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CONSTITUTION  
SOCIETY FOR  
LAW AND POLICY



Issue Brief

## **The Slow, Tragic Demise of Standing in Establishment Clause Challenges**

**By Steven K. Green**

**September 2011**

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American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

# The Slow, Tragic Demise of Standing in Establishment Clause Challenges

Steven K. Green \*

Sometimes dramatic shifts in Supreme Court jurisprudence come about suddenly and with little warning; witness the abrupt changes that took place with the Court's holdings in *United States v. Lopez* (effectively gutting sixty years of deference to regulations under the Commerce Clause) and *Employment Division v. Smith* (reconfiguring the standard of review in Free Exercise jurisprudence).<sup>1</sup> More commonly, though, change comes gradually. Even the most significant case of the twentieth century, *Brown v. Board of Education*, was preceded by a series of decisions that chipped away at the doctrine of "separate but equal."<sup>2</sup> Gradual doctrinal change is the preferred alternative as it allows for buy-in by stakeholders, including constitutional lawyers and scholars, even if they disagree with the ultimate outcome. But sometimes, stakeholders feel they are mere observers of an incremental tidal wave of seemingly inevitable change, as if they are minor players in a fatalistic Greek tragedy in which the eventual outcome has already been determined.

Possibly I overstate matters for effect, but recent holdings by the Supreme Court and the Seventh Circuit Court of Appeals (among others) concerning the standing doctrine in Establishment Clause cases suggest we may be witnessing the slow death of taxpayer standing for challenges to government funding of religion, as well as the whittling away of non-taxpayer "injury" standing for many non-funding challenges to the Establishment Clause (e.g., those concerning government sponsored religious displays).<sup>3</sup> To an extent, the changes should not be surprising, as both the taxpayer exception and the generous definition of injury for non-economic violations have always had shaky foundations. These were artificial rules designed to get around equally artificial aspects of the Court's general standing jurisprudence. Still, this demise of the Court's own standing doctrine has not been pretty to watch. The once stable rule from *Flast v. Cohen* – finding an exception to the ban on taxpayer standing for Establishment Clause challenges – is being carved up like a Thanksgiving turkey, such that before long, only the bones and a few unpalatable portions of standing will remain.<sup>4</sup> One is almost drawn to jump on board the wagon of Justices Antonin Scalia and Clarence Thomas who advocate a quick, though not merciful, end to the doctrine.<sup>5</sup> But the stakes are too high to drink such poison. Not only will these changes keep otherwise qualified plaintiffs out of court and make bringing an Establishment Clause challenge more difficult, but conservative members of the Court seem intent on immunizing certain branches and functions of the government from any judicial review of some "establishing" practices. By deciding not to decide certain classes of challenges, courts will effectively be throwing Establishment Clause questions, such as the constitutionality of the

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\* Fred H. Paulus Professor of Law and Director, Center for Religion, Law and Democracy, Willamette University.

<sup>1</sup> *Lopez*, 514 U.S. 549 (1995); *Smith*, 494 U.S. 872 (1990).

<sup>2</sup> *Brown*, 347 U.S. 483 (1954). See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950).

<sup>3</sup> See *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Freedom From Religion Found. v. Obama*, 641 F.3d 803 (7th Cir. 2011). See also *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008).

<sup>4</sup> See *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968).

<sup>5</sup> *Hein*, 551 U.S. at 618 (Scalia, J., concurring).

National Motto “In God We Trust,” to the politically elected branches. Political expediency, rather than constitutional fealty, will become the rule of law, and Justice Robert Jackson’s immortal statement about withdrawing questions of constitutional rights from “the vicissitudes of political controversy” and placing them “beyond the reach of majorities and officials” will be stood on its head.<sup>6</sup>

What follows is an analysis of the recent holdings on Establishment Clause standing, with my own observations of why such changes were inevitable given the way in which the Court had constructed the doctrine. I close by arguing for a reevaluation of the core understanding of injury for Establishment Clause purposes.

## I. A Brief Primer on Standing

Standing requirements are essentially a form of self-imposed judicial restraint<sup>7</sup> that serve what Professor Mark Rahdert has called a “dispute resolution aim:” to ensure that the matter before the court is capable of proper and effective adjudication. Standing asks the parties to demonstrate “adversariness.”

