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COURT REFORM AND BREATHING SPACE UNDER THE ESTABLISHMENT CLAUSE

MARK C. RAHDERT*

INTRODUCTION

Over forty years ago, the Supreme Court developed special rules to govern standing in Establishment Clause cases. In Flast v. Cohen, the Court held that federal taxpayers have standing to challenge laws that authorize government spending in aid of religion.1 The Court acknowledged that taxpayer standing under the Establishment Clause was an exception to the general rule, first adopted in Frothingham v. Mellon, which denies taxpayers standing in federal courts to attack spending measures.2 The Court reasoned that establishment claims are different because the Establishment Clause was intended to operate as a specific limitation on federal taxing and spending power, and further because taxation in any amount, however small, for the purpose of funding unconstitutional religious spending worked constitutionally cognizable psychic harm.

From the late 1960s to the Court’s 2007 decision in Hein v. Freedom from Religion Foundation, Inc.,3 Flast’s taxpayer standing rule seemed to be settled law. The decision in Flast produced only a single dissenting opinion,4 and even that opinion acknowledged that allowing standing for taxpayers under the Establishment Clause would not violate Article III.5

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2. 262 U.S. 447, 487 (1923). This case is reported as Massachusetts v. Mellon.
5. Justice Harlan acknowledged that standing would have been appropriate if it had been authorized by Congress. Id. at 131–33. Obviously, congressional authorization would have made no difference if the taxpayer standing Congress authorized violated Article III.
Although Flast generated some critical scholarly commentary, the decision occasioned no serious public outcry. In an era famous for its controversial Supreme Court decisions, Flast was not among them.

In the decades following Flast, the federal courts routinely accepted jurisdiction in many establishment cases based on taxpayer standing without much comment on questions of jurisdiction. To the courts, as to the public at large, the taxpayer standing rule for establishment claims became thoroughly domesticated. While some of the cases brought under Flast provoked vigorous debate on the merits, neither the Justices nor those who commented on their decisions treated the Court's acceptance of jurisdiction as an abuse of judicial power. To the contrary, the Court's nuanced adjudication made it clear that, in practice, only through judicial review could the sometimes subtle distinctions between permissible and impermissible forms of government spending be adequately articulated and developed. While some Justices and many critics vigorously protested the answers the Court gave on the merits, none doubted its authority to give them.

The Court did refuse jurisdiction in Valley Forge Christian College v. Americans United for Separation of Church and State, but it did so on the ground that Flast should not be extended past taxing and spending to suits challenging the federal government's exercise of its Property Clause powers to dispose of government property. The Court shortly thereafter reaffirmed taxpayer standing in Bowen v. Kendrick, a decision based on taxpayer standing that upheld a family planning spending program that included religiously affiliated grantees. Over the years, taxpayer standing has supplied jurisdiction in some of the Court's leading establishment cases, including decisions that have both upheld and overturned government spending measures.


Since the decision in *Hein*, however, it has been relatively clear that the Court’s establishment standing tables are in the process of being turned. *Hein* refused jurisdiction in a case challenging the constitutionality of the George W. Bush administration’s handling of its “faith-based” spending initiatives. The Court held that the taxpayer plaintiffs lacked standing. Justice Alito’s plurality opinion purported to accept *Flast*, but in the manner of *Valley Forge* it refused to “extend” taxpayer standing to cases that objected, not to actual appropriations by the legislature, but to executive implementation of the spending program. Two Justices—Scalia and Thomas—concurred separately in an opinion that specifically called for *Flast* to be overruled.

Led by Justice Souter, the four dissenters observed that it was hardly an “extension” of *Flast* to apply it to matters of spending-measure implementation, because it is almost always the implementation of an appropriation that makes the appropriation unconstitutional. The dissenters argued that, from the vantage of standing, there was really no difference between the situation of the challengers in *Hein* and those in *Bowen*.

The *Hein* decision provoked some commentators (myself included) to speculate that *Flast*’s days were likely numbered, and that it would be only a matter of time before the Scalia-Thomas position garnered a majority. Those days may be even fewer than we thought, because in its most recently completed term, the Supreme Court denied taxpayer standing again in *Arizona Christian School Tuition Organization v. Winn*.

In *Arizona Christian*, the Court concluded that Arizona taxpayers have no standing to challenge the constitutionality of a state system of tax credits that channels funds to private (and typically religiously affiliated) schools. Justice Kennedy’s majority opinion treated taxpayer standing in Establishment Clause cases as just another variant of the kind of constitutional at-

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9. *Hein*, 551 U.S. at 605 (plurality opinion).
10. Id. at 637 (Scalia, J., concurring).
11. Id. at 641–42 (Souter, J., dissenting).
12. See Mark C. Rrahert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1099, 1046 (2011). See also Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Jurisprudence*, 2008 BYU L. REV. 115, 132 (2008) (arguing that *Hein* further restricts *Flast* to situations where “the challenged expenditure must: (1) be made under an express legislative mandate, which (2) includes a specific appropriation, that (3) the enacting legislature understood at the time would benefit religious entities.”); Douglas W. Kmiec, *Standing Still—Did the Roberts Court Narrow, but Not Overrule, Flast to Allow Time to Re-think Establishment Clause Jurisprudence?*, 35 PEPP. L. REV. 509, 514 (2008) (asserting imminence of *Flast*’s demise: “So again, why not toss *Flast* now? Because, as Mother used to say, ‘The soup is not ready yet’. . . . The primary benefit of the modest decision in *Hein* is that it gives the Roberts Court an opportunity to re-think the underlying religion-clause jurisprudence more carefully.”).
tack on spending that *Frothingham* meant to preclude.\(^4\) His opinion developed at some length the abstract dangers posed by taxpayer standing to the proper Article III boundaries of the federal courts. In the name of protecting the separation of powers, he refused once again to "extend" *Flast*—in this case from spending measures to measures giving tax breaks.\(^5\) But he offered little reason to view tax relief measures differently from spending measures,\(^6\) and most of what he said against standing would apply with equal force had the suit had been brought against a state appropriation rather than a tax credit.

