AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era—Judicial Power and Constitutional Authority

Hein v. Freedom from Religion Foundation, 551 U.S. 587 (2007)

In 2001, President George W. Bush created the White House Office of Faith-Based and Community Initiatives to facilitate charitable partnerships between the government and private groups, including religious groups. This initiative was funded out of the appropriations for general executive branch activities. Among other activities, the initiative sponsored conferences that included religious organizations. The Freedom from Religion Foundation filed suit against Jay Hein, the director of the office, in federal district court contending that government participation in such conferences conveyed an inappropriate message that such organizations were "insiders and favored members of the political community." The individuals making up the Foundation relied on their status as taxpayers to provide standing for the lawsuit. The case was dismissed for lack of standing in the district court, but reinstated by a divided circuit court. In a 5–4 decision, the U.S. Supreme Court reversed the circuit court, concluding that the judicial acceptance of taxpayer suits in establishment clause cases could not be extended beyond the context of specific congressional spending.

Is Alito successful in finding a middle ground between Scalia and Souter? Is there a principled basis for distinguishing between taxpayer suits involving congressional programs and those involving executive actions? Could a taxpayer claim standing to seek a judicial injunction to prevent a president ending his speeches with the line "God bless America"? Is there another way for courts to avoid issuing such an injunction (assuming they agreed that such statements were inconsistent with the establishment clause)? What are the "separation of powers principles" that might limit judicial investigations of executive words and deeds?

JUSTICE ALITO delivered the opinion of the Court.

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Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies," and "'Article III standing . . . enforces the Constitution's case-or-controversy requirement.'" . . .

"[O]ne of the controlling elements in the definition of a case or controversy under Article III" is standing. The requisite elements of Article III standing are well established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright* (1984).

The constitutionally mandated standing inquiry is especially important in a case like this one, in which taxpayers seek "to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens." . . . The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution. Rather, federal courts sit "solely, to decide on the rights of individuals," and must "'refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.'" . . .

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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 for Article III standing. . . .

We have consistently held that this type of interest is too generalized and attenuated to support Article III standing. . . .

Because the interests of the taxpayer are, in essence, the interests of the public at large, deciding a constitutional claim based solely on 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 v. Mellon* (1923).

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In *Flast v. Cohen* (1968), the Court carved out a narrow exception to the general constitutional prohibition against taxpayer standing. . . .

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The Court held that the taxpayer-plaintiffs in *Flast* had satisfied both prongs of [a two-part] test: The plaintiff's "constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare," and she alleged a violation of the Establishment Clause, which "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."

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The expenditures challenged in *Flast*, then, were funded by a specific congressional appropriation and were disbursed to private schools (including religiously affiliated schools) pursuant to a direct and unambiguous congressional mandate. . . .

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The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action.

We have never found taxpayer standing under such circumstances. . . .

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In short, this case falls outside "the narrow exception" [in] *Flast*. . . .

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Flast focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures. . . .

It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts. . . .

Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court. To see the wide swathe of activity that respondents' proposed rule would cover, one need look no further than the amended complaint in this action, which focuses largely on speeches and presentations made by Executive Branch officials. . . .

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. . . . "Relaxation of standing requirements is directly related to the expansion of judicial power," and lowering the taxpayer standing bar to permit challenges of purely executive actions "would

significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *United States v. Richardson* (1974). The rule respondents propose would enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials. This would "be quite at odds with . . . *Flast*'s own promise that it would not transform federal courts into forums for taxpayers' 'generalized grievances'" about the conduct of government. . . .

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Respondents set out a parade of horribles that they claim could occur if *Flast* is not extended to discretionary Executive Branch expenditures. For example, they say, a federal agency could use its discretionary funds to build a house of worship or to hire clergy of one denomination and send them out to spread their faith. . . . Of course, none of these things has happened, even though *Flast* has not previously been expanded in the way that respondents urge. In the unlikely event that any of these executive actions did take place, Congress could quickly step in. And respondents make no effort to show that these improbable abuses could not be challenged in federal court by plaintiffs who would possess standing based on grounds other than taxpayer standing.

. . . . We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.

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Reversed.

JUSTICE KENNEDY, concurring.

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The courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties. The Court has refused to establish a constitutional rule that would require or allow "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." . . .

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It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

Today's opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently. If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast v. Cohen* (1968) should be applied to (at a minimum) all challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing.

There is a simple reason why our taxpayer-standing cases involving Establishment Clause challenges to government expenditures are notoriously inconsistent: We have inconsistently described [the injury at stake in such cases. . . . We have alternately relied on two entirely distinct conceptions of injury in fact, which for convenience I will call "Wallet Injury" and "Psychic Injury."

Wallet Injury is 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 is higher than it would be, but for the allegedly unlawful government action. The stumbling block . . . [is that it is] uncertain what the plaintiff's tax bill would have been had the allegedly forbidden expenditure not been made, and it is even more speculative whether the government will, in response to an adverse court decision, lower taxes rather than spend the funds in some other manner.

Psychic Injury, on the other hand, has nothing to do with the plaintiff's tax liability. Instead, the injury consists of the taxpayer's mental displeasure that money extracted from him is being spent in an unlawful manner. This shift in focus eliminates traceability and redressability problems. . . . Restricted or not, this conceptualizing of injury in fact in purely mental terms conflicts squarely with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated. . . .

. . . . The basic logical flaw in our cases is thus twofold: We have never explained why Psychic Injury was insufficient in the cases in which standing was denied, and we have never explained why Psychic Injury, however limited, is cognizable under Article III.

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. . . . *Flast* is indistinguishable from this case for purposes of Article III. Whether the challenged government expenditure is expressly allocated by a specific congressional enactment has absolutely no relevance to the Article III criteria of injury in fact, traceability, and redressability.

Yet the plurality is also unwilling to acknowledge that the logic of *Flast* (its Psychic Injury rationale) is simply wrong, and for that reason should not be extended to other cases. Despite the lack of acknowledgment, however, that is the only plausible explanation for the plurality's [argument]. . . .

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Is a taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner ever sufficiently concrete and particularized to support Article III standing? The answer is plainly no.

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. . . . [O]nce a proper understanding of the relationship of standing to the separation of powers is brought to bear, Psychic Injury, even as limited in *Flast*, is revealed for what it is: a contradiction of the basic propositions that the function of the judicial power "is, solely, to decide on the rights of individuals," *Marbury v. Madison* (1803), and that generalized grievances affecting the public at large have their remedy in the political process.

Overruling prior precedents, even precedents as disreputable as *Flast*, is nevertheless a serious undertaking, and I understand the impulse to take a minimalist approach. But laying just claim to be honoring *stare decisis* requires more than beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive. . . .

. . . . [E]xperience has shown [] that *Flast*'s lack of a logical theoretical underpinning has rendered our taxpayer-standing doctrine such a jurisprudential disaster that our appellate judges do not know what to make of it. . . . I can think of few cases less warranting of *stare decisis* respect. It is time—it is past time—to call an end. *Flast* should be overruled.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

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. . . . [T]he injury from Government expenditures on religion is not accurately classified with the "Psychic Injury" that results whenever a congressional appropriation or executive expenditure raises hackles of disagreement with the policy supported. . . . Justice Stewart recognized this in his concurring opinion in *Flast*, when he said that "every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution," and thus distinguished the case from one in which a taxpayer sought only to air a generalized grievance in federal court.

Here, there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion. The taxpayers therefore seek not to "extend" *Flast*, but merely to apply it. When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury. . . .

The plurality points to the separation of powers to explain its distinction between legislative and executive spending decisions, but there is no difference on that point of view between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one. . . .

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Because the taxpayers in this case have alleged the type of injury this Court has seen as sufficient for standing, I would affirm.