It also asks whether the record the parties are likely to develop will be sufficient to illuminate the legal issues, allow authoritative resolution, facilitate relief, and enable confinement of resulting precedent to an appropriate range of similar settings. And it asks whether the parties involved possess the kind of interest in the outcome that will ensure an adequate precedential basis for determining the rights of others who might become involved in similar disputes.<sup>8</sup>

When a court dismisses a case or claim for lack of standing, it essentially declines to hear an otherwise cognizable constitutional claim because the party bringing the action is not sufficiently vested in the matter (i.e., not personally or uniquely injured), or the claim exists at a level of abstraction such that it lacks a sufficient connection to an action by the defendant or undermines the court’s ability to afford meaningful relief. Related to the standing doctrine are the courts’ twin aversions to announcing advisory opinions or trespassing on the realms of the other branches of government. Still, implicit within the standing rules, and consistent with the Court’s assertion that it remains the ultimate arbiter of the meaning of the Constitution, is the assumption that some appropriate party does (or should) exist to bring a focused claim to enable the Court to fulfill its role of judicial review. Unfortunately, as scholars and constitutional lawyers have frequently charged, courts apply standing rules inconsistently, if not arbitrarily, which suggests

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<sup>6</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

<sup>7</sup> *See Newdow*, 542 U.S. 1 (2004) (“The standing requirement is born of ‘an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.’”) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

<sup>8</sup> Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 *CARDOZO L. REV.* 1009, 1059-60 (2011).

that decisions may turn as much on the judges' view of the merits of a conflict, rather than on its justiciability.<sup>9</sup>

Many standing determinations come down to the issue of injury, termed “injury-in-fact,” i.e. whether the plaintiff has suffered a “concrete and particularized” injury (not a hypothetical one) that exists currently or in the near future. The purpose of this inquiry, the Supreme Court has oft noted, is to ensure that this particular plaintiff has a stake in the lawsuit and can hone the issues for the court’s resolution. The assumption is that a direct and particularized injury will steel the party’s resolve to litigate vigorously the case in a way that a party suffering less direct harm will not.<sup>10</sup> The Court has contrasted these positions as being “particularized” versus “generalized” injuries, but it has never adequately explained why one suffering an injury shared by many cannot assume the role of a vigorous litigant, other than to blindly characterize shared injuries as always being abstract in nature.<sup>11</sup> In a sense, the rule against hearing generalized interests is counterintuitive, as adjudicating a claimed injury shared by many, rather than addressing it piece-meal, would be a better use of judicial resources.

This distinction between particularized injuries and generalized grievances explains the Court’s general rule against taxpayer standing, i.e. standing asserted by a taxpayer in a case challenging government expenditures on the grounds that taxpayer funds are being used for unconstitutional purposes. The Court has been highly skeptical of such standing on the grounds that an interest of a taxpayer is one shared by the public at large, and such interest is “too indeterminable, remote, uncertain and indirect to furnish a basis for [a challenge to an] expenditure.”<sup>12</sup> In addition, the argument is that a taxpayer’s connection to any particular government expenditure “is comparatively minute and indeterminable” such that an injury is impossible to trace. This sounds closer to a *de minimus* rule rather than one abhorring generalized injuries (“interest in the moneys of the treasury . . . is shared with millions of others”), but the result is the same.<sup>13</sup>

## II. Establishment Clause Standing

### A. The Basic Rules

In 1952, in *Doremus v. Board of Education*, the Supreme Court applied its rule prohibiting taxpayer standing to turn back a challenge to a state law authorizing teacher-led Bible reading in the public schools. At the same time that it determined that the taxpayer’s financial interest was too indeterminate, the justices also minimized the significance of the plaintiffs’ non-pocket book injury as being only a psychic affront over a religious difference.<sup>14</sup> But applying the taxpayer standing prohibition strictly would have prevented the enforcement of a central aspect of the Establishment Clause – ending the practice of non-preferential financing of religious

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<sup>9</sup> See Suzanna Sherry, *Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 978-85 (2011).

<sup>10</sup> *Flast*, 392 U.S. at 101 (noting the purpose of standing is to ensure that the dispute “will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”).

<sup>11</sup> See *United States v. Richardson*, 418 U.S. 166, 189-91 (1974).

<sup>12</sup> *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433 (1952).

<sup>13</sup> *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923).

<sup>14</sup> See *Doremus*, 342 U.S. at 434.

ministries – where government expenditures for religion would harm all citizens equally.<sup>15</sup> And so, in *Flast* the Court carved an exception to allow taxpayer challenges to government expenditures where the litigant could demonstrate a connection between the legislative enactment authorizing the expenditure and the purported constitutional violation. As a result of *Flast*, any taxpayer could allege that a legislative appropriation on behalf of religion violated the Establishment Clause, regardless of her own connection to the entity or institution receiving the government funds. Armed with this weapon, individuals and groups such as the ACLU, Americans United for Separation of Church and State, and the Freedom From Religion Foundation were able to mount a host of successful challenges to funding programs.<sup>16</sup>

Fourteen years after *Flast*, in *Valley Forge College v. American United for Separation of Church and State*, the Court qualified the taxpayer standing exception to emphasize that the exception applied only to expenditures made pursuant to Congress' Article I, §8 taxing and spending powers. The aid to religion in *Valley Forge* – a transfer of government property to a religious college – occurred via congressional authority under the Property Clause, Article IV, §3. The Court's reading of *Flast* was technically correct, though it elevated that aspect of the holding over others (the *Flast* Court's emphasis on Congress' taxing and spending authority was chiefly due to the facts that were before them, and the Court left open the question of whether "other specific limitations" existed). Besides its narrow reading of *Flast*, Justice Rehnquist's *Valley Forge* opinion evinced hostility toward the exception, generally, by noting that the alleged government wrong-doer in the case was not Congress but a federal agency (a distinction the Court had not made in *Flast*), and the nature of the plaintiffs' injury was of a generalized gripe (the plaintiffs' injury was only "psychological," and such "injury [was not] sufficient to confer standing . . . even though the disagreement is phrased in constitutional terms. . . . [T]he Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing."). As such, *Valley Forge* emphasized that the *Flast* exception to taxpayer standing prohibition was in fact that, an *exception* to the default rule, and *Valley Forge* reiterated that the way to evaluate taxpayer interests with respect to Establishment Clause claims was to look for their injury-in-fact.<sup>17</sup>

The question of plaintiff injury has also arisen in the context of challenges to another area of Establishment Clause litigation: those involving government-owned or sponsored displays of religious items and symbols, such as Christmastime crèches and Ten Commandments monuments. Since *Valley Forge*, a tension has existed within the injury segment of standing analysis. *Valley Forge* stated that regardless of the intensity of one's beliefs, a psychological offense caused by government conduct does not amount to a concrete injury sufficient to confer standing.<sup>18</sup> However, in *Lujan v. Defenders of Wildlife*, the Court subsequently acknowledged

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<sup>15</sup> THOMAS J. CURRY, *THE FIRST FREEDOMS* 222 (1986).

<sup>16</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). *Everson*, of course, pre-dated *Flast*, but the Court allowed a taxpayer-based suit regardless.

<sup>17</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 *passim* (1982). The Court built on earlier holdings in *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), which refused to allow taxpayer standing for challenges pursuant to other sections under Article I.

<sup>18</sup> *Valley Forge*, 454 U.S. at 465. *Accord Schlesinger*, 418 U.S. at 217.

(grudgingly, via Justice Scalia) in a non-Establishment Clause context that a more particularized injury of an aesthetic or psychological nature may suffice.<sup>19</sup> A desire and some future plan to access a site for recreational use, for example, can serve as a noneconomic injury that confers standing.<sup>20</sup> As a result, lower courts have struggled over what is a sufficient noneconomic injury to bring a challenge to a religious display on government property or to a government proclamation endorsing religion. Courts have generally determined that plaintiffs have alleged a sufficient personal injury if they have some direct contact with the offending item/action or if they alter their behavior to avoid coming into such contact. In essence, if the religious display impairs the plaintiff's potential enjoyment of the property, she has alleged sufficient noneconomic injury, even if she has incurred minimal costs, experienced minimal distress or inconvenience, or has yet to encounter the offending item. Although a potentially unlimited number of people may share the plaintiff's situation, provided she can allege her own contact, inconvenience, etc., she has a particularized injury.<sup>21</sup> Although this generous interpretation of noneconomic injury varies slightly between the circuits, until recently, all circuits have recognized this distinction from the *Valley Forge* "mere psychological" rule. Even the Supreme Court accepted this level of injury in its early religious display cases, and only recently, in *Salazar v. Buono*, has this accepted form of injury been questioned.<sup>22</sup>

## B. The Problem with the Rules

Like standing rules applied to other types of constitutional claims, the rule requiring a particularized injury has the effect of weeding out less desirable plaintiffs and claims in the Establishment Clause context. But a tension has always existed in applying a standard injury requirement to Establishment Clause cases. The overarching problem is that a focus on demonstrating a particularized injury highlights only one aspect of the Clause's purpose – to prevent government coercion or favoritism with respect to matters of faith – to the detriment of an equally important value – that of reaffirming jurisdictional boundaries between the Church and the State. Several scholars have referred to this as the "structural" function of the Establishment Clause – to disable the government of all authority to act religiously. Unlike other potential constitutional violations, the injuries that flow from many Establishment Clause wrongs are inherently "generalized;"<sup>23</sup> "the damage, broadly speaking, accrues to society as a whole rather than to individuals as such."<sup>24</sup> Professors Chip Lupu and Bob Tuttle have argued that:

The Establishment Clause occupies a unique role within the Bill of Rights. As constructed over the past half-century, it frequently

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<sup>19</sup> 504 U.S. 555, 562-63 (1992) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)) (recognizing aesthetic injuries in addition to economic injuries).

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

<sup>21</sup> See *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983).

