standing, 86 COLUM. L. REV. 564, 566 (1986) (concluding that *Richardson* and *Valley Forge* rendered *Flast* a "dead letter").

117. *Bowen*, 487 U.S. at 619-20. Justices Kennedy and Scalia joined the opinion of the Court. *Id.* at 591. This is noted because these justices also concurred in the judgment in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007).

118. Pub. L. No. 97-35, § 955, 95 Stat. 357, 578 (1981). The Act provided for grants to public and private organizations to address adolescent pregnancy and sexual relations. *Bowen*, 487 U.S. at 593. The Secretary of Health and Human Services was charged with administration of the grants. *Id.* at 594. The private organizations given grants included religious organizations. *Id.* at 597.

119. *Bowen*, 487 U.S. at 597. The plaintiffs challenged the Act as unconstitutional both on its face and as applied to grants given to religious organizations. *Id.* The Court held that the Act was not facially invalid. *Id.* at 593. The Court's standing analysis related to the as-applied challenge. *Id.* at 618.

120. *Id.* at 619.

administration of the funds by the Executive Branch did not make the grants any less an exercise of Congress's taxing and spending power.¹²¹ This signaled a retreat from *Valley Forge's* reliance on the executive-congressional action distinction, indicating that the true basis for *Valley Forge* was the distinction between actions taken under the Taxing and Spending Clause versus those under the Property Clause.¹²² The Court also found the grants were not incidental expenditures of funds "in the administration of an essentially regulatory statute" because the challenged program was primarily a program of fund disbursement enacted pursuant to Congress's taxing and spending powers.¹²³ The Court determined that the plaintiffs had standing to challenge the grant program "as applied" and remanded to the District Court to decide on the merits of the plaintiffs' claims.¹²⁴

After *Bowen*, it was clear that the *Flast* test remained a valid but rigidly applied exception to the general rule against taxpayer standing.¹²⁵ This was the status of federal taxpayer standing doctrine when the Court considered *Hein v. Freedom From Religion Foundation, Inc.*¹²⁶

III. STATEMENT OF THE CASE

A. *Statement of Facts*

On January 29, 2001, President Bush established the White House Office of Faith-Based and Community Initiatives ("the White House OFBCI") and Executive Department Centers for Faith-Based and Community Initiatives ("the Department Centers").¹²⁷ The stated purpose of the Department Centers was to "coordinate department efforts to eliminate regulatory, contracting and other programmatic obstacles to the participation of faith-based and other community

121. *Id.*

122. *See id.* at 619 ("This is not a case like *Valley Forge*, where the challenge was to an exercise of executive authority pursuant to the Property Clause . . .").

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

124. *Id.* at 619-21.

125. *See id.* at 618 ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing . . .").

126. 127 S. Ct. 2553 (2007).

127. Exec. Order No. 13,199, 3 C.F.R. 752-54 (2001) (establishing the White House OFBCI) and Exec. Order No. 13,198, 3 C.F.R. 750-52 (2001) (establishing department centers for FBCI under the Attorney General, the Secretary of Education, the Secretary of Labor, the Secretary of Health and Human Services, and the Secretary of Housing and Urban Development).

organizations in the provision of social services.”¹²⁸ The directors of the White House OFBCI and the Department Centers were alleged to have supported and made speeches at government-sponsored conferences where faith-based organizations were identified as being “particularly worthy of federal funding because of their religious orientation.”¹²⁹ There was no congressional mandate to establish either the White House OFBCI or the Department Centers.¹³⁰

B. Procedural History

The Freedom from Religion Foundation (“FFRF”)¹³¹ and individual members of the FFRF (“the Plaintiffs”) sought declaratory and injunctive relief in the Western District of Wisconsin alleging that the Defendant Directors of the White House OFBCI and Department Centers used congressional appropriations to give preference to faith-based organizations in violation of the Establishment Clause.¹³² The

128. Exec. Order No. 13,198, § 2, 3 C.F.R. 750.

129. Petition for a Writ of Certiorari at 73a, *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553 (No. 06-157) (Aug. 1, 2006), 2006 WL 2161324 (reproducing Plaintiffs’ Amended Complaint at Appendix E), available at <http://www.usdoj.gov/osg/briefs/2006/2pet/7pet/2006-0157.pet.aa.pdf>. The District Court’s decision and subsequent appeals arise from defendants’ partial motion to dismiss for which the Court assumed the accuracy of the Plaintiffs’ allegations. *Id.* at 28a (reproducing the district court’s order in *Freedom from Religion Foundation v. Towey*, No. 04-C-381-S (W.D. Wis. decided Nov. 15, 2004) at Appendix B).

130. Petition for Writ of Certiorari, *supra* note 129, at 33a (concluding that there is no congressional mandate because the OFBCI was established by executive order and funded by general budget appropriations).

131. Freedom from Religion Foundation, Inc (“FFRF”), is a Wisconsin-based corporation “opposed to government endorsement of religion in violation of the Establishment Clause.” Petition for Writ of Certiorari, *supra* note 129, at 68a. FFRF describes itself as “an educational group working for the separation of state and church” with purposes “to promote the constitutional principle of separation of state and church, and to educate the public on matters relating to nontheism.” Freedom from Religion Foundation, <http://www.ffrf.org/purposes/> (last visited Oct. 29, 2008). FFRF pursues these purposes by filing lawsuits, publishing newsletters and books, sponsoring free thought essay competitions, providing public speakers, and holding annual conventions, among other activities. *Id.*

132. Petition for Writ of Certiorari, *supra* note 129, at 77a. The amended complaint also alleged that the Department Secretaries directly funded services that integrated religion in violation of the Establishment Clause and that “funded intermediary faith-based organizations that preferentially award sub-grants to other faith-based organizations.” *Id.* at 79a. The Plaintiffs voluntarily dismissed all but two of these claims. *Freedom From Religion Foundation v. Towey*, No. 04-C-381-S, 2005 U.S. Dist. LEXIS 39444, at *2 (W.D. Wis. Jan. 11, 2005). The district court granted Plaintiffs’ motion for partial summary judgment, finding an Establishment Clause violation with respect to grants to MentorKids USA, a faith-based program for mentoring children of prisoners. *Id.* at *28-29. The district court also partially granted Defendants’ motion for summary judgment, upholding a grant made to Emory University. *Id.* at *29.

Plaintiffs asserted standing based on their federal-taxpayer status.¹³³ In applying the *Flast* two-prong test, the district court found that the challenged activities were not sufficiently related to an exercise of Congress's taxing and spending power to satisfy *Flast*'s first prong.¹³⁴ The district court dismissed the Plaintiffs' claims against the Defendant Directors for lack of standing, reasoning that the Plaintiffs had failed to establish a sufficient link between the Defendant Directors' actions and a congressional enactment.¹³⁵

A divided panel for Seventh Circuit Court of Appeals vacated the dismissal and remanded for judgment on the merits.¹³⁶ The Seventh Circuit held that Plaintiffs could assert standing as taxpayers because the challenged program was funded by congressional appropriations, even though such funds were from general Executive Branch appropriations.¹³⁷ The Seventh Circuit paid particular attention to the Supreme Court's statement in *Flast* that it would not be sufficient for a plaintiff to merely challenge "an incidental expenditure of tax funds in the administration of an essentially regulatory statute."¹³⁸ The Seventh Circuit determined that "incidental" did not refer to the magnitude of the expenditure.¹³⁹ Instead, the test used for determining if an expenditure were more than merely "incidental" was whether the implementation of the regulatory program that allegedly violated the Establishment Clause involved an expenditure of funds greater than what the expenditure would have been in implementing the program in a manner that did not

133. Petition for Writ of Certiorari, *supra* note 129, at 30a.

134. *Id.* at 34a (finding the challenged actions to not to be "exercises of congressional power").

