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## Standing in the Way of Clarity: *Hein v. Freedom from Religion Foundation, Inc.*

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STANDING IN THE WAY OF CLARITY: *HEIN V. FREEDOM FROM RELIGION FOUNDATION, INC.*

I. INTRODUCTION AND OVERVIEW

In the waning days of the 2006 Term, the Supreme Court published a series of fractured and controversial decisions, filled with fiery constitutional platitudes and passionate dissents. The most notable cases dealt with the Bipartisan Campaign Finance Reform Act, commonly known as McCain-Feingold,<sup>1</sup> and a teenager extolling the virtues of “Bong Hits 4 Jesus!” to an unsuspecting student audience.<sup>2</sup> Although these cases received the lion’s share of the media coverage,<sup>3</sup> another decision with arguably more importance, showcasing the jurisprudential face of the new Court, slipped out to the presses. The case was *Hein v. Freedom from Religion Foundation, Inc.*,<sup>4</sup> and it dealt with the often misunderstood and maligned issue of taxpayer standing.

Standing is an issue in the back of any practitioner’s mind as he enters the federal courthouse. If you do not have it, you need it. If you have it, your case has just begun. At its heart, standing is the answer to the question “who can sue?”, and over the years it has become a mix of constitutional and prudential considerations affecting every plaintiff and shaping the very role of the courts themselves.<sup>5</sup>

Over time, however, two distinct jurisprudences have sprung up side by side as the Court has moved towards a constitutional basis for its standing requirements. On one hand is the three pronged test of “injury-in-fact,” “causation,” and “redressability,” which is at the heart of nearly every case brought to court.<sup>6</sup> On the other is a shadow jurisprudence that eschews traditional standing tests in favor of a two-pronged analysis aimed at congressional spending and the Establishment Clause in the context of taxpayer suits.<sup>7</sup> This wayward judicial meandering was born in the Court’s landmark

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1. See *FEC v. Wisc. Right to Life*, 127 S. Ct. 2652 (2007).  
2. See *Morse v. Frederick*, 127 S. Ct. 2618 (2007).  
3. See, e.g., Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.  
4. 127 S. Ct. 2553 (2007).  
5. See, e.g., *infra* Part III.  
6. See *infra* Part II.B.5.  
7. See *infra* Part III.D. *et seq.*

decision of *Flast v. Cohen*<sup>8</sup> and has matured into an incoherent and formalistic mess with the decision of *Hein*.<sup>9</sup>

This comment will seek to explore the Court's standing jurisprudence as it has evolved from "cases and controversies" to a modern constitutional doctrine. It will begin with a discussion of the Framers' judiciary and the development of a modern standing doctrine.<sup>10</sup> It will then turn to the area of taxpayer and citizen suits, exploring the judicial landmarks and landmines from *Frothingham v. Mellon* to *Flast*.<sup>11</sup> Next, it will explore the applications and limitations of the *Flast* test during the Burger, Rehnquist, and early Roberts Courts<sup>12</sup> before turning to the most recent decision of *Hein*.<sup>13</sup> The comment will conclude with a look into the future of taxpayer suits, a critical analysis of the *Hein* decision, and a recommendation that the Court reconcile these wayward jurisprudences by abandoning *Flast* and applying a uniform standing analysis across the board.<sup>14</sup>

## II. THE FRAMERS' JUDICIARY AND AN INTRODUCTION TO STANDING DOCTRINE

The Court's standing doctrine is crucial in defining the role the judiciary plays in our system of limited and divided government.<sup>15</sup> Although the role the founders envisioned for the judiciary is up for debate, an originalist analysis<sup>16</sup> of the Constitution's text, key writings and decisions from the founding generation, and the "original meaning"<sup>17</sup> of words and phrases provides a clear guidepost to understanding the Framers' Judiciary.<sup>18</sup> The

8. 392 U.S. 83 (1968).

9. See *infra* Part VI.

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. See *infra* Part V.

14. See *infra* Part VI.

15. For a general discussion of standing doctrine and how it relates to conceptions of judicial power, see the following articles for examples: Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999) (questioning the political application of standing rules); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

16. For a general discussion of originalism as a judicial philosophy, see THE FEDERALIST SOCIETY, *INSIDE ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Regnery 2007).

17. In most originalist schools, the term "original meaning" is a term of art that refers to the original public meaning of the terms in the document at the time of its enactment.

18. A discussion of the overall role of the judiciary is beyond the scope of this comment; therefore, this section will limit originalist analysis to select writings with an emphasis on standing doctrine.

following section will discuss the textual bases from which the standing doctrine emerged and corresponding treatment of the founders' take on the judiciary.<sup>19</sup> Next, this section will trace the evolution of modern standing doctrine from its roots in the English and American experience with writs of certiorari and prohibition to the landmark Supreme Court decision of *Lujan v. Defenders of the Wildlife*.<sup>20</sup>

#### A. From Text to Experience

The necessary starting point for any discussion on standing is the text of the Constitution. Over the last two hundred years, two aspects of this text—one specific and one thematic—have set out the Court's understanding of standing. The specific aspect, generally understood as the textual hook for modern standing doctrine,<sup>21</sup> is the limitation placed on federal judicial power by Article III, section 2, which enumerates a set of justiciable “cases and controversies” over which the federal courts may exercise judicial power.<sup>22</sup> The other basis for standing is the more thematic or structural composition of federal power generally called the “separation of powers.”<sup>23</sup> Although this more thematic element cannot be attributed to a particular clause, it shines through in the structure of the government established by the Constitution: three distinct branches of government, each with a unique function and role.

##### 1. *Article III, Section 2—“Cases and Controversies”*

Article III, section 2, lists nine distinct categories of “cases and controversies” over which the federal judiciary may exercise authority.<sup>24</sup> Although this list does not specifically address the issue of standing,<sup>25</sup> its language has served as a textual hook for the Court in numerous standing decisions.<sup>26</sup> This

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19. See *infra* Part II.A.

20. 504 U.S. 555 (1992); see *infra* Part II.B.

21. See, e.g., Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297 (1979); compare with Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986) (criticizing the Court's continued “constitutionalization” of jurisdictional issues such as standing).

22. UNITED STATES CONST. art. III, § 2.

23. See UNITED STATES CONST. art. I; UNITED STATES CONST. art. II; UNITED STATES CONST. art. III; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

24. UNITED STATES CONST. art. III, § 2; see also Arthur Hellman, *The Heritage Guide to the Constitution* 241 (Edwin Meese III et al. eds., The Heritage Foundation 2005). For a discussion of the constitutional limits on federal judicial power, see Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990).

25. In fact, the word “standing” is not found anywhere in the Constitution.

26. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

list, if nothing else, limits the exercise of judicial power only to those suits which fall within its purview.<sup>27</sup>

The language of Article III sets boundaries on the judiciary. Although the meaning of its terms has been the subject of much scholarly debate both “within and outside of the Court,”<sup>28</sup> from the outset the text is not self-defining and requires context in order to grasp its original meaning.

Federalist Number 80 is instructive. There, Publius<sup>29</sup> noted that each case and controversy enumerated in Article III, section 2, describes a particular situation in which the rights protected by the Constitution are implicated in *actual* disputes between adverse parties.<sup>30</sup> These controversies arise in a variety of situations, including the following: disputes of rights guaranteed by the laws of the United States or its Constitution; disputes between States or citizens of different States; or even maritime disputes.<sup>31</sup> In each instance, the common denominator is an actual conflict. Although this may not directly address the matter of who can sue, it does at least create a strong presumption in favor of actual disputes between parties as envisioned in this grant of authority. The overall structure of the Constitution provides a clearer foundation for interpretation.

## 2. *General Structure of the Constitution: Articles I, II, and III— Separation of Powers Part One*

From the beginning of the text to its last lines, the following three principle themes permeate the Constitution: limited government, federalism, and separation of powers. Although each of these themes is implicated whenever federal power is exercised, regarding standing, none is more pronounced than separation of powers.<sup>32</sup>

Articles I through III establish three distinct, though sometimes overlapping, branches of government; each branch has unique powers and checks on the other branches; each article vests an authority in each branch

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27. See UNITED STATES CONST. art. III, § 2.

28. Compare Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997), with Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

29. “Publius” is the pseudonym adopted by John Jay, Alexander Hamilton, and James Madison in a series of essays directed to the people of New York advocating ratification of the new United States Constitution.

30. THE FEDERALIST NO. 80, at 507 *et seq.* (Alexander Hamilton) (Robert Scigliano ed., Random House 2001).

31. UNITED STATES CONST. art. III, § 2, cl. 1.

32. See generally Scalia, *supra* note 23.

of government.<sup>33</sup> The extent of such authority is not left to conjecture, but is subsequently spelled out in the enumerated authorities the People delegated to each branch.<sup>34</sup> As Madison noted, the division of authority between the branches serves as a check on each branch for the preservation of liberty.<sup>35</sup> Liberty is preserved to the extent that each branch exercises only that lawful authority granted by the Constitution.<sup>36</sup> The importance of this thematic aspect of the Constitution has not been lost on the Court's standing jurisprudence, though from time to time its relevance has ebbed and flowed.<sup>37</sup> Nevertheless, the Federalist Papers provide some guidance as to the judiciary's role in the separation of powers.

"[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."<sup>38</sup> It was to be the least dangerous branch, which on its own lacked the power of the sword or the purse and was to take no active resolution whatsoever.<sup>39</sup> The judiciary is the branch that has neither force nor will, but merely judgment.<sup>40</sup> It was the last place liberty would be seized, so long as the power of judging was separated from the legislative and executive powers.<sup>41</sup> This is consistent with the purpose of separating power between the branches as noted by Madison above, but it is also dependent on the branches only exercising the authority lawfully granted.

The extent of judicial power cuts to the heart of standing, especially when dealing with the muddled issue of taxpayer standing, and here Publius praised the independent judiciary. He repeatedly highlighted the importance of an independent judiciary in a limited Constitution, noting that limitations on the other branches were meaningless if there was no forum of courts

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33. For example, Article I, section 1, states that "[a]ll legislative powers herein granted shall be vested in a Congress." UNITED STATES CONST. art. I, § 1. Likewise Article II, section 1, begins by stating that "[t]he executive power shall be vested in a President . . . ." UNITED STATES CONST. art. II, § 1, and Article III, section 1, vests judicial power in the federal courts, UNITED STATES CONST. art. III, § 1.

34. The author recognizes that the exact extent of the enumerated powers is a source of much litigation. Nevertheless, the starting point for such discussions always, necessarily begins with what powers the constitution specifically enumerates as to each branch.

35. THE FEDERALIST NO. 51, at 330 (James Madison) (Robert Scigliano ed., Random House 2001).

36. *Id.*

37. *See infra* Part III–V.

38. THE FEDERALIST NO. 78, at 496 (Alexander Hamilton) (Robert Scigliano ed., Random House 2001) (writing under the alias Publius, Hamilton wrote about the limited nature of judicial authority).

39. *Id.*

40. *Id.*

41. *Id.* at 497.

whose duty it was to declare acts contrary to the Constitution void.<sup>42</sup> This foundational role of the courts was not meant to render our democratic republic an oligarchy, but instead to recognize the role of the courts to *interpret* laws, with the Constitution as the fundamental law,<sup>43</sup> a point taken up by Chief Justice Marshall in *Marbury v. Madison*.<sup>44</sup>

### 3. *Marbury v. Madison: A Judiciary That Decides the Rights of Individuals*

No discussion of the Court's standing doctrine would be complete without first mentioning *Marbury v. Madison*.<sup>45</sup> The opinion, written by Chief Justice Marshall, prevented a Constitutional crisis and cemented the important role of the judiciary in our national government.<sup>46</sup> Aside from its holding encapsulated in the statement that "an act of the legislature, repugnant to the Constitution, is void,"<sup>47</sup> the decision provides a cogent discussion of judicial power, which provides fodder for both sides of the standing debate.<sup>48</sup>

In a brazen assertion of Anglo-American legal theory, Marshall stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>49</sup> He further defined the judiciary's role in relation to such injuries in

42. *Id.*

43. *Id.* at 498.

44. 5 U.S. 137 (1803); *see infra* at Part II.B.2.

45. David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of Marbury v. Madison*, 57 ALA. L. REV. 1041, 1041 (2006). For a view emphasizing one of the many ways *Marbury* continues to impact the judicial landscape, see Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

46. Marion, *supra* note 45, at 1042.

47. *Marbury*, 5 U.S. at 177.

48. There are two aspects of the *Marbury* decision that can lead to two contrary understandings of judicial power in the realm of standing. One perspective would see the admonition that "[t]he distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed," as an imperative that the judiciary take an active role in enforcing the constitution against all violations. *Id.* at 176. Note also the phrase, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. The other perspective takes to heart the judicial modesty encapsulated in the statement, "[t]he province of the court is, solely, to decide on the rights of individuals. . . ." *Id.* at 170. Both statements provide a contrast, one a statement of raw judicial power to correct constitutional ills and the other a plea for judicial modesty aimed at redressing only those ills that harm individuals. This tension between the judicial desire to correct all constitutional wrongs and the modesty of staying within its constitutional role is a repetitive theme that appears in the Court's standing jurisprudence, and it is visible in the contrast between the general ban on taxpayer standing and the "exceptional" rule of taxpayer suits in the Establishment Clause.

49. *Id.* at 163.

stating, “[t]he province of the court is, solely, to decide on the rights of individuals . . . .”<sup>50</sup> In these two statements, whether known to Marshall or not, the Chief Justice linked the proper exercise of judicial power to requirements of proper parties. The courts are in the business of redressing injuries, and not just any injuries, but the injuries of individuals.<sup>51</sup>

Although such statements taken on their own do not definitively end the debate over how expansive the Court’s standing doctrine should be, they do evidence a clear specific injury requirement. Some no doubt argue that this requirement could be met by congressional creation of individual legal rights and causes of action or other novel theories, such as private attorneys’ general provisions,<sup>52</sup> even if the individual link to such injuries is attenuated at best. Although this argument has merit, the opinion in *Marbury* does contain some guidance as to what sort of injuries it is referring.

In a discussion near the end of the opinion on the fundamental superiority of the Constitution over acts of Congress, Marshall noted three hypothetical situations involving a personally harmed individual.<sup>53</sup> These harms were either monetary or physical.<sup>54</sup> The first hypothetical presented an individual suing to recover money seized under an illegal tariff.<sup>55</sup> Such an injury would be monetary in nature. In reference to the prohibition on ex post facto laws, Marshall discussed an individual with the threat of condemnation to death under such an invalid law,<sup>56</sup> a reference to personal physical injury. The third hypothetical dealing with treason presents much the same harm as the second.<sup>57</sup> While seemingly minor in its implication on substantive injuries, such language is nonetheless instructive as it showcases the Court’s early view on cognizable injuries.

## B. The Evolution of Modern Standing Doctrine—From Founding to *Lujan*

From this brief discussion of the Framers’ Judiciary, this section turns to the evolution of modern standing doctrine. The concept of “standing,” although always present in American law, has not always gone by that name.<sup>58</sup> The following section will provide a brief overview of the historical

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50. *Id.* at 170.

51. *See id.*

52. Eric J. Segall, *Standing Between the Court and the Commentators: A Necessity Rationale for Public Actions*, 54 U. PITT. L. REV. 351, 396 (1993).

53. *Marbury*, 5 U.S. at 179–80.

54. *See id.* at 179.

55. *Id.*

56. *Id.*

57. *See id.*

58. For an article advocating a complete reassessment of the Court’s standing jurisprudence, see Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); see also Eric



shifts in the Constitutional packaging of standing, shifts which correspond to changes in the Court's approach to taxpayer standing. It will begin with a discussion of the early Anglo-American experience with writs of prohibition and certiorari—generally cited in favor of liberal access to the courts by critics of the Court's generalized grievance prohibition.<sup>59</sup> It will proceed to discuss the "creation" of modern standing doctrine during the New Deal era<sup>60</sup> and its evolution during the Warren<sup>61</sup> and Burger<sup>62</sup> Courts. This section concludes with a brief encapsulation of modern standing principles as stated by the Court in *Lujan v. Defenders of Wildlife*.<sup>63</sup>

### 1. *Early English and American Experience—Those Pesky Writs*

Concurring in the 1951 decision of *Joint Anti-Fascist Refugee Committee v. McGrath*,<sup>64</sup> Justice Felix Frankfurter sought to tie the Court's nascent standing doctrine to America's long common law heritage.<sup>65</sup> In particular, he noted that federal courts must

not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was . . . the business of the Colonial courts and the courts of Westminster when the Constitution was framed.<sup>66</sup>

In response to Justice Frankfurter's assertions regarding the historical necessity of standing, many critics, such as the late professor Louis L. Jaffe, attacked his historical understanding, citing the use in English courts of certain prerogative writs during the eighteenth century.<sup>67</sup> The principle position of these scholars was that the English and their American counterparts were quite content to entertain some proceedings in which the party invoking judicial power lacked any personal interest in the relief sought.<sup>68</sup>

This reading of the history has not gone without criticism. Other scholars, such as Bradley S. Clanton, have unearthed insights into the English and

B. Schnurer, "More than an Intuition, Less than a Theory": Toward a Coherent Doctrine of Standing, 86 COLUM. L. REV. 564 (1986).

59. See *infra* Part II.C.1.

60. See *infra* Part II.C.2.

61. See *infra* Part II.C.3.

62. See *infra* Part II.C.4.

63. See *infra* Part II.C.5.

64. 341 U.S. 123 (1951).

65. *McGrath*, 341 U.S. at 151 (Frankfurter, J. concurring).

66. *Id.* at 150.

67. See, e.g., Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1308 (1961).

68. Clanton, *supra* note 28, at 1005.

American use of writs of prohibition and certiorari, which call into question the work of these earlier scholars.<sup>69</sup> Contrary to the opinions of Professor Jaffe and others, a “stranger” was not a person without an interest in the relief sought; a “stranger” was merely a person who was not a party to the litigation at hand.<sup>70</sup>

If anything, the historical record shows that the matter is up for debate in many academic circles. Nevertheless, the Court’s jurisprudence has continued to evolve from the practice of the courts of Westminster, whatever that may have been, to the modern rule of *Lujan*.

## 2. A “New Deal” on Standing

The history of “standing” doctrine is quite meager during the time between the Founding Fathers and the advent of the Progressive-New Deal era, but the requirement of proper parties was still present. The Court was very much concerned with the adjudication of concrete and personal rights during this time—dismissing suits in which the parties were not proper to litigate the issues raised.<sup>71</sup> That said, most scholars generally tie the emergence of constitutional standing requirements to the changes on the Court and in the country during the 1920s, 1930s, and 1940s.<sup>72</sup>

One of the first cases espousing something closely resembling modern standing was *Frothingham v. Mellon*,<sup>73</sup> discussed in more detail below,<sup>74</sup> which the Court decided in the early 1920s. Nevertheless, it was during the next three decades, that the Court, led by Justice Frankfurter, began linking the requirement of “standing” to the “case and controversy” aspects of Article III and our common law heritage.<sup>75</sup> During this time period, the requirement of a legally cognizable injury began to take shape, but it would take another fifty years of doctrinal turmoil until the Court settled on a clear—if not always consistent—definition and justification of the requirements of standing.

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69. See *id.* (providing a thorough critique of Professor Jaffe’s position).

70. *Id.* at 1010–11 (citing S.M. Thio, *Locus Standi and Judicial Review* 81–82 (1971)).

71. See, e.g., Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004).

72. See, e.g., Woolhandler, *supra* note 71, at 689–90; Sunstein, *supra* note 28, at 166; John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395 (1988).

73. 262 U.S. 447 (1923).

74. See *infra* Part III.A.

75. Clanton, *supra* note 28, at 1001–02.

### 3. *Liberalization of Standing—The Warren Court*

The Court took a renewed interest in the doctrine of standing during the Warren era, expanding the categories of injuries that would meet the various standing requirements.<sup>76</sup> This expansive notion came to the forefront in the case of *Flast v. Cohen*,<sup>77</sup> discussed below.<sup>78</sup> During this era, the Court developed a malleable “legal wrong” test, which allowed many people affected by governmental decisions, including, for example, beneficiaries of federal programs, to bring a challenge against the government.<sup>79</sup> Standing was liberally granted no matter how remote the interests of individuals affected by certain regulatory decisions.<sup>80</sup> This included radio listeners who sued because of insufficient regulatory protections and a whole host of environmental litigators.<sup>81</sup>

It was not just the Court that began loosening the rules of standing, Congress also got into the act. During this period, Congress began creating numerous “citizen suit” provisions in federal regulatory statutes, which in effect allowed private individuals to “prosecute” federal agencies for failure to obey congressional mandates.<sup>82</sup> The constitutionality of these provisions was not addressed by the Court until *Lujan*; however, these marked expansions of standing did inevitably lead to a tightening and doctrinal strengthening of standing doctrine during the Burger Court.

### 4. *Doctrinal Resurgence—The Burger Court*

During the reign of the Burger Court, justices such as future Chief Justice Rehnquist began linking the standing doctrine to the overall Constitutional scheme of separation of powers.<sup>83</sup> Citing the important relationship between access to the courts and judicial power, these justices began toning down the rhetoric of the Warren era and generally tightened standing limits.<sup>84</sup> These Burger era decisions laid the foundation for what would become the Court’s test in *Lujan*.

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76. Sunstein, *supra* note 28, at 183.

77. 392 U.S. 83 (1968).

78. See *infra* Part III.D.

79. Sunstein, *supra* note 28, at 183.

80. *Id.* at 184.

81. *Id.* at 183.

82. *Id.* at 192–93.

83. Dana S. Treister, *Standing to Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689, 693 (1994).

84. *Id.* For a case that highlights a somewhat anomalous broad grant of standing during the Burger Court, see *United States v. SCRAP*, 412 U.S. 669 (1973).

5. *Lujan v. Defenders of Wildlife: The Modern Test*

As one of the seminal standing cases of the Rehnquist era, *Lujan* set out an irreducible Constitutional minimum for the exercise of judicial power—one which could not be abdicated simply by the creation of a congressionally approved cause of action.<sup>85</sup> The case dealt primarily with statutory “citizen suit” provisions and environmental regulation.<sup>86</sup> In striking these provisions, the Court, per Justice Antonin Scalia, stated that standing contained three constitutional elements derived both from its source in the “case and controversy” requirements of Article III and the general separation of powers theme served throughout the Constitution.<sup>87</sup>

First, the plaintiff must have suffered an “injury in fact”—that is, an invasion of a legally protected interest which is both “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>88</sup> Second, there must be a causal connection between the injury and the conduct complained of—in other words, the injury must be “fairly traceable” to the defendant’s actions.<sup>89</sup> Finally, it must be “likely” as opposed to “speculative” that the injury will be redressed by a favorable decision.<sup>90</sup>

In sum, the answer to “what’s it to you?”<sup>91</sup> is a person who suffered a real injury that can be traced to the defendant’s alleged malfeasance and that the court can do something about. Generalized grievances—as the citizen suits in question were termed—were out of the question as hallmarks of judicial overreaching inconsistent with the purposes of separation of powers.<sup>92</sup> Having reached the modern test for standing, the next section turns to the twin issues of taxpayer and citizen standing.

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85. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). For criticism of the Court’s holding and analysis, see Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993). For a critique of the Court’s increasingly formalistic application of the various standing rules, including those derived from *Lujan*, see David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004).

86. *Lujan*, 504 U.S. at 562.

87. *Id.* at 560–61.

88. *Id.* at 560.

89. *Id.*

90. *Id.* at 561.

91. This is the crucial question to all standing matters in determining why a party should have a right to bring suit in federal court. See Scalia, *supra* note 23, at 882.

92. *Lujan*, 504 U.S. at 577.

### III. TAXPAYER AND CITIZEN SUITS—LANDMARKS AND LANDMINES: FROM FROTHINGHAM TO FLAST

Taxpayer and citizen suits have the perplexing distinction of being both one of the most stable *and yet* most uncertain areas of standing law.<sup>93</sup> This section will provide the historical introduction to the Court's taxpayer and citizen standing jurisprudence. It will begin with three cases that marked out the pre-*Flast* consensus on taxpayer and citizen suits: *Frothingham v. Mellon*,<sup>94</sup> *Ex parte Levitt*,<sup>95</sup> and *Doremus v. Board of Education*.<sup>96</sup> It will end with a discussion of the case that many either consider a constitutional landmine or doctrinal landmark, *Flast v. Cohen*.<sup>97</sup>

#### A. *Frothingham v. Mellon*<sup>98</sup>

Every discussion concerning taxpayer standing inevitably begins with the landmark decision of *Frothingham v. Mellon*. In 1923, the Court decided whether a citizen as a federal taxpayer had a right to enjoin the execution of a federal appropriations act on the twin grounds that it was invalid and would result in taxation for an unconstitutional purpose.<sup>99</sup> In a unanimous decision written by Justice Sutherland, the Court rejected arguments in favor of taxpayer standing and established the general bar against taxpayer

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93. See generally Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771 (2003). This area is stable in the sense that results tend to be the same—taxpayers lack standing—yet, its overarching justification has shifted over time, leading to considerable confusion among courts and commentators about the true nature of such suits. See *infra* Part VI.A–B.

94. See *infra* Part III.A.

95. See *infra* Part III.B.

96. See *infra* Part III.C.

97. See *infra* Part III.D.

98. 262 U.S. 447 (1923). The Court decided this case with a companion case, *Massachusetts v. Mellon*. *Id.* That case, brought under the Court's original jurisdiction, dealt with a State's ability to challenge the constitutionality of a congressional enactment. *Id.* at 483. The Court held that it lacked jurisdiction over the matter because it was not justiciable in character. *Id.* The Court went on to say that the question was "political and not judicial in character, and therefore [was] not a matter which admits of the exercise of the judicial power." *Id.* Such a decision, voiding a federal enactment because of a State's objection, was akin to prior instances where the issue was non-justiciable because of its political nature. *Id.* at 481–82 (citing *Georgia v. Stanton*, 73 U.S. 50 (1867)). Decisions resolving the constitutionality of congressional enactments as applied to states only arise where proprietary rights were involved. *Id.* at 481–82. Such proprietary rights are almost exclusively related to a state's sovereignty. *Id.* at 482 (citing *Missouri v. Holland*, 252 U.S. 416 (1920); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (dealing with the right of dominion of the State over the air and soil within its domain)).

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

suits<sup>100</sup>—an unconditional bar that would remain in effect for nearly forty years.<sup>101</sup>

Frothingham challenged the constitutionality of a federal act commonly known as the Maternity Act.<sup>102</sup> The act aimed at reducing infant and maternal mortality rates and generally protecting the health of mothers and their children.<sup>103</sup> The act appropriated funds to those states that consented to its application.<sup>104</sup> The lower court dismissed the initial suit brought by Frothingham, but she appealed the case to the Supreme Court for resolution of the standing issue.<sup>105</sup> Her challenge amounted to an attack on the act because it would increase her burden of taxation, now and in the future, in furtherance of an unconstitutional program.<sup>106</sup>

This case was the first time that the Court addressed the matter of taxpayer standing in federal courts.<sup>107</sup> After noting the existence, and acceptance, of such standing in the municipal context, the Court rejected general federal taxpayer standing.<sup>108</sup> Contrasting municipal and federal governments, the Court noted that the relationship between a taxpayer and the federal government was of a far different order and magnitude than that of the city and its taxpayer.<sup>109</sup> The question was one of scale and scope, and a citizen's interest in his moneys in the federal treasury was simply one shared with millions of others.<sup>110</sup> His interest was so minute and indeterminable that it could not afford a basis for equitable relief.<sup>111</sup>

The Court lacked the power "per se to review and annul acts of Congress on the grounds that they are unconstitutional."<sup>112</sup> Such review only existed where there was some *direct injury* suffered or threatened, which presented a justiciable issue, resting on that act.<sup>113</sup> Judicial review was merely a negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of enforcing an individual's legal right.<sup>114</sup> To interpose judicial judgment on a congressional enactment, absent a direct injury, would require the Court to assume a position of authority over the

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100. *Id.* at 488.

101. *See* *Flast v. Cohen*, 392 U.S. 83, 91 (1968).

102. *Frothingham*, 262 U.S. at 479.

