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2008

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### Recommended Citation

Ira C. Lupu & Robert W. Tuttle, Ball on a Needle: *Hein V. Freedom from Religion Foundation* and the Future of Establishment Clause Adjudication, 2008 B.Y.U. L. Rev. 115 (2002).

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Ball on a Needle: *Hein v. Freedom from Religion Foundation*  
and the Future of Establishment Clause Adjudication

Ira C. Lupu and Robert W. Tuttle<sup>1</sup>

Amidst a flurry of controversial decisions in the final days of the 2006-07 Term,<sup>2</sup> the Supreme Court delivered its opinions in *Hein v. Freedom from Religion Foundation, Inc.*<sup>3</sup> For several reasons, *Hein* attracted considerably less attention than the other decisions at Term's end, all of which were seen as manifesting the Court's general rightward turn.<sup>4</sup> First, *Hein* involved the seemingly arcane and relatively inaccessible subject of taxpayer standing to sue in the federal courts. Second, the underlying facts in *Hein* presented a legally weak and intuitively unappealing claim that the federal government had acted unconstitutionally in holding regional conferences to promote the President's Faith-Based and Community Initiative. This was a

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<sup>2</sup> See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (invalidating voluntary plans for racial integration of public schools); *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (invalidating portion of Bipartisan Campaign Reform Act); *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (upholding disciplinary action against secondary school student for displaying sign with message "BONG HiTS 4 JESUS"). [BB 1.4(d) – this probably doesn't matter, but the Supreme Court orders them this way, even though both cases were decided on the same day].

<sup>3</sup> 127 S. Ct. 2553 (2007).

<sup>4</sup> See Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N. Y. TIMES, July 1, 2007, at A1; Cass Sunstein, *Minimalists vs. Visionaries*, WASH. POST, June 28, 2007.

lawsuit destined to go nowhere, even if the Supreme Court had affirmed the Seventh Circuit's decision to uphold taxpayer standing in the case.<sup>5</sup>

Moreover, the significance of *Hein* may have been obscured by the fact that the Supreme Court splintered into three groups and produced no majority opinion. In rejecting taxpayer standing in this case, Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, relied heavily and explicitly on the character of the challenged conferences as executive rather than legislative.<sup>6</sup> This, they concluded, served to distinguish *Hein* from *Flast v. Cohen*,<sup>7</sup> the Court's most prominent precedent in favor of taxpayer standing in Establishment Clause cases.<sup>8</sup> But none of the other six Justices accepted this distinction. Justices Scalia and Thomas concurred in the result, but rejected the plurality's distinction between executive and legislative spending.<sup>9</sup> Instead, they joined in a separate opinion that urged the Court to overrule *Flast* and end what they viewed as the anomalous concept of taxpayer standing in Establishment Clause cases.<sup>10</sup> In an opinion by Justice Souter, the four dissenters also repudiated the executive-legislative distinction on which the plurality opinion rested,<sup>11</sup> but the dissenters concluded that the Court should affirm the Seventh Circuit's holding in favor of taxpayer

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<sup>5</sup> See *id.*; *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006), *rev'd sub nom.*, *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

<sup>6</sup> *Hein*, 127 S. Ct. at 2567–71.

<sup>7</sup> 392 U.S. 83 (1968).

<sup>8</sup> *Hein*, 127 S. Ct. at 2568.

<sup>9</sup> *Id.* at 2579–81.

<sup>10</sup> *Id.* at 2573–74, 2582–84 (Scalia, J., joined by Thomas, J., concurring in the judgment).

<sup>11</sup> *Id.* at 2584–88 (Souter, J., joined by Ginsburg, Breyer, & Stevens, JJ., dissenting).

standing.<sup>12</sup>

Far more than may appear on the surface, the outcome and opinions in *Hein* are likely to reverberate heavily through the process of Establishment Clause adjudication. Indeed, the fall-out from *Hein* was quick and dramatic:

1) A few days after releasing *Hein*, the Supreme Court vacated and remanded for reconsideration a decision which had permitted taxpayers to seek an order to the University of Notre Dame to reimburse the United States for funds that allegedly had been spent in violation of the Establishment Clause.<sup>13</sup> The challenged program had ended, and the case would have been moot but for the highly controversial reimbursement remedy authorized by the appellate court.<sup>14</sup>

2) That same week, the Department of Justice invoked *Hein* in asking the Seventh Circuit to dismiss an appeal involving a taxpayer challenge to the Veterans' Administration's policies and practices concerning chaplains in VA hospitals.<sup>15</sup> Prior to the Court's opinion in *Hein*, the government had defended the VA case on its merits, and

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<sup>12</sup> *Id.* at 2588.

<sup>13</sup> *Univ. of Notre Dame v. Laskowski*, 127 S. Ct. 3051 (2007) (vacating and remanding, for reconsideration in light of *Hein*, *Laskowski v. Spellings*, 443 F. 3d 930 (7th Cir. 2006)).

<sup>14</sup> *Laskowski*, 443 F. 3d at 934. A similar order of restitution, entered in *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, , 432 F. Supp. 2d 862 (S.D. Iowa, 2006), is now being challenged on appeal in the Eighth Circuit.

<sup>15</sup> Claire Hughes, *Lawsuit Targeting Faith-Based Prison Program Becomes "Hein Fatality,"* ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, July 10, 2007, <http://www.religionandsocialpolicy.org/news/article.cfm?id=6740> (describing post *Hein* filing by the Department of Justice in *Nicholson*). The government's brief in the appeal to the Seventh Circuit in *Nicholson* devotes substantial attention to the argument that *Hein* undoes the basis for federal taxpayer standing in the case. Brief for Appellees R. James Nicholson et. al., No. 07-1292, available at <http://www.ca7.uscourts.gov/efn/efns.fwx?caseno=07-1292&submit=showdkt&yr=07&num=1292>. We discuss *Nicholson* further in Section V.B.

had not bothered to challenge the taxpayer plaintiffs' standing in the district court.<sup>16</sup>

3) Several weeks later, the Freedom from Religion Foundation ("FFRF") abandoned its twenty-month old lawsuit against a faith-based rehabilitation program in the New Mexico prison after the district court judge indicated that he was likely to dismiss the case for lack of taxpayer standing.<sup>17</sup>

4) In late July, in *Doe v. Tangipahoa Parish School District*,<sup>18</sup> a narrowly (8-7) and bitterly divided Fifth Circuit decided en banc to dismiss on standing grounds a lawsuit that challenged the practice of beginning local school board meetings with a prayer. The *Tangipahoa* case did not involve taxpayer standing; instead, the plaintiff's standing had rested on allegations of attendance at school board meetings by a parent whose children were enrolled in the local public schools.<sup>19</sup> The en banc majority ruled that those allegations had been neither proven, nor made subject to an express stipulation of agreed-upon facts. The en banc court (*sua sponte*) vacated the panel decision in the plaintiff's favor, and remanded with an order to dismiss the case.<sup>20</sup> Concurring in the en banc ruling, Judge DeMoss invoked *Hein* and expressly criticized the Supreme Court for pretending to apply the same standing rules to all cases while in fact tolerating a considerably lower threshold of Article III injury in Establishment Clause cases.<sup>21</sup> Such a posture, he said, "opens the courts' doors to a group of plaintiffs who have no complaint

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<sup>16</sup> *Freedom from Religion Found., Inc. v. Nicholson*, 469 F. Supp. 2d 609, 616-17 (W.D. Wis. 2007) (listing defendant's arguments).

<sup>17</sup> Hughes, *supra* note 17.

<sup>18</sup> 494 F.3d 494 (5<sup>th</sup> Cir. 2007). We discuss the case in depth in Part VII, *infra*.

<sup>19</sup> *Id.* at 497.

<sup>20</sup> *Id.* at 499.

<sup>21</sup> *Id.* at 500 (DeMoss, J., specially concurring). 4

other than they dislike any government reference to God.”<sup>22</sup>

5) In late October, the Seventh Circuit relied explicitly on *Hein* to dismiss a challenge by Indiana taxpayers to the practice of religious invocations before each session of the Indiana House of Representatives. In *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*,<sup>23</sup> Judge Ripple’s opinion for a 2-1 majority ruled that the involvement of the House in the prayer practice, through its own rules and minor expenditures, could not support taxpayer standing.<sup>24</sup>

These rapid developments demonstrate that *Hein* portends something quite important. In Establishment Clause cases, litigants have long understood standing doctrines as expansive and have contested standing with infrequent success. After *Hein*, the issue of standing is likely to become an active battleground. While the majority of lower courts may ultimately treat *Hein* as a narrow exception to the *Flast* rule, some may instead view *Hein* as an invitation to narrow considerably the access that Establishment Clause plaintiffs have to the federal courts. Moreover, such a narrowing may extend beyond the specialized field of taxpayer standing to more general doctrines under which, as Judge DeMoss suggests, plaintiffs in Establishment Clause cases have been granted standing without having suffered any injury traditionally recognized under Article III.

The fall-out from the sudden appearance of new and sharp limitations on standing

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<sup>22</sup> *Id.*

<sup>23</sup> 2007 U.S. App. LEXIS 25363 (7<sup>th</sup> Cir., Oct. 30, 2007). The lower court had enjoined the practice of sectarian prayer in these invocations, including specifically the use in the prayer of “Christ’s name or title or any other denominational appeal.” *Id.* at \*9, n. 3. The opinion of the district court, which had expressly found that the plaintiff-taxpayers had standing to maintain the claim, is reported at *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (SD Ind 2005).

<sup>24</sup> We discuss *Hinrichs* in detail in Part V.C., *infra*. For a sign of pre-*Hein* movement in the direction of limiting taxpayer standing, see *Winkler v. Gates*, 481 F.3d 977 (7<sup>th</sup> Cir. 2007) (taxpayers lack standing to bring Establishment Clause challenge to the Boy Scouts of America Jamboree Act because the Act did not rest primarily on the congressional power to tax and spend).

to sue in Establishment Clause cases is potentially greater than might be the case with other constitutional provisions. Although some Establishment Clause violations are accompanied by injuries of a more conventional sort,<sup>25</sup> a great many Establishment Clause plaintiffs allege injuries that fit uncomfortably at best within conventional Article III standards. In addition to claims by taxpayers, courts have granted standing to challenge public religious displays to those whose ordinary paths bring them into contact with these displays.<sup>26</sup> Because in many circumstances such people could rather easily avert their eyes or ears, the injury caused by these displays is primarily psychological – the distress caused by knowledge that the government promotes a religious sentiment. It is unimaginable that courts would adjudicate claims of psychological injury by observers of other constitutional wrongs, such as cruel punishments or patently unfair trials. Establishment Clause standing doctrines are looser than most, for the prudential reason that the Clause would not be judicially enforced if traditional Article III rules applied.<sup>27</sup>

The result of this historical looseness in the justiciability of Establishment Clause claims is that the substantive gloss on the Clause now resembles a large ball resting on a

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<sup>25</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (student required to passively participate in school-sponsored prayer as condition of attendance at her middle school commencement may challenge constitutionality of prayer).

<sup>26</sup> See, e.g., *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). See also *ACLU v. Rabun City Chamber of Commerce*, 698 F.2d 1098, 1107 (11th Cir. 1983); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1982); *Pelphrey v. Cobb County*, 448 F. Supp. 2d 1357 (N.D. Ga. 2006).

<sup>27</sup> The subject of justiciability in general, and standing to sue in particular, has produced a vast amount of literature. We do not in this piece address the full set of theoretical concerns that underlie the requirement that federal courts decide only “cases and controversies.” For worthwhile efforts at that enterprise, see, e.g., Jonathan Siegel, *A Theory Of Justiciability*, 86 TEX. L. REV. (forthcoming 2007); Cass Sunstein, *What’s Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365 (1973); Daniel Farber, *A Place-Based Theory of Standing* (UC Berkeley Public Law Research Paper No. 1013084, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1013084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013084).

very thin needle. If the Court – and the lower courts following its lead – were to suddenly retreat from this expansive treatment of the justiciability of such claims, judicial monitoring of religion-promoting activity by government might slow down considerably. Whether or not the ball of substantive doctrine toppled entirely off that needle, the incentive structure facing governments that sought to engage in religion-promoting activity would change radically in a world in which litigation could be easily blocked short of reaching the merits. In that legal milieu, litigation might eventually dry up, liberating government to act without fear of disruptive injunctions and awards of attorneys’ fees to prevailing plaintiffs. Whether state courts might pick up some of the resulting slack is an intriguing question, full of subtleties.

Thus, the meta-question looming after *Hein* is the relationship between the substance of the Establishment Clause and the justiciability of claims arising under the Clause. Under the broad standing doctrines that have governed for the past several decades, the gap between substance and justiciability is relatively narrow. Although some religion-promoting acts of government may remain outside the reach of the courts, a generous approach to standing has permitted adjudication of most asserted violations of the Establishment Clause. If doctrines of standing narrow dramatically, however, the gap between substance and justiciability will grow, creating the possibility of severe constitutional tensions.

Our primary purposes in this paper are to expose, analyze, and critique that potential gap. The piece begins with a focus on *Hein* itself. Part I describes the litigation on its path to the Supreme Court, and Part II outlines the arguments and conclusions

offered in the Court's opinions.

The remainder of the piece analyzes what *Hein* may signal for the future. Part III discusses which opinion in *Hein* is controlling, and explores the role of *stare decisis* in *Hein* and its aftermath. Part IV explores the relationship between the question of whether the Establishment Clause is constitutionally exceptional, and the doctrines of justiciability that correspond to the competing answers to that question. Part V maps with particularity the ways in which lower courts are likely to apply *Hein* in future cases involving taxpayer standing; among other things, Part V distinguishes the easy from the difficult post-*Hein* cases, and addresses the special problems associated with the standing of state and local taxpayers. In light of concerns brought out in Part V, Part VI explores the incentive effects of *Hein*'s intense focus on the legislative-executive distinction, and identifies problems that may arise if that distinction determines the status of plaintiffs. Part VII addresses non-taxpayer standing in Establishment Clause cases, including both funding cases and cases about government religious speech. In addressing the latter category, Part VII returns to the explosive hints, reflected in *Doe v. Tangipahoa Parish School District*, that *Hein*'s gloss on Article III and the Establishment Clause may spill outside of taxpayer standing to other settings for litigation under the Clause. Part VIII adds a brief note on the potential role of state courts if and when Article III doctrines become altered in ways that tend to silence the federal courts in Establishment Clause cases.

