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Brendan R. McNamara

FORCEFUL MINIMALISM, *HEIN V. FREEDOM FROM RELIGION FOUNDATION, INC.*, AND THE PRUDENCE OF "NOT DOING"

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Abstract: Proponents of judicial minimalism argue that courts should issue narrow rulings that address only the issues necessary to resolve the case at hand and should avoid needlessly broad rulings that could result in unforeseen consequences. The recent Supreme Court decision in *Hein v. Freedom From Religion Foundation, Inc.* provides a compelling case study of judicial minimalism. Resisting opposing calls for broader rulings from both the concurring and dissenting justices, a plurality of the Court followed a minimalist approach to resolve a difficult question of taxpayer standing. Generally, federal taxpayers do not have standing to challenge government expenditures of tax funds in federal court. In *Flast v. Cohen*, the Court carved out a narrow exception for challenges to expenditures that allegedly violate the First Amendment's Establishment Clause. This exception requires a connection between the constitutional violation and Congress's use of its taxing and spending power. *Hein* involved a challenge to purely executive actions, and the Court faced the issue of whether to expand *Flast* to cover such actions. While some Justices called for completely overruling *Flast* in all situations and others called for expanding *Flast* to cover purely executive actions, the plurality took a narrower approach, denying standing without expanding or contracting the taxpayer standing doctrine. This Note builds on prior scholarship that advocates for judicial minimalism by arguing that *Hein*'s plurality opinion demonstrates judicial minimalism succeeding in practice.

INTRODUCTION

Justice Brandeis famously said about the Supreme Court's role, "[t]he most important thing we do is not doing."[1] Judicial review, the power to strike down laws, essentially amounts to the power to negate the acts of the popularly elected and politically accountable branches of government. This power is not one to wield lightly. Rather, judicial review "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy . . . ."[2] Judicial minimalists embrace the view that courts should only do as much as necessary to dispose of the case at hand and no more.[3] If all judicial

1. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71 (2d ed. Yale Univ. Press 1986) (1962).

2. Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892).

3. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix–x (1999).

decisions run the risk of being wrong, minimalist decisions run this risk only when necessary.

This Note uses a recent Supreme Court decision, *Hein v. Freedom From Religion Foundation, Inc.*,[4] to argue for judicial minimalism as a general method of adjudication. In *Hein*, the Court faced a choice between issuing a narrow or broad ruling.[5] The case presented an issue of standing—specifically, whether federal taxpayers have standing to challenge executive actions that allegedly violate the Establishment Clause.[6] Justice Alito's plurality opinion denied standing on narrow grounds by distinguishing prior precedent.[7] Justice Scalia, joined by Justice Thomas, argued for a broad resolution that would overrule precedents on which standing could be based and thereby deny standing.[8] The dissent argued for interpreting prior precedents expansively to allow standing.[9] Justice Kennedy also wrote a separate concurrence discussing concerns about separation of powers.[10]

This Note argues that Justice Alito's plurality opinion in *Hein* resolves the case in the best way. This view contradicts that taken by many of the legal commentators who reacted to the case when the opinions were issued.[11] Further, this Note analyzes the divergent jurisprudence of Justice Alito's and Justice Scalia's opinions in *Hein*, explores how the facts in *Hein* fit into taxpayer standing doctrine, and

4. 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553 (2007).

5. *See* SUNSTEIN, *supra* note 3, at 10–11 (discussing how minimalists prefer rulings to be narrow rather than wide). Although Professor Sunstein uses "wide" rather than "broad," this Note uses the term "broad" as synonymous and interchangeable with "wide."

6. *Hein*, 127 S. Ct. at 2559.

7. Chief Justice Roberts and Justice Kennedy joined this opinion. *Id.* For discussion of how this opinion distinguished prior precedents, see *infra* Part III.

8. *Id.* at 2573–74 (Scalia, J., concurring in the judgment).

9. *Id.* at 2584 (Souter, J., dissenting). Justices Stevens, Ginsburg, and Breyer joined the dissent. *Id.*

10. *Id.* at 2572 (Kennedy, J., concurring).

11. *See, e.g.*, Marci Hamilton, *Three Important Developments Involving Law and Religion During The Summer of 2007*, FINDLAW'S WRIT, Sep. 6, 2007, http://writ.news.findlaw.com/hamilton/20070906.html (describing the plurality's reasoning as "intellectually and morally indefensible"); Posting of David Stras to SCOTUSblog, http://www.scotusblog.com/wp/commentary-and-analysis/the-significance-of-hein-part-two-of-two/ (June 26, 2007, 15:49 EDT) (questioning the plurality's basis for distinguishing the facts of *Hein* from *Flast v. Cohen*); Posting of Jack Balkin to Balkinization, http://balkin.blogspot.com/2007/06/bomb-throwers-and-dismantlers-some.html (June 25, 2007, 13:55 EDT) (describing the *Hein* plurality as "a decision that made little sense as a principled matter").

argues that the plurality's minimalist approach best exemplifies the prudence of "not doing" more than necessary to resolve a case. This narrow ruling avoids a drastic change in a settled area of law that has not proven to need an abrupt about face, while leaving room in the future for further modifications as they may prove necessary upon consideration of cases with facts that compel broader judicial action.

Part I of this Note provides background on judicial minimalism and explains how standing doctrine and stare decisis accord with minimalism. Part II summarizes the development and status of federal taxpayer standing doctrine before *Hein*, providing context for the precedents that Justice Scalia would overturn and noting the narrow manner in which the Court has both written and construed these precedents. Part III analyzes *Hein*'s separate opinions, compares the case's facts to prior precedents, and explains which opinion of the fractured Court controls. Finally, Part IV explains why minimalism is the best solution for *Hein* and explores areas where minimalism will not be the best approach.

I. MINIMALISM, STANDING DOCTRINE, AND STARE DECISIS LIMIT THE ROLE OF FEDERAL COURTS

Minimalism, standing doctrine, and stare decisis all further a common purpose of limiting the role of federal courts,[12] along with other doctrines like constitutional avoidance[13] and *Pullman* abstention.[14] Taken together, these doctrines further the minimalist goal of doing as little as necessary and resolving cases narrowly.

To illustrate, *Railroad Commission of Texas v. Pullman Co.*[15] epitomizes minimalism's virtues. The case involved an Equal Protection

12. *See* SUNSTEIN, *supra* note 3, at 262 (linking minimalism to standing and other methods of limiting the reach of judicial decisions).

13. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (listing when the Court should and should not rule on the constitutionality of a congressional statute).

14. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). *Pullman* created an equitable abstention doctrine to discourage federal courts from hearing disputes over difficult constitutional issues when a case could be resolved on state law grounds; thus, the doctrine may be viewed as a form of constitutional avoidance. *See* Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 590 (1977); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1188–90 (5th ed. 2003).

15. 312 U.S. 496 (1941).

challenge to segregation on railroad cars,[16] a direct attack on another famous railroad segregation case, *Plessy v. Ferguson*.[17] While the Court unanimously overruled *Plessy* in 1954,[18] this consensus may not have been possible thirteen years earlier in *Pullman*.[19] In dismissing the federal lawsuit and leaving the issue—whether the Texas Railroad Commission had the authority to issue the contested order[20]—to be resolved on state law grounds,[21] the Court prevented an unnecessary decision on the merits. How might the law have developed if the Court reached the merits in *Pullman* and reaffirmed *Plessy* in 1941? Alternatively, considering the resistance to the unanimous *Brown v. Board of Education of Topeka*[22] decision thirteen years later, what would have happened if a narrow majority overruled *Plessy* in 1941? Minimalists seek to avoid ensnaring unelected judges in these political traps. The following sections of Part I describe the doctrines of minimalism, standing, and stare decisis in greater detail.

A. Minimalist Judges Resolve Each Case on Narrow Grounds

Judicial minimalists[23] decide only the issues necessary to resolve each case or controversy, while leaving extraneous issues to be resolved another time, if at all.[24] The point of minimalism is to write narrow opinions that only address the issues necessary to adjudicate a case,

16. *Id.* at 497–98.

17. 163 U.S. 537 (1896).

18. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494–95 (1954).

19. *See* Judith Resnick, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1039 (1994) ("In 1941 it was, I take it, not obvious how federal constitutional law would decide this question. It was not easy because national norms did not readily trump local customs and prejudices, indeed because national norms may well have shared such prejudices."); FALLON ET AL., *supra* note 14, at 1189–90.

20. The Texas Railroad Commission issued an order mandating that all sleeping cars operated in Texas be operated by conductors (who were exclusively white) rather than porters (who were exclusively black). *See Pullman*, 312 U.S. at 497–98. If Texas law did not grant the Commission the power to issue such an order, that would render the federal Equal Protection challenge moot. *See id.* at 501.