Pressed to do so by Justice Kagan's forceful dissent,\(^7\) Justice Kennedy acknowledged that the Court had previously accepted jurisdiction in several taxpayer establishment challenges to a variety of tax benefits.\(^8\) The decisions include some of the leading establishment cases of their day, such as *Walz v. Tax Commission of the City of New York*\(^9\) and *Mueller v. Allen.*\(^20\) Rather than distinguish those decisions, the best Kennedy could tepidly claim was that the Court had not actually decided the jurisdictional question in those cases, so that the fundamental jurisdictional defects somehow must have escaped the attention of all the Justices then serving on the Court (including, in some instances, Justice Kennedy himself).\(^21\)

That *Hein* and *Arizona Christian* represent a new restrictive approach to standing in establishment cases seems clear. Exactly how far they will go to cut off taxpayer standing is still uncertain, but most of the rhetoric for overruling *Flast* is now firmly in place, in the language of a majority decision carrying precedential weight.\(^22\) The three Justices who purported not

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\(^1\) Id. at 1442-44.
\(^2\) Id. at 1445-48.
\(^3\) Justice Kennedy did point out that with spending measures the government directs funds to the benefited organizations, while with tax credits the choice is made by private individuals. Id. at 1447-48. Under decisions such as *Zelman v. Simmons-Harris*, that difference could potentially affect the merits of the challengers' establishment claim, but it does not alter the fact that the decision being challenged—the creation of the tax benefit—was made by the government, and represented an exercise of the state's taxing and spending powers. 536 U.S. 639, 649 (2002) (allowing private school vouchers in part on the ground that their use was directed by private choice).

\(^17\) *See Ariz. Christian,* 131 S. Ct. at 1453-55 (Kagan, J., dissenting). Justice Kagan's dissent was joined by Justices Ginsburg, Breyer, and Sotomayor. Id. at 1450.

\(^18\) Id. at 1448-49 (majority opinion of Justice Kennedy).


\(^21\) *Ariz. Christian,* 131 S. Ct. at 1448-49. Justice Kennedy also suggested, without much elaboration, that in at least some of the other tax benefit cases, the challengers may have been able to rely on some argument other than their taxpayer status to sustain standing. Id.

\(^22\) Consider, for example, Justice Kennedy's concluding flourish in *Arizona Christian*:

> Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who dis-
to disturb *Flast* in *Hein*, all of whom subscribed to the majority’s broad attack on taxpayer standing in *Arizona Christian*, may well find themselves ready in the next taxpayer case to join with Justices Scalia and Thomas in casting *Flast* away.

*Hein* and *Arizona Christian* are not the only recent decisions to exhibit a restrictive trend toward standing in Establishment Clause matters. Late in the Rehnquist Court, the Court rather notoriously denied standing in *Elk Grove Unified School District v. Newdow*. The case involved a challenge to the constitutionality of the 1954 statute inserting “under God” into the Pledge of Allegiance. It was brought by the parent of a school child who objected to the administration of the Pledge in his child’s public school. Despite the many prior decisions in which the Court had allowed parents to litigate establishment matters on behalf of their children in school, the Court rejected standing in this case on the rather technical ground that the complaining parent (who was divorced from the child’s custodial mother but actively involved in the upbringing of his daughter), was not the child’s legally designated custodial parent.

More recently, standing issues arose in *Salazar v. Buono*, a case involving a challenge to the erection of a cross on once-public land that had been transferred by Congress to private ownership, allegedly to avoid a federal injunction. Without directly ruling on the jurisdictional question, the Court raised doubts about the challenger’s continuing standing to press the case once the property had been placed in private hands. Justices Scalia and Thomas argued separately that the Court should have dismissed the case for lack of standing.

Thus, after a long period of relative jurisdictional tranquility following *Flast*, we have had four recent Supreme Court Establishment Clause decisions either raising or enforcing significant new standing limitations, all in

agrees with them. In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so. Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress’ power to change. The present suit serves as an illustration of these principles . . . . To alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III.

*Id.* at 1449. If the challenge in *Arizona Christian* is an “illustration of these principles,” the challenge in *Flast* probably is as well.

24. *Id.* at 15–17.
26. *Id.* at 1814–15.
27. *Id.* at 1824 (Scalia, J., concurring).
the course of seven years. Such jurisdictional ferment, especially after a long period of relative quiescence, naturally raises two questions: Why this sudden shift? And what does it signify for the future of the Establishment Clause?