103. *Id.*

104. *Id.*

105. *Id.* at 478.

106. *Id.* at 486.

107. *Id.*

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

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 488.

113. *Id.*

114. *Frothingham*, 262 U.S. at 488.

acts of another co-equal department, an authority that the Court clearly lacked.<sup>115</sup>

Although the holding in *Frothingham* was quite clear—no federal taxpayer standing<sup>116</sup>—its reasoning has been subject to much scholarly debate.<sup>117</sup> The principle question is whether the Court established a prudential or constitutional bar to taxpayer suits. Language in the decision supports both conclusions. As the Court itself would note in *Flast v. Cohen*, the repeated references to the minute interest of federal taxpayers in tax moneys indicated a prudential concern—a concern more associated with the magnitude of the interest than any sort of constitutional analysis.<sup>118</sup> On the other hand, language in the opinion clearly cited the separation of powers rationale taken up by later decisions as well as the need for a direct injury to trigger judicial review.<sup>119</sup> Although some on and off the Court have found the decision to create a merely prudential bar,<sup>120</sup> subsequent decisions citing *Frothingham*, such as *Ex parte Levitt*<sup>121</sup> and *Doremus*<sup>122</sup> indicate a far different understanding.

#### B. *Ex parte Levitt*<sup>123</sup>—Barring Citizen Suits

Concerns about taxpayer standing and ideologically motivated litigation go hand in hand with the Court's citizen suit jurisprudence.<sup>124</sup> Decided over a decade after *Frothingham*, the Court's brief per curiam opinion in *Ex parte Levitt* provides some indication of the constitutional limitation on citizen standing. Like its predecessor, however, the Court in *Ex parte Levitt* failed to indicate whether it sought to embrace wholeheartedly the constitutional rationale implicit in its rejection of citizen suits.

115. *Id.* at 489.

116. *Id.* at 488.

117. See, e.g., John J. Egan III, *Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken*, 63 B.U. L. REV. 717, 730 (1983); Segall, *supra* note 52, at 357–58; Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302–03 (1961). For a general discussion on the prudential and constitutional nature of the bar on generalized grievances, see Ryan Guilds, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863 (1996).

118. *Flast v. Cohen*, 392 U.S. 83, 93 (1968).

119. “To [allow taxpayer standing] 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.” *Frothingham*, 262 U.S. at 489.

120. See, e.g., *Flast*, 392 U.S. at 94; Jaffe, *supra* note 117, at 302–03.

121. See *infra* Part III.B.

122. See *infra* Part III.C.

123. 302 U.S. 633 (1937).

124. For a discussion about the “democratic” aspects of broad standing grants to citizens and taxpayers, see Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997).

Albert Levitt filed a pro se suit challenging the appointment of Hugo Black to the Supreme Court.<sup>125</sup> He alleged that Black's appointment and confirmation were null and void because Black was ineligible to serve on the Supreme Court under Article I, section 6, clause 2, of the Constitution.<sup>126</sup> Levitt's only interest was that of a United States citizen.<sup>127</sup>

In refusing to address the substance of his claim and implicitly reiterating the separation of powers rationale from *Frothingham*, the Court held that citizenship alone was insufficient to entitle a private litigant to seek an exercise of the judicial power to determine the validity of an executive or legislative action.<sup>128</sup> The Court rebuked such claims that are general and common to all members of the public, citing the need for a private individual to show that he has sustained or is immediately in danger of sustaining a direct injury as the result of the challenged action before the Court would invoke judicial review.<sup>129</sup> Citizen suits, like federal taxpayer suits before them, were rejected as means of challenging constitutional impropriety.

C. *Doremus v. Board of Education*<sup>130</sup>—Taxpayers and the Establishment Clause

In 1952, the Court decided another taxpayer standing suit, *Doremus v. Board of Education*.<sup>131</sup> This time, the Court dealt with an Establishment Clause challenge to circumstances strikingly more pronounced than in the later decision of *Flast v. Cohen*.<sup>132</sup> In language clearly couched in constitutional terms, the Court held that a plaintiff invoking the federal court as a taxpayer could only successfully pursue that action if his injury were a direct dollars and cents injury, not mere religious difference.<sup>133</sup>

A New Jersey statute provided for the reading of five Old Testament verses at the opening of each school day.<sup>134</sup> The plaintiffs in the case, *Doremus* and *Klien*, challenged the act in state court as taxpayers and citizens.<sup>135</sup> They alleged that the act violated the Establishment Clause of the First

125. *Ex parte Levitt*, 302 U.S. at 633.

126. *Id.* "No senator or representative shall, during the [t]ime for which he was elected, be appointed to any civil [o]ffice under the [a]uthority of the United States, which shall have been created, or the [e]moluments whereof shall have been [i]ncreased, during such time . . . ." UNITED STATES CONST. art. 1, § 6, cl. 2.

127. *Ex parte Levitt*, 302 U.S. at 633.

128. *Id.*

129. *Id.*

130. 342 U.S. 429 (1952).

131. *Id.* at 430.

132. *Id.*

133. *Id.* at 434.

134. *Id.* at 430.

135. *Id.*



Amendment as applied to the states.<sup>136</sup> The trial court and the New Jersey Supreme Court upheld the act, despite the jurisdictional issue of standing.<sup>137</sup> Upon reaching the Supreme Court, the Court confronted the “case and controversy” limitations on its own jurisdiction, prompting another examination of taxpayer standing.<sup>138</sup>

As previously held in *Frothingham*, the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain, and indirect to furnish a basis for appeal to the power of the federal courts.<sup>139</sup> A party must be able to show not only that a statute is invalid, but that he sustained or is immediately in danger of sustaining some “direct injury as a result of enforcement, and not merely that he suffers in some indefinite way in common with people generally.”<sup>140</sup> Without limiting a taxpayer’s ability to restrain unconstitutional acts that resulted in a direct pecuniary loss, the Court reiterated that what was true for challenges of federal actions was equally true of challenges to state actions.<sup>141</sup> The only time a taxpayer suit may meet the “case and controversy” burden was when it was a “good-faith pocketbook action,” not merely a religious difference.<sup>142</sup> It was not a question of motivation, but possession of the requisite financial interest injured by the unconstitutional action.<sup>143</sup>

Couched in the constitutional language of modern standing, the *Doremus* decision stands in marked contrast to the subsequent decision of *Flast v. Cohen*.<sup>144</sup> Nevertheless, it was in the context of the *Flast* decision that the Court once again addressed the matter of taxpayer standing and the Establishment Clause—moving away from an emphasis on the interests of the parties towards the seriousness of the issue at hand.<sup>145</sup>

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136. *Doremus*, 342 U.S. at 430.

137. *Id.* at 432.

138. *Id.* at 434. It is worth noting that the Court declined to address the issue of taxpayer standing in State court, confining its analysis to its own constitutional limitations. A similar circumstance presented itself in the *Cuno* decision, discussed below; though that case dealt with removal to federal court, not appeal. See *infra* Part IV.C.

139. *Doremus*, 342 U.S. at 433.

140. *Id.* at 434 (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)).

141. *Id.*

142. *Id.*

143. *Id.* at 435.

144. See *infra* Part III.D.

145. Dissenting in *Doremus*, Justice Douglas argued in favor of standing because of the importance of the issues at stake. *Doremus*, 342 U.S. at 435 (Douglas, J., dissenting). He continued, “where the clash of interests is as real and as strong as it is here, it is odd indeed to hold there is no case or controversy within the meaning of art. III, [§]2 of the Constitution.” *Id.* at 436. Douglas’s broad notion of standing in *Doremus* would reemerge later in his *Flast* concurrence. See *infra* Part III.D.3.

D. *Flast v. Cohen*<sup>146</sup>—Taxpayers and the Establishment Clause Revisited

Flast and several other individuals filed suit in federal court to enjoin allegedly unconstitutional expenditures under the Elementary and Secondary Education Act of 1965.<sup>147</sup> The complaint alleged that Congress appropriated federal funds to finance instruction and purchase supplies in religious schools.<sup>148</sup> The plaintiffs alleged that this violated the Establishment and Free Exercise Clauses of the First Amendment.<sup>149</sup> Each plaintiff made clear in their complaints that standing rested “solely on their status as federal taxpayers.”<sup>150</sup> A three judge panel addressed the standing issue and, relying on *Frothingham*, ruled that the plaintiffs lacked standing to sue.<sup>151</sup> It was not long until the Supreme Court became involved and once again took up the issue of taxpayer standing in Establishment Clause context.<sup>152</sup>

*Flast* constituted a monumental shift from the earlier precedents of *Frothingham* and *Ex parte Levitt*. Setting aside the constitutional implications of those decisions, all the justices agreed that the bar on taxpayer suits was prudential—the difference came with how each justice would respond to that conclusion.<sup>153</sup> The majority and concurring opinions favored a grant of standing, at least in the context of First Amendment Establishment Clause cases, while Justice Harlan took a more restrained approach, critical of the majority’s holding, which advocated standing only where Congress expressly authorized via a private attorney general provisions in federal statutes.

This section will begin with Chief Justice Warren’s opinion for an eight-to-one Court in *Flast*. It will cover the Court’s assessment of the *Frothingham* bar,<sup>154</sup> before addressing the new test for taxpayer standing adopted by the Court.<sup>155</sup> After discussing the majority opinion, this section will highlight the two contrasting opinions by Justice Douglas<sup>156</sup> and Justice Harlan.<sup>157</sup>

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146. 392 U.S. 83 (1968).

147. *Flast v. Cohen*, 392 U.S. 83, 85 (1968).

148. *Flast*, 392 U.S. at 85–86.

149. *Id.* at 86.

150. *Id.* at 85.

151. *Id.* at 88.

152. *Id.*

153. *Id.*

154. *See infra* Part III.D.1.

155. *See infra* Part III.D.2.

156. *See infra* Part III.D.3.

157. *See infra* Part III.D.4.

### 1. *Taking a Fresh Look at the Frothingham Bar*

Chief Justice Warren began by reexamining the holding of *Frothingham* in order to decide whether it served as a constitutional or prudential bar to taxpayer standing.<sup>158</sup> Noting that the barrier to taxpayer standing in that case had never been breached, the Chief Justice nonetheless determined that it was merely a prudential rule of judicial restraint.<sup>159</sup> The Court in *Frothingham* gave conflicting signals on the nature of the rule, yet for the Chief Justice the concrete reasons rested primarily on something less than constitutional footing.<sup>160</sup>

The statements made by the *Frothingham* Court about the relatively minute nature of the taxpayer's bill indicated that she had been denied standing, not because of her taxpayer status, but because her tax bill was simply not large enough.<sup>161</sup> Such statements and reasoning were purely indicative of policy considerations.<sup>162</sup> Because there was nothing inherently constitutional in the *Frothingham* decision, minimizing separation of powers concerns, the Chief Justice saw no bar per se to taxpayer suits and turned to the purpose behind standing and justiciability.<sup>163</sup>

### 2. *Special Standing Rules—Two Prongs, One Test*

Referring to the constitutional language of standing, the Chief Justice stated that the Article III "case and controversy" requirement limited judicial power.<sup>164</sup> Those words required the courts to resolve real conflicts, defining the precise role of the courts in the constitutional order.<sup>165</sup> These words embodied the concept of justiciability.<sup>166</sup> Certain suits simply lacked justiciability, one example being when a plaintiff lacked standing.<sup>167</sup>

The doctrine of justiciability, particularly standing, had become a blend of constitutional and policy considerations, and it was often difficult to ascertain which concerns governed.<sup>168</sup> In this case, the government argued that the constitutional scheme of separation of powers presented an absolute bar to taxpayer suits because they involved no more than a mere disagreement

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158. *Flast*, 392 U.S. at 91.

159. *Id.* at 93.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 94.

164. *Flast*, 392 U.S. at 94.

165. *Id.* at 95.

166. *Id.*

167. *Id.*

168. *Id.* at 97.

about the spending of tax money.<sup>169</sup> Analyzing the role standing played in the federal system, the Court dispatched and dismissed this argument and in doing so created a new two pronged test for taxpayer standing.<sup>170</sup>

a. Concrete adverseness and the personal stake of taxpayers

The crux of standing doctrine was “whether the party seeking relief had ‘alleged such a personal stake in the outcome of the controversy as to assure [the] concrete adverseness that sharpen[s] presentation of the issues.’”<sup>171</sup> Whether a party had standing was distinct from whether the issue was itself justiciable—that is, not a political question—which would implicate the separation of powers.<sup>172</sup> The key to standing was a personal stake in the litigated matter, not the substantive issues.<sup>173</sup>

Practically ignoring the role of the Separation of Powers doctrine, Chief Justice Warren went on to assert a taxpayer’s stake in the potential unconstitutional use of his or her tax dollars.<sup>174</sup> A taxpayer could surely have a personal stake in federal taxing and spending programs; therefore, Article III could not pose a bar to standing.<sup>175</sup> The sufficiency of that stake was the subject of the remainder of the Court’s opinion.

b. The Establishment Clause and beyond?

The Court established a two pronged test aimed at defining a taxpayer’s stake for standing in the Establishment Clause context.<sup>176</sup> First, the taxpayer must establish a logical link between that status (as taxpayer) and the type of legislative enactment attacked.<sup>177</sup> Thus the taxpayer could only challenge spending provisions because those provisions explicitly relied on tax monies.<sup>178</sup> Second, the taxpayer must establish a nexus between that status and the precise nature of the alleged constitutional infringement.<sup>179</sup> In other words, the challenged enactment must exceed a specific constitutional limi-

169. *Id.* at 98.

170. *Flast*, 392 U.S. at 98–101.

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

172. *Id.* at 100.

173. *Id.* at 101.

174. *Id.*

175. *Id.*

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

177. *Id.*

178. *Id.* The opinion added the following caveat: this standard did not cover those actions of an essentially regulatory nature. *Id.*

179. *Id.*

tation placed on the taxing and spending power, and not an action that just generally exceeded Congress's enumerated powers.<sup>180</sup>

The Chief Justice noted that the plaintiffs in this case satisfied the new two pronged test and that such a holding was consistent with the prior decision of *Frothingham*.<sup>181</sup> Here, the plaintiffs alleged a congressional appropriation violated a specific prohibition on the exercise of that power, that is, the Establishment Clause.<sup>182</sup> The Court distinguished the allegations in *Frothingham* as a challenge to an exercise of spending, but only alleging that it violated the general separation of powers between the Federal government and the States<sup>183</sup> and not some other as yet undefined explicit prohibition. Whether the Constitution contained other specific spending prohibitions was left for future cases,<sup>184</sup> though the language indicated that the Court was leaning heavily towards recognizing more "specific" limitations.<sup>185</sup>

### 3. *Douglas and a Breach of the Social Contract Suit*

Contrary to the distinguishing posture of the majority, Justice Douglas was the lone justice in favor of discarding the *Frothingham* rule altogether.<sup>186</sup> Noting that *Frothingham* was rendered at the height of the *Lochner* era with its forays into substantive due process, Justice Douglas observed that the Court at that time was coming dangerously close to becoming a "Council of Revision."<sup>187</sup> A contrary holding in *Frothingham* might well have accentuated an "ominous trend to judicial supremacy."<sup>188</sup> Interestingly, Justice Douglas stated that the Court no longer exercised that kind of power; therefore, the risks for the *Frothingham* Court were no longer present.<sup>189</sup>

Praising the work of so-called "private attorneys general" at the state level, Justice Douglas noted that although a taxpayer's stake may be minimal, the service they perform was valuable.<sup>190</sup> In a statement embracing an active (as opposed to reactive) judiciary, he stated that the role of the Court

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180. *Id.* at 103.

181. *Id.*

182. *Flast*, 392 U.S. at 104.

183. *Id.* at 104–05.

184. *Id.* at 105.

185. Contrary to the majority's openness to additional limitations on spending authority, Justices Stewart and Fortas understood the decision to limit standing *only* to First Amendment Establishment Clause cases. *Id.* at 114 (Stewart, J., concurring); *id.* at 115 (Fortas, J., concurring).

186. *Id.* at 107 (Douglas, J., concurring).

187. *Id.*

188. *Flast*, 392 U.S. at 107.

189. *Id.*

190. *Id.* at 109.

was not merely to serve as referee, but to protect individuals.<sup>191</sup> The judiciary was the essential component to the operation of the federal system, particularly in light of the growing complexities of government bureaucracy.<sup>192</sup> “The Constitution even with the judicial gloss it ha[d] acquired plainly [wa]s not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive [b]ranches.”<sup>193</sup> The judiciary should, therefore, open its doors to such private attorneys general to guard the rights of individuals against the powers of the government.<sup>194</sup> Because of the good that such taxpayer standing could accomplish, Justice Douglas would not have limited such standing to the First Amendment but would have allowed it in all circumstances to challenge the constitutionality of government action.<sup>195</sup>

#### 4. *Lone Dissenter—Harlan’s Critic*

In marked contrast to the rest of the Court, Justice Harlan declined to breach the *Frothingham* bar, absent some form of Congressional action.<sup>196</sup> For Harlan, the core issue presented to the Court was not purely a matter of abstract judicial rules, but rather, something at the heart of the Court’s role in the constitutional structure.<sup>197</sup> *Frothingham*, he stated, was correctly decided, but the reasoning was faulty.<sup>198</sup>

The issue was not whether a taxpayer *could* have standing, but rather, whether a taxpayer *as taxpayer alone* could have standing.<sup>199</sup> Basically, taxpayer suits were identical to citizen suits.<sup>200</sup> Both are public actions brought to vindicate public rights.<sup>201</sup> Justice Harlan believed that the Court correctly held that *Frothingham* did not present a constitutional bar to such suits be-

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191. *Id.* at 110.

192. *Id.* at 111.

193. *Id.*

194. *Flast*, 392 U.S. at 111. Interestingly enough, Justice Douglas’s opinion sounded a very Lockean approach to taxpayer standing. This approach would view the taxpayer’s right to sue as predicated on a breach of the social contract. Because a taxpayer, like all citizens, was a party to the contract, he would be able to vindicate breaches of the constitution through suit in federal court. For a further discussion of this idea, see Donald L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52 (1985).

195. *Flast*, 392 U.S. at 114 (Douglas, J., concurring).

196. *Id.* at 130 (Harlan, J., dissenting).

197. *Id.* at 116.

198. *Id.*

199. *Id.* at 117.

200. *Id.* at 118.

201. *Flast*, 392 U.S. at 118.

cause it was clear that Article III was not offended by such suits per se.<sup>202</sup> Where he differed was on what to do with such a determination.

Whereas Justice Harlan was willing to accept that a taxpayer as taxpayer *may* have sufficient injury to meet the Article III standing requirements, he was not willing to allow a broad grant of standing absent explicit Congressional authorization for such suits.<sup>203</sup> His approach emphasized the risks to the separation of powers.<sup>204</sup> Because of the extraordinary nature of public actions, it was Congress's role—not the Court's—to authorize such suits.<sup>205</sup> It would take several years, but later justices would pick up on Harlan's concerns, and the Court would move away from this broad acceptance of taxpayer standing.<sup>206</sup>

#### IV. *FLAST* OVER TIME: THE GIFT THAT KEEPS ON GIVING

It was not long after *Flast* was decided that the Court began to cut back on its broad grant of taxpayer standing. This section will catalogue a series of cases throughout the Burger, Rehnquist, and early Roberts eras dealing with *Flast* and taxpayer standing. First, it will discuss the limitation of *Flast* to the Establishment Clause context during the Burger Court and the ever increasingly formalistic application of the *Flast* test.<sup>207</sup> Next, it will note a single reemergence of *Flast* during the Rehnquist era.<sup>208</sup> It will conclude with a look at taxpayer standing during the first term of the Roberts Court.<sup>209</sup>

##### A. The Burger Court

The Burger Court moved quickly to tighten the reins on taxpayer standing. By 1974, the Court had limited *Flast* to the Establishment Clause with two decisions rendered the same day—*United States v. Richardson*<sup>210</sup> and *Schlesinger v. Reservists Committee to Stop the War*.<sup>211</sup> Both suits tested the outer limits of *Flast* and answered the question left unanswered by the *Flast* majority: whether the Court would recognize additional limitations on congressional spending. Eight years later, the Court reassessed the continued vitality of *Flast* in the Establishment Clause context. As the Court had done

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202. *Id.* at 120 (Harlan, J., dissenting).

203. *Id.* at 130.

204. *See id.* at 132.

205. *Id.* at 130.

206. *See infra* Part IV.A.

207. *See infra* Part IV.A.

208. *See infra* Part IV.B.

209. *See infra* Part IV.C.

210. 418 U.S. 166 (1974).

211. 418 U.S. 208 (1974).

previously, it declined to liberally apply the *Flast* precedent, prompting some commentators to declare *Flast* a dead letter.<sup>212</sup>

1. *Limiting Flast to the Establishment Clause*—United States v. Richardson and Schlesinger v. Reservists Committee to Stop the War

In *Richardson*, the Court addressed whether a party had standing as a federal taxpayer when challenging certain public reporting provisions of the Central Intelligence Agency Act of 1949 as in violation of Article I, section 9, clause 7 of the Constitution.<sup>213</sup> In rejecting the party's standing, Chief Justice Burger, writing for the Court, stated that a violation of the Accounting Clause did not fall within the explicit limits on congressional spending that *Flast* had required.<sup>214</sup>

The same day as *Richardson*, the Court also decided *Schlesinger*. In *Schlesinger*, the Court was confronted with whether reservists had standing either as citizens or as taxpayers to challenge members of Congress who were also reservists under the Incompatibility Clause.<sup>215</sup> Again Chief Justice Burger authored an opinion that reaffirmed the traditional bar to citizen suits from *Ex parte Levitt* and declined to expand *Flast* to this new context.<sup>216</sup>

Discussing the decision in *Flast*, Chief Justice Burger acknowledged that it had created an exception to the previously impenetrable holding of *Frothingham*; however, that exception was very narrow: when a party falls outside the narrow exception of *Flast* the near absolute bar of *Frothingham* still governs.<sup>217</sup> Applying *Flast*'s two pronged analysis in *Richardson*, he found *Richardson* failed on both prongs.<sup>218</sup> The same was true of the reservists in *Schlesinger*.<sup>219</sup> Without establishing the requisite nexus, *Richardson* and the reservists' claims were wholly undifferentiated from a claim com-

212. John J. Egan III, *Analyzing Taxpayer Standing in Terms of General Standing Principles: The Road Not Taken*, 63 B.U. L. REV. 717, 741 (1983).

213. *United States v. Richardson*, 418 U.S. 166, 167–68 (1974). Article I, section 9, clause 7 provides that: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” UNITED STATES CONST. Art. I, § 9, cl.7 (emphasis added).

214. *Richardson*, 418 U.S. at 170.

215. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 209 (1974). Article I, section 6, clause 2 provides that: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time.” UNITED STATES CONST. Art. I, § 6, cl. 2.

216. See *Schlesinger*, 418 U.S. at 209.

217. *Richardson*, 418 U.S. at 173.

218. *Id.* at 174–75.

219. *Schlesinger*, 418 U.S. at 228.



mon to all members of the public<sup>220</sup>—a claim that the government abides by the Constitution.

Discussing citizen suits in *Schlesinger*, the Chief Justice stated that to have standing, a party must have a concrete injury.<sup>221</sup> This was what citizen suits lacked.<sup>222</sup> A citizen's claim was undifferentiated from interests shared by all other citizens, thus making the injury mere speculation.<sup>223</sup> Reaffirming the traditional rejection of citizen standing from *Ex parte Levitt*, the Chief Justice acknowledged that such suits presented merely abstract claims.<sup>224</sup>

A concrete personal injury, as required for standing, eliminates speculation by presenting real plaintiffs who are affected by the court's actions and reducing the risk of abuse by the judiciary.<sup>225</sup> Critical of expansive citizen standing, the Chief Justice went on to state that abstract citizen complaints created the "potential for abuse of the judicial process" which would "distort the role of the Judiciary" and lead to "government by injunction."<sup>226</sup> Standing requirements, therefore, limited the courts to actual controversies so as not to lead to judicial grandstanding.<sup>227</sup>

In both cases, the Court acknowledged that if the parties were ultimately unable to assert their claims, arguably no one would be able to litigate the matter.<sup>228</sup> Nevertheless, the Court stated that the Constitution did not provide a cause of action in the legal process for every wrong; rather, another mechanism—that is, the democratic process—was available to redress the claim.<sup>229</sup> The inability to sue because a party lacked standing did not deny the plaintiff a remedy; instead, he could pursue the political process, slow and cumbersome as it may be.<sup>230</sup> Alluding to the separation of powers rationale, the Court noted that granting standing to taxpayers (or citizens) would have meant the framers created something akin to an "Athenian democracy" to oversee the conduct of the government by lawsuits in federal courts, and not a representative government responsible electorally to the public.<sup>231</sup>

Through its holdings in *Richardson* and *Schlesinger*, the Court essentially slammed the door on expansive readings of the *Flast* precedent, and it seemed that *Flast* had been limited to the Establishment Clause. It would not

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220. *Richardson*, 418 U.S. at 177; *Schlesinger*, 418 U.S. at 228.

221. *Schlesinger*, 418 U.S. at 217.

222. *Id.*

223. *Id.*

224. *Id.* at 220.

225. *Id.* at 221.

226. *Id.* at 222.

227. *Schlesinger*, 418 U.S. at 222.

228. *Richardson*, 418 U.S. at 179; *Schlesinger*, 418 U.S. at 227.

229. *Richardson*, 418 U.S. at 179; *Schlesinger*, 418 U.S. at 227.

230. *Richardson*, 418 U.S. at 179.

231. *Id.*

be long, however, before the Court would turn its eye on the heart of the *Flast* precedent, revisiting the Establishment Clause.

2. *Formalism over Substance: Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*<sup>232</sup>

Eight years after the *Richardson* and *Schlesinger* decisions, the Court took up an Establishment Clause challenge brought under *Flast*. Writing for the majority in *Valley Forge*, then-Justice Rehnquist addressed whether a federal taxpayer had standing to challenge Executive Branch action that allegedly violated the Establishment Clause.<sup>233</sup> In a tortured example of rhetorical formalism,<sup>234</sup> the Court applied the two pronged test of *Flast*, holding that Americans United failed to meet the requisite nexus for taxpayer standing.<sup>235</sup>

In 1949, Congress enacted the Federal Property and Administrative Services Act, which authorized federal agencies to dispose of surplus government property.<sup>236</sup> In particular, the Act authorized the Secretary of Health, Education, and Welfare to dispose of real property for various educational uses.<sup>237</sup> In 1973, the federal government closed the Valley Forge General Hospital and declared it “surplus property” under the Act.<sup>238</sup> Later that same year, the Secretary conveyed the seventy-seven acre property to the Valley Forge Christian College (VFCC).<sup>239</sup>

VFCC was a religious non-profit institution organized under the Assemblies of God.<sup>240</sup> It intended to use the property for the training of men and women for “Christian service as either ministers or laymen.”<sup>241</sup> Americans United for the Separation of Church and State, Inc. (“Americans United”) learned of this conveyance and filed suit in federal district court, chal-

232. 454 U.S. 464 (1982).

233. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 470 (1982).

234. For a critical view of the Court’s holding and reasoning in *Valley Forge*, see Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C. L. REV. 798 (1983). For a view supportive of the Court’s reasoning, see William P. Marshall & Maripat Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at Valley Forge*, 11 HOFSTRA L. REV. 63 (1982).

235. *Valley Forge*, 454 U.S. at 482.

236. *Id.* at 466.

237. *Id.* at 467.

238. *Id.* at 467–68.

239. *Id.* at 468.

240. *Id.*

241. *Valley Forge*, 454 U.S. at 468.

lenging it under the Establishment Clause.<sup>242</sup> The sole basis for standing was as taxpayers under the Court's earlier decision of *Flast*.<sup>243</sup>

Justice Rehnquist began by stating that standing placed constitutional and prudential limitations on the exercise of federal judicial power.<sup>244</sup> Article III required that a plaintiff show some actual or threatened injury, which is fairly traceable to the challenged action and likely to be redressed by a favorable decision, ensuring that the courts acted consistent with a system of separated powers.<sup>245</sup> Prudential concerns also affected standing, such as the prohibition on third party claims or generalized grievances,<sup>246</sup> but these prudential concerns were not to be confused with the independent requirements of Article III.<sup>247</sup>

The analysis of Americans United's suit necessarily began with the general ban on taxpayer suits from *Frothingham* and *Doremus*.<sup>248</sup> Referencing *Flast*'s abrogation of this rigid prohibition, Justice Rehnquist noted that the plaintiff must show that (1) Congress exercised its taxing and spending power and (2) it did so in violation of a specific prohibition on such power, that is, the Establishment Clause.<sup>249</sup>

Americans United failed the first prong of the *Flast* test for two reasons.<sup>250</sup> First, Americans United did not even challenge the congressional enactment at issue, merely discretionary executive action.<sup>251</sup> Second, even if congressional action had been challenged, Congress was acting under the Property Clause, Article IV, section 3, clause 2, and not the taxing and spending provisions of Article I, section 8.<sup>252</sup>

Although Americans United claimed the Constitution had been violated, they failed to identify any personal injury as a result of this error—other than mere psychological disagreement.<sup>253</sup> “[S]tanding [wa]s not measured by the intensity of the litigant's interest or the fervor of his advocacy.”<sup>254</sup> Americans United lacked any cognizable interest, economic or oth-

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242. *Id.* at 469.

243. *Id.*

244. *Id.* at 471.

245. *Id.* at 472.

246. *Id.* at 474.

247. *Valley Forge*, 454 U.S. at 475.

248. *Id.* at 476–77.

249. *Id.* at 478–79.

250. *Id.* at 479.

251. *Id.*

252. *Id.* at 480. Article IV, section 3, clause 2 provides that: “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.” UNITED STATES CONST. ART. IV, § 3, cl. 2.

253. *Valley Forge*, 454 U.S. at 485.

254. *Id.* at 486.

erwise, sufficient to confer standing independent of *Flast*.<sup>255</sup> Judicial power required more for its invocation than important issues and a willing litigant.<sup>256</sup>

Criticism of the majority's rigid formalism came almost immediately, taking to heart the words of Justice Brennan's biting dissent.<sup>257</sup> Standing for Justice Brennan was a purely jurisdictional matter that should be determined prior to any assessment of the substantive issues of a plaintiff's case.<sup>258</sup> He accused the majority of effectively using "standing" to slam the courthouse door when it should be deciding constitutional issues.<sup>259</sup> The Constitution ensures rights, and Article III was designed to provide a hospitable forum to assert those rights.<sup>260</sup> The framers did not use the modern language of standing, but they clearly meant that the Constitution's beneficiaries should enjoy rights legally enforceable in courts of law.<sup>261</sup>

According to Justice Brennan, the majority had wrenched *Flast* from its moorings, drawing distinctions that were specious at best.<sup>262</sup> There was no distinction between the legislative and executive branches under the Establishment Clause, and the comparison of "spending clause" versus "property clause" distinction was equally irrelevant.<sup>263</sup> For Brennan, the majority's formalism drew a distinction where one did not logically exist.<sup>264</sup> There was no reasonable difference between a congressional act giving cash to a religious group to build a facility and simply giving the group a facility.<sup>265</sup> Nevertheless, the majority's decision would draw such a line.

#### B. The Rehnquist Court—*Flast* Reborn: *Bowen v. Kendrick*<sup>266</sup>

Six years after *Valley Forge*, the Court breathed new life into *Flast*, if only for a moment.<sup>267</sup> In *Bowen v. Kendrick*, the Court faced another taxpayer suit presenting an Establishment Clause challenge, this time of a congres-

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255. *Id.*

256. *Id.* at 489.

257. *See, e.g.,* Nichol, *supra* note 234.

258. *Valley Forge*, 454 U.S. at 490 (Brennan, J., dissenting).

259. *Id.*

260. *Id.* at 493–94.

261. *Id.* at 494.

262. *Id.* at 510.

263. *Id.* at 511.

264. *Valley Forge*, 454 U.S. at 511 (Brennan, J., dissenting). This appeal to logic in the Court's taxpayer standing jurisprudence would later re-emerge in Justice Scalia's opinion in *Hein*, see *infra* Part V.C.2, albeit coming to the opposite conclusion.

265. *Id.*

266. 487 U.S. 589 (1988).

267. For an article generally discussing the Court's Establishment Clause holding in *Bowen*, see Margo R. Drucker, *Bowen v. Kendrick: Establishing Chastity at the Expense of Constitutional Prophylactics*, 64 N.Y. L. REV. 1165 (1989).

sional enactment.<sup>268</sup> After years of defeats, *Bowen* would be one of the few successful instances in which the Court applied the holding in *Flast* to grant taxpayer standing.<sup>269</sup>

A group of federal taxpayers filed an action in federal district court challenging the constitutionality of the Adolescent Family Life Act (AFLA) under the Establishment Clause.<sup>270</sup> When the Court addressed the issue, it held that the taxpayers in this case possessed standing consistent with the decision in *Flast*.<sup>271</sup>

Although the Court reiterated the narrowness of *Flast*,<sup>272</sup> this challenged action was saved because Congress had exercised taxing and spending power, unlike the *Valley Forge* decision and despite the existence of discretionary executive action.<sup>273</sup> Somewhat ironically in light of *Valley Forge*, Chief Justice Rehnquist, writing for the majority, reiterated that it was no less a challenge to congressional action when the congressional funds flowed through and were administered by executive agencies whose specific actions were the alleged violations.<sup>274</sup> After all, *Flast* itself was a suit directed at a secretary for administering the challenged law.<sup>275</sup> AFLA was, at its root, a spending bill, and the First Amendment challenge was consistent with the rigors of *Flast*.<sup>276</sup> Leaving *Flast* intact, the Court continued to the substantive merits of the plaintiff's claim.

### C. The Roberts Court—Additional Limits on *Flast*: *DaimlerChrysler Corp. v. Cuno*<sup>277</sup>

Years after the *Bowen* decision, and after several changes in membership, the Court attacked the issue of taxpayer standing in the 2006 decision of *DaimlerChrysler Corp. v. Cuno*. In a unanimous opinion, the newly minted Roberts Court, with Chief Justice Roberts authoring the opinion, held that plaintiffs asserting a Commerce Clause<sup>278</sup> claim as state taxpayers lacked standing in federal court.<sup>279</sup>

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268. *Bowen v. Kendrick*, 487 U.S. 589, 597 (1988).

269. *Id.* at 591.

270. *Id.* at 597.

271. *Id.* at 619.

272. *Id.* at 618.

273. *Id.* at 619.

274. *Bowen*, 487 U.S. at 619.

275. *Id.*

276. *Id.* at 619–20.

277. 126 S. Ct. 1854 (2006).

278. U.S. CONST. art. I, § 8, cl. 3.

279. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (2006). In a brief concurrence, Justice Ginsburg agreed that the opinion was consistent with the prior holding in *Fro-*

The city of Toledo and State of Ohio sought to encourage DaimlerChrysler to expand its Jeep production facilities in Ohio.<sup>280</sup> To do so, the State offered various tax breaks and tax incentives to DaimlerChrysler.<sup>281</sup> A group of Ohio taxpayers challenged those credits as violations of the Commerce Clause.<sup>282</sup>

In an opinion expected to be a major dormant Commerce Clause challenge,<sup>283</sup> the Court sidestepped the substantive issues of the case, focusing on the matter of standing.<sup>284</sup> Noting the important separation of powers function served by standing, Chief Justice Roberts began by stating that standing was an essential limit of federal jurisdiction and necessary to maintain the proper division of power among the branches of the federal government.<sup>285</sup> This case called into question the Court's prior taxpayer standing cases, and it was there that the new Chief began his opinion.<sup>286</sup>

The Court repeatedly held that a federal plaintiff's claim to standing by virtue of his taxpayer status did not establish standing under Article III.<sup>287</sup> *Frothingham* made it clear that a federal taxpayer's interest in the moneys of the treasury was "comparatively minute and indeterminable" as well as "remote, fluctuating, and uncertain."<sup>288</sup> The injury sustained as a taxpayer was not concrete and particularized, but instead a grievance that a taxpayer suffered in some indefinite way common to people generally.<sup>289</sup> This rationale applied equally to federal and state taxpayer suits that made their way into federal court<sup>290</sup>—something to which the *Doremus* decision had previously alluded.<sup>291</sup> The Chief Justice stated that affording State taxpayers such standing would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of State fiscal administration.<sup>292</sup> Such a role was inconsistent with the modest role of the judiciary envisioned in Article III.<sup>293</sup>

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*thingham*, yet refused to endorse the additional limitations on standing found by the Court. *Cuno*, 126 S. Ct. at 1869 (Ginsburg, J., dissenting).

280. *Cuno*, 126 S. Ct. at 1859.

281. *Id.*

282. *Id.*

283. *Sue Ann Mota, DaimlerChrysler v. Cuno—Plaintiffs Lack Standing to Challenge State Franchise Tax Credit in Federal Court, According to the Supreme Court*, 29 N.C. CENT. L.J. 66, 66 (2006).

284. *Cuno*, 126 S. Ct. 1854.

285. *Id.* at 1861.

286. *Id.* at 1860.

287. *Id.* at 1862 (quoting *Mass. v. Melton*, 262 U.S. 447, 486–87 (1923)).

288. *Id.*

289. *Id.*

290. *Cuno*, 126 at 1863.

291. *See supra* Part III.C.

292. *Cuno*, 126 S. Ct at 1864.

293. *Id.*

The plaintiff attempted to rely on the narrow exception of *Flast*, claiming that a Commerce Clause challenge was just as vital as the Establishment Clause.<sup>294</sup> This argument fell on deaf ears as the Chief Justice noted that whatever the interest an individual had in the Commerce Clause, it was quite different from the right not to contribute three pence for support of any religious establishment.<sup>295</sup> The Court in *Flast* understood the injury to the Establishment Clause to be the very extraction and spending of tax money in aid of religion, extending that to the Commerce Clause would be at odds with the narrowness of *Flast*, making the federal courts fora for a taxpayer's generalized grievances.<sup>296</sup> Such a decision would be inconsistent with both federalism and separation of powers as well as beyond the narrow limits of the *Flast* holding.<sup>297</sup>

V. IS *FLAST* DEAD, YET—*HEIN V. FREEDOM FROM RELIGION FOUNDATION, INC.*

After thirty-nine years of *Flast*—confusion, tumult, and all—the Roberts Court took another shot at the issue of taxpayer standing in *Hein v. Freedom from Religion Foundation, Inc.*<sup>298</sup> In this case, the Court had a chance to provide clarity and coherence to an area of law sorely lacking in both regards. Instead, the Court left things just as murky as when they began—an area governed more by the rule of five than the rule of law and logic.

This section will catalogue *Hein's* journey from the White House office of Faith Based Initiatives to the Supreme Court. It will begin with the facts of the case,<sup>299</sup> followed by a discussion of Judge Richard Posner's Seventh Circuit decision.<sup>300</sup> Next, it will discuss the Supreme Court's decision.<sup>301</sup> This section will cover the plurality's opinion written by Justice Samuel Alito<sup>302</sup> and Justice Scalia's scathing concurrence.<sup>303</sup> It will conclude with a word on Justice Souter's dissent.<sup>304</sup>

294. *Id.*

295. *Id.*

296. *Id.* at 1865.

297. *Id.*

298. 127 S. Ct. 2553 (2007).

299. *See infra* Part V.A.

300. *See infra* Part V.B.

301. *See infra* Part V.C.

302. *See infra* Part V.C.1.

303. *See infra* Part V.C.2.

304. *See infra* Part V.C.3.

### A. Facts and Legal Fiction

In 2001, President Bush issued an executive order creating the White House Office of Faith-Based Initiatives.<sup>305</sup> The initiative aimed at helping religious organizations take advantage of federal financial assistance programs for social services.<sup>306</sup> In many respects, it amounted to several seminars and conferences held for religious groups on the application process for federal funds, and it sought to put these groups on equal footing with other secular organizations.<sup>307</sup> No congressional legislation authorized the creation of this office or *specifically* appropriated moneys for these activities.<sup>308</sup> Bush created the office entirely within the executive branch.<sup>309</sup>

The plaintiffs were members of a non-stock corporation opposed to government endorsement of religion known as the Freedom from Religion Foundation.<sup>310</sup> They filed suit in the United States District Court for the Western District of Wisconsin, alleging that the conferences violated the Establishment Clause.<sup>311</sup> The fact that the Plaintiffs were federal taxpayers was the only asserted basis of standing.<sup>312</sup> The district court dismissed the suit for want of standing under the Supreme Court's decision in *Flast*.<sup>313</sup> Shortly thereafter, the matter came before the Seventh Circuit on appeal.

### B. Posner Gets First Crack at It

Judges Richard Posner, Kenneth Ripple, and Diane Wood comprised a three judge panel that faced the question of whether a taxpayer could ever have standing under Article III to litigate an alleged violation of the Establishment Clause unless Congress had earmarked money for the program or activity challenged.<sup>314</sup> Writing for the majority, Judge Posner held that taxpayers have standing to challenge an executive branch program, alleged to promote religion that is financed by a congressional appropriation, even if

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305. *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2559 (2007) (plurality opinion).

306. *Hein*, 127 S. Ct. at 2559 (plurality opinion).

307. *Id.* at 2559–60.

308. *Id.* at 2560.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Hein*, 127 S. Ct. at 2561 (plurality opinion).

313. *Id.*

314. *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 990 (7th Cir. 2006) *rev'd sub nom.* *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007). For an initial reaction to the *Chao* decision, see Debra L. Lowman, *A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action*, 30 SEATTLE U. L. REV. 651 (2007).



the program is created entirely within the executive branch, by an executive order.<sup>315</sup> Judge Ripple dissented, stating that the court went beyond established Supreme Court precedent in order to create a dramatic expansion of taxpayer standing.<sup>316</sup>

Judge Posner began with the Court's decision in *Flast*.<sup>317</sup> That Court noted that standing doctrine was comprised of both constitutional and prudential considerations.<sup>318</sup> Prudential considerations, such as the ban on generalized grievances, did not stand in the way of challenges to congressional expenditures under the taxing and spending clause of Article I, section 8, at least as it related to favoritism or aid to religion.<sup>319</sup> Although *Valley Forge* limited the holding in *Flast*, the essential premise that taxpayers had standing to challenge congressional action under Article I, section 8, in violation of the Establishment Clause, remained.<sup>320</sup>

The *Bowen* decision followed a narrow reading of *Flast* as not requiring taxpayers to show that a specific congressional expenditure violates the Establishment clause, but that the congressional action under Article I, section 8, was *necessary* for the violation to occur.<sup>321</sup> In that way, so long as the allegedly unconstitutional action, even if committed by the executive, flows from a congressional exercise of the Tax and Spend Clause, the taxpayer had standing under *Flast*.<sup>322</sup> According to Posner, the difference between explicit congressional funding of a program and general appropriation could not possibly be controlling.<sup>323</sup> Because congressional appropriations funded the challenged executive action in this case, the plaintiffs established sufficient standing to maintain their suit.<sup>324</sup>

Penning a stirring dissent, Judge Ripple chastised the majority for its flippant disregard of Supreme Court precedent.<sup>325</sup> He stated that the majority had gone far beyond established Supreme Court precedent in order to create a dramatic expansion of taxpayer standing.<sup>326</sup> Taxpayer standing pushed the envelope of traditional standing doctrine, and so it was with great hesitation that the Supreme Court had allowed *any* taxpayer standing suits.<sup>327</sup> *Flast* created a narrow exception, which had been limited to its facts since its in-

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315. *Chao*, 433 F.3d at 996–97.

316. *Id.* at 997 (Ripple, J., dissenting).

317. *Id.* at 996 (majority opinion).

318. *Id.* at 991.

319. *Id.* at 992.

320. *Id.*

321. *Chao*, 433 F.3d at 993.

322. *Id.*

323. *Id.* at 994.

324. *Id.* at 996–97.

325. *Id.* at 997 (Ripple, J., dissenting).

326. *Id.*

327. *Chao*, 447 F.3d at 997 (Ripple J. dissenting).

ception.<sup>328</sup> The action in question here was not congressional action in the strictest sense, but rather executive discretion.<sup>329</sup> The majority's decision expanded the narrow concept of taxpayer standing to the point where it could not logically be distinguished from citizen standing—long decried by the Court.<sup>330</sup>

After the panel rendered its decision, the whole Seventh Circuit decided whether to grant en banc review of the case. In denying review, Chief Judge Joel Flaum penned a brief concurrence denying review, not necessarily because the opinion was correct, but because the law was so unclear.<sup>331</sup> In his estimation, the case was ripe for the Supreme Court to step in and resolve the obvious tension engendered by prior Court decisions.<sup>332</sup> Similarly, Judge Frank Easterbrook noted that his vote to deny rehearing was not based on the accuracy of the panel's decision.<sup>333</sup> The principal difficulty was that the decisions on taxpayer standing were so arbitrary—put plainly, where is the concrete issue?<sup>334</sup> Arbitrariness was built into the doctrine, and it was not for the Seventh Circuit to resolve.<sup>335</sup> Noting the futility of further review, Judge Easterbrook stated that there was no logical way to determine the extent of an arbitrary rule.<sup>336</sup>

### C. The Supreme Court Wades into the Confusion

In late February 2007, the Court heard oral arguments in *Hein v. Freedom from Religion, Inc.* Months later, in one of the last opinions rendered during the 2006–07 term, the Court delivered a sharply divided—and sharply worded—opinion denying standing and reversing the Seventh Circuit's panel decision. Justice Alito wrote the plurality opinion for himself, Justice Kennedy, and Chief Justice Roberts.<sup>337</sup> Concurring in the plurality's result but disputing its reasoning, Justice Scalia wrote a blunt critique, which Justice Thomas joined.<sup>338</sup> Although the justices denying standing highlighted the very real differences in their respective jurisprudence, the dissenting justices evidenced doctrinal unanimity, signing onto a single opinion written by Justice Souter.<sup>339</sup> The following section dissects the various *Hein* opi-

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328. *Id.* at 998.

329. *Id.*

330. *Id.* at 1000.

331. *Id.* at 988 (Flaum, C.J., concurring).

332. *Id.* at 988.

333. *Choa*, 447 F.3d at 989 (Easterbrook, J., concurring).

334. *Id.*

335. *Id.* at 990.

336. *Id.*

337. *See infra* at Part V.C.1.

338. *See infra* at Part V.C.2.

339. *See infra* at V.C.3.

nions, beginning with Justice Alito's plurality. It will cover Justice Scalia's lengthy concurrence and conclude with a look into Justice Souter's dissent.

### 1. *The Plurality—Minimalist Ascendancy*

Beginning with language reminiscent of *Frothingham* and *Marbury*, Justice Alito stated that the federal courts are not empowered to seek out and strike down any governmental act that they deem repugnant to the Constitution.<sup>340</sup> Rather, federal courts sit solely to determine the rights of individuals.<sup>341</sup> Justice Alito added that as a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable personal injury required by Article III.<sup>342</sup> Over time, the Court has consistently held that this interest is too generalized and attenuated.<sup>343</sup> Judge Alito went on to note that the interests of a taxpayer are, in essence, the interests of the public-at-large. Deciding a constitutional claim based solely on taxpayer standing would not resolve a judicial controversy but instead would assume power over the other branches, a power the courts do not possess.<sup>344</sup>

Turning to *Flast*, Justice Alito stated that the decision carved out a narrow exception to the general bar on taxpayer suits.<sup>345</sup> Justice Alito distinguished *Hein* from *Flast* by stating that *Flast* dealt with expenditures pursuant to an *express* congressional mandate and appropriation.<sup>346</sup> As the Court noted in *Valley Forge*, *Flast* was limited to exercises of *congressional authority*—not executive action.<sup>347</sup> Unlike *Flast*, the plaintiffs here did not challenge congressional appropriation.<sup>348</sup> The expenditures were the result of pure executive discretion.<sup>349</sup> Because the expenditures were not expressly authorized or mandated by any specific congressional enactment, the plaintiffs failed to qualify for taxpayer standing under *Flast*.<sup>350</sup>

*Flast*, as precedent, was limited to congressional actions, and the plurality declined the invitation to extend its holding to discretionary executive action despite the clear Establishment Clause implications.<sup>351</sup> Justice Alito

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340. *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2562 (plurality opinion).

341. *Id.*

342. *Id.* at 2563.

343. *Id.*

344. *Id.*

345. *Id.* at 2564.

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

347. *Id.* at 2566.

348. *Id.*

349. *Id.*

350. *Id.* at 2568.

351. *Id.*

noted that even *Flast* distinguished “incidental expenditures of tax funds in the administration of an essentially regulatory statute” from the Congressional expenditures.<sup>352</sup> Furthermore, in the four decades that followed, the *Flast* decision had yet to be extended beyond its facts.<sup>353</sup> To extend it to executive activity would subject every federal action to an Establishment Clause challenge in federal court.<sup>354</sup> Such a broad reading would ignore the requirement of *Flast*’s first prong, as well as raise serious separation of powers issues.<sup>355</sup>

Critical of *Flast*, Justice Alito believed that it failed to give sufficient weight to separation of powers concerns raised by any grant of taxpayer standing.<sup>356</sup> Constitutional requirements for standing played an essential role in the separation of powers.<sup>357</sup> Relaxation of those requirements would fundamentally alter the inter-branch relationships—a major shift away from democratic governance.<sup>358</sup> It was not the role of the courts to be continuous monitors of the soundness of executive actions and to “govern[] by injunction.”<sup>359</sup>

Declining to engage in a wholesale reexamination of *Flast*, Justice Alito deferred to the principle of stare decisis, which, short of overruling precedent, does not always require such precedent be extended to the limit of its logic.<sup>360</sup> The plurality declined to extend *Flast* to this circumstance, yet at the same time declined to overrule it.<sup>361</sup> The plurality left *Flast* as they found it and decided only the case at hand: whether or not *Flast* should be extended.<sup>362</sup>

## 2. *Scalia’s Concurrence—Logic and the Soul of the Law*

Coming out swinging, Justice Scalia began by stating that *Flast* is “wholly irreconcilable with the Article III restrictions on federal-court juris-

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352. *Hein*, 127 S. Ct. at 2568 (plurality opinion).

353. *Id.* at 2568–69.

354. *Id.* at 2569.

355. *Id.*

356. *Id.*

357. *Id.* at 2570.

358. *Hein*, 127 S. Ct. at 2570 (plurality opinion).

359. *Id.*

360. *Id.* at 2571.

361. *Id.*

362. *Id.* at 2571–72. Justice Kennedy wrote a brief concurrence to highlight that he was not willing to disassemble the *Flast* framework. *Id.* at 2572 (Kennedy, J., concurring). For Justice Kennedy, *Flast* struck the proper balance between separation of powers concerns and the important interests unique to the Establishment clause. *Id.* Nonetheless, he chided government officials that they must always make a conscious effort to act constitutionally; even if they were not subject to lawsuits. *Id.* at 2573.

diction."<sup>363</sup> *Flast* and other taxpayer-standing cases have been notoriously inconsistent, mostly because the Court has alternately relied on two different types of injury to satisfy the "injury in fact" requirement of Article III: "wallet injury" and "psychic injury."<sup>364</sup>

"Wallet injury" refers to "the type of concrete and particularized injury one would expect to be asserted in a *taxpayer* suit, namely, a claim that the plaintiff's tax liability [wa]s higher than it would be, but for the allegedly unlawful government action."<sup>365</sup> "Psychic injury," on the other hand, has nothing to do with tax liability, and instead consists of "the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner."<sup>366</sup> *Flast* and the cases following it invoked a peculiarly restricted version of psychic injury in specific instances.<sup>367</sup> This type of injury, however, conflicts with the familiar requirements of concrete and particularized injury that distinguish an actual injury from a generalized grievance.<sup>368</sup> The cases are no less clear because "wallet injury" was denied in the early cases as insufficient, whereas *Flast*'s limited "psychic injury" was allowed.<sup>369</sup> This logical contradiction has never been resolved to show why "psychic injury" was cognizable, although a "wallet injury" was not.<sup>370</sup>

Discussing two pre-*Flast* cases, *Frothingham* and *Doremus*, Justice Scalia illustrated the problem with "wallet injury" in taxpayer suits.<sup>371</sup> In *Frothingham*, the Court held the taxpayer lacked standing because the effect on future taxation was remote and fluctuating.<sup>372</sup> That Court had referred to traceability and redressability problems associated with such an injury, those suffered in some indefinite way in common with the people generally.<sup>373</sup> *Doremus*, another pre-*Flast* case, denied taxpayer standing in an Establishment Clause case for much the same reason as *Frothingham*.<sup>374</sup> The plaintiffs did not seek to litigate a "dollars-and-cents injury, but rather, a religious difference."<sup>375</sup> Both cases rejected "psychic injury" in unmistakable terms, in addition to their rejection of most types of "wallet injury."<sup>376</sup>

363. *Id.* at 2574 (Scalia, J., concurring).

364. *Hein*, 127 S. Ct. at 2574.

365. *Id.*

366. *Id.* (emphasis original).

367. *Id.*

368. *Id.*

369. *Id.* at 2574–75.

370. *Hein*, 127 S. Ct. at 2575.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Hein*, 127 S. Ct. at 2575.

Sixteen years after *Doremus*, the Court decided *Flast*. For Justice Scalia, the two-prong test it developed could not have been based on “wallet injury” because its plaintiffs were no better able to prove the money loss than those in *Frothingham*.<sup>377</sup> *Flast* relied on “psychic injury” for standing.<sup>378</sup> This logic can only constitute a cognizable injury because of the “magical two-pronged nexus test,” though it has been repeatedly pointed out that the “criteria . . . are *entirely unrelated* to the purported goal of ensuring the plaintiff has a sufficient ‘stake in the outcome of the controversy.’”<sup>379</sup> He noted that each prong existed solely to distinguish the cases of *Doremus* and *Frothingham*.<sup>380</sup>

Later cases such as *Valley Forge* were similarly incoherent.<sup>381</sup> Justice Scalia, channeling the late Justice Brennan, could not fathom “why Article III standing should turn on whether the government enables a religious organization to obtain real estate by giving it a check drawn from general tax revenues or instead by buying the property itself and then transferring title.”<sup>382</sup> The Court in *Valley Forge* rejected “psychic injury,” yet did not explain why *Flast* should remain.<sup>383</sup>

In *Bowen*, the Court resuscitated *Flast*, again relying on essentially “psychic injury” within the formalism of the *Flast* framework, yet revealing just how at odds the holding was with *Doremus*.<sup>384</sup> To Justice Scalia, *Flast* and *Bowen*’s acceptance of “psychic injury” was directly at odds with the Court’s other holdings to the contrary in *Frothingham*, *Doremus*, and *Valley Forge*.<sup>385</sup> After *Cuno*, the Court was left with two logical choices to the following question: Is “psychic injury” consistent with Article III? If the answer is yes, *Flast* should extend to all government expenditures in violation of the Constitution; if not, *Flast* should be overruled.<sup>386</sup> Unfortunately, according to Justice Scalia, the plurality did not follow either principled option.<sup>387</sup>

To Justice Scalia, the plurality provided no intellectual justification for its holding except that *stare decisis* did not always require a precedent to be expanded to the limit of its logic.<sup>388</sup> Although true as far as it goes, because “courts purport to be engaged in *reasoned* decision-making, it is *only* true

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377. *Id.* at 2576.

378. *Id.*

379. *Id.* at 2576–77 (emphasis original).

380. *Id.* at 2577.

381. *Id.* at 2577.

382. *Hein*, 127 S. Ct. at 2578.

383. *Id.*

384. *Id.* at 2579.

385. *Id.*

386. *Id.*

387. *Id.* at 2579.

388. *Hein*, 127 S. Ct. at 2579.

when” the precedent’s logic requires narrowing or the logic is fundamentally flawed and should be limited to its facts.<sup>389</sup> Neither justification was present in the plurality’s opinion.<sup>390</sup> *Flast* was “indistinguishable” from the present case for purposes of Article III—whether the expenditure is explicitly allocated by specific congressional enactment “has absolutely no relevance to the Article III criteria” for standing.<sup>391</sup> The plurality failed to acknowledge that the logic of *Flast* (sufficiency of “psychic injury”) was wrong, and “for that reason should not be extended to other cases.”<sup>392</sup> Instead the plurality adopted the express-allocation test, a test that had no mooring to the Article III requirements for standing.<sup>393</sup>

Striking at the heart of the plurality’s perceived motivations; Justice Scalia chastised their pose of minimalism.<sup>394</sup> Justice Scalia shared the dissent’s bewilderment that executive discretion could be distinguished from congressional discretion when taxpayer funds were spent on an unconstitutional purpose.<sup>395</sup>

Furthering his critique on the plurality’s minimalism, Justice Scalia stated as follows: “Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason.”<sup>396</sup> He went on to say that either *Flast* was correct and must apply to every expenditure, or it was incorrect and must be abandoned.<sup>397</sup>

Although critical of the plurality’s opinion, Justice Scalia was also critical of Freedom from Religion’s position on expansive taxpayer standing.<sup>398</sup> Its position logically required every expenditure alleged to violate the Establishment Clause to be subject to suit under *Flast*, though to do so ran contrary to the explicit denial in *Doremus*.<sup>399</sup> Such broad standing would allow roving bands of ideologically motivated taxpayers to search for governmental wrongdoing and reveal it in federal court—transforming the federal courts into “ombudsmen of the general welfare” with respect to Establishment clause issues.<sup>400</sup>

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389. *Id.* (emphasis original).

390. *Id.*

391. *Id.* at 2580 (emphasis original).

392. *Id.*

393. *Id.*

394. *Hein*, 127 S. Ct. at 2580.

395. *Id.* at 2581.

396. *Id.* at 2582.

397. *Id.*

398. *Id.* at 2581.

399. *Id.*

400. *Hein*, 127 S. Ct. at 2581.

Finally, turning to the sufficiency of *Flast*'s "psychic injury" under Article III, Justice Scalia looked to the Court's prior precedents in *Lujan*, *Frothingham*, *Ex parte Levitt*, *Richardson*, and *Schlesinger*—all of which dealt with generalized grievances.<sup>401</sup> Noting that the Court had occasionally called it a "prudential bar," he pointed to *Lujan* and other decisions, which unanimously held that a suit alleging only generalized grievances failed to meet the Article III requirement for an injury in fact to be concrete and particularized.<sup>402</sup> A taxpayer seeks relief that no more directly and tangibly benefits him than the public at large.<sup>403</sup> *Flast* relied on the slim reed of Madison's *Remonstrance* for the special treatment of the Establishment clause, but that novel claim of purely "psychic injury" was undermined by the Court's precedence.<sup>404</sup>

Furthermore, Scalia believed that *Flast* was incorrect because it explicitly and erroneously disregarded the separation of powers function served by the standing doctrine.<sup>405</sup> *Flast*'s judge-empowering understanding of the role Article III standing plays in preserving separated powers has been repudiated as leading to the arguable charge of "government by injunction."<sup>406</sup> Applying proper Article III analysis in light of separation of powers, *Flast*'s general notion of "psychic injury" is revealed as a contradiction of the basic function of the judiciary, which "is, solely, to decide on the rights of individuals."<sup>407</sup> Those with generalized grievances affecting the public at large have their remedy: the political process.<sup>408</sup>

Referring to the en banc decision by the Seventh Circuit, Justice Scalia highlighted that well-respected lower court judges found the Court's prior cases so lawless that even they saw no point in second-guessing the panel decision.<sup>409</sup> *Flast*'s lack of logical theoretical underpinnings rendered the taxpayer-standing doctrine a jurisprudential disaster.<sup>410</sup> There was no reliance interest engendered here, not only because one does not arrange his affairs around standing, but also because there is no relying on the random and irrational.<sup>411</sup> Fewer cases warrant less stare decisis respect, and so Justice Scalia stated that *Flast* should be overruled.<sup>412</sup>

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401. *Id.* at 2582.

402. *Id.*

403. *Id.* at 2583.

404. *Id.*

405. *Id.*

406. *Hein*, 127 S. Ct. at 2583.

407. *Id.* at 2584.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Hein*, 127 S. Ct. at 2584.



### 3. *Souter's Dissent—Is that You Justice Brennan?*

Penning a dissent for himself, Justices Ginsburg, Stevens, and Breyer, Justice Souter would have found standing under the *Flast* analysis.<sup>413</sup> *Flast* held that plaintiffs with an Establishment Clause claim could demonstrate the necessary stake as taxpayers to satisfy Article III requirements.<sup>414</sup> The injury for an alleged violation of the Establishment Clause was the very extracting and spending of tax money in aid of religion.<sup>415</sup> This injury was quite real and has deep historical roots in the purpose of the Establishment Clause.<sup>416</sup> As Madison noted in his *Remonstrance*, government in a free society may not force a citizen to contribute three pence to the support of any one establishment of religion.<sup>417</sup> For the dissent, this was not mere disagreement or “psychic injury” as Justice Scalia claimed; there was a personal constitutional right not to be taxed for the support of religious institutions.<sup>418</sup>

Contrary to the plurality, the parties here did not seek to extend *Flast*, but merely to apply it.<sup>419</sup> Executive agencies can spend unconstitutionally just as easily as Congress such that the injury is indistinguishable.<sup>420</sup> If the Executive could accomplish through the exercise of discretion exactly what Congress cannot through legislation, the Establishment Clause protections would melt away.<sup>421</sup> Put mildly, the distinction between congressional mandate and executive discretion in spending is arbitrary.<sup>422</sup>

Justice Souter went on, noting that cognizable harm takes into account the nature of the interest protected, not merely injury of the flesh or purse.<sup>423</sup> Injuries have been found sufficient for other non-monetary, non-physical harms, such as esthetic harms, uneven competition on the basis of race without showing of loss, and even living in racially gerrymandered districts.<sup>424</sup> This is not to say that any sort of alleged injury will suffice, but it dispels the notion that only physical or monetary injuries are permitted.<sup>425</sup> *Flast* merely recognized a special injury unique to taxpayers in Establishment Clause cases in light of the history and purpose of that constitutional

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

414. *Id.* at 2585.

415. *Id.* at 2584–85.

416. *Id.* at 2585.

417. *Id.*

418. *Hein*, 127 S. Ct. at 2585.

419. *Id.*

420. *Id.*

421. *Id.* at 2586.

422. *Id.*

423. *Id.* at 2587.

424. *Hein*, 127 S. Ct. at 2587.

425. *Id.*

protection.<sup>426</sup> Because the taxpayers here alleged such an injury, they met the test for standing—contrary to assertions by Justices Alito and Scalia.<sup>427</sup>

## VI. COMMENTARY—THE LANDSCAPE AFTER *HEIN*

The legal landscape after *Hein* is much the same as it was before: inconsistent, formalistic, and unhelpful for lower court application. The following section will offer a critique of the *Hein* decision as well as an outline of its possible and probable impact on taxpayer suits. This section will highlight the consistent inconsistency of the Court's taxpayer jurisprudence, noting examples of both pre- and post-*Hein* confusion among the lower courts.<sup>428</sup> Specifically, it takes issue with the Court for wasting an opportunity to provide clarity and guidance in an area desperately in need of both.<sup>429</sup> Finally, it concludes with a recommendation that the Court return to a reasoned standing analysis in light of the first principles and the underlying purposes of the standing doctrine by bringing taxpayer standing inline with constitutional standing principles.<sup>430</sup>

### A. Doublespeak

Less than a month after *Hein*, it was clear that the status quo remained firmly intact. Judge DeMoss of the Fifth Circuit said it best: “[t]he Supreme Court cannot continue to speak out of both sides of its mouth if it intends to provide real guidance to federal courts on this issue.”<sup>431</sup> Judge DeMoss's post-*Hein* critique mirrored that of Judge Easterbrook's dilemma with the Court in *Chao*. Not much had changed in that regard.<sup>432</sup>

Before the *Hein* decision, nearly every circuit had addressed the dilemma created by *Flast* and *Doremus*, particularly in light of the restrictions placed on *Flast* by *Valley Forge*. For example, both the First and the Ninth Circuits noted the restrictive view of taxpayer standing that emerged from *Valley Forge*, yet both circuits realized that in many ways *Flast* was still intact.<sup>433</sup> The bigger concern that both courts left unaddressed was the tension created between post-*Flast* case law and the pre-*Flast* consensus, most notably *Doremus*. The reasoning of those two decisions seemed patently at

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426. *Id.* at 2587–88.

427. *Id.* at 2588.

428. *See infra* Part VI.A.

429. *See infra* Part VI.B.

430. *See infra* Part VI.C.

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

432. *See supra* Part V.B.

433. *See Donnelly v. Lynch*, 691 F.2d 1029, 1030–31 (1st Cir. 1982); *Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 793 (9th Cir. 1999).

odds, but the courts were content to distinguish the two because *Doremus* dealt with state, rather than federal, taxpayers.<sup>434</sup> Nevertheless, those courts and the *Hein* plurality did not address those conceptual and theoretical differences.

Other circuits had acknowledged the shift in taxpayer standing caused by the *Flast* line of cases but were unsure what to make of it. The Second Circuit noted the “complex[ity]” of the test from *Flast* but, at least in one instance, decided to pursue normal standing analysis, rather than get involved in the minutiae.<sup>435</sup> The Sixth Circuit stated that *Flast* had influenced all federal taxpayer suits, but just how much impact the decision had was not stated.<sup>436</sup> At the very least, it was a shadow jurisprudence behind the Burger and Rehnquist Courts’ marked developments of normal constitutional standing.<sup>437</sup>

In light of the doctrinal inconsistency between *Flast* and its predecessors, and the uncertainty remaining after *Valley Forge*, the circuits responded more and more in the formalistic fashion that the *Hein* plurality exhibited. Following the Supreme Court’s guidance in *Valley Forge*, the Eighth Circuit declined to expand *Flast*’s reach to Free Exercise Clause taxpayer suits, strictly applying the two-pronged analysis.<sup>438</sup> The Tenth Circuit chastised plaintiffs for relying on *Flast* as a broad license for taxpayer suits,<sup>439</sup> despite the language to the contrary found in the *Flast* opinion itself.<sup>440</sup> Over and over, circuits took an increasingly formalistic and narrow approach to the *Flast* jurisprudence, although occasionally, as the Ninth Circuit showed, a plaintiff could meet the burden despite a nominal injury.<sup>441</sup>

In many ways, the circuit courts were following the lead of the Supreme Court, which practically eviscerated *Flast* in its infancy, all the while implicitly stating its holding was sacrosanct.<sup>442</sup> With *Valley Forge* as the most obvious example of judicial formalism, it was no wonder the circuits were willing to apply the letter of *Flast*, but not its spirit. The closest any circuit came to applying *Flast* creatively and consistent with its reasoning

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434. See, e.g., *Madison School*, 177 F.3d at 796.

435. *United States v. City of New York*, 972 F.2d 464, 471 (2d Cir. 1992).

436. *Taub v. Kentucky*, 842 F.2d 912, 916 (6th Cir. 1988).

437. Compare *supra* Part II.B.4–5 to *supra* Part IV.A–C.

438. *Tarsney v. O’Keefe*, 225 F.3d 929, 934–35 (8th Cir. 2000); see also 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 (2001).

439. *Citizens Concerned for Separation of Church and State v. Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980).

440. See *supra* Part III.D.2.b.

441. *Kong v. Scully*, w2003 U.S. App. LEXIS 26862, \*13 (9th Cir. Sept. 2, 2003).

442. See *supra* Part IV.

was Judge Posner's opinion in *Chao*,<sup>443</sup> which was subsequently reversed by *Hein*.

Because the *Hein* plurality took much the same tact as Justice Rehnquist had in *Valley Forge*, we can expect similar results in the foreseeable future. The plurality's minimalism continues the timid, mathematical approach to taxpayer suits started by the Burger Court. Despite sapping this area of law of its strength, the plurality stubbornly refused to re-examine the principle holding of *Flast*, thus perpetuating a jurisprudence that flies in the face of ordinary standing rules.<sup>444</sup> The plurality failed to address the fundamental inconsistency in its standing jurisprudence: Why must taxpayer suits in the Establishment Clause context play by different rules? The Court has yet to reconcile its divergent approaches. *Hein* presented an opportunity to do just that, but the Court wasted its chance and failed to apply the lessons learned in *Lujan*.

In such a muddled environment—with conflicting doctrines and inconsistent, some might say irrational, results at every turn—it is no wonder lower courts have thrown their hands up in dismay.<sup>445</sup> Specious distinctions built on exceptions, without some solid constitutional grounding, wreak havoc on a judicial system striving for consistency and the rule of law. The problem is not so much what the Court did in *Hein*, but what it failed to do.

## B. Critical of the *Hein* Plurality

As Judge DeMoss indicated, there is a tension in the Court's Establishment Clause taxpayer standing jurisprudence.<sup>446</sup> On the one hand, the Court has stated that standing requirements are just as rigid in Establishment Clause suits as all others.<sup>447</sup> There is no hierarchy of constitutional rights.<sup>448</sup> On the other hand, the Court has allowed standing in Establishment Clause cases despite the lack of any cognizable injury sufficient to meet the ordinary constitutional requirements, all thanks to the magical *Flast* test.<sup>449</sup> Critics can rightly find fault with a Court whose jurisprudence says Establishment Clause suits are treated the same as others, while in the same breath espousing a unique standing test that only applies in the Establishment

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443. See *supra* Part V.B.

444. Compare *Flast*'s two-pronged analysis to the three-part standing test of *Lujan*.

445. See, e.g., *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 500 (5th Cir. 2007) (en banc) (DeMoss, J., concurring).

446. *Id.*

447. *Id.* at 16.

448. *Id.* (citing *Valley Forge Christian Coll. V. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982)).

449. *Id.* at 16–17.

Clause context. This form of doublespeak was only further compounded by the splintered *Hein* decision that avoided the issue altogether.

In its opinion, the plurality masterfully laid a groundwork that categorically undermined all attempted taxpayer suits. Citing concerns with the separation of powers and the problems associated with generalized grievances, the plurality seemed poised to finally rid itself of *Flast*.<sup>450</sup> But, when the moment came, the plurality retreated, passing the buck on to a later Court.<sup>451</sup> As Justice Scalia noted in his concurrence, the culprit was its pose of minimalism.<sup>452</sup>

Minimalism is generally a positive judicial trait, removing speculation and conjecture by limiting decisions only to those matters at hand. Minimalism is not some unqualified good, however, and it all too often leads a court to turn a blind eye to pressing concerns even where they are wrapped up in a decision before it. It is of this principle flaw that the plurality was guilty. By failing to re-examine *Flast*, the plurality's minimalism resorted to making distinctions where none existed between executive and legislative action, effectively overruling a precedent by subterfuge. The plurality allowed *Flast* to continue its existence, while effectively eliminating any chance that it may be successfully applied to so-called "executive" actions.

As mentioned above, the plurality failed to address the hard question of *Flast*'s continued vitality in light of modern developments in the constitutional doctrine of standing.<sup>453</sup> Instead the plurality drew a line in the sand—effectively, though likely temporarily, insulating *Flast* from harm without acknowledging the tension such a decision engenders. It was a triumph for a failed status quo, and as mentioned above, will no doubt compound and continue the frustration of lower courts.<sup>454</sup>

### C. Recommendation: Returning to the Constitutional Principles of Standing

So what is the Court to do?<sup>455</sup> The simple answer is to apply the same rules to taxpayer suits in the Establishment Clause context as the Court would apply in ordinary standing analysis. Although this answer may appear simplistic, it is the only rational way to address this blight on the Court's jurisprudence. Either standing rules are constitutional in origin and should

450. See *supra* Part V.C.1.

451. See *supra* Part V.C.1.

452. See *supra* Part V.C.2.

453. Consider *supra* Part II.B.5.

454. See, e.g., *Tangipahoa*, 494 F.3d at 500 (DeMoss, J., concurring).

455. For an initial reaction to the Court's holding in *Hein*, see Robert Corn-Revere, *Federalism and Separation of Powers: Narrow Issue of Taxpayer Standing Highlights Wide Divisions Among the Justices*, 2006–07 CATO SUP. CT. REV. 215 (2007).

apply to all suits, or the rules merely serve as guideposts, while the true rule of law is the rule of five. To consider why returning taxpayer suits to some semblance of constitutional analysis is important, consider the underlying purposes of standing doctrine generally.

Several constitutional and prudential concerns favor standing requirements. Among these, the two most important depend on the unique characteristics of the judicial branch and its overall role in a constitutional scheme of separated powers. The following sections will discuss those qualities of the judiciary that make standing all the more necessary, as well as the important considerations served by such requirements.<sup>456</sup> It will then highlight the separation of powers function served by standing doctrine.<sup>457</sup>

### 1. *Unique Characteristics of the Federal Judiciary*

The Federal Judiciary is unique among the three branches of government in that it is an entirely “reactive” branch.<sup>458</sup> Unlike the Legislative and Executive branches, that can proactively address pressing national issues at the whim of a democratic electorate, the Judiciary deals with matters in the past—it determines fault, produces remedies, and adjudicates rights already violated. The federal courts do not confront issues before they emerge and likewise are not subject to the same democratic limitations as the other branches. In a special way, the courts serve as the least threatening branch because they do not actively seek out litigation to redress all societal ills. Whereas the democratic branches deal with constituencies, the courts deal with cases, parties, and individuals. The reactive nature of the judiciary counsels hesitation in hearing cases without an adequate background, and it is here that standing doctrine becomes the most pertinent.

Unlike Congress, courts cannot conduct extensive hearings and impanel magistrates to investigate the various questions that may arise in the course of litigation.<sup>459</sup> The courts rely on the parties as the movers and shakers. In our adversarial system, the parties bring to court their issues, their facts, and their grievances. The court in response addresses those suits and “judges” the merits of the respective claims. Because the investigation is left to the parties in any given case, it is essential to the interests of judicial economy that the proper parties be present before the court. Otherwise the

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456. See *infra* Part VI.C.1.

457. See *infra* Part VI.C.2.

458. For a general discussion about the unique characteristics of the judiciary, particularly as it relates to standing doctrine, see Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573 (1985). For an academic overview of the judicial role, note MARTIN H. REDISH & SUZANNA SHERRY, *FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS*, 17–69 (Thomson-West, 6th Ed. 2007).

459. See generally Erwin Chemerinsky, *FEDERAL JURISDICTION* 57–59 (4th ed. 2003).

distinction between judicial and legislative advocacy becomes so blurred as to be nonexistent.

Proper parties present a concrete factual circumstance where legal issues become most real. The constitutional or statutory issues are not theoretical, but factual. They have a face, a name, and a story. It is in this situation that the judiciary is most at home: judging the rights of individuals who have suffered some injury. In this way, rather than ideological partisans, personally invested litigants—those with a personal stake in the outcome—take advantage of the judicial forum. Should matters become reversed, the courts would cease to be fora for the resolution of individual conflicts and become yet another avenue for political posturing. In doing so, the weight of an overbearing judicial oligarchy would crush the principles of democratic sovereignty. Roving bands of ideologically motivated partisans could use the court as a tool to achieve their aims outside the democratic process and outside democratic accountability. Although Publius noted the judiciary is the least dangerous branch,<sup>460</sup> such a moniker is easily lost once the courts cease to be “courts of law” and become patently political actors. This caution spills over into concerns with the separation of powers.

## 2. *The Separation of Powers Doctrine*

In a landmark article on standing and the judiciary, then-Judge Antonin Scalia stated that standing doctrine was an essential component to the Separation of Powers doctrine.<sup>461</sup> More than any other justiciability doctrine,<sup>462</sup> standing is crucial to prevent the over-judicialization of the processes of self-governance.<sup>463</sup> There is a core constitutional element of standing, which not even Congress can eliminate, that is inextricably linked to the Separation of Powers doctrine.<sup>464</sup> Justice Scalia criticized the more prudential justifica-

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460. THE FEDERALIST NO. 78, at 496 (Alexander Hamilton) (Robert Scigliano ed., Random House 2001).

461. Scalia, *supra* note 23, at 881. For criticism of this view see, for example, Gene Nichol, *supra* note 21; and Treister, *supra* note 83, at 691.

462. For a discussion about how standing doctrine has come to replace the political question doctrine, see Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 306 (1996) (arguing that the separation of powers function of the political question doctrine has been supplanted by the emergence of a substantive standing doctrine).

463. Scalia, *supra* note 23, at 881. For an additional article discussing the separation of powers concerns of standing, see David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WISC. L. REV. 37 (1984).

464. Scalia, *supra* note 23, at 885.

tions of standing such as concrete adverseness,<sup>465</sup> and pointed to something more in the purpose of standing doctrine.<sup>466</sup>

Standing has a major impact on the division of power between the various branches of government. Should parties, and by association issues, be excluded from court, then compliance with constitutional mandates would be left entirely to the whim of the Executive and Legislative branches.<sup>467</sup> On the other hand, should courts liberally grant standing to any and all parties they would convert themselves into political fora—public interest firms standing side by side legislative lobbyists.<sup>468</sup>

Standing serves a functional purpose: limiting the role of the judiciary and restricting the courts to their “traditional undemocratic role of protecting individuals and minorities against impositions of the majority.”<sup>469</sup> This is quite a contrast to court challenges of governmental action to vindicate what is essentially an interest of the general public, such as the interest in government acting in accordance with the Constitution.<sup>470</sup> A concrete injury, apart from a mere breach of the social contract shared by all, is what distinguishes the plaintiff with standing and allows access to the anti-majoritarian institution of the courts.<sup>471</sup> Courts, unlike their elected counterparts, are not designed to vindicate majority rights.<sup>472</sup> They are insulated, indeed isolated from public opinion and public accountability—something which helps redress the rights of harmed individuals *against* popular action, but not those of the people generally.<sup>473</sup> In this way, standing keeps the courts in their proper role, solely vindicating the rights of individuals and preventing judicial encroachments upon the democratic process.

While this view is provocative and persuasive, it has not been without critics in the academy. Numerous scholars, most notably Cass Sunstein, have taken issue with Judge Scalia’s assertion of the separation of powers rationale to standing, arguing that standing ill serves this rationale and would be better focused on a litigant’s personal interests.<sup>474</sup> These critics note that the constitutional separation of powers is not absolute; in fact reliance on “standing” to dismiss a suit thwarts separation of powers by abdicating judicial authority.<sup>475</sup> In these scholars’ estimations, the principles of the Separation of Powers doctrine determine the proper allocation of power

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465. See *supra* Part III.D.2.a.

466. Scalia, *supra* note 23, at 885.

467. *Id.* at 892.

468. *Id.* at 893.

469. *Id.* at 894.

470. *Id.*

471. *Id.* at 895.

472. Scalia, *supra* note 23, at 896.

473. *Id.*

474. Treister, *supra* note 83, at 691.

475. *Id.* at 703.



between the branches, but it is ultimately for the Court to ensure that the other branches do not get too much power.<sup>476</sup> Failing to hear matters of constitutional import reduces judicial authority to an afterthought—something clearly not intended by the Constitution.

These critics bring up a legitimate point about the limiting effect standing doctrine has on judicial authority, but it is not one that is unanswerable. The premise of their argument is that for every constitutional violation there must be some available litigant to raise the matter in federal court; after all, the political system is simply too inefficient at redressing these grievances.<sup>477</sup> Such reasoning elevates the courts as above all fora for constitutional disputes and the sine qua non guardian of the Constitution. Such an emphasis on the judiciary is misplaced and not entirely consistent with the overarching constitutional structure.

Above all else, our Constitution creates a limited democratic republic and envisions an active citizenry to ensure that the government “plays by the rules.” Such appeals to the democratic process may fall on deaf ears; however, to dismiss them is to dismiss a hallmark of the American constitutional order: democratic accountability. While such political action may be unwieldy, it is no less vital to a functioning constitutional system. The need for democratic accountability is thwarted when the least democratic branch removes issues from the political arena. It is true that because of standing requirements certain suits and certain issues may never see the inside of a courtroom, but that is not always a bad thing; in fact it creates an opportunity for democratic debate. Political issues are left to the political branches, whereas fundamentally judicial issues—adjudicating the rights of individuals—are left to the judiciary. Such is the hallmark of our system of separated powers.

### 3. *Putting It All Together*

With the foregoing principles in mind, this section turns to taxpayer suits generally and Establishment Clause taxpayer suits specifically. With the constitutional test of *Lujan* in mind as a mechanism of the foregoing principles, the primary issue with taxpayer suits is whether they present a cognizable injury-in-fact. As a rule, to meet this prong a plaintiff must show the invasion of a legally protected interest that is both “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>478</sup>

At their heart, taxpayer suits seek to redress a grievance based solely on an interest common to all taxpayers or the public at large. Such an inter-

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476. *Id.* at 704.

477. *Id.* at 707.

478. *See supra* Part II.B.5.

est would rightfully fall within the category of prohibited generalized grievances against which the Court has oft spoken. Nevertheless, an injury does not cease to be cognizable simply because it is commonplace. Indeed, if one were only to look at the adequacy of a case that could be brought before the Court, a taxpayer suit would seem ideal. It presents a situation in which the legal issue is clearly presented and the Court can fashion any number of judicial remedies. However, such reasoning runs counter to the overarching separation of powers rationale stated above. Standing takes more than an important issue and a willing litigant.

The injury issue could be broadly defined in this context, where for example a taxpayer (or citizen) could be granted the right to sue on a breach of the social compact theory. Although somewhat appealing for its Lockean undertones,<sup>479</sup> such a system would run counter to the notion of democratic authority and accountability. Furthermore, the potential for mischief presented by such suits would empower the courts well beyond their constitutional mandate to decide cases and controversies. Courts could presumably pick and choose the issues they wish to address, thus leading to the charge of government by injunction. Again, such notions run counter to the principles of a democratic republic.

So what types of injury will suffice, and would taxpayer suits qualify? The general injuries foreseen by the earliest Courts and even the modern Court, excluding *Flast*, have been those injuries of the flesh and the purse. Pocketbook actions and those implicating imprisonment, punishment, and the like, and have been cognizable from time in memoriam. Most important, however, have been violations of substantive individual rights such as the freedom of speech or the right to be free from unreasonable searches and seizures. The key element to all of these suits is their individualist character. Individuals suffer the harm *individually* and, as such, have redress through the courts.

The problem with taxpayer suits, even those regarding the Establishment Clause, is the nature of the supposed injury—an injury that invites speculation and conjecture because it is impossible to point to some particularized harm, individually sustained, other than psychological displeasure with the results of a governmental action. Although this is important, indeed vital, to the democratic process, it is ill served when transplanted to the judiciary. At some point it falls upon the people themselves, not the courts, to serve as the check on the excesses of the political branches. This is not a flaw in the American constitutional system, merely a recognition that democracy has consequences. In the constitutional scheme, the people do not

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479. "Lockean" refers to the influential English political philosopher, John Locke, who was known for his contribution to social contract theory of government.

abdicate their role to the courts merely because the issue may be controversial or the remedy difficult.

Even if the courts recognized an injury-in-fact in these circumstances, they would undermine the basic separation of powers function served by standing when it comes to causation and redressability. The difficulty with causation is much the same as with identifying the injury-in-fact, and thus little need be said on that topic. With regards to redressability, however, it is here that the courts undermine separation of powers, in effect empowering themselves while minimizing the democratic accountability of the other branches. After all, why would Congress act when they can pin all the blame on the courts? In such circumstances, the courts become pawns, or at worst willing accomplices, of ideologically motivated litigants. Such partisanship runs counter to the prevailing role of the judiciary in the constitutional scheme.

Applying the three pronged analysis of *Lujan* to taxpayer suits would almost certainly eliminate taxpayer standing altogether, regardless of the nature of the claim, but this can be a good thing. By applying the same analysis to these suits, the Court could go a long way towards restoring sense to this area of the law and introducing constitutional principles to an area that has persisted with little more than a "because we said so" rationale. As this comment has attempted to show, *Hein* has done little to provide this much needed sanity, and it will be up to future courts to renew the emphasis on constitutional principles in taxpayer standing cases. Until such time that the Court recognizes the mess it has created by its two inconsistent standing doctrines functioning side by side, litigants and judges will have to deal with the status quo and continue to make those arguments which deaden the soul of the law, parsing precedents and drawing distinctions where none exist.

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