#### I. THE LITIGATION BACKGROUND OF *HEIN V. FREEDOM FROM RELIGION FOUNDATION, INC.*

The litigation in *Hein v. FFRF* arose out of a series of regional conferences, co-

sponsored by the White House Office of Faith-Based and Community Initiatives (“WHOFBCI”) and several executive branch agencies,<sup>28</sup> designed to promote the Faith-Based and Community Initiative (“FBCI”).<sup>29</sup> The government invited representatives of non-profit groups, both religious and secular, to attend these conferences and learn about federally funded opportunities to receive grants for social services. Acting on behalf of its federal taxpayer-members, FFRF brought suit in the federal district court for the Western District of Wisconsin against James Towey, then the Director of the WHOFBCI, and several executive branch officers whose agencies had co-sponsored the regional conferences. Among other things, FFRF’s complaint alleged that the conferences involved the expenditure of government funds to endorse and promote religion. The alleged methods of endorsement included speeches, laudatory of religion-based social services, by Cabinet officers at the conferences.<sup>30</sup>

The government defendants moved to dismiss the complaint on the ground that the taxpayer-plaintiffs lacked standing to bring the suit. In resisting this motion, FFRF relied on a line of precedent, beginning with *Flast v. Cohen*.<sup>31</sup> *Flast* had upheld a taxpayer suit, resting on the Establishment Clause, brought to enjoin expenditures under a program enacted by Congress pursuant to its power in Article I, Section 8, Clause 1, to tax and spend for the general welfare of the United States. The Court in *Flast* had explained that there was a “logical nexus” among taxpayer status, suits against

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<sup>28</sup> These included the Departments of Health & Human Services, Labor, and Education.

<sup>29</sup> *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007).

<sup>30</sup> *Id.* at 2559.

<sup>31</sup> 392 U.S. 83 (1968).

expenditures made pursuant to Article I, Section 8, Clause 1, and historical concerns concerning the coercion of taxpayers to support religion.<sup>32</sup> *Flast* represents a conceptually solitary exception to the otherwise pervasive and long-standing rule against recognizing the standing of federal taxpayers to challenge the constitutionality of government expenditures.<sup>33</sup>

The government relied primarily on a contrary precedent, *Valley Forge Christian College v. Americans United for Separation of Church and State*,<sup>34</sup> which had rejected taxpayer standing in cases of executive transfer of real property, rather than expenditure of funds. The Court in *Valley Forge* reasoned that the executive transfer of property arose from the congressional power in Article IV, Section 3, Clause 2, to “dispose of . . . the Property belonging to the United States,” rather than the Article I power to tax and spend, and therefore did not fall within the *Flast* exception.<sup>35</sup>

The district court granted the government’s motion to dismiss.<sup>36</sup> The court

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<sup>32</sup> *Id.* at 102–04. As Chief Justice Warren put it, “Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general.” *Id.* at 103–04 & n.24 (discussing James Madison’s experience in opposing a proposed tax in Virginia for supporting teachers of the Christian religion).

<sup>33</sup> The rule finds its genesis in *Frothingham v. Mellon*, 262 U.S. 447 (1923) and had been very recently reaffirmed in *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006).

<sup>34</sup> 454 U.S. 464 (1982).

<sup>35</sup> *Id.* at 466 (quoting U.S. CONST. art. IV, §3, cl. 2) & 480. Later, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court reaffirmed the standing of taxpayers to challenge executive agency grants to religious entities, because a congressional decision to tax and spend for religion-based social services was the predicate for the grant program.

<sup>36</sup> The Memorandum and Order of Dismissal, dated Nov. 15, 2005, is unreported, but is mentioned in a subsequent installment of the litigation, *Freedom from Religion Found., Inc. v. Towey*, 2005 U.S. Dist LEXIS 39444, at \*1–\*2 (W.D. Wisc. Jan. 11, 2005). For a discussion on the dismissal order, see Ira C. Lupu & Robert W. Tuttle, *Freedom from Religion Foundation, Inc. (and others) v. Jim Towey, Director of White House Office of Faith Based and Community Initiatives (and others)*, ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, Nov. 22, 2004,

concluded that the conferences were activities for which the Executive Branch, rather than Congress, was primarily responsible. Relying on the Supreme Court’s opinion in *Valley Forge*, the district court ruled that taxpayer standing did not extend to the situation described in FFRF’s complaint, even though the FFRF lawsuit involved the expenditure of money rather than the transfer of real property. According to the district court, decisions concerning the use of general Executive Branch funds to promote the FBCI – a presidential initiative – do not sharply implicate congressional power over the expenditure of taxpayers’ dollars. The *Flast* exception, allowing taxpayer standing, therefore did not apply.

FFRF appealed the dismissal to the U.S. Court of Appeals for the Seventh Circuit. In an opinion authored by Judge Posner, a panel of that court reversed.<sup>37</sup> By a 2-1 vote, the panel concluded that the legislative-executive distinction on which the district court had relied was mistaken.<sup>38</sup> Congress had appropriated the funds used by the WHOFBCI and other federal agencies to sponsor the conferences. “[Because] the program itself is challenged as unconstitutional,” Judge Posner wrote, “the fact that it was funded out of general rather than earmarked appropriations-that it was an executive rather than a congressional program-does not deprive taxpayers of standing to challenge it. Taxpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was

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[http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=31](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=31).

<sup>37</sup> *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006). Judge Ripple’s dissent for the Court of Appeals panel argued that allowing taxpayers to challenge expenditures should be rare and exceptional. Because the expenses complained of in FFRF’s lawsuit were not properly attributable to specific congressional decisions about the FBCI, Judge Ripple concluded that taxpayers should not be free to bring lawsuits challenging them as outside of Congress’ power to tax and spend. *Id.* at 997-1001 (Ripple, J. dissenting).

<sup>38</sup> *Id.* at 996–97 (majority opinion).

created entirely within the executive branch, as by Presidential executive order.<sup>39</sup>

Judge Posner recognized that his ruling could lead to taxpayer standing to challenge virtually every religion-promoting action taken by the executive branch, because congressional appropriations always support those actions – at the very least, in the salaries of the relevant executive personnel.<sup>40</sup> Judge Posner thus limited the panel’s ruling to cases in which the marginal cost of the alleged constitutional violation was greater than zero.<sup>41</sup> Under this rule, for example, a taxpayer could not challenge a favorable reference to God in a Presidential speech, because the speech would cost taxpayers no less without that reference. Thus, under Posner’s suggested rule, FFRF had standing because the conferences as a whole allegedly promoted religion and added identifiable costs to the FBCI.<sup>42</sup>

The government petitioned the full Seventh Circuit to rehear the case en banc . The circuit court denied the petition,<sup>43</sup> but several judges wrote opinions that complained of the uncertainty in current principles of taxpayer standing, and pleaded for the Supreme Court to clarify those principles in this or some other case.<sup>44</sup> The government successfully petitioned the Supreme Court to hear the case.

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<sup>39</sup> *Id.* at 996-97. See also *id.* at 993-94.

<sup>40</sup> *Id.* at 995–97.

<sup>41</sup> *Id.* at 995–96.

<sup>42</sup> *Id.* at 996–97.

<sup>43</sup> *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006).

<sup>44</sup> Judges Flaum and Easterbrook concurred in the denial of rehearing, but they argued that taxpayer standing principles were in disarray, and they expressed the hope that the government would petition for Supreme Court review, and that the Court would accept the petition and clarify the governing principles. *Id.* at 988 (Flaum, J. concurring); *Id.* at 989–90 (Easterbrook, J., concurring). Judge Ripple dissented from the denial of rehearing, and argued that the panel had erred. *Id.* at 990–91 (Ripple, J. dissenting).

The United States argued the case on very narrow grounds. Unlike some amicus filings, which urged the Court to overrule *Flast v. Cohen* and do away entirely with taxpayer standing in Establishment Clause cases,<sup>45</sup> the government argued that FFRF's case was distinguishable from *Flast* in two important ways. First, the government emphasized the district court's reasoning in dismissing the case; that is, that the expenditure had resulted from discretionary decisions by the Executive Branch, rather than from any specific authorization by Congress to promote the FBCI.<sup>46</sup> Second, the government argued that taxpayer standing should be limited to expenditures to non-governmental third parties, such as religious organizations.<sup>47</sup> The conferences were internal administrative expenses, which the government asserted should be left outside the scope of the rule in *Flast*.

FFRF challenged the relevance of both of these distinctions. First, it argued that all executive branch spending is attributable to congressional appropriations, and therefore necessarily involves the exercise of congressional power to tax and spend.<sup>48</sup> In addition, FFRF challenged the distinction between external and internal expenditures; the harm to taxpayers resulting from government spending to promote religion is identical, FFRF argued, regardless of whether the Executive Branch engaged in the promotion, or

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<sup>45</sup> Among others, the American Center for Law and Justice filed an amicus brief, which argued for the Court to overrule *Flast*. Amicus Brief of the American Center for Law and Justice at 4-14, *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (No. 06-157).

<sup>46</sup> Brief for the Petitioners Jay Hein et al., *Hein v. Freedom from Religion Foundation, Inc.*, U.S. Supreme Court Docket No. No. 06-157, at 26-38.

<sup>47</sup> *Id.* at 38-45.

<sup>48</sup> Brief for the Respondent Freedom from Religion Foundation, Inc., *Hein v. Freedom from Religion Foundation, Inc.*, U.S. Supreme Court Docket No. 06-157, at 22-35.

paid someone else to engage in the same activity.<sup>49</sup> FFRF’s brief proposed that the limit on taxpayer standing be that the challenged expense be “fairly traceable to the conduct alleged to violate the Establishment Clause.”<sup>50</sup>

## II. THE *HEIN* OPINIONS

The Court in *Hein* splintered into three groups, and produced no majority opinion. The first group, represented by Justice Alito’s plurality opinion for himself, Chief Justice Roberts, and Justice Kennedy (hereafter “the Alito group”), accepted the government’s basic argument that taxpayer standing depended on whether the target of the suit was a decision by Congress to tax and spend in support of religion. The starting premise for the Alito group was that standing to sue, under Article III’s limitation of the federal judicial power to “cases” and “controversies,” depends upon the plaintiff demonstrating that he or she has been personally injured in a way that is “traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the . . . relief [requested from the court].”<sup>51</sup> Ordinarily, taxpayers lack standing to complain of the alleged illegality of an expenditure because the complaint of illegal spending involves a grievance that all taxpayers share in common, and therefore is not “personal” to the plaintiff. In addition, a favorable ruling does not result in the return of any misspent money to the complaining taxpayer.

As the Alito group recognized, however, the Court in *Flast* had created an exception to that general rule against taxpayer standing, and had held that taxpayers in

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<sup>49</sup> *Id.* at 42–46.

<sup>50</sup> *Id.* at 17.

<sup>51</sup> 127 S. Ct. at 2562 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

some circumstances have standing to assert that an exercise of Congress' Article I power to tax and spend violates the Establishment Clause. *Flast* involved an act of Congress, passed in 1965, authorizing aid to public and private schools (both elementary and secondary) that educated low-income students. The Alito group argued that Congress, in light of the demography of private schools, "surely understood that much of the aid mandated by the statute would find its way to religious schools."<sup>52</sup>

The Alito group emphasized that the *Flast* exception should be narrowly construed in order to preserve the integrity of the underlying rule against taxpayer standing. The facts in *Hein* revealed no specific appropriations by Congress for creation of the WHOFBCI, the agency centers on the FBCI, or the conferences to promote the FBCI. Instead, the Office of the President had made an independent decision to initiate the FBCI,<sup>53</sup> and had used general, discretionary budget authority for administrative expenses to support the WHOFBCI, the agency centers, and the conferences. On those facts, the Alito group concluded, taxpayers lack standing to complain that the expenditures violate the Constitution, because the expenditures lack the sufficient nexus, required by *Flast*, to a congressional decision to spend.<sup>54</sup> The Alito group thus ruled in the government's favor, and proclaimed that it was doing so without changing the pre-existing norms of taxpayer standing.<sup>55</sup>

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<sup>52</sup> *Id.* at 2565, n. 3.

<sup>53</sup> Executive Order No. 13,199, 3 C.F.R. 752 (2002).

<sup>54</sup> 127 S. Ct. at 2566.

<sup>55</sup> *Id.* at 2571–72. The Alito opinion suggested that potential constitutional abuses by the Executive Branch acting alone might be challengeable by "plaintiffs who would possess standing on a basis other than taxpayer standing." *Id.* at 2571. Presumably, the FBCI Conferences might have been challenged by those who were present at the Conferences and therefore exposed to the alleged religious promotion, but

To buttress its case that the *Flast* exception was and should remain very narrow, the Alito group argued that prior case law had never extended taxpayer standing to any claim other than one based on the Establishment Clause,<sup>56</sup> and that the Court had essentially confined *Flast* to its own facts of knowing and specific authorization by Congress of expenditures in aid of religious organizations.<sup>57</sup> The Alito group made evident that it thought the result in *Flast* was highly questionable, but nevertheless concluded that “[w]e do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.”<sup>58</sup>

Justice Kennedy joined the Alito opinion, but added a concurring opinion in which he emphasized that lawsuits like this one would intrude significantly on the day-to-day conduct of the Executive Branch.<sup>59</sup> On the allegations in this case, for example, courts would have to undertake discovery and a possible trial on questions of exactly what had been said at each of the regional conferences for the FBCI. Kennedy argued that this sort of judicial supervision of the day-to-day speech and conduct of executive officials violated concerns of power separation within the federal government.<sup>60</sup> Kennedy’s opinion thus expands on a rationale that the Alito group mentions without

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FFRF did not include such a plaintiff in this lawsuit. The Alito opinion ignores the government’s argument that taxpayer standing depends upon the expenditure going to non-governmental entities, such as religious organizations.

<sup>56</sup> *Id.* at 2569.

<sup>57</sup> *Id.* at 2568–69.

<sup>58</sup> *Id.* at 2571–72.

<sup>59</sup> *Id.* at 2572–73 (Kennedy, J., concurring).

<sup>60</sup> *Id.* Justice Kennedy here built on a theme that the Court had elaborated more fully in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). He also stressed this theme in his opinion for the Court in *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1961 (2006).

elaboration.<sup>61</sup> Unlike the Alito group, which had described *Flast v. Cohen* with some disdain,<sup>62</sup> Justice Kennedy’s opinion proclaimed that *Flast* had been correctly decided.<sup>63</sup> Nevertheless, because Kennedy’s explicitly states that he joins the Alito opinion “in full,” Kennedy’s opinion does not purport to narrow or broaden the standing rules that lower courts should apply in the wake of *Hein*.

Six of the nine Justices rejected the Alito group’s distinction between legislative and executive branch decisions, but these six divided into two diametrically opposed camps. Justice Scalia, joined by Justice Thomas (hereafter the “Scalia group”), wrote an opinion concurring in the judgment.<sup>64</sup> The Scalia group agreed with the plurality opinion that taxpayers lacked standing to sue over expenditures by the Executive Branch to promote the FBCI, and thus brought the number of Justices who ruled in favor of the government to five. But the Scalia group argued that *Flast v. Cohen* was wrongly decided and should be overruled;<sup>65</sup> that is, that taxpayers should not be free to sue over expenditures that allegedly transgressed Establishment Clause limits, regardless of which branch of government is responsible for those expenditures.

The Scalia opinion makes a distinction between taxpayer suits that involve “Wallet Injury,”<sup>66</sup> in which taxpayers claim that their tax liability is higher than it would

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<sup>61</sup> 127 S. Ct. at 2569–70.

<sup>62</sup> *Id.* at 2568–69.