135. Petition for Writ of Certiorari, *supra* note 129, at 33a-34a. The district court stated that the general rule is that "status as a federal taxpayer is insufficient to convey standing to challenge federal expenditures." *Id.* at 31a (citing *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923)). The court then considered the exception to the general rule provided by *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). *Id.* at 31a. The court found the second element of the test satisfied because the Establishment Clause limits Congress's taxing and spending power. *Id.* at 32a (citing *Flast*, 392 U.S. at 104). The district court held the Plaintiffs failed to satisfy the first element of the test in that the Defendant Directors were not charged with administration of congressional programs. *Id.* at 34a.

136. *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989, 997 (7th Cir. 2006).

137. *Id.* at 996-97. Judge Posner, writing for the court, saw no reason why a standing determination would rest on whether the challenged funds were from a general appropriation rather than a specific congressional grant. *Id.* at 994. He believed that equally egregious violations of the Establishment Clause could result from Executive Branch expenditures of general appropriations as could result from expenditures provided for in a legislative enactment. *Id.* at 994-95.

138. *Id.* at 995 (quoting *Flast*, 392 U.S. at 102).

139. *Id.*

violate the Establishment Clause.¹⁴⁰ In applying this incremental cost test, the Seventh Circuit determined that the Plaintiffs had standing to challenge the OFBCI as a program because it involved expenditures that were more than just “incidental” to other executive functions.¹⁴¹

C. *United States Supreme Court Decision*

In 2006, the Supreme Court granted Defendants’ petition for writ of certiorari.¹⁴² The Court considered the question “[w]hether taxpayers have standing under Article III of the Constitution to challenge, on Establishment Clause grounds, the actions of Executive Branch officials pursuant to an Executive Order, where the conduct at issue is financed only indirectly through general appropriations legislation and no funds are disbursed to any institutions or individuals outside the government.”¹⁴³

1. Plurality Opinion¹⁴⁴

The plurality examined earlier cases where the Court had evaluated taxpayer standing, noting that the Plaintiffs did not challenge collection of a tax assessment and only challenged the expenditure of collected funds.¹⁴⁵ The plurality reiterated the *Frothingham*¹⁴⁶ general rule against taxpayer standing in cases challenging the expenditure of federal funds.¹⁴⁷ The plurality also noted the Court’s longstanding policy against finding standing where the alleged injury is a “generalized

140. *Id.* at 995-96. The Seventh Circuit gave the example of the President making a religious reference in the State of the Union Address. *Id.* In that case, the expenses involved in providing security for the President would be considered incidental to the performance of his function of delivering the speech. *Id.* Even if it were assumed that such statements violated the Establishment Clause, such expenditures could not be the basis for taxpayer standing to challenge the expenses associated with the speech because those expenses would be incurred even if the speech contained no religious references. *Id.*

141. *Id.* at 996-97.

142. *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 722 (2006) (granting petition for writ of certiorari).

143. Brief for the Petitioners at *1, *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (No. 06-157) (Jan. 5, 2007), 2007 WL 62299.

144. *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007). Justice Alito announced the judgment of the Court and delivered an opinion in which Chief Justice Roberts and Justice Kennedy joined. *Id.* at 2559.

145. *Id.* at 2562-63.

146. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

147. *Hein*, 127 S. Ct. at 2562.

grievance[]” shared “in some indefinite way in common with people generally.”¹⁴⁸

The plurality recognized the continued validity of the exception provided in *Flast* and applied the *Flast* test.¹⁴⁹ The plurality found that the Plaintiffs failed to establish “the requisite ‘logical nexus’ between taxpayer status ‘and the type of legislative enactment attacked.’”¹⁵⁰ The plurality reasoned that the expenditures related to the challenged activities fell outside the *Flast* exception because they were not made pursuant to an express congressional mandate.¹⁵¹ The plurality determined the challenged expenditures were the product of executive discretion and not a congressional act.¹⁵² The plurality similarly rejected the Plaintiffs’ argument that the challenge was an as-applied challenge to the underlying congressional appropriation because the Plaintiffs were unable to identify any specific statute authorizing the challenged expenditure.¹⁵³

The plurality believed that *Flast* should not be expanded to include the instant case because it would shift the equilibrium of powers away from the democratically elected branches and transform the courts into “forums for taxpayers’ generalized grievances.”¹⁵⁴ The plurality rejected the Court of Appeals incremental cost test as being unworkable.¹⁵⁵ The plurality, who were joined by Justices Scalia and Thomas in concurring in the judgment, reversed the Seventh Circuit.¹⁵⁶

2. Justice Kennedy’s Concurring Opinion

Justice Kennedy wrote separately, emphasizing separation-of-powers concerns and noting the importance of public events and speeches in facilitating an open discussion to address governmental

148. *Id.* at 2564 n.2 (quoting *United States v. Richardson*, 418 U.S. 166, 174 (1974), and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006)).

149. *Id.* at 2565-68.

150. *Id.* at 2568 (citing *Flast*, 392 U.S. at 102).

151. *Id.* at 2568. The plurality found that the Plaintiffs fell outside the *Flast* exception because they failed to direct their complaint at a specific congressional enactment. *Id.*

152. *Id.* at 2566.

153. *Id.* at 2567.

154. *Id.* at 2570.

155. *Id.* The plurality criticized the Seventh Circuit’s zero incremental cost test as giving taxpayers standing to potentially challenge many speeches by Executive Branch personnel. *Id.* The plurality gave the examples of an Executive Branch official attending a prayer breakfast or a speechwriter researching religious imagery as potentially giving rise to taxpayer standing in cases where standing was not warranted. *Id.* at 2570-71.

156. *Id.* at 2570.

concerns.¹⁵⁷ Justice Kennedy feared that applying the *Flast* exception to executive speeches and conferences would result in “judicial oversight of executive duties.”¹⁵⁸ Justice Kennedy further noted that the lack of judicial intervention in the activities of the Legislative and Executive Branches did not excuse the members of those branches from complying with the Constitution.¹⁵⁹

3. Justice Scalia’s Opinion Concurring in the Judgment¹⁶⁰

Justice Scalia criticized the distinction that the plurality drew between the facts in the case before the Court and those in *Flast*.¹⁶¹ Instead, Justice Scalia rejected the allowance for taxpayer standing provided in *Flast*, finding *Flast* “wholly irreconcilable with . . . Article III restrictions on federal-court jurisdiction”¹⁶² He contended that the two-prong test established in *Flast* was a contrivance used by the Court in *Flast* to prevent its holding from being inconsistent with earlier precedent.¹⁶³ In criticizing the Court’s “shameful tradition” in deciding taxpayer-standing cases, Justice Scalia noted the Court’s unwillingness to recognize *Flast*’s reliance on psychic injury.¹⁶⁴

Justice Scalia reasoned that the Court should first address *Flast* head-on and either apply *Flast* to the limits of its logic or reject its logic and overrule it.¹⁶⁵ He then asserted that simply satisfying the *Flast* criteria was not sufficient to establish an injury under Article III because the alleged psychological injury was not sufficiently concrete or particularized.¹⁶⁶ Justice Scalia further criticized the *Flast* opinion for

157. *Id.* at 2572-73 (Kennedy, J., concurring).

