RECENT CASES

ESTABLISHMENT CLAUSE — STANDING — SEVENTH CIRCUIT HOLDS THAT TAXPAYERS HAVE STANDING TO CHALLENGE ACTIVITIES OF FEDERAL CENTERS FOR FAITH-BASED AND COMMUNITY INITIATIVES. — *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006).

Since 1968, when the Supreme Court first opened the courthouse door to a federal taxpayer challenging the constitutionality of a federal expenditure, judges have faced the question of how often and under what circumstances they should reopen the door. Recently, in *Freedom from Religion Foundation, Inc. v. Chao*,[1] the Seventh Circuit held that taxpayers have standing to allege that an executive branch expenditure of a general administrative congressional appropriation violates the Establishment Clause. To reach this result, the Seventh Circuit correctly reasoned that the expenditure of funds — not the administration of a congressional program — should be the key factor in a taxpayer standing inquiry. While the conflicting Supreme Court precedents on taxpayer standing did not demand this result, the reasoning does accord with the motivation behind the limited grant of standing to taxpayers challenging Establishment Clause violations.

In January 2001, President Bush quickly began fulfilling his campaign promise[2] to promote government partnership with religious organizations providing social services.[3] He issued a series of executive orders establishing a White House Office of Faith-Based and Community Initiatives (the White House Office) and creating Centers for Faith-Based and Community Initiatives (the Centers) within several

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

[2] *See* Adam Clymer, *Filter Aid to Poor Through Churches, Bush Urges*, N.Y. TIMES, July 23, 1999, at A1 (describing then-Governor Bush's "first major policy speech" of the 2000 campaign, in which he promised that "[i]n every instance when my Administration sees a responsibility to help people . . . we will look first to faith-based institutions, to charities and to community groups that have shown their ability to save and change lives" (internal quotation marks omitted)).

[3] This type of partnership was not a new idea in Washington. In 1996, Congress, in an effort led by then-Senator John Ashcroft, inserted a "Charitable Choice" provision into the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, "requiring the states to include [faith-based organizations] among the organizations with which the state contracted for vocational training and other, welfare-related services." Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 6 (2005) (citing 42 U.S.C. § 604a (2000)). Before that time, federal regulations hindered grant-making to the charitable arms of religious organizations, though such organizations often received grants from state and local governments. *See id.* at 5–6. Congress attempted to change this somewhat by requiring that faith-based organizations be included in grants for the Adolescent Family Life Act. *See id.* at 6 (citing Pub. L. No. 97-35, 95 Stat. 578 (1981)). That law survived a facial constitutional challenge in *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988).

executive agencies.[4] As part of this effort, the White House Office and the Centers sponsored workshops around the country to educate faith-based and community organizations about the availability of federal funds and to offer grant-writing assistance.[5]

In September 2004, the Freedom from Religion Foundation[6] (the Foundation) and several of its officers filed suit in a Wisconsin federal district court against fourteen government officials including the Director of the White House Office and the directors of the Centers.[7] The Foundation alleged that the defendants had violated the Establishment Clause by using congressional appropriations to support activities, including the grant-writing workshops, that "endorse religion and give faith-based organizations preferred positions as political insiders."[8] The government moved for dismissal of these claims on the ground that the plaintiffs lacked standing to challenge executive branch expenditures. The district court granted the motion, holding that because the defendants were not "charged with the administration

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[4] *See* Exec. Order No. 13,199, 3 C.F.R. 752 (2002), *reprinted in* 3 U.S.C. ch.2 (Supp. III 2003) (creating the White House Office); Exec. Order No. 13,198, 3 C.F.R. 750 (2002), *reprinted in* 5 U.S.C. § 601 (Supp. III 2003) (creating Centers in the Departments of Justice, Education, Labor, Health and Human Services, and Housing and Urban Development); *see also* Exec. Order No. 13,342, 3 C.F.R. 180 (2005), *reprinted in* 5 U.S.C.A. § 601 (West Supp. 2005) (establishing Centers in the Small Business Administration and in the Departments of Commerce and Veterans Affairs); Exec. Order No. 13,280, 3 C.F.R. 262 (2003), *reprinted in* 5 U.S.C. § 601 (establishing Centers in the Department of Agriculture and in the Agency for International Development). President Bush also issued an executive order requiring equal treatment of faith-based organizations providing social services. *See* Exec. Order No. 13,279, 3 C.F.R. 258 (2003), *reprinted in* 5 U.S.C. § 601.