21. *Id.* at 498–99.

22. 347 U.S. 483, 494–95 (1954).

23. This Note treats judicial minimalism as a jurisprudential lens through which to view procedural doctrines such as standing and stare decisis. This explains why this Note proceeds first with a discussion of minimalism and then with a discussion of standing and stare decisis.

24. *See* SUNSTEIN, *supra* note 3, at ix ("A minimalist court settles the case before it, but it leaves many things undecided.").

rather than to write broad opinions designed to address entire swathes of potential cases.[25] While minimalism is a form of restraint, minimalism differs from the concept of judicial restraint because the latter focuses on giving deference to decisions of the political branches.[26] In contrast to judges embracing judicial restraint, a minimalist judge has no problem striking down popularly enacted laws if the resolution of a case demands that result.[27] Mindful both of the apparent contradiction of allowing non-elected federal judges to strike down popularly enacted laws within a democratic system of government,[28] and of the inherent risk that any decision might lead to negative consequences,[29] the minimalist exercises restraint by resisting the urge to rule broadly.

Minimalism is a natural outgrowth of the common-law system.[30] Rather than laying out broad rules designed to apply prospectively to a wide range of situations, courts build the common law as a wall in which each case forms a brick.[31] The common law accretes over time from the resolution of individual fact scenarios into a body of precedent that guides subsequent judges by analogy in a wide range of situations.[32] If one case proves to have been incorrectly decided, a later judge may replace that brick without having to build an entirely new wall.[33]

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25. *See id.* at 10 ("[M]inimalists try to decide cases rather than to set down broad rules.").

26. *See id.* at x ("Judicial minimalism can be characterized as a form of 'judicial restraint,' but it is certainly not an ordinary form."); *id.* at 261 ("A maximalist, for example, may be entirely devoted to the principle of judicial restraint; consider the idea that all congressional enactments should be upheld."). For an example of using the term "judicial restraint" to refer to minimalism, see *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1159 (D.C. Cir. 2006) (Henderson, J., concurring) (advocating "judicial restraint" in ruling on the existence of a federal reporter-source privilege "[b]ecause my colleagues and I agree that any federal common-law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not, and therefore should not, decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect.").

27. *See* SUNSTEIN, *supra* note 3, at x ("Minimalist judges are entirely willing to invalidate some laws.").

28. *See* BICKEL, *supra* note 1, at 16–23. Professor Bickel called this the "Counter-Majoritarian Difficulty." *Id.*

29. *See* SUNSTEIN, *supra* note 3, at 46.

30. *Cf. id.* at 44 ("Judges who rely on cases can reduce the burden of decisions; at least for the individual judge, reliance on past cases may well be better on this count than attempts to build law from the ground up.").

31. *See id.*

32. *See id.* at 42 ("Analogical reasoning is part and parcel of . . . minimalism. It is of course a hallmark of legal reasoning to proceed by reference to actual and hypothetical cases.").

33. *See id.* at 44 ("[P]ast cases might well be distinguished if they seem to go wrong as applied to

B. Standing Doctrine Accords with Minimalism

Standing doctrine ensures that federal courts only exercise their power when necessary to resolve a valid dispute between adverse parties. Article III of the United States Constitution grants jurisdiction to enumerated types of "Cases" and "Controversies,"[34] and federal courts have interpreted this jurisdictional limitation to restrict the power of the federal courts to rule on *actual* cases and controversies.[35] Standing, along with related justiciability doctrines,[36] maintains the separation of powers of the three branches of government by defining "the proper—and properly limited—role of the courts in a democratic society."[37] To borrow a famous phrase from the administrative law context, standing helps ensure that the federal judicial power remains "canalized within banks that keep it from overflowing."[38] The Court has firmly established that standing is an essential part of separation of powers.[39]

Like its fellow justiciability doctrines, standing reduces the reach of federal judicial power. To the judicial minimalist, this is desirable. Just as minimalism counsels that courts should rule only on the issues necessary to resolve each case, it also insists that courts should resolve each case only when given the power to do so.[40] This approach maintains separation of powers by ensuring that courts pass judgment, and thus run the risk of error, only when they have been given such power and only when reaching a judgment on the merits is necessary.[41] Because the judicial power only extends to justiciable cases, rulings in

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new circumstances.").

34. U.S. CONST. art. III, § 2, cl. 1.

35. *E.g.*, Warth v. Seldin, 422 U.S. 490, 498–99 (1975).

36. In addition to standing, justiciability doctrines include ripeness, mootness, and the bans on deciding political questions and issuing advisory opinions. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 43–172 (5th ed. 2007); FALLON ET AL., *supra* note 14, at 55–267.

37. *Warth*, 422 U.S. at 498.

38. Panama Refining Co. v. Ryan, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting) (arguing that separation of powers requires Congress to place limits on the powers it delegates to administrative agencies).

39. Allen v. Wright, 468 U.S. 737, 750, 752 (1984); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

40. *See* SUNSTEIN, *supra* note 3, at 39–40 ("[T]he principles [of justiciability] are obviously an effort to minimize the judicial presence in American public life . . . . [f]or example, a judgment that a complex issue is not now ripe for decision may minimize the risk of error and increase the scope for continuing democratic deliberation on the problem at hand."); *see also id.* at 39 (linking minimalism to the "passive virtues" discussed in BICKEL, *supra* note 1, at 111–98).

41. *See id.* at 40.

cases where plaintiffs lack standing are illegitimate and undermine the judiciary's stature in a government of separated and enumerated powers.[42] In disputes involving contentious public rights such as religious freedom, standing doctrine prevents federal courts from sailing into treacherous political waters without the anchor of a true case or controversy.[43] Because minimalism seeks to limit the risk of error created by judicial involvement in divisive political battles,[44] standing requirements for Establishment Clause litigation provide fertile ground to explore minimalism.

C. Stare Decisis Works in Tandem with Minimalism to Limit the Role of Federal Courts

Stare decisis, literally "to stand by things decided,"[45] governs the continued validity and precedential value of case holdings.[46] The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[47] faced with the choice of affirming or overruling the landmark abortion case *Roe v. Wade*,[48] discussed the factors that courts must weigh when deciding whether to overrule precedent.[49] The Court stated that the best justification to overrule a precedent is that the precedent has proven itself to be so clearly erroneous as to demand its abandonment.[50] Because this situation occurs rarely, courts may consider other factors when determining whether to overrule precedent.[51] These factors include whether the rule set forth in the challenged precedent: (1) defies "practical workability," (2) has been relied upon such that overruling would result in hardship, (3) has become a remnant of an abandoned doctrine, or (4) relies on outdated facts such that the rule has lost "significant application or justification."[52] By limiting the circumstances

42. *See* BICKEL, *supra* note 1, at 111, 117 (viewing standing as a "passive virtue" that limits courts to their legitimate role in a democracy).

43. *Cf.* FALLON ET AL., *supra* note 14, at 127–28.

44. *See* SUNSTEIN, *supra* note 3, at 4–5.

45. BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

46. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (affirming the "central rule" of *Roe v. Wade*, 410 U.S. 113 (1973)).

47. 505 U.S. 833 (1992).

48. 410 U.S. 113 (1973).

49. *Casey*, 505 U.S. at 854.

50. *Id.*

51. *Id.*

52. *Id.* at 854–55.

under which controlling precedent may be abandoned, stare decisis tethers the Court to its prior rulings and constrains the scope of future decisions.

In sum, the doctrines of minimalism, standing, and stare decisis all ensure that the judicial branch operates within a limited sphere. Minimalist judges limit their rulings to address only what is necessary; standing limits courts to hearing only those cases brought by proper plaintiffs; stare decisis keeps judges bound to the decisions of prior courts.[53]

II. FEDERAL TAXPAYERS HAVE STANDING TO CHALLENGE A NARROW CLASS OF ESTABLISHMENT CLAUSE VIOLATIONS

Citizens claiming standing based on their status as federal taxpayers face an uphill battle in convincing a federal court to adjudicate their cases. The Supreme Court has held that taxpayers do not have standing to challenge the constitutionality of federal statutes.[54] In *Flast v. Cohen*,[55] the Court carved out an exception for certain Establishment Clause claims.[56] In cases subsequent to *Flast* and preceding *Hein*, the Court clarified and cabined the limits of this exception.[57]

A. Taxpayers Generally Do Not Have Standing to Challenge the Constitutionality of Federal Statutes

Standing doctrine requires that a plaintiff bringing a cause of action in federal court have suffered a personal injury.[58] From time to time, federal taxpayers seek to establish standing by framing the injury as the

53. For a discussion of how stare decisis furthers judicial restraint, see Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277– 82 (2005). As discussed at *supra* note 26, though minimalism differs from judicial restraint, the terms are often used interchangeably or used to refer to the same concept of limiting the scope of judicial decision-making.

54. *See infra* Part II. A.

55. 392 U.S. 83 (1968).

56. *See infra* Part II.B.

57. *See infra* Part II.C.

58. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Allen v. Wright, 468 U.S. 737, 751 (1984). In addition to the injury requirement, there must be a causal link between the plaintiff's injury and the alleged wrongful acts of the defendant, and the remedy sought must redress the plaintiff's injury. *Allen*, 468 U.S. at 751; *see also id.* at 753 n.19 (clarifying that the causation and redressability requirements of standing are distinct and separate requirements).

financial injury of paying taxes.[59] Although taxpayers have standing to challenge the collection of a specific tax on the grounds that the tax itself violates a constitutional provision,[60] a tougher question emerges when a plaintiff asserts standing as a federal taxpayer and the alleged unconstitutional act is not the imposition of the tax but rather how the taxes are spent. The Supreme Court first ruled on the ability of federal taxpayers[61] to challenge the constitutionality of federal spending in *Frothingham v. Mellon*.[62]

In *Frothingham*, the plaintiffs challenged a federal appropriations statute, the Maternity Act of 1921,[63] on the ground that the statute invaded state sovereignty,[64] thus violating the Tenth Amendment.[65] Mrs. Frothingham argued, in effect, that she had standing as a federal taxpayer because the allegedly unconstitutional spending for the Maternity Act increased her tax burden without due process of law.[66] The Court rejected this argument, declaring that an individual taxpayer has so minute an interest in the pool of federal tax funds that there is no individualized interest or injury; therefore, Mrs. Frothingham did not

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59. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 771–73 (2003) (citing various taxpayer standing lawsuits).

60. Hein v. Freedom From Religion Found., Inc., 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553, 2563 (2007) (plurality opinion) (citing Follett v. Town of McCormick, 321 U.S. 573 (1944)). *Follett* involved a prosecution for selling books without a locally required license. *Follett*, 321 U.S. at 574. The defendant there was a Jehovah's Witness who challenged the license statute as violating his right to free exercise of religion. *Id.* The Supreme Court held that the license fee amounted to an unconstitutional tax on constitutionally protected religious activity. *Id.* at 577.

61. For a thorough exploration of the history of state and municipal taxpayer standing in federal court, see generally Staudt, *supra* note 59. As Professor Staudt notes, whether state and municipal taxpayers have standing to sue in *state* courts presents a different question governed by state law and not subject to federal standing doctrine. *Id.* at 775. The contours of state and municipal taxpayer standing, both in federal and in state courts, are beyond the scope of this Note.

62. Frothingham v. Mellon, 262 U.S. 447, 486 (1923) (decided with *Massachusetts v. Mellon*). Although Mrs. Frothingham claimed standing as a federal taxpayer, Massachusetts challenged the federal appropriations statute as a violation of its sovereignty over state affairs. *Id.* at 480. The Court dismissed both cases on justiciability grounds. *Id.* ("We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions."). Although the term "standing" had not yet been widely adopted to refer to these types of justiciability issues, see FALLON ET AL., *supra* note 14, at 126 n.1, this Note will use the term "standing" for clarity.

63. 42 Stat. 224, 224–26 (1921), 42 U.S.C. §§ 161–175 (1925) (repealed 1929). The Act "provided federal financial support for state programs to reduce maternal and infant mortality . . . ." FALLON ET AL., *supra* note 14, at 127.

64. *Frothingham*, 262 U.S. at 479.

65. U.S. CONST. amend. X.

66. *Frothingham*, 262 U.S. at 486.

have standing to bring her claim in federal court.[67] Instead, the Court characterized an individual taxpayer's injury as one suffered in common with people generally.[68] Additionally, the Court reasoned that the judiciary has no power to rule on the validity of congressional acts in a vacuum and thus, when a taxpayer seeks a judicial remedy, the taxpayer must show "not only that the statute is invalid but [also] that [the party] has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement."[69] Consequently, an injury suffered "in some indefinite way in common with people generally" cannot support a valid case or controversy.[70]

In a subsequent state taxpayer standing case, the Court further expounded on the limitations of taxpayer injury.[71] In *Doremus v. Board of Education of the Borough of Hawthorne*,[72] the plaintiffs challenged the practice of teachers reciting Bible verses in New Jersey public schools[73] under the Establishment Clause,[74] claiming standing as state and municipal taxpayers.[75] The Court declined to review the state court's decision, holding that the plaintiffs had no standing in federal court.[76] In addressing the issue of taxpayer injury, the Court quoted favorably from the state high court ruling that the brief recitation from the Old

67. *Id.* at 487.

68. *Id.* at 488–89. Such injuries are known as generalized grievances. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) ("If a plaintiff can show sufficient injury to satisfy Article III, he must also satisfy prudential concerns about, for example . . . whether he should be able to litigate generalized social grievances.").

69. *Frothingham*, 262 U.S. at 488.

70. *Id. But see* Fed. Election Comm'n v. Akins, 524 U.S. 11, 19, 21, 23–24 (1998) (holding that when a statute grants a cause of action to any person "aggrieved" by an action of the Federal Election Commission, an aggrieved plaintiff has standing if the injury is "concrete" even if it is one shared by many others).

71. Although the plaintiffs brought suit in state court claiming standing as state taxpayers, the Supreme Court reviewed the case because the complaint alleged violations of the Establishment Clause. Doremus v. Board of Educ. of the Borough of Hawthorne, 342 U.S. 429, 430, 432 (1952).

72. 342 U.S. 429 (1952).

73. *Id.* at 430.

74. U.S. CONST. amend. I, cl. 1.

75. *Doremus*, 342 U.S. at 432. One plaintiff also claimed standing as a parent of a child subject to the challenged law, but the Court dismissed this as moot because the child had already graduated. *Id.* at 432–33.

76. *Id.* at 435. *Cf.* ASARCO Inc. v. Kadish, 490 U.S. 605, 618 (1989) (holding that only the party seeking Supreme Court review of an adverse state court ruling need satisfy federal standing requirements); *id.* at 623 n.2 (distinguishing *Doremus*, where the original state court plaintiff sought Supreme Court review, from *ASARCO*, where the original state court defendant-intervenors sought Supreme Court review).

Testament each morning added no additional cost to the schools' operational budget.[77] Because the school day lasts a fixed period of time, the cost of teacher salaries does not change based on lesson content or classroom speech.[78] While the plaintiffs claimed taxpayer injury, there was no specific appropriation of funds and therefore no taxpayer standing.[79] Despite being a state taxpayer standing case, *Doremus* is significant to the federal taxpayer standing doctrine because of this last distinction: federal taxpayer standing, if it can exist at all, must be linked to a specific expenditure of funds supporting the challenged activity.[80]

B. Flast v. Cohen *Created a Narrow Exception That Permits Federal Taxpayer Standing Under Certain Circumstances*

Forty-five years after *Frothingham*, the Supreme Court carved out a narrow exception to the general ban on federal taxpayer standing.[81] *Flast v. Cohen* presented an Establishment Clause challenge to the Secondary Education Act of 1965[82] on the ground that the Act authorized states to give federal education funds to private schools.[83] The plaintiffs claimed standing as taxpayers and specifically challenged the use of federal tax dollars[84] to support religious institutions, characterizing such actions as "compulsory taxation for religious purposes."[85] The Court held that a federal taxpayer can have standing to challenge a federal statute by showing a "logical nexus between the status asserted and the claim sought to be adjudicated."[86]

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77. *Id.* at 431 (quoting Doremus v. Bd. of Educ. of Borough of Hawthorne, 75 A.2d 880, 881–82 (N.J. 1950)).

78. *See id.*

79. *Id.* at 434–35.

80. *See* Flast v. Cohen, 392 U.S. 83, 102 (1968).

81. *See* Bowen v. Kendrick, 487 U.S. 589, 618 (1988) (explaining *Flast*'s holding).

82. 79 Stat. 27, 27–58 (1965), 20 U.S.C. § 241a (Supp. I 1965) (repealed 1978).

83. *Flast*, 392 U.S. at 85–86. While the Act only referred to private schools generally and did not mention private *religious* schools, during the 1960s the vast majority of private schools were religiously affiliated. Hein v. Freedom From Religion Found., Inc., 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553, 2565 n.3 (2007) (plurality opinion).

84. Justice Harlan argued that tax dollars become general funds and lose their identity as tax dollars once collected, and thus the plaintiffs challenged the use of general funds rather than tax dollars. *Flast*, 392 U.S. at 128 (dissenting opinion).

85. *Id.* at 87.

86. *Id.* at 102.

According to *Flast*, the analysis of whether the required nexus between federal taxpayer status and the claim to be adjudicated exists has two parts.[87] First, a taxpayer may only challenge federal statutes passed under the taxing and spending power[88] so long as the spending is not "incidental" to administering "an essentially regulatory statute."[89] The Court noted that Congress appropriated almost one billion dollars to implement the Secondary Education Act in 1965[90] and referred to this amount as "substantial,"[91] but *Flast*'s holding did not explicitly require that any minimum amount be spent.[92] Second, the challenge must be based on a specific constitutional limitation on the taxing and spending power.[93] The Court held that the Establishment Clause imposes a limitation on the taxing and spending power, but did not decide whether any other constitutional provisions impose a similar limitation.[94]

C. Later Cases Further Narrowed the Flast *Exception*

In fact, the Court has never found any additional constitutional provisions that directly limit the taxing and spending power.[95] A few years after *Flast*, two cases denied taxpayer standing for alleged

87. *Id.*

88. *Id.* The Constitution grants Congress the power to tax and spend. U.S. CONST. art. I, § 8, cl. 1.

89. *Flast*, 392 U.S. at 102 (citing Doremus v. Bd. of Educ. of the Borough of Hawthorne, 342 U.S. 429 (1952)). This restriction means that to pass the first part of the nexus test, Congress must have allocated money to be spent on the challenged statutory program. *See* Bowen v. Kendrick, 487 U.S. 589, 619 ("We do not think, however, that appellees' claim that [statutory] funds are being used improperly by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary."). Similar to *Doremus*, a taxpayer would fail the first part of the nexus test if the challenged statute dictated that a federal employee perform allegedly unconstitutional activities in the course of employment without providing any additional funding for these new activities. *See Flast*, 392 U.S. at 102; *Doremus*, 342 U.S. at 431.

90. *Flast*, 392 U.S. at 103 n.23.

91. *Id.* at 103.

92. *See id.* at 105–06. Indeed, the Court seemed to imply that any amount spent would be sufficient as long as the spending was not incidental to a regulatory scheme as discussed in *supra* note 89. *See Flast*, 392 U.S. at 103–04 (citing 2 WRITINGS OF JAMES MADISON 183, 186 (Hunt ed. 1901)).

93. *Id.* at 102–03.

94. *Id.* at 105.

95. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 508 n.18 (1982) (Brennan, J., dissenting) ("In the years since the announcement of the *Flast* test we have yet to recognize a similar restriction on Congress' power to tax, and I know of none.").

violations of other constitutional provisions.[96] The Court recently denied standing to a state taxpayer challenging an alleged Dormant Commerce Clause violation.[97] Although the Court in *Flast* left open the possibility that other constitutional provisions could pass the second part of the nexus test,[98] *Flast*'s holding has effectively been confined to Establishment Clause challenges.[99] Contrary to Justice Douglas's prediction that *Flast*'s narrow holding would expand and lead to the gradual erosion of *Frothingham*,[100] later decisions have done just the opposite: narrowed *Flast* and reinforced *Frothingham*.

Even within *Flast*'s accepted domain, the Establishment Clause, the Court has applied *Flast* narrowly. Faced with a federal taxpayer challenge to a federal government transfer of a surplus World War II military hospital to a religious school, the Court declined to grant standing under *Flast*.[101] *Valley Forge Christian College v. Americans United for Separations of Church and State*[102] distinguished *Flast* on two grounds: first, that the transfer of property was a discretionary decision of an executive agency, rather than congressional action;[103] second, that Congress authorized this kind of transfer under the Property Clause,[104] rather than the taxing and spending power.[105] As the Court suggested,[106] these two distinctions are really manifestations of the same underlying issue: the challenged action in *Valley Forge* did not actually involve any spending.[107] *Valley Forge* reiterates that *Flast* only allows

96. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (denying taxpayer standing to challenge Members of Congress serving in the Army Reserve as against the Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2); United States v. Richardson, 418 U.S. 166, 175 (1974) (denying taxpayer standing to challenge the Central Intelligence Agency's refusal to publish detailed records as allegedly required by the Accounts Clause, U.S. CONST. art. I, § 9, cl. 7).

97. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 338, 346 (2006) (rejecting state taxpayer standing to bring a Dormant Commerce Clause challenge to franchise tax credits designed to persuade DaimlerChrysler not to move a factory out of state).

98. *Flast*, 392 U.S. at 105–06.

99. *See DaimlerChrysler Corp.*, 547 U.S. at 347.

100. *Flast*, 392 U.S. at 107 (Douglas, J., concurring).

101. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 467–68, 482 (1982).

102. 454 U.S. 464 (1982).

103. *Id.* at 479.

104. U.S. CONST. art. IV, § 3, cl. 2.

105. *Valley Forge Christian Coll.*, 454 U.S. at 480.

106. *Id.* ("Secondly, and perhaps redundantly . . . .").

107. *Id.* at 480 n.17; *see also* Hein v. Freedom From Religion Found., Inc., 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553, 2586–87 n.2 (2007) (Souter, J., dissenting).

standing to challenge congressional spending that allegedly violates the Establishment Clause.[108]

Valley Forge suggests that an executive agency's discretionary acts fail the first part of the *Flast* nexus test simply because the Executive Branch, rather than the Legislative Branch, has performed the challenged action.[109] The Court later clarified, however, that once Congress has authorized spending to administer a statute, the fact that an executive agency chose to spend the appropriated funds in violation of the Establishment Clause will not preclude taxpayer standing.[110] *Bowen v. Kendrick*[111] allowed standing for an as-applied challenge to the Adolescent Family Life Act[112] based on grants given to religious organizations at the discretion of the Secretary of Health and Human Services.[113] The Court held that this challenge passed the first part of the *Flast* nexus test because the Secretary administered the spending of funds approved by Congress.[114] Thus clarifying the issue left open in *Valley Forge*, *Bowen* allowed standing under *Flast* for challenges to executive administration of federal statutes.[115]

In sum, the Court has fashioned and maintained a narrow exception to the general ban on taxpayer standing.[116] Recognizing the sound policy of *Frothingham*'s ban on generalized grievances, the Court has applied *Flast*'s two-part nexus test strictly.[117] The Court did not revisit this line of cases until *Hein v. Freedom From Religion Foundation, Inc.* during the 2006 Term.[118]

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108. *Valley Forge Christian Coll.*, 454 U.S. at 479.

109. *See id.*

110. *See* Bowen v. Kendrick, 487 U.S. 589, 619–20 (1988).

111. 487 U.S. 589 (1988).

112. 42 U.S.C. § 300z to z-10 (1982 & Supp. II 1985). The Act set a regulatory structure for giving grants to groups focused on teenage sexual activity and pregnancy. *Id.*

113. *See Bowen*, 487 U.S. at 593, 618.

114. *Id.* at 619.

115. *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553, 2567 (2007); *Bowen*, 487 U.S. at 619–20.

116. For discussion of minimalist nature of this narrow exception, see *infra* Part IV.A.

117. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 106 (1968) ("We lack that confidence [to allow taxpayer standing] in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.").

118. *Hein*, 127 S. Ct. at 2561–62.

III. THE COURT IN *HEIN* DISAGREED ABOUT THE VALIDITY AND APPLICATION OF *FLAST*

The Court in *Hein* issued four separate opinions. Justice Alito wrote the plurality opinion, which Chief Justice Roberts and Justice Kennedy joined. Justice Kennedy's concurring opinion expands on separation of powers issues. Justice Scalia, joined by Justice Thomas, concurred in the judgment but substantially disagreed with the plurality's reasoning. Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. The first section of Part III of this Note discusses the facts and procedural history of the litigation leading to the Court's opinions. The rest of Part III explores the reasoning of each opinion.

A. Hein *Challenged Certain Aspects of President Bush's Faith-Based Initiatives*

In *Hein*, the Freedom From Religion Foundation, Inc. (FFRF) challenged both the constitutionality of conferences designed to train religious groups on how to successfully apply for federal aid, and the religiously themed speeches given at these conferences by President George W. Bush and other executive officers.[119] The litigation grew out of an Executive Order[120] that created the Office of Faith-Based and Community Initiatives (OFBCI) within the Executive Office of the President.[121] The Order charged OFBCI with ensuring that religious groups providing community services could compete on an equal playing field with secular groups providing similar services when applying for federal aid.[122] Congress did not create the OFBCI, and funding came from general Executive Branch funds rather than specific congressional appropriations.[123]

FFRF claimed taxpayer standing under *Flast* as its sole basis for standing in federal court.[124] The district court dismissed the case for lack of standing because FFRF did not challenge an exercise of congressional

119. *Id.* at 2559.

120. Exec. Order No. 13,199, 3 C.F.R. 752 (2001), *reprinted in* 3 U.S.C.A. ch. 2 annots., at 451–52 (2005).

121. *Hein*, 127 S. Ct. at 2559.

122. *Id.* at 2559–60 (citing 3 C.F.R. 752–753).

123. *Id.* at 2560.

124. *Id.* at 2561.

power.[125] On appeal to the Seventh Circuit Court of Appeals, a divided panel reversed the district court ruling, holding that *Flast* allows standing to challenge government actions "financed by a congressional appropriation," even if the spending was not pursuant to any statutory program.[126] One judge dissented from the panel decision, warning that the Court of Appeals' holding threatened to broaden standing under *Flast*.[127] The Court of Appeals then denied rehearing en banc, and a concurring opinion suggested that the Supreme Court needed to resolve the issue.[128] The Court granted certiorari to resolve this dispute.[129]

The Court divided sharply, issuing four separate opinions: (1) Justice Alito's plurality opinion, joined by Chief Justice Roberts and Justice Kennedy;[130] (2) Justice Kennedy's concurrence;[131] (3) Justice Scalia's concurrence in the judgment and disagreement with the plurality's reasoning, joined by Justice Thomas;[132] and (4) the dissenting opinion of the remaining four Justices, who would have found standing.[133] When no opinion commands the support of five Justices, the narrowest opinion that concurs in the judgment controls the case.[134] As discussed below, because the plurality opinion expressed the narrowest grounds leading to reversal of the Court of Appeals, Justice Alito's opinion controls.[135]

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125. *Id.*

126. Freedom From Religion Found., Inc. v. Chao, 433 F.3d 989, 994, 997 (7th Cir. 2006), *rev'd sub nom.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553, 2559 (2007)).

127. *Chao*, 433 F.3d at 997–98, 1000 (Ripple, J., dissenting).

128. Freedom From Religion Found., Inc. v. Chao, 447 F.3d 988, 988 (7th Cir. 2006) (Flaum, C.J., concurring in the denial of rehearing en banc); *id.* at 989 (Easterbrook, J., concurring in the denial of rehearing en banc).

129. *Hein*, 127 S. Ct. at 2561–62.

130. *Id.* at 2559.

131. *Id.* at 2572 (Kennedy, J., concurring).

132. *Id.* at 2573 (Scalia, J., concurring in the judgment).

133. *Id.* at 2584 (Souter, J., dissenting).

134. Marks v. United States, 430 U.S. 188, 193 (1977); *see also* Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV 115, 130 (2008) (noting that *Marks* sets the standard for determining the controlling opinion when no majority of the court joins a single opinion).

135. *See Marks*, 430 U.S. at 193; *Hein*, 127 S. Ct. at 2584 (Souter, J., dissenting) (describing Justice Alito's opinion as controlling without explicitly stating why or citing *Marks*); *see also* Lupu, *supra* note 134, at 130, 130 n.80 (discussing whether Justice Alito's or Justice Kennedy's is the most narrow, but suggesting that it "may not make any tangible difference in the outcome of future cases in the lower courts").

B. Justice Alito Denied Standing by Distinguishing Precedent in His Plurality Opinion

The plurality embraced the narrowness of *Flast* and its progeny, especially *Valley Forge*, and applied the "*Flast* exception" with "rigor."[136] In so doing, the plurality described *Flast* as a case involving specific and direct congressional spending alleged to violate the Establishment Clause.[137] Focusing on the first part of the nexus test, the plurality found the link between congressional action and the challenged executive acts too attenuated to support standing.[138] While *Bowen* allowed a challenge to the administration of a congressional statute that was left to the discretion of an executive agency, the plurality distinguished *Bowen* as only applying to the administration of federal statutes.[139] Key to this conclusion was the plurality's observation that FFRF "can cite no statute whose application they challenge."[140] Even though Congress had allocated funds for the operation of executive agencies and those funds were used to pay for the conferences at issue, Congress had played no role in the creation of the OFBCI and had imposed no restrictions on the use of these operational funds.[141] Therefore, because FFRF had no congressional action to challenge, there was no nexus between FFRF's taxpayer injury and Congress's use of the taxing and spending power.[142]

Where FFRF claimed that distinguishing between legislative and executive acts that violate the Establishment Clause did not make sense, the plurality explained that "*Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures."[143] The plurality viewed *Flast* as creating a narrow exception limited to a small range of situations, and thus followed past precedent, which had refused to apply

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136. *Hein*, 127 S. Ct. at 2565 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 481 (1982)).

137. *Id.*

138. *Id.* at 2568.

139. *Id.* at 2567.

140. *Id.*

141. *Id. See also id.* at 2568 n.7 ("Nor is it relevant that Congress may have informally 'earmarked' portions of its general Executive Branch appropriations to fund the offices and centers whose expenditures are at issue here.").

142. *Id.* at 2568.

143. *Id.*

the *Flast* exception to other situations.[144] Separation of powers concerns informed the decision to keep *Flast* confined to congressional statutes.[145] Specifically, the Court reasoned that allowing standing to challenge the vast range of executive activities funded through general operating budgets any time a taxpayer alleges an Establishment Clause violation would seriously aggrandize the power of the judiciary at the expense of the executive.[146]

In response to the charge that immunizing the executive from the type of review *Flast* imposes upon Congress would give agencies a loophole to exploit, the plurality suggested that Congress could stop such abuse through statute.[147] Also, the plurality reasoned that egregious Establishment Clause violations often produce injuries more particularized than taxpayer injury, and these injuries would support standing outside the context of *Flast*.[148] Ultimately, the plurality viewed its ruling as a narrow resolution of the case at hand.[149] Seeing no justification for expanding *Flast* and no need to overrule it, Justice Alito declared, "[w]e leave *Flast* as we found it."[150]

C. Justice Kennedy Explained in His Concurring Opinion Why Hein *Is Distinguishable from* Flast

Although he joined the plurality "in full," Justice Kennedy wrote separately to explain his views on separation of powers and *Flast*.[151] Justice Kennedy agreed that *Flast* should not support standing in this case, based on concerns over separation of powers.[152] Fearing "judicial oversight of executive duties," he stated that allowing standing for this

144. *Id.* at 2568–69.

145. *Id.* at 2569–70.

146. *Id.* at 2569–70.

147. *Id.* at 2571.

148. *Id.* For illustrations of such injuries, see Lee v. Weisman, 505 U.S. 577, 584 (1992) (recognizing a student's injury for being subjected to school-sponsored prayer at a graduation ceremony rather than relying on taxpayer standing); cf. Freedom From Religion Found., Inc. v. Chao, 433 F.3d 989, 994 (7th Cir. 2006), *rev'd sub nom.*, *Hein*, 127 S. Ct. at 2572 (plurality opinion) ("No doubt so elaborate, so public, a subvention of religion [as a government official building a mosque with federal funds] would give rise to standing to sue on other grounds [besides taxpayer standing].").

149. *Hein*, 127 S. Ct. at 2572.

150. *Id.* at 2571–72.

151. *Id.* at 2572 (Kennedy, J., concurring).

152. *Hein*, 127 S. Ct. at 2572.

type of case would cast the courts in the "role of speech editors . . . and event planners" for the Executive Branch.[153] Mindful of the potential for abuse in situations where plaintiffs will have a hard time gaining standing to challenge the Executive Branch, Justice Kennedy stated that government officials must "conform their actions" to the Constitution.[154]

Regarding *Flast*'s validity, Justice Kennedy gave *Flast* a much warmer embrace than the plurality, declaring that "the result reached in *Flast* is correct and should not be called into question."[155] On the one hand, discussion of the soundness of *Flast*'s holding as a policy matter, being unnecessary to the plurality's conclusion, reaches more broadly and should not be controlling.[156] Yet, when combined with the four dissenting Justices that clearly support *Flast*, Justice Kennedy's view commands a majority of the Court in this respect and could be viewed as a controlling statement.[157]

D. Justice Scalia Urged Broadly Overruling Flast

In stark contrast to the plurality's minimalism, Justice Scalia's opinion called for a complete reversal of *Flast* on all grounds, regardless of the case at hand.[158] Justice Scalia portrayed the taxpayer injury in cases like *Flast* as a "Psychic Injury" and questioned why such mental injuries should ever support standing.[159] Calling *Flast* and the cases following it a "jurisprudential disaster,"[160] Justice Scalia argued that overruling was the only principled approach.[161] This opinion attacked the plurality's minimalist approach for being based on meaningless

153. *Id.* at 2572–73.

154. *Id.* at 2573.

155. *Id.*

156. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

157. *Cf.* Lupu, *supra* note 134, at 130 (suggesting that Justice Kennedy's opinion may be more narrow because it is "more respectful of the pre-existing law," thus supporting the inference that five Justices agree that *Flast* is good law).

158. *Id.* at 2573–74 (Scalia, J., concurring in the judgment).

159. *Id.* at 2574–75. Use of the term "Psychic Injury" leads to confusion, because some "psychic" injuries, like infliction of mental distress, are sufficient for standing, while "ideological" injuries generally are not. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188–89 (1992).

160. For a previous "jurisprudential disaster," see Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting). *Lee* recognized religious "coercion" as an Establishment Clause violation. *Id.* at 604 (Blackmun, J., concurring).

161. *Hein*, 127 S. Ct. at 2584.

distinctions used to distinguish past precedent.[162] Thus, Justice Scalia argued that *Doremus* cannot be reconciled with *Flast*[163] and that more generally, *Flast* is inconsistent with the constitutional limits on standing described in *Lujan v. Defenders of Wildlife*[164] because taxpayer injury can never be an injury in fact.[165]

E. Justice Souter Argued in His Dissenting Opinion That Hein *and* Flast *Present the Same Injury*

In his dissent, Justice Souter argued that the injury to taxpayers is the same whether Congress or the Executive Branch spends the funds, and thus, that standing should exist for both types of claims.[166] Rather than reading *Flast* narrowly to allow standing only to challenge spending pursuant to a congressional mandate, the dissent read *Flast* to apply logically no matter which branch of the government spent the funds.[167] The dissent also recognized the distinction between *Flast* and *Doremus*, but suggested that because identifiable amounts of federal funds financed the challenged conferences, *Doremus* did not preclude standing for FFRF.[168] Addressing separation of powers, the dissent argued that *Flast* already allowed federal court plaintiffs to challenge these types of congressional spending decisions and that the Executive Branch should receive no more insulation from these lawsuits than Congress.[169] Finally, regarding the plurality's distinguishing of *Bowen*, Justice Souter saw no difference between discretion in the administration of a statute and discretion outside the administration of a statute.[170]

IV. *HEIN* EXEMPLIFIES THE PROPER ROLE OF MINIMALISM IN JUDICIAL DECISIONMAKING

Having explored the foundation of Establishment Clause taxpayer standing and having surveyed the various opinions in *Hein*, the question

162. *Id.* at 2582.
163. *Id.* at 2577.
164. 504 U.S. 555 (1992).
165. *See Hein*, 127 S. Ct. at 2574.
166. *Id.* at 2584–85 (Souter, J., dissenting).
167. *Id.*
168. *See id.* at 2585.
169. *Id.* at 2586.
170. *Id.*

remains whether minimalism makes sense in the context of taxpayer standing doctrine. By "not doing"[171] the deathblow to *Flast* and instead doing only what was necessary to resolve the case at hand, the plurality avoided issuing a broad ruling that would reach too far. Of the competing opinions in *Hein*, the plurality opinion is the most consistent with the values of minimalism and the limited role of federal courts.

This Part argues first that the Establishment Clause exception for taxpayer standing is itself a minimalist doctrine intended to allow standing in a narrow range of cases without allowing the exception to swallow the rule against taxpayer standing. The minimalist nature of *Flast* supports the minimalist solution in *Hein*. Second, *Flast* is consistent with other standing decisions. Third, under the *Casey* factors, there is a lack of compelling reasons to abandon the Establishment Clause taxpayer standing doctrine that *Flast v. Cohen* created, supporting the plurality's minimalist solution in *Hein*. Fourth, the potential negative effects of the plurality's narrow ruling are speculative and should be left for later resolution if the need arises. Finally, some situations demand broader rulings, providing limits to the usefulness of minimalism.

A. Flast *Created a Minimalist Doctrine*

The Court's narrow holding in *Flast*, which created the two-part nexus test as a limited exception to the general ban on federal taxpayer standing, exhibits many minimalist qualities. Most significantly, the Court could have overruled *Frothingham* and opened up a vast realm of taxpayer standing, as indeed one member of the Court advocated.[172] Instead, the Court distinguished *Frothingham* as failing the second part of the nexus test because the constitutional provisions invoked by the *Frothingham* plaintiffs[173] did not impose limitations on the taxing and

171. *See* BICKEL, *supra* note 1, at 71.

172. *Flast*, 392 U.S. at 107 (1968) (Douglas, J., concurring) (arguing that the narrow exception will slowly get larger and erode *Frothingham* and that the Court should overrule *Frothingham*). The majority viewed *Frothingham* favorably and fashioned the exception in *Flast* very narrowly to preserve *Frothingham* in most situations. *See id.* at 106 (majority opinion) ("We lack that confidence [to allow taxpayer standing] in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.").

173. The plaintiffs relied on the Tenth Amendment and the Due Process Clause of the Fifth Amendment. Frothingham v. Mellon, 262 U.S. 447, 479–80 (1923).

spending power.[174] While *Frothingham* broadly banned federal taxpayer standing,[175] *Flast* gave *Frothingham* a narrower scope.[176] Even more minimally, the Court in *Flast* declined to name any constitutional provisions other than the Establishment Clause that limit Congress's taxing and spending power.[177] The Court went only as far as necessary, leaving the evaluation of other constitutional provisions to "the context of future cases."[178] By creating a narrow exception with a minimal scope, the Court ensured that *Flast*'s limited exception would not become a large one that would lead to the abandonment of the principles underlying the general rule of *Frothingham*.[179] Subsequent cases have clarified and limited *Flast*, maintaining the minimalist nature of the Establishment Clause taxpayer standing doctrine.[180]

B. Flast *Is Consistent with Standing Doctrine Generally*

Flast has not been overruled by the constitutionalization of standing.[181] In his opinion, Justice Scalia argued that *Flast* improperly allows standing without any particularized injury,[182] but *Federal Election Commission v. Akins*[183] suggests that taxpayer injury can be a valid injury for standing purposes.[184] *Lujan v. Defenders of Wildlife* held

174. *Flast*, 392 U.S. at 105.

175. *Frothingham*, 262 U.S. at 487.

176. *Flast*, 392 U.S. at 105. However, because the *Flast* exception to *Frothingham* is quite narrow, *Frothingham* only went from being *always* applicable to *almost always* applicable. *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553, 2564–65 (2007) (plurality opinion); United States v. Richardson, 418 U.S. 166, 173 (1974).

177. *Flast*, 392 U.S. at 105.

178. *Id.*

179. *See supra* Part II.

180. *See supra* Part II.C.

181. By "constitutionalization of standing" I mean post-*Flast* cases that define standing as having an "irreducible constitutional minimum." *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (collecting and summarizing prior cases fleshing out the injury, traceability, and redressability requirements that the Court has created based on Article III); *see also* Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 329 (2001) ("[The *Lujan* majority] began by explicitly recognizing [the Court's] gradual constitutionalization of standing doctrine."); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 23 (1984) (referring to the "constitutionalization of remedial standing").

182. *See Hein*, 127 S. Ct. at 2582–83 (Scalia, J., concurring in judgment).

183. 524 U.S. 11 (1998).

184. *See id.* at 24 ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though

that the Constitution requires a plaintiff to claim a valid injury to have standing to sue in federal court.[185] Defining what constitutes a valid injury, however, involves prudential decisions by the Court rather than clear constitutional directives.[186] Thus, consistent with *Lujan* and constitutional standing doctrine, the Court can declare certain injuries as valid for standing purposes, as in fact the Court has done in cases such as *Flast* and *Akins*.

Justice Scalia also argued in his *Hein* concurrence that *Flast* fashioned its two-part nexus to circumvent prior precedent.[187] But, *Doremus* and *Flast* have managed to coexist based on the distinction between statutes that command certain behavior and statutes that create spending programs.[188] In the former case, Congress has not invoked the power to tax and spend, while in the latter case, it has.[189] Though almost all government action involves some expenditure of funds,[190] there is a meaningful difference between spending incidental to regulatory activity[191] and spending pursuant to a statutory mandate.[192] Invoking the power to tax and spend in violation of a specific constitutional limitation on that power is what underlies the *Flast* nexus test. Similar to *Doremus*, in *Hein*, FFRF lacked standing because it did not challenge an exercise of the taxing and spending power.[193] While Justice Scalia did not accept such a distinction, the plurality did, and thus the plurality could deny

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widely shared, the Court has found injury in fact.") (citations omitted); *see also Hein*, 127 S. Ct. at 2587 n.3 (Souter, J., dissenting) (citing *Akins* to suggest the harm in *Hein* was concrete and widely shared).

185. 504 U.S. 555, 560–61 (1992).

186. *See* Flast v. Cohen, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) ("It does not, however, follow that suits brought by [plaintiffs claiming non-standard injuries] are excluded by the 'case or controversy' clause of Article III of the Constitution from the jurisdiction of the federal courts."); *cf.* Sunstein, *supra* note 159, at 190 ("[W]hether there is a so-called nonjusticiable ideological interest, or instead a legally cognizable 'actual injury,' is a product of legal conventions and nothing else."); Fletcher, *supra* note 68, at 232 ("A statement that a plaintiff . . . suffered no 'injury in fact' [is] based on some normative judgment about what ought to constitute a judicially cognizable injury . . . [and] not whether an actual injury occurred.").

187. *Hein*, 127 S. Ct. at 2577 (Scalia, J., concurring in the judgment) (arguing that the first prong of the nexus test circumvents *Doremus*, and the second prong does the same with *Frothingham*).

188. *See supra* note 89.

189. *See id.*

190. *See Hein*, 127 S. Ct. at 2569 (plurality opinion).

191. *See Flast*, 392 U.S. at 102 (1968).

192. *See* Bowen v. Kendrick, 487 U.S. 589, 619–20 (1988).

193. *Hein*, 127 S. Ct. at 2568.

standing without having to overrule any precedent.[194] Such an approach avoids a broad ruling and potential "jurisprudential disasters"[195] that might otherwise follow, choosing instead to confront such "disasters" when they materialize.

C. Overruling Flast *at This Time Is Inconsistent with Stare Decisis*

By arguing to overrule *Flast*, Justice Scalia advocated abandoning the continued reliance on *Flast* as precedent. Although the Court did not need to overrule *Flast* to reach its judgment in *Hein*, Justice Scalia, in his opinion concurring in the judgment, posed the question of whether *Flast* merits continued adherence. This section weighs the factors discussed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[196] that provide guidance when deciding whether to overrule precedent.

Although the Court has essentially limited *Flast* to its facts,[197] the principles of stare decisis discussed in *Casey* do not support its abrogation.[198] Regarding the first *Casey* factor—practical workability—*Flast*, *Valley Forge*, *Bowen*, and *Hein* demonstrate that taxpayer standing doctrine is capable of working in practice.[199] Second, although *Flast* arguably may not have created a strong reliance interest for plaintiffs because "one does not arrange his affairs with an eye to standing,"[200] a precedent should not be overruled simply because few will mourn its passing.[201] A lack of reliance reduces the consequences of overruling a precedent but does not provide a principled reason for abandoning settled law.[202] Third, *Flast* is not a remnant of an abandoned

194. *Compare id.* at 2577 (Scalia, J., concurring in the judgment) *with id.* at 2568 (plurality opinion).

195. *See supra* note 160.

196. 505 U.S. 833, 854–55 (1992).

197. *See Hein*, 127 S. Ct. at 2568–69.

198. For a discussion of the *Casey* factors, see *supra* Part I.C.

199. *Compare* Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 420 (8th Cir. 2007) (applying *Hein* to find taxpayer standing based on specific appropriations by the Iowa legislature) *with Hein*, 127 S. Ct. at 2584 (Scalia, J., concurring in judgment) *and* Freedom From Religion Found., Inc. v. Chao, 447 F.3d 988, 989–90 (7th Cir. 2006) (Easterbrook, J., concurring in denial of rehearing en banc) (stating there is "no logical way to determine the extent of an arbitrary rule").

200. *Hein*, 127 S. Ct. at 2584 (Scalia, J., concurring in the judgment).

201. *Cf.* Dickerson v. United States, 530 U.S. 428, 443 (2000) (suggesting that there needs to be a compelling justification to overrule a precedent).

202. *Cf. id.*; *Casey*, 505 U.S. at 855–56 (discussing the reliance interest of precedent).

doctrine no matter how one frames the relevant doctrine.[203] Finally, *Flast* does not rely on such outdated facts that it has lost "significant application or justification."[204] Even if *Hein* presents weak facts, the underlying system of faith-based initiatives presents live constitutional issues without easy resolution.[205]

Justice Scalia may disagree with the Court that taxpayers suffer a judicially cognizable injury, but the doctrine of stare decisis does not allow overruling precedent just because the Court might have ruled on this issue differently from the way the Court ruled in *Flast*.[206] Because *Flast* fits within the broad and varied umbrella of standing doctrine, *Flast* remains a vital part of a living doctrine and should not be overruled, even if the Court were forced to decide that question. While future development of the law may eventually render *Flast* an anachronism, minimalism demands that overruling wait until the arrival of these future developments.[207]

D. Potential Abuses of Loopholes Created by Hein *Should Be Adjudicated When and if They Arise*

Because minimalism seeks to reduce the risk and limit the scope of judicial error,[208] the plurality opinion's success depends upon the potential negative consequences it might create. Justice Souter argued in his dissent that the plurality's distinction between legislative and executive action creates an improper disparity in taxpayer standing doctrine that could lead to abuse by creative executive agencies.[209] Justice Scalia went even further, suggesting some ways such abuse could

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203. If the doctrine at issue is taxpayer standing generally, then *Flast* is a narrowly carved exception to the general doctrine banning taxpayer standing. *See supra* Part II. Instead, if the relevant doctrine is Establishment Clause taxpayer standing, that doctrine has at least some life, as evidenced by its continued litigation. *See, e.g.*, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 420 (8th Cir. 2007) (recognizing taxpayer standing for a challenge to prison religious programs). Likewise, if standing doctrine itself is the relevant issue, this doctrine too has not been abandoned. *See supra* Part II.

204. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

205. *See, e.g.*, Equal Treatment in Dep't of Labor Programs for Faith-Based & Cmty. Orgs., 69 Fed. Reg. 41,882, 41,884–86 (July 12, 2004) (responding to public commentary about the proposed rule through extensive legal argument about the rule's constitutionality).

206. *See Dickerson*, 530 U.S. at 443.

207. *Cf.* Hein v. Freedom From Religion Found., Inc., 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553, 2571–72 (2007) (leaving hypothetical cases to be resolved only if they become actual cases).

208. *See* SUNSTEIN, *supra* note 3, at 46.

209. *See Hein*, 127 S. Ct. at 2586 (Souter, J., dissenting).

occur.[210] For example, Congress could try to immunize an agency from taxpayer challenges either by allocating generic operational funds or by expressly limiting the use of funds to programs that comply with the Establishment Clause.[211] Although the former might be more effective than the latter under *Hein*,[212] both involve spending pursuant to a federal statute. *Bowen* suggests, and *Hein* seems to reinforce, that as long as Congress creates the specific spending program at issue, the nexus will exist to support taxpayer standing.[213]

Ultimately, these concerns do not amount to much.[214] Speculating about these concerns presents a deeper problem: this involves extended hypothesizing about facts not before the Court. While judges naturally consider the future effects of their rulings, minimalists decide one case at a time and reconcile previous rulings with the unique facts of later cases as they arise.[215] When litigants in subsequent cases argue for precedent to be applied in ways that reach questionable results, courts can modify the doctrine at issue to avoid such problems.[216] This is exactly what the plurality did in *Hein*: it declined to extend *Flast* outside the realm of congressional action.[217] Once the hypothetical abuses imagined by Justices Scalia and Souter come before the Court, if they ever do come

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210. *Id.* at 2580 (Scalia, J., concurring in the judgment).

211. *Id.*

212. The former example at least leaves the choice of how to spend the appropriated funds to executive discretion, thus minimizing congressional involvement in the way the funds are spent. The latter example involves more congressional involvement, and thus more of a nexus. *But see id.* at 2580 (Scalia, J., concurring in the judgment) (arguing that the plurality's reasoning would allow Congress to immunize executive action from suit simply by "codifying the truism that no appropriation can be spent by the Executive Branch in a manner that violates the Establishment Clause.").

213. *See Hein*, 127 S. Ct. at 2567 (plurality opinion); Bowen v. Kendrick, 487 U.S. 589, 619–20 (1988); *cf. Hein*, 127 S. Ct. at 2568 (suggesting that a congressional statute creating the spending program is prerequisite to standing under *Flast*).

214. *Compare Hein*, 127 S. Ct. at 2586 (Souter, J., dissenting) (arguing that the executive can now "accomplish through the exercise of discretion exactly what Congress cannot do through legislation") *with id.* at 2571 (plurality opinion) (noting that egregious actions like using "discretionary funds to build a house of worship" are both unlikely and remediable without taxpayer standing). It is worth noting, however, that President Bush only created the OFBCI through Executive Order after legislative attempts stalled in Congress. *See* Lupu, *supra* note 135, at 48–49. Had Congress created the OFBCI through statute, FFRF might well have had standing under *Flast*. *Id.*

215. *See* SUNSTEIN, *supra* note 3, at 44.

216. *Id.* at 44–45.

217. *See Hein*, 127 S. Ct. at 2571.

before the Court,[218] the Court can, with the benefit of fully developed facts, evaluate whether to modify taxpayer standing doctrine to address such abuse.[219] The minimalist judge leaves such thorny issues for later resolution, addressing them only if facts arise that require facing them directly. If the abuses hypothesized in *Hein* never emerge, then the plurality wisely avoided grappling with them prematurely.

E. Minimalism Is Not Always the Appropriate Method of Adjudication

Minimalism reaches its limit when fundamental notions of justice demand a ruling more expansive than minimalism provides. Some cases demand broad rulings,[220] perhaps the most famous and revered being the landmark school desegregation case *Brown v. Board of Education of Topeka*.[221] Such a rare and monumental case demands sweeping moral judgment: by 1954, the societal view of the Constitution had evolved to reject segregation to such an extent that the Court realistically could not avoid resolving the issue. A minimalist ruling—holding, perhaps, that although Topeka's segregation program violated the Constitution, the school segregation programs in Virginia and Delaware[222] could survive constitutional scrutiny—would likely have encouraged school districts to craftily tailor programs that fit within some narrower scope of acceptable discrimination. By contrast, consider the cases from 1976 that struck down some state death penalty laws while upholding others.[223] Rather than holding the death penalty either constitutional or unconstitutional per se, the Court interpreted the Eighth Amendment's ban on cruel and unusual punishment to permit death penalty statutes that provide clear criteria for imposing the sentence but allow for discretion in the

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218. There is sufficient doubt whether such abuses might occur. *See Hein*, 127 S. Ct. at 2571.

219. *Cf. id.* ("In the unlikely event that any of these [hypothetical] executive actions did take place, Congress could quickly step in.").

220. *See* SUNSTEIN, *supra* note 3, at 37–38.

221. 347 U.S. 483, 486 (1954).

222. *Brown* involved consolidated cases challenging school segregation programs in Delaware, Kansas, South Carolina, and Virginia. *Brown*, 347 U.S. at 486.

223. Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion) (upholding Georgia's death penalty law for imposing the sentence fairly); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) (plurality opinion) (upholding Florida's law on similar grounds as Georgia's law); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion) (upholding Texas's law on similar grounds); Woodson v. North Carolina, 428 U.S. 280, 286, 305 (1976) (plurality opinion) (striking North Carolina's death penalty law as unfair because it triggered automatically for "a broad category of homicidal offenses"); Roberts v. Louisiana, 428 U.S. 325, 331–32 (1976) (plurality opinion) (striking Louisiana's law on similar grounds as North Carolina's law).

penalty's imposition.[224] After the Court handed down these minimalist opinions, states could narrowly tailor their statutes to fit within the approved ranges.[225]

The decision to issue a broad ruling carries great risk and should not be made lightly. *Brown* came as the culmination of a protracted series of cases chipping away at the block of Jim Crow[226] and thirteen years after the Court avoided the issue in *Pullman*.[227] Other famous broad cases, like *Dred Scott v. Sandford*[228] and *Roe v. Wade*,[229] came suddenly, without buildup, and either proved disastrous (*Dred Scott*) or highly contentious (*Roe*).[230] Only when the Court can be certain its moral judgment is correct and necessary should it issue such broad rulings, and even then this path is fraught with risk: the Court in *Dred Scott* perhaps felt the same moral certainty as the Court in *Brown*.[231]

In the context of Establishment Clause taxpayer standing, the likelihood of such a morally compelling case seems unlikely because standing decisions focus on procedural requirements, rather than on the underlying substantive rights.[232] Although Establishment Clause cases decided on the merits may call for broad rulings at times,[233] standing doctrine is a naturally minimalist area of the law that seeks to limit court decisions on the merits to situations that require such adjudication.[234] *Flast* opened courthouse doors that were previously closed by *Frothingham*, but only enough to let the occasional plaintiff plead an Establishment Clause claim.[235] Rather than eroding away at the

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224. *See Gregg*, 428 U.S. at 198 (1976); *Proffitt*, 428 U.S. at 259–60 (1976); *Jurek*, 428 U.S. at 276; *Woodson*, 428 U.S. at 286, 305; *Roberts*, 428 U.S. at 331–32 (1976).

225. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 524–37 (Simon & Schuster 2005) (1979).

226. SUNSTEIN, *supra* note 3, at 38.

227. *See supra* Part I.

228. 60 U.S. (19 How.) 393 (1856).

229. 410 U.S. 113 (1973).

230. *See* SUNSTEIN, *supra* note 3, at 36–37.

231. *See id.* at 37 ("[*Dred Scott*] shows that judicial efforts to resolve questions of political morality now and for all time may well be futile.").

232. The Establishment Clause taxpayer standing doctrine focuses on the nature of the underlying right, but it does not consider the merits of the specific alleged violation.

233. *See, e.g.*, Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947) (incorporating the Establishment Clause to be applicable to the states, and beginning the intense judicial scrutiny of government involvement with religion).

234. *See* BICKEL, *supra* note 1, at 117.

235. *See supra* Part II.

Frothingham ban, as Justice Douglas predicted,[236] *Flast* created a narrow way for courts to hear seemingly meritorious Establishment Clause cases without abandoning the ban on generalized grievances.[237] Cases like *Valley Forge*, *Bowen*, and *Hein* use minimalism to develop the *Flast* doctrine incrementally, leaving room for further corrections as needed. Just as *Bowen* clarified *Valley Forge* and *Hein* clarified *Bowen*, ambiguities in *Hein* can be clarified when required by the next case.

Over time, if the *Flast* exception leads to unacceptable results or constitutional standing doctrine shifts to such an extent that *Flast* becomes anachronistic and unworkable, then the time may arrive to issue a broad ruling overturning *Flast*, much like *Brown* overturned *Plessy v. Ferguson*.[238] On the other hand, perhaps morally compelling cases will emerge where *Flast* does not support standing and yet only taxpayers have any claim of injury at all. If the Court feels the moral duty to reach the merits on such a case, the minimalist approach taken by the plurality in *Hein* would not suffice. Justice Breyer suggested some hypothetical situations during oral argument in *Hein* that might fit this situation.[239] Ultimately, such hypothetical cases would have to be evaluated on their facts if they ever actually arose, and the Court would have to decide if the merits were so compelling as to warrant finding standing, even if a narrow reading of standing doctrine counseled otherwise.[240]

V. CONCLUSION

Minimalism provides a method by which courts can address the narrow issues necessary to resolve the case at hand without broadly reaching out to decide, possibly erroneously, issues beyond the scope of

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236. *See* Flast v. Cohen, 392 U.S. 83, 107 (1968) (Douglas, J., concurring).

237. For an argument that all standing decisions should be evaluations of the merits of the case, see generally Fletcher, *supra* note 68.

238. Brown v. Bd. Of Educ. Of Topeka, 347 U.S. 483, 495 (1954) (holding that doctrine of "separate but equal" has no place in public education).

239. Transcript of Oral Argument at 16–19, Hein v. Freedom From Religion Found, Inc., 551 U.S. ___ (June 25, 2007), 127 S. Ct. 2553 (2007) (No. 06-157). Justice Breyer's first hypothetical asked if a taxpayer would have standing to challenge the federal government's construction of an official church at Plymouth Rock to commemorate the Pilgrims. *Id.* at 16. Justice Breyer also questioned whether taxpayer standing would be available to challenge a federal statute establishing one religion but that did not give money to any private religious groups. *Id.* at 17–18.

240. *See generally* Lupu, *supra* note 134, at 155–64 (exploring the availability of both taxpayer standing and other forms of standing for difficult Establishment Clause cases post-*Hein*).

the current case. The Court developed Establishment Clause taxpayer standing in *Flast* as a narrow exception to the rule against federal taxpayer standing based on a two-part nexus test designed to limit standing to cases where taxpayer injury could be directly linked to the exercise of Congress's taxing and spending power. Subsequent cases construed this exception narrowly, and the plurality in *Hein* maintained this minimalist approach by refusing to extend *Flast* to cover purely executive actions without Congress's involvement. Over strong calls for the reversal of *Flast*, the plurality in *Hein* distinguished past cases to deny standing without disrupting precedent. Although this minimalist approach left open some difficult questions about separation of powers and possible abuses of executive discretion, these questions were properly left to be resolved later, should the need arise. Because the plurality avoided unnecessarily overruling precedent and left difficult, though hypothetical, problems to be resolved only when later cases demand resolution, this minimalist approach resolved the case at hand without running the risk of overreaching and making errors where no actions were needed. While the minimalist approach may fail in exceptional cases, for the majority of decisions, especially in areas of justiciability, the best thing the Court does is "not doing."[241]

241. *See* BICKEL, *supra* note 1, at 71.