

SHOULD THE COURTS SAVE TAXPAYER STANDING?
INTERPRETING *HEIN V. FREEDOM FROM RELIGION
FOUNDATION* NARROWLY THROUGH THE LENS OF
JUDICIAL-BRANCH SPENDING

Akiva Shapiro*

I. INTRODUCTION

Over the course of the 2006-07 Term, the Supreme Court's first full year with Chief Justice Roberts at the helm, the Court handed down a series of five-four decisions on a broad range of politically divisive issues.¹ One of the last of these decisions, *Hein v. Freedom From Religion Foundation, Inc.*,² turned on a technical question of taxpayer standing. Justice Alito (writing for a plurality) interpreted *Flast v. Cohen*, the classic case that opened the door to taxpayer standing in cases of government spending in violation of the Establishment Clause, to have upheld taxpayer standing only because there was a "specific

* Associate, Gibson, Dunn & Crutcher LLP (New York); J.D., Columbia; M.A., Yale (Religious Studies). I would like to thank three people without whom this article would never have been completed: Nathan Lewin, who brought the *Hein* case to my attention, and with whom I attended the *Hein* oral argument at the Supreme Court; Vince Blasi, the source of sage advice and unswerving encouragement—not to mention inspiring First Amendment and tort theory pedagogy—since my first semester of law school; and Kent Greenawalt, who read early drafts and provided invaluable comments.

1. Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom From Religion Foundation and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. Rev. 115, 115 ("Amidst a flurry of controversial decisions in the final days of the 2006-07 Term, the Supreme Court delivered its opinions in *Hein*." (footnotes omitted); Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, 156 N.Y. Times A1 (July 1, 2007) (discussing series of hotly disputed five-four decisions, including *Hein*); Jewish Daily Forward, *Blind Justice*, <http://www.forward.com/articles/11080> (July 3, 2007) [hereinafter *Blind Justice*] (noting that Court's then-recent "decisions touching on racial equity, church-state separation, antitrust regulation and more, cap[ped] off . . . the court's first full year under Chief Justice John Roberts") (accessed July 1, 2009; copy on file with Journal of Appellate Practice and Process).

2. 551 U.S. 587 (2007).

congressional enactment” that “expressly authorized or mandated” the challenged expenditure.³ As the executive branch spending at issue in *Hein* was from general Congressional appropriations, and the decision to spend funds for arguably religious purposes was an act of executive discretion, the plurality concluded that *Flast* did not apply; having reached this conclusion, the plurality declined to “extend” *Flast*, and held that the respondents lacked standing.⁴

Despite the technical nature of the taxpayer-standing holding, the decision generated an outpouring of negative press, as the case implicated deep church-state concerns. The criticisms came in two distinct forms. First, critics objected to *Hein* on normative grounds, arguing that it effectively insulated large swaths of government spending from Establishment Clause challenge, and thereby threatened to undermine judicial enforcement of the Clause.⁵ Second, legal commentators

3. *Hein*, 551 U.S. at 608-10 (interpreting and applying *Flast v. Cohen*, 392 U.S. 83 (1968)).

4. *Id.* at 609. The Alito plurality opinion is written in an overtly minimalist tone, declining to address the merits or underlying rationale of *Flast* because “[w]e decide only the case at hand” and concluding that the case at hand can be distinguished from *Flast*; therefore “[w]e do not extend *Flast* We leave *Flast* as we found it.” *Id.* at 615. Despite the plurality’s purporting to leave *Flast* unaltered, its opinion was “implicitly quite critical of the precedent[.]” and effectively narrowed what had been the prevailing interpretation of *Flast*. Linda Greenhouse, *Justices Reject Suit on Federal Money for Faith-Based Office*, N.Y. Times Online (June 26, 2007) (available at <http://www.nytimes.com/2007/06/26/washington/26faith.html?scp=1&sq=justices%20reject%20suit%20federal%20money%20for%20faith&st=cse> (accessed July 1, 2009; copy on file with Journal of Appellate Practice and Process)); see also Robert Corn-Revere, *Federalism and Separation of Powers: Narrow Issue of Taxpayer Standing Highlights Wide Divisions Among the Justices*, 2006-07 Cato Sup. Ct. Rev. 215, 234 (criticizing plurality for purporting to leave *Flast* “as [they] found it” but “as a practical matter . . . marginaliz[ing] the concept of taxpayer standing”).

5. Robyn Blumner, *Bush Merges Church & State*, Pittsburgh Tribune-Review (July 8, 2007) (criticizing the Court in *Hein* for “help[ing] insulate Bush’s faith-based agenda from legitimate legal challenge,” claiming that “[t]here is now a four-member conservative plurality of the Roberts court that is openly hostile toward those who seek to keep their tax money from flowing into religious coffers,” and asserting that “[t]he dismantled wall between church and state will be just another one of Bush’s disastrous legacies”); *Blind Justice*, *supra* n. 1 (calling the *Hein* decision “damaging to minority rights” because it “limited the right of citizens to challenge religious encroachments on government” and stating that the “same . . . tortured logic and contempt for precedent, all in the service of right-wing ideology, showed up in one decision after another this year”); but see *Editorial: The Roberts Court*, Wash. Times A16 (June 27, 2007) (characterizing the ruling in *Hein* as “a victory for the democratic process insofar as it pushes contentious social issues out of the courts and back into the court of public opinion, where they belong”).

criticized—in the harshest of terms—the logic of the plurality opinion, which made a sharp distinction between Congressional spending that supported standing in *Flast* and Executive Branch spending of general Congressional appropriations that did not in *Hein*.⁶ Noting that the injury—spending a taxpayer’s money for religious purposes—was identical in both cases, these critics blasted the plurality for its “utterly meaningless” and “intellectually . . . indefensible” distinction.⁷

But by explicitly refusing to discuss the applicability of the decision—and the viability of *Flast*—outside the specific

6. See e.g. Marci Hamilton, *Three Important Developments Involving Law and Religion During the Summer of 2007*, Findlaw.com, <http://writ.corporate.findlaw.com/hamilton/20070906.html> (Sept. 6, 2007) (stating that the plurality’s claim that taxpayer standing is only permitted where Congress specifically designated that the funds be used for religious purposes is “simply intellectually and morally indefensible” because the “harm identified by *Flast* is certainly present in *Hein*: taxpayers’ funds were being used to support a religious mission”) (accessed July 6, 2009; copy on file with Journal of Appellate Practice and Process); Robert H. Bork, *4 + 1—And the 1 Is Justice Kennedy*, National Review (July 30, 2007) (stating that “[t]he basis for a constitutional distinction between congressional and presidential spending is, to say the least, elusive,” and calling “irrefutable” Justice Scalia’s criticism that the plurality’s opinion is rooted in “meaningless and disingenuous distinctions”); Vikram David Amar, *The Supreme Court Denies Plaintiffs Standing to Challenge Bush Administration Activities that They Allege Violated the Establishment Clause*, Findlaw.com, <http://writ.news.findlaw.com/amar/20070706.html> (July 6, 2007) (“The line the *Hein* Court draws—between Congress and Executive programs to promote religion—makes absolutely no sense.”) (accessed July 6, 2009; copy on file with Journal of Appellate Practice and Process).

7. *Hein*, 551 U.S. at 618, 628, 630 (Scalia & Thomas, JJ., concurring in the judgment) (stating that “there is no intellectual justification” for the “utterly meaningless” distinction drawn by the plurality, and that the reasoning of the plurality is not “sane” and “invites demonstrably absurd results”); Hamilton, *supra* n. 6 (calling the distinction “simply intellectually and morally indefensible”).

In addition to these two criticisms, two other authors have examined and criticized the plurality opinion in *Hein* succinctly, in the style of case reports, on the ground that it incentivizes Congress and the Executive to collude in hiding policy choices (through general appropriations) in order to evade judicial review in Establishment Clause spending cases. See *The Supreme Court, 2006 Term: Leading Case: Federal Jurisdiction and Procedure—Standing—Establishment Clause Violations*, 121 Harv. L. Rev. 325, 326, 331 (criticizing “illusory distinction” drawn in *Hein* between Congressional spending and executive spending that “incentivizes Congress to avoid explicitly expressing its policy choices, thus undermining nondelegation principles”); Corn-Revere, *supra* n. 4, at 237 (criticizing *Hein* because it “create[s] a road map by which the executive may circumnavigate judicial standing in Establishment Clause cases altogether, simply by supporting religious institutions on its own initiative”); see also Lauren S. Michaels, Student Author, *Hein v. Freedom From Religion Foundation: Sitting This One Out—Denying Taxpayer Standing to Challenge Faith-Based Funding*, 43 Harv. C.R.-C.L. L. Rev. 213, 237 (2008) (“[T]he Court was satisfied in *Hein* to leave the other branches to check themselves.”).

Executive Branch spending setting of the case,⁸ the plurality opinion left open many important questions with which the lower courts have already begun to grapple. First and foremost is whether and how *Hein* applies in taxpayer spending cases outside the federal Executive Branch. After *Hein*, does the simple collection and expenditure of funds in violation of the Establishment Clause by Congress or a state still give rise to taxpayer standing, as long as the spending is not limited to the federal Executive Branch? Or does the *Hein* pronouncement that taxpayer standing only lies where there is a “specific [legislative] enactment” that “expressly authorize[s] or mandate[s]” the challenged expenditure apply even in federal non-Executive cases and in cases implicating state and municipal taxpayer standing?

This article raises these questions, and suggests—through the lens of Judicial Branch spending—that the approach taken by many courts thus far is deeply problematic.⁹ In a host of cases, the broader interpretation of *Hein* already seems to be taking hold, as many courts have applied the Alito plurality directly (or as directly as possible, at any rate) in a number of non-Executive Branch taxpayer spending cases, despite the executive-specific separation-of-powers and administrability concerns at the heart of the opinion.¹⁰ Based on this developing

8. *Hein*, 551 U.S. at 615 (“[W]e have never extended [*Flast*’s] narrow exception to a purely discretionary Executive Branch expenditure. We need go no further to decide this case. Relying on the provision of the Constitution that limits our role to resolving the ‘Cases’ and ‘Controversies’ before us, we decide only the case at hand.”).

9. Federal judicial spending cases provide a good template with which to examine the applicability of *Hein* for three reasons. First, because it is the one federal branch that the Court did not discuss in *Hein*, the judiciary provides a blank slate on which to project the reasoning of *Hein* outside its specific holding. Second, none of the complications of federal/state or federal/local-taxpayer standing are implicated in the analysis. Third, because it is the area of Establishment Clause jurisprudence that has received the least amount of attention by commentators and academics, the discussion of judicial violations will itself be an important contribution to the literature. However, as noted above, the conclusions about the applicability of *Hein* to Judicial Branch spending serve a larger purpose: Judicial spending provides a relatively straightforward lens through which to capture *Hein*; the picture developed through this article (which questions the already-coalescing standard reading) will be applicable in federal legislative cases and in state and local taxpayer cases, which together constitute the vast majority of taxpayer-standing cases.

10. See e.g. *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 499-500 (5th Cir. 2007) (en banc) (DeMoss, J., concurring) (applying *Hein* in an eight-to-seven decision to deny plaintiff parent standing to sue school board from opening its meetings with a prayer); *Hinrichs v. Speaker of the House, Ind. Gen. Assembly*, 506 F.3d 584, 597-600 (7th Cir.

trend, two leading scholars of the Religion Clauses—in the most thorough examination of the implications of *Hein* since the decision was handed down—see the threat of *Hein*'s narrowing of taxpayer standing bleeding into standing for Establishment Clause violations generally, a development that would undermine citizens' access to the courts to contest Establishment Clause violations at every level and branch of government.¹¹ At the same time, a significant minority of courts and judges have questioned the applicability of *Hein* outside its federal executive-specific context.

Against this backdrop of confusion and disagreement, there are at least two reasons that lower courts should stop the bleeding. First, a full *Marks*¹² analysis, applied properly, leads to the conclusion that there is no precedent-setting opinion in *Hein*, or at the very least that the narrower Kennedy concurrence is controlling.¹³ Under either conclusion, courts are free to apply the pre-*Hein* standard in spending cases that involve governmental entities outside the federal Executive Branch.¹⁴ Second, because Justice Alito's plurality opinion is best read as a decision primarily concerned with Executive Branch

2007) (applying *Hein* in dismissing state taxpayer-standing action alleging that the practice of legislative prayer in the Indiana House of Representatives violated the Establishment Clause); *Mainstreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 754 (7th Cir. 2007) (Sykes, J., concurring) (citing *Hein* in concluding that “if the Supreme Court’s recent standing jurisprudence means anything, it is that constitutional standing prerequisites are to be closely monitored and scrupulously enforced”); *but see e.g. Pelphrey v. Cobb County*, 495 F. Supp. 2d 1311, 1318 n. 3 (N.D. Ga. 2007) (distinguishing *Hein* as “inapposite” in upholding municipal taxpayer standing to sue county board of commissioners and county planning commission for practice of beginning meetings with invocational prayers).

11. Lupu & Tuttle, *supra* n. 1, at 119 (“After *Hein*, the issue of standing is likely to become an active battleground. . . . [S]ome [lower courts] may view *Hein* as an invitation to narrow considerably the access that Establishment Clause plaintiffs have to the federal courts. Moreover, such a narrowing may extend beyond the specialized field of taxpayer standing to more general doctrines under which . . . plaintiffs in Establishment Clause cases have been granted standing without having suffered any injury traditionally recognized under Article III.”). Others have also examined (and criticized) the plurality opinion in *Hein*. *See generally e.g. n. 7, supra*.

