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Standing on Hallowed Ground: Should the Federal Judiciary Monitor Executive Violations of the Establishment Clause?

Freedom from Religion Foundation, Inc. vs. Chao[1]

I. INTRODUCTION

The standing doctrine is a threshold inquiry into whether a court has the power to hear the claims brought by a particular party.[2] Motivated by a desire to reach the merits of a higher number of cases under the Establishment Clause, the Supreme Court created an exception to the traditional standing doctrine known as *Flast* standing, after the case from which it originated, which allows a taxpayer to challenge congressional appropriations that allegedly violate the Establishment Clause. However, despite the Court's efforts, the limited nature of the *Flast* doctrine, coupled with the normative requirement that a plaintiff suffer injury-in-fact, continues to limit the number of Establishment Clause claims that can be resolved on the merits. In *Freedom from Religion Foundation, Inc. v. Chao*,[3] the Seventh Circuit incrementally expanded taxpayer standing to include challenges to executive branch funding of programs created by the President.

This Note argues that the Seventh Circuit reached the correct result. However, there is little logic in continuing to limit Establishment Clause adjudications to plaintiffs who can show injury-in-fact or, absent such injury, plaintiffs who can claim the allegedly unconstitutional act was an exercise of the Taxing and Spending Clause. Instead, because the Establishment Clause is a unique structural restraint which separates the government from organized religion[4] and prohibits government support of religion that divides the political process along religious lines, this Note concludes that standing to sue for Establishment Clause violations should be extended to acts of any government power.

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1. 433 F.3d 989 (7th Cir. 2006).

2. 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531 (2d ed. 1984).

3. *Freedom from Religion Found.*, 433 F.3d 989.

4. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1, 61 (1998).

II. FACTS AND HOLDING

Through executive orders, President George W. Bush created a program commonly known as Faith-Based and Community Initiatives.[5] Although faith-based and community groups have provided social services to people in need for years, the federal government was often unwilling to partner with these groups.[6] President Bush's program was aimed at reversing that practice,[7] and the President funded conferences to promote the program through executive agencies.[8] The conferences "provide[d] participants with information about the Federal funding process, available funding opportunities, and the requirements that come with the receipt of Federal funds."[9] These seminars allowed "thousands of grassroots organizations" to receive training in the Federal grant process, and hundreds of new organizations have successfully received Federal funds to perform their social service functions.[10] This law-

5. Exec. Order No. 13,199, 66 Fed. Reg. 8499, 8499 (Jan. 31, 2001) (There is established a White House Office of Faith-Based and Community Initiatives (White House OFBCI) within the Executive Office of the President that will have lead responsibility in the executive branch to establish policies, priorities, and objectives for the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law.); *Freedom from Religion Found.*, 433 F.3d at 993.

6. *Freedom from Religion Found.*, 433 F.3d at 993.

7. Faith-based and other community organizations are indispensable in meeting the needs of poor Americans and distressed neighborhoods. Government cannot be replaced by such organizations, but it can and should welcome them as partners. The paramount goal is compassionate results, and private and charitable community groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes, such as curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty. This delivery of social services must be results oriented and should value the bedrock principles of pluralism, nondiscrimination, even-handedness, and neutrality.

Exec. Order No. 13,199, 66 Fed. Reg. at 8499.

8. *Id.*; Exec. Order No. 13,280, 67 Fed. Reg. 77145, 77146 (Dec. 16, 2002) (The agency shall "develop and coordinate agency outreach efforts to disseminate information more effectively to faith-based and other community organizations with respect to programming changes, contracting opportunities, and other agency initiatives, including but not limited to Web and Internet resources.").

9. *Freedom from Religion Found.*, 433 F.3d at 993. "The conferences will be supported by the Departments of Justice, Agriculture, Labor, Health and Human Services, Housing and Urban Development, Education, Commerce, and Veterans Affairs, the Small Business Administration, and the Agency for International Development." *Id. See* Exec. Order No. 13,280, 67 Fed. Reg. at 77146.

10. *Freedom from Religion Found.*, 433 F.3d at 993.

suit arose at the outset of a new round of conferences to support the Faith-Based and Community Initiatives program.[11]

One of the plaintiffs in the instant case, Freedom from Religion Foundation (FFRF),[12] attacked the constitutionality of using federal funds to host these conferences.[13] FFRF alleged that "the conferences are designed to promote religious community organizations over secular ones" and characterized the conferences as "propaganda vehicles for religion."[14] The basis of their lawsuit was that the conferences violated the separation between church and state governed by the Establishment Clause.[15]

FFRF's standing to bring its challenge was as a federal taxpayer, alleging that the conferences are funded by money which has been appropriated by Congress.[16] However, Congress did not earmark the money specifically for the conferences or for any other activities of the various Faith-Based and Community Initiatives programs.[17] Instead, the money was drawn from funds allocated to the executive for general expenditures.[18] These are funds "over which the President and other executive branch officials have a degree of discretionary power."[19] Plaintiffs claimed that executive expenditures in this matter violate the Establishment Clause.

The district court granted the government's motion to dismiss on the grounds that FFRF did not have taxpayer standing to challenge the Faith Based and Community Initiatives conferences because federal funds had not been appropriated directly by Congress to serve a religious goal.[20] On appeal,

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11. *Id.*

12. Freedom from Religion Foundation is an educational group whose self-stated mission is "to promote the constitutional principle of separation of state and church, and to educate the public on matters relating to nontheism." http://www.ffrf.org/purposes (last visited Mar. 4, 2006).

13. *Freedom from Religion Found.*, 433 F.3d at 993.

14. *Id.* at 433 F.3d at 993-94. Although the instant appeal is concerned with whether FFRF has standing to challenge the executive expenditure of funds to host conferences that are in part about the procedures required to get federal funds, they also challenged the constitutionality of granting federal funds to a religious organization under the program. *Id.* at 996. The district court held that the plaintiffs do not have standing to bring that challenge. *Id.* at 990.

15. *Id.* at 994. The majority characterizes the Establishment Clause as requiring "that the government be neutral between religion and irreligion." *Id.* This characterization, however, is not consistent with Supreme Court precedent, which recognized exemptions for religious organizations that did not exist for secular groups. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that South Carolina must provide an exemption from its eligibility requirements for public welfare that allow an individual to decline work on her Sabbath).

16. *Freedom from Religion Found.*, 433 F.3d at 990.

17. *Id.* at 994.

18. *Id.*

19. *Id.*

20. *Id.* at 996.

the Seventh Circuit Court of Appeals reversed the district court's decision, holding that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch, as by Presidential executive order."[21]

III. LEGAL BACKGROUND

A. Evolution of Taxpayer Standing

Article III of the Constitution defines the judicial power of the United States, but it also limits the exercise of that power in several respects.[22] One of these limitations involves restricting the bounds of judicial power to "Cases or Controversies."[23] Originally, this limitation was simply a reflection of the familiar operations of the English judicial system and "its manifestations on this side of the ocean."[24] It was not within the jurisdiction of the courts to exercise power over "abstract, intellectual problems," but to arbitrate "concrete, living contest[s] between adversaries."[25] Over time, the Court adopted the doctrine of standing to protect the values inherent in this constitutional limitation.[26] This Note explores one facet of the standing doctrine, taxpayer standing, in an effort to understand the affect that doctrine has on the resolving alleged violations of the Establishment Clause.[27]

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21. *Id.* at 996-97.

22. *See* U.S. CONST. art. III.

23. *Id.* § 2, cl. 1.

24. *See* Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). "Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Id.* Although the judges of Westminster had the power to give advisory opinions, the federal bar on such opinions is grounded in the unique nature of American courts and the other two branches of government. WRIGHT ET AL., *supra* note 2, § 3529.1.

25. *Freedom from Religion Found.*, 433 F.3d at 990.

26. *See, e.g.*, WRIGHT ET AL., *supra* note 2, § 3529.

27. Although not the only inquiry into which attention should be drawn when evaluating plaintiff standing, this Note is primarily concerned with the requirement that a plaintiff show actual injury. *See generally* WRIGHT ET AL., *supra* note 2, § 3529 ("Extended attention will be paid to the elements of injury, causation, and redressability that now shape Article III requirements.").

Frothingham v. Mellon[28]

Beginning with *Frothingham v. Mellon*,[29] the Court exhibited disfavor with the idea that the federal courts should be open to persons suffering merely from grievances shared by the general public. In *Frothingham*, one of the preeminent justiciability decisions, the Court held that a party requesting the Court to exercise its power of judicial review "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[30] The plaintiff in *Frothingham* had challenged a federal statute that apportioned money to the states, conditioned upon state cooperation with the federal government's efforts to reduce infant mortality rates.[31] Plaintiff complained that Congress exceeded its constitutionally enumerated powers in enacting the program and claimed as an injury her tax burden in supporting it.[32] In declining to approve taxpayer standing, the Court held that a plaintiff's tax burden was not a sufficiently direct and immediate injury, and as a result, the court was not justified in exercising its power of judicial review.[33]

Recently, the Court has continued to develop and affirm a bar to standing where a plaintiff's only injury is generalized and shared in an equal measure among a large class of citizens.[34] Between *Frothingham* and the

28. 262 U.S. 447 (1923). *Frothingham* was the combination of two cases: Massachusetts v. Mellon and Frothingham v. Mellon. *Id.* It is most commonly cited as Frothingham v. Mellon.

29. *Id.*

30. *Id.* at 488.

31. *Id.* at 480.

32. *Id.*

33. *Id.* at 488-89. "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." *Id.* at 488. "[T]he Court found a lack of sufficiently direct injury to an immediate taxpayer interest to justify judicial interference with legislative and executive powers, and suggested that allowing such suits would generate grave 'inconveniences.'" WRIGHT ET AL., *supra* note 2, § 3531.1.

34. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 167-69 (1974) (denying taxpayer standing to plaintiff seeking disclosure of C.I.A. expenditures under the Accounts Clause of the Constitution, which requires a regular statement and account of public funds); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209 (1974) (denying taxpayer standing to plaintiff challenging constitutionality of members of Congress also holding commissions in the Armed Forces); Warth v. Seldin, 422 U.S. 490, 493 (1975) (denying plaintiffs standing to challenge allegedly discriminatory zoning ordinances).

contemporary affirmation of *Frothingham*, however, there appears an anomaly: *Flast v. Cohen*.[35]

Flast v. Cohen[36]

In 1968, the Court granted a plaintiff standing as an individual federal taxpayer. *Flast* involved an Establishment Clause challenge to federal funding of religious schools.[37] According to the Court, the Case and Controversy Clause articulated a dual limitation on judicial power.[38] First, it limits the jurisdiction of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[39] Second, and consistent with *Frothingham*, it defines the judiciary as but one of a tripartite division of government "to assure that the federal courts will not intrude into areas committed to the other branches of government."[40] The Court, however, recognized that standing rested not only upon constitutional limitations, but upon prudential considerations as well.[41] Ultimately, however, *Flast* failed to define exactly where the line was drawn between Article III limitations and prudential limitations.[42]

Standing is a question of whether the plaintiff is the appropriate party to request adjudication of a particular issue, not of whether the issue itself is justiciable.[43] For example, the constitutional values protected by standing are different than the values protected when a court declines to hear a political question.[44] Standing implicates the adversarial prong of the Case or Controversy Clause as opposed to the separation of powers prong implicated by a

35. 392 U.S. 83 (1968). The Court in *Flast* recognized that in the twenty-six years since *Frothingham*, the extent to which *Frothingham* was justified on policy grounds was criticized. *Id.* at 94. The modern world saw corporate taxpayers contributing millions of dollars in federal tax liability, a far greater monetary liability than they incurred in any municipality. *Id.* Fears that taxpayer suits would overwhelm the federal system were at least partially obviated by modern rules regarding class action and joinder. *Id.* These criticisms compelled the Court to take a fresh examination of the limitations to sue in federal court. *Id.*

36. *Flast*, 392 U.S. 83.

37. *Id.* at 85-86.

38. *Id.* at 94-95.

39. *Id.* at 95.

40. *Id.* For example, both aspects of the dual role are evidenced in the longstanding rule that federal courts do not issue advisory opinions. *Id.* The rule implements the separation of powers prescribed by the clause in confining the courts to the role assigned to them in Article III. *Id.* at 96. It also encourages the court to hear only cases brought within the adversarial context, where clear and concrete questions are more likely to emerge. *Id.* at 96-97.

41. *Id.* at 97.

42. *See* Warth v. Seldin, 422 U.S. 490 (1975).

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

44. *Id.*

political question.[45] With the doctrine of standing, it is appropriate to question whether the plaintiff has a personal stake in the outcome of the suit because a personal stake advances adversarial tendencies.[46] The Court suggested that, in some cases, a taxpayer may have the requisite personal stake to challenge the suit and in other cases the taxpayer may not; therefore, the Case or Controversy Clause must not provide an absolute bar to such suits.[47]

Although standing is a question of whether the proper party has brought the suit, the substantive issue being litigated is relevant for another purpose: "whether there is a logical nexus between the status asserted [by the plaintiff] and the claim sought to be adjudicated."[48] This inquiry is essential in determining if the plaintiff is the proper party to prosecute a particular claim.[49] When standing is pled as a federal taxpayer, the "action turns on whether [the plaintiff] can demonstrate the necessary stake as [a] taxpayer[] in the outcome of the litigation to satisfy Article III requirements."[50] Thus, under *Flast*, a taxpayer only has the necessary stake in the controversy if he is challenging an exercise of congressional power under the Taxing and Spending Clause because it is the Taxing and Spending Clause that forms the necessary nexus between taxpayer-as-plaintiff and injury to the tax burden.[51]

But the inquiry does not stop there. A taxpayer challenge must also involve more than merely incidental expenditures of tax funds in furtherance of a regulatory statute.[52] Further, the plaintiff must "show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art[icle] I, [Section] 8."[53] The *Flast* court held that the Establishment Clause was a specific limitation on congressional power to tax and spend.[54] In fact, the Court noted that the Establishment Clause was specifically designed to pre-

45. *Id.* at 100-01. The Court would later change its mind on this issue, and rule that standing also implicates the separation of powers prong. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

46. *Flast*, 392 U.S. at 101.

47. *Id.*

48. *Id.* at 102.

49. *Id.* The nexus requirement is what distinguishes *Flast* from *Frothingham*, because it alters the inquiry from whether the case involves merely taxpayer standing to whether the nexus between taxpayer status and the claim being adjudicated is sufficient to meet the adversarial requirements of Article III. WRIGHT ET AL., *supra* note 2, § 3531.1.

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

51. *Id.*

52. *Id.* This requirement, that the expense not be incidental, "is consistent with the limitation imposed upon state-taxpayer standing in federal courts." *Id.*

53. *Id.*

54. *Id.* at 104.

vent government financial aid in support of one religion over another.[55] It was this later requirement which failed the plaintiffs in *Frothingham*, because the challenge to the Maternity Act was as an invasion of "the legislative province reserved to the several States by the Tenth Amendment," not to Congress's taxing and spending power.[56]

Valley Forge Christian College v. Americans United for a Separation of Church and State, Inc.[57]

The Court reinforced and clarified *Flast* doctrine in *Valley Forge Christian College v. Americans United for a Separation of Church and State, Inc.*[58] The Court declared that Article III stands to protect "the autonomy of those persons likely to be most directly affected by a judicial order."[59] Further, Article III prevents the federal courts from becoming "'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[60] In this respect, the injury-in-fact requirement promotes the values present in an adversarial setting where the plaintiff has a direct stake in the outcome of the action.[61]

In *Valley Forge*, the Court exposed the line between the threshold Article III standing requirements and the Court's self-imposed prudential limitations.[62] Article III requires a plaintiff who can show actual or threatened injury.[63] The Court's prudential doctrine, however, further denies standing to adjudicate "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."[64]

The plaintiffs in *Valley Forge* were denied standing because they failed the *Flast* test in both respects. They alleged that a transfer of surplus property to a religious organization was a violation of the Establishment Clause.[65]

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55. *Id.* at 103-04.
56. *Id.* at 91.
57. 454 U.S. 464 (1982).
58. *Id.* at 479-80.
59. *Id.* at 473.
60. *Id.* (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).
61. *Id.*
62. *Id.* at 474-75. Both Article III and the prudential requirements are rooted in the same justifications, but the prudential requirements are especially concerned with the Court's self-governance in maintaining the limited role of the federal judiciary in solving public disputes. Warth v. Seldin, 422 U.S. 490, 500 (1975).
63. *Valley Forge Christian College*, 454 U.S. at 472.
64. *Id.* at 475 (quoting *Warth*, 422 U.S. at 499). In classifying generalized grievances as a prudential limitation, the Court acknowledged that such an injury meets the Constitutional requirements. *See* WRIGHT ET AL., *supra* note 2, § 3531.2.
65. *Valley Forge Christian College*, 454 U.S. at 469.

However, in pleading taxpayer standing under *Flast*, the plaintiffs were required to allege a violation of the Taxing and Spending Clause. The property at issue in *Valley Forge* was given away through a congressional exercise under the Property Clause.[66] Although the property was purchased with a congressional expenditure thirty years prior, the plaintiffs did not challenge that expenditure.[67] Thus, the Court held that the taxpayers in *Valley Forge* did not have standing to challenge the grant of surplus property to a religious organization.[68]

Bowen v. Kendrick[69]

In 1988 with its decision in *Bowen v. Kendrick* the Court further expanded the *Flast* doctrine.[70] *Bowen* involved a challenge to a federal grant program providing funding for services related to adolescent sexuality and pregnancy.[71] Although the money was appropriated by Congress directly to the program under its taxing and spending power,[72] the Secretary of Health and Human Services administered the grants and determined some of the services required to meet grant eligibility.[73]

It was clear that plaintiffs had the right to challenge the program on its face,[74] but it was unclear whether the plaintiffs could challenge the program as applied by the Secretary.[75] The Court held that administration by the executive department did not destroy the nexus between taxpayer and the congressional exercise of its taxing and spending power.[76] Thus, the plaintiffs had standing to challenge the actions of the Secretary in executing the program. This case set the stage for the Seventh Circuit's decision in *Freedom from Religion Foundation v. Chao*, but it did not clearly answer the question presented in that case: whether a program created by the Executive, not Congress, and funded only through discretionary funds, not specific congressional grants to the program, could be brought into federal court through the taxpayer standing doctrine.

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66. *Id.* at 480. The Property Clause can be found in Article IV, Section 3, Clause 2 of the Constitution.

67. *Id.* at 480 n.17.

68. *Id.* at 480.

69. 487 U.S. 589 (1988).

70. *Id.*

71. *Id.* at 593.

72. *Id.* at 619.

73. *Id.* at 594 ("[T]he AFLA leaves it up to the Secretary of Health and Human Services (the Secretary) to define exactly what types of services a grantee must provide.").

74. *Id.* at 618. The constitutional allegation was that the Secretary was distributing financial support in violation of the Establishment Clause. *Id.*

75. *Id.* at 618.

76. *Id.* at 620.

B. Structural Violations of the Constitution and Injury-in-Fact

Requiring a plaintiff to have direct injury serves the values that standing protects. Injured plaintiffs promote the adversarial system because injury "assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[77] Further, actual injury keeps the court within the bounds of its role as a co-equal branch of the federal government by restricting its constitutional inquires to only those cases with plaintiffs who suffer harm.[78] These values restrict the issues litigated to the proper plaintiffs.[79]

The search for the proper plaintiff can be vexing when the constitutional challenge is to a structural limit on the exercise of government power.[80] Violations of structural limits may not always result in the type of concrete injury that the Court expects under its standing doctrine.[81] For example, it is difficult to imagine a plaintiff with an individualized injury when the act being challenged is whether members of Congress may simultaneously hold office and be members of the military reserves, in contravention of the Incompatibility Clause of the Constitution.[82] Similarly, without *Flast* taxpayer standing, violations of the Establishment Clause may go without redress because some violations will not create a plaintiff with individual injury. The Court has refused to grant standing, though, merely because a structural restraint may never create a plaintiff with individualized injury because a generalized grievance is insufficient to confer standing.[83]

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77. Baker v. Carr, 369 U.S. 186, 204 (1962). *See also* Flast v. Cohen, 392 U.S. 83, 96-97 (1968).

78. *See* Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996). In *Lewis*, the Court clarified that standing protects not only the values of an adversarial system, but also promotes a separation-of-powers between the court and the other branches of the federal government. *Id.*

79. *Flast*, 392 U.S. at 99-100 ("In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.").

80. Esbeck, *supra* note 4, at 34.

> A violation of a right will result in an individualized injury and thereby produce a claimant with standing to sue. The exceeding of a structural limit, however, will not necessarily result in an individualized injury. Hence, where overstepping a structural restraint is involved, there may not be an individual claimant with standing to sue.

Id. See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.5, 95-96 (2d ed. 2002).

81. Esbeck, *supra* note 4, at 34. CHEMERINSKY, *supra* note 80, § 2.5 at 96.

82. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-21 (1974) (The Court denied standing.).

83. United States v. Richardson, 418 U.S. 166, 179 (1974)

In *United States v. Richardson*, the structural restraint at issue was the Accounts Clause.[84] The plaintiff challenged "provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public."[85] In *Schlesinger v. Reservists Committee to Stop the War*, plaintiffs sought to have all members of Congress discharged from the military reserves, arguing that holding both offices violated the Incompatibility Clause.[86] These cases recognize the fear that the federal judiciary might be used to inhibit the political process.[87] Without more, a citizen does not have a right to use the federal courts to ensure a government that follows all the structural rules of the Constitution.[88]

But to understand why the federal courts should divorce themselves from these questions, it is important to recognize the purpose of the constitu-

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(It may be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.).

84. The Accounts Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

85. *Richardson*, 418 U.S at, 168 n. 1 (1974).

86. 418 U.S. 208, 211 (1982). They also sought repayment of reserve income paid to former members of Congress who served both offices simultaneously. *Id.* The Incompatibility Clause states that

> [n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art I, § 6, cl. 2.

87. James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-in-Fact Rule and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 22 (2001).

88. *See, e.g.*, *Richardson*, 418 U.S. at 179.

> The Constitution created a representative Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the 'ground rules' established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.

Id. See also CHEMERINSKY, *supra* note 80, § 2.5, at 96. "The effect of the generalized grievance doctrine is to read these clauses out of the Constitution except to the extent the political branches want to voluntarily comply with them." *Id.*

tional restraints at issue in these cases. The Incompatibility Clause, at issue in *Schlesinger*, separates the legislative branch from the other two branches by prohibiting a national legislator from holding any other office in the federal government, thus ensuring the disbursement of government power and maintaining the system of checks and balances.[89] Furthermore, the Accounts Clause, at issue in *Richardson*, ensures that disbursement of appropriations have been accounted to the public, thus providing a check on Congress's spending power by ensuring the political process is well-informed.[90] Because these clauses restrict the bounds of power between branches or influence the political process, the federal courts should intervene and interpret the lines of separation only when a plaintiff comes forward with individualized injury because doing so implicates the limited role of the federal judiciary, and the absence of such a plaintiff demonstrates that the subject matter has been committed to the political process.[91] In other words, if the public does not like the actions that gave rise to the complaints in *Richardson* or *Schlesinger*, they have recourse: change the political body that made those decisions through the democratic process. Requiring injury-in-fact and traditional notions of standing, therefore, promotes both the limited role of the federal court system and the underlying political process of our system of government. It also demonstrates the necessity of inquiring into the harms against which these structural restraints were designed to prevent.

C. The Dual Harms Protected Against by the Establishment Clause

The Establishment Clause protects two actors from harm by the government. It protects religion,[92] and it also protects the body politic from the division caused by active government involvement in religious belief.[93] Identifying the potential harm of a constitutional violation is critical, because the harm identifies the type of injury that might focalize a complaint into a justiciable question. Like other structural violations, a violation of the Establishment Clause may not always create a plaintiff with individualized injury.[94]

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89. U.S. CONST. art. I, § 6, cl. 2.

90. *Id.* § 9, cl. 7; *see* Leonard & Brant, *supra* note 87, at 128-29.

91. *Richardson*, 418 U.S. at 179; *see* Leonard & Brant, *supra* note 87, at 128-29.

92. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 620 (1971) ("This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."); Esbeck, *supra* note 4, at 73.

93. *See e.g.*, *Lemon*, 403 U.S. at 622-23 (1971).

94. *See* Esbeck, *supra* note 4, at 5-6. The instant case may pose such an example. *See* Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 993 (7th Cir. 2006). If the government is hosting the conferences promoting the "Faith-Based and Community Initiatives" program without singling out one religion over another, then it is

Therefore, it is necessary to understand the harms protected against by the Establishment Clause to understand why it should be treated differently than other structural clauses.

First, the Establishment Clause protects religious organizations from governmental interference.[95] Throughout history, government has made monetary grants to private organizations, but such grants are "almost always . . . accompanied by varying measures of control and surveillance."[96] In striking down government financial aid to religious schools, the Supreme Court stated that

> [t]he government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.[97]

The danger, therefore, in allowing religions to accept cash subsidies granted by the government is not in the benefit it poses to the religion, but the risk that government will inject itself into the functioning and belief of religious organizations through the control it attaches to the money.

Second, the Establishment Clause protects the body politic from the division that naturally occurs when government aids religion. By nature, government action made absent unanimity fragments and divides the body politic.[98] Ordinarily, this is a healthy exercise of our democratic system because it encourages vigorous debate on important issues that face the country.[99] When government aids religion, however, the division forms along religious lines, which is "one of the principal evils against which the First Amendment was intended to protect." This division threatens the normal political process.[100]

In striking down government financial support of nonpublic (chiefly religious) elementary and secondary schools, Chief Justice Burger had this to say: "It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government."[101] With this understanding, it might be said that the Establishment Clause particularly withdraws religious debate from the government sphere and vests that debate instead in the people, who

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difficult to imagine an organization or individual that will incur injury-in-fact. Instead, the harm is generalized and shared by the body politic.

95. *See, e.g.*, *Lemon*, 403 U.S. at 620 (1971).

96. *Id.* at 621-22; *see also* Esbeck, *supra* note 4, at 73-74.

97. *Lemon*, 403 U.S. at 621-22.

98. *Id.* at 622.

99. *Id.*

100. *Id.* at 623.

101. *Id.*

maintain and enjoy an individual and a structurally guaranteed right to religious liberty.[102] Questions of religion are meant to be sorted out by individuals and private-sector groups, not by government.[103] This assures the body politic of a government free to solve their shared social ills without being divided over contests of religion.[104]

IV. THE INSTANT DECISION

A. Majority Opinion[105]

Judge Posner, joined by Judge Wood, reversed the holding of the district court and held that the plaintiffs had standing as federal taxpayers to challenge the constitutionality of executive branch expenditures funding the conferences.[106] Expanding the doctrine of taxpayer standing to challenge Establishment Clause violations set forth in *Flast*, the court refused to recognize the distinction between a federal program created and specifically funded by Congress (as was the program in *Flast*) and a program created entirely within the executive branch funded through general appropriations (as are the conferences in FFRF).[107] The court's opinion, as explained more fully below, is grounded in the practical similarity of specific and general congressional appropriations of funds.[108]

The majority began by summarizing both traditional and modern notions of standing. In recognizing that traditional notions of standing require a plaintiff to show injury-in-fact, the court ruled that the plaintiffs, in this case, did not suffer any such injury.[109] Thus, "it [was] taxpayer standing or nothing for

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102. This is the function of the Free Exercise Clause and demonstrates why these two clauses are independent entities, preventing very different harms.

103. *Id.*

104. This does not mean, however, that churches and religious organizations lack the same fundamental right to participate in the political process as secular individuals. Walz v. Tax Comm'n of New York 397 U.S. 664, 670 (1970)

> (Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts--one that seeks to mark boundaries to avoid excessive entanglement.).

105. The Honorable Richard Posner, joined by the Honorable Harlington Wood Jr., wrote for the majority. Freedom from Religion Found., Inc. v. Chao, 443 F.3d 989, 990.

106. *Id.* at 996-97.

107. *Id.*.

108. *Id.* at 994.

109. Id. at 991.

. . . plaintiffs."[110] After asserting that the notion of general taxpayer standing was long ago discarded by the Supreme Court,[111] the majority noted that *Flast* had created an exception when a plaintiff challenged a congressional expenditure that allegedly violated the Establishment Clause.[112] The question the court faced was not whether to follow *Flast*, but whether *Flast* extended beyond congressional expenditures specifically earmarked for the challenged program or activity.[113]

To demonstrate the fallacy of allowing taxpayer standing to turn on whether the congressional expenditure was a specific or a general appropriation, the court postulated a hypothetical.[114] Suppose the Secretary of Homeland Security used general appropriations in her budget "to build a mosque and pay an Imam a salary to preach in it because the Secretary believed that federal financial assistance to Islam would reduce the likelihood of Islamist terrorism" in the country.[115] Judge Posner suggested that such an "elaborate [and] public . . . subvention of religion would give rise to standing to sue on other grounds."[116] Therefore, "it would be too much of a paradox to recognize taxpayer standing only in cases in which the violation of the establishment clause was so slight or furtive that no other basis of standing could be found, and to deny it in the more serious cases."[117]

However, the court recognized a limiting principle in the Establishment Clause's standing doctrine, stating that "the fact that almost all executive branch activity is funded by appropriations does not [alone] confer standing to challenge" government financial support.[118] To contrast its earlier hypo-

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110. *Id.*

111. *Id.* at 990. The court noted the rejection of taxpayer standing was grounded in the fact that the tangible harm to a taxpayer would often be "zero because if the complained-of expenditure was enjoined, the money would probably be used to defray some other public expense that would not benefit the taxpayer, rather than returned to [the taxpayer] in the form of a lower tax rate." *Id.*

112. *Id.* at 991. The court acknowledged the dichotomy it created by denying to adopt a principle of general taxpayer standing, but adopting *Flast* taxpayer standing when violation is to the Establishment Clause. It resolved this incongruity by distinguishing between Article III standing and prudential standing. *See id.* Prudential standing principles are

> judge-made principles . . . that deny standing to someone who has been injured as a result of the defendant's conduct (the core standing requirement of Article III) but who is not the 'right' person to bring suit, maybe because someone has been injured more seriously and should be allowed to control the litigation.

Id.

113. *Id.* at 990.

114. *Id.* at 994.

115. *Id.*

116. *Id.*

117. *Id.* at 994-95.

118. *Id.* at 995.

thetical, the court postulated another: "Imagine a suit complaining that the President was violating the [Establishment] clause by including favorable references to religion in his State of the Union Address."[119] Taxpayers do not enjoy standing to bring a complaint in such a hypothetical case, because the President did not expend funds for a religious purpose.[120] Although an accountant could estimate the consequential costs to taxpayers of the President's address, the cost would not be greater because the President "mentioned Moses rather than John Stuart Mill."[121]

Conversely, in the mosque hypothetical and in the instant case, money was undoubtedly appropriated to the objectionable program, "albeit by executive officials from discretionary funds handed them by Congress, rather than by Congress directly."[122] Thus, the court determined that the distinction upon which standing turns is not which branch of the government directs where the congressional appropriations are spent, but whether that money has been appropriated to an objectionable program.[123]

The government asked the court to draw the line not between speech and initiative, but between the initiative and actual grants to religious organizations.[124] The government's line would give taxpayers standing to challenge federal grants of money to religious organizations, but not to challenge federal expenditures to support conferences that in part train religious organizations in how to obtain grants.[125] The court thought that this line "would be artificial because there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause."[126] For example, as long as it never made a grant of money to a contractor, the government could operate a mosque.[127]

Next, the court took up an exception, carved out in *Flast*, which denies standing when the alleged violation is "an incidental expenditure of tax funds in the administration of an essentially regulatory statute."[128] The court declined to define the word "incidental" by comparing the cost of the conferences to the budget of the various executive departments hosting them.[129] Such a comparison would deny taxpayers standing in any case, because any single expenditure would appear "incidental" against "the great goal of the public welfare, a pursuit that costs the federal government some $2 trillion a

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*

year."[130] Instead, the court reserved the word "incidental" "for such cases as that of the government's expenditure on an armored limousine to transport the President to the Capitol to deliver the State of the Union address in which he speaks favorably of religion."[131]

Lastly, the court reviewed a line of cases wherein taxpayer standing to enforce provisions other than the Establishment Clause was rejected.[132] That line of cases supported the proposition that "[w]hen what is involved is expenditures in implementation of a regulatory statute, or mere executive activity that entails some expenditures, there is no . . . arrow aimed at taxpayers as a class."[133] Consistent with this line of cases, the court determined that taxpayers could not challenge programs of unquestioned constitutionality simply because federal employees sometimes deviated from constitutional activities.[134] Returning to its hypothetical State of the Union address, the court stated that even in the "unlikely event that the speech violated the establishment clause," an offended citizen would not have standing to sue because the constitutionality of the State of the Union was not questioned.[135]

Accordingly, while taxpayers are not granted standing to sue for lapses in administering otherwise constitutional programs, FFRF alleged something altogether different.[136] Its challenge, in the instant case, was to the constitutionality of the conferences supporting the Faith-Based and Community Initiatives program itself.[137] Therefore, "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."[138]

B. Dissenting Opinion

In his dissent, Judge Ripple refused to expand the *Flast*'s doctrine to programs created wholly in the executive and funded only through general appropriations.[139] Further, he argued that the plaintiffs did not allege an injury sufficient to overcome the threshold requirements of constitutional standing under Article III.[140]

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130. *Id.*

131. *Id.* at 995-96. Returning to its mosque hypothetical, the court described the budget for the Department of Homeland Security as $30 billion, compared to which the cost of a mosque would "certainly be incidental." *Id.* at 995.

132. *Id.* at 996.

133. *Id.* (omission in original).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1000 (Ripple, J., dissenting).

140. *Id.*

Although *Flast* carved out the taxpayer standing exception for alleged violations of the Establishment Clause, it did not eliminate the constitutional requirement.[141] As Judge Ripple noted, a concrete injury remains an "irreducible constitutional minimum" to taxpayer standing.[142] Part of the formula set forth in *Flast* for analyzing constitutional injury is "whether the plaintiffs have, in the allegations of their complaint, set forth with sufficient rigor a nexus between their status as taxpayers and an exercise of the congressional power under the Taxing and Spending Clause."[143]

The plaintiffs argued that the expenditure of government funds in support of the Faith-Based and Community Initiatives conferences, allegedly in violation of the Establishment Clause, was sufficient to show the required nexus. The government replied that, because the funds were expended by the President in his discretion, not through a specific appropriation by Congress, the "object of the plaintiffs' complaint" was not the Taxing and Spending Clause, but the President's use of the funds.[144]

For the foregoing reasons, Judge Ripple agreed with the government. In Judge Ripple's view, the majority's approach, "while possessing an initial appeal, simply cuts the concept of taxpayer standing loose from its moorings."[145] Judge Ripple would have restrained *Flast* to its narrow facts,[146] and he would read *Valley Forge* to foreclose standing to plaintiffs in cases where the challenged program originated in the executive department.[147] Further, he argued that *Bowen v. Kendrick* did not alter this general proposition, because *Bowen* involved a program that "Congress had created."[148] In Judge Ripple's estimation, the expansion adopted by the majority opinion made "virtually any executive action subject to taxpayer suit."[149]

V. COMMENT

This comment argues that, while the *Flast* doctrine serves an important function in protecting the values of the Establishment Clause, it is critical to understand that the *Flast* doctrine is simply a legal fiction that endures merely to advance those values. Because those values are unique in the federal constitution in that they organize relations between church and state, not branches of the federal government, a more logical approach would be to adopt a rule of citizen standing for challenges under the Establishment

141. *Id.*
142. *Id.* at 997.
143. *Id.*
144. *Id.* at 998.
145. *Id.*
146. *Id.* at 1000.
147. *Id.*
148. *Id.* (emphasis omitted).
149. *Id.*

Clause. This approach would be consistent with the dual harms the Establishment Clause was designed to protect against: a political debate free of religious strife and religious freedom unencumbered by political influence. Unfortunately, the Court has rejected the notion of citizen standing.[150] Alternatively, it, therefore, makes sense to allow *Flast*'s expansion at least as far, if not farther, than the facts of the instant case because doing so does not expose *Flast* as the legal fiction for which it is. In other words, the expansion of the doctrine sought by FFRF is slight enough that it does not drastically alter the doctrine. This comment steps through each of these arguments to prove that this is a proper and logical result advancing constitutional values.

A. Standing is an Inquiry into Whether the Proper Plaintiff has Brought Suit

The court veered off-target, in a formalistic sense, when it based its holding on the pragmatic incongruity that might result if it allowed adjudication of serious Establishment Clause violations, but denied adjudication of slight or furtive ones.[151] The court's holding was that a taxpayer has standing to challenge the executive department's use of discretionary money to fund programs that allegedly violate the Establishment Clause, just as *Flast* allows challenges to funding of allegedly unconstitutional programs by specific congressional appropriation (funding of a program created by Congress).[152] The court believed that such a distinction should not be controlling.[153]

In justification, the court posed the hypothetical stated in Section IV wherein the Department of Homeland Security funded a mosque to reduce the likelihood of Islamist terrorism in the United States.[154] The court reasoned that "it would be too much of a paradox to recognize taxpayer standing only in cases in which the violation of the Establishment Clause was so slight or furtive that no other basis of standing could be found, and to deny it in the more serious cases."[155] Without more, this rationale goes against *Flast*'s direct mandate that standing is not an inquiry into whether the merits of a claim should be reached, but an inquiry into whether the plaintiff is the appropriate

150. Admitedly, citizen standing, even if adopted merely for structural violations under the Establishment Clause, might be a costly rule. It would require that the court open its doors to every citizen with a religious grievance.

151. *Id.* at 994-95 (majority opinion).

152. *Id.* at 996-97.

153. *Id.* at 994.

154. *Id.*

155. *Id.* at 994-95. For an example of how plaintiffs might find standing in the "more serious" case, see ACLU of Illinois v. City of St. Charles, 794 F.2d 265, 269 (7th Cir. 1986) (finding that plaintiff has standing to challenge government display of Latin cross during Christmas because she had to detour her custom route to avoid seeing the cross).

person to bring the claim.[156] However, whether the court focused on the wrong inquiry does not answer the question presented in the instant case, which is whether *Flast* allows standing to challenge executive department discretionary funding of programs allegedly violating the Establishment Clause. To answer that question, we must first unpack the injury that *Flast* proposes protection against.

B. The Flast Fiction

Flast posits that taxpayers have a direct injury in unconstitutional expenditures of their tax debt. However, taxpayer standing, as described and allowed by *Flast*, is a legal fiction.[157] The injury asserted by a taxpayer is that she is being compelled to pay to the government a tax in support of a constitutionally deficient program. But, if the injury the Court is being asked to redress is a tax, the appropriate remedy to that injury would be a refund of the tax or a reduction in the complainant's tax burden.[158] The plaintiffs did not seek such a remedy in *Flast*, *Bowen*, or in *Freedom from Religion Foundation*. Instead, plaintiffs sought an injunction to prevent the disbursement of federal funds to the allegedly unconstitutional programs.[159] The remedy,

156. *See* Flast v. Cohen, 392 U.S. 83, 99 (1968) ("The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.").

157. *See* Esbeck, *supra* note 4, at 36 n.138; Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 74 (1968) ("And it is a fiction that a taxpayer like Flast is asserting a personal stake or interest based on his reluctance to have his tax money expended for the purpose to which he objects.").

158. In a contemporary case decided by the Seventh Circuit, also written by Judge Posner, the court draws this distinction to light. *See* Laskowski v. Spellings, 443 F.3d 930 (7th Cir. 2006). *Laskowski* involved disbursements made to support a charitable program of religious character at Notre Dame. *Id.* at 933. Plaintiffs could not seek an injunction against the program, however, because the money had already been disbursed. *Id.* at 933-34. Defendants argued that this mooted the case. *Id.* The court, applying its holding in *Freedom from Religion Foundation*, held to the contrary because plaintiffs stood before the court as taxpayers, and the injury suffered was to their tax burden. *Id.* Therefore, if successful on the merits, Notre Dame could be required to refund the ill-begotten tax monies it received to the United States treasury. *Id.* at 938-39. This result demonstrates that although a tax refund might be available, it is rarely sought in Establishment Clause cases, because *Flast* is used as a legal fiction to protect against the harms the Establishment Clause was designed to prevent, not the pecuniary harm suffered by a taxpayer in the unconstitutional expenditure of tax money.

159. Flast v. Gardner, 271 F. Supp. 1, 1-2 (1967), *rev'd sub nom.*, Flast v. Cohen, 392 U.S. 83, 99 (1968); Kendrick v. Bowen, 657 F. Supp. 1547, 1570 (D.D.C. 1987), *rev'd*, 487 U.S. 589 (1988).

therefore, does not match the harm giving the plaintiff standing to challenge the program.[160]

If *Flast* is not designed to protect taxpayers from the pecuniary harm suffered when government expends money advancing religion, then what harm is it designed to protect against? It protects against the dual harms prevented by the Establishment Clause. As discussed in Section III, the Establishment Clause protects against both harm to religion and the harm to the body politic suffered by injecting religious matters into the political debate.[161] These harms are likely to go without redress in the absence of some exception to the standing doctrine, because of the Establishment Clause's nature as a structural restraint on power.

A violation of the nature found in the instant case harms, or threatens to harm, the very organizations that receive the benefit of federal money.[162] By entangling themselves with the government, they make themselves vulnerable to government control.[163] So while the prospect of government aid may gleam brightly in the organization's eye, the cloud of government control hangs nearby.[164] Although this harm creates an injury specific and individual to the religious institutions accepting the aid, and they may very well have standing to sue, they are unlikely ever to bring suit because a successful suit would mean the loss of the government funding the institution relies upon. Therefore, the harm is unlikely to be redressed, and one of the chief purposes of the Establishment Clause cannot be enforced.[165]

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160. WRIGHT ET AL., *supra* note 2, § 3531.10 ("The injury redressed by the Flast decision is not really the injury of tax payments. Instead, it is the sense of wrong that arises from unconstitutional acts of government. Only a theory that some constitutional rights deserve greater judicial solicitude than others can account for the Flast ruling that unconstitutional spending is an injury sufficient to confer standing with respect to some constitutional trespasses but not others. The result is not taxpayer standing, but simply Establishment Clause standing.")

161. *See supra* notes 92-93 and accompanying text.

162. *See* Esbeck, *supra* note 4, at 73; Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

163. *See* Esbeck, *supra* note 4, at 73; *Lemon*, 403 U.S. at 620.

164. *See, e.g.*, *Lemon*, 403 U.S. 621-22.

(The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.)

See also Esbeck, *supra* note 4, at 73-74.

165. When the Establishment Clause is understood as a structural restraint on state power, it is not sufficient to waive away the harm to religious organizations as one might surrender their objection to an individual right. *See, e.g.*, Clinton v. City of

Meanwhile, the other harm protected against by the Establishment Clause may also go without redress, because it is unlikely to generate individual plaintiffs with injury-in-fact. The harm that results when the political body is preoccupied debating religious matters by its nature is a harm shared by all citizens. Therefore, it lacks the individualized nature required by the Court's standing doctrine. Because the Establishment Clause is unique among structural restraints in the Constitution, this debate is particularly well-suited to the federal courts.

C. Taxpayer Standing Advances Redress of Harm to the Body Politic

As explained previously, the Court has rejected the idea that all citizens have standing to challenge violations of structural restraints, even when those restraints are unlikely to generate a plaintiff with injury-in-fact.[166] But the specific nature of the Establishment Clause compels a different result. When a violation of the Accounts Clause was implicated, the Court denied citizen standing to a plaintiff who wanted to know where Congressional money was being spent.[167] Rather, a citizenry that disagreed with the level of disclosure Congress was making with regard to public money has a remedy in the political process: elect a different Congress. Similarly, an alleged violation of the Incompatibility Clause did not give rise to citizen standing.[168] The purpose of that restraint was to order power between the branches of government and prevent an individual from holding office in two branches simultaneously. Again, the political process provides an adequate remedy and limits the federal court's role in drawing those lines of power. In these instances, requiring a plaintiff with individualized injury ensures that the court is not refereeing disputes among co-equal branches of the government.

The Establishment Clause, however, is an altogether different sort of structural restraint. It does not separate branches of government. Rather, it separates government from organized religion. One of its chief goals is to protect the division that occurs from injecting religious debate into the body politic. Therefore, the political process is not an adequate remedy to a generalized grievance, because placing these issues into the political debate implicates one of the very harms the Establishment Clause was designed to protect against. As a result, the federal courts, insulated from political pressure, are particularly suited to adjudicating the boundaries the Establishment Clause

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New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (standing for the proposition that violations of structural clauses cannot be waived).

166. Valley Forge Christian Coll, v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 488, 102 (1982). *Cf.* Flast v. Cohen, 392 U.S. 83, 115-116 (1968) (Fortas, J., concurring) ("Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for this challenge.").

167. United States v. Richardson, 418 U.S. 166, 170 (1974).

168. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209 (1974).

draws between church and state. And citizen standing seems an appropriate means of putting those disputes in front of the court.[169]

Although citizen standing is the more sensible doctrine, plaintiffs are left with a narrower version of the same in the *Flast* fiction. In recognizing the Establishment Clause as a specific restraint on taxing and spending, *Flast* carves out the exception that standing will be granted when a plaintiff incurs a tax burden that allegedly aids religion in violation of the Establishment Clause.[170] This is consistent with the Founders' particular interest in preventing the establishment of a national religion through financial support by the government.[171]

When the fiction is understood, it should make no difference whether federal funds are appropriated by Congress specifically or by the Executive using discretionary funds. In *Freedom from Religion Foundation*, the plaintiffs alleged that the executive branch was unconstitutionally aiding religion by hosting conferences to support the President's Faith-Based and Community Initiatives program.[172] The harm to these plaintiffs is the harm of injecting religious debate into the political process.[173] Although a generalized injury, it is distinguishable from the types of generalized injuries the Court has rejected because the Establishment Clause is specifically designed to separate church and state and prevent government injection of religion into the political process.[174] In recognizing the harm, *Flast* represents only a narrow right to adjudicate such harms, specifically, the right to challenge acts that are exercises of the Taxing and Spending Clause.[175] Plaintiffs in the instant case meet that nexus. Unlike *Valley Forge*, this is not an exercise of government power under the Property Clause, but a use of tax money to, allegedly, aid religion.

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169. One argument against citizen standing is that such a relaxation of the standing doctrine threatens to overwhelm the federal court system and consume valuable judicial resources. *See* WRIGHT ET AL., *supra* note 2, § 3531.3. But this argument is hardly compelling if you accept the argument put forth in this Note that the Establishment Clause particularly vests the resolution of these debates in federal judiciary in order to free the political process from the division that occurs as a result of these debates.

170. *Valley Forge Christian Coll.*, 454 U.S. at 478-79.

171. Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970).

172. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 994 (7th Cir. 2006).

173. *See supra* Part III.C.

174. The generalized injury to the body politic, religious divisiveness, is no less specific than the tax injury that *Flast* allows to be sufficient to grant standing, because any debate by the government is time, energy and money that could spent debating issues that have not been withdrawn from the political process by the Establishment Clause.

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

When *Flast* is exposed as a fiction, and the true harms it protects against are understood, *Valley Forge* should be seen as merely setting the boundary on how far the fiction will stretch without being pulled apart. The challenge in *Valley Forge* stretched the fiction too far because the congressional expenditure of tax funds to purchase the property at issue was made thirty years prior and it did not aid religion. The allegedly unconstitutional act was in transferring the property to a religious organization, which was an exercise of power conferred under the Property Clause, not the Taxing and Spending Clause.[176] The intervening use of the property, as a military hospital, was wholly constitutional. When the Taxing and Spending Clause cannot be implicated as the source of power under which the allegedly unconstitutional act is completed, the *Flast* fiction tears apart.

In the instant case, there is no intervening use of the money. The money went directly from Congress to the executive branch, which disbursed it in the allegedly unconstitutional manner. Therefore, the Court's fiction is not exposed, and standing can still be found without adopting citizen standing as a whole. Thus, the narrow exception of *Flast* can be maintained. In this analysis, the instant case is not distinguishable from *Bowen*, where money was appropriated by Congress, under its taxing and spending power, to the executive department for disbursement to a religious organization. When the harm to plaintiffs is understood to be the harm that results when religion enters the political process, the fact that money is earmarked not by Congress, but by the executive branch, should not be controlling. Thus, the issue of whether an appropriation violates the Establishment Clause is one that can be adjudicated on the merits, and *Flast*'s fiction can be maintained.

Returning to the critique of the majority's holding in the instant case, the logic of this analysis does not violate the first rule of standing, which is that standing is an inquiry into whether the proper plaintiff has brought the claim before the court. The proper plaintiff is the body politic, because they, along with religion itself, suffer the true harm. The plaintiffs have both injury to their tax burden as well as the generalized injury of having a body politic where government is withdrawn from the religious debate. These harms make the plaintiffs the proper parties to litigate these questions in that branch of government liberated from the political process: the federal courts.

VI. CONCLUSION

The *Flast* fiction, that a generalized grievance can give rise to standing when the constitutional challenge is to a specific restraint on the power of Congress to tax and spend, is just a slice of citizen standing. It ensures that financial support of religion by the government can be challenged in federal court and that the merits of those claims can be adjudicated in the body best

176. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 464 (1982).

suited to draw a neutral line between church and state. That line is necessary to determine the extent to which the Establishment Clause prohibits religion to be drawn into political debate by government to prevent the divisiveness naturally occurring from such a contest. True and unfettered citizen standing would be necessary to challenge potential abuses of government power originating from sources other than the Taxing and Spending Clause. While this Note has argued and identified how citizen standing can and should be justified for alleged violations of the Establishment Clause in particular, such a drastic departure is unnecessary in the instant case, because the *Flast* fiction can be maintained under the facts presented. Therefore, the majority properly allowed plaintiffs standing to continue their litigation. It remains to be seen whether the President's program will withstand constitutional scrutiny under the Establishment Clause, but we can be confident that the Court will be vigilant in its fulfillment of the role James Madison envisioned for it:

> If [the first ten amendments] are incorporated into the [C]onstitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the [L]egislative or [E]xecutive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the [C]onstitution by the declaration of rights.[177]

BRADLEY THOMAS WILDERS

177. 1 Annals of Cong. 457 (1789), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=230.