<sup>63</sup> *Id.* at 2572 (“In my view the result reached in *Flast* is correct and should not be called into question.”).

<sup>64</sup> *Id.* at 2573–84 (Scalia, J., joined by Thomas, J., concurring in the judgment).

<sup>65</sup> *Id.* at 2584 (“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.”).

<sup>66</sup> *Id.* at 2574.

be if the illegal expenditure had not been made, and “Psychic Injury,”<sup>67</sup> in which taxpayers claim that the expenditures cause them some sort of psychic distress. Courts routinely deny standing to complain about “Wallet Injuries,” Justice Scalia argues, because of difficulties in tracing the injury to the defendant’s conduct and redressing the grievance.<sup>68</sup> But “Psychic Injuries” also cannot be “redressed.” They are generalized grievances, shared by many citizens, who are upset because they believe that the law is not being followed.<sup>69</sup> Courts do not in other circumstances redress “Psychic Injury” unaccompanied by material injury, and Justice Scalia argues that courts should not make a special exception for the “Psychic Injuries” caused by alleged violations of the Establishment Clause.<sup>70</sup> Furthermore, according to Justice Scalia, the courts have made an illogical mess out of trying to keep the exceptional ruling in *Flast v. Cohen* within logical and reasonable bounds.<sup>71</sup>

Justice Souter, joined by Justices Breyer, Ginsburg, and Stevens (hereafter the “Souter group”) agreed completely with the Scalia group that the distinction between suits aimed at congressional decisions to spend for religious causes and executive decisions of the same sort is illogical.<sup>72</sup> But the Souter group argued that the Court should achieve logical consistency by permitting taxpayer standing regardless of whether

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 2574–75.

<sup>70</sup> *Id.* at 2575.

<sup>71</sup> *Id.* at 2577–2584. “[W]hat experience has shown,” Justice Scalia contended, “is 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.” *Id.* at 2584.

<sup>72</sup> *Id.* at 2584–2588 (Souter, J., joined by Breyer, Stevens, and Ginsburg, JJ., dissenting).

the precise target was a congressional enactment or a discretionary executive decision.<sup>73</sup>

The injury to taxpayers is identical in cases where the executive rather than the legislature has decided to aid religion. In both situations, the injury is one to the conscience of taxpayers who object to being compelled to support religious opinions or activities.<sup>74</sup>

And that injury can be redressed by an order to the Executive Branch to stop making such expenditures, which is the remedy that FFRF sought in this litigation. Accordingly, the Souter group concluded that the federal courts should accept FFRF's standing to represent its taxpayer-members in this case.<sup>75</sup>

### III. THE MEANING OF *HEIN* – CONVENTIONS OF INTERPRETATION

Whatever the genesis or wisdom of the legislative-executive distinction in *Hein*, the opinions raise vitally important questions about the scope of taxpayer standing in the future. What considerations will guide the lower courts in interpreting and applying these opinions in cases yet to come? In this Part, we discuss the interpretive conventions associated with a) Supreme Court decisions that lack majority opinions, and b) the application of principles of vertical *stare decisis* by the lower courts. In the Part that immediately follows, we turn to broader, thematic considerations about the scope of the Establishment Clause and the nexus between that scope and doctrines of justiciability.

#### A. Which Opinion Controls?

*Hein* lacks a majority opinion, and the Supreme Court's decision in *Marks v.*

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<sup>73</sup> *Id.* at 2586.

<sup>74</sup> *Id.* at 2585–86.

<sup>75</sup> *Id.* at 2588. If some complaints about executive spending activity are frivolous, the Souter group argued, courts will and should reject them as involving no violation of the Constitution. For those that are not frivolous, taxpayers should be able to bring them, and courts should be free to hear them. Souter, J., dissenting, *id.* at 2586, n.1.

*United States*<sup>76</sup> instructs lower courts to treat as controlling the narrowest opinion that supports the result in the case. In *Hein*, the narrowest opinion must either be Justice Alito's or Justice Kennedy's; Justice Souter's opinion does not support the result, and Justice Scalia's opinion (urging the overruling of a major precedent) is not narrow at all.

One would initially expect the lower courts to follow Justice Alito's plurality opinion. Justice Kennedy joined the plurality opinion in its entirety,<sup>77</sup> and he wrote separately in order to amplify the argument about separation of powers, which the plurality also noted briefly. If neither opinion is narrower than the other, lower courts will inevitably follow the plurality opinion, because it is far more comprehensive and because three Justices joined it.

But there is another way of reading Justice Kennedy's opinion. He says *Flast* was correct,<sup>78</sup> while Alito strongly suggests that *Flast* was wrong, but is not being overruled because a decision in the government's favor in *Hein* does not require such overruling.<sup>79</sup> So, arguably, Kennedy's opinion is "narrower" than Alito's, because Kennedy's opinion is more respectful of the pre-existing law, as reflected in *Flast*. If lower courts rely on Kennedy's opinion, they might be somewhat more generous in their interpretation of the scope of *Flast*, as now modified by *Hein*.<sup>80</sup>

#### *B. Stare Decisis.*

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<sup>76</sup> *Marks v. United States*, 430 U.S. 188 (1977).

<sup>77</sup> 127 S. Ct. at 2572.

<sup>78</sup> *Id.* ("In my view the result reached in *Flast* is correct and should not be called into question.").

<sup>79</sup> *Id.* at 2571–72.

<sup>80</sup> We expect the lower courts to wrestle over this question of which is the narrowest opinion, though we recognize that choosing the Alito opinion over the Kennedy opinion, or vice versa, may not make any tangible difference in the outcome of future cases in the lower courts.

The practices and attitudes of lower court judges about *stare decisis* may turn out to be very important in the application of *Hein* to new situations. Theories of *stare decisis* can be highly abstract,<sup>81</sup> but they inevitably encompass the question of how narrow or broad a principle can be fairly attributed to a prior case. Here, the crucial issue is the scope of *Flast v. Cohen*. Although the Alito opinion says that *Flast* has been “confined to its facts,”<sup>82</sup> that assertion cannot be taken literally. Its “facts” include the congressional choice to fund private schools under the Elementary and Secondary Schools Act of 1965, and no trained lawyer would think that only cases arising under that particular enactment can fall within the principle of *Flast*. Any coherent theory of *stare decisis* requires similar treatment for “like” cases, even if the enactment is on another subject or has come into being at another time.

Accordingly, the real question for lower court judges will be what constitutes a case “like” *Flast*, as glossed by *Hein*. On this question, the Alito opinion gives some very important clues. It says, among other things, that “the expenditures at issue in *Flast*

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<sup>81</sup> *Stare decisis* in constitutional cases is a topic on which there is a vast literature. Most of the work focuses on so-called “horizontal” *stare decisis* – that is, the obligation of Supreme Court Justices to respect prior Supreme Court opinions. Our focus here is on “vertical” *stare decisis* – that is, the scope of interpretive authority conferred on lower court judges with respect to applying Supreme Court precedent. See Michael Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2040 (1994) (arguing that the requirements of vertical *stare decisis* extend to rationales relied upon by the Supreme Court, and not just to the outcomes reached by the Court on particular facts). For a sampling of the work on horizontal *stare decisis*, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Larry Alexander & Emily Sherwin, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Steven G. Calabresi, *Overrule Casey!: Some Originalist and Normative Arguments Against Stare Decisis in Constitutional Cases*, 22 CONST. COMMENT. 311 (2006); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 1, 39 (2006); Hon. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 404 (1988).

<sup>82</sup> 127 S. Ct. at 2568-69.

were made pursuant to an express congressional mandate and a specific congressional appropriation,”<sup>83</sup> and that “Congress surely understood that much of the aid mandated by the statute would find its way to religious schools.”<sup>84</sup> So the principle assigned to *Flast* by the Alito opinion in *Hein* is that, in order to support taxpayer standing, the challenged expenditure must 1) be made under an express legislative mandate, which 2) includes a specific appropriation, that 3) the enacting legislature understood at the time would benefit religious entities.

The statute in *Flast*, however, did not expressly specify that religious entities would receive grants. Requiring that degree of legislative specification thus would appear to go beyond what was determinative in *Flast*. Because the Alito opinion insists that its authors chose to leave *Flast* as they found it, conditioning taxpayer standing on a clear and explicit legislative statement—not just a background understanding—that faith-based organizations will receive funds seems unfaithful to the views of the Alito group. A “clear statement” requirement cannot be extracted from the Alito group’s interpretation of *Flast*.

Lower court judges with a view of *stare decisis* that emphasizes the “no-growth, no-extension” attitude toward *Flast* reflected in the Alito opinion may insist that taxpayers seeking to challenge a statute on Establishment Clause grounds demonstrate that the enacting legislature effectively (even if not explicitly) mandated the inclusion of religious entities, and made a specific appropriation that would include such entities, or in any event had unequivocal knowledge that religious entities would receive funds under

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<sup>83</sup> *Id.* at 2565.

<sup>84</sup> *Id.* at 2565 n.3.

the statute. Moreover, because *Flast* involved federal taxpayers, some lower court judges may be especially reluctant to give the benefit of the *Flast* exception to state and local taxpayers.<sup>85</sup> Instead, as suggested in Part V.C. below, the question of state and local taxpayer standing may be re-analyzed from the ground up.

In contrast, lower court judges inclined to somewhat more generous interpretation of still-valid precedents might read *Flast* as requiring no more than reasonable foreseeability (rather than “sure knowledge”) by an enacting legislature that its enacted social service programs will include religious entities as grantees. Moreover, a slightly more capacious view of *stare decisis* could lead lower courts to conclude that a subsequent legislative appropriation for a program, under an objective belief that grants might thereafter go to faith-based groups, will support taxpayer standing even if the legislature had originally enacted the program without such an objective belief, perhaps because constitutional law or administrative practice precluded such grants at the time of original enactment. In addition, some judges will conclude that the lower courts have been unquestioningly recognizing *Flast*-type standing for state and local taxpayers since 1968<sup>86</sup> and will see nothing in *Hein* that suggests that state and local taxpayers should now be treated differently from federal taxpayers for these purposes.

#### IV. THE MEANING OF *HEIN* – ESTABLISHMENT CLAUSE EXCEPTIONALISM AND ITS RELATION TO JUSTICIABILITY

In our view, predicting *Hein*'s path depends upon considerations far deeper than those involved in applying the rule in *Marks* or working out the particulars of vertical

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<sup>85</sup> See *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*, 2007 U.S. App. LEXIS 26363 at \*24-\*25 (7<sup>th</sup> Cir., Oct. 30, 2007).

<sup>86</sup> Cases challenging specific grants of state and local tax monies under the FBCI have all involved taxpayer standing. See, e.g., *Ams. United for Separation of Church and State v. Prison Fellowship Ministries*, 395 F. Supp. 2d 805 (S.D. Iowa, 2005); *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002).

*stare decisis*. *Hein v. FFRF* engages a pair of enduring and interlocking constitutional themes that will be central to further developments. These themes include the exceptionalism of the Establishment Clause as a source of constitutional norms and the complex relationship between those norms and considerations of justiciability.

The Establishment Clause occupies a unique role within the Bill of Rights. As construed over the past half-century, it frequently involves questions of government voice and structure,<sup>87</sup> as well as more conventional constitutional concerns about individual coercion. When the Clause is seen as a structural limitation on government, the question of what constitutes an “injury” takes on a different coloration than under other Bill of Rights provisions, where the notion of personal injury is individuated, material, and far easier to see. In cases involving government display of the Ten Commandments or a Christmas Creche,<sup>88</sup> for example, the injury to individuals is non-material and typically involves a fleeting exposure to an unwanted message.<sup>89</sup> The concerns at stake in most

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<sup>87</sup> Several of Justice Breyer’s opinions, which emphasize the theme of the Clause as a check on religious divisiveness, strongly suggest a structural rather than an individually-oriented character to the Clause. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 717–728 (2002) (Breyer, J., joined by Souter and Stevens, JJ., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 698–705 (2005) (Breyer, J., concurring in the judgment). For a critique of a divisiveness-based theory of adjudication under the Clause, see *Richard Garnett, Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006). For a scholarly elaboration of a structural theory of the Establishment Clause, see Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). Professor Esbeck explicitly references *Flast* as support for his structural theory. *Id.* at 33–40.

<sup>88</sup> *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (Ten Commandments display); *Allegheny County v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (Creche display on County Courthouse steps).

<sup>89</sup> The Establishment Clause is also exceptional in its particular relationship to concerns of federalism, a theme that has been emphasized by Justice Thomas, see *Cutter v. Wilkinson*, 544 U.S. 709, 727–28 (2005) (Thomas, J., concurring) (arguing that the Clause should not apply to the States because it was originally designed to keep the nation out of the business of controlling state policy on matters of religion), as well as a number of commentators. *See, e.g.,* Stephen D. Smith, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (Oxford, 1995); Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 55 EMORY L.J. 19 (2006); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004). The federalism debate

Establishment Clause cases are public, not private, and a theory of public “injury” is frequently necessary for adjudication under the Clause to go forward.<sup>90</sup>

Among the Justices in the majority in *Hein* are several who have been hostile to this broad and exceptional notion of Establishment Clause injury. Justices Scalia and Thomas, in particular, have argued that the Clause prohibits only 1) religious coercion, narrowly construed, of individuals, and 2) sectarian discrimination. These Justices accordingly dissented in *Lee v. Weisman*,<sup>91</sup> where they argued that graduation prayer did not subject students to coercion, because no punishment attached to their refusal to join in the prayer.<sup>92</sup> And they dissented as well in *McCreary County v. ACLU of Kentucky*,<sup>93</sup> where they contended that the government should be free to display the Ten Commandments, a text valued by Judaism, Christianity, and Islam,<sup>94</sup> in their view, only a more narrowly sectarian display, such as a Cross, would run afoul of the Establishment Clause.<sup>95</sup> And the plurality opinion in *Mitchell v. Helms*,<sup>96</sup> joined by these same Justices

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has no direct bearing on the standing question, although it might lead those who agree with Justice Thomas to be even less hospitable to state and local taxpayer standing than they are to federal taxpayer standing. If the Clause still protects states from coercive federal legislative intrusion on matters from religion, states should have standing to complain of such interference. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (permitting states to complain that RLUIPA’s prison provisions violate the Establishment Clause but upholding those provisions on the merits); cf. *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (holding that states have standing to complain of EPA’s failure to consider regulation of greenhouse gas emissions).

<sup>90</sup> For a scholarly account of the varieties of public injury associated with broad doctrines of non-Establishment, see Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. OF PA. J. CONST. L. 725 (2006).

<sup>91</sup> 505 U.S. 577 (1992).

<sup>92</sup> *Id.* at 636–639 (Scalia, J., joined by Thomas, J., dissenting). For a comparable scholarly account, see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

<sup>93</sup> 545 U.S. 844 (2005)

<sup>94</sup> *Id.* at 894.

<sup>95</sup> *Id.* at 894 n. 4. See also *Allegheny County v. ACLU*, 492 U.S. 573, 655-678 (1989) (Kennedy,

as well as Justice Kennedy, rejected the notion that the First Amendment barred government from financially supporting religious activities as a means to achieve a secular purpose.

The harms of legal coercion and sectarian preference fit comfortably within a much more conventional model of injury under Article III. An exclusive focus on such injuries, however, calls into question the independent significance of the Establishment Clause. State coercion of religious experience would seem to be a *prima facie* violation of the Free Exercise Clause,<sup>97</sup> and sectarian preference in the state’s distribution of benefits or burdens would be a *prima facie* violation of the Equal Protection Clause.<sup>98</sup> A private rights approach to non-Establishment thus tends to make the Establishment Clause constitutionally superfluous.

By contrast, the “injuries” associated with religious alienation,<sup>99</sup> state financial support for explicitly religious activities,<sup>100</sup> offense to taxpayer conscience, and absence of secular legislative purpose<sup>101</sup> do not fit within that conventional model. The Souter group, in their dissent in *Hein*, asserted that the Establishment Clause embodies precisely

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J., joined by Scalia, J., dissenting from a ruling that display of a Christmas creche in the County courthouse violated the Establishment Clause). Justice Alito has evinced similar sentiments during his tenure on the Third Circuit. *See* *ACLU of N.J. v. Schundler*, 168 F.3d 92 (3d Cir. 1999).

<sup>96</sup> 530 U.S. 793, 835–836 (2000).

<sup>97</sup> *See* *Lee v. Weisman*, 505 U.S. 577, 621–622 (1992) (Blackmun, J., concurring).

<sup>98</sup> *Larson v. Valente*, 456 U.S. 228, 245–247 (1982).

<sup>99</sup> Justice O’Connor’s “no endorsement” theory rests on an anti-alienation principle. *Allegheny County v. ACLU*, 492 U.S. 573, 625–26, 633 (1989) (O’Connor, J., concurring) (holding that government should not be free to express itself in ways that intentionally create religious “insiders” and “outsiders”).

<sup>100</sup> *See* *Mitchell v. Helms*, 530 U.S. 793, 867 (2000) (O’Connor, J., joined by Breyer, J., concurring) (Establishment Clause forbids direct state support of explicitly religious activity); *id.* at 899 (Souter, J., joined by Ginsburg and Stevens, JJ, dissenting) (Establishment Clause forbids direct state support of pervasively religious entities, such as parochial schools).

<sup>101</sup> *See, e.g.,* *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating Louisiana’s law requiring balanced treatment for creation science on the ground that the law lacked a secular purpose).

these kinds of normative concerns. Although they did not concede the anomalous quality of their position on what constitutes an injury for Article III purposes,<sup>102</sup> Justices in this group have consistently advanced a broad view of the substance of the Clause. For example, the same four Justices dissented in *Zelman v. Simmons-Harris*,<sup>103</sup> which upheld the Ohio voucher plan for the Cleveland schools, and all four (joined by Justice O'Connor) agreed that McCreary County acted with the constitutionally impermissible purpose of endorsing or promoting a particular faith when the County posted the Ten Commandments.<sup>104</sup> The Justices in this group support an unusually broad and constitutionally unconventional concept of "injury" in Establishment Clause cases, as reflected in their solicitude for taxpayers in *Zelman* and *McCreary County*. True to such positions, the Justices in their dissent in *Hein* urged the Court to maintain taxpayer standing as broadly as possible, a breadth that reflects their more expansive conception of the Clause.<sup>105</sup>

These rival accounts of Establishment Clause doctrine animate the Justices' views

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<sup>102</sup> *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2587 (2000) (comparing taxpayer injury to environmental injury and the injury associated with racial gerrymandering).

<sup>103</sup> 536 U.S. 639, at 686-717 (Souter, J., joined by Breyer, Ginsburg, and Stevens, JJ., dissenting).

<sup>104</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 847 (2005)

<sup>105</sup> We would expect scholars who continue to urge "separationist" interpretations of the Clause similarly to support broad notions of standing in Establishment Clause cases. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (Harv. Univ. Press 2007); Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. OF PA. J. CONST. L. 725 (2006); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998); Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071 (2002); Steven K. Green, *Of (Un)equal Jurisprudential Pedigree: Rectifying the Imbalance between Neutrality and Separationism*, 43 B.C. L. REV. 1111 (2002); Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807 (1999); Douglas Laycock, *"Noncoercive" Support of Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1991); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002).

on standing, but this underlying substantive disagreement is only implicit in the *Hein* opinions. Because the opinions focus solely on the plaintiffs' alleged injury, they fail to address the deeper substantive meaning of the Clause. This failure opens up a real and potentially widening gap between justiciability and substance. After *Hein*, the substance of Establishment Clause doctrine remains tied to requirements that the government act only for secular purposes, ensure that its funds not be diverted to religious use, and avoid religious endorsement or divisiveness—concerns that are public and structural rather than private. But the rule on justiciability of Establishment Clause challenges now depends on a showing of private injury, such as coercion or discriminatory treatment.

Gaps between substance and justiciability arise in other areas of constitutional law, but the opening that *Hein* creates in Establishment Clause law presents special difficulties. In other areas, courts have articulated reasoned justifications for the limits on justiciability, such as the concerns about finality or institutional competence that underlie the “political question” doctrine.<sup>106</sup> The limits recognized in *Hein*, however, lack any clear relationship to current substantive doctrine of the Establishment Clause. The decision thus sets up an unexplained conflict between rival theories of the Establishment Clause—one that controls justiciability, and another that still controls the substance of the Clause.

This conflict generates the potential for instability and uncertainty in lower court decisions. Some courts might follow the normative vision implicit in the *Hein* opinions by Justices Alito and Scalia and refuse to recognize other exceptional types of Establishment Clause injury, such as that of observers who view religious displays or

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<sup>106</sup> *Nixon v. United States*, 506 U.S. 224 (1993); *see generally*, Martin H. Redish, Judicial Review and the “Political Question,” 79 NW. U. L. REV. 1031 (1985); Louis Michael Seidman, The Secret Life of the Political Question Doctrine, 37 J. Marshall L. Rev. 448 (2004).

experience legislative prayers.

Judge DeMoss's concurring opinion in *Doe v. Tangipahoa Parish School Board*,<sup>107</sup> referenced above, represents an early and important post-*Hein* move toward narrowing the universe of judicially cognizable injury under the Establishment Clause. As we discuss in more detail in Part VII below, Judge DeMoss' opinion explicitly called attention to the discontinuity between general Article III standards and the justiciability rules that courts have been applying in Establishment Clause cases. Relying explicitly on *Hein*, he pleaded for a return to conventional Article III considerations in Establishment Clause cases.<sup>108</sup> If other judges in the lower federal courts follow the analytic lead of Judge DeMoss, the structure of Establishment Clause standing doctrine may ultimately collapse. Eventually, the substance of the Clause may be understood as no broader than the norms of justiciability under the Clause; violations of the Clause, unless accompanied by legal coercion or explicit sect preference, will go unremedied. Under those conditions, the Clause's normative lessons are far less likely than at present to be internalized by government officials.

#### V. HEIN UNFOLDING – A CLOSER LOOK AT TAXPAYER STANDING CASES.

Armed with the interpretive conventions analyzed in Part III, and cognizant of the normative debate over competing views of the Establishment Clause, we are now in a position to analyze closely the ways in which the lower courts will interpret and apply *Hein v. FFRF* in cases involving taxpayer standing. The key variables are likely to be 1) the type and degree of legislative specificity that funds will go to religious causes or

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<sup>107</sup> 494 F.3d 494 (5<sup>th</sup> Cir. 2007).

<sup>108</sup> See *id.* at 500 and n. 2 (DeMoss, J., concurring).

entities; and 2) whether the plaintiff-taxpayers are federal taxpayers, challenging the use of federal funds, or state or local taxpayers, challenging the use of those kinds of tax funds to support religion.

The best analytic vehicles for understanding what may now develop in the lower courts are examples, real and hypothetical, of post-*Hein* taxpayer suits against publicly financed support for faith-based social service.

*A. Easy cases.* It is not difficult to imagine easy cases in either direction. An easy case for denying taxpayer standing would be one that resembles *Hein* in significant respects—that is, one with little legislative involvement in the decision to spend in ways that include religious entities. For example, assume Congress creates a general budget for the buildings and grounds controlled by the Department of Labor. The department’s budget request has asked for the money for general renovations and upkeep of existing buildings. Now suppose that the Department decides to convert a meeting room in its headquarters into a chapel where employees can go to pray and meditate.<sup>109</sup> Whether or not such a project violates the Establishment Clause, taxpayers will not be able to sue to block it. In the absence of an explicit agency request for money to create a chapel, or a formal earmark by Congress of funds that must be used to create a chapel,<sup>110</sup> congressional budget authority for buildings and grounds cannot be seen as reflecting a

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<sup>109</sup> Justice Souter’s dissent in *Hein* relied on a comparable example, without the details of legislative involvement:

“It would surely violate the Establishment Clause for the Department of Health and Human Services to draw on a general appropriation to build a chapel for weekly church services (no less than if a statute required it), and for good reason: if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.” 127 S. Ct. at 2586 (footnote omitted).

<sup>110</sup> Justice Alito’s opinion in *Hein* asserted that informal earmarks of funds for particular purposes, noted in congressional committee reports, do not satisfy the requirement of legislative specificity, because the executive branch is not bound by them. 127 S. Ct. at 2568 n. 7.

legislative decision to spend for religious purposes. Rather, such legislative appropriation is properly viewed against a backdrop of what is usual and customary in such matters, and an agency expenditure to build a place of worship is likely to be quite the opposite of “usual and customary.”

There are equally easy cases for recognition of taxpayer standing after *Hein*. One would be a legislative grant formally earmarked to go to a religious group, such as the grant for sexual abstinence programs to the Silver Ring Thing.<sup>111</sup> That grant was challenged in *ACLU of Massachusetts v. Leavitt*,<sup>112</sup> a case which produced a settlement highly favorable to the plaintiffs, and nothing in *Hein* would preclude taxpayer-plaintiffs from litigating a similar case in the future. Another clear-cut case would be a challenge to a federal agency grant, made to a faith-based organization, pursuant to the Charitable Choice provisions of the 1996 welfare reform enactment.<sup>113</sup> Those provisions make explicit reference to the inclusion of faith-based providers as service grantees. Congress knew and specifically intended that such providers be among the recipients of grants. Courts would deem any congressional appropriations, designated for use in making such

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<sup>111</sup> See, e.g., FYI 2003 Omnibus Appropriations Bill, Pub. L. No. 108-7, 117 Stat. 11 (Feb. 20, 2003). Several other such earmarks for the Silver Ring Thing are itemized in paragraph 66 of the complaint in *ACLU of Massachusetts v. Leavitt*, available at <http://www.aclu.org/FilesPDFs/teeneducomplaint.pdf>. Similar earmarks at the state level have recently been held unconstitutional in *ACLU Foundation of Louisiana v. Blanco*, 2007 U.S. Dist. LEXIS 74718 (invalidating specific legislative grants to named churches in recently enacted appropriations laws in Louisiana). For further commentary on the *Blanco* case, see Ira C. Lupu and Robert W. Tuttle, *Legal Update on ACLU Foundation of Louisiana v. Blanco*, available at [http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=63](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=63).

<sup>112</sup> The case settled in February 2006. For discussion of the importance of the settlement agreement, see Ira C. Lupu & Robert W. Tuttle, *Legal Update on ACLU of Massachusetts v. Leavitt*, available at [http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=44](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=44).

<sup>113</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in various sections of 42 U.S.C., including 42 U.S.C. § 604a et seq. (1996)).

grants thereafter (by federal or state agencies), to have been made with both knowledge and expectation by Congress that some funds would go to religious groups for work training of welfare recipients, or some other purpose related to the welfare system. Accordingly, taxpayers would be free to challenge them under *Flast*, as construed by the *Hein* plurality. Indeed, this example is precisely like *Bowen v. Kendrick*,<sup>114</sup> a 1988 decision which upheld taxpayer standing to challenge federal agency grants under an enactment that expressly referenced religious organizations as grantees. The Alito opinion mentioned *Bowen*<sup>115</sup> and said nothing to cast doubt on its continued validity.

*B. Hard cases.* The difficult cases after *Hein* will involve legislation that falls somewhere near the mid-point of the continuum that runs between the easy cases; that is, enactments that do not clearly reveal legislative knowledge or intent that funds go to religious groups or causes, but which nevertheless give rise to a reasonable prediction or likelihood that funds will go in that direction. An overlapping set of hard cases will involve state and local taxpayer standing to raise Establishment Clause claims, a subject which the Supreme Court has not had occasion to directly address since well before its decision in *Flast*.

Imagine, for example, that in the mid-1970s, a state legislature created a program designed to combat adult illiteracy. Ever since, the legislature has funded the program by annual appropriations. The program is administered through the state Department of

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<sup>114</sup> See 487 U.S. 589 (1988).

<sup>115</sup> 127 S. Ct. at 2567 (noting that the statute at issue in *Bowen* “expressly contemplated that [grants] might go to projects involving religious groups”) It was unnecessary in *Flast* and *Bowen* to show that Congress intended the grants to go to religious activities, as distinguished from entities with a religious character. *Hein* cannot fairly be read to require that sort of exacting specificity of congressional direction of funds to religious activities, which the Establishment Clause forbids government to do. See further discussion of this distinction, *infra*, text at note 107 (discussing *Mitchell v. Helms*).

Education, which gives grants to local literacy initiatives.<sup>116</sup> The program receives no federal money. The Department in the past has given grants only to secular non-profits, but in 2007, the Department awards a grant to a church-based group that brings students into the church's sanctuary for reading instruction and uses the Bible as its primary text. Do state taxpayers have standing to challenge this grant as a violation of the Establishment Clause?

This is a case in which the original enacting legislature in the 1970s may have had no knowledge or expectation that church groups would ever be grantees. Among other relevant considerations, the prevailing constitutional law at that time precluded such a grant because the Supreme Court had interpreted the Establishment Clause to bar "pervasively sectarian" entities from direct receipt of government funds.<sup>117</sup> In addition, the state Department of Education would probably have been aware of those constitutional rules because they appeared primarily in cases about aid to education. Accordingly, the state's prior administrative practice of not even entertaining applications for grants from church groups may have been a product (at least in part) of those constitutional rulings.

But times have changed. The Supreme Court has backed away from the bar on grants to pervasively sectarian entities<sup>118</sup> and has limited the Establishment Clause to a

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<sup>116</sup> The teachers in such an initiative are likely to be unpaid volunteers, but the Department gives grants to local non-profit groups that coordinate relationships between volunteer teachers and those adults who need their help.

<sup>117</sup> See, e.g., *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973).

<sup>118</sup> In *Mitchell v. Helms*, a four-Justice plurality explicitly repudiated the concept that "pervasively sectarian" entities were barred from public aid, and the concurring opinion of Justices O'Connor and Breyer implicitly accepted that repudiation. 530 U.S. 793, 826-29, 860-67 (2000). A number of lower courts have picked up on the significance of this development. See, e.g., *Freedom from Religion Found.*,

ban on public funding of activities with religious content. Moreover, President Bush has initiated the FBCI, and many states (perhaps even the imaginary one in which the example is unfolding) have created their own offices of faith-based and community initiatives<sup>119</sup> designed to implement the President's program. As a result of these developments, our imaginary Department of Education (and other state departments as well) has begun to make grants to faith-based service providers.

Under these circumstances, courts might well attribute to the state legislature knowledge of, and responsibility for, grants by the state's executive branch to faith-based organizations for adult literacy programs. The competing arguments are obvious. Government lawyers, opposing taxpayer standing in the case, would argue that the enactment in the mid-1970s contemplated no such grants, that past practice reveals no pattern of such grants, and that one such grant in 2007 can be attributed only to a new administrative policy to widen the grantee base. The plaintiff's lawyers would have to focus on the relevant changes in constitutional law<sup>120</sup> as well as changes in the national and state climate with respect to the role of faith groups in social services. These lawyers would also assert that the state legislature is (or should be deemed to be) aware of this evolution of law and policy. On this view, the annual legislative appropriations for the program would be sufficient to constitute legislative recognition of the possibility that faith-based groups might receive a grant to run a literacy program, and that recognition would be sufficient to confer standing on state taxpayers. After *Hein*, these competing

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Inc. v. McCallum, 179 F.Supp. 2d 950, 969 (W.D. Wis. 2002); Am. Atheists, Inc. v. City of Detroit, 503 F.Supp.2d 845, 862 (E.D. Mich., 2007).

<sup>119</sup> See Mark Ragan & David Wright, *The Policy Environment for Faith-Based Social Services in the United States: What Has Changed Since 2002?*, THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POL'Y, Dec. 2005, [http://www.religionandsocialpolicy.org/homepage/State\\_Scan\\_2005\\_report.pdf](http://www.religionandsocialpolicy.org/homepage/State_Scan_2005_report.pdf).

<sup>120</sup> Such changes, of course, would only hurt the plaintiff's case on the merits.

arguments seem to us a toss-up, with the victory likely turning on the judge's views of the Establishment Clause and *stare decisis*.

An intriguing example of the contending views that we expect to appear in “hard cases” is presented by the pending appeal in *Freedom from Religion Foundation, Inc. v. Nicholson*,<sup>121</sup> a case in which FFRF challenges, on behalf of federal taxpayers, the use of chaplains in the health care system operated by the U.S. Veterans' Administration. The government defendants did not raise the issue of the plaintiffs' standing in the district court,<sup>122</sup> which rejected the plaintiffs' claim on its merits prior to the Supreme Court's decision in *Hein*.<sup>123</sup> On FFRF's appeal to the 7<sup>th</sup> Circuit in *Nicholson*, the United States has now asserted that taxpayers lack standing to advance this Establishment Clause claim.<sup>124</sup>

The competing arguments for FFRF and the United States come as no surprise. The brief for FFRF emphasizes that Congress has required the Veterans' Health Administration to provide medical services for veterans, and has appropriated money annually for the payment of such services.<sup>125</sup> Because various practices of the VA chaplaincy, challenged in this case, fall within the health services offered by the VA,

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<sup>121</sup> 469 F. Supp. 2d 609 (WD Wisc. 2007).

<sup>122</sup> *Id.* at 616-617 (listing government's arguments).

<sup>123</sup> *Id.* at 617-23.

<sup>124</sup> Brief for Defendant-Appellees in *Freedom from Religion Foundation, Inc. v. Nicholson*, U.S. Court of Appeals for the Seventh Circuit, No. 07-1292, available at <http://www.ca7.uscourts.gov/efn/efns.fwx?caseno=07-1292&submit=showdkt&yr=07&num=1292>. The government's arguments against taxpayer standing are found at pp. 22-36 of its brief. Because the question of plaintiffs' standing is related to the court's jurisdiction over the case, the government may raise the question at any time during the pendency of the litigation. *See, e.g., Kochert v. Greater Lafayette Health Services, Inc.*, 463 F.3d 710 (7<sup>th</sup> Cir. 2006), *cert. denied*, 127 S. Ct. 1328 (2007).

<sup>125</sup> Brief of Appellants in *Freedom from Religion Foundation, Inc. v. Nicholson*, U.S. Court of Appeals for the Seventh Circuit, No. 07-1292, at 18-24. The brief is available at <http://www.ca7.uscourts.gov/efn/efns.fwx?caseno=07-1292&submit=showdkt&yr=07&num=1292>.

FFRF contends, these practices fall within what remains of the *Flast* exception – that is, taxpayers may challenge such specific appropriations, which are being used to promote religious experience.<sup>126</sup>

In response, government argues that the plurality opinion in *Hein* requires taxpayer-plaintiffs to show that Congress appropriated funds specifically for the challenged activity.<sup>127</sup> Here, the appropriation supports medical services for veterans, both in VA hospitals and as outpatients, but Congress has not specified the use of a chaplaincy as part of those services. Rather, the decision to rely on a chaplaincy corps is a decision made by the VA, an executive agency, not by the Congress. Therefore, the government asserts, the practices challenged in the lawsuit are the result of executive branch decisions, rather than expressly mandated legislative expenditures in support of religious activity.<sup>128</sup> Accordingly, the government’s brief concludes, these practices fall within the general policy against recognizing taxpayer standing, reinforced in *Hein*.<sup>129</sup>

*Nicholson* may be different from our hypothetical “hard case” of a grant to a church-based literacy program, because the *Nicholson* litigation involves a longstanding program of government-provided health care, in a context in which the presence of

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<sup>126</sup> *Id.*

<sup>127</sup> Brief for Defendant-Appellees, note \_\_ supra, at 27.

<sup>128</sup> *Id.* at 27-32. In addition, the government argues that the 7<sup>th</sup> Circuit’s decision in *Winkler v. Gates*, 481 F.3d 977 (7<sup>th</sup> Cir. 2007) also precludes taxpayer standing in *FFRF v. Nicholson*, because, as in *Winkler*, Congress has acted under the Military Clauses as well as under its power to tax and spend. Brief for Defendant-Appellees, note \_\_ supra, at 32-36. In response, FFRF has asserted that *Winkler* – which involved congressionally authorized assistance by the Department of Defense to the Boy Scouts Jamboree – is distinguishable from the VA chaplains case because aid to the Scouts is primarily a disposition of surplus property and only secondarily a “spending” program. Brief for Appellants, note \_\_ supra, at 24-30.

<sup>129</sup> Brief for Defendant-Appellees, note \_\_ supra, at 31-32.

chaplains is completely expected. The military itself has such a chaplaincy corps,<sup>130</sup> and it is commonplace for virtually all hospitals – VA or otherwise – to make use of chaplains in the care of patients.<sup>131</sup> Accordingly, the presumption seems very strong that Congress is fully aware that it is spending for the VA health care chaplaincy, even if Congress is unaware of all of the details of how the VA implements the chaplaincy. Nevertheless, the Seventh Circuit has already manifested a response to *Hein* that demonstrates an aggressive willingness to restrict the scope of taxpayer standing in Establishment Clause cases.<sup>132</sup> Accordingly, *Nicholson* may well turn out to be a case that reveals the significant gap between a narrow and broad interpretation of what remains of *Flast v. Cohen*.

*C. Are State and Local Taxpayers Different from Federal Taxpayers?*

Whatever the proper resolution of these issues of legislative awareness and specificity, the imaginary case of a grant to a church-based literacy program, discussed in the preceding section, is made still more difficult by the fact that it involves only state taxpayers. Should the rule in *Flast*, as revisited in *Hein*, apply with equal force and on the same terms in this situation?

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<sup>130</sup> The Second Circuit has upheld the institution of the military chaplaincy against constitutional attack. *Katcoff v. Marsh*, 755 F.2d 223 (2<sup>nd</sup> Cir. 1985). For a full discussion of the many issues raised by contemporary operation of the military chaplaincy, see Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 W. Va. L. Rev. 87 (forthcoming, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=996050](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996050).

<sup>131</sup> See generally, Association for Clinical Pastoral Education, et al., *The Professional Chaplaincy: Its Role and Importance in Healthcare* (discussing hospital accreditation requirements for pastoral care of patients), available at [http://www.healthcarechaplaincy.org/publications/publications/white\\_paper\\_05.22.01/01.html](http://www.healthcarechaplaincy.org/publications/publications/white_paper_05.22.01/01.html).

<sup>132</sup> **Error! Main Document Only.** *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*, 2007 U.S. App. LEXIS 25363 (Oct. 30, 2007) (dismissing taxpayer challenge, on Establishment Clause grounds, to sectarian invocations<sup>37</sup> at the beginning of legislative sessions).

The Supreme Court has on a number of occasions treated the problems of state taxpayer standing as conceptually indistinguishable from federal taxpayer standing. As recently as 2006, in *Daimler Chrysler Corp. v. Cuno*,<sup>133</sup> the Court held that state and municipal taxpayers lacked standing in federal court to complain about the alleged illegality of a tax break designed to lure new businesses into a community. The discussion in *Daimler Chrysler* proceeded on the assumption that the general policy against recognizing federal taxpayer standing applied with equal force to state and local taxpayers.<sup>134</sup> Moreover, the Court’s rejection of state and local taxpayer standing was based on reasons identical to those typically invoked in federal taxpayer cases—the interests of state and local taxpayers are too general and remote to satisfy the concept of “injury.”<sup>135</sup> In addition, the *Daimler Chrysler* opinion explicitly distinguished *Flast* as resting on special, taxpayer-focused concerns with respect to the Establishment Clause.<sup>136</sup> There was no hint in *Daimler Chrysler* that state or municipal taxpayers might be viewed differently from federal taxpayers for purposes of Establishment Clause standing.

Similarly, the Alito plurality in *Hein* cites with approval the Court’s 1952

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<sup>133</sup> 126 S. Ct. 1854 (2006).

<sup>134</sup> *Id.* at 1862–66. *Daimler Chrysler* involved only the question of state and local taxpayers’ standing to sue in federal court, not their standing to bring suit in state court.

<sup>135</sup> *Id.* at 1862.

<sup>136</sup> For a unanimous Court in *Cuno*, Chief Justice Roberts wrote: *Flast* is consistent with the principle, underlying the Article III prohibition on taxpayer suits, that a litigant may not assume a particular disposition of government funds in establishing standing. The *Flast* Court discerned in the history of the Establishment Clause “the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.” The Court therefore understood the “injury” alleged in Establishment Clause challenges to federal spending to be the very “extract[ion] and spen[ding]” of “tax money” in aid of religion alleged by a plaintiff. And an injunction against the spending would of course redress that injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally. *Id.* at 1865 (quoting *Flast v. Cohen*, 392 U.S. 83, 103, 106 (citation omitted)).

decision in *Doremus v. Board of Education of Hawthorne*,<sup>137</sup> which rejected state taxpayer standing for parents who objected on Establishment Clause grounds to a state law authorizing public school teachers to conduct Bible readings in class. The Court in *Doremus* characterized the complaint as being about an objection to the reading, not an objection to the money spent on the salary for the teacher, and concluded that the plaintiff's interest was unrelated to his taxpayer status.<sup>138</sup>

The Court has thus consistently treated federal, state, and local taxpayers as indistinguishable for purposes of taxpayer standing in federal court. But this tale contains an anomaly, on which the Court has not yet focused. *Flast v. Cohen* rests explicitly on the “nexus” between taxpayer status and the power of Congress in Article I, section 8, clause 1, to tax and spend.<sup>139</sup> *Hein* (like *Valley Forge* before it) rejects taxpayer standing when that nexus is not present—that is, when the decision to benefit religion is an executive rather than legislative decision.<sup>140</sup> In other words, *Hein* appears to recognize taxpayer standing only when the decisions to impose a tax and to spend on religion are made by a “unitary actor.” Where the taxing and spending decisions are separated, as was the case with respect to the FBCI’s conferences, taxpayer standing does not exist. How does the requirement of a unitary actor, and the attendant concern for the “nexus” between taxpayer status and the claim of unlawful expenditure, map on to the actions of state and local government?

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<sup>137</sup> 342 U.S. 429 (1952), cited in *Hein v. Freedom From Religion Found., Inc.* 127 S. Ct. 2553,2563 (2007).

<sup>138</sup> *Id.* at 432-35.

<sup>139</sup> 392 U.S. at 102–04.

<sup>140</sup> *Hein*, 127 S. Ct. at 2568.

The dilemma that this question poses for courts is a function of the independence of state and local law from the federal model of separation of powers. States are not obliged by the federal constitution to separate legislative and executive power in a way that matches the division between Congress and the President, although all of them do separate power in roughly that manner.<sup>141</sup> Legislatures decide whether to tax, and either explicitly direct the spending, or delegate the power to spend to executive officials.

Local governments, however, may well not separate power in that conventional manner.<sup>142</sup> They may combine taxing power and executive power in one body, such as a County Council that maintains executive authority over some county functions.<sup>143</sup> Such a combination of powers would not present a problem under *Hein*, because that sort of combination would readily satisfy the theory of “unitary actor” that seems to underlie the *Hein* plurality. In contrast, a complete separation of taxing and spending power would present a severe dilemma under such a theory. Some types of local government may lack taxing authority of their own and get much of their revenue from state or county taxation, with a corresponding disconnection between the taxing authority and the body that decides how to spend the monies raised.<sup>144</sup> Must state and local taxpayers show,

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<sup>141</sup> Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 VAND. L. REV. 1167, 1190–91 (1999).

<sup>142</sup> See generally, Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. CHI. L. REV. 339 (1993) (detailing the varied structures and functions of local governments, and suggesting why concepts central to federal constitutional law may not apply in the local government context). See also Inna Reznik, Note, The Distinction Between Legislative and Adjudicative Decisions in *Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 257–66 (2000) (varied roles of local land use authorities).

<sup>143</sup> See *Pelphrey v. Cobb County*, 495 F. Supp. 2d 1311, 1318, n.3 (N.D. Ga. 2007) (distinguishing *Hein* in a case involving expenditures by the County Planning Commission, a legislative body that sponsored a prayer before each Commission meeting); see also Briffault, *supra* note 115, at 348.

<sup>144</sup> In most states, the taxing authority of local government is derived by delegation from the state

after *Hein*, that the governing body that decided to fund religious organizations is the same body that imposed the tax that raised the funds so spent?

A recently decided case, *American Atheists, Inc., v. City of Detroit Downtown Development Authority*,<sup>145</sup> provides a good example of how this dilemma may present itself. The Detroit City Council enacted a “Facade Improvement Project” (FIP) to enhance the city’s streetscape in advance of several nationally prominent events, including the 2006 NFL SuperBowl.<sup>146</sup> The Council authorized the Downtown Development Authority (DDA), a “public body corporate” under Michigan law, to reimburse property owners for repairs to the exterior of buildings within a defined area of the city.<sup>147</sup> Funds for the FIP were “derived from taxes levied by the City of Detroit and other units of government.”<sup>148</sup> The FIP did not explicitly permit DDA to fund the improvement of houses of worship, nor did the program specifically prohibit such funding.<sup>149</sup> The DDA entered into contracts with several churches, and plaintiffs brought suit, alleging that reimbursement of the churches would violate the Establishment Clause.<sup>150</sup> Plaintiffs alleged—and the court agreed—that they had standing because they or their members paid property taxes within the development zone.<sup>151</sup>

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government, and that delegation may be general or limited. *See, e.g.*, N.Y. Const. art. 16, § 1; *Sonmax, Inc. v. City of New York*, 392 N.Y.S.2d 810, 811–12 (N.Y. Sup. Ct. 1977), *aff’d*, 372 N.E.2d 9 (N.Y. 1977).