12. *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (laying out framework for lower court analysis of precedential effect of fragmented opinions). Thus far, courts have uniformly treated the Alito plurality opinion as controlling, and many—perhaps most—have neglected to conduct a *Marks* analysis at all. *See infra* nn. 115-30 and accompanying text (discussing and applying the *Marks* analysis to *Hein*).

13. *See infra* nn. 115-30 and accompanying text.

14. *See id.*

independence from the judiciary (and executive-specific prudential administrability), rather than the absence of irreducible Article III injury in fact, lower courts should adopt an interpretation of the Alito plurality that remains loyal to the opinion by limiting the effect of the decision on taxpayer spending cases outside the realm of federal executive spending.¹⁵

The rest of the article proceeds as follows: Part II provides—for the first time—a taxonomy and systematic examination of judicial violations of the Establishment Clause, a little-analyzed area of Establishment Clause jurisprudence. In the course of surveying and discussing the primary categories of judicial violations of the Establishment Clause, it highlights those violations that might give rise to taxpayer spending.

Part III turns to *Hein* itself: Section A discusses the factual background of the case; section B presents the lower court decisions in the case; section C discusses the four opinions in the Supreme Court decision of the case; and section D analyzes the four opinions in light of the *Marks* doctrine, and demonstrates that under *Marks*, there is either no binding opinion in *Hein*, or the controlling opinion is the Executive Branch-specific Kennedy concurrence.

Part IV turns to the interpretation and application of Justice Alito's plurality opinion, in light of the fact that courts have almost uniformly assumed that it is controlling. Section A presents the prevailing interpretation of the plurality opinion by the courts; it shows that courts are already divided on whether a straightforward application of the plurality opinion to taxpayer spending cases outside the federal Executive Branch is feasible, and argues that such an approach leads to results that cannot be justified by the opinion's language and logic. Section B argues that the plurality opinion's denial of taxpayer standing, read properly, is in fact based in separation of powers and prudential standing concerns particular to the Executive Branch, rather than the absence of Article III injury. Section C applies this reading to judicial spending cases, and demonstrates that *Hein* does not limit taxpayer standing in judicial spending cases. Finally,

15. See *infra* nn. 147-55 and accompanying text. Of course, for those courts that accept either that there is no controlling opinion in *Hein*, or that the Kennedy concurrence is controlling, my interpretation of the plurality opinion will be largely academic.

Section D discusses major critiques of my reading of Justice Alito's plurality opinion.

The Conclusion then offers some preliminary thoughts on the implications of this interpretation of *Hein* for other taxpayer spending cases outside the federal executive spending context, and suggests that lower courts can and should save taxpayer standing (and make sense of *Hein*) either by applying the *Marks* doctrine to limit the precedential effect of *Hein*, or by interpreting the Alito plurality opinion in its executive-specific context.

II. JUDICIAL VIOLATIONS OF THE ESTABLISHMENT CLAUSE

The classic description of the meaning of the First Amendment's Establishment Clause is found in *Everson v. Board of Education*.¹⁶

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion.¹⁷

16. 330 U.S. 1 (1947).

17. *Id.* at 15-16. It is beyond the scope of this article to discuss the substantive interpretation and meaning of the Establishment Clause as it has developed since *Everson*. For a thorough discussion and analysis of the current (confused) state of Establishment Clause jurisprudence, see Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. Pa. J. Const. L. 725 (2006), in which the author points out that

[i]t is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory. On a purely doctrinal level, the Court cannot even settle on one standard to apply in all Establishment Clause cases. At some point during the last ten years, one or more of the nine Justices have articulated ten different Establishment Clause standards. Many of the Justices have endorsed several different—and often conflicting—constitutional standards. . . . The situation is even more confused at the theoretical level.

Id. at 725 (footnote omitted). The leading casebook on the Religion Clauses, Michael W. McConnell et al., *Religion and the Constitution* (2d ed., Aspen Publishers, Inc. 2006), is a useful starting point for research.

The Establishment Clause has been understood to apply to the activities of all levels¹⁸ and branches of government,¹⁹ including the judiciary.²⁰ However, despite a fair number of cases that apply the Establishment Clause to judicial acts, there is very little scholarship that focuses on judicial violations of the Clause, and no comprehensive survey of such violations.²¹

In this Part, I provide just such a survey and taxonomy of judicial violations of the Establishment Clause, with special emphasis on violations that could give rise to taxpayer standing.²² Section A discusses violations by judges acting outside the scope of their strictly judicial duties. A thorough investigation of the case law reveals that this type of violation generally arises in two contexts: judges arranging for Ten

18. See *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986) (“The modern Supreme Court . . . has treated the establishment clause as a directive to the courts to strike down all public acts, federal, state, and local, whose primary purpose or predominant effect is to promote one religious group at the expense of others or even promote religion as a whole at the expense of the nonreligious[.]”).

19. See e.g. Kent Greenawalt, *History as Ideology: Philip Hamburger’s Separation of Church and State*, 93 Cal. L. Rev. 367, 375 (2005) (“In modern times, construing the First Amendment to apply only to statutes adopted by legislatures would be unthinkable.”); *Hein*, 551 U.S. at 639-40 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (“[N]o one has suggested that the Establishment Clause lacks applicability to executive uses of money.”); see also *Shrum v. City of Coweta*, 449 F.3d 1132, 1140-43 (10th Cir. 2006) (McConnell, J.) (discussing at length and rejecting the contention that the Establishment and Free Exercise Clauses do not apply to exercises of executive authority).

20. See e.g. *Glassroth v. Moore*, 335 F.3d 1282, 1293-94 (11th Cir. 2003) (discussing and rejecting the contention that the Establishment Clause does not apply to the judicial branch); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 Marq. L. Rev. 537, 553 (1998) (“[W]ithout question these [Establishment Clause] proscriptions apply to judges, both federal and state, no less than to other governmental actors.”)

21. The one area in which there has been some attention paid by commentators is that of the propriety of an individual judge relying on her personal religious views in reaching a legal conclusion. This topic falls within the larger conversation about the role of religion in politics and public morality; to the extent that it has relevance for the analysis of judicial violations of the Establishment Clause, it will be drawn on at a later point.

22. There are two main areas of Establishment Clause jurisprudence: (1) public manifestations of religion by government and (2) government financial support of religious institutions. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Calif. L. Rev. 673, 679 (2002) (characterizing these topics as “the two most important doctrinal areas of the Establishment Clause”). As a practical matter, judicial conduct implicates the Establishment Clause only in the former category, as the judicial branch does not independently fund non-governmental institutions or provide grants to such institutions. Thus, both of the types of violations discussed in this Part fall within the broad confines of public manifestations of religion by government.

Commandments displays to be placed in a courtroom or courthouse,²³ and judges opening court with a prayer.²⁴ Section B discusses violations by judges acting within the scope of their strictly judicial duties; in particular, it focuses on judges issuing opinions and making sentencing decisions on religious grounds.²⁵

A. Conduct of Judges Acting Outside the Scope of Their Judicial Duties

1. Ten Commandments Displays

Courts have, with some regularity, criticized individual judges on Establishment Clause grounds for setting up Ten Commandments displays in their courtrooms or courthouses.²⁶

23. See e.g. *Glassroth*, 335 F.3d at 1284 (noting that “[t]he Chief Justice of the Alabama Supreme Court installed a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building”).

24. See e.g. *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1146 (4th Cir. 1991) (indicating that the state trial judge whose behavior was at issue would enter his courtroom, “sit down, turn on a light at his bench, and say, ‘Let us pause for a moment of prayer,’” and then utter a prayer addressed to “O Lord, our God, our Father in Heaven”).

25. This distinction is made in *Glassroth*, where then-Chief Justice Moore arranged for (and refused to remove) a large granite tablet containing the Ten Commandments in the state courthouse. The Eleventh Circuit noted that it had the authority to review the conduct of the Chief Justice because, though “state courts when acting judicially, which they do when deciding cases brought before them by litigants, are not bound to agree with or apply the decisions of federal district courts and courts of appeal[,]” the circumstances in the case were somewhat different:

At issue here is not a judicial decision of the Alabama Supreme Court, eight-ninths of which had nothing to do with the challenged action. At issue here is the conduct of a party, who concedes he acted not judicially but as the administrative head of a state government department, and in that capacity his conduct is subject to as much scrutiny as that of any head of any government department.

Glassroth, 335 F.3d at 1302 n. 6.

26. See e.g. *ACLU of Ohio Found., Inc. v. Ashbrook*, 211 F. Supp.2d 873, 888, 893 (N.D. Ohio 2002) (concluding that state judge’s display of the Ten Commandments in his courtroom constituted a violation of the Establishment Clause because the judge’s purpose was “at heart, religious in nature” and a “reasonable observer” would think that the state judge and the State of Ohio were “endorsing” a religion); *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993) (holding that the display of the Ten Commandments on a county courthouse wall constituted an establishment of religion), *aff’d*, 15 F.3d 1097 (11th Cir. 1994); Deborah Tedford, *Suit Asks To Bar Commandments from Courtroom*, Houston Chron. A39 (Dec. 11, 1997) (discussing an action filed against a Texas state court judge

In a recent case, then-Alabama Supreme Court Chief Justice Roy Moore arranged for a massive granite monument bearing the Ten Commandments to be placed in the Alabama courthouse in which his court sat. He was sued personally in federal district court under the Establishment Clause.

The district court held that this placement of the Ten Commandments violated the Establishment Clause. The Eleventh Circuit affirmed and discussed the applicability of the Establishment Clause to the judiciary. The court first noted that

[t]he First Amendment does not say that no government official may take any action respecting an establishment of religion or prohibiting the free exercise thereof. It says that “Congress shall make no law” doing that. Chief Justice Moore is not Congress.²⁷

Nonetheless, the court made clear that “the religion clauses of the First Amendment apply to all laws, not just those enacted by Congress,”²⁸ as the religion clauses bind every branch and level of government.²⁹ Moreover, the court stated that the Establishment Clause limits government conduct in all its forms, even when it is not strictly law-making.³⁰ Thus, the court applied the traditional *Lemon* test³¹ to Chief Justice Moore’s conduct,

whose courtroom was adorned with a poster of the Ten Commandments). For analysis of a similar opinion, see, for example, Rick Bragg, *Judge Allows God’s Law To Mix with Alabama’s*, 146 N.Y. Times A14 (Feb. 13, 1997) (discussing an earlier Alabama case involving then-Judge Moore’s display of the Ten Commandments in his trial courtroom); Derek H. Davis, *Religion and the Abuse of Judicial Power*, 39 J. Church & State 203 (1997) (critiquing judges’ conduct in the then-pending Alabama and Texas cases).

27. *Glassroth*, 335 F.3d at 1293.

28. *Id.* (citing *Everson*).

29. *Id.*

30. In the context of this discussion, the court considered a somewhat obscure principle enunciated by the Supreme Court: that, when looking at state-attributable conduct that is not strictly law-making, the analysis of the courts should proceed “as if a . . . statute decreed that the [conduct] must occur.” *Id.* at 1294; see also *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.”); *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983) (concluding that “if a statute authorizing the teachers’ activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional”).

31. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing three-prong test for Establishment Clause violations that looks to the purpose, effect, and possibility of “excessive government entanglement with religion” of the challenged government conduct). Note that the *Lemon* test has been criticized, limited, and (at times) ignored over

and found that the placement of the monument failed the first two prongs: It violated the Establishment Clause due to both its purpose³² and its effects.³³

Given the costs inevitably associated with the purchase, placement, and upkeep of a Ten Commandments display, taxpayers will often be able to point to government expenditures in such a case in arguing for taxpayer standing.

2. *Opening Court with a Prayer*

Less frequently, courts have passed on the constitutionality of a judge's opening court with a prayer.³⁴ In *Constangy*,³⁵ plaintiffs brought an Establishment Clause challenge against a state trial judge in North Carolina, hoping to permanently enjoin him from opening court with a prayer. The district court ruled that the judge's practice violated the Establishment Clause, and the Fourth Circuit affirmed.³⁶ The defendant argued that his prayer in court "is his personal prayer and thus it does not result in government endorsement of religion."³⁷ However, the Fourth

the years. See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia & Thomas, JJ., concurring) (noting that as many as six Justices have "driven pencils through the . . . [Lemon test's] heart"); Stephen M. Feldman, *Divided We Fall: Religion, Politics, and the Lemon Entanglement Prong*, 7 First Amend. L. Rev. 253, 269-77 (2009) (discussing checkered application of the *Lemon* test by Supreme Court). Most importantly, the entanglement prong has arguably been folded into the effects prong by *Agostini v. Felton*, 521 U.S. 203 (1997), leaving (according to many commentators and some members of the Court) a two-prong test in its wake. See e.g. *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring); Ashlie C. Warnick, *Accommodating Discrimination*, 77 U. Cin. L. Rev. 119, 140-42 (2008). However, despite sustained criticism, the *Lemon* test has still been routinely applied (sometimes in modified form) by many courts, including the Eleventh Circuit in *Glassroth*.

32. *Glassroth*, 335 F.3d at 1296 ("Chief Justice Moore testified candidly that his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures.").

33. *Id.* at 1297 (quoting district court's finding in *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1304 (M.D. Ala. 2002), that a reasonable observer "would feel as though the State of Alabama is advancing or endorsing, favoring or preferring, Christianity").

34. See e.g. *Collmer v. Edmondson*, 16 Fed. Appx. 876, 877-78 (10th Cir. 2001) (noting that state trial judge's prayer in open court before prospective jurors "troubled" appellate bench "in light of the well-known constitutional dictate that the establishment of religion by government is not permitted[,] while holding that the prayer did not substantially impair the fairness of the trial for the purposes of habeas corpus relief).