It is, of course, never wholly possible to peer into the minds of the Justices. In general, we take their written opinions at face value and largely assume that the reasons the Justices give for their decisions are the actual reasons behind their actions. Indeed, we regard such transparent, reasoned decision making as one of the hallmarks of the judicial process—part of what composes the judicial power and distinguishes it from legislative or executive action.

Yet we also know from experience that some Court decisions betoken more than they disclose. Historians poring over the papers of past Supreme Court Justices have unearthed conference notes showing that the Justices sometimes engage in vigorous debates about issues stretching well beyond the particulars of the cases before them, that those debates sometimes affect judgments about whether or not to exercise jurisdiction in particular matters, and that those underlying issues, when they do arise, seldom get squarely acknowledged in the opinions the Justices issue. Whether there are such side-bench undercurrents in any contemporary decision—and, if so, what they are—may not be known for a generation or more, until some present Justice’s private papers are opened for public inspection. Where we suspect that this sort of activity is afoot, the best we can do is try to read between the lines of existing decisions and opinions, searching for signals (either intentional or not) that suggest what those deeper undercurrents may be.

Speculation about a back-story can occur in almost any context, but it seems particularly apt when the Court acts out of historical character on a particular issue, especially a jurisdictional one. When the Court suddenly takes jurisdiction in a kind of case that it has previously refused to decide—as happened, for example, in Baker v. Carr,28 or more recently in Bush v. Gore29—it raises the distinct possibility that a major shift in judicial perspective or some other significant undercurrent may be driving the deci-


29. 531 U.S. 98 (2000). Prior to Bush v. Gore, the tabulation of votes in an electoral recount was left largely to the states. The Court (in)famously took jurisdiction in the Bush case to bring about closure to the highly disputed 2000 presidential election.
sion. Conversely, a similar possibility arises when the Court suddenly decides that jurisdiction is absent in a kind of case it has regularly handled on the merits. Given the substantial interplay between jurisdiction and substantive doctrine that inheres under the Court’s prevailing “test” for standing, the prospect that a shift on standing jurisdiction presages a shift on merits seems to be nigh unavoidable.

This article represents an attempt to speculate about what may lie behind the Court’s recent choices regarding standing in Establishment Clause matters—especially its move to sharply contain or even eliminate taxpayer standing. I will develop two principal themes. The first is fairly straightforward: that the Court wants to cut down on the amount of Establishment Clause litigation in the federal courts, and that it wants to do so in an asymmetrical fashion which significantly reduces challenges to governmental financial aid to religion and therefore increases the prospect that such aid will be delivered. I will consider the reasons that the Court may want to do that, and I will muse about some of the accompanying implications for Establishment Clause litigation and doctrine.

The second theme, which involves deeper speculation, and which draws inspiration from Alexander Bickel’s famous idea that refusing jurisdiction can involve the deliberate exercise of a “passive virtue,” is that the Justices are preparing for a major substantive departure from existing substantive Establishment Clause doctrine, but have not yet worked out the contours of their new position and its rationale. Rather than perpetuating existing law while they debate, or clouding doctrine with messy distinctions, half-doctrines, or transitional rulings that are destined not to survive, they would rather remain passive and relatively silent until the best opportunity arises for a bold transformative departure. While a cutoff of taxpayer standing will not entirely advance this aim, it will substantially reduce the number of instances in which the Court gets drawn into open controversy over the Establishment Clause’s future, and it will do so in some of the messier and potentially more divisive cases. This may afford those Justices who are already committed to the new departure the time and circumstances they need to hone their arguments and persuade other Justices who are on the fence that theirs is the right direction to take.

30. For many years the Court has addressed standing issues by inquiring whether the party invoking the court’s jurisdiction can show “personal injury,” that is “fairly traceable to the defendant’s allegedly unlawful conduct,” and that is “likely to be redressed” through a judicial remedy. See Allen v. Wright, 468 U.S. 737, 751 (1984).

Whatever reason supports the Court's action in Hein and Arizona Christian, the retreat from Flast has important ramifications for the practical content of the Establishment Clause. When the Court declines jurisdiction on the contention that an entire class of plaintiffs (and hence of cases) lies beyond the reach of judicial power, that decision contains an implicit assertion that the subject matter of those cases falls within the largely unreviewable discretion of the government's political branches. Whatever the political branches do, and however they do it, the matter will not come to the Court for review unless it happens to touch on some other unrelated legal issue. Thus, a decision to deny taxpayer standing in Establishment cases is, inevitably, a decision to hand Congress and the Executive (and their state government counterparts) broad and largely unreviewable discretion about whether and how to treat religion in taxing and spending. It converts the content of financial arrangements between church and state from a judicial and constitutional to a purely political issue. It also renders the commands of the First Amendment regarding government spending on religion—whatever those commands may be—largely precatory rather than mandatory in character.

I. ESTABLISHMENT CLAUSE COURT REFORM

Anyone studying the development of Establishment Clause doctrine in the Supreme Court quickly discovers that the frequency of Court decision on Establishment Clause matters has increased progressively over time. Nearly all Supreme Court law on the subject has been written in the last sixty years. While the decades of the 1950s and 1960s involved a relative handful of Supreme Court decisions on establishment matters, that number increased substantially in the 1970s and thereafter. Two cases are principally responsible for this explosion of precedent. The first is Everson v. Board of Education of Ewing Township, which officially applied the Establishment Clause to the states through the Fourteenth Amendment. The second is Flast.

Before Everson, Supreme Court decisions on the establishment of religion were exceedingly rare. That is no doubt partly because the Establishment Clause, before Everson, was thought to apply only to the federal government. State law and practice entailed far greater interaction between church and state than did federal law. State law on such matters as

32. 330 U.S. 1, 8 (1947).
33. In Everson, the Court officially held that the First Amendment's Establishment Clause applied to the states through the Fourteenth Amendment. Id.
property ownership, land use, education, commerce, employment, taxation, and the like inevitably encountered religious activities, calling forth an array of state statutes and court decisions structuring the legal relationship between religion and government. Federal law, on the other hand, rarely interacted with religion much at all.

Until the Everson decision, when states made choices that promoted or supported religion, their action raised no federal question. School prayer, compulsory Bible readings, holiday displays, Ten Commandment postings, even the outright choice of a state church—none of it had federal constitutional significance. Any protection for separation of church and state at the state level depended on state law, as interpreted by state courts. From the mid-nineteenth century onward, all states had state constitutional guarantees of religious freedom, but their interpretation was quintessentially a matter of state law, and most state courts treated the state constitutional commands permissively.

After Everson, federal courts had to decide for the first time what forms of state response to religion were or were not permitted under the First Amendment. It is no surprise, then, that the Establishment Clause cases which made their way to the Court in the first decade or two after Everson almost exclusively involved matters of state law and practice. Indeed, the vast majority of the Court’s Establishment Clause decisions have concerned facets of state law and practice. Consequently, the Court’s decision in Everson to apply the Establishment Clause to the states significantly expanded the scope and volume of practical federal jurisdiction over matters touching the separation of church and state.

If Everson opened the federal court door to an array of establishment challenges, Flast opened it even wider. Prior to Flast, cases where parties had standing to challenge government taxing or spending policies allegedly in aid of religion were relatively rare. Cases of that sort did arise occasionally. Everson itself, for example, involved a challenge by taxpayers to a state scheme for reimbursing students’ travel expenses to private and parochial schools. But the circumstances where taxpayers could sue were fairly unusual. As Justice Jackson put it in Doremus v. Board of Education

34. For an interesting discussion of the development of state law on religion during the 19th century, see generally Mark DeWolfe Howe, The Garden and the Wilderness: Religion and the Government in American Constitutional History (1965).

35. Examples include the “released time” cases—invoking state public school laws providing time for religious instruction—such as Zorach v. Clauson, 343 U.S. 306 (1952) and McCollum v. Bd. of Educ., 333 U.S. 203 (1948), as well as the “Sunday closing” cases—invoking state laws prohibiting business activity on Sunday—collected in McGowan v. Maryland, 366 U.S. 420 (1961).

36. 330 U.S. at 3.
of Hawthorne, the requirement to demonstrate some form of tangible "pocket-book" injury, as opposed to mere "religious difference," tended to halt most challenges at (or even before) the courthouse door. Taxpayer standing, where it existed, depended on evidence of specific exactions tied fairly closely to specific religious benefits or uses. Spending to support religion that came from general appropriations was relatively immune from constitutional challenge.

By opening the courthouse door to taxpayers, Flast enabled the development of a regular flow of establishment challenges to taxing and spending measures at both the federal and state levels. To be sure, there have been many Establishment Clause challenges over the years since Flast that did not depend either directly or indirectly on taxpayer standing. But there have been many others that did, and they include some of the Court's leading doctrinal decisions, as well as some of its most controversial rulings. Significantly, they include Lemon v. Kurtzman and many subsequent cases that developed and applied Lemon's three-prong "test" for ascertaining an Establishment Clause violation. They also include Walz, Mueller, and other decisions involving claims of unconstitutional preferential tax treatment of religion. And they include challenges to an array of state and federal spending measures, particularly in support of education and social services, which made funds available to religiously affiliated recipients.

Consequently, much of the Establishment Clause law we have today owes its existence, in whole or in part, to cases where jurisdiction depended on Flast. Instead of the relatively small handful of cases occasionally grappling with Establishment Clause issues that marked the Court's work in the pre-Flast era, the Court's docket proliferated to include dozens of deci-

sions, making Establishment Clause discourse a recurrent staple of the Court’s doctrinal diet.

The growth in jurisdiction not only added to the Court’s Establishment Clause docket; it also added to the complexity and contention surrounding Establishment Clause doctrine. It seems fair to surmise that Establishment Clause constitutional discourse in the post-Flast period has been neither productive nor satisfying for most members of the Court. Despite many attempts to formulate a consensus-based system of doctrinal tenets that could be used to produce a reasonably consistent set of legal outcomes, the Court has remained locked in a perpetual doctrinal tug-of-war between those Justices who favor relatively strict principles of church-state separation and those who favor a more flexible and accommodating approach. For decades, this tension has produced ongoing conflict over the legal content of the Clause, in which neither side has consistently prevailed, and neither side has given ground. To borrow loosely from Gertrude Stein, there has been fairly little “there there” in the Court’s Establishment Clause jurisprudence over much of the past forty years.

Looking principally at results, one may infer that in the first two decades after Flast, the Court took a relatively strict approach toward church-state interaction that aimed toward securing a substantial degree of both formal and functional governmental neutrality in matters touching on religion. In contrast, during the last two decades, the Court has more often deviated from this position in ways that have allowed greater latitude for both formal acknowledgment of religion and indirect methods of government financial support. But neither of these trends brought with it much if any doctrinal consistency or conviction. In both periods, decisions vacillated from one position to the other based on shifting majorities in the Court while the Justices continuously debated (without much firm resolution)

43. GERTRUDE STEIN, EVERYBODY’S AUTOBIOGRAPHY 215 (1938) (commenting that “there is no there there” in Oakland, California, her childhood home).

44. The cases from this period include Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Nyquist, 413 U.S. at 756; and Lemon, 403 U.S. at 602, all of which sustained restrictions on government authority to provide various forms of assistance to religiously affiliated private schools. They also include Wallace v. Jaffree, 472 U.S. 38 (1985) and Stone v. Graham, 449 U.S. 39 (1980), which placed restrictions on religious expression in public schools.

what the controlling constitutional principles ought to be and how they should be applied.  

What occurred in the Supreme Court almost surely was reflected in the lower courts as well. The built-in selectivity of the Court’s use of the writ of certiorari suggests that the lower federal courts decided many cases based on taxpayer standing that never made it to Supreme Court review. These cases were frequent enough to make taxpayer-based Establishment Clause litigation a regular component of the federal docket. Additionally, because the lower courts’ job is to interpret and apply the precedent of the Supreme Court, the indeterminacy and vacillation in Supreme Court establishment doctrine was no doubt reflected in the reasoning and decisions of the lower courts, with lots of uncertainty, doctrinal tension and inconsistency from case to case and court to court.

What should the Supreme Court do about an area of litigation that is constant, time-consuming, complicated, and with high constitutional stakes, but at the same time is often fruitless, fraught with uncertainty, and prone to inconsistent outcomes? One answer is to cut back on the amount of litigation itself, and one of the surest ways to do that is to tighten the jurisdictional strings so that fewer plaintiffs may bring such actions. Among the most direct ways to do that is to eliminate the one doctrine that gave litigants greater access to courts in establishment cases than they enjoyed in other areas of law.

Thus an undercurrent in both Justice Alito’s plurality opinion in *Hein* and Justice Kennedy’s majority opinion in *Arizona Christian* is that the potential judicial interference with taxing and spending spawned by *Flast* is unseemly. Justice Kennedy’s *Arizona Christian* opinion, in particular, develops the general theme that judicial review of legislative exercises of the taxing and spending power, in cases brought by mere taxpayers, represents an abuse of judicial authority. It is, in his view, something the fed-


48. *Ariz. Christian*, 131 S. Ct. at 1443–44 (arguing that taxpayer claims challenging tax credits “rest on unjustifiable economic and political speculation” and that “[e]ach of the inferential steps to show causation and redressability [sic] depends on premises as to which there remains considerable doubt”). Justice Kennedy’s argument assumes that to establish standing, taxpayers must show that their own tax burden was increased as a result of government action, and that an injunction against the challenged tax break would lead to a reduction in taxes. This argument treats the taxpayer as asserting a
eral courts should not be doing. While many of Kennedy's comments are phrased as general propositions, the structure of his reasoning rests on the assumption that what is true of taxpayer suits in general ought equally to be true under the Establishment Clause. Taxpayers ought to have no special status in Establishment Clause matters. Their injury from compulsory taxation in aid of religion ought not to carry any special weight.

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Viewed in this light, Hein and Arizona Christian take their place along with decisions in other contexts that have also cut back on the scope of the federal docket. They fit within a larger pattern of recent Court decisions that have fought against the rising tide of federal civil litigation by tightening pleading requirements, limiting remedies, strengthening litigation avoidance devices like arbitration clauses, and altering the procedural and proof requirements of class actions.

Exactly how far the Court will take this reasoning is still unclear. Hein purported not to quarrel with Flast on its own terms, and by treating tax credits as different from spending Arizona Christian stopped just short of overruling Flast. To borrow the idiom of finance, it is clear that Flast's stock has fallen, but it is not yet certain how far, or whether the ruling will collapse into bankruptcy and final liquidation. It is still possible that the Court will resist calls from Justices Scalia and Thomas to overrule Flast entirely. If so, the Flast standing rule might be retained for the most flagrant forms of government religious spending. But it seems more likely (particularly given the staunchly anti-taxpayer-standing reasoning in Arizo-

49. Justice Kennedy's opinion does acknowledge the Flast rule, but apparently confines it to circumstances where "moneys have been extracted from a citizen and handed to a religious institution in violation of the citizens' conscience." Id. at 1448. Absent such an immediate connection between "extract[ion] and spend[ding]," the opinion implies the standards of Flast cannot be satisfied. Id. at 1446 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).


52. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).


that the current cutbacks on Flast are stepping stones towards an outright overruling that is likely to occur sometime in the relatively near future. The Hein/Arizona Christian dyad thus supports the fairly straightforward inference that the Court is attempting to cut back on the amount and frequency of Establishment Clause litigation, and in the process to lop off the cases that put the courts in their most awkward position vis-à-vis the other branches of government.

Behind this impulse may lie the belief that the volume and frequency of Establishment Clause litigation since Flast is at least partly responsible for the doctrinal dissension and confusion that have accompanied it. If this is true, then having fewer cases (and practically none on matters of taxing and spending) might enable Establishment Clause doctrine to develop more gradually and also perhaps more clearly. For one thing, it would be more focused, since the cases coming to court would be more similar to one another in the types of potential aid to religion they involved. For another, the actions of government allegedly in conflict with the Establishment Clause would have to have some sort of regulatory or programmatic component that acted directly on the activities of the litigants before the Court. This would arguably give the issues before the Court a more consistent texture, making its decisions potentially more harmonious with one another in outcome and impact. In any event, in a period of great doctrinal confusion, arguably any cutback on the amount of Establishment Clause litigation may be a good thing, since multiplying the cases only multiplies the opportunities for further disagreement on the Court, compounding the resulting doctrinal confusion.

It is also possible that the Court senses a greater potential for reaching consensus on the non-financial aspects of government involvement with religion than it does on matters involving financial affairs. Past decisions—particularly those involving various forms of government support for private (including religious) education—have reflected a particularly high degree of disagreement on the Court, with outcomes often turning on exceedingly fine distinctions between different kinds of aid in different contexts. By eliminating these cases on jurisdictional grounds, the Court would be eliminating an arena of Establishment Clause litigation in which it has had a particularly hard time finding a common thread and rationale.

This “court reform” reading carries with it some important implications for the content of Establishment Clause doctrine. First, it distinguishes among different types of government behavior in terms of their potential Establishment Clause implications. Laws with a significant regulatory content presumably will still be subject to challenge by those who
come under their aegis, because the regulated individuals experience a direct harm as a result of their duty to comply with the regulatory command. So will laws (and official governmental action) that affect the programs and policies of public institutions, such as public schools, which can be challenged by those who are subjected to them. Similarly, symbolic linkages between government and religion, such as holiday displays and Ten Commandment displays, may still be subject to challenge, at least by those who can claim injury through regular (perhaps mandatory) exposure to them. In all these instances, there are potential challengers who do not need to rely on taxpayer standing to formulate their claims of injury in fact. Law on the Establishment Clause thus will continue to develop in these areas, although it may be slowed in part by the somewhat greater challenge involved in establishing the factual records needed to support non-taxpayer standing.

What will get cut off from court review if Flast is overruled are laws that structure funding opportunities for religious uses or activities, or that confer financial benefit in the form of preferential tax relief. In those instances, non-taxpayer standing will be difficult if not impossible to formulate, so that the number of cases surviving jurisdictional challenge is likely to fall off considerably, if not entirely disappear.

This development says something that is at least partly substantive about the Establishment Clause. It supports a typological hierarchy of potential issues. Those actions of government that involve "command and control" regulation arguably are at the top of that hierarchy, with the greatest prospect for standing, and hence the greatest likelihood of being successfully challenged. Anyone whose behavior is subject to the law's command or control obviously experiences direct injury in fact from the legal consequences that flow from refusing to comply.

Next come actions of government that communicate an ideological (in this context either religious or antireligious) message. Standing may be a

55. An example might be a case like Estate of Thornton v. Caldor, Inc., which struck down a Connecticut statute requiring employers to allow their employees time off on the employees' chosen religious day of rest or worship. 472 U.S. 703, 709 (1985).
56. An example would be a case like Santa Fe Independent Sch. Dist., involving school-sponsored prayers at public high school football games. 530 U.S. 290, 294–95 (2000).
58. Challengers will, however, have to meet the factual requirements set by cases such as Lujan v. Defenders of Wildlife, which require actual imminent exposure to allegedly unlawful conditions. 504 U.S. 555, 562–63 (1992).
bit harder to come by, but there will be some individuals who can mount a
claim to types of injury in fact the Court may be prepared to recognize.
Additionally, even if standing is unavailable for such claims as an Establish-
ment Clause matter, claims under the First Amendment’s Speech
Clause will also sometimes be available, and in that environment the
Court’s position on what constitutes injury remains relatively generous.59

Standing will be discernibly more difficult, but not wholly impossible,
in cases involving relatively passive government symbolism. Mere aware-
ness or occasional exposure to the symbol will not likely be enough. But
challenges will still be possible for those who can claim regular and con-
tinuous exposure to the symbols in question, especially where that exposure
is effectively mandatory or unavoidable.60

In contrast, without Flast standing will be nigh impossible in cases in-
volving financial relationships between church and state.61 Beneficiaries of
those measures will lack either motive or injury to challenge them. Would-
be religious beneficiaries might challenge the terms of distribution, but lack
any motive to challenge the program of benefits itself. Nonreligious com-
petitors for tax relief or spending will lack standing on the grounds, among
others, that any injury they might claim is purely hypothetical and incap-
able of redress. In other words, without taxpayer standing there will be none
who can come forward with an alternative basis for invoking jurisdiction.
Thus, effectively, an entire class of Establishment Clause litigation will be
cut off from judicial cognizance and review.

This litigation hierarchy also says something about the jurisdictional
significance of psychic harm from religious preference. In the regulatory,
ideological and symbolic categories, claims based on psychic harm from
what Justice Jackson in Doremus termed “religious difference”62 can at
least sometimes support a merits decision. In financial cases, however,
once Flast is gone psychic harm either is not recognized, or is of insuffi-
cient weight to matter. As long as government steers clear of certain for-
mal, regulatory, ideological or symbolic religious preferences or choices, it
may provide functional financial religious support with relative immunity.

59. However, speech challenges may well founder on the merits, given the Court’s increasing
tendency to afford “government speech” immunity from attack on First Amendment grounds. See
display of Ten Commandments in part due to permissibility of viewpoint and content discrimination
under “government speech” doctrine).
60. Examples would include exposure to religious symbolism in public schools with mandatory
attendance, or in a courthouse, where litigants and witnesses have no choice but to be present.
61. See Rahdert, supra note 12, at 1034–35.
There is another important quasi-substantive implication of *Flast*'s imminent demise. In the past, when the Court has upheld government spending in support of religious activities, it has often either explicitly or implicitly attached conditions that the spending be used for activities of religious organizations that are not explicitly sacramental, institutional, or proselytizing in character. Thus, for example, when the Court allowed government funding for construction of educational facilities at religious colleges, it did so in part on the strength of legislative conditions that the funding could not be used for houses of worship. When and if *Flast* goes, the need for such restrictions on government spending presumably will also disappear, since even funding that finds its way to explicitly religious uses will be remain effectively immune from judicial challenge.

Finally, as I have argued at length elsewhere, cutoff of taxpayer standing says something about the nature of constitutionally cognizable Establishment Clause injury. It either denies or substantially devalues the psychic injury that occurs from compulsory tax-and-spend-based support for religion. It also draws a constitutional distinction between direct and indirect means of favoring religion. Thus, for example, if the government were to command that every individual must give a portion of his or her wealth to a church, its command and control of private spending could potentially offend the Establishment Clause and those subject to the law would likely have standing to object. But if the government took that same wealth out of private hands through general taxes, and then gave a portion of it to religion in the form of a government appropriation, without taxpayer standing no one would experience cognizable harm, and no one would have the standing to mount a constitutional challenge. Spending on religion would be, from this perspective, no different in constitutional substance than spending on public health (the form of spending that had been challenged in *Frothingham*), spending on public highways and parks, or spending on public schools. As in these other cases constitutional complaints about spending in aid of religion would have no chance of being heard in a federal court. The only appeal would be to the legislature.

Thus, one possible reading of the no-taxpayer standing rule emerging from *Hein* and *Arizona Christian* is that it is a measure of "court reform" meant to confine establishment litigation to regulatory, ideological, and symbolic measures, with little if any judicial oversight over financial inter-

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actions between religion and government. From this perspective, the Establishment Clause is about message, not money.

II. BREATHING SPACE

The frequency of Establishment Clause litigation during the past forty years has almost surely been further compounded by the Court’s perpetual division over fundamental doctrine. In the early years following Flast, the Court agreed on the general doctrinal contours of Establishment Clause law, which it arranged around the three “prongs” of the Lemon standard, though the Justices often disagreed intensely over their proper application. Then, beginning in the 1980s and extending apace to the present, the Court has disagreed over both the content of doctrine and its proper application. That period has witnessed a prolonged stretch of experimentation and advocacy by different coalitions of Justices engaged in an attempt to supplant prevailing doctrinal tenets with new formulae that the proposing Justices believe would more accurately capture the Clause’s meaning. Typically the proposals would also allow substantially more room for governmental support of religious entities and activities.

In the main, these experiments have not borne much fruit. For example, as early as 1993 in his famous Lamb’s Chapel v. Center Moriches Union Free School District concurrence, Justice Scalia explicitly proposed abandonment of the Lemon approach, which he concluded had become totally moribund. Yet nearly twenty years later—in cases such as McCreary—we still see references to Lemon, which the Court still evidently sometimes uses to organize inquiry, even though Lemon may no longer retain much force for directing outcomes.

What is particularly noteworthy about this period of thesis and antithesis is that it has failed to date to produce any lasting synthesis. Instead it has produced seemingly endless dissension, not a little acrimony, and a

66. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (“Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must no foster ‘an excessive government entanglement with religion.’") (quoting Walz v. Tax Comm’n of City of N.Y.C., 397 U.S. 664, 670 (1970)).


68. 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (comparing Lemon to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ”).

succession of quasi-tests and counter-tests that appear and disappear from
the Court’s decisions as the majorities and writers of majority opinions
change. The Justices have remained resolutely locked in irresolution, leav-
ing observers with a strong sense that Establishment Clause doctrine is
moving neither forward nor backward but sideways. In a recent dissent
from denial of certiorari, Justice Thomas recently commented critically on
this unfortunate state of affairs.\footnote{70}{Utah Highway Patrol Ass’n v. Am. Atheists, Inc., 565 U.S. ___, No. 10-1276, slip. op., at 4
(Oct. 31, 2011) (Thomas, J., dissenting from denial of certiorari) (arguing that “[o]ur jurisprudence
provides no principled bases by which a lower court could discern whether Lemon/endorsement, or
some other test, should apply in Establishment Clause cases”).}

One result of all this unchanneled ferment has been that, today, lower
courts facing Establishment Clause issues sometimes find it prudent to
apply not a single doctrinal formula, but various alternative formulae in
succession, in an effort to resolve the constitutional issues in the case in a
way that will insulate the decision from further review by avoiding the risk
that a reviewing court will eschew one test in favor of another. As a conse-
quence, we do not have a single set of controlling Establishment Clause
principles. Instead, we have various tests that simultaneously overlap and
diverge, so that it is never wholly possible to discern in advance which test
should be uppermost in determining the outcome. When the tests coalesce
and produce the same result, that is not too serious a problem; but when the
tests point in different directions and lead to different outcomes as they
sometimes do, it generates a fair amount of confusion.

When a court is so embroiled, what should it do? One answer is to
keep trying, but that way lies further potential uncertainty and confusion.
Another answer might be to stop trying to do so much. Perhaps, if the
Court were to stop kneading the Establishment Clause and give it a bit of a
rest, the yeast of new doctrine could begin to rise, and take shape. This
might particularly be true if the Justices continued to discuss Establishment
Clause issues among themselves in the privacy of the Supreme Court con-
fERENCE\footnote{71}{This can occur in the context of debates over whether or not to grant certiorari, since by
tradition denials of certiorari need not be explained, and written dissents from denial are rare.} without the constant necessity of coming to decision. After a
period of rumination and more desultory, less constantly decision-driven
exchange, it might be possible for the Justices to concoct a new blend of
principles that are neither \textit{Lemon} nor “anti-\textit{Lemon},” but rather different
from the various previous formulations, and that stand some chance of
achieving consensus across the Court’s juridical-political divides. Perhaps
that process of moving toward consensus requires a period of gestation that
is incommensurate with the press of constant decision.

70. Utah Highway Patrol Ass’n v. Am. Atheists, Inc., 565 U.S. ___, No. 10-1276, slip. op., at 4
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71. This can occur in the context of debates over whether or not to grant certiorari, since by
tradition denials of certiorari need not be explained, and written dissents from denial are rare.
The need for rumination, if it exists, invites an exercise of what Alexander Bickel famously termed the Court’s “passive virtues”—a way of avoiding decision without evidently surrendering the Court’s commitment to the rule of law. Bickel argued that one of the more potent means for exercising passive virtue is for the Court to decline jurisdiction on grounds that the matter at hand presents a non-justiciable question. Of all the doctrines that lend themselves to such jurisdictional passivity, standing is among the most potentially useful.

As critics of Bickel’s thesis noted, in the Supreme Court itself there is a more immediate expedient for passive virtue than justiciability: the denial of certiorari. The Court could (and often does) avoid the necessity of deciding messy issues of all sorts by the simple expedient of denying certiorari. It has surely done so on many occasions involving the Establishment Clause. As Justice Thomas noted in a recent dissent to denial of certiorari, the Court may well be doing precisely that in cases involving government use of crosses to memorialize the dead.

There are several difficulties with the Court’s exercise of certiorari as a means of obtaining “breathing space” on the Establishment Clause. The first is that certiorari is governed by the “rule of four,” which enables a minority of Justices to place a case on the Court’s docket for argument and decision. That means that even if a majority of Justices prefers to wait, perhaps while they carry on discussions about the proper content of new doctrine, a minority can push the Court to judgment. Since the tough cases under the Establishment Clause typically produce slim majorities at best, a determined minority could prevent reliance on certiorari denial as a tool for exercising passive virtue.

Second, denial of certiorari does nothing to the law—doctrine remains whatever it was before the Court denied certiorari—and it does nothing regarding the jurisdiction of the lower federal courts. Lower courts will continue to hear and decide cases, and in doing so they will be obliged to apply existing Establishment Clause doctrine as best they can. If the Court declines certiorari, the lower courts’ interpretation of the doctrine stands as

74. Cf. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) (concluding that even where cases lie within the Court’s Article III jurisdiction the Court must “guard jealously and exercise rarely our power to make constitutional pronouncements . . . when matters of great national significance are at stake”).
precedent, at least for the circuit or state court system in which it was rendered. Where at least four Justices on the Court are convinced that the law as it stands is likely wrong, and thus are further convinced that the decision of the court below applying that law is also (a fortiori) wrong, it becomes very difficult for those Justices to exercise discretion by withholding decision. Doing so (from the hypothetical four Justices’ perspective) perpetuates constitutional error. Although the Supreme Court long ago ceased to function as a court of errors, it still must require considerable discipline for the Justices to let a run of seemingly wrong lower court decisions in such an important area of constitutional law go untouched. This is no doubt particularly difficult when the lower courts are attempting to forbid the political branches of government from making taxing and spending decisions that enjoy (both in theory and likely in practice) widespread popular support.\textsuperscript{76}

Third (and this difficulty aggravates the second), when the Court denies certiorari, the law (such as it is) remains unchanged. Lower courts will continue to decide cases on the merits, and when they do they will be obliged to follow older decisions that are on point, even if those decisions no longer reflect the Court’s current majority thinking. Denial of certiorari doesn’t make the lower court decisions go away, and each lower court decision adds something to the weight of the authority the Court is (by hypothesis) working its way toward eventually changing or discarding entirely. Any flaws in existing doctrine will be not only perpetuated but also to some degree entrenched, making it that much harder for the Court to set off in a different direction when it is finally ready to do so.

Although the Court’s certiorari-denying practices rarely get much attention outside the legal and political science academy, that situation could change if it became too apparent that the Court was dodging tough constitutional questions by simply ignoring the cases that presented them. “Denial” at the Supreme Court would take on a new and fairly pejorative meaning. This would be particularly true if those cases involved situations where lower courts declared important taxing or spending decisions by state legislatures to be unconstitutional, as could have happened in\textit{Arizona Christian}, or declared popular presidential spending initiatives unconstitutional, as could have happened below in\textit{Hein}. It would be even worse if the lower courts made similar determinations about taxing and spending

\textsuