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RESPONSE

Hein and the Goldilocks Principle

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Two weeks into his presidency, George W. Bush issued an executive order establishing the White House Office of Faith-Based and Community Initiatives (OFBCI) to encourage religious groups to provide federally funded social services.¹ In particular, the OFBCI and its corresponding centers in various executive agencies sought to help religious organizations obtain federal grant monies by providing technical assistance to help them navigate the often byzantine bureaucracy surrounding federal grant-making.² The OFBCI achieved its goal of increasing federal grants to religious organizations, in part by funding workshops and conferences designed to aid religious groups pursuing federal financing.³ Concerned that the Bush Administration was using taxpayer dollars to support religious activity, the Freedom from Religion Foundation (FFRF), a Wisconsin organization that works to defend the constitutional principle of separation of church and state, filed suit in federal court seeking to enjoin the activities of the OFBCI as violative of the Establishment Clause.⁴ FFRF asserted that it had taxpayer standing to challenge the OFBCI program.⁵

The Supreme Court, in *Hein v. Freedom from Religion Foundation*, barred the use of taxpayer standing as a means to challenge executive expenditures that violate the Establishment Clause.⁶ Traditionally, the Court has not granted standing for plaintiffs asserting only “generalized grievances” as opposed to an “injury-in-fact.”⁷ Generalized grievances involve plaintiffs suing solely as citizens concerned that the government is not following the law.⁸ Federal taxpayers do not have standing to challenge government spending that they believe contravenes the Constitution, as these cases epitomize the assertion of a generalized grievance.⁹ However, prior precedent, *Flast v. Cohen*, established an important exception to the rule against taxpayer standing if government spending violates the Establishment Clause.¹⁰ *Flast*’s rule is unique, “for no claim on the merits other than one brought under the Establishment Clause has ever been permitted in a federal court by a plaintiff asserting taxpayer standing.”¹¹ In *Flast*, the taxpayer plaintiffs challenged a *congressional* appropriation for education that government officials used to support parochial schools.¹² In *Hein*, the Court rejected the claim that *executive*

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¹ See Lauren S. Michaels, Recent Development, *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, 222 (2008).

² *Id.*

³ *Id.*

⁴ *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 595 (2007).

⁵ *Id.* at 596.

⁶ *Id.* at 609-10.

⁷ See *Frothingham v. Mellon*, 262 U.S. 447 (1923).

⁸ See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974).

⁹ See *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

¹⁰ *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

¹¹ See Carl H. Esbeck, *What the Hein Decision Can Tell Us About the Roberts Court and the Establishment Clause*, 78 MISS. L.J. 199, 211 (2008).

¹² See *Flast*, 392 U.S. at 85.

spending offensive to the Establishment Clause should similarly be subject to an exception to the rule against taxpayer standing.¹³

In *What the Hein Decision Can Tell Us About the Roberts Court and the Establishment Clause*, Professor Carl Esbeck gives a clear and succinct account of the problem of generalized grievances and the Establishment Clause.¹⁴ Professor Esbeck's essay uses the *Hein* decision on taxpayer standing as a lens to understanding the Roberts Court's substantive approach to the Establishment Clause. Professor Esbeck argues that the Establishment Clause is structural in nature, serving to "police the boundary between government and organized religion" rather than to protect individual rights.¹⁵ When violations of constitutional structure occur, such as violations of separation of powers or federalism principles, typically "there will be some other government branch eager to defend against the encroachment on its turf" that will be able to assert injury-in-fact standing.¹⁶ In contrast, under the Establishment Clause, Professor Esbeck demonstrates that government officials could disburse large sums of money aiding religion, but no individual would have a particularized injury sufficient to assert standing to remedy the constitutional violation—every taxpayer would have only a generalized grievance.¹⁷

Therefore, *Flast*'s exception to the rule against taxpayer standing is crucial for preservation of the separation of church and state.¹⁸ As Professor Esbeck explains, without *Flast*, Congress could appropriate money for religious schools or even to pay the salaries of religious ministers, yet "no one would have standing to challenge such a law in federal court, which surely strikes at the core of the American church-state settlement."¹⁹ Professor Esbeck notes that the *Flast* rule "enabled a more expansive judicial enforcement of the Establishment Clause."²⁰ So why did the Court reject a similar exception to taxpayer standing when the executive spends taxpayer dollars in support of religion, as the Bush Administration allegedly did through the OFBCI?

¹³ *Hein*, 551 U.S. at 603-04.

¹⁴ See Esbeck, *supra* note 11, at 203-11.

¹⁵ *Id.* at 215. Of course, not all agree with this characterization of the Establishment Clause. See *Hein*, 551 U.S. at 639 (Souter, J., dissenting) (arguing that the Establishment Clause protects the individual right of conscience and therefore "every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution" as distinguished from a generalized grievance); see *id.* at 616 (Kennedy, J., concurring) (stating that the Establishment Clause protects the individual right of "freedom of conscience").

¹⁶ Esbeck, *supra* note 11, at 217. Professor Esbeck acknowledges that there are exceptions to this general principle. See *id.* at 215-16 (noting that sometimes when structural violations occur there is no one who can assert injury-in-fact standing and sometimes there are cases of individuated injury-in-fact when the Establishment Clause is violated).