35. 947 F.2d 1145.

36. *Id.* at 1152-53.

37. *Id.* at 1151.

Circuit found this argument “wholly unpersuasive,” as “a judge wearing a robe and speaking from the bench is obviously engaging in official conduct.”³⁸

The *Constangy* court also distinguished *Marsh v. Chambers*,³⁹ a case that permitted prayer before legislative sessions, because, unlike prayer in the legislative context, “[j]udicial prayer in the courtroom is not legitimated . . . by past history or present practice.”⁴⁰ Moreover, in discussing legislative and judicial prayer, the court implied that a judge should be held to a higher standard than a legislator: “[U]nlike judges, legislators do not have an obligation to be neutral Because a judge must be a neutral decisionmaker, prayer in court by a judge has far more potential for establishing religion than legislative prayer.”⁴¹ After disposing of these preliminary issues, the court then applied the *Lemon* test to the defendant judge’s morning in-court prayers and concluded that they failed in at least two of the three *Lemon* prongs—effect and entanglement⁴²—and arguably failed in the third prong, purpose, as well.⁴³

More recently, the issue of judicial prayer or invocations was discussed in Justice Scalia’s concurrence in *Hein*, which is the only instance—in any of the four *Hein* opinions—at which there is any discussion of judicial violations of the Establishment Clause. Justice Scalia suggests that if the Court upholds taxpayer standing in every instance in which the government expends funds:

Any taxpayer would be able to sue whenever tax funds were used in alleged violation of the Establishment Clause. So, for example, any taxpayer could challenge the fact that the Marshal of our Court is paid, in part, to call the

38. *Id.* at 1149 (noting that “a judge presiding over a court is the court”).

39. 463 U.S. 783 (1983).

40. *Constangy*, 947 F.2d at 1149.

41. *Id.* (stating that “[f]or a judge to engage in prayer in court entangles governmental and religious functions to a much greater degree than a chaplain praying before the legislature”).

42. *See id.* at 1151 (indicating that “the primary effect of Judge Constangy’s prayer was to advance and endorse religion”), 1152 (concluding that “Judge Constangy’s practice of praying in court . . . excessively entangle[es] the government with religion”).

43. *Id.* at 1150.

courtroom to order by proclaiming “God Save the United States and this Honorable Court.”⁴⁴

The clear implication is that this kind of action should not be permitted. However, Justice Scalia’s hypothetical case is easily distinguishable from non-Supreme Court judicial prayer cases, as the invocation by the Marshal of the Supreme Court is explicitly categorized by the Court as an example of ceremonial deism, one in a limited number of circumstances in which “government can . . . acknowledge or refer to the divine without offending the Constitution” because of the “history, character, and context” of the activity.⁴⁵ Judicial prayer in forums other than the Supreme Court, in courtrooms where there is no longstanding practice of offering an invocation, and where there is no traditional, formal, fixed invocation, would likely not pass Constitutional muster.

Even though the funds expended on such prayers would be miniscule, the alleged damage would still be judicially cognizable in a taxpayer action if the taxpayer-standing doctrine were to be extended to its logical limit, as it is premised on the position that even “three pence” spent in violation of the Establishment Clause is constitutionally problematic and injurious.⁴⁶

44. *Hein*, 551 U.S. at 632 (2007) (Scalia & Thomas, JJ., concurring in the judgment).

45. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring in the judgment) (asserting that the “category of ‘ceremonial deism’ most clearly encompasses such things as the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (‘God save the United States and this honorable Court’)”); see also *Allegheny v. ACLU*, 492 U.S. 573, 626, 630 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (taking position that “[p]ractices such as legislative prayers or opening Court sessions with ‘God save the United States and this honorable Court’” are rituals that “serve the secular purpose of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society” and are “examples of ceremonial deism,” and thus do not violate the Establishment Clause) (citations and some internal quotation marks omitted)).

46. See *Hein*, 551 U.S. at 638 (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *The Writings of James Madison* vol. 2, 183, 186 (Gaillard Hunt ed., G.P. Putnam’s Sons 1901)).

*B. Religiously Motivated and Facially Non-Neutral
Judicial Decisions*

In this section I will address the Establishment Clause status of religiously motivated judicial decisions, both those that do not explicitly invoke religious authority in reaching a decision and those that do. For example, what is the status of a sentencing in which the judge premises the harshness of the sentence on religious values?⁴⁷ What is the status of an opinion whose holding is explicitly based on a Biblical verse?⁴⁸ Do these scenarios raise Establishment Clause red flags, and when do they amount to Establishment Clause violations?

1. The Role of a Judge's Personal Religious Beliefs in the Process of Decisionmaking

The personal religious beliefs of a judge or other political officer are often difficult to ascertain. The role that those beliefs play when a judge reaches a given legal decision is almost impossible to capture in a given case, especially when the judge does not explicitly reference his religious beliefs in his opinions

47. Cf. *U.S. v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991) (holding, on due process rather than establishment grounds, that sentence should be overturned because of the judge's "impermissibly tak[ing] his own religious characteristics into account in sentencing"); *Arnett v. Jackson*, 2003 U.S. Dist. LEXIS 20645 at *18 (S.D. Ohio 2003) (noting that "[t]his Court has grave doubts about the propriety under the Establishment Clause of the state judge's express reference in open court to New Testament scripture as the last source she consulted in deciding the appropriate sentence for petitioner," and holding that the Establishment Clause claim was waived but the due process claim was valid), *rev'd* 393 F.3d 681, 687-88 (6th Cir. 2005) ("Because the record does not demonstrate that the judge's personally held religious beliefs formed 'the basis of [her] sentencing decision,' we conclude that Arnett's due process rights were not violated by the judge's Biblical reference at sentencing."); *see also id.* at 691 (Clay, J., dissenting) ("When . . . a judge directly and publicly relies on a religious source to reach a specific legal result, she flouts a defendant's fundamental expectation that he will not be adjudged according to any religious tenets, regardless of whether the sentencing judge herself adheres to those tenets.").

48. *See e.g. Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., concurring in part and dissenting in part) ("Until . . . [the mother] can establish . . . that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children."); *see also* Kent Greenawalt, *Private Consciences and Public Reasons* 142 n. 2 (Oxford U. Press 1995) (citing *Chicoine* after noting that "[i]n the nineteenth century . . . judges occasionally mentioned Christian teachings to help support legal conclusions," but that "[o]ne does not often find such mentions today").

and statements in open court. Despite these and other practical difficulties, there has been a fair amount of analysis of whether and when it is appropriate for citizens and political actors to seek to enact laws or make public decisions based on their religious beliefs or premised on religious doctrines,⁴⁹ and a smaller, but still substantial, body of work examining the proper role of the judge's religious beliefs and values in the process of judicial decisionmaking.⁵⁰

Despite vigorous disagreement over the exact limits and scope of judicial reliance on religious beliefs, much of it counseling for wide latitude in this regard,⁵¹ there is underlying consensus, even from the strongest defenders of the propriety of relying on religious values in judicial decisionmaking, that when a judge's reliance on religious values is for the purpose of

49. See e.g. *Symposium: Religion and Morality in the Public Square*, 22 St. John's J.L. Comm. 417, 417-558 (2007) (containing seven papers presented by leading scholars of law and religion); Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 Cornell J. L. & Pub. Policy 1 (2002); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality is Not Illegitimate in a Liberal Democracy*, 36 Wake Forest L. Rev. 217 (2001); Robert Audi, *Religious Commitment and Secular Reason* (Cambridge U. Press 2000); Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (Oxford U. Press 1997); Greenawalt, *supra* n. 48; David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067 (1991); Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (Oxford U. Press 1991); Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford U. Press 1987).

50. See e.g. Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 Cath. U.L. Rev. 709 (2004); Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. Dayton L. Rev. 1 (2000); *Symposium: Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions*, 81 Marq. L. Rev. 177 (1998); Greenawalt, *supra* n. 48, at 147-49 (presenting and assessing four uses of religious values that do not directly implicate a judge's own religious beliefs); Scott C. Idleman, Student Author, *The Role of Religious Values in Judicial Decision Making*, 68 Ind. L.J. 433, 481 (1993) (stating that "[f]or Establishment Clause purposes, . . . it may be necessary to discriminate among different judicial uses of religious values" and that "three factors may be helpful in this process: (1) the nature of the religious value; (2) the degree to which it informs the judge's decision making; and (3) the manner in which it is employed by the judge") (emphasis in original); Stephen L. Carter, *The Religiously Devout Judge*, 64 Notre Dame L. Rev. 932 (1989).

51. See e.g. Teresa S. Collett, *"The King's Good Servant, But God's First": The Role of Religion in Judicial Decisionmaking*, 41 S. Tex. L. Rev. 1277, 1278 (2000) ("This article concludes by affirming the present judicial stance of allowing judges wide discretion in determining whether their religious beliefs render them ineligible to hear particular cases, and suggesting that it is both foolish and futile to promulgate laws, rules, or professional norms that require agnosticism (or the public appearance of agnosticism) as a predicate to holding judicial office or hearing particular cases.").

advancing religion, this will offend the Establishment Clause.⁵² At the same time, there is widespread recognition that very few—if any—courts have actually found that improper religious motivations compromised the actions of a judge acting within the scope of his or her judicial duties.⁵³

Because the cost of reaching a decision or issuing an opinion would not be affected by the religious motivations of the judge, the simple fact that a decision was religiously motivated would not give rise to taxpayer standing.

2. Facially Religious Statements and References in Judicial Opinions

While the personal religious beliefs and motivations of the judge are often difficult to ascertain, judges sometimes make facially religious statements and references in written opinions and in open court. It is unresolved whether or when such references are appropriate under the Establishment Clause in the absence of other evidence of religious purpose on the part of the judge. When do we accept that the judge is harmlessly “gilding the lily” with religious references, and when do such references implicate the Establishment Clause?

These concerns have been most thoroughly reviewed by the courts in the context of sentencing decisions. In *Arnett v. Jackson*,⁵⁴ for example, the Sixth Circuit reversed a district

52. See e.g. Idleman, *supra* n. 20, at 553 (“It does not require a great deal of imagination to suppose that a judge’s use of religious values might be driven by the purpose of advancing religion or, alternatively, might lack a secular purpose.”). Cf. nn. 26-33, *supra*, and accompanying text (discussing *Glassroth* holding that judicial conduct at issue was inappropriate because its purpose was to advance religion).

53. Idleman, *supra* n. 20, at 555 (“There is, to my knowledge, no decision holding that a judge’s use of religion as a decisional factor violated the Establishment Clause.”). Given the practical difficulties inherent in ascertaining the motivations of public actors, the absence of such cases is not surprising. Cf. Kent Greenawalt, *Religiously Based Judgments and Discourse in Political Life*, 22 St. John’s J.L. Comm. 445, 491 (2007) (concluding that while the author has “resisted the idea” that legislation of religious morality is never unconstitutional, “as far as courts are concerned, and apart from situations in which a religion or a specific religious outlook is promoted or endorsed, the limits on appropriate grounds for laws are too narrow to have much practical significance”).

54. 393 F.3d 681 (6th Cir. 2005). For many more examples of explicit judicial reference to and use of the Bible and other religious authorities in reaching decisions, see Sanja Zgonjanin, Student Author, *Quoting the Bible: The Use of Religious References in Judicial Decisionmaking*, 9 N.Y. City L. Rev. 31 (2005).

court's decision that the defendant's due process rights were violated when the sentencing judge noted in a statement at the sentencing hearing that she relied on the New Testament in reaching her decision. In reversing, the Sixth Circuit distinguished a line of cases that found the defendant's due process rights violated when a judge took her own religious viewpoints into account when sentencing,⁵⁵ stating that

[b]ecause the record does not demonstrate that the judge's personally held religious beliefs formed "the basis of [her] sentencing decision," we conclude that Arnett's due process rights were not violated by the judge's Biblical reference at sentencing.⁵⁶

This reasoning pointedly raises the following issue: Does a judge's explicit reliance on religious authorities invalidate an opinion, even if there is no evidence of the judge's subjective intent to further religious goals?

The dissenting judge in *Arnett* took issue with the Sixth Circuit majority on this very issue.⁵⁷ He noted that, while the record may have been silent on the judge's personally held religious beliefs, this was not relevant, given what was in the record: Before pronouncing the defendant's sentence, the trial judge explained that she had been "trying to determine in [her] mind what type of sentence [Arnett] deserved in this particular case." After noting several different sources of information from which to make her decision, she confessed that she could not answer the question "what sentence?" based solely on the information she had received until she "answered [her] question late at night when [she] turned to one additional source to help [her]"—a series of verses from the New Testament, which read:

55. See e.g. *Bakker*, 925 F.2d 728. In *Bakker*, the Fourth Circuit held that the sentencing judge had violated due process when sentencing a television evangelist for fraud because the judge had commented that the defendant "had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grabbing preachers or priests." *Id.* at 740 (emphasis in original). Thus the judge exceeded the boundaries of due process by "impermissibly tak[ing] his own religious characteristics into account in sentencing." *Id.*

56. *Arnett*, 393 F.3d at 687-88. But see Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 163 n. 282 (2002) ("Some judges have explicitly invoked sectarian teachings as a basis for their decisions But such behavior is . . . inappropriate in any American court.") (citation omitted).

57. *Arnett*, 393 F.3d at 689 (Clay, J., dissenting). The quoted information from the trial record appears at 393 F.3d 684.