<sup>145</sup> 503 F.Supp.2d 845 (E.D. Mich. 2007).

<sup>146</sup> *Id.* at 849–50.

<sup>147</sup> *Id.* at 849–50.

<sup>148</sup> *Id.* at 849.

<sup>149</sup> *Id.* at 850–52.

<sup>150</sup> *Id.* at 852–53.

<sup>151</sup> *Id.* at 854.

Because the *American Atheists* case was briefed and argued before the Supreme Court's decision in *Hein*, the government defendants apparently did not object to the plaintiffs' standing as property taxpayers. Had they done so in light of *Hein*,<sup>152</sup> however, the question of standing in *American Atheists* would have been substantial. If taxpayer standing depends on the existence of a unitary actor—the same entity responsible for both the taxation and the decision to spend on religion—then the plaintiff's right to challenge Detroit's FIP rests on shaky ground. Because the Council did not explicitly address the participation of churches in the program, the court would be obliged to examine the relationship between the DDA and the Detroit City Council. The legal nexus between the two entities might make it possible to regard the DDA's specific funding decisions as acts independent of the authority of the City Council, thus destroying the requisite unity of taxing and spending. It might also be possible to regard the DDA's decisions as having been delegated by, and thus under the authority of, the City Council, and therefore preserve the unity of taxing and spending. The question of taxpayer standing, therefore, might well turn entirely on how Michigan law treats local development authorities and their freedom to spend, independent of the parameters dictated by the taxing authorities.

If the required unity of taxing and spending prescribed by *Hein* is imposed on state and local law, federal judges will have to wrestle with complex issues of state and local taxing and spending authority, all for the purpose of deciding when taxpayers can sue and when they cannot. It is difficult to believe that the Supreme Court intended to

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<sup>152</sup> The district court announced the decision in *American Atheists* on August 8, 2007, suggesting that the defendants had time to request supplemental briefing in light of *Hein*. But the opinion gives no indication that they did so. If there is an appeal to the Sixth Circuit in *American Atheist*, we expect that the standing question will come up, either because the parties will raise it or the appellate panel will raise it *sua sponte*.

impose such a task on the lower federal courts, and even more difficult to believe that application of such a doctrine will lead to sensible results under either Article III or the Establishment Clause. Nevertheless, the legislative-executive distinction that drives *Hein* may result in precisely this dilemma. Neither the values of non-Establishment, nor the values of intelligent federal-state relations, seem well-served by such an enterprise.

Moreover, a recent and prominent decision from the Seventh Circuit suggests that even some situations that do involve a “unitary actor,” which both taxes and spends for religious causes, may be insufficient to support state taxpayer standing. In *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*,<sup>153</sup> the panel relied explicitly on *Hein* to dismiss a challenge by Indiana taxpayers to the practice of religious invocations before each session of the Indiana House of Representatives. A House Rule explicitly authorized the practice,<sup>154</sup> which of late had involved a significant proportion of prayers in the name of Jesus.<sup>155</sup> The costs associated with the practice included those generated by the mailing a letter to clergy invited to give the prayer; the taking of photographs with House members and invited clergy; the mailing of thank-you notes and photographs to invited clergy after they delivered the prayer; and the costs of webcasting the prayer as part of Internet broadcast of House sessions.<sup>156</sup> The district court had enjoined the Speaker from administering a system that involved sectarian

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<sup>153</sup> 2007 U.S. App. LEXIS 25363 (7<sup>th</sup> Cir., Oct. 30, 2007). The lower court had enjoined the practice of sectarian prayer in these invocations, including specifically the use in the prayer of “Christ’s name or title or any other denominational appeal.”

<sup>154</sup> *Id.* at \*4 (“House Rule 10.2 calls for a prayer or invocation to be given each meeting day before the House conducts any business.”)

<sup>155</sup> *Id.* at \*6-7.

<sup>156</sup> 2007 U.S. App. LEXIS at \*7-8. The court describes the costs as “minimal,” which they appear to be.

prayer.<sup>157</sup>

The 7<sup>th</sup> Circuit, in a 2-1 panel decision authored by Judge Ripple,<sup>158</sup> ruled that the Indiana legislature had not specifically authorized the use of state funds for these purposes, and that accordingly state taxpayers lacked standing to challenge them. That the challenged Rule, practices, and expenditures were entirely a product of the state House of Representatives, and that the state's executive branch had nothing to do with them, appeared to give the panel no reason for hesitation. As Judge Ripple interpreted *Hein*, taxpayers could not maintain the suit because the Indiana Legislature had done no more than authorize general administrative expenditures by the House, and had not explicitly mandated the expenditures for prayer.<sup>159</sup>

Judge Wood – who had recently shown herself as something other than a universal champion of taxpayer standing in Establishment Clause cases<sup>160</sup> – dissented in

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<sup>157</sup> *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (SD Ind 2005). The injunction extended specifically to the use in the prayer of “Christ’s name or title or any other denominational appeal.” 2007 U.S. App. LEXIS at \*9, n.3.

<sup>158</sup> As discussed in Part I, *supra*, Judge Ripple had dissented from the panel decision in *Hein*, and had dissented as well from the Seventh Circuit’s denial of the government’s petition to rehear the case en banc. Judge Ripple’s opinions in *Hein*, it is fair to say, suggest that he is strongly predisposed to read *Flast v. Cohen* as narrowly as possible.

<sup>159</sup> 2007 U.S. App. LEXIS at \*41-\*42. Judge Ripple was quite explicit about the significance of *Hein* in “clarifying” the law of taxpayer standing since the Seventh Circuit’s earlier disposition of the Indiana Speaker’s motion for a stay in *Hinrichs*. *Id.* at \*44-\*45. Judge Ripple suggested that the federal courts might be more favorably inclined toward municipal taxpayer standing than state taxpayer standing, *id.* at \*45, n.9. Perhaps the law of some states favors local over state taxpayers for purposes of access to courts, but whatever policies of local government may justify that distinction do not map onto Article III or the Establishment Clause. The relevant population numbers alone cannot support such differential treatment. Are those who pay taxes to Los Angeles or New York City in any way more injured by local expenditures than state taxpayers are injured by state expenditures in lightly populated states like Idaho or Rhode Island?

<sup>160</sup> *Winkler v. Gates*, 481 F.3d 977 (7<sup>th</sup> Cir. 2007) (Wood, J.) (taxpayers lack standing to complain of Establishment Clause violation in implementation of Boy Scout Jamboree Act, because the challenged aid to the Scouts by the U.S. Department of Defense is primarily a disposition of surplus property in possession of the Executive Branch, and only secondarily a program of taxing and spending).

*Hinrichs*.<sup>161</sup> She argued explicitly that the Establishment Clause “uniquely involves . . . . psychic, aesthetic, or intangible injury,”<sup>162</sup> rather than physical or monetary harm. Moreover, she emphasized the conceptual chasm between *Hein* and *Hinrichs*. The former had involved congressional appropriations for the White House budget, apparently made with no foresight to the possibility of expenditure to promote religion-based social services, and the exercise of executive discretion. In contrast, the invocations before House sessions in Indiana without question involved unitary, intra-branch action, because the invocations did not involve the state’s executive branch at all.<sup>163</sup>

In earlier sections of this article, we suggested that lower court judges would react to *Hein*, at least in part, on the basis of their pre-existing jurisprudential views of the Establishment Clause and their corresponding inclinations to interpret *Hein* in light of those views. The opinions of Judge Ripple and Judge Wood in *Hinrichs* are Exhibit A in support of that suggestion. And there is no question that Judge Ripple’s view has, for the moment, removed the courts from a highly controversial dispute about the sectarian character of legislative invocations. Whether other potential plaintiffs, such as those who may observe the House’s invocations from the legislative balcony,<sup>164</sup> may yet appear and

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<sup>161</sup> 2007 U.S. App. LEXIS at \*48-\*82.

<sup>162</sup> *Id.* at 64.

<sup>163</sup> *Id.* at \*70-\*76.

<sup>164</sup> In his original complaint, Mr. Hinrichs had alleged injury as both a taxpayer and as an individual subject to unwanted exposure to the invocations, because he had been a lobbyist who at times attended these sessions. *Id.* at \*16, n.5. But Hinrichs ended his job as a lobbyist during the litigation, and abandoned this alternative theory of injury. *Id.*

mount a new challenge, remains to be seen.<sup>165</sup>

## VI. THE INCENTIVE EFFECTS OF *HEIN* AND THE PROBLEMS OF THE LEGISLATIVE-EXECUTIVE DISTINCTION

Much of this paper's focus is on the likely judicial responses to *Hein*. The executive-legislative distinction that now controls the law, however, suggests the possibility of perverse incentives for both legislative and executive branches, at all levels of government, that are considering funding faith-based programs.<sup>166</sup> Prior to *Hein*, Congress and President George W. Bush had been deadlocked over the question of legislative authorization for the Faith-Based and Community Initiative. The President had sought such authorization for all federally financed social services, but the proposed bills had stalled in Congress,<sup>167</sup> and the President (in late 2002) eventually issued an Executive Order to expand the Initiative to all federally funded social services.<sup>168</sup>

Ironically, the Executive Branch's failure to get broad legislative buy-in to the FBCI may have led to an executive victory in *Hein*. Because Congress had not specifically authorized the creation of the WHOFBCI, the Alito plurality was unwilling to lay the conference expenditures at the legislature's doorstep. In the future, this lesson of *Hein* will not be lost on savvy lawyers in both the legislative and executive branches.

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<sup>165</sup> In Part VII, below, we consider the Article III questions presented by non-taxpayer plaintiffs, such as those who observe (rather than pay for) state promotion of religion.

<sup>166</sup> We are especially grateful to David Wright, of the Nelson A. Rockefeller Institute on State and Local Government, State University of New York, for focusing our attention on this point.

<sup>167</sup> The most prominent measure was the proposed Community Solutions Act of 2001, H.R. 7, 107th Cong. (2001). The primary political obstacle to enactment was the inclusion of a provision protecting the right of grantees to engage in faith-based hiring. For fuller discussion of the executive-legislative history of the Charitable Choice movement, see Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 5–14 (2005).

<sup>168</sup> Equal Protection of the Laws for Faith-Based and Community Organizations, Exec. Order No. 13279, 3 C.F.R. 258 (2003).

To the extent that legislatures remain silent about or ignorant of expenditures for faith-based organizations and activities, courts may reject taxpayer standing to challenge those activities.

This justiciability-driven incentive to legislative silence may in some circumstances compete with strong incentives to the contrary. Legislatures may want political credit for these initiatives, and may also want to lock future executives into them. Statutory approval of faith-based initiatives will do just that. Likewise, from the perspective of the executive branch, legislative approval may signal wider and deeper political support for the program, greater likelihood of its continuity, and strong grounds for future executive calls for expanded funding. When grants to religious organizations are especially controversial, as may have been the case in Detroit in the *American Atheists* lawsuit discussed above, joint legislative-executive ratification of such grants may help ensure their political legitimacy.<sup>169</sup>

These incentive-based considerations, together with the uncertainty concerning the sort of “hard cases” discussed in Part V.B. above, suggest that the six Justices who reject the legislative-executive distinction have a position far more persuasive than those who joined the plurality in *Hein*.<sup>170</sup> The injury to taxpayers that results from government spending cannot be fairly traced to which branch is primarily responsible for the decision to spend. So long as the substantive doctrine of the Establishment Clause extends to

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<sup>169</sup> Such joint support of course cannot dispose of questions that might be raised about such grants under the Establishment Clause.

<sup>170</sup> For a different view, see Debra Lowman, *A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action*, 30 SEATTLE U. L. REV. 651 (2007). Ms. Lowman’s piece focuses on the Seventh Circuit’s disposition in *Hein*. She argues that *Flast* is anomalous, and should not be extended to executive branch decisions to spend for religion. Although she is correct that *Flast* is exceptional, Ms. Lowman does explore the functional reasons for creating exceptional standing requirements in Establishment Clause cases. In the absence of those reasons, taxpayer standing to complain about either branch may not be justifiable. *Id.* at 655–67.

actions by executive officers, as it has for many years,<sup>171</sup> it makes neither conceptual nor functional sense to draw a line between the branches for purposes of justiciability only.

Functionality has long been the key to understanding the various doctrines of Establishment Clause standing. Many religion-promoting acts by government create no obvious material or personal injury and may be quite popular. The political branches thus will frequently have incentives to violate the Clause. Without broad notions of justiciability in Establishment Clause cases, there is reason to expect that the Clause would be significantly under-enforced.<sup>172</sup> Just as prudential considerations may lead courts to deny standing in cases in which Article III minima are satisfied,<sup>173</sup> a different set of prudential considerations may justify the extension of standing in cases where conventional Article III criteria appear unmet. Constitutional prudence may therefore serve as a two-way ratchet, allowing some plaintiffs to remain in the courthouse even as it yanks some of them out. These prudential considerations bear absolutely no relationship to the distinction between legislative and executive action, because either or both branches may reap political benefits from taking actions that violate the Establishment Clause. Moreover, as explained above, drawing a line between challenges to executive and legislative acts may encourage legislatures to abdicate policy-making

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<sup>171</sup> *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 672–87 (1984) (Mayor’s decision to erect Christmas display); *Zorach v. Clauson*, 343 U.S. 306, 310–15 (1952) (public school system’s program of “released time” for religious instruction subject to Establishment Clause constraints). These decisions involve local government, but no one has ever suggested that the Executive Branch of the U.S. is not similarly subject to the Clause.

<sup>172</sup> Of course, even broad doctrines of justiciability will not lead to adjudication of the merits of every conceivable violation of the Clause. *See, e.g.*, *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936, at \*2–\*3, \*11 (E.D. Cal. Dec. 28, 2001) (“electronic” attendance at Presidential inauguration is insufficient for standing to challenge religious content of President’s Inaugural address).

<sup>173</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 19 (2004)

responsibility, and to confer unjustifiably broad discretion on the executive branch whenever religion-promoting activity may be associated with a particular government program.

It is difficult to imagine that the executive-legislative distinction on which *Hein* rests would have been persuasive as an original matter to any of the current Justices other than Kennedy. His view rests on power separation concerns about judicial interference with the details of executive branch administration of law and policy. These concerns may be well-founded, but could easily be taken into consideration at the merits stage of Establishment Clause litigation. Courts are not going to find it necessary or appropriate to enjoin Presidents from referring to God or religious faith in official pronouncements. Similarly, courts will not parse executive branch speeches to measure the extent or quality of religious details. But if a President decided to use funds from his general White House budget to erect a permanent Latin cross or other, highly sectarian religious symbol on the White House lawn, no sensible legal logic explains why taxpayers should be entitled to challenge that enterprise only if Congress had specifically authorized it.<sup>174</sup>

## VII. SUITS BY NON-TAXPAYER PLAINTIFFS

The impact of *Hein* will turn in part on whether the decision's restrictive attitude toward standing is limited to taxpayer plaintiffs, and whether other plaintiffs are available to challenge practices that taxpayers might have targeted. This part explores those questions. We begin with cases involving government financial support for religion. We

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<sup>174</sup> The plurality suggested that someone other than taxpayers might have standing to challenge blatant violations of the Establishment Clause by the Executive Branch. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2571 (2007). As we discuss in Part VII below, however, other bases for standing in Establishment Clause cases may be quite as exceptional as taxpayer standing, and we doubt that the members of the plurality would leave that anomaly unnoticed.

then turn to consideration of cases in which government promotes religion by speech or symbol, rather than through financial means.

### *A. Funding Cases*

In some of the cases that challenge grants made under the FBCI, taxpayers are the only conceivable plaintiffs because typically no one is injured by a decision to fund a particular grantee. In such cases, a lack of taxpayer standing may mean that no private citizens can sue to enforce the Establishment Clause against state funding agencies.

Other government officials, such as a state Attorney General, might be able to take action to enforce the Clause on behalf of a general public interest in constitutional compliance, but action by state officials to enforce federal constitutional law is exceedingly rare.<sup>175</sup>

In some situations, potential plaintiffs other than taxpayers might be available. For example, a disappointed rival for a grant may complain that the grant was unlawfully awarded. In cases where the rival is a religious organization, however, the only constitutional claim that will be raised is religious preferentialism, not the promotion of religion with government funds. If, for example, a Muslim group sues to complain about unlawful preference for Christians or Jews, the Muslim group will neither seek nor desire an order excluding all religious groups from grant eligibility. The injury to the Muslim group would be that of religious discrimination, rather than the inclusion of religious entities in the class of potential grantees. Accordingly, claims of sect preference will never lead to the wholesale adjudication of the permissibility of including religious

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<sup>175</sup> State attorneys general are far more likely to be involved in enforcement of state constitutional restrictions on financial assistance to religious entities. *See, e.g.* Ga. Op. Atty. Gen. No. 00-5, 2000 WL 777917 (2000) (Georgia Constitution prohibits state grants to religious schools for after-school “Reading Challenge” program); 69 Op. Att’y Gen. 136 (Ga. 1969) (state funding of YMCA likely to violate state constitution); 18 Op. Att’y Gen. (Neb. 1995) (grants to private religious schools would violate the state constitution).

activities as a permissible object of funding.

Another example of an alternative plaintiff may arise in cases that involve allegations of religious coercion. Some litigation about faith-based programs in prison has raised such claims,<sup>176</sup> as does the recent lawsuit against North Dakota for funding a program that allegedly coerces teenagers into religious observance.<sup>177</sup> A teenager placed against her will in such a facility would unquestionably have standing to complain about such coercion. But, akin to the example discussed above involving claims of sectarian preference, these teenager-plaintiffs would not have standing to complain about government funding of any voluntary religious experience at the Ranch, because uncoerced religious experience would not cause such a plaintiff any injury.

Thus, non-taxpayer plaintiffs may be available in some cases, but they will inevitably be limited in the kinds of claims they can present, and the remedies they will seek, to those which are connected to the particular injury they have suffered. Only taxpayers will be free to argue that an ongoing program of expenditures, or a particular grant, must be enjoined because the program or grant impermissibly subsidizes religious experience.

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<sup>176</sup> See, e.g., *Ams. United v. Prison Fellowship Ministries*, 395 F. Supp. 2d 805 (S.D. Iowa 2005); see also a discussion of the lawsuit in *Moeller v. Bradford County*, filed 2/17/05, in Ira C. Lupu & Robert W. Tuttle, *Legal Update*, THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POL'Y, March 21, 2005, [http://www.religionandsocialpolicy.org/legal/legal\\_update\\_display.cfm?id=35](http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=35). *Moeller* has now been settled with no admission of wrongdoing and a commitment by the County to refrain from funding any religious activity in its rehabilitation programs for prisoners. See Lisa R. Howeler, *Bradford County Settles Lawsuit with Bradford County Alliance for Democracy*, SAYRE EVENING TIMES, April 6, 2007, <http://www.religionandsocialpolicy.org/news/article.cfm?id=6302>.

<sup>177</sup> See Neela Banerjee, *North Dakota is Sued in Church-State Case*, N.Y. TIMES, June 21, 2007, at A16; Claire Hughes, *Lawsuit Targets Troubled Teens' Placement in Christian Homes*, THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POL'Y, June 19, 2007, <http://www.religionandsocialpolicy.org/news/article.cfm?id=6635>. For further analysis of the legal complaint in the North Dakota case, see Ira C. Lupu and Robert W. Tuttle, *Legal Update on Freedom from Religion Foundation v. Bjergaard*, available at [http://www.religionandsocialpolicy.org/legal/legal\\_update51display.cfm?id=61](http://www.religionandsocialpolicy.org/legal/legal_update51display.cfm?id=61).

*B. Non-funding Cases—Standing to Challenge Government Religious Speech*

On the surface, nothing in *Hein* appears to threaten the current structure of standing to sue in cases involving government-sponsored religious speech. *Hein* is a case about taxpayer standing, and lawyers have understood for years that *Flast* is a narrow and specific exception to the general bar on generalized taxpayer grievances in the federal courts.

But no crystal ball is required to perceive that the anti-exceptionalism that animates *Hein* may spill over into challenges to government religious speech. In such cases, standing frequently rests on an elusive and highly contestable concept of injury. Except for disputes arising in public schools,<sup>178</sup> standing in government display cases often rests entirely on “observer” status.<sup>179</sup> In *ACLU of Kentucky v. McCreary County*, for example, the basis for standing was that the plaintiffs “must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business.”<sup>180</sup> And in *Van Orden v. Perry*,<sup>181</sup> the basis for Mr. Van Orden’s standing to challenge the Ten Commandments display on the Texas State Capitol grounds was his encounters with the monument during his frequent visits to the grounds, typically to use

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<sup>178</sup> In *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-37 (2004), the Court dismissed on standing grounds Mr. Newdow’s complaint about the recitation of the Pledge of Allegiance in his daughter’s public school. But the ground for the dismissal was a concern, labeled “prudential” by the Court, that Mr. Newdow lacked custodial parent status with respect to his daughter. The Justices all assumed that Newdow would have had standing to assert his daughter’s rights to be free from government religious speech in school if he had full rights of custody. *Id.* at 11–18.

<sup>179</sup> Taxpayer standing may sometimes be a basis for suit in cases involving government religious speech, but the Seventh Circuit’s recent decision in *Hinrichs*, analyzed in Part V.C. *supra*, has raised serious doubts about taxpayer standing in such cases.

<sup>180</sup> *ACLU v. McCreary*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000), *aff’d as modified*, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).

<sup>181</sup> 545 U.S. 677 (2005).

the law library in the State Supreme Court building nearby.<sup>182</sup>

Though judges may have become completely accustomed to recognizing this sort of injury in religious display cases, visual or aural exposure to a government wrong—even in a context like *McCreary*, where exposure is a condition of access to a public place or good—would not constitute an injury sufficient to satisfy Article III requirements under any other constitutional provision. If someone visits a courthouse and observes patently unfair trials, or blatant acts of racial discrimination, or cruel and unusual punishments, the viewer would not have suffered an injury within the meaning of Article III. Standing for observers in Establishment Clause cases is thus as exceptional as standing for taxpayers. If the Establishment Clause context were to be removed, standing would likely disappear.<sup>183</sup>

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<sup>182</sup> *Id.* at 682.

<sup>183</sup> The closest the Court has come in other contexts to recognizing observer standing is in environmental cases, in which persons who allege that they make physical use of public space are permitted to bring actions designed to protect the environmental integrity of that space. *See, e.g.,* *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (dismissing action because of no allegation that Club’s members used the Mineral King Valley); *Friends of the Earth, Inc. v. Laidlaw Env’t. Serv. (TOC), Inc.*, 528 U.S. 167, 173–74 (2000) (upholding standing of people who live near and use a stream to bring action complaining of water pollution). Environmental standing for those who make recreational or economic use of public space seems different from observer standing in Establishment Clause cases for two reasons. First, environmental cases tend to be based on statutory rather than constitutional causes of action; when Congress has chosen to protect environmental interests, courts would be thwarting the legislative will if they refused to allow persons who suffer identifiable injury, tied to their use of the relevant place, from the effect of polluting activities. In contrast, Establishment Clause cases typically do not come with the boost of statutory causes of action; these cases rest on the Constitution alone, where counter-majoritarian concerns are strongest and therefore animate prudential limits on standing. Second, environmental plaintiffs typically allege that their actual physical use of the place will be diminished if the polluting activities continue. *See* Daniel Farber, *A Place-Based Theory of Standing* (UC Berkeley Public Law Research, Paper No. 1013084, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1013084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013084). In contrast, users of public space that contains religious expression— for example, courthouses, parks, grounds of public buildings— do not allege that their ability to use and enjoy the space is physically diminished by the expressed religious sentiments. Rather, the injury seems more psychological and less physical than in environmental cases. We hasten to add that we do not think that the justiciability of these cases should turn on distinctions this fine. Rather, we believe that considerations of prudence and need for judicial enforcement underlie environmental standing cases in ways highly similar to Establishment Clause cases. In both sets of cases, the legal system depends upon a concept of “private attorneys general” to police the action of the political

As we noted in our introductory reference to the Fifth Circuit’s en banc decision in *Doe v. Tangipahoa Parish School District*,<sup>184</sup> *Hein* has already begun to spill over in this direction. *Doe* involved a challenge by a resident and taxpayer of Tangipahoa Parish, Louisiana, to a variety of prayer practices in or related to the public schools, which *Doe*’s two sons attended.<sup>185</sup> *Doe* alleged in his complaint that his sons had been exposed to officially sponsored prayers in the schools. He further alleged that he had attended Board meetings at which the Board sponsored pre-meeting prayers, some of which were explicitly in Jesus’s name.<sup>186</sup>

On the merits, the district court accepted the plaintiff’s argument that the Supreme Court’s decisions involving school-sponsored prayer,<sup>187</sup> rather than its decision in *Marsh v. Chambers*<sup>188</sup> permitting legislative prayer, were controlling, and enjoined all officially sponsored prayer at Board meetings.<sup>189</sup> A Fifth Circuit panel modified the district court

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branches. Many of the Justices who would limit or overturn *Flast* tend to be the same Justices who would limit environmental standing as well. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1463–1478 (2007) (Roberts, CJ, joined by Alito, Scalia, and Thomas, JJ).

<sup>184</sup> 494 F.3d 494 (5th Cir. 2007). Prior to this case, the Fifth Circuit had already exhibited signs of internal struggle over doctrines of standing in Establishment Clause cases. *See Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 464 (5th Cir. 2001) (en banc) (affirmance by equally divided court of parents’ standing to challenge program of “clergy in the schools”, which involved volunteers and no government financial support).

<sup>185</sup> *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 191 (5th Cir. 2006). The case originally involved pre-game prayers before athletic contests, student-led prayers over the PA system, and prayers recited before school board meetings. The panel opinion reports that all of the issues other than prayer at Board meetings were resolved under a consent judgment. .

<sup>186</sup> *Id.* at 192.

<sup>187</sup> *Santa Fe Ind. Sch. Dist v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>188</sup> 463 U.S. 783 (1983).

<sup>189</sup> *Doe v. Tangipahoa Parish Sch. Bd.*, No. 03-2870, 2005 U.S. Dist. LEXIS 3329, at \*32 (E.D. La. Feb. 24, 2005).

order to cover only sectarian prayers.<sup>190</sup> The Board did not contest Doe’s standing to sue, but the panel decision, *sua sponte*, raised the question of Doe’s standing, and concluded that the party’s stipulations of agreed facts permitted an implication of admission of the allegations that Doe had attended the relevant meetings.<sup>191</sup> On this basis, the panel concluded that Doe’s standing to challenge the prayers at Board meetings had been adequately established by his uncontested allegation of physical presence at the meetings.

The Board successfully petitioned the Fifth Circuit for rehearing en banc. Precisely one month to the day after the Supreme Court’s decision in *Hein*, the full Fifth Circuit ruled (eight to seven) that Mr. Doe’s standing to complain about the prayers had not been successfully demonstrated.<sup>192</sup> The majority opinion, by Judge Edith Jones, did not challenge the legal proposition that attendance at meetings where Board-sponsored prayers were uttered was sufficient to confer standing on Doe. Rather, the majority opinion argued that the facts demonstrating injury to Mr. Doe (attendance, plus a sense of offense at hearing the prayers) had not been proven, and that the “implied admission” theory on which the Circuit panel had relied was insufficient to make up for that lack of proof.<sup>193</sup>

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<sup>190</sup> *Doe*, 473 F.3d at 204–06.

<sup>191</sup> *Id.* at 194–96.

<sup>192</sup> *Doe*, 494 F.3d at 498–99. . The en banc court vacated the district court’s judgment, and remanded the case with instructions to dismiss. *Id.* at 499.

<sup>193</sup> The panel opinion’s author, Judge Barksdale, wrote a strenuous dissent (joined by four others) to this disposition of the case, *id.* at 501, as did Judge Benavides. *Id.* at 509 (joined by six others). The narrow majority of the Fifth Circuit was probably using this strained argument to avoid the merits of a politically and legally difficult case. The courts in a number of jurisdictions have been struggling with the question of sectarian legislative prayer. *Hinrichs v. Bosma*, 410 F. Supp. 2d 745 (S.D. Ind. 2006); *Coles v. Tracy*, 171 F.3d 369 (6th Cir. 1999) (striking down school board prayer); *Bacus v. Palo Verde Unified School District Board of Education*, 52 Fed. Appx 355 (9th Cir. 2002) (same); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (striking down practice of sectarian prayer); *Simpson v. Chesterfield*

As noted in the Introduction to this paper, however, Judge DeMoss was not content with this narrow disposition. Relying explicitly on *Hein* and its concern for separation of powers,<sup>194</sup> he challenged the idea that voluntary attendance at a Board meeting would inflict on Mr. Doe or his children an “individualized and direct injury.”<sup>195</sup> In Judge DeMoss’s view, “this case is like *Hein* in that the Does have established only a general grievance indistinguishable from the one that any other non-attendeo citizen could have.”<sup>196</sup> In addition, he accused the Supreme Court of contradicting its own Article III jurisprudence: “On the one hand, the Court has stated that the standing requirements in Establishment Clause cases are *as rigorous as in other types of cases*. . . . On the other hand, the Court has implicitly, and wrongly in my view, assumed standing in Establishment Clause cases where plaintiffs have not alleged or proved an injury that would suffice to confer standing in any other type of case.”<sup>197</sup>

Whatever ensues with respect to the particular controversy in *Doe v. Tangipahoa Parish School District*, Judge DeMoss’ opinion has splashed blood into the water.

Government lawyers, and other judges in this and other Circuits, are now likely to focus

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County Board of Supervisors, 404 F.3d 276 (4th Cir. 2005) (upholding practice of nonsectarian prayer, but permitting board to deny invitation to Wiccan practitioner because no general invitation is extended to the public). Like the dismissal of *Hinrichs* in the Seventh Circuit, *Hinrichs v. Speaker*, 2007 U.S. App. LEXIS 25363 (7<sup>th</sup> Cir., Oct. 30, 2007), a similar dismissal of Doe’s case permitted the Fifth Circuit to avoid that question for the moment. Because the disposition turned on the adequacy of proof, rather than a legal proposition about standing in cases of this type, the court has every reason to expect that the issue will return. Indeed, Judge Jones concluded her opinion with an express recognition that the controversy would soon be back: “To find lack of standing at this late stage no doubt poses an inconvenience for the parties. On the other hand, it spares this court from issuing a largely hypothetically-based ruling on issues of broad importance to deliberative public bodies in this circuit and beyond. Finally, given the ideological nature of the case, it is not hard to conceive that a more concrete controversy may arise in the future.” *Doe*, 494 F.3d at 499. (footnote omitted).

<sup>194</sup> *Id.* at 497–99.

<sup>195</sup> *Id.* at 500.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

on the argument that “observer standing” is as anomalous as taxpayer standing, and they may see *Hein* as the opening volley in the battle to remove such apparent anomalies from doctrines of justiciability.

We expect that some cases involving prayer in public schools will escape this trend. The Supreme Court’s analyses of the effects of prayer at public school commencements in *Lee v. Weisman*,<sup>198</sup> and pre-game prayer in *Santa Fe Independent School District v. Doe*,<sup>199</sup> strongly suggest that the state may not make passive participation in worship a condition of access to the public goods delivered by a government-provided school system. Attaching such a condition is a form of coercion, and thus falls within conventional notions of injury, at least in Justice Kennedy’s view.<sup>200</sup> Moreover, standing to challenge elective, Bible study courses in public schools may rest on a theory of *de facto* religious discrimination against students who wish to study the Bible as literature, but are effectively precluded from the course by its sectarian religious content.<sup>201</sup>

When, however, school-sponsored religious expression does not require any form of student participation or effectively exclude students from access to a scarce opportunity, parental or student standing to challenge such expression may be more

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<sup>198</sup> 505 U.S. 577, 598–99 (1992) (students exposed to school-sponsored prayer at commencement are unconstitutionally coerced into religious experience); *see also* *Mellen v. Bunting*, 327 F.3d 355, 360 (4th Cir. 2003) (VMI cadets exposed to daily supper prayer are being unconstitutionally coerced).

<sup>199</sup> 530 U.S. 290 (2000).

<sup>200</sup> Justice Kennedy is the author of the opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), which emphasized the coercive quality of the commencement prayer. Justice Scalia’s dissent vigorously objected to treating this passive participation, in a commencement ceremony at which attendance was optional, as legally coercive. *Id.* at 631–46.

<sup>201</sup> *See, e.g.*, the recent lawsuit by the ACLU challenging an elective Bible studies course in the high schools of Odessa, Texas, described in *ACLU Helps Parents Challenge Bible Classes in Texas Public Schools*, <http://www.aclu.org/religion/schools/bibleinpublicschools.html>.

questionable. For example, posting the Ten Commandments<sup>202</sup> or other, still more sectarian messages, on school house walls<sup>203</sup> may not be seen by judges as inflicting a “personal” injury within a narrowing, post-*Hein* conception of Article III.<sup>204</sup>

The Supreme Court’s decisions about government-sponsored religious expression outside of public schools are a notorious mess, full of splintered opinions<sup>205</sup> and deeply uncertain guidance for the lower courts. Perhaps a rejection of “observer standing,” or other exceptional bases for standing in Establishment Clause cases, would have been salutary if it had occurred before the Court began deciding such cases in 1984.<sup>206</sup> Indeed, in retrospect, abstaining from such adjudication might have been prudential in its own way, leaving to community politics the set of difficult questions that Justice Breyer rightly labels as divisive—no matter which way they are decided—in his dispositive

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<sup>202</sup> *Stone v. Graham*, 449 U.S. 39 (1980).

<sup>203</sup> See, e.g., *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 682–83 (6th Cir. 1994) (graduated student has standing to sue over painting of Jesus hanging in hallway of public school, because student continued to visit the school and had girlfriend who attended the school).

<sup>204</sup> Plaintiffs will rely in the alternative on taxpayer status in all of these cases involving religious expression by government, but some involve no public expenditure, or at least no marginal increase in public expenditure. (Recall that the Court in *Doremus* dismissed the suit because the complaint about Bible reading was aimed at the practice itself, rather than at the payment of a salary to the teacher who led the practice. *Doremus v. Bd. Of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952)). Still other cases that do involve traceable expenditures may fail under *Hein*’s distinction between legislative and executive action. If only executive officials, such as superintendents, principals, and teachers, rather than elected school boards, have authorized the challenged practices, *Hein* would appear to exclude taxpayer standing. Opportunities for collusion—school board members quietly encouraging executive personnel to promote religion in school—seem ripe in such a legal environment. Moreover, the Seventh Circuit’s disposition of *Hinrichs*, discussed in Part V.C. above, shows that purely legislative action may not be a basis for taxpayer standing, even if the legislature has provided financial support for the challenged practice.

<sup>205</sup> *Allegheny County v. ACLU*, 492 U.S. 573 (1989); *Van Orden v. Perry*, 545 U.S. 677 (2005). For criticism of the “endorsement” test that has come to dominate lower court treatment of such disputes, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 276 (1987).

<sup>206</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984).

concurring opinion in *Van Orden v. Perry*.<sup>207</sup> But we have severe doubts that this sort of exercise of “passive virtues,”<sup>208</sup> however appropriate it may have been *ex ante*, is now capable of producing a sensible resolution of such controversies. Once cats like the doctrine of non-endorsement<sup>209</sup> are out of the bag, and perch in the legal system adjacent to competing doctrines of the permissibility of public acknowledgement of our religious traditions,<sup>210</sup> the terms of substantive constitutional debate have been determined. Now that courts have put such terms in place, a sudden retreat to a posture of non-justiciability of cases of this character may well lead to bitterness and recrimination, rather than to a constitutional discourse appropriately leavened by local conditions and political flexibility.

#### VIII. A ROLE FOR THE STATE COURTS?

All that has been said so far applies only to the federal courts. In some states, the law is considerably more receptive to taxpayer suits than is the law of Article III.<sup>211</sup> A wholesale retreat from taxpayer standing in the federal courts in Establishment Clause cases may thus lead plaintiffs to the doors of the state courts in search of an alternative

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<sup>207</sup> 545 U.S. 677, 698–705 (2005) (Breyer, J., concurring in the judgment to permit the Ten Commandments monument to remain on the grounds of the courthouse and other state governmental buildings in Texas).

<sup>208</sup> See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 111–198 (Bobbs-Merrill Co., 1962) (advocating judicial use of the “passive virtues” associated with doctrines of non-justiciability to avoid politically difficult contexts for constitutional adjudication).

<sup>209</sup> *Lynch*, 465 U.S. at 687–94 (O’Connor, J., concurring) (introducing the “endorsement” test into Establishment Clause adjudication of publicly-sponsored religious displays).

<sup>210</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33–45 (2004) (O’Connor, J., concurring) (defending the state-sponsored recital in public schools of the words “under God” in the Pledge of Allegiance as acknowledging the role of religious belief in the founding of the United States).

<sup>211</sup> See, e.g., *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E. 2d 1047, 1052–53 (N.Y. 2003) (describing broad theory of taxpayer standing as part of common law of New York). In contrast, we very much doubt that state law is currently more receptive than the law of Article III to suits by offended observers of government-sponsored displays, religious or otherwise.

forum.

In theory, state courts must be open to assertions of violation of federal law on the same terms as state courts are otherwise open to hear state law claims.<sup>212</sup> For a variety of reasons, however, state courts are unlikely to be hospitable forums for suits brought under the Establishment Clause. Many state court judges are elected, or are subject to electoral recall, and the political unpopularity of many Establishment Clause claims may well make state judges reluctant to apply existing constitutional principles with vigor.<sup>213</sup> Moreover, state courts may lack authority to award attorneys' fees in such cases. The possibility of such awards to prevailing parties in the federal courts is an important part of the dynamic of Establishment Clause litigation,<sup>214</sup> in which local counsel can sometimes persuade elected officials that constitutional recalcitrance may be quite expensive. Thus, the availability of state courts to hear such claims is no guarantee that Establishment Clause norms will be adequately enforced.

If state courts do become the only available forum for these cases, the dilemma of non-uniformity looms. Retreat from broad norms of Establishment Clause standing, without comparable retreat from broad substantive norms under the Clause, is functionally equivalent to a congressional withdrawal of jurisdiction from the federal

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<sup>212</sup> *Testa v. Katt*, 330 U.S. 386 (1947). The obligation may be even broader. *See generally* Nicole Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 145 (1984).

<sup>213</sup> *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

<sup>214</sup> Forces opposed to Establishment Clause litigation recently tried to get Congress to remove such cases from the general statutory scheme governing award of attorneys' fees to prevailing parties in constitutional litigation in the federal courts. Public Expression of Religion Act of 2005, H.R. 2679, 109th Cong. (2005). For discussion of the political context of the proposal, see Claire Hughes, *Proposed Law Would Limit Church-State Lawsuits*, Roundtable on Religion and Social Welfare Policy, June 27, 2006, <http://www.religionandsocialpolicy.org/news/article.cfm?id=4459>. The law received a favorable vote in the House but did not come up in the Senate.

courts. In such a scenario, federal courts are removed from the picture, but substantive federal law remains. When appropriately called upon to do so, state courts are duty-bound under the Supremacy Clause to apply the pre-existing law of the Establishment Clause.<sup>215</sup> But the content of those norms is highly contested,<sup>216</sup> and even those state courts operating in utmost fidelity to the rule of law will not necessarily apply such norms in a uniform way.

If Article III precludes federal court adjudication of Establishment Clause claims brought by taxpayers, or ultimately by observers of displays, and state law permits state courts to proceed to the merits of such cases, Supreme Court review of conflicts on these issues among the state courts may be precluded.<sup>217</sup> Just as the skittishness of state court judges may undermine the supremacy of federal law, the loss of a unifying federal voice in these matters may eventually subvert the uniformity of federal law as well.<sup>218</sup>

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<sup>215</sup> *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (Supremacy Clause binds state officials to follow Supreme Court interpretations of the Constitution).

<sup>216</sup> For a recent and elegant account of that contest, see Steven Gey, *Life After the Establishment Clause*, 110 W. Va. L. Rev. 1 (2007) (forthcoming, November 2007).

<sup>217</sup> See *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam) (dismissing appeal from state court decision on the merits of federal constitutional question on ground that the state court plaintiff lacked standing to litigate the question in the federal court). *Tileston* involved an attempt to obtain a declaratory judgment of unconstitutionality with respect to Connecticut's law against use of birth control devices. The Supreme Court eventually struck down the Connecticut law in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), in which the Court recognized the standing of doctors, defending against a criminal prosecution, to raise the constitutional rights of their patients.

<sup>218</sup> See generally ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* §§ 3.1–3.3 (4th ed. 2003); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Laurence Sager, *Constitutional Limits on Congress' Ability to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (arguing that Art. III requires that some federal forum be available for the enforcement of federal constitutional rights). A phenomenon roughly comparable to what we describe in text has begun to arise under the Guarantee Clause, U.S. CONST. art. IV, § 4. The Supreme Court long ago held that claims under the Clause are non-justiciable in the federal courts, see *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 143–150 (1911), but a number of state courts have entertained such claims. In *re Interrogatories*, 536 P.2d 308 (Colo. 1975) (Guarantee clause is justiciable in state court); *Van Sickle v. Shanahan*, 511 P.2d 223 (Kan. 1973) (same). But see *State ex rel. Huddleston v.*

Whatever one's view of the Establishment Clause, these consequences cannot be seen as salutary for either religious freedom or the constitutional system as a whole.

## CONCLUSION

*Hein* is fully subject to the dictum of ordinary language philosophy that no decision can tell you how to read it. The terms of engagement seem obvious, but the full pattern that will develop in the lower courts is for now unknowable. What seems evident is that *Hein* has narrowed the needle of justiciability on which so much Establishment Clause doctrine rests. Moreover, the campaign to narrow the role of courts in enforcing the Clause is not likely to come to a halt when the question involves the status of injuries other than those associated with taxpayers. Government lawyers, once awakened to these possibilities, will press them strenuously, and many judges will be receptive to the opportunity to avoid the merits of these difficult and notoriously divisive disputes.

If the ball of Establishment Clause doctrine is to be deflated, the constitutional system would be far better served if courts faced the issues squarely, and resolved them on their merits. It is one thing for courts to systematically and continuously avoid adjudication of matters better left to political branches—the scope of war powers, for example, where the courts have interfered very reluctantly and infrequently with questions of presidential versus congressional authority to commit troops to battle.<sup>219</sup>

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Sawyer, 932 P.2d 1145, 1160 (Or. 1997) (Guarantee Clause not justiciable in state court). *See generally*, Michael C. Dorf, The Relevance of Federal Norms for State Separation of Powers, 4 Roger Williams U. L. Rev. 51, 59-67 (1998). Such decisions by the highest state courts are unreviewable in the U.S. Supreme Court. The situation described in the text is different, because (unlike the context of the Guarantee Clause) the Supreme Court has already developed elaborate standards under the Establishment Clause. If some state court decisions under the Establishment Clause are unreviewable in the federal courts, those state decisions may contradict one another and may also contradict Supreme Court precedent that purportedly controls. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (characterizing Supreme Court decisions as the “supreme Law of the Land” within the meaning of the Supremacy Clause, U.S. CONST. art. VI, cl. 2).

Establishment Clause adjudication, however, is much different because minority interests are frequently at stake and because the courts have developed an elaborate body of governing norms. These norms have resided for a generation or more in the constitutional system, but they are not self-enforcing. Without the threat of judicial enforcement, they are likely to wither.

If the judiciary, led by the Supreme Court, is going to dismantle the current structure of non-establishment law, it should do so straightforwardly, and not by stealthy attacks along the front of justiciability. That form of battle is profoundly destabilizing. It threatens religious liberty, and it invites continued disrespect to the rule of law from decision-makers who believe they are safe from expensive lawsuits, even if they blatantly ignore prior judicial pronouncements on the meaning of the Constitution. *Hein* is an early step down a perilous path.

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<sup>219</sup> For competing views of this question, compare JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993) (arguing for a strenuous judicial role in limiting abuse of the executive's war-making powers) with Abraham Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33 (1995) (arguing that such questions should be left to battles over power and policy between the political branches, and that courts should stay out of such conflicts).