[5] *See* WHITE HOUSE OFFICE OF FAITH-BASED & CMTY. INITIATIVES, PRESIDENT BUSH'S FAITH-BASED AND COMMUNITY INITIATIVE 2 (2005), *available at* http://www.whitehouse.gov/government/fbci/overview2005.pdf; *see also* GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION (2001), *available at* http://www.whitehouse.gov/news/reports/faithbased.pdf; White House Office of Faith-Based & Cmty. Initiatives, Technical Assistance Events and Resources, http://www.whitehouse.gov/government/fbci/technical-assistance.html (last visited Apr. 9, 2006); White House Office of Faith-Based & Cmty. Initiatives, Conference Homepage, http://www.dtiassociates.com/FBCI (last visited Apr. 9, 2006).

[6] The Foundation's purpose is to "protect the fundamental constitutional principle of separation of church and state by representing and advocating on behalf of its members." Amended Complaint at 2, *reprinted in* Appendix to Brief of Appellants at A-2, *Freedom from Religion Found.*, 433 F.3d 989 (7th Cir. 2006) (No. 05-1130), *available at* http://www.ca7.uscourts.gov/briefs.htm (enter Case Number "05-1130"; select "Freedom from Religion v. Chao"; and then select "Req'd Short Appendix").

[7] *Id.* at 3–6, *reprinted in* Appendix to Brief of Appellants, *supra* note 6, at A-3 to A-6.

[8] *Id.* at 6, *reprinted in* Appendix to Brief of Appellants, *supra* note 6, at A-6. The plaintiffs also challenged grants made to religious organizations by the secretaries of executive agencies and a speech about the power of faith made by the Secretary of Education. *See id.* at 7–8, 10–12, *reprinted in* Appendix to Brief of Appellants, *supra* note 6, at A-7 to A-8, A-10 to A-12. The district court did not deny the plaintiffs standing to challenge the grants, and the Foundation did not appeal the denial of standing to challenge the speech. *See Freedom from Religion Found.*, 433 F.3d at 996.

of a congressional program,"[9] the claims did not satisfy the test for taxpayer standing established by the Supreme Court in *Flast v. Cohen*.[10]

On appeal, a divided panel of the Seventh Circuit reversed and remanded for determination on the merits.[11] Writing for the majority, Judge Posner[12] held that "[t]axpayers have standing to challenge an executive-branch program, alleged to promote religion, that is financed by a congressional appropriation, even if the program was created entirely within the executive branch."[13] Judge Posner found that the case fell within the *Flast* exception to the *Frothingham v. Mellon*[14] ban on taxpayer standing.[15] The *Flast* test allows a plaintiff to assert standing as a taxpayer when two "nexuses" exist: first, the exercise of congressional power under the Taxing and Spending Clause creates a nexus with the plaintiff's status as a taxpayer; and second, there is a nexus between the challenged use of the taxing and spending power and a specific constitutional limitation on that power.[16] Because the plaintiffs alleged that the money for the workshops came not from voluntary donations but, ultimately, from congressional appropriations, the plaintiffs satisfied the first prong.[17] Because the plaintiffs were alleging a violation of the Establishment Clause — *Flast*'s paradigmatic "specific" limitation on Congress's taxing and spending power[18] — they satisfied the second prong.[19]

The majority refused to ascribe controlling significance to the fact that the money for the expenditures had come from general appropriations to the executive branch rather than from a congressional appropriation earmarked for the purpose of promoting faith-based initiatives.[20] Judge Posner pointed out that in both *Flast* and the subsequent case of *Bowen v. Kendrick*[21] the Supreme Court found that taxpayers had standing to challenge grants made pursuant to a facially valid statute when the executive branch implemented the statute in a

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[9] Freedom from Religion Found., Inc. v. Towey, No. 04-C-381-S, slip op. at 8 (W.D. Wis. Nov. 15, 2004).