158. *Id.* at 2573. Justice Kennedy cautioned that by permitting courts to review the content of executive officials’ public speeches, “courts would soon assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold.” *Id.*

159. *Id.* (“Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law”).

160. *Id.* at 2573 (Scalia, J., concurring in judgment). Justice Scalia delivered an opinion joined by Justice Thomas concurring in judgment only. *Id.*

161. *Id.* Justice Scalia describes the plurality’s opinion as “creat[ing] . . . [a] meaningless distinction[]” that cannot justify a different result “in any sane world.” *Id.*

162. *Id.* at 2574.

163. *Id.* at 2575.

164. *Id.* at 2578-80.

165. *Id.* at 2582.

166. *Id.* at 2582-83. In his concurrence, Justice Scalia identifies two types of injury asserted by taxpayers: “Wallet Injury” and “Psychic Injury.” *Id.* at 2574. “Wallet Injury” is the taxpayer’s alleged higher tax liability as a result of the unlawful expenditures and “Psychic Injury” is the “mental displeasure” resulting from the use of tax money in violation of the law. *Id.* Justice Scalia argues that neither of these injuries is sufficient to support taxpayer standing. *Id.* at 2574-75. He quickly dismisses “Wallet Injury” as suitable to support standing because the “Wallet Injury” is

failing to recognize the standing rules' separation-of-powers function.¹⁶⁷ Justice Scalia saw no value in applying *stare decisis* principles to uphold *Flast*, noting that the Court's rulings on Article III standing have been so erratic that no person would reasonably rely on *Flast's* holding.¹⁶⁸ Justice Scalia concluded that *Flast* should be overruled.¹⁶⁹

4. Dissenting Opinion¹⁷⁰

The dissent claimed that the government's spending of money for religious purposes is itself a judicially cognizable injury.¹⁷¹ The dissent, like Justice Scalia, disagreed with the plurality's creation of a distinction between congressionally earmarked funds and Executive Branch discretionary funds.¹⁷² The dissent noted that an injury shared with the public generally should not deprive a plaintiff of standing.¹⁷³ The dissenting justices asserted that no extension of *Flast* was required and that the taxpayers in this case had shown a cognizable injury under *Flast*.¹⁷⁴ The dissent believed the expenditure of tax funds by the executive in identifiable sums under a general appropriation satisfied *Flast's* link between taxpayer status and a congressional enactment.¹⁷⁵

neither sufficiently traceable to the government's alleged wrongdoing nor capable of redress by the courts. *Id.* at 2574. The absence of traceability and redressability are due to the uncertain effect that the alleged wrongful conduct and the requested relief would have on the taxpayer's tax liability. *Id.* Justice Scalia then focuses on why "Psychic Injury" is insufficient for taxpayer standing.

167. *Id.* at 2583. Justice Scalia found "Psychic Injury" to be "a contradiction of the basic propositions that the function of the judicial power 'is solely, to decide the rights of individuals.'" *Id.* at 2584 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)). He believed the *Flast* test failed to demonstrate that the "Psychic Injury" purportedly suffered by the taxpayer plaintiff was any different than the injury suffered by the general public. *Id.* at 2583.

168. *Id.* at 2584.

169. *Id.*

170. *Id.* at 2587 (Souter, J., dissenting). Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined. *Id.*

171. *Id.* at 2587.

172. *Id.* at 2586. "[T]he plurality's distinction between a 'congressional mandate' on one hand and 'executive discretion' on the other is at once arbitrary and hard to manage." *Id.* (citation omitted). "When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, the taxpayers suffer injury." *Id.* at 2585.

173. *Id.* at 2587 n.3.

174. *Id.* at 2585.

175. *See id.* at 2585-86.

IV. ANALYSIS

A. *The Flast Test*

To understand the impact of *Hein*, one must first fully understand the two-pronged test articulated in *Flast*.¹⁷⁶ Unfortunately, in deciding taxpayer standing cases, the Court has not always been clear in explaining what distinguished the taxpayer plaintiffs with standing from those without standing.¹⁷⁷ Furthermore, the Court's attempts to articulate why the distinctions the test drew between different plaintiffs were relevant to the standing inquiry have not been completely satisfying.¹⁷⁸ However, an examination of the *Flast* decision and its progeny do lend some insight into how the test functions and what purpose it serves.

Each of the three elements of federal-taxpayer standing may be seen as limiting the population of suits that may be heard by the federal judiciary.¹⁷⁹ The requirement that a plaintiff show a concrete injury generally has the effect of narrowing the population of potential plaintiffs who may bring a suit to challenge an action.¹⁸⁰ When the government acts in violation of the law, arguably all citizens are injured because each citizen has an interest in having the government comply with the laws.¹⁸¹ The Court's prohibition on hearing "generalized grievances" reflects the Court's determination that in those cases where the population of plaintiffs includes all citizens, the redress of the grievance is best left to political processes.¹⁸² The *Flast* test is best

176. *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968).

177. *Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring in judgment) ("We have inconsistently described the first element of the 'irreducible constitutional minimum of standing' . . ."); *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it . . .").

178. See Chemerinsky, *supra* note 4 at 691 (describing the distinctions drawn by the *Valley Forge* Court as "senseless"); *Hein*, 127 S. Ct. at 2573 (Scalia, J., concurring in judgment) (describing the distinctions drawn as "utterly meaningless").

179. See *supra* note 24.

180. See *Allen v. Wright*, 468 U.S. 737, 755-56 (1984).

181. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

182. *Id.* ("We have consistently held that a plaintiff raising only a generally available grievance about government - claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and 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.").

viewed as separating these “generalized grievance” cases from those cases where a taxpayer is alleging a more particularized injury.¹⁸³

According to the *Flast* Court, the test was created to require a plaintiff claiming injury as a taxpayer to show that the alleged injury was in fact suffered in his or her capacity as a taxpayer.¹⁸⁴ Specifically, the test was designed to determine if the source of the plaintiff’s alleged injury was the result of an unconstitutional exercise of Congress’s taxing and spending power.¹⁸⁵ The primary distinction that the *Flast* Court sought to draw was not based on the magnitude of the injury allegedly suffered by the plaintiff, but rather the type of the injury suffered.¹⁸⁶ Thus, the *Flast* Court apparently intended to separate plaintiffs truly asserting taxpayer standing from those asserting “citizen standing”¹⁸⁷ by recognizing that a taxpayer is not just complaining about the government acting contrary to the Constitution, but is in fact complaining about an injury greater than that suffered by the public at large, namely the taking and use of his or her money for an unlawful purpose.¹⁸⁸ The manner in which the *Flast* test accomplishes this distinction can be seen by examining each of its elements.

1. *Flast*’s First Prong – The Taxpayer-Tax Power Nexus

The *Flast* test seeks to accomplish the separation of the taxpayer plaintiff from the citizen plaintiff by first requiring the plaintiff to first show a logical link between the plaintiff’s status as taxpayer and the type of enactment challenged.¹⁸⁹ Thus, to satisfy *Flast*’s first prong, a plaintiff must show (1) that he or she is a federal taxpayer and (2) that the challenged act is an exercise of Congress’s taxing and spending power.¹⁹⁰ This first prong requirement separates the taxpayer from the

183. See *Flast v. Cohen*, 392 U.S. 83, 101-03 (1968).

184. *Id.* at 102 (stating the test determines “whether there is a logical nexus between the status asserted and the claim sought to be adjudicated”).

185. *Id.*

186. See *id.* at 101-03. The *Flast* Court focused the inquiry on plaintiff’s status and the nature of the congressional enactment. *Id.* There is no evaluation made of the amount of tax paid by the taxpayer in support of the alleged unconstitutional expenditure. *Id.*

187. As used in this discussion, “citizen standing” refers to the assertion of standing resting on the premise that each citizen of the country has an interest in seeing the government act in accordance with the Constitution. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216-17 (1974).

188. *Flast*, 392 U.S. at 106 (distinguishing the judicially redressable injury of the *Flast* plaintiffs from the generalized grievance of the plaintiff in *Frothingham v. Mellon*, 262 U.S. 447 (1923)).

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

190. *Id.*

mere citizen in two ways. To illustrate how these modes of separation work, let us consider two hypothetical situations where the plaintiff would not have standing. In the first case, a non-taxpaying citizen sues alleging a congressional act exceeds Congress's taxing and spending authority.¹⁹¹ In the second case, a taxpaying plaintiff sues alleging that a congressional exercise of one of Congress's other powers violates the constitution.¹⁹²

a. The Need for a Taxpayer

The non-taxpaying citizen in the first example fails *Flast's* first prong because he simply has no status other than that of citizen to assert claims that can be tied to the exercise of the taxing and spending power.¹⁹³ In effect, the non-taxpaying plaintiff is incapable of suffering any particularized injury by the congressional exercise of the taxing and spending power alone because he has had no money taken from him that could be spent in violation of the Constitution.¹⁹⁴ Since any injury that the non-taxpayer plaintiff suffered as a citizen would necessarily have been suffered by taxpaying and non-taxpaying citizens alike, it is one of the "generalized grievances" shared by all citizens that the Court has consistently rejected as the basis for standing.¹⁹⁵

b. An Exercise of the Taxing and Spending Power

In the second hypothetical, the taxpaying plaintiff would fail because he was not challenging an exercise of the taxing and spending power.¹⁹⁶ In this case, the taxpaying plaintiff can suffer no greater injury

191. In reality, a court would never actually apply the *Flast* test in this case because there is no "taxpayer standing" question since there is no taxpayer, but the hypothetical application of *Flast* to this case can help in understanding the purpose that the test serves.

192. Unlike the first hypothetical, the Supreme Court has addressed cases where the taxpayer plaintiff was not challenging the congressional exercise of the taxing and spending power. *See infra* note 196 (cataloguing these cases).

193. *See Flast*, 392 U.S. at 101 ("[The rules of standing] have been fashioned with specific reference to the status asserted by the party whose standing is challenged and the type of question he wishes to have adjudicated.").

194. *See id.* at 106 ("The taxpayer's allegation . . . would be that his tax money is being extracted and spent in violation of specific constitutional protections . . .").

195. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government - claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and 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.").

196. *United States v. Richardson*, 418 U.S. 166, 168 (denying standing to a taxpayer challenging congressional compliance with the Statement and Accounts Clause, U.S. CONST. art. I,

than the non-taxpaying plaintiff by the unconstitutional act because the source of his injury is not the result of the taking and spending of his money.¹⁹⁷ Without any greater injury than that suffered by the non-taxpaying plaintiff, the plaintiff's complaint in the second case also becomes a "generalized grievance" shared by all citizens.¹⁹⁸ In applying *Flast*'s first prong, the Court has found on several occasions that the action challenged by the taxpayer was not an exercise of Congress's taxing and spending power and rightly denied standing based on the lack of any injury other than a generalized grievance that the government is acting unconstitutionally.¹⁹⁹

c. Expenditures Incidental to Regulatory Programs

In setting forth the first prong of the test, the *Flast* Court stated that it would be insufficient for a plaintiff asserting standing to allege only "an incidental expenditure of tax funds in the administration of an essentially regulatory statute."²⁰⁰ It is more difficult to see how this requirement advances the first prong's purpose of differentiating the taxpayer's injury from the citizen's general grievance.²⁰¹ However, this

§ 9, cl. 7); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 209 (denying standing to taxpayers challenging compliance with the Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2); *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 479-80 (1982) (denying standing to taxpayers challenging an exercise of executive action authorized by Congress under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2).

197. See, e.g., *Schlesinger*, 418 U.S. at 212-29 (rejecting plaintiffs' claim for taxpayer standing where their asserted injury – deprivation of the services of a Congressman who is in the military Reserves – is unrelated to Congress's taxing and spending power, affecting taxpayers and non-taxpayers alike).

198. See *Richardson*, 418 U.S. at 175-77 (recognizing the interest of a taxpayer in knowing how his taxes are spent, but holding that any injury the plaintiff may have suffered from Congress's alleged violation of the Statement and Accounts Clause was undifferentiated from the public at large).

199. See *supra* note 196.

200. *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

201. The *Flast* Court apparently included this requirement in order to distinguish the *Flast* plaintiffs from the group of plaintiffs who were denied standing in *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952). *Flast*, 392 U.S. at 102. However, the *Flast* Court did not actually define what constitutes either "an incidental expenditure" or "an essentially regulatory statute." See *id.* The Supreme Court has never directly stated what is and is not an "incidental expenditure." The Courts of Appeals have attempted to interpret the "incidental expenditure." Compare *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 796 (9th Cir. 1999) (en banc) (defining "an incidental expenditure" as the "type of indirect support that flows to an activity when the government does not spend 'a measurable appropriation or disbursement' solely on the challenged activity") with *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989, 995 (7th Cir. 2006), rev'd, *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007) (describing incidental expenditures as those

requirement does in fact help differentiate the taxpayer's complaint from the citizen's grievance by focusing the standing inquiry on whether the challenged action is actually an exercise of the taxing and spending power or if the plaintiff's claim is really just a disguised challenge to the exercise of one of Congress's regulatory powers.²⁰² If the true source of the challenged action is an exercise of a regulatory power then the taxpayer is in the same position as the non-taxpaying citizen.²⁰³

The incidental expenditure element also serves a practical function. In the case of a plaintiff whose complaint is truly targeted at an abuse of a regulatory power, there is more likely to be a plaintiff who is directly impacted by the exercise of a regulatory power.²⁰⁴ In such cases, a court might believe that the target of the regulation is a "better" party to bring the suit.²⁰⁵ In the case of an act involving purely an expenditure of tax funds without any accompanying regulation, there is less likely a party on the spending side of the enactment who could legitimately claim

where the action which the plaintiff complains has a "marginal or incremental cost to the taxpaying public").

202. The way in which the "incidental expenditure" requirement differentiates valid taxpayer complaints from citizens' generalized grievances becomes apparent when examined in light of the three underlying elements of plaintiff standing: (1) a "concrete and particularized" injury (2) that is "fairly traceable" to the challenged action and (3) likely to be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The unlawful exercise of a purely regulatory power (i.e., one involving no expenditure of funds) would not injure the taxpaying citizen any more than the non-taxpaying citizen because there is no monetary injury to elevate the taxpayer's claim to anything more than a generalized grievance shared by all citizens. *See supra* Parts IV(A)(1)(a)-(b). Therefore, the plaintiff must allege at least the expenditure of tax funds to show a sufficiently concrete injury. The need for plaintiffs to show that the expenditure is more than merely incidental to a regulatory statute supports the requirements that the injury be "fairly traceable" to the defendant's conduct and redressable by the courts. If the challenged activity were merely the expenditure of funds incidental to a regulatory program, there would be great uncertainty as to whether the challenged activity had any impact on the plaintiff's tax burden. Thus, any monetary injury suffered by the taxpayer would not be fairly traceable to expenditures incidental to the challenged activity. Since the cause of plaintiff's alleged injury is not fairly traceable to the activity, there is similar doubt that the court's remedy would be effective at redressing the plaintiff's monetary injury.

203. *See supra* Part IV(A)(1)(b).

204. For example, although the plaintiffs in *Doremus v. Board of Education* lacked standing as taxpayers to challenge the reading of Bible verses in schools because they could not show that any tax funds were spent in furtherance of the regulation, a student at the school who alleged being directly injured by the reading of the Bible in class would have standing to challenge the regulation. *See Doremus v. Bd. of Educ.*, 342 U.S. 429, 432 (1952).

205. David S. Bogen, *Standing Up for Flast: Taxpayer and Citizen Standing to Raise Constitutional Issues*, 67 KY. L.J. 147, 170-71 (1978-79); John J. Egan, III, Note, *Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken*, 63 B.U. L. REV. 717, 739 n.105 (1983) ("[T]hose directly affected by an essentially regulatory statute can bring suit and that there is consequently no need to extend standing to taxpayers who are affected only indirectly.").

direct injury.²⁰⁶ In such a case, a taxpayer would be a better party than a mere citizen because the taxpayer suffered a financial injury whereas all other citizens would only have a generalized grievance shared by all.²⁰⁷

2. *Flast's* Second Prong – A Constitutional Limitation on the Taxing and Spending Power

Flast's second prong requires “a nexus between [the plaintiff’s taxpayer status] and the precise nature of the constitutional infringement alleged.”²⁰⁸ To establish this nexus, a plaintiff must show that the challenged act violates a specific constitutional limitation on the taxing and spending power.²⁰⁹ This second prong also acts to differentiate between the injured taxpayer and the aggrieved citizen.²¹⁰ It does so by assuring that the source of the plaintiff’s injury is from the expenditure of funds itself and not merely the process by which the funds were spent.²¹¹ The second prong thus assures that the challenged action involves an alleged violation of a constitutional provision designed to protect taxpayers.²¹² By requiring a showing that the source of the injury is the expenditure of funds, the second prong assures that the plaintiff’s assertion of unlawful expenditure of funds is not merely a pretext for

206. Bogen, *supra* note 205, at 170-71.

207. *See id.*

208. *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

209. *Id.* at 102-03. The Establishment Clause is the only specific limitation on the taxing and spending power that the Supreme Court has recognized as satisfying *Flast's* second prong. 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.10 (2007). The Ninth Circuit has also recognized the two-year limit on congressional appropriations for use to raise and support an army as a specific limitation on the spending power. *Id.*; U.S. CONST. art. 1, § 8, cl. 12 (“[B]ut no Appropriation of Money to that Use shall be for a longer Term than two years”); *See Western Mining Council v. Watt*, 643 F.2d 618, 633 (9th Cir. 1981) (finding the clause a specific limitation on congressional spending, but dismissing the claim on other grounds).

210. *See Flast*, 392 U.S. at 106 (distinguishing the judicially redressable injury of the *Flast* plaintiffs from the generalized grievance of the plaintiff in *Frothingham v. Mellon*, 262 U.S. 447 (1923)).

211. *Flast's* second prong assures the plaintiff’s injury is more than just a claim that political procedures were not followed by requiring the alleged act violate a “[l]imitation[] on the exercise of power, as opposed to [a] limitation[] on who can appropriately exercise it” Bogen, *supra* note 205, at 171. Since all citizens have an interest in Congress only exercising its delegated powers, the injury resulting from Congress overstepping its bounds is a generalized grievance shared by all. *See id.*

212. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986 at 444 (1990).

challenging the unlawful exercise of another one of Congress's powers.²¹³

B. Drawing a New Line

An examination of the plurality's application of the *Flast* test in *Hein* reveals that the Court added a new distinction between plaintiffs that is inconsistent with the test's purpose of differentiating the taxpayer plaintiff from the aggrieved citizen. In reaching its decision, the *Hein* plurality relies heavily upon the fact that the expenditures were made from general appropriations and were not traceable to a specific, earmarked congressional appropriation²¹⁴ to conclude that the first prong of the *Flast* test was not satisfied.²¹⁵ However, the distinction between expenditures of earmarked funds and expenditures of generally appropriated funds does not clearly affect the concreteness of the plaintiff's injury,²¹⁶ nor does it clearly affect the logical nexus between the plaintiff's status as taxpayer and the type of action challenged so as to leave the complaining taxpayer undifferentiated from the aggrieved citizen.²¹⁷

213. See *Flast*, 392 U.S. at 104-05. The *Flast* Court in distinguishing *Frothingham v. Mellon*, 262 U.S. 447 (1923), stated that the *Frothingham* plaintiff was asserting a state's interest in freely exercising its legislative authority rather than her interest as a taxpayer. *Flast*, 392 U.S. at 104-05. The second prong thus gives the Court additional assurance that the complaint is not a generalized grievance. *Id.* at 106.

214. To understand the analysis that follows, it is important to have a basic understanding of the difference between general appropriations and earmarked appropriations. Congress passes bills that appropriate money for use by the Executive Branch to execute the laws. U.S. GOV'T ACCOUNTING OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATION LAW 1-2 (2004), available at <http://www.gao.gov/special.pubs/3rdeditionvol1.pdf>. Some of these bills have provisions that appropriate specific amounts and restrict the use of those funds for a specified purpose. *Id.* at 2-21. Such an appropriation is referred to as an "earmark." U.S. GOV'T ACCOUNTING OFFICE, GAO/AFMD-2.1.1, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 43 (1993), available at <http://archive.gao.gov/t2pbat6/148403.pdf>. Congress also appropriates funds for general use by Executive Branch offices. GAO-04-261SP at 2-21. Congress does not specifically restrict how these funds may be used. *Id.* These appropriations are "general appropriations" and are provided to give the office the funding sufficient to carry out its statutory purpose. *Id.* at 4-09 to 4-11.

215. *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2568 (2007).