¹⁷ See *id.* at 217-18. Taxpayer standing is especially critical to obtaining judicial enforcement of the Establishment Clause in cases involving government grants to religious organizations. See Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. REV. 115, 155-58 (2008) (arguing that in many cases challenging government financial support for religion "taxpayers are the only conceivable plaintiffs because typically no one is injured by a decision to fund a particular grantee").

¹⁸ See Lupu & Tuttle, *supra* note 17, at 153 ("Many religion-promoting acts by government create no obvious material or personal injury and may be quite popular. The political branches thus will frequently have incentives to violate the [Establishment] Clause. Without broad notions of justiciability in Establishment Clause cases, there is reason to expect that the Clause would be significantly under-enforced.").

¹⁹ Esbeck, *supra* note 11, at 212.

²⁰ *Id.*

In *Hein*, only three Justices agreed to uphold a distinction between legislative and executive spending in aid of religion for purposes of Article III standing. Justice Alito’s controlling plurality opinion, joined by Chief Justice Roberts and Justice Kennedy, held that *Flast* should stand, but should not be extended to allow taxpayer standing to challenge Establishment Clause violations by the executive. Justice Alito asserted that separation of powers principles demanded the denial of taxpayer standing to individuals challenging executive expenditures supporting religion, fearing that the executive would become subject to extensive judicial oversight at the behest of all taxpayers.²¹ Justice Scalia, joined by Justice Thomas, argued vigorously that not only should taxpayer standing be denied in *Hein*, but also *Flast* should be overruled.²² Justice Scalia scorned the plurality’s distinction between legislative and executive spending, arguing that it was “utterly meaningless” and would lead to “the sure promise of engendering further meaningless and disingenuous distinctions in the future.”²³ Professor Esbeck acknowledges that the plurality’s approach in *Hein* “operate[s] in the realm of logical inconsistency,” but nevertheless represents an appropriate “Goldilocks stance.”²⁴ He argues that the plurality took a measured “middle road” that properly balanced the core constitutional values of church-state separation and separation of powers.²⁵

I would argue that *Hein* takes a middling course rather than a measured, thoughtful middle course on Establishment Clause standing. The problem with *Hein* is not just logical inconsistency. The *Hein* decision allows a blurring of the boundary between church and state by rendering it more difficult to bring challenges to executive actions entangling the government with religion. As Judge Posner explained, executive agencies could violate the Establishment Clause through expenditures just as readily as the legislative branch, even through such extreme actions as building their own houses of worship.²⁶ Justice Alito’s plurality opinion claimed that if the executive did engage in a “parade of horrors” involving direct financial support for religion, “Congress could quickly step in.”²⁷ However, the plurality’s assertion ignores the possibility that Congress may be a willing partner in the executive’s Establishment Clause violations.²⁸ Other Justices also remarked that Congress could manipulate the distinction drawn in *Hein* by funneling financial support for religion through the executive branch.²⁹ Moreover, as Justice Souter noted, “fear that there will be many [lawsuits] does not provide a compelling reason,

²¹ See *Hein*, 551 U.S. at 610. In particular, the plurality expressed concern that “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.*

²² See *id.* at 633 (Scalia, J., concurring in the judgment). Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented. See *id.* at 637 (Souter, J., dissenting).

²³ *Id.* at 633 (Scalia, J., concurring in the judgment).

²⁴ Esbeck, *supra* note 11, at 218.

²⁵ *Id.*

²⁶ See *Freedom from Religion Found. v. Chao*, 433 F.3d 989, 994-95 (7th Cir. 2006).

²⁷ *Hein*, 551 U.S. at 614.

²⁸ See *Lupu & Tuttle*, *supra* note 17, at 154 (“[D]rawing a line between challenges to executive and legislative acts may encourage legislatures to abdicate policy-making responsibility and to confer unjustifiably broad discretion upon the executive branch whenever religion-promoting activity may be associated with a particular government program.”).

²⁹ See *Hein*, 551 U.S. at 630 (Scalia, J., concurring in the judgment) (arguing that the plurality opinion would lead to “absurd” results such as denying taxpayer standing where Congress disbursed funds to religious organizations through informal negotiations with the President rather than a discrete appropriation).

much less a reason grounded in Article III, to keep them from being heard.”³⁰ *Hein* reflects a much more forgiving view of church-state separation that may leave *Flast* an empty shell.

Hein’s logical inconsistency—essentially permitting the executive to “accomplish through the exercise of discretion exactly what Congress cannot do through legislation”—is on par with the well-documented incoherence in the entire line of precedent governing Establishment Clause standing.³¹ The chipping away at *Flast* may have more to do with normative disagreements about where to draw the line on church-state separation than the technicalities of standing doctrine. In other words, *Flast* and its convoluted progeny are likely the consequence of cloaking a debate about the meaning of the Establishment Clause in a debate about standing.³²

So what does the *Hein* decision tell us about the two newest Justices’ views of the Establishment Clause? It may suggest, as Professor Esbeck proposes, that Chief Justice Roberts and Justice Alito intend to adhere to *Flast* and its resulting protection of church-state separation.³³ Alternatively, *Hein*’s middling stance on judicial enforcement of the Establishment Clause may stem more from insufficient power to overturn *Flast* than from any commitment of these two Justices to judicial minimalism or to separation of church and state. Likely, it made no practical sense for the two newest Justices to rock the boat since they lacked Justice Kennedy’s critical fifth vote.³⁴ The Roberts Court has certainly not been reluctant to overturn long-standing precedent when able, despite Chief Justice Roberts’s claim to strive to be a minimalist judge.³⁵ Furthermore, Justice Alito’s plurality opinion clearly leaves the door open to overrule *Flast* in a

³⁰ *Id.* at 640 n.1 (Souter, J., dissenting). Judge Posner also dismissed the notion that extending *Flast* to executive expenditures supporting religion would necessarily lead to undue judicial oversight of executive officials at the behest of taxpayers. *See Chao*, 433 F.3d at 995. Judge Posner’s opinion emphasized that the FFRF had taxpayer standing to challenge the OFBCI program, not merely speeches by officials, and the fact that the OFBCI “was an executive rather than a congressional program does not deprive taxpayers of standing to challenge it.” *Id.* at 996.

³¹ *Hein*, 551 U.S. at 640 (Souter, J., dissenting); *see also id.* at 618-28 (Scalia, J., concurring in the judgment) (discussing inconsistencies between taxpayer standing precedents); *see also* *Freedom from Religion Found. v. Chao*, 447 F.3d 988, 989-90 (7th Cir. 2006) (Easterbrook, J., concurring in denial of rehearing en banc) (describing Establishment Clause standing precedents as “illogical” and “arbitrary”).

³² *See* Lupu & Tuttle, *supra* note 17, at 136-37 (arguing that differing substantive interpretations of the Establishment Clause implicitly animate the Justices’ views on standing). Standing doctrine has long been criticized as highly manipulable and as a tool used to further substantive policy agendas. *See, e.g.*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies--And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635 n.2, 688-89 (2006) (discussing the Warren, Burger, and Rehnquist Courts’ use of justiciability doctrines to further policy priorities); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650-51 (1985) (criticizing incoherence of standing doctrine generally and its covert use to express views on the merits of legal claims).

³³ *See* Esbeck, *supra* note 11, at 222-23.

³⁴ *See* Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2d 335, 345-46 (2006) (stating that “Kennedy was and will continue to be the key fifth vote between the progressive and conservative wings of the Court”).

³⁵ *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 836, 886 (2010) (overturning prior precedent limiting corporate spending on political campaigns); *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (stating that the Court’s decision to uphold the federal “partial-birth” abortion ban retreats from long-standing precedent requiring health exceptions to abortion restrictions). *See also* Jeffrey Toobin, *Annals of Law: No More Mr. Nice Guy, The Supreme Court’s Stealth Hard-liner*, THE NEW YORKER, May 25, 2009 (“His jurisprudence as Chief Justice, Roberts said, would be characterized by ‘modesty and humility.’ After four years on the Court, however, Roberts’s record is not that of a humble moderate but, rather, that of a doctrinaire conservative.”).

case that directly presents the question.³⁶ Notably, Justice Kennedy felt the need to write separately to emphasize his view that *Flast* was decided correctly, an opinion that neither Chief Justice Roberts nor Justice Alito joined.³⁷ Justice Scalia also remarked that only Justice Kennedy “avowedly contends both that *Flast* was correctly decided and that [FFRF] should nevertheless lose this case,” a position he and the dissenters found “incomprehensible.”³⁸

Establishment Clause standing has long been a vexing area of the law because, in numerous cases, an exception to the rule against taxpayer standing is necessary to make the separation of church and state a meaningful constitutional principle.³⁹ Establishment Clause protection “would melt away” in the many circumstances where no individual can assert traditional standing to challenge government financing of religious activities, whether the source of the financing is legislative or executive.⁴⁰ Although *Flast* still lives—for now—*Hein*’s Goldilocks approach does not feel “just right” as a means to maintain separation of church and state.

³⁶ For example, in discussing *Flast*, Justice Alito’s opinion stated only that “we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures,” not that *Flast* was correctly decided. *Hein*, 551 U.S. at 609. The last section of the opinion also noted that the case before it did not require overturning *Flast*, and since the decision is “[r]elying 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”—implicitly suggesting that *Flast* could be reconsidered another day when the issue directly presents itself. *Id.* at 615.

³⁷ See *id.* at 616 (Kennedy, J., concurring).

³⁸ *Id.* at 629 n.3, 636 (Scalia, J., concurring in the judgment); see *id.* at 641 (Souter, J., dissenting) (stating that distinction drawn by the plurality between legislative and executive spending is “arbitrary and hard to manage”).

³⁹ See Lupu & Tuttle, *supra* note 17, at 119 (“Establishment Clause standing doctrines are looser than most, for the prudential reason that the Clause would not be judicially enforceable if traditional Article III rules applied.”).

⁴⁰ See *Hein*, 551 U.S. at 640 (Souter, J., dissenting).