[10] 392 U.S. 83 (1968).

[11] *Freedom from Religion Found.*, 433 F.3d at 997.

[12] Judge Wood joined Judge Posner's opinion.

[13] *Freedom from Religion Found.*, 433 F.3d at 996–97.

[14] 262 U.S. 447 (1923) (holding that a federal taxpayer did not have sufficient interest in the expenditure of federal funds to challenge a congressional appropriation as beyond Congress's enumerated powers).

[15] *See Freedom from Religion Found.*, 433 F.3d at 994.

[16] *See* Flast v. Cohen, 392 U.S. 83, 102–03 (1968).

[17] *See Freedom from Religion Found.*, 433 F.3d at 994.

[18] *Flast*, 392 U.S. at 103–04.

[19] *See Freedom from Religion Found.*, 433 F.3d at 994.

[20] *Id.* at 994.

[21] 487 U.S. 589 (1988).

way that allegedly violated the Establishment Clause.[22] The Supreme Court rejected standing in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,[23] the majority reasoned, only because the challenged action was not an exercise of Congress's taxing and spending power, not because *Flast* required that the appropriations statute itself violate the Establishment Clause.[24] Therefore, the fact that the appropriation that funded the White House Office reached the executive branch with no strings attached was irrelevant; the statute only had to be "necessary for the violation to occur — it did not have to be sufficient. The violation was not completed until the executive branch acted . . . ."[25]

To illustrate the irrelevance of the distinction between expenditures and grants, Judge Posner offered a hypothetical in which the Secretary of Homeland Security decided to build a mosque using unearmarked funds. It would be "too much of a paradox" to recognize taxpayer standing in certain less egregious cases and not in this one, even though this hypothetical case would probably create an injury sufficient for conventional Article III standing.[26] Judge Posner also rejected the government's argument that the court should deny standing because the executive branch had merely spent money to fund activities and had not made a grant to a nongovernmental organization.[27] The majority, however, did limit its holding by requiring that the expenditure be more than "incidental."[28] A taxpayer could not argue, for example, that the cost of transporting the President to a speech at which he praised faith-based organizations created standing to allege an Establishment Clause violation.[29]

Judge Ripple dissented. He characterized the majority holding as a "dramatic expansion of current standing doctrine" that was not authorized by Supreme Court precedent.[30] He questioned whether what the

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[22] *Freedom from Religion Found.*, 433 F.3d at 992–93.

[23] 454 U.S. 464 (1982).

[24] *Freedom from Religion Found.*, 433 F.3d at 993. The plaintiffs in *Valley Forge* had challenged the government's donation of a military base to a religious college. *See Valley Forge*, 454 U.S. at 468–69. Then-Justice Rehnquist found that Congress's power to enact the statute that authorized the donation derived not from the Taxing and Spending Clause, but from Congress's power under Article IV, Section 3 to dispose of property. *Id.* at 480.

[25] *Freedom from Religion Found.*, 433 F.3d at 993.

[26] *Id.* at 994–95. Conventional standing — not on a taxpayer basis — is possible in Establishment Clause cases when a governmental religious display causes a plaintiff to take steps to avoid seeing it. *See id.* at 991 (citing ACLU v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986)).

[27] *See id.* at 995.

[28] *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)) (internal quotation marks omitted).

[29] *See id.* at 995–96. Judge Posner pointed out that the district court was therefore correct in rejecting the Foundation's standing to challenge a speech made by the Secretary of Education. *Id.* at 996.

[30] *Id.* at 997 (Ripple, J., dissenting).

plaintiffs were challenging was really an exercise of the taxing and spending power, or instead a policy decision by the executive branch.[31] If the latter, he thought it not only would fall outside the narrow *Flast* exception, but also would be precluded by language in *Valley Forge* and other Supreme Court precedent that cautioned against allowing challenges to purely executive action.[32]

By selecting the presence of nonincidental expenditures as the key criterion for taxpayer standing in Establishment Clause cases, the majority in *Freedom from Religion Foundation* chose the best approach from among the varied and conflicting Supreme Court precedents.[33] The majority properly rejected two alternative standards: one that would grant taxpayer standing only when Congress had earmarked money for religious purposes, and one that would require that the money spent be in the form of a grant rather than an expenditure. The majority's decision to draw the line where it did accords with the purposes of the *Flast* exception, with the weight of related precedents in other areas, and with the history of the Establishment Clause.