<sup>22</sup> *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>23</sup> Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

<sup>24</sup> Note, *Nontaxpayer Standing, Religious Favoritism, and the Distribution of Government Benefits: The Outer Bounds of the Endorsement Test*, 123 HARV. L. REV. 1999, 1999 (2010).

involves questions of government voice and structure, as well as more conventional constitutional concerns about individual coercion. Where 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 relevant injury is individuated, material, and more visible. . . . The concerns at stake in most Establishment Clause cases are public, not private . . . .<sup>25</sup>

In essence, with respect to claims that the government is funding religion in a non-preferential manner, such that no religious body is preferred or excluded from receiving benefits, the Establishment Clause injury is shared by all of us, equally, or by none of us.

The same “generalized” injury exists with many instances of governmental expropriation of religious imagery and symbolism for its own purposes. So, for example, where the government’s endorsement of religion is ecumenical – such as with a presidential call for nonsectarian prayer – the offense is to the structural restraint on the government’s use of religion more than it is to a generally held offense at the action. Therefore, in both funding and symbolism cases, requiring a particularized injury is inapposite to the constitutional wrong. By resting the ability to challenge an Establishment Clause violation upon the necessity of demonstrating an injury, the Court in *Flast* set the standing inquiry down a particular path, one that may have now reached a dead end.

### III. Recent Developments in Taxpayer Standing.

One could argue that the demise of the *Flast* taxpayer exception is not of recent making; that it suffered a near-mortal wound in *Valley Forge* in 1982 and has been living on borrowed time ever since. Yet *Valley Forge*, when read narrowly, excluded only a small segment of potential claims and claimants: those wishing to challenge a financial benefit to religion that did not originate through a legislative appropriation. The vast majority of challenges to funding programs, e.g., teacher salary supplements, educational equipment and supplies, tax deductions and credits, tuition vouchers, faith-based social services, have involved a legislative appropriation and have not been affected by the holding in *Valley Forge*. In fact, in 1988 in *Bowen v. Kendrick*, the Court (surprisingly, via Chief Justice Rehnquist) appeared to blunt the force of *Valley Forge*’s “congressional versus executive action” distinction by noting that most programs administered by executive agencies receive authorization through a congressional appropriation.<sup>26</sup> Still, the *Valley Forge* decision stood as a boundary, and a warning, to potential litigants and claims.

The hostility to permissive standing, generally, and within the Establishment Clause context, in particular, as the Court’s conservative wing demonstrated in *Valley Forge*, came to full flower in 2007. In *Hein v. Freedom From Religion Foundation*, members of the Wisconsin-

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<sup>25</sup> Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom From Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 133-34 (2008).

<sup>26</sup> See *Bowen v. Kendrick*, 487 U.S. 589, 618-20 (1988).

based organization relied upon taxpayer standing to challenge aspects of President George W. Bush’s “Faith-Based Initiative,” particularly the use of White House and Executive Branch monies to fund various faith-based offices within federal agencies and departments, and conferences where, allegedly, administration officials endorsed religion in promoting the program.<sup>27</sup> The Seventh Circuit, in an opinion written by noted conservative jurist Richard Posner, held that *Flast* controlled and the plaintiffs had standing.<sup>28</sup> A five-justice majority of the Supreme Court reversed and dismissed the case, ruling that FFRF lacked taxpayer standing to bring a challenge because the alleged expenditures came through an administrative action, rather than via a congressional appropriation.<sup>29</sup> A three-justice plurality read narrowly the *Flast* holding that taxpayer standing was allowed to challenge an appropriation arising under congressional taxing and spending authority. It decided that because the funds came out of a \$53 million general appropriation to fund the Executive Branch’s “day-to-day activities,”<sup>30</sup> and because there was no congressional direction as to their use, the expenditure was not “undertaken pursuant to an express congressional mandate.”<sup>31</sup> For the plurality, *Flast* had created only a “narrow exception” to the rule against taxpayer standing, and this claim fell outside that rule.<sup>32</sup> The plurality also implied that the claim was barred under the *Valley Forge* holding that taxpayers lack standing to challenge “discretionary Executive Branch expenditures” generally (seeming to resurrect the congressional versus executive distinction downplayed in *Kendrick*).<sup>33</sup>

As the dissenters asserted, the plurality’s opinion represented a crabbed reading of *Flast* and the purposes behind the taxpayer exception. The “psychic injury” that taxpayers experience when their government funds religious activities remains as great regardless of which branch disburses the check. As the dissent explained, “[w]hen executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injuries.” And the injury is as great – and possibly worse due to transparency concerns – when the decision to expend money is discretionary rather than mandated by a statute. Separation of powers concerns about reviewing discretionary executive decisions are also no greater than the similar threat presented by judicial evaluation of congressional action, Justice Souter noted.<sup>34</sup> The effect of *Hein* is to immunize a potentially large amount of Executive Branch action from judicial review which, “for the purposes of justiciability, makes neither conceptual nor functional sense.”<sup>35</sup>

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<sup>27</sup> 551 U.S. 587 (2007). The Faith Based Initiative was the Bush Administration’s expansion of “Charitable Choice” – a series of laws enacted during the Clinton presidency which encourage the government to contract with religious based charities to provide social services. See JO RENEE FORMICOLA ET AL., FAITH-BASED INITIATIVES AND THE BUSH ADMINISTRATION: THE GOOD, THE BAD, AND THE UGLY (2003).

<sup>28</sup> *Freedom From Religion Found. v. Chao*, 433 F.3d 989.

<sup>29</sup> *Hein*, 551 U.S. 587 (2007).

<sup>30</sup> *Id.* at 605.

<sup>31</sup> *Id.* at 604.

<sup>32</sup> *Id.* at 602.

<sup>33</sup> *Id.* at 607-08.

<sup>34</sup> *Id.* at 639 (Souter, J., dissenting).

<sup>35</sup> Lupu & Tuttle, *supra* note 25, at 153.

Two other aspects of *Hein* are as troubling as its holding. First, the plurality opinion, written by Justice Alito, purported to affirm *Flast*, but did so only grudgingly. Because the desired result could be reached through a formalistic reading of *Flast*, *stare decisis* directed the plurality's approach ("We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it."). But as frequently happens when justices claim they are merely adhering to precedent, the holding just followed now looks slightly different. Justices Scalia and Thomas agreed with the dissenters that the plurality's distinction was wooden, but urged that *Flast* should be overruled. Only Justice Kennedy in the majority embraced *Flast* ("the result reached in *Flast* is correct"). This bodes ill for the future of the *Flast* exception. Despite Kennedy's defense of *Flast*, he could soon be convinced by Scalia's argument that to remain logically consistent, *Flast* (as now interpreted) must either be expanded or gutted.<sup>36</sup>

The other troubling aspect of *Hein* was Justice Souter's cautious defense of taxpayer standing. Disappointingly, Souter put the constitutional interest at stake squarely within a traditional notion of an injury-in-fact. The interest was "a personal constitutional right not to be taxed for the support of a religious institution," Souter argued. James Madison's infamous "three pence implicates the conscience," he wrote, and "the injury [results] from Government expenditures on religion." By so arguing, Souter sought to maintain the conceptual rationale for allowing challenges to government violations of nonestablishment within the traditional parameters of an injury-in-fact. By so doing, Souter kept the concept of taxpayer standing on a collision course with usual notions of injury, rather than seizing the opportunity to explore other rationales for allowing funding challenges, such as whether the Establishment Clause imposes a structural limitation on the government's action, irrespective of any particularized injury.<sup>37</sup>

The fall-out from *Hein* only confirmed that "*Flast's* rule appears to be hanging by a thread over the fires of probable judicial damnation."<sup>38</sup> Only weeks following the decision, the Justice Department asked the Seventh Circuit to dismiss a taxpayer challenge to a Veterans Administration policy regarding chaplains serving in VA hospitals.<sup>39</sup> And just a few months later, the Seventh Circuit dismissed a challenge by taxpayers to a practice of religious invocations in the Indiana House of Representatives. Relying on *Hein*, the court ruled that the minor internal expenditures by the Indiana House that supported the prayer practice were insufficient to implicate any taxpayer injury.<sup>40</sup> Such quick developments have caused litigating organizations such as the ACLU, Americans United, and FFRF to reevaluate their litigation plans.

This past term the Supreme Court took another step toward dismantling taxpayer standing with its decision in *Arizona Christian School Tuition Organization v. Winn*.<sup>41</sup> The case, brought by Arizona taxpayers, challenged a state law that gives tax credits for personal and corporate

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<sup>36</sup> *Hein*, 551 U.S. at 615-16.

<sup>37</sup> *See id.* at 641-42 (Souter, J., dissenting).

<sup>38</sup> Rahdert, *supra* note 8, at 1045.

<sup>39</sup> *See* Freedom From Religion Found. v. Nicholson, 469 F. Supp. 2d 609 (W.D. Wis. 2007), *vacated*, 563 F.3d 730 (7th Cir. 2008). Prior to *Hein*, the Justice Department had conceded the plaintiffs' standing and was defending the claim on the merits.

<sup>40</sup> *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005), *reversed*, 506 F.3d 584 (7th Cir. 2007).

<sup>41</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

contributions to private “school tuition organizations” which in turn award tuition grants to students attending private schools, including religious schools. The program was likely to be held constitutional based on the Court’s decision in *Zelman v. Simmons-Harris*, but rather than ruling on the merits, the Court accepted the petitioners’ argument – supported by the Obama Justice Department – that the plaintiff/respondents lacked taxpayer standing. The opinion, written by Justice Kennedy, again reaffirmed *Flast* but again narrowed its effect. Kennedy wrote that the interest of taxpayers (and their injury) is limited to legislative appropriations of tax money for religion – the “‘injury’ alleged in Establishment Clause challenges to federal spending” is connected to “the very extraction and spending of tax money in aid of religion.”<sup>42</sup> A *tax credit*, in contrast, involves no extraction or expenditure by the government, Kennedy noted. Any subsidy of religious activity through the tax credit is the result of “private action” and not “traceable to the government’s expenditures.”<sup>43</sup> Kennedy acknowledged, as he was forced to by Justice Kagan’s blistering dissent, that “tax credits and governmental expenditures can have similar economic consequences.” However, Kennedy declared, in a feat of syllogistic logic, that when the government declines to tax, “there is no such connection between [the] dissenting taxpayer and [an] alleged establishment.”<sup>44</sup>

Justice Kagan easily dismantled Kennedy’s faulty economic analysis: “[c]ash grants and targeted tax breaks are means of accomplishing the same governmental objective – to provide financial support to select individuals or organizations. . . . Either way, the government has financed the religious activity.”<sup>45</sup> As Kagan noted, in five previous cases the Court had considered the constitutionality of tax exemptions/deductions/credits in suits brought by taxpayers.<sup>46</sup> The Court’s facile distinction sets up a catch-22 where a tax break may advance religion but no one is able to bring a challenge. Any continuity between substance and justiciability is destroyed. Kagan also put the Court’s “arbitrary distinction” between direct and indirect expenditures in its larger light. The holding was yet another “end-run [around] *Flast*’s guarantee of access to the Judiciary.” Building on *Hein*, the *Winn* decision may lead to “the effective demise of taxpayer standing,” which “will diminish the Establishment Clause’s force and meaning.”<sup>47</sup>

The cumulative effect of *Valley Forge*, *Hein* and *Winn* is that the alleged funding violation must flow not merely from a congressional appropriation to a program administered by an executive agency, but that Congress must expressly intend and mandate the particular expenditure. And the expenditure must be in cash (forget the “tax” part of *Flast*’s “tax and spend” requirement where it involves tax mechanisms that are used in lieu of a cash grant). Actions that may be clearly “establishing” in appearance and effect to a first year law student – such as a discretionary cash grant to build a house of worship or a dollar-for-dollar tax forgiveness for a religiously owned business – are now potentially immune from challenge.

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<sup>42</sup> *Id.* at 1446.

<sup>43</sup> *Id.* at 1447.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1450 (Kagan, J., dissenting).

<sup>46</sup> *Id.* at 1452-53.

<sup>47</sup> *Id.* at 1450-51.

#### IV. Diminished Non-Economic Standing

The judicial attack on non-economic standing for Establishment Clause challenges has not been as overt as that on taxpayer standing. Nonetheless, there is a growing hostility to allowing plaintiffs to bring suits alleging psychic injuries from their exposure to government endorsements of religion, such as through a state-sponsored religious display or official proclamation endorsing religion.

As noted above, standing was not an issue in the Court's leading holdings concerning challenges to government sponsored religious displays. So in *Lynch v. Donnelley* (crèche in city park), *Allegheny v. ACLU* (crèche in county courthouse), *McCreary County v. ACLU* (Ten Commandments in courthouses) and *Van Orden v. Perry* (Ten Commandments on grounds of state capital), the justices accepted that the plaintiffs had alleged sufficient injury through their encounters with the allegedly unconstitutional items.<sup>48</sup> For example, in *Van Orden*, the plaintiff's allegation that he regularly passed by the Ten Commandments monument on his way to the Texas State Law Library drew no comment or challenge. Implicitly, the Court accepted that the plaintiffs' alleged injury was more than the psychic or abstract offense it had decried in *Valley Forge*, *Richardson* and *Schlesinger*. The ripple effect of *Hein* and *Winn*, however, soon impacted this area as well.

An early sign that several justices were eager to reconsider the availability of non-taxpayer standing occurred in the 1996 denial of certiorari in a case challenging the depiction of a Latin cross in a city seal. In *Robinson v. City of Edmond*, the Tenth Circuit held the plaintiff had standing where he had observed the seal but had not altered his conduct to avoid its encounter. Three justices dissented from the certiorari denial (Rehnquist, Scalia, and Thomas) expressing their desire to consider whether standing should be afforded on nothing more than direct exposure to the offending religious symbol.<sup>49</sup>

By the time the Court heard *Salazar v. Buono*, a challenge to the maintenance of a Latin Cross on the Mojave National Preserve, *Hein* had been decided. The Ninth Circuit, in an opinion by Judge Alex Kozinski, rejected the government's characterization of the plaintiffs' injury as being merely ideological, and not an in-fact injury.<sup>50</sup> Before the high court, the government – now the Obama Administration – reasserted the standing challenge, claiming that Buono lacked a personal injury to challenge the display because he was merely offended at the presence of the cross on public land. Justice Kennedy, speaking for the plurality, side-stepped the government's challenge by noting that the present appeal involved only a question of enforcing a final judgment (which the government had attempted to avoid complying with by transferring the land around the cross to the Veterans of Foreign Wars), an action that Buono had standing to bring as the prevailing party.<sup>51</sup> Still, the plurality reversed the lower court's issuance of an injunction respecting the land transfer, opining that the Court could not assume illicit motives on the part of

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<sup>48</sup> See *Lynch*, 465 U.S. 668 (1984); *Allegheny*, 492 U.S. 573 (1989); *McCreary County*, 545 U.S. 844 (2005); *Perry*, 545 U.S. 677 (2005).

<sup>49</sup> *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 517 U.S. 1201, 1202-03 (1996) (Rehnquist, C.J., dissenting).

<sup>50</sup> *Buono v. Norton*, 371 F.3d 543, 547-48 (9th Cir. 2004).

<sup>51</sup> *Salazar v. Buono*, 130 S. Ct. 1803, 1815-16 (2010).

Congress, and noting as an aside that the government’s use of a sectarian symbol may serve valid purposes (“[t]he Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society.”).<sup>52</sup> In their concurrence, Justices Scalia and Thomas echoed the plurality’s hostility to *Buono*’s claim on the merits, but argued that his injury-in-fact was still a relevant question. Conflating questions of standing and substance, Scalia argued that *Buono* would experience no injury if the cross remained on land now purportedly owned by the VFW, though managed by the government.<sup>53</sup> Although the ultimate holding and impact of *Buono* are convoluted, the decision signals an increasing willingness by conservative justices to reconsider questions of standing, particularly with merits claims they find lacking, such as challenges to religious displays.

The fall-out of this trend can be seen in the recent holding of the Seventh Circuit denying plaintiffs standing to challenge presidential prayer proclamations. Relying chiefly on *Valley Forge*, *Richardson* and *Schlesinger*, Chief Judge Frank Easterbrook held that the plaintiffs raised only a generalized grievance and thus lacked any personalized injury (“the President’s proclamations are addressed to plaintiffs, in common with all citizens”).<sup>54</sup> Easterbrook declared that the plaintiffs merely had “hurt feelings” and “fe[lt] slighted” by the President’s declining to comply with their view of the Constitution, but that a psychological disagreement “is not an ‘injury’ for the purpose of standing.”<sup>55</sup> To that extent, the holding was consistent with the above trio of cases. But two other aspects of the holding are worrisome. Relying on *Valley Forge*, *Richardson*, *Schlesinger*, and now *Hein*, Easterbrook reaffirmed that some constitutional claims might simply be immune from judicial review by virtue of the actor: “If anyone suffers injury . . . that person is the President, who is not complaining.”<sup>56</sup> And though the court dispatched the plaintiffs’ standing using current rules, Easterbrook opined that the courts “may need to revisit the subject of observers’ standing.”<sup>57</sup> Indeed, *Freedom from Religion Foundation v. Obama* affirms what several commentators have observed recently: in light of the cut-back in taxpayer standing in Establishment Clause cases, courts will logically be reexamining the previously permissive rules governing non-taxpayer injuries as well.

## V. The Future

It is likely that we are witnessing a sea change in judicial thinking about how the standing doctrine applies to Establishment Clause challenges. It is also likely that this change is motivated in part by the conservative majority’s general view of Establishment Clause claims. The *Hein* plurality’s “utterly meaningless distinction[]”<sup>58</sup> between legislative and executive expenditures, and the *Winn* Court’s “novel distinction”<sup>59</sup> between appropriations and tax expenditures, can only be explained by an underlying hostility to the *Flast* exception. And it is

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<sup>52</sup> *Id.* at 1818 (citing *Lee v. Weisman*, 505 U.S. 577, 598 (1992)).

<sup>53</sup> *Id.* at 1826-27 (Scalia, J., concurring).

<sup>54</sup> *Freedom From Religion Found. v. Obama*, 641 F.3d 803, 806 (7th Cir. 2011).

<sup>55</sup> *Id.* at 807.

<sup>56</sup> *Id.* at 805.

<sup>57</sup> *Id.* at 807.

<sup>58</sup> *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 618 (2007) (Scalia, J., concurring).

<sup>59</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450 (2011) (Kagan, J., dissenting).

clear that “the effective demise of taxpayer standing—will diminish the Establishment Clause’s force and meaning.”<sup>60</sup>

Blame for the demise of taxpayer standing – and the diminishing of non-taxpayer standing – should not rest solely on the judicial activism of the conservative Supreme Court majority. Equal blame lies with the Court’s Establishment Clause standing jurisprudence generally, and specifically with the initial decision to characterize violations of the Clause as personalized injuries. With some Establishment Clause claims – such as those involving religious discrimination, coercion, or preferences – personalized injury-in-fact exists, and it makes sense to apply traditional standing rules. But other forms of Establishment Clause violations involve infringements that are of a structural nature – where the government has appropriated money in support of religion in a non-preferential manner or has appropriated religious discourse for its political goals. “Injury” in such cases is not personalized but a violation of a constitutionally endowed group right, one that guarantees that the government cannot assume authority over religious matters. With such claims, there is no reason that a committed individual or group, such as the ACLU, cannot serve as a proxy for us all. There is little risk that such plaintiffs cannot vigorously litigate the case or hone the legal issues for adjudication. Where there have been violations of the structural limits imposed by the Establishment Clause, the rights to be vindicated are of a public, rather than a private nature.<sup>61</sup>

*Flast* started the Court down the wrong road by characterizing the interest of citizens to challenge an appropriation as an injury to taxpayers. The question, the Court stated, was whether a federal taxpayer had a “personal stake and interest.” Her injury was that “[h]er tax money [was] being extracted and spent in violation” of the no-establishment mandate. In other places, the majority called it an infringement on “religious liberty,” whereas Justice Stewart’s concurrence called it “a personal constitutional right.”<sup>62</sup> On one level, the justices could be forgiven for these characterizations, as they were struggling with the legacy of *Frothingham* and *Doremus*, which had already described the required interest as being one of an injury. Yet despite characterizing the interest as such, the *Flast* Court was not firm that a personal injury was the only constitutional interest at stake. It also suggested that the Establishment Clause serves a structural function as well: the Clause “was designed as a specific bulwark against such potential abuses of government power,” Chief Justice Warren wrote, and it represents “a specific constitutional limitation” on congressional power.<sup>63</sup> Justice Fortas, while concurring with the majority, also opined that “the vital interest of a citizen in the establishment issue . . . would be acceptable as a basis for this challenge” “without reference to his taxpayer’s status.”<sup>64</sup> And Justice Harlan, while dissenting from the Court’s finding of standing, also observed that the true “interests [a citizen] represents, and the rights he espouses, are, as they are in all public actions, those held in common by all citizens.” It made no sense to Harlan to “describe those rights and interests as personal.”<sup>65</sup> Thus despite the holding, the justices in *Flast* did not reduce the interest in preventing government funding of religion to solely the injury a taxpayer experiences when

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<sup>60</sup> *Id.*

<sup>61</sup> Esbeck, *supra* note 23; Lupu and Tuttle, *supra* note 25, at 133-137.

<sup>62</sup> *Flast v. Cohen*, 392 U.S. 83, 101, 103, 106, 114 (1968).

<sup>63</sup> *Id.* at 104.

<sup>64</sup> *Id.* at 104, 115 (Fortas, J., concurring).

<sup>65</sup> *Id.* at 129 (Harlan, J., dissenting).

his extraction is used to support another's religion. The question before the Court, however, was whether an exception existed to the *Frothingham* and *Doremus* rules against taxpayer standing, and the Court ruled that one did.

Any ambiguity over whether the interest in government fealty to the Establishment Clause was a personal right or a structural interest was settled in *Valley Forge*, which clearly put the interest in the former category. This should not be surprising. In seeking to limit the scope of the *Flast* exception, the conservative majority was inclined to emphasize that standing, for Article III purposes, requires a traditional understanding of injury, which (conveniently) did not exist in that case. The plaintiffs – staffers of Americans United for Separation of Church and State – had sought to vindicate an interest shared by society as a whole: to prevent the transfer of valuable government property to a religious entity to be used for religious education. This was a structural interest, but one will look in vain in Justice Rehnquist's opinion for any discussion of such an interest as occurred in *Flast*. Rather, by relying chiefly on the generalized grievance holdings of *Schlesinger* and *Richardson*, Rehnquist effectively closed the door to viewing the constitutional guarantee against religious funding as a corporate right.<sup>66</sup> After *Valley Forge*, the dye had been cast, such that even liberal justices like Justice Souter in *Hein* would agree that the injury citizens experience by government funding of religion is of a personal nature. And by applying a strict notion of injury-in-fact in funding challenges, judges are invited to do the same with noneconomic claims, particularly where the plaintiffs' offense seems more generalized than personalized.

Unfortunately, the opportunity to reconfigure the justices' thinking about standing in Establishment Clause challenges may have passed. Rather, the Court's majority is moving in the opposite direction to emphasize traditional notions of injury-in-fact while building on *Valley Forge's* formalistic compartmentalizing of government functions. In its unwillingness to concede that a similar injury exists to a taxpayer when the expenditure occurs under the authority of the Executive Branch, or that a tax relief measure is as subsidizing of religion as a cash grant, the Court is exacerbating a widening gulf between justiciability and substance.<sup>67</sup> Claims with equal constitutional merit will go unheeded. The result of “the effective demise of taxpayer standing,” as Justice Kagan noted, “will diminish the Establishment Clause's force and meaning.”<sup>68</sup>

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<sup>66</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 482-87 (1982).

<sup>67</sup> See Lupu & Tuttle, *supra* note 25, at 136.

<sup>68</sup> *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1451.