216. To borrow Justice Scalia's terminology, the "Wallet Injury" and "Psychic Injury" are no different for an expenditure of earmarked funds as for an expenditure of generally appropriated funds. See *supra* note 166. The money is still being taken from the taxpayer and spent in an allegedly unconstitutional manner, so the financial "Wallet Injury" is no different. See *Hein*, 127 S. Ct. at 2580 (Scalia, J., concurring in judgment). Similarly, the "Psychic Injury" of the mental displeasure the plaintiffs feel in having tax money spent in violation of the Establishment Clause can hardly be based on the form of the appropriations bill. See *id.*

217. See *infra* Part IV(B)(1).

1. Executive vs. Congressional Action

One justification the plurality provides for the earmarked versus general appropriation distinction is that expenditures of general appropriations are directed by the President rather than Congress.²¹⁸ The President undoubtedly has the power to execute the laws of the United States, including the power to spend moneys appropriated by Congress within the limits of the law.²¹⁹ In the same way that plaintiffs who had previously successfully established standing under the *Flast* test, the *Hein* plaintiffs brought suit against Executive Branch officials.²²⁰ Therefore, the person or organization spending the appropriated funds cannot itself be a meaningful difference in the standing inquiry.²²¹ Of course, there is arguably a difference in who is directing the expenditure of the funds. In the case of an earmarked appropriation, the executive official has less discretion in directing the funds since he must spend them for the identified purpose, whereas in the case of a general appropriation, the executive has greater discretion in directing use of the funds.²²² But is this distinction meaningful for the standing inquiry? As the *Hein* dissent aptly noted, the mere exercise of executive discretion cannot alone deprive a plaintiff of standing since the Court had previously held in *Bowen v. Kendrick* that plaintiffs had standing to challenge a facially valid appropriation statute as applied to grants made pursuant to Executive Branch discretion.²²³ The only apparent difference between *Bowen v. Kendrick* and *Hein* then becomes the distinction between an appropriation bill that explicitly permits executive discretion in funding activities that may violate the Constitution versus a general appropriation bill that does not specifically

218. *Hein*, 127 S. Ct. at 2568.

219. U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

220. *Flast v. Cohen*, 392 U.S. 83 (1968) (suit against the Secretary of Health, Education, and Welfare, et. al); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (suit against the Secretary of Health and Human Services); *Hein*, 127 S. Ct. at 2553 (suit against the Director of White House Office of Faith-Based and Community Issues, et. al.).

221. *Flast*, 392 U.S. at 103 (finding standing to challenge the expenditure by the Executive Branch); *Bowen*, 487 U.S. at 620 (finding standing to challenge grants directed by the Executive Branch); *Hein*, 127 S. Ct. at 2571-72 (finding no standing to challenge the expenditure by the Executive Branch).

222. The Executive Branch may not spend money for a purpose other than that authorized by law. U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”). The statutory language defines what is authorized by law. GAO-04-261SP, *supra* note 214, at 4-9.

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

state that funds may be used for a specific program that may violate the Constitution.²²⁴ However, it is not clear how this difference is meaningful when evaluating the appropriation under *Flast*.

2. Earmarked vs. General Appropriations – A Meaningless Distinction?²²⁵

The plurality states that to treat a general appropriation bill in the same manner as a specific appropriation bill “would stretch the meaning of [‘as-applied challenge’] past its breaking point,” and would establish standing to challenge the underlying appropriation in any case where a discretionary executive action is challenged.²²⁶ The plurality relies on this fear of opening the door to challenges of all discretionary actions to exclude Executive Branch-directed expenditures under *Flast*’s first prong requirement that the challenged act be an exercise of the taxing and spending power.²²⁷ However, this fear is unwarranted. The plurality ignores the fact that *Flast* requires more than simply a challenge to the taxing and spending power and that the “incidental expenditure” element of *Flast*’s first prong and *Flast*’s second prong would act to deny taxpayers standing in many of the challenges to executive action that the plurality fears.²²⁸ In fact, these are specifically the types of generalized grievances that the “incidental expenditure” requirement and the second prong were designed to weed out.²²⁹ By denying any taxpayer plaintiff standing to challenge any executive-directed expenditures of general appropriation, the plurality paints with a

224. Compare *id.* at 2568, with *Bowen*, 487 U.S. at 593-94.

225. Justice Scalia uses the term “meaningless distinction” to describe the plurality’s distinction between earmarked and general appropriations. *Hein*, 127 S. Ct. at 2584 (Scalia, J., concurring in judgment).

226. *Id.* at 2567-68 (plurality opinion).

227. *Id.* at 2568 (“Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents’ lawsuit is not directed at an exercise of congressional power and thus lacks the requisite ‘logical nexus’ between taxpayer status ‘and the type of legislative enactment attacked.’”) (citations omitted).

228. See *id.* at 2567-68 (omitting a discussion of the “incidental expenditure” element); *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989, 995-96 (7th Cir. 2006), *rev’d sub nom.* *Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553 (arguing that the “incidental expenditure” element forecloses attenuated claims against the executive, such as mentioning religion in a speech).

229. The “incidental expenditure” requirement was set up to exclude taxpayer standing to challenge regulatory programs such as the school prayer regulation challenged in *Doremus v. Board of Education*, 342 U.S. 429 (1952). *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). The second prong was designed to deny taxpayer plaintiffs standing in cases such as *Frothingham v. Mellon*, 262 U.S. 447 (1923), where the constitutional limit alleged to be violated was not a provision designed to specifically protect the interests of taxpayers. *Flast*, 392 U.S. at 104-05.

broader brush than is necessary to effectively differentiate the valid taxpayer claim from the generalized grievance.

To illustrate their fear of opening the door to challenges of all executive actions, the plurality provides an example that if challenges to general appropriations were permitted then a criminal defendant could challenge an unconstitutional search or seizure as a taxpayer challenging the appropriation statute for the Federal Bureau of Investigation.²³⁰ To be sure, a criminal defendant under the Court's precedents would not have standing as a taxpayer to challenge the constitutionality of an FBI search or seizure. However, the defendant's lack of standing as a taxpayer in this example is not because the general appropriation bill is not challengeable as an exercise of the taxing and spending power.²³¹ Nor is the defendant's lack of standing due to the fact that the money spent in conducting the search was at the direction of the Executive Branch rather than by congressional earmark.²³² Rather, the taxpayer-defendant would fail *Flast's* requirement that the expenditure not be incidental to a regulatory statute as well as *Flast's* second prong because the Fourth Amendment is not a "specific constitutional limitation[] imposed upon the exercise of the congressional taxing and spending power."²³³ Thus, *Flast* already contained provisions that would greatly

230. *Hein*, 127 S. Ct. at 2568. Usually, a criminal defendant would have standing to challenge the search as the direct victim of the search or seizure because he or she would have alleged an undoubtedly concrete injury to his or her liberty or privacy interests and would not need to assert standing as a taxpayer. *E.g.* *Brendlin v. California*, 127 S. Ct. 2400, 2402 (2007) (holding passenger in car seized as a result of unlawful traffic stop had standing to challenge stop). However, we must assume for the discussion of this example that the defendant is challenging the search or seizure of another person, which he would not have standing to challenge except as a taxpayer.

231. The *Flast* first prong requires (1) the challenged act be an exercise of Congress's taxing and spending power and (2) that the challenged expenditure not be merely incidental to an essentially regulatory statute. *Flast*, 392 U.S. at 102. *See also supra* Part IV(A)(1). Since the challenged act in this hypothetical would be the appropriations bill, which is necessarily an exercise of the taxing and spending power, the first sub-element is satisfied.

232. *See Bowen v. Kendrick* 487 U.S. 589, 619 (1988) (rejecting the government's contention that money spent at direction of the Executive Branch was not an "exercise of congressional authority under the Taxing and Spending Clause.").

233. *Flast*, 392 U.S. at 102-03. This hypothetical illustrates why the *Flast* Court imposed the "incidental expenditure" requirement. The defendant in this hypothetical is in the same position as the plaintiffs in *Doremus v. Board of Education* because the defendant would be unable to show that the amount expended to perform the unlawful search would be any different than the alternative, constitutional law enforcement action. *See Doremus v. Bd. of Educ.*, 342 U.S. 429, 434-35. Also, the victim of the search would be a better plaintiff than a mere taxpayer since the injury suffered to the victim's interest in being free of unreasonable searches and seizures would be more concrete than any interest asserted by a mere taxpayer. *See supra* notes 204-207 and accompanying text. As to the second prong, "the basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy

limit challenges to the discretionary executive activities that the plurality seemed to fear. The new line the plurality draws between general and earmarked appropriations blurs the elements of the *Flast* test by incorporating a new restriction into the taxpayer-tax power nexus requirement that overlaps the functions of the incidental expenditure requirement and second prong but which is much broader in limiting which exercises of the taxing and spending power are challengeable.²³⁴

The plurality's blurring of the *Flast* test's elements is also evident in how they support the assertion that *Flast* has not been extended beyond the Establishment Clause.²³⁵ The plurality notes that the Court has not extended taxpayer standing to sue under the Statement and Account Clause²³⁶ in *United States v. Richardson*²³⁷ or the Incompatibility Clause²³⁸ in *Schlesinger v. Reservists to Stop the War*.²³⁹ However, neither of these cases should be relied upon as supporting the proposition that those provisions are not constitutional limitations on Congress's taxing and spending power. In those cases, the Court held that the plaintiffs failed *Flast*'s first prong because they were not

and security of individuals against arbitrary invasions by governmental officials," not to protect taxpayers from unlawful expenditures of governmental funds. *Camara v. Mun. Ct. of City and County of San Francisco*, 387 U.S. 523, 528 (1967). Thus the Fourth Amendment would not be a specific constitutional limitation on the taxing and spending power. See *supra* Part IV(A)(2).

234. The most notable cases that the distinction between executive discretion and congressional expenditure would leave unchallengeable would be ones such as Executive Branch-directed programs that provide grants to support religious organization for religious purposes, or Executive Branch programs established solely for the purpose of promoting religion.

235. *Hein*, 127 S. Ct. at 2569 ("We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause").

236. U.S. CONST. art. I, § 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

237. 418 U.S. 166 (1974).

238. U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

239. 418 U.S. 208 (1974); *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2569 (2007). In addition to *Richardson* and *Schlesinger*, the plurality also cites *Tilton v. Richardson*, 403 U.S. 672 (1971), as supporting "no taxpayer standing to sue under the Free Exercise Clause," and *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) as supporting "no taxpayer standing under the Commerce Clause." *Id.* The Court in *Tilton* did not apply the *Flast* test and, in fact, did not rule on the issue of the plaintiffs' standing. See *Tilton*, 403 U.S. at 689. The *Tilton* Court evaluated the challenged statute on the merits and did not determine if the Free Exercise Clause could be a constitutional limitation that satisfies *Flast*'s second prong. *Id.* ("Appellants claim that the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants under the Act. Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs."). *DaimlerChrysler*, in applying a *Flast*-like analysis to state expenditures, did hold that the Commerce Clause was not a specific constitutional limitation on state taxing and spending power under *Flast*'s second prong. *DaimlerChrysler*, 547 U.S. at 347-49.

challenging the exercise of Congress's taxing and spending power.²⁴⁰ The plurality reads *Richardson* and *Schlesinger* as largely confining *Flast* to its facts.²⁴¹ This overstates the importance of *Richardson* and *Schlesinger*, which certainly call for rigorous application of *Flast*'s requirement for a challenge to the taxing and spending power but cannot be read as a narrowing of the *Flast* holding.²⁴²

By distinguishing between general appropriation bills and specific appropriations that allow executive discretion, the plurality is narrowing the *Flast* exception by introducing a new element to the first prong requirement for a challenge to the taxing and spending power that did not previously exist.²⁴³ The plurality's concern about allowing taxpayer standing to challenge all executive actions is legitimate and supported by separation-of-powers concerns that have been expressed in earlier decisions.²⁴⁴ However, by drawing the line between congressionally mandated and discretionary executive actions, the plurality would deny standing to a greater number of potential plaintiffs than necessary to address their concern, including a large number of cases where the separation-of-powers concerns are no greater than in a challenge to congressionally mandated expenditures.²⁴⁵ Even accepting the plurality's contention that the incremental expenditure test proposed by the Seventh Circuit is unworkable, a rule could have been set forth that would at least have given taxpayers standing to challenge programs that

240. *United States v. Richardson*, 418 U.S. 166, 175 (1974) ("Respondent makes no claim that appropriated funds are being spent in violation of 'a specific constitutional limitation upon the . . . taxing and spending power'" (quoting *Flast v. Cohen* 392 U.S. 83, 104); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 228 (1974) (finding that plaintiffs did not challenge a congressional action under Art. I § 8).

241. *See Hein*, 127 S. Ct. at 2568-69.

242. Neither *Richardson* nor *Schlesinger* required any narrowing of the *Flast* holding in order to deny those plaintiffs standing because in both cases the plaintiffs failed to challenge an exercise of the taxing and spending power. *Richardson*, 418 U.S. at 175; *Schlesinger*, 418 U.S. at 228.

243. It is noted that the plurality did not determine that the Plaintiffs' challenged action was "an incidental expenditure of tax funds in the administration of an essentially regulatory statute." *Hein*, 127 S. Ct. at 2568 (quoting *Flast*, 392 U.S. at 102). Rather, the plurality rested its determination that the Plaintiffs failed to satisfy the first prong on the distinction between Executive Branch directed expenditures and congressional directed expenditures. *Id.* By doing so, the plurality changed the analysis of the incidental expenditure element from an evaluation of whether the challenged act is regulatory in nature as opposed to a disbursement program to an evaluation of which branch is directing a challenged expenditure.

244. *Id.* at 2570 (noting that allowing standing to challenge all Executive Branch discretionary actions could result in excessive judicial intervention in the executive function).

245. *Id.* at 2586 (Souter, J., dissenting) ("[T]here is no difference on [the separation of power concern] between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one.").

are at their heart spending programs.²⁴⁶ Such a rule would largely address the plurality's separation-of-powers concerns but would also remain true to the *Flast* holding by preserving the distinction between taxpayer complaint and citizen grievance.²⁴⁷ As the Court noted in *Bowen v. Kendrick*, the flow of funds through the executive simply does not make the challenged act any less of an exercise of the taxing and spending power.²⁴⁸

C. Practical Impact of *Hein*

The Court's decision in *Hein* will have consequences for plaintiffs in future lawsuits and could affect the possible form of future congressional appropriations.

1. Effect on Future Plaintiffs

The most direct impact of the Court's decision in *Hein* will likely be taxpayer plaintiffs having even greater difficulty establishing standing in federal courts.²⁴⁹ Although the Court's earlier *Flast* applications had strictly limited taxpayer plaintiff standing to challenges of exercises of the taxing and spending power, *Hein* now adds the new requirement of showing that it is Congress who is directing the spending.²⁵⁰ This will make the already difficult-to-pass *Flast* test even more difficult.²⁵¹ There will simply be no judicial remedy available when the Executive

246. The plurality could have broadened the "incidental expenditure" requirement to extend beyond "regulatory programs" to include those activities for which it expressed concern, such as speech preparation and conference attendance, since such activities would generally not produce a concrete injury to the taxpayer that is fairly traceable to the Executive Branch action. *See id.* at 2571 (2007); *see also supra* note 202.

247. *See supra* Part IV(A).

248. *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988).

249. *Hein*'s restriction on challenges to discretionary acts has already been used to deny plaintiffs standing as taxpayers. *E.g.* *Hinrichs v. Speaker of the House of Representatives of the Ind. General Assembly*, 506 F.3d 584, 598-600 (7th Cir. 2007) (relying on *Hein* to deny plaintiffs standing to challenge use of funds in support of an Indiana General Assembly prayer program on grounds that there was no specific appropriation for the program); *In re Navy Chaplaincy*, 516 F. Supp. 2d 119, 126-27 (D.D.C. 2007) (relying on *Hein* to deny standing as taxpayers to plaintiffs challenging the administration of the Navy chaplaincy program on grounds that no specific congressional appropriation was challenged).

250. *Hein*, 127 S. Ct. at 2568.

251. *Staudt, supra* note 27, at 810 (noting general hostility to federal taxpayer standing in federal courts). *See also supra* note 249.

Branch spends treasury funds in violation of the Establishment Clause unless such spending creates a more directly injured plaintiff.²⁵²

2. Congressional Appropriations Legislation

Hein opens the door for Congress and the President to potentially act cooperatively to violate the Establishment Clause as well as other possible constitutional limitations on the taxing and spending power without the possibility of judicial intervention.²⁵³ If the President initiated a program by executive order that clearly violated the Establishment Clause and funded it through generally appropriated funds, then as long as no party suffered a direct injury as a result of the program there would be no person - citizen or taxpayer - with standing to challenge the program.²⁵⁴ A congressional majority that is either friendly to the President or that supports his cause could endorse the program by simply adjusting the general appropriation for the office upward.²⁵⁵ Of course, there is also the possibility that Congress could either reduce the discretionary funding for the office or include specific provisions in the appropriations bill forbidding the use of funds for the program.²⁵⁶ Thus, in such cases, taxpayers will have to rely exclusively on political processes to vindicate their right not to have their tax dollars “extracted and spent in violation of [the Establishment Clause].”²⁵⁷

V. CONCLUSION

Contrary to the plurality’s assertion that it left *Flast* unchanged,²⁵⁸ the Supreme Court’s decision in *Hein* redraws the boundaries of the

252. See *Hein*, 127 S. Ct. at 2571. A direct injury would require a plaintiff to at least observe “offensive religious materials” where the plaintiff has a “personal connection” with the conduct alleged to violate the Establishment Clause. *Newdow v. Cong. of the U.S.*, 435 F. Supp. 2d 1066, 1073 (E.D. Cal. 2006).

253. See *Hein*, 127 S. Ct. at 2568 (holding that expenditures not expressly authorized or mandated by Congress do not give rise to taxpayer standing).

254. *Id.* Similarly, any congressionally enacted program that was invalidated by the courts could subsequently be made immune to challenge if adopted by the executive and supported by general congressional appropriation. See *id.*

255. Such an action would be unchallengeable by taxpayers because there would be no express congressional mandate on how the funds are spent. *Id.* at 2568.

256. See *id.* at 2571 (“In the unlikely event that any [clearly unacceptable executive actions] did take place, Congress could quickly step in.”). The bill reducing the appropriation or restricting the use of the funds would also need to be presented to the President for approval. U.S. CONST. art. I, § 7, cl. 2. Since appropriations for most programs are passed as part of omnibus bills, any decision to defund a program would likely be subject to compromise.

257. See *Flast v. Cohen*, 392 U.S. 83, 105 (1968).

258. *Hein*, 127 S. Ct. at 2572.

taxpayer-standing test developed in *Flast v. Cohen*.²⁵⁹ Thus, instead of bringing clarity to a muddy area of law, the plurality continues the Court's tradition of being less than completely forthright in its taxpayer standing decisions.²⁶⁰ The plurality's introduction of the earmarked-general appropriation distinction into the first prong of the *Flast* test is not supported by the Court's precedent and creates a higher hurdle for taxpayer plaintiffs to clear than is necessary to address the separation-of-powers concerns that the plurality raised.²⁶¹ By drawing a line based on *who* is spending the money rather than *how* the money is being spent, the plurality undermines the *Flast* test's connection to the three underlying essentials of Article III standing.²⁶² The concreteness and particularity of a taxpayer's alleged injury is unaffected by whether the money is spent as a result of a congressional earmark or a discretionary executive expenditure.²⁶³ Similarly, which governmental branch directs the expenditure of funds does not itself affect the traceability or redressability of a taxpayer's injury.²⁶⁴ Rather, a rule strictly applying the incidental expenditure provision to exclude challenges to executive actions that are not principally spending programs would preserve the *Flast* test's ties to the injury, traceability, and redressability elements while simultaneously addressing the plurality's fears of the judiciary intruding on the domain of the Executive Branch.²⁶⁵

By distinguishing between Executive Branch and congressional action, the plurality opens a loophole that the Executive Branch may exploit without fear of judicial intervention. This new loophole allows Congress to enable Executive Branch violations of the Establishment Clause and also leaves Congress as the sole watchdog overseeing the legality of Executive Branch expenditures.²⁶⁶ Ultimately, the *Hein*

259. See *supra* Part IV(B).

260. See *supra* notes 177-178 and accompanying text.

261. See *supra* Part IV(B)(2).

262. See *Hein*, 127 S. Ct. at 2571-72 (resting the denial of standing on plaintiffs' failure to challenge a congressional enactment).

263. The taxpayer's money is allegedly being extracted and spent in violation of the Establishment Clause in both cases; the only difference is who is causing the injury. See *supra* note 216 and accompanying text.

264. A discretionary distribution of funds by the Executive Branch has the same impact on the fisc as a distribution directed by Congress. Enjoining an Executive Branch official has the same impact of preventing the disbursement regardless of whether it was directed by Congress or made within the bounds of executive discretion.

265. See *supra* notes 243-248 and accompanying text.

266. See *supra* Part IV(C)(2). Congress will now have to explicitly prohibit the use of discretionary appropriated funds if it decides to end an executive-initiated spending program that it believes violates the Establishment Clause. Since *Hein* effectively excludes judicial intervention in

decision makes taxpayers reliant on Congress to check Executive Branch-initiated Establishment Clause violations since the courts will not intervene.

Executive Branch discretionary expenditures by denying taxpayers standing in such cases, Congress remains the only body that can effectively prevent the Executive Branch from funding an unconstitutional program.