The *Freedom from Religion Foundation* majority quite rightly placed little emphasis on *Flast*'s language about *congressional* action.[34] Then-Justice Rehnquist did emphasize this language in *Valley Forge* in contending that the plaintiffs failed the first prong of the *Flast* test not only because they challenged an action under the Property Clause, but also because they challenged an exercise of *executive* power.[35] However, he backtracked from that reasoning when he asserted in *Kendrick* that the plaintiffs' complaint was not "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 [of Health and Human Services]."[36] As Chief Justice Rehnquist acknowledged in *Kendrick*, the funding in *Flast* had also flowed from a neutral appropriations statute to a religious organization through the executive branch.[37]

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[31] *Id.* at 998.

[32] *See id.* at 1000 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982); Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 228 (1974)).

[33] *See generally* RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 127–36 (5th ed. 2003) (summarizing the various approaches Supreme Court precedents take on the issue of standing).

[34] *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968) ("[W]e hold that a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.").

[35] *Valley Forge*, 454 U.S. at 479.

[36] Bowen v. Kendrick, 487 U.S. 589, 619 (1988).

[37] *See id.*; *see also Flast*, 392 U.S. at 86 (citing 20 U.S.C. § 241e(a)(2) (Supp. II 1966)) (noting that plaintiff's challenge was based on a statute that provided aid to private schools).

The court was also right to reject the government's argument that there is or should be a constitutional distinction between grants made pursuant to a particular program — whether legislative or executive in origin — and expenditures that are not in the form of grants.[38] Judge Ripple found justification for this proposition in *Flast*'s requirement that the challenged government action be a "federal spending program,"[39] but, as Judge Posner recognized, it was the word "spending," not the word "program," that imposed the requirement.[40] Drawing the line instead between those challenging government actions that require direct expenditures and those challenging actions that require no or only incidental expenditures preserves *Flast*'s emphasis on spending and ensures that plaintiffs will not be able to challenge mere policy decisions of the executive branch.

Furthermore, because "there is so much that executive officials could do to promote religion in ways forbidden by the establishment clause . . . without making outright grants to religious organizations,"[41] granting standing to those challenging expenditures in the form of grants but not those, like the plaintiffs in *Freedom from Religion Foundation*, who challenge other forms of expenditures[42] would recreate the problem that *Flast* was arguably created to remedy. Unlike most other government actions that implicate constitutional rights, the expenditure of government funds for the establishment of religion creates no particularized injury that satisfies the demands of Article III.[43] Therefore, if taxpayers or other categories of citizens without a particularized grievance do not have standing to challenge Establishment Clause violations consisting of improper expenditures, those violations are insulated from constitutional challenge. While the majority opinion in *Flast* expressly left open the question of whether the "Constitution contains other specific limitations" on the taxing and spending power,[44] it included strong language identifying taxation in support of religion as a "specific evil[]" feared by the drafters of the Establishment Clause.[45] Perhaps because of this language, later courts have not extended *Flast* beyond the Establishment Clause context.

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[38] *See Freedom from Religion Found.*, 433 F.3d at 995.

[39] *Flast*, 392 U.S. at 102.

[40] *Compare Freedom from Religion Found.*, 433 F.3d at 1000 (Ripple, J., dissenting), *with id.* at 994 (majority opinion).

[41] *Id.* at 995.

[42] *Id.* at 994–95.

[43] The recipient of funds has no incentive to sue, and one who is denied funding cannot show a direct link between the denial and the grant to the religious organization. *See id.* at 998 (Ripple, J., dissenting).

[44] *Flast*, 392 U.S. at 105.

[45] *Id.* at 103–04.