And whoso shall receive one such little child in my name, receiveth me. But, whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea.⁵⁸

These verses, she explained, enabled her to resolve “the final part of her struggle” to determine Arnett’s sentence. Thus, according to the dissent, “[t]he judge’s statements at sentencing undeniably show that this biblical tract played a significant, determinative role in Arnett’s sentence.”⁵⁹

The dissenting Sixth Circuit judge then squarely faced the issue of the trial judge’s personal beliefs:

Ultimately, the judge’s reliance, or lack thereof, on her personal religious beliefs is not critical to the due process question in this case. In principle, there is nothing wrong with a judge indirectly drawing upon her firmly-held religious beliefs for moral guidance in resolving a case for which the legal precedents provide no clear answer . . . just as an a-religious judge similarly might draw upon his or her firmly-held secular beliefs When, however, a judge directly and publicly relies on a religious source to reach a specific legal result, she flouts a defendant’s fundamental expectation that he will not be adjudged according to any religious tenets, regardless of whether the sentencing judge herself adheres to those tenets.⁶⁰

Moreover, he recognized the Establishment Clause problem inherent in this case, noting that

[a] judge’s assumption of such authority is not only fundamentally unfair to defendants, who expect to be sentenced without regard to religious considerations, but also erodes the “wall of separation between church and State.”⁶¹

It seems clear that the dissenting judge had the better argument on Establishment Clause grounds: Decisions and in-court speeches that explicitly rely on religious reasoning in such a pervasive way are constitutionally problematic, whatever the

58. *Matthew* 18:5-6 (King James).

59. *Arnett*, 393 F.3d at 689 (Clay, J., dissenting).

60. *Id.* at 691 (Clay, J., dissenting) (citation omitted).

61. *Id.* at 691-92 (Clay, J., dissenting) (quoting *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878)).

personal religious values of the judge. Even so, such decisions do not result in any extra expenditure of funds on the part of the judiciary, and so, despite their explicit religiosity, such non-neutral decisions would not give rise to taxpayer standing.

III. *HEIN* AND ITS PROBLEMS

A. *Factual Background*

In 2001, the President issued executive orders creating the White House Office of Faith-Based and Community Initiatives within the Executive Office of the President, as well as several Centers for Faith-Based and Community Initiatives within various federal agencies and departments.⁶² The purpose of the new Office was to ensure that

“private and charitable community groups, including religious ones . . . have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes” and adhere to “the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.”⁶³

The Centers “were given the job of ensuring that faith-based community groups would be eligible to compete for federal financial support without impairing their independence or autonomy.”⁶⁴

Shortly thereafter, the Freedom From Religion Foundation, an advocacy group “opposed to government endorsement of religion,”⁶⁵ and some of its members, sued the directors of the White House Office and various Executive Department Centers, alleging that the Office and the Centers violated the Establishment Clause by organizing conferences that were “designed to promote, and had the effect of promoting, religious community groups over secular ones,” and that sent a message to nonbelievers “that they are outsiders” and “not full members

62. *Hein*, 551 U.S. at 593-95 (citing Exec. Or. 13342, 3 CFR 180 (2004); Exec. Or. 13280, 3 CFR 262 (2002); Exec. Or. 13198, 3 CFR 750 (2001); Exec. Or. 13199, 3 CFR 752 (2001); Exec. Or. 13397, 71 Fed. Reg. 12275 (Mar. 7, 2006)).

63. *Id.* at 594 (quoting Exec. Order No. 13199).

64. *Id.*

65. *Id.* at 595.

of the political community.”⁶⁶ The only basis for standing asserted in the complaint was that the individual plaintiffs were federal taxpayers “opposed to the use of Congressional taxpayer appropriations to advance and promote religion.”⁶⁷ In that capacity, they challenged Executive Branch expenditures for the conferences, which, they contended, violated the Establishment Clause.⁶⁸

B. The Decisions Below

The District Court dismissed the claims for lack of standing,⁶⁹ concluding that, under *Flast*, federal taxpayer standing is limited to cases in which a party “alleges[s] the unconstitutionality . . . of exercises of congressional power under the taxing and spending clause of Art. I, § 8.”⁷⁰ Because the Office and the Centers acted “at the President’s request and on the President’s behalf” and were not “charged with the administration of a congressional program,” the District Court held that the challenged activities were “not ‘exercises of congressional power’” sufficient to support taxpayer standing under *Flast*.⁷¹

A divided panel of the Seventh Circuit reversed.⁷² The majority read *Flast* as granting federal taxpayers standing to challenge Executive Branch programs on Establishment Clause grounds so long as the activities are “financed by a

66. *Id.*

67. *Id.* at 596.

68. *Id.*

69. See *Freedom from Religion Found. v. Towey*, No. 04-C-381-5 (W.D. Wis. Nov. 15, 2004) (mem. & order) (attached as Appendix B to petition for certiorari in *Hein*; available at <http://www.justice.gov/osg/briefs/2006/2pet/7pet/2006-0157.pet.aa.pdf> (accessed Dec. 15, 2009; copy on file with Journal of Appellate Practice and Process); *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 990 (7th Cir. 2006) (noting that “[t]he question presented by this appeal is whether a taxpayer can ever have standing under Article III of the Constitution to litigate an alleged violation of the First Amendment’s establishment clause unless Congress has earmarked money for the program or activity that is challenged,” and that “[t]he district judge thought not”).

70. *Towey*, Appx. B to Pet. for Cert., *supra* n. 69, at 31a (quoting *Flast*, 392 U.S. at 102).

71. *Id.* at 33a-34a.

72. *Chao*, 433 F.3d 989.

congressional appropriation.”⁷³ This is so, the majority held, even where “there is no statutory program” enacted by Congress and the funds are “from appropriations for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary power.”⁷⁴ According to the majority, then, a taxpayer should have standing to challenge the actions of a federal executive agency or officer so long as “the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause” is greater than “zero.”⁷⁵

In dissent, Judge Ripple contended that the majority’s decision constituted a “dramatic expansion of current standing doctrine,” that “cuts the concept of taxpayer standing loose from its moorings.”⁷⁶ Noting that “[t]he executive can do nothing without general budget appropriations from Congress,” he criticized the majority for ignoring *Flast*’s requirement that a “plaintiff must bring an attack against a disbursement of public funds made in the exercise of Congress’ taxing and spending power.”⁷⁷

C. Four Opinions in *Hein*

In deciding *Hein*, the Court released four opinions, none of which constituted a majority opinion.⁷⁸ The plurality opinion, written by Justice Alito and joined by the Chief Justice and Justice Kennedy, denied taxpayer standing and reversed the Seventh Circuit. Justice Kennedy issued a concurrence that purported to join the plurality opinion in full, but appeared to decide the case on narrower grounds. Justice Scalia (joined by Justice Thomas) concurred in the result, but would have reversed *Flast*, and would have thus completely eliminated taxpayer standing in the federal courts. Finally, Justice Souter

73. *Id.* at 997.

74. *Id.* at 994.

75. *Id.* at 995 (pointing out that, in the case of a hypothetical taxpayer challenge to the President’s reference to “Moses rather than John Stuart Mill” in the State of the Union address, “the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero”).

76. *Id.* at 997-98 (Ripple, J., dissenting).

77. *Id.* at 1000 (Ripple, J., dissenting) (emphasis in original).

78. Lupu & Tuttle, *supra* n. 1, at 125.

issued an opinion for a four-justice minority that would have read *Flast* broadly enough to support taxpayer standing in *Hein*, and would have affirmed the decision below.

1. Justice Alito's Plurality Opinion

The plurality opinion laid out a three-step analysis: First, as a general matter, Justice Alito pointed out that

the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable “personal injury” required for Article III standing . . . [because] this type of interest is too generalized and attenuated.⁷⁹

Second, he noted that in *Flast*, the Supreme Court had used a two-prong test to carve out a “narrow exception” to the general prohibition against taxpayer standing,⁸⁰ and he focused on the first prong of that test: “[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, Sec. 8 of the Constitution.”⁸¹ Third, he asserted that the spending at issue in *Hein*—discretionary spending by the Executive Branch from general Congressional appropriations—did not fall within the *Flast* exception because it was not an exercise of Congressional power under the taxing and spending clause, and was instead an exercise of executive discretion.⁸² Thus, he concluded, taxpayers had no standing to challenge the expenditures at issue in *Hein*.

Justice Alito forcefully asserted his conviction that the primary fact distinguishing *Hein* from *Flast* was that the expenditures in *Flast* were made “pursuant to an express congressional mandate” and “funded by a specific congressional

79. *Hein*, 551 U.S. at 599-600 (discussing *Frothingham v. Mellon*, 262 U.S. 447 (1923)).

80. *Id.* at 602.

81. *Id.* (quoting *Flast*, 392 U.S. at 102-03). The second *Flast* prong is that “the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.” *Flast*, 392 U.S. at 102-03. In other words, “the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.” *Id.* Because the taxpayers’ challenge in *Hein* was based on the Establishment Clause, this prong was satisfied. *Hein*, 551 U.S. at 602.

82. *Id.* at 605.

appropriation.”⁸³ In the absence of both, he pointed out, the Court had never found taxpayer standing under *Flast*, and he concluded that it would not do so in *Hein*.⁸⁴ As to the taxpayers’ charge that any distinction drawn between money spent pursuant to Congressional mandate and expenditures made in the course of executive discretion must be arbitrary because the injury to taxpayers is identical in each situation, Justice Alito had little to say.⁸⁵ He stated simply that “*Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures.”⁸⁶

Justice Alito offered three justifications for declining to extend *Flast*, all of which sound in judicial minimalism or executive-specific concerns:

- First, “in the four decades since its creation, the *Flast* exception has largely been confined to its facts.”⁸⁷ Thus, the Court has declined to apply *Flast* in actions involving violations of any constitutional provision apart from the Establishment Clause,⁸⁸ and has “similarly refused to . . . permit taxpayer standing for Establishment Clause challenges that do not implicate Congress’ taxing and spending power.”⁸⁹
- Second, “[b]ecause almost all Executive Branch activity is ultimately funded by some congressional appropriation,” the Court’s “extending the *Flast* exception to purely executive

83. *Id.* at 604; *see also id.* at 605 (making the point that “[t]he link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here”).

84. *Id.* at 605-08 (discussing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); and *Bowen v. Kendrick*, 487 U.S. 589 (1988)).

85. *Id.* at 609-10.

86. *Id.* at 609.

87. *Id.* at 609; *see also id.* at 615 (“[I]n the four decades since *Flast* was decided, we have never extended its narrow exception to a purely discretionary Executive Branch expenditure.”).

88. *Id.* at 609 (citing cases).

89. *Id.* at 610 (citing cases).

expenditures would effectively subject every federal action . . . to Establishment Clause challenge by any taxpayer in federal court.”⁹⁰

- Third, extending *Flast* would “raise serious separation-of-powers concerns” relating to improper expansion of judicial powers at the expense of the Executive Branch.⁹¹

2. Justice Kennedy’s Concurring Opinion

Although Justice Kennedy purported to join the plurality opinion “in full,”⁹² he also wrote a separate concurring opinion that differed from the plurality opinion in two important respects. First, in agreeing with Justice Alito that there should be no taxpayer standing in *Hein*, Justice Kennedy focused exclusively on the separation-of-powers concerns particular to the case. He stated that courts “must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties,” a reluctance that—in this case—pushed firmly in the direction of denying taxpayer standing.⁹³ He wrote that

[p]ermitt[ing] any and all taxpayers to challenge the content of . . . executive operations and dialogues would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real danger of judicial oversight of executive duties.⁹⁴

Moreover, “were this constant supervision to take place the courts would soon assume the role of speech editors for communications issued by executive officials.”⁹⁵

Indeed, Justice Kennedy made clear that his decision to deny taxpayer standing in *Hein* was rooted in a line of cases distinct from *Flast*, non-taxpayer cases that deny standing to plaintiffs because of separation-of-powers concerns about

90. *Id.* at 610-11. This is an administrability argument.

91. *Id.* at 611. This is an executive-specific separation of powers argument.

92. *Id.* at 616 (Kennedy & Scalia, JJ., concurring).

93. *Id.* at 617 (Kennedy & Scalia, JJ., concurring).

94. *Id.* at 616-17 (Kennedy & Scalia, JJ., concurring).

95. *Id.* at 617 (Kennedy & Scalia, JJ., concurring).

judicial intrusion into the internal workings of the Executive Branch.⁹⁶ After citing and quoting from these non-taxpayer cases, he wrote that “[t]he same principle applies here. The Court should not authorize the constant intrusion upon the executive realm that would result from granting taxpayer standing in the instant case.”⁹⁷ Justice Kennedy’s opinion, then, is rooted in a concern that maps onto Justice Alito’s opinion but is largely distinct from it; he implies that, were it not for the judicial intrusion onto the Executive Branch that would be occasioned by granting standing to the *Hein* plaintiffs, he would not be troubled by a finding that they had satisfied the standing requirements.

Justice Kennedy also emphasized that “the result reached in *Flast* is correct and should not be called into question.”⁹⁸ Specifically, he emphasized the distinction between the bedrock Article III case-or-controversy limitation and the rather less strict Article III separation-of-powers principles, pointing out that sometimes (as in *Hein*) those principles lead to the conclusion that there should be no taxpayer standing. But sometimes, of course, they do not, so while the case-or-controversy limitation can never be overridden, *Flast* and its progeny were decided on separation-of-powers concerns that are more flexible in certain circumstances. Thus, *Flast* “must be interpreted as respecting separation-of-powers principles but acknowledging as well that these principles, in some cases, must accommodate the First Amendment’s Establishment Clause.”⁹⁹

96. *Id.* Justice Kennedy observed that in *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006), “[t]he Court . . . refused to establish a constitutional rule that would require or allow ‘permanent judicial intervention in the conduct of governmental operations [of the executive] to a degree inconsistent with sound principles of federalism and the separation of powers’”; noted the holding in *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 382 (2004), that separation-of-powers considerations should inform the judicial evaluation of a mandamus petition involving the President or Vice President because of concerns about courts “interfering with a coequal branch’s ability to discharge its constitutional responsibilities”; and referred to the Court’s statement in *Allen v. Wright*, 468 U.S. 737, 761 (1984), that separation-of-powers concerns “counsel[] against recognizing standing in a case brought . . . to seek restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.” *Id.* at 617-18.

97. *Id.* at 617 (Kennedy & Scalia, JJ., concurring).

98. *Id.* at 616 (Kennedy & Scalia, JJ., concurring).

99. *Id.*

3. Justice Scalia's Opinion Concurring in the Judgment

Justice Scalia surveyed the Court's "notoriously inconsistent"¹⁰⁰ decisions on taxpayer standing over the eighty-year period from *Frothingham v. Mellon*¹⁰¹ to *DaimlerChrysler Corp. v. Cuno*,¹⁰² and concluded that the essential problem is that the Court has relied on "two entirely distinct conceptions" of injury in fact, the first element of the "irreducible constitutional minimum of standing."¹⁰³ These two conceptions are "Wallet Injury" (a claim that the plaintiff's tax liability is higher than it would be if not for the allegedly unlawful government action) and "Psychic Injury" (the taxpayer's mental displeasure that money extracted from him is being spent in an unlawful manner).¹⁰⁴ Justice Scalia criticized the Court for ruling on Psychic Injury inconsistently: While the Court upheld taxpayer standing in *Flast* and some later cases based on Psychic rather than Wallet Injury, it denied standing in other such cases. Moreover, it "never explained why Psychic Injury, however limited, is cognizable under Article III," because generalized grievances based on the knowledge that a law is being violated do not, as a general rule, create standing-worthy injuries.¹⁰⁵

Justice Scalia took the position that the Court must follow the logic of *Flast* to its bitter end: If Psychic Injury is consistent with Article III, the Court "should apply *Flast* to *all* challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power," and "if it is not, [the Court] should overturn *Flast*."¹⁰⁶ Because Justice Scalia believes that Psychic Injury is too insubstantial and insufficiently individualized to create an injury in fact under Article III, he reached the conclusion that *Flast* should be overruled.¹⁰⁷ Thus, he concurred in Justice Alito's

100. *Id.* at 618 (Scalia & Thomas, JJ., concurring in the judgment).

101. 262 U.S. 447 (1923).

102. 547 U.S. 332 (2006). Justice Scalia's discussion of the relevant cases decided during those eight decades covers eight pages. See *Hein*, 551 U.S. at 620-28.

103. *Id.* at 619 (Scalia & Thomas, JJ., concurring in the judgment).

104. *Id.*

105. *Id.* at 620 (Scalia & Thomas, JJ., concurring in the judgment).

106. *Id.* at 628 (Scalia & Thomas, JJ., concurring in the judgment) (emphasis in original).

107. *Id.* at 637 (Scalia & Thomas, JJ., concurring in the judgment).

conclusion that there was no standing in *Hein*. Nevertheless, he criticized the plurality for refusing to acknowledge this stark choice, but instead drawing “meaningless and disingenuous distinctions” that are lacking in “logic and reason,”¹⁰⁸ and that further “smudge” what the Seventh Circuit had characterized below as the Court’s already “arbitrary” and “illogical” jurisprudence of taxpayer standing.¹⁰⁹

4. Justice Souter’s Dissenting Opinion

Like Justice Scalia, Justice Souter focused on the fact that the injury in *Flast* was identical to the injury in *Hein*,¹¹⁰ but Justice Souter concluded that the injury in *both cases* satisfied Article III. There is, he noted, a “personal constitutional right not to be taxed for the support of a religious institution,”¹¹¹ the violation of which satisfies the standing requirements of Article III, for “the ‘injury’ alleged in Establishment Clause challenges to federal spending is ‘the very extract[ion] and spend[ing] of tax money in aid of religion.’”¹¹²

Disputing Justice Scalia’s characterization of taxpayer injury as Psychic Injury, Justice Souter described the taxpayer injury asserted in an Establishment Clause case as a personal constitutional right that is “in a class by itself,” distinct from the kind of non-justiciable policy disagreements that occur

108. *Id.* at 633 (Scalia & Thomas, JJ., concurring in the judgment).

109. *Id.* at 636-37 (Scalia & Thomas, JJ., concurring in the judgment) (citing *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006)). Justice Scalia’s opinion did not escape criticism. See e.g. Richard Epstein, *Scalia’s Judicial Activism*, Wall St. J. A15 (June 29, 2007) (“Justice Scalia . . . takes a blatantly anti-originalist position by reading into the Constitution a limitation [on taxpayer standing across the board] found neither in its text nor its basic structure, nor in the judicial practice running deep in our history.”); Hamilton, *supra* n. 6 (calling Justice Scalia’s opinion “principled” but “utterly wrongheaded and historically indefensible”).

110. *Id.* at 639 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (“When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury.”).

111. *Id.* (quoting *Flast*, 392 U.S. at 114 (Stewart, J., concurring), and pointing out that “government in a free society may not ‘force a citizen to contribute three pence only of his property for the support of any one establishment’ of religion.” (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *The Writings of James Madison* vol. 2, 183, 186 (Gaillard Hunt ed., G.P. Putnam’s Sons 1901)).

112. *Id.* at 638 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (quoting *Cuno*, 547 U.S. at 348) (alterations in original).

whenever the Congress or the executive spends money.¹¹³ Finally, Justice Souter pointed out that Establishment Clause cases are not “unique in recognizing standing in a plaintiff without injury to flesh or purse.”¹¹⁴

D. Reading Hein through Marks: Is There a Controlling Opinion Here?

The first question that any court applying *Hein* needs to ask is which of the four opinions, if any, is controlling. The Court in *Marks* laid out the basic rule for ascertaining the precedential value of the decision in a case in which there is a series of opinions, and no clear majority opinion:

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.”¹¹⁵

In *Hein*, the narrowest opinion is either Justice Alito’s or Justice Kennedy’s, as Justice Souter’s opinion does not support the result and Justice Scalia’s opinion is by far the broadest of the opinions supporting the judgment.¹¹⁶

A quick look at the holdings would suggest that Justice Alito’s opinion is controlling, as Justice Kennedy purports to

113. *Id.* at 641 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

114. *Id.*

115. *Marks*, 430 U.S. at 193 (quoting *Gregg v. Ga.*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). For further discussion of the *Marks* doctrine and the precedential effect of plurality opinions, including extended discussions of the difficulty of applying *Marks* in certain categories of cases, see W. Jesse Weins, Student Author, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave Marks over Van Orden v. Perry*, 85 Neb. L. Rev. 830 (2007); Rafael A. Seminario, Student Author, *The Uncertainty and Debilitation of the Marks Fractured Opinion Analysis—The U.S. Supreme Court Misses an Opportunity: Grutter v. Bollinger*, 2004 Utah L. Rev. 739 (2004); Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 Theoretical Inq. L. 87 (2002); Adam S. Hochschild, Student Author, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 Wash. U. J.L. & Policy 261 (2000); Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 Const. Commentary 321 (2000); Linda Novak, Student Author, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980); Mark I. Levy, *Plurality Opinions*, 29 Natl. L. J. 13 (Feb. 12, 2007).

116. Lupu & Tuttle, *supra* n. 1, at 130 (“Justice Scalia’s opinion (urging the overruling of a major precedent) is not narrow at all.”).

join the plurality opinion “in full.”¹¹⁷ Indeed, courts that have invoked *Hein* have uniformly applied the Alito plurality opinion, though they have rarely discussed the *Marks* doctrine in doing so.¹¹⁸

However, a closer reading shows that, though Justice Kennedy purports to join the plurality opinion in full, his opinion departs from and is narrower than Justice Alito’s on two grounds. First, Justice Kennedy focuses exclusively on the separation-of-powers rationale for declining to extend *Flast* to the executive branch spending at issue in *Hein*.¹¹⁹ As we will see, the separation-of-powers rationale does not apply to any other category of taxpayer standing cases, which indicates that Justice Kennedy would likely uphold taxpayer standing in some situations in which the Chief Justice and Justice Alito would not.¹²⁰ Second, Justice Kennedy would not confine *Flast* to its facts, and does not believe that *Flast* should be “called into question.”¹²¹ Thus, as in Justice Breyer’s concurrence in *Medtronic v. Lohr*, it is actually Justice Kennedy’s opinion that should be considered controlling, despite the fact that it purports to join the plurality in full.¹²²

117. *Hein*, 551 U.S. at 616 (Kennedy, J., concurring).

118. See e.g. *Americans United for the Separation of Church and State v. Prison Fellowship Ministries*, 509 F.3d 406 (8th Cir. 2007) (applying plurality opinion without discussing or citing *Marks*); *Hinrichs*, 506 F.3d at 597-99 (same); *Tangipahoa Parish*, 494 F.3d at 499-500 (DeMoss, J., concurring) (same). For examples of cases that do discuss or cite *Marks* in applying Justice Alito’s opinion, see *In re: Navy Chaplaincy*, 534 F.3d 756, 760 n. 2 (D.C. Cir. 2009) (“Justice Alito’s opinion . . . is the binding opinion of the Court in [*Hein*]”) (citing *Marks*); *Freedom from Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 738 n. 11 (7th Cir. 2008) (stating that Justice Alito’s plurality opinion in *Hein* is controlling because it “expresses the narrowest position taken by the Justices who concurred in the judgment”) (citing *Marks*).

119. See nn. 92-99, *supra*, and accompanying text; Lupu & Tuttle, *supra* n. 1, at 130.

120. Not all commentators agree. See Lupu & Tuttle, *supra* n. 1, at 130 n. 80 (“[W]e recognize that choosing the Alito opinion over the Kennedy opinion, or vice versa, may not make any tangible difference in the outcome of future cases in the lower courts.”).

121. *Hein*, 551 U.S. at 616 (Kennedy, J., concurring); Lupu & Tuttle, *supra* n. 1, at 130 (noting that “lower courts may perceive Kennedy’s opinion to be ‘narrower’ than Alito’s, because Kennedy’s opinion is more respectful of the pre-existing law, as reflected in *Flast*”).

122. See *Horn v. Thoratec Corp.*, 376 F.3d 163 (3d Cir. 2004) (analyzing *Medtronic v. Lohr*, 518 U.S. 470 (1996)). In *Horn*, the Third Circuit held that Justice Breyer’s concurrence in *Medtronic v. Lohr* was the controlling opinion, even though he joined the section of the plurality’s opinion necessary to make the majority, because Justice Breyer articulated a rationale that was “the more narrow of the two” and because Justice Breyer

The difference between the Kennedy and Alito opinions for the question of whether *Hein* applies to non-Executive taxpayer spending is potentially vast. I will argue below that even according to the Alito opinion, *Hein* should not be applied outside the Executive spending context. But regardless of the proper reading of Justice Alito's opinion, Justice Kennedy would likely uphold broad taxpayer standing in taxpayer spending cases outside the federal Executive Branch context. With respect to judicial spending, there are certainly no separation-of-powers concerns where the higher courts monitor and control the activities of the lower courts, as there is no such thing as intra-branch separation of powers. And Justice Kennedy's separation-of-powers rationale for denying taxpayer standing would not comfortably apply to state and municipal spending either, as it arises out of a wariness towards the encroachment of the judiciary into the realm of federal executive discretion.¹²³

It seems clear, then, that the Kennedy concurrence is "narrower" than the Alito plurality opinion in *Hein*, and should be treated as controlling under *Marks*—if in fact there is a precedent-setting opinion at all. However, courts—including the Supreme Court itself¹²⁴—have struggled with the application of the *Marks* "narrowest grounds" test for decades,¹²⁵ and have

"cast the so-called 'swing vote,' which was crucial to the outcome of the case and without which there could be no majority." *Horn*, 376 F.3d at 175.

123. See Part III.C.2., *supra* (discussing Justice Kennedy's rationale). The harder question for Justice Kennedy would be whether *Hein* should apply to limit taxpayer standing in cases where both the taxing and spending is done by Congress, but there are no specific, explicit appropriations for religious purposes. On the one hand, separation of powers certainly comes into play in the context of judicial oversight over Congress. On the other hand, judicial examination of Congressional legislation for violations of the Constitution is at the heart of the Judicial power. See *infra* Part IV.D.2. Moreover, the concept of "executive discretion" that plays such an important role in Justice Kennedy's opinion in *Hein* has no corollary for the legislative branch.

124. See *e.g. Nichols v. U.S.*, 511 U.S. 738, 745-46 (1994) (stating that the *Marks* test is "more easily stated than applied" and should not always be applied to find an opinion of the Court, for "it has so obviously baffled and divided the lower courts that have considered it"); see also *U.S. v. Johnson*, 467 F.3d 56, 62 (1st Cir. 2006) ("*Marks* . . . has proven troublesome in application for the Supreme Court itself and for the lower courts.>").