While Judge Posner relied on common sense and hypotheticals to reach the result in *Freedom from Religion Foundation*, ample precedent in the areas of taxpayer standing and Establishment Clause jurisprudence supports the soundness of his emphasis on expenditures. Judge Posner could have drawn upon the decision in *Doremus v. Board of Education*,[46] which denied the plaintiffs standing on the grounds that the challenged government action — school-led Bible reading — was not an expenditure of funds and therefore bore no relation to plaintiffs' standing as taxpayers.[47] In *United States v. Richardson*,[48] the Court found that a plaintiff challenging the executive branch's failure to document the Central Intelligence Agency's expenditures failed *Flast*'s first prong, since his complaint was not necessarily about the expenditures, but rather about the failure to document them.[49] The Court's general Establishment Clause jurisprudence also broadly supports the importance of expenditures, as the Court has often distinguished expenditures from exemptions that have the same economic effect.[50]

The nexus between the plaintiff's status as a taxpayer and the requirement of an expenditure — hinted at in *Doremus*, formalized in *Flast*, and properly emphasized by Judge Posner in *Freedom from Religion Foundation* — gives meaning to taxpayer standing distinct from the broader concept of citizen standing. This justification finds support in the historical roots of the Establishment Clause. As Justice Brennan pointed out in his *Valley Forge* dissent, originally "[t]he taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion."[51] James Madison's *Memorial and Remon-*

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[46] 342 U.S. 429 (1952).

[47] *See id.* at 433–34. The Court pointed out that a case in which standing was granted, *Everson v. Board of Education*, 330 U.S. 1 (1947), had involved a "measurable . . . disbursement of . . . funds." *Doremus*, 342 U.S. at 434. The Supreme Court later held that the First Amendment prohibited school-led Bible reading in public schools, but the plaintiffs in that case claimed a conventional Article III personal injury rather than taxpayer standing. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 206–07 (1963). Judge Posner cited *Doremus* for the proposition that taxpayer standing is categorically inconsistent with Article III. *See Freedom from Religion Found.*, 433 F.3d at 990. However, *Doremus* acknowledged that municipal taxpayers, in contrast to federal taxpayers, can have standing in federal court because taxpayer interest is more direct at the local level. *Doremus*, 342 U.S. at 433–34.

[48] 418 U.S. 166 (1974).

[49] *See id.* at 175.

[50] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970) (distinguishing between the significance of "a direct money subsidy" and a grant of tax-exempt status in creating government involvement in religion).

[51] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 504 (1982) (Brennan, J., dissenting) (emphasis omitted). Justice Brennan added:

> The anomaly of allowing a municipality's actions to be challenged by a local taxpayer in federal court as a violation of the Establishment Clause, made applicable to the States by virtue of the Fourteenth Amendment, while exempting the Federal Government, whose use of the taxing power in aid of religion was the target of the Framers'

strance reveals this relationship between the taxpayer and the Establishment Clause in its caution against requiring even "three pence" in taxes to support a church.[52] Indeed, the Establishment Clause itself may have been born out of the struggles to repeal state taxes supporting ministers.[53]

Professor Noah Feldman suggests that the solution to the divisive role of religion in American public life today might be to return to our history and "offer greater latitude for public religious discourse and religious symbolism, and at the same time insist on a stricter ban on state funding of religious institutions and activities."[54] While "public religious discourse and religious symbolism," however, can give rise to the kind of particularized injuries required by Article III, challenges to "state funding of religious institutions and activities" depend on the existence of taxpayer standing.[55] By establishing the existence of expenditures — rather than of congressional action or a grant-making program — as a central criterion for taxpayer standing, the Seventh Circuit allowed courts the freedom to adopt Professor Feldman's approach and preserved the possibility of meaningful enforcement of First Amendment guarantees in eras of executive embrace of religion.

> adoption of the Establishment Clause, also must have been apparent to the [*Flast*] Court.

Id. at 507 n.17.

[52] James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* JAMES MADISON: WRITINGS 31 (Jack N. Rakove ed., 1999).

[53] *See* NOAH FELDMAN, DIVIDED BY GOD 33–42 (2005).

[54] *Id.* at 237.

[55] *Cf. Freedom from Religion Found.*, 433 F.3d at 991 (recounting the low threshold for conventional standing in Establishment Clause cases but noting its inapplicability to the plaintiffs' challenge).