125. See *e.g. Johnson*, 467 F.3d at 64 (noting that the "understanding of 'narrowest grounds' as used in *Marks* does not translate easily to the present situation" and discussing "the shortcomings of the *Marks* formulation"); *U.S. v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("When the plurality and concurring opinions take distinct approaches, and there is no 'narrowest opinion' representing the 'common denominator of

denied precedential effect to Supreme Court decisions where the reasoning of the concurrence differed markedly from or was in direct conflict with that of the plurality.¹²⁶ In these cases, the courts treat decisions of the Court as lacking a controlling opinion applicable to future cases that are factually distinct from the splintered decision; the only holding is the specific result of the case.¹²⁷

In *Hein*, though a majority was cobbled together by combining the opinions of Justices Alito, Kennedy, and Scalia, it is clear that the logic and reasoning of the Alito and Kennedy opinions are in direct conflict with—and are disparaged by—the Scalia concurrence in the judgment. Most importantly, Justices Alito and Kennedy reach their respective conclusions within the *Flast* framework, while Justice Scalia would overrule *Flast* outright.¹²⁸ Indeed, it is strange to think that three justices could

the Court's reasoning,' then *Marks* becomes 'problematic.'" (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991); *King*, 950 F.2d at 781 ("Marks is workable . . . only when . . . the narrowest opinion . . . represents[s] a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.")).

126. See e.g. *Tex. v. Brown*, 460 U.S. 730, 737 (1983) (plurality opinion) (holding that *Coolidge v. N.H.*, 403 U.S. 443 (1971), itself a plurality opinion, was "not a binding precedent"); *King*, 950 F.2d at 782 (holding that there is no "controlling opinion or governing test" in *Penn. v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 782 (1987) because Justice O'Connor's concurrence in part and concurrence in the judgment is one of "three distinct approaches to the issue of contingency enhancements in fee-shifting statutes, none of which enjoys the support of five Justices," and noting of *Coolidge* that although four justices agreed there on the controlling issue involving the inadvertence requirement of the plain-view doctrine, "Justice Harlan's opinion concurring in the judgment provided no reasoning by which one could discern his position" on it); *U.S. v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (pointing out that "[w]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on [an] issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court").

127. See cases cited in nn. 124-26, *supra*; *U.S. v. Capers*, 2007 U.S. Dist. LEXIS 25852, at *31 n. 10 (S.D.N.Y. March 29, 2007) (noting that "the only holding is the specific result" where the analysis of the concurrence "is simply different than that articulated by the plurality, rather than a logical subset") (citing *U.S. v. Cohen*, 372 F. Supp. 2d 340, 354-55 (E.D.N.Y. 2005)).

128. See nn. 79-109, *supra*, and accompanying text; see also n. 7, *supra*, and accompanying text (providing examples of language from the Scalia opinion criticizing the reasoning of the plurality opinion in unusually strong terms); Corn-Revere, *supra* n. 4, at 216 ("Justice Scalia's concurring opinion . . . read[s] more like an unusually tart dissent.). The Alito and Kennedy opinions in *Hein* are subsets of the Scalia concurrence in the sense that Justice Scalia would deny standing in every taxpayer case and Justices Alito and Kennedy would deny taxpayer standing in only some cases. However, since Justice Scalia

formulate the law of the land when the reasoning of the “controlling” plurality opinion is passionately and directly contested and criticized by six other justices.¹²⁹ Under this approach, there is no controlling opinion in *Hein*,¹³⁰ and the plurality opinion is binding only in the specific context in which the *Hein* facts arose, which can be construed most broadly as federal Executive Branch spending cases.

Nevertheless, recognizing that most courts have treated Justice Alito’s plurality opinion as controlling, this article turns in the Part that follows to the prevailing interpretation and application of *Hein*, and to an alternative reading that both makes sense of the harshly-criticized plurality opinion, and points the way towards the continued vitality of Establishment Clause taxpayer standing.

IV. SAVING TAXPAYER STANDING

Many commentators—and indeed, six members of the Court—have criticized the distinction drawn by the *Hein* plurality between government expenditures expressly allocated by specific Congressional enactment and Executive Branch expenditures from general Congressional appropriations;¹³¹ the primary criticism has been that the Article III injury to taxpayers

reaches his broad result in a way that is completely different from, and very much at odds with, the opinions of Justices Alito and Kennedy, his opinion should not be combined with those of Justices Alito and Kennedy to create a binding precedent. *See* nn. 100-09, *supra*.

129. As a district judge wrote recently in a similar case, “*Marks* should not be used to ‘turn a single opinion that lacks majority support into national law.’” *Capers*, 2007 U.S. Dist. LEXIS 25852, at *34 (quoting *King v. Palmer*, 950 F.2d at 771, 782 (D.C. Cir. 1991); *cf. King*, 950 F.2d at 782 (“When eight of nine justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force.”)).

130. *See* nn. 128-29, *supra*, and accompanying text.

131. *See supra* nn. 6-7; *Hein*, 551 U.S. at 633 (Scalia & Thomas, JJ., concurring in the judgment) (“Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason.”), 637 (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting) (“[T]he controlling opinion closes the door on . . . taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury. I see no basis for this distinction in either logic or precedent.”).

is identical in both cases.¹³² And the courts that have applied *Hein* based on this reading of the Alito plurality—and on the further understanding that the Alito opinion controls—have felt compelled to deny standing for lack of Article III injury where the requirements of *Hein* are not met. This has occurred even in cases raising questions that fall outside the federal Executive Branch context, and despite the minimalist language of the Alito opinion and the problems that courts have encountered in applying its reasoning to non-Executive spending cases.¹³³

There are, however, better readings of *Hein*. As discussed above, courts faced with non-Executive Branch or non-federal taxpayer spending cases should apply *Marks* to reach the conclusion that there is no precedent-setting opinion in *Hein*, or at the very least that Justice Kennedy's executive-specific opinion is controlling. Second, even if courts apply the Alito plurality, they should read its denial of standing and its distinction between legislative and executive spending as rooted in case-specific separation-of-powers and prudential concerns, rather than in Article III injury deficiencies. This reading both answers critics of Justice Alito's distinction between legislative and executive spending and suggests that courts should not apply *Hein* outside the federal executive branch context. It is to this "redemptive" reading of *Hein* that this article now turns.

A. Difficulties Applying Hein in Non-Federal Executive Spending Cases

Numerous courts and commentators, along with the six justices of the Scalia concurrence and the Breyer dissent, have apparently understood Justice Alito's plurality opinion to be rooted in the belief that there is no Article III injury to taxpayers where there is no specific Congressional appropriation on behalf of activities that allegedly violate the Establishment Clause. But

132. See e.g. *Hein*, 551 U.S. at 629 (Scalia & Thomas, JJ., concurring in the judgment) ("As the dissent correctly contends, . . . *Flast* is indistinguishable from this case for purposes of Article III."), 643 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) ("*Flast* speaks for this Court's recognition (shared by a majority of the Court today) that when the Government spends money for religious purposes a taxpayer's injury is serious and concrete enough to be 'judicially cognizable.'" (quoting *Allen*, 468 U.S. at 752)).

133. See *infra* nn. 134-46 and accompanying text.

this reading of the Alito opinion has left courts struggling to apply *Hein* to cases outside the federal executive branch. On the one hand, if *Hein* delineates a narrow Article III minimum for injury in taxpayer spending cases, then *Hein* should apply (and effectively eviscerate taxpayer standing) even in cases outside the federal Executive Branch; it would make no sense for Article III injury to differ depending on the party doing the spending.¹³⁴ On the other hand, since the Alito plurality is explicitly and vigorously minimalist in its logic and in its own description of its holding, focusing on executive-specific separation-of-powers and administrability arguments, the concerns expressed in declining taxpayer standing would appear to carry little or no weight in judicial, state, and municipal spending cases.¹³⁵

One recent case that highlights the already developing confusion and disagreement among the lower courts on this question is *Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly*.¹³⁶ In *Hinrichs*, a Seventh Circuit panel split on the question of whether the plaintiffs, state taxpayers, had standing to sue the Indiana Speaker on the ground that the Indiana House's practice of legislative prayer violated the Establishment Clause. The majority held that *Flast*, as explained by *Hein*, requires the taxpayer to point to a program that is "mandated by statute," and to show that there is a "specific appropriation of funds by the legislature to implement the program" even in purely legislative action cases.¹³⁷ Thus, because the prayer at issue in *Hinrichs* was mandated by a

134. See e.g. *Navy Chaplaincy*, 534 F.3d at 761-63 (holding that *Hein* plurality opinion establishes Article III minimum for taxpayer standing); *Tangipahoa Parish*, 494 F.3d at 499-500 (DeMoss, J., concurring) (citing *Hein* for the proposition that "a generally available grievance about government . . . does not constitute an injury in fact").

135. See e.g. *Bats v. Cobb Co.*, 495 F. Supp. 2d 1311, 1318 n. 3 (N.D. Ga. 2007) (distinguishing *Hein* in upholding taxpayer standing to sue county board of commissioners and county planning commission for practice of beginning meetings with invitational prayers: "Here, the expenditures attacked by Plaintiffs are made by a local legislative body—the Cobb County Planning Commission—and thus *Hein* is inapposite."); *Trunk v. City of San Diego*, 547 F. Supp. 2d 1144, 1150 (S.D. Cal. 2007) (finding taxpayer standing in a case involving a challenge to a city's condemnation of land containing a large cross and its likely use of tax funds to pay compensation to the landowner; declaring that "the natural reading of the language of th[e] *Hein* opinion is that when a Congressional act implicates the taxing and spending power, taxpayer standing is not precluded"; and characterizing the discussion in *Hein* regarding the interpretation of *Flast* as "dicta").

136. 506 F.3d 584 (7th Cir. 2007).

137. *Id.* at 598.

House rule rather than by statute, and the appropriations funding the prayer “did not expressly authorize, direct, or even mention the expenditures,” the “nexus” required by *Flast* as explained in *Hein* had not been shown.¹³⁸

Judge Wood, dissenting, contested this straightforward application of *Hein* to legislative spending:

[t]he reason why the Alito plurality thought that the *Flast* rule did not apply to the plaintiffs in *Freedom From Religion* was simple: the plaintiffs were not challenging legislative actions; instead, they were attacking Executive Branch expenditures.¹³⁹

When, however, a challenge is made to an “unquestionably . . . legislative act,” the limitations of the Alito plurality in *Hein* do not apply.¹⁴⁰ If, she said, the taxing and spending are done wholly within the legislative branch—as in *Hinrichs*—the legislative-action requirement is satisfied by the mere act of taxing and spending, regardless of how specifically the appropriation is made.¹⁴¹

In addition, wholly apart from the legislative-executive distinction made by Judge Wood, courts have questioned whether *Hein* is ever applicable in state taxpayer standing cases. The majority in *Hinrichs* had found that “state taxpayers are held to the same standing requirements as federal taxpayers.”¹⁴² But in *Pedreira v. Kentucky Baptist Homes for Children, Inc.*,¹⁴³ for example, the Sixth Circuit distinguished both *Hein* and *Hinrichs* in finding Article III injury (and with it, state taxpayer standing) in the absence of a specific legislative appropriation to fund the challenged activity. Noting that Justice Alito’s opinion

138. *Id.*

139. *Id.* at 607 (Wood, J., dissenting). Judge Wood also noted that “[w]hile the dissenters [in *Hein*] took the plurality to task for that distinction [between legislative and executive expenditures], arguing that the Judicial Branch has no reason to distinguish between the actions of the Executive Branch and those of the Legislative Branch, theirs was not the prevailing voice.” *Id.*

140. *Id.* at 609 (Wood, J., dissenting).

141. *Id.* at 612 (Wood, J., dissenting) (“In my view, the taxpayer-plaintiffs before us have alleged enough to win the right to present their challenge to the House Prayer before a judicial forum. They are challenging a legislative act, and they have alleged concrete pocketbook injuries.”).

142. *Id.* at 598; see also *Americans United*, 509 F.3d at 420 (applying specific-legislative-appropriations requirement to uphold taxpayer standing in state taxpayer case).

143. 579 F.3d 722 (6th Cir. 2009).

“explicitly refused to alter the [pre-existing] standards for taxpayer standing,” the court “decline[d] to find that *Hein* overrules [its] precedent that specifically instructs that [the] nexus [between a specific legislative appropriation and the challenged spending] is *unnecessary* in state taxpayer cases.”¹⁴⁴ Moreover, the court specifically rejected the argument that federalism or separation of powers concerns might compel a narrower approach to standing in state taxpayer cases, finding that “[t]hese concerns are [already] taken into consideration by the strict requirement for taxpayer standing.”¹⁴⁵

These cases, which capture the jumbled post-*Hein* decisional landscape, highlight some of the problems inherent in applying *Hein* where the challenged spending occurs outside the federal Executive Branch. Where the oversight that generated so much concern in the plurality opinion—the judicial encroachment on executive discretion—is absent, there is room for courts to conclude that *Hein* does not imply or effect a wholesale narrowing of Article III standing in all taxpayer standing cases, or to reach just the opposite conclusion.¹⁴⁶

In the section that follows, this article will suggest a reading for the lower courts to follow, which makes sense of the plurality opinion on its own terms, while demonstrating that the logic and reasoning of Justice Alito’s opinion compel the conclusion that *Hein* should not be applied to limit taxpayer standing in cases outside the federal executive spending context.

B. Mission Impossible? Making Sense of the Alito Plurality

Justice Kennedy’s denial of standing in *Hein* is rooted in an independent line of cases that limit judicial intrusion into the federal executive branch; he almost certainly rejects the position that the denial of standing in *Hein* was rooted in a lack of Article III injury in fact.¹⁴⁷ To the extent that courts are persuaded that

144. *Id.* at 731 n. 4, 732 (emphasis in original).

145. *Id.* at 733 n. 5; see also e.g. *ACLU Found. of La. v. Blanco*, 2007 U.S. Dist. LEXIS 74718, at *2, *15-*18 (E.D. La. 2007) (applying pre-*Hein* test in upholding state taxpayer standing where state legislature’s “unrestricted, unmonitored, non-neutral grants of state taxpayer money” went to two churches).

146. See *supra* Part III.C.1.

147. See nn. 92-99, *supra*, and accompanying text.

there is no controlling opinion in *Hein*, or that the Kennedy opinion should be treated as the controlling opinion, they should not apply *Hein* outside the executive context, and they should not treat non-executive spending taxpayer actions with any greater suspicion than they had pre-*Hein*; absent separation-of-powers concerns, there is no reason to deny standing when a governmental body spends taxpayer funds in violation of the Establishment Clause.

But, despite what the critics have said, Justice Alito might very well agree that the injury to the taxpayer is identical in *Flast* and in *Hein*.¹⁴⁸ As the critics have emphasized, Justice Alito never attempts to make a principled distinction between the injury in *Flast* and that in *Hein*.¹⁴⁹ Instead, he concludes that *Flast* should not be extended to cover executive spending based on three factors, none of which implicates Article III injury. And he joined the Chief Justice's near-unanimous opinion in *Cuno*, which made clear that there is a personal right not to have money spent in support of religion that is wholly unlike the generalized grievances typically articulated in other taxpayer actions.¹⁵⁰ Justice Alito never addresses this disjuncture head on in *Hein*, but a close reading of the opinions leaves the distinct impression that much of the huge gap between Justice Alito's opinion on the one hand and those of Justice Scalia and Justice Souter on the other has to do with Justice Alito's muscular understanding of separation of powers in the executive context, and prudential concerns about the courts being flooded by taxpayer standing actions based on executive branch spending, which the other justices (and many commentators) read as an

148. Despite my conclusion that the Kennedy opinion controls, courts that have applied *Hein* have by and large applied the Alito plurality opinion. For this reason, my analysis proceeds under the Alito opinion.

149. See *supra* nn. 79-91 and accompanying text (discussing Alito opinion); *supra* n. 7 (collecting commentators critical of the distinction).

150. See *Cuno*, 547 U.S. at 347-38 (distinguishing between general taxpayer injuries and the injury alleged in Establishment Clause challenges to federal spending, where the injury is "the very extraction and spending of tax money in aid of religion alleged by a plaintiff" and thus "fundamentally unlike" other taxpayer standing claims, and quoting *Flast*, 382 U.S. at 106) (quotation marks omitted). Only Justice Ginsburg did not join the Chief Justice's opinion for the Court in *Cuno*, instead concurring in part and concurring in the judgment. *Id.* at 354-55.

illogical attempt at drawing Article III injury distinctions between legislative and executive spending.¹⁵¹

Thus, although the Alito opinion certainly discusses Article III injury in fact in its opening sections,¹⁵² and although the opinion recognizes that “the standing requirement[] . . . [is] ‘an essential ingredient of separation and equilibration of powers,’”¹⁵³ once the opinion turns to the question of taxpayer standing in *Hein* itself, the focus is not on general injury-in-fact principles, but rather on a distinct and specific aspect of separation of powers rooted in a respect for executive discretion and a concern for prudential matters.¹⁵⁴

But, as in Justice Kennedy’s analysis, that is not the end of the inquiry for Justice Alito. Rather, despite the fact that the injury in *Hein* satisfies Article III’s basic case-and-controversy injury-in-fact requirement (and thus meets the bare minimum for the exercise of the judicial power), there is an independent facet of separation of powers—special protection for executive discretion—that counsels against standing in *Hein*. In addition, Justice Alito invokes prudential factors—administrability and narrow exception—that in his view counsel against taxpayer standing in the specific circumstances in *Hein*.¹⁵⁵

151. See e.g. nn. 6-7, 131, *supra*.

152. *Hein*, 551 U.S. at 599 (discussing Article III standing and stating that “[a]s a general matter the interest of the federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable ‘personal injury’ required for Article III standing”) (emphasis added).

153. *Id.* at 611 (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 101 (1998)).

154. See Martha C. Nussbaum, *The Supreme Court: 2006 Term: Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 Harv. L. Rev. 4, 95 (2007) (suggesting that “Justice Alito’s opinion [is] written as if the burden of an imagined flood of litigation were the major problem presented by the case”).

155. For a discussion of anticipated criticisms of this reading, see *infra* notes 164-183 and accompanying text. But note that my reading parallels Judge Posner’s recent decision in *Mainstreet Org. of Realtors*, 505 F.3d 742, a third-party standing case suggesting that Article III injury minimums are extremely broad that pointedly did not invoke *Hein*. In contrast, Judge Sykes, concurring, cited *Hein* in concluding that he would have dismissed the action for “lack of Article III standing” because the alleged injury is “a diffuse and speculative harm” and “if the Supreme Court’s recent standing jurisprudence means anything, it is that constitutional standing prerequisites are to be closely monitored and scrupulously enforced.” *Id.* at 754 (Sykes, J., concurring) (internal citations omitted). Judge Sykes also cited *Hein* in stating that “I see little reason to think the Court would be inclined to relax the constitutional minimums in third-party standing cases.” *Id.* Judge Sykes thus adopted a broad reading of *Hein*, one that would enable its Executive Branch taxpayer

C. Back to Judicial Spending: Does Hein Apply?

Faced with a judicial spending case, courts that treat the Alito plurality as controlling (and read it as I do) will have to decide whether the opinion's separation-of-powers and prudential concerns apply with equal force in Judicial Branch spending cases.¹⁵⁶ If they do not, then lower courts should decline to apply *Hein*'s limitations on taxpayer standing in judicial spending cases.

First, because the judicial branch would be evaluating its own discretionary activities in a judicial taxpayer standing case, there is no separation of powers issue.¹⁵⁷ The analysis would instead involve the two prudential concerns discussed by the plurality that weighed against standing in *Hein*: (1) The "narrow exception" argument; and (2) the "slippery slope" argument.¹⁵⁸

As to the first concern, while the narrow-exception argument has some force in the judicial context in that the Court has not applied *Flast* to judicial spending, this fact is not enough on its own to deny standing. In the context of executive spending, the plurality in *Hein* pointed to a number of cases in which the Court—in the plurality's interpretation of the case law—had declined to extend *Flast* to cases of executive action.¹⁵⁹ But in the case of the Judicial Branch, there is no comparable history of Supreme Court hostility to taxpayer standing; the Court has simply never faced such a case. Moreover, the judicial branch is funded out of general Congressional appropriations, and judicial spending is therefore

standing holding to bleed into other standing contexts.

156. The same sort of analysis regarding the applicability of *Hein* should be done in the federal legislative (i.e. Congressional) and state and municipal taxpayer spending context, as discussed *infra* in the Conclusion.

157. See nn. 120-23, *supra*, and accompanying text. The bottom line is that "intra-branch separation of powers" is an oxymoron.

158. The "narrow exception" argument is that "in the four decades since *Flast* was decided, we have never extended its narrow exception to a purely discretionary Executive Branch expenditure." *Hein*, 551 U.S. at 614. The "slippery slope" argument is that "[b]ecause almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court." *Id.* at 610. For a fuller discussion of the Alito plurality opinion, see notes 79-91, *supra*, and accompanying text.

159. *Hein*, 551 U.S. at 605-07 (discussing cases).

arguably “Congressional action.” Though this was not enough in *Hein* to overcome the countervailing executive-independence separation-of-powers concerns, in the context of judicial spending it might be enough to satisfy the “Congressional action” requirement.

The slippery slope administrability concern is similarly attenuated in judicial spending cases. First, the slippery slope cases about which the Court is explicitly concerned in the judicial context would be easily disposed of on the merits.¹⁶⁰ Justice Scalia, in the only discussion of judicial spending in *Hein*, says that the Court cannot uphold taxpayer standing in every instance in which the government expends funds because

[a]ny taxpayer would be able to sue whenever tax funds were used in alleged violation of the Establishment Clause. So, for example, any taxpayer could challenge the fact that the Marshal of our Court is paid, in part, to call the courtroom to order by proclaiming “God Save the United States and this Honorable Court.”¹⁶¹

This formulation works well rhetorically, but the specter of plaintiffs descending on the Supreme Court to challenge its call to order serves merely as a straw man. In fact, these cases would be easily disposed of on the merits as involving only ceremonial deism, as the Supreme Court has already acknowledged on multiple occasions.¹⁶²

160. See nn. 44-46, *supra*, and accompanying text. As discussed in Part II, judicial spending cases are likely limited to public displays, which are widely recognized to be constitutionally problematic and appropriate for judicial challenge, and invocations such as “God save this honorable Court,” which seem, at least when part of a longstanding tradition, not to be so. It is the possibility that a plaintiff could challenge these invocations, and others like them, that has really driven the slippery slope argument in the judicial context.

161. *Hein*, 551 U.S. at 632 (Scalia & Thomas, JJ., concurring in the judgment).

162. *Newdow*, 542 U.S. at 37 (O’Connor, J., concurring in the judgment) (“Th[e] category of ‘ceremonial deism’ most clearly encompasses such things as the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (‘God save the United States and this honorable Court’).”); see also *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (“Practices such as legislative prayers or opening Court sessions with ‘God save the United States and this honorable Court’ serve the secular purpose of solemnizing public occasions and expressing confidence in the future,” are “examples of ceremonial deism,” and thus do not violate the Establishment Clause) (citation and some quotation marks omitted); *Hein*, 551 U.S. at 640 n. 1 (Souter, Stevens,

Sectarian pre-session prayers offered by judges, and judge-controlled Ten Commandments displays, discussed in Part II, might have more merits substance. But the number of such cases would likely be rather limited, as challenges to judicial conduct in violation of the Establishment Clause in general are already rather limited in number. To the extent that a limited number of such actions were meritorious, they should be permitted to go forward, rather than being disposed of on lack-of-standing grounds.¹⁶³ At the same time, religiously motivated and facially non-neutral judicial decisions, also discussed in Part II, do not involve the expenditure of any extra funds, and for that reason would not give rise to taxpayer standing. Thus, there is little risk of inundating the federal courts with plaintiffs suing over taxpayer-funded invocations and other alleged judicial-spending violations.

Moreover, the judiciary spends only a fraction of the money that the executive and legislative branches spend, and the vast majority of its spending is on activities that are not in any way conceivably challengeable under the Establishment Clause. In contrast, as the Court in *Hein* emphasized, a substantial amount of executive discretionary spending is for activities and programs that touch on the Establishment Clause, such as speeches that mention God or religion, meetings with religious leaders, and a whole host of funding decisions such as financial underwriting of the non-religious activities of religious organizations.

Thus, given the important differences between Executive and Judicial branches from the perspective of separation of powers, “narrow exception,” and administrability/slippery slope, the Alito plurality opinion—even if controlling—should not be understood to limit taxpayer standing in challenges to Judicial Branch spending in violation of the Establishment Clause.

Ginsburg, Breyer, JJ., dissenting) (“If these claims are frivolous on the merits, I fail to see the harm in dismissing them for failure to state a claim instead of for lack of jurisdiction.”).

163. *Hein*, 551 U.S. at 640 n. 1 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (“To the degree the claims are meritorious, fear that there will be many of them does not provide a compelling reason . . . to keep them from being heard.”).

D. Likely Criticisms of This Reading

I anticipate two main objections to my suggestion that *Hein* should not be understood to narrow taxpayer standing outside the federal Executive Branch context.¹⁶⁴ First, one could argue that generalized grievances such as those articulated in most taxpayer standing cases do not give rise to Article III injury in fact, so I must be reading the Alito opinion incorrectly when I claim that Justice Alito does not base his denial of standing in *Hein* on a lack of Article III injury.¹⁶⁵ Second, one could argue that this reading makes no more sense than the prevailing reading, because it retains the distinction between executive and legislative spending. Though it shifts the focus of the distinction to separation of powers, a critic could argue that there is in fact no difference from the perspective of separation of powers between judicial oversight of the legislative branch and judicial oversight of the executive branch.¹⁶⁶

1. Generalized Grievances

My reading might be criticized with the argument that grievances that are generally and equally available to all citizens do not give rise to Article III standing.¹⁶⁷ However, this reading makes the Alito plurality indistinguishable from the Scalia opinion,¹⁶⁸ and if true, it would suggest that the Court should have eliminated taxpayer standing altogether. In addition, this argument is unavailing on its own terms.

First, the Court has made clear that widely shared injuries satisfy Article III as long as the harm caused is “concrete.”¹⁶⁹

164. The most obvious objection—the suggestion that I am misreading or misapplying Justice Alito’s opinion—is dealt with directly in my discussion of the Alito opinion and its application. See nn. 147-55, *supra*, and accompanying text.

165. See *infra* n. 167-79 and accompanying text.

166. See *infra* n. 180-83 and accompanying text.

167. *Hein*, 551 U.S. at 635-36 (Scalia & Thomas, JJ., concurring in the judgment).

168. *Hinrichs*, 506 F.3d at 610 (Wood, J., dissenting) (“This reading of *Freedom From Religion* would effectively adopt Justice Scalia’s concurring opinion for himself and Justice Thomas advocating the overruling of *Flast*, in contravention of the rule in *Marks*.”).

169. See *FEC v. Akins*, 524 U.S. 11, 23 (1998) (stating that the Court “has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the appropriate remedy” but that this is the case only “where the harm at issue is not only widely shared, but is also of an abstract and indefinite

Thus, an injury solely to a plaintiff's interest in seeing that the law is obeyed does not give rise to standing,¹⁷⁰ nor does an injury to the general interest in seeing taxes spent for legal purposes.¹⁷¹ But an injury to informational rights directly related to voting, which would seem analogous to an injury to the long-recognized "right not to contribute three pence . . . for the support of any one [religious] establishment," indisputably does give rise to standing, even though the grievance is generalized, because it is also concrete and particular.¹⁷² Thus, despite Justice Scalia's protestations to the contrary, where standing is denied on account of a generalized grievance, it is denied out of prudential concerns.¹⁷³

nature," and that "[o]ften the fact that an interest is abstract and the fact this it is widely shared go hand in hand," but acknowledging that "their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact'" (citations omitted); *Public Citizen v. Dept. of Just.*, 491 U.S. 440, 449-50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen [their] asserted injury."); see also *Hein*, 551 U.S. at 641-42 (Souter, Stevens, Ginsburg &, Breyer, JJ., dissenting) (citing cases finding "injury in fact" where the harm is generalized and non-economic).

170. *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 303 (1940) (pointing out that "[t]he complainant must possess something more than a common concern for obedience to law").

171. See *Frothingham*, 262 U.S. at 487 (stating that the plaintiff's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation . . . so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court"); *Cuno*, 547 U.S. at 344 (stating that "[s]tanding has been rejected . . . because the alleged injury is not 'concrete and particularized' . . . [and] the injury is not 'actual or imminent,' but instead 'conjectural and hypothetical'" (citations omitted)).

172. See *Akins*, 524 U.S. at 1 ("We conclude that . . . the informational injury at issue here, directly related to voting, . . . is sufficiently concrete and specific such that the fact that it is widely shared does not [prevent] . . . its vindication in the federal courts.").

173. *Hein*, 551 U.S. at 642 n. 3 (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting) ("Although the plurality makes much of the fact that the injury in this case is 'generalized,' . . . those properties on their own do not strip a would-be plaintiff of standing.") (citing *Akins*); see also *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991). Cf. *Tangipahoa Parish*, 494 F.3d at 499 (DeMoss, J., concurring) (distinguishing between constitutional limitation to standing that emphasizes "injury in fact" and "another important purpose of the standing requirement[, which] is to ensure separation of powers" recognized in *Hein*); *Hinrichs*, 506 F.3d at 604 (Wood, J., dissenting) ("Whether the restrictions on taxpayer standing derive from one or more of [the] basic Article III constraints or if they stem from a rule of self-restraint has been unclear. Because no one Justice spoke for a majority of the Supreme Court in *Freedom from Religion*, the question may still be debatable."). Indeed, in the classic case that laid out the general rule against federal taxpayer standing, the Court indicated that prudential concerns were central to its decision to deny taxpayer standing in the typical case. See *Frothingham*, 262 U.S. at 487 ("If one

Indeed, the Court recently reaffirmed, in a near-unanimous opinion by the Chief Justice that was joined by Justices Alito and Kennedy, that the injury in Establishment Clause taxpayer standing cases is “fundamentally unlike” the non-concrete injuries in other taxpayer spending cases, as there exists a “right not to contribute three pence . . . for the support of any one [religious] establishment.”¹⁷⁴ Given that the four justices in dissent in *Hein* state explicitly that generalized grievances can pass Article III muster, and given that Justice Alito says nothing to contest this notion, it would be difficult to argue that Justice Alito meant implicitly to overrule the Court’s generalized grievances jurisprudence in his plurality opinion in *Hein*.¹⁷⁵

Second, the Court has consistently held that municipal taxpayer standing rests on the bare taxing and spending by a municipality for illegal purposes.¹⁷⁶ In this context, the Article III injury is the use of an individual’s taxes for illegal purposes, with nothing more.¹⁷⁷ This is a strong indication that the bare

taxpayer may champion and litigate such a cause, then every other taxpayer may do [the] same, . . . in respect of every other appropriation act and statute whose administration requires the outlay of public money The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.”)

174. See *Cuno*, 547 U.S. at 347-48 (distinguishing between general taxpayer injuries and the injury alleged in Establishment Clause challenges to federal spending, in which the injury is “the very extraction and spending of tax money in aid of religion alleged by a plaintiff” and thus “fundamentally unlike” other taxpayer standing claims) (quoting *Flast*, 382 U.S. at 106) (quotation marks omitted). Only Justice Ginsburg did not join the Chief Justice’s opinion for the Court in *Cuno*. Instead, she concurred in part and concurred in the judgment. *Id.* at 354-55.

175. But see *Hinrichs*, 506 F.3d at 604 (Wood, J., dissenting) (“[B]ecause Justice Alito relied squarely on Article III in his rejection of taxpayer standing in [*Hein*], I assume for the sake of argument that we are dealing with a restriction on standing that is grounded in the Constitution.”).

176. *Frothingham*, 262 U.S. at 486-87 (noting the “rule frequently stated by this Court” that “resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation” and distinguishing municipal taxpayer standing from its federal corollary because of “the peculiar relation of the corporate taxpayer to the corporation” and the prudential concern for the “inconveniences” that will ensue if “every [federal] taxpayer” can bring taxpayer suits); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989) (reiterating distinction between federal taxpayers and their municipal counterparts); *Cuno*, 547 U.S. at 345, 349 (reaffirming distinction but denying standing because the “rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers” and these plaintiffs “identify no municipal action contributing to any claimed injury”).

177. There is very little scholarship on state taxpayer standing, and almost none on municipal taxpayer standing. Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 *Emory L.J.* 771, 773-75 (2003) (surveying the field

minimum for Article III injury in the taxpayer context is taxing and spending for illegal purposes, and that *Hein*'s far narrower scope comes from some other line of authority.¹⁷⁸

Thus, while plaintiffs in taxpayer standing cases do of course have to satisfy Article III injury in fact, the available evidence indicates that Article III requires a much looser connection between taxing and spending than that articulated in *Hein*, at least in Establishment Clause cases. And that looser connection would be satisfied with the simple fact that a taxpayer's "three pence" has been spent by the government in violation of the Establishment Clause.¹⁷⁹

of taxpayer standing scholarship and noting that "legal scholars ignore state and municipal taxpayers" in discussing taxpayer standing). Indeed, Staudt describes her systematic study of taxpayer lawsuits by municipal, state, and federal taxpayers as the "begin[ing of] an exploration of a topic that legal scholars have left entirely unexamined." *Id.* at 775. Staudt's work itself appears to stand as the sole exception to the general absence of in-depth analysis of municipal taxpayer standing.

In the realm of state taxpayer spending the lacunae have been filled somewhat by the Court's decision in *Cuno* and scholarship relating to that case. *See e.g.* Kristin E. Hickman, *How Did We Get Here Anyway? Considering the Standing Question in DaimlerChrysler v. Cuno*, 4 *Geo. J. L. & Pub. Policy* 47 (2006). It is also worth noting that, despite the clear distinction drawn by the Court between federal and state taxpayers on the one hand and municipal taxpayers on the other hand, *see n.* 176, *supra*, both lower courts and legal scholars have sometimes conflated the state and municipal taxpayer spending analyses. *See e.g.* Lupu & Tuttle, *supra n.* 1, at 146 (stating that "[t]he Court has . . . consistently treated federal, state, and local taxpayers as indistinguishable for purposes of taxpayer standing in federal court" in discussing whether state and local taxpayers should be treated differently from federal taxpayers after *Hein*).

178. Indeed, the Court has found Article III injury in a wide range of non-pocketbook and non-bodily injuries. *See nn.* 169-74, *supra*, and accompanying text. The cases cited there demonstrate convincingly that Article III injury can come in a variety of non-pocketbook forms.

179. Richard Epstein makes an even bolder claim: that nothing in Article III limits who counts as a proper plaintiff, and that Article III should not be relied upon to deny taxpayer standing at all:

Any defender of limited government who believes in an originalist interpretation of the Constitution should reject, root-and-branch, the court's hostility to taxpayer standing.

...

The proper rule should allow all taxpayers free rein to challenge either Congress or the executive branch for overstepping their constitutional authority.

...

At stake is whether judicial review itself remains as a check on the political branches.

...

[L]imits on taxpayer standing do not derive from any textual command. They rest on a serious misreading of the constitutional text, which contains no

2. *Distinction between Executive and Legislative Spending*

My reading of the plurality opinion could also be criticized on the grounds that it merely shifts the “unprincipled” distinction between legislative and executive spending from the question of injury in fact to that of separation of powers. Indeed, Justice Scalia and the dissent make this argument in criticizing the separation-of-powers analysis in the plurality opinion.¹⁸⁰

However, while it is true that separation of powers concerns inform the relationship among all three branches, there is a long-recognized, fundamental distinction between judicial review of Congressional law-making and judicial review of discretionary executive activities. Most importantly, “the very essence of the judicial duty” is the review of Congressional law-making for unconstitutional activities.¹⁸¹ In contrast, the judicial power is at its nadir when courts review Executive Branch discretionary activities.¹⁸²

standing requirement at all.

...

Nothing [in Article III] limits who counts as a proper plaintiff. It is therefore a supreme sleight-of-hand to assume that Article III justifies this self-imposed limit on judicial power.

Epstein, *supra* n. 109.

180. Justice Souter writes that

[t]he plurality points to the separation of powers . . . but there is no difference on that point of view between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one. We owe respect to each of the other branches, no more to the former than to the latter, and no one has suggested that the Establishment Clause lacks applicability to executive uses of money.

Hein, 551 U.S. at 639-40 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

Similarly, if somewhat less explicitly, Justice Scalia writes that “I cannot begin to comprehend how the amorphous separation-of-powers concerns that motivate [Justice Kennedy] bear upon whether the express-allocation requirement grounded in the Article III criteria of injury in fact, traceability, or redressability.” *Id.* at 630 n. 3 (Scalia & Thomas, JJ., concurring in the judgment).

181. *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

182. See *Hein*, 551 U.S. at 616-17 (Kennedy, J., concurring) (citing and discussing cases); Richard H. Fallon, Jr., et al., *The Federal Courts and The Federal System* 254 (5th ed., Found. Press 2003) (“[I]n *Marbury* itself Chief Justice Marshall suggested that questions should be deemed ‘political,’ and therefore not subject to judicial review, if non-judicial officers possessed ‘discretion’ to act as they did in the circumstances.”). This long-established limitation on the judicial power, commonly known as the political question doctrine, can also be framed as a recognition of the limits of the judicial power in the face of executive discretionary activities. See e.g. *Nixon v. U.S.*, 506 U.S. 224, 228 (1983) (stating that “[a] controversy is nonjusticiable—i. e., involves a political question—where

Indeed, in *Marbury v. Madison*, the Court made just this distinction between claims that require the courts to “enquire how the executive, or executive officers, perform duties in which they have a discretion”—which is not the “province of the court”—and claims “not depending on executive discretion, but on particular acts of congress” over which the court has authority to exercise the judicial power.¹⁸³

Thus, the distinction made by Justice Alito between weak judicial oversight of executive discretionary activities and strong oversight of purely legislative spending both explains the plurality’s denial of standing in *Hein* and makes perfect sense in the context of separation of powers. But it would not justify a denial of taxpayer standing in cases that do not implicate executive discretion.

V. CONCLUSION

Ideally, when the Supreme Court decides a case, it does so with such clarity of language and force of logic that there is no doubt as to the correctness of the opinion and the scope and manner of its applicability to future cases. But when a preference for judicial minimalism, a muddled body of underlying substantive law, and the reality of a fractured court meet in one case, as they did in *Hein*, the lower courts are sometimes left scratching their proverbial heads, struggling to make sense of and apply a decision.

The lower courts have already begun this process with *Hein*. Overlooking the possibility that there may be no controlling opinion at all, and reading the Alito plurality opinion broadly despite its Executive-specific reasoning and overt minimalism, some courts have applied *Hein*’s strict requirements for federal Executive Branch taxpayer standing to cases involving state and municipal taxpayers and purely legislative actions. This reading of *Hein* transforms the almost-

there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it,’” in a challenge to the Senate’s procedures for handling articles of impeachment adopted against a federal district judge) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

183. *Marbury*, 5 U.S. at 170.

uniformly criticized opinion of three Justices into the law of the land, turns the logic and reasoning of the plurality opinion on its head, and if it takes hold, will effectively eliminate taxpayer standing in actions challenging violations of the Establishment Clause.

But there are ways for the lower courts to “save” taxpayer standing, and at the same time to make sense of the Alito plurality opinion. First, if the lower courts engage in a full *Marks* analysis, they should conclude that there is no precedent-setting opinion in *Hein*; at the very least, they should find that Justice Kennedy’s narrow concurring opinion is controlling, and that it should not be understood to tighten taxpayer standing outside the federal Executive Branch context. Second, even if the lower courts continue to treat the Alito plurality opinion as controlling, they should understand that much of the criticism of the plurality opinion has been driven by a misunderstanding of the distinction between legislative and executive spending that is at its heart. Understood properly, the distinction (and the strict holding regarding taxpayer standing that it generates) is not about different injuries, but is instead rooted in a heightened concern for the inappropriate invasion by the Judicial Branch into the realm of executive discretion, and executive-specific prudential concerns.

For all of these reasons, *Hein* should be understood as a narrow decision particular to the federal Executive Branch. The implications of this new reading of *Hein* for the doctrine of taxpayer standing are potentially vast, as federal executive spending cases make up only a small portion of taxpayer standing cases. I have demonstrated in this article that *Hein* should not be understood as a barrier to taxpayer standing in judicial spending cases, but my analysis has implications for Congressional, state, and municipal taxpayer standing cases as well. Since Justice Alito’s plurality opinion does not constitute the law of the land, and since his opinion—even if controlling—is rooted in executive-specific concerns, courts are free to decline to apply *Hein* in the vast majority of taxpayer standing cases. Thus, despite the Supreme Court’s re-entrance into the field in *Hein*, the power to save taxpayer standing remains in the hands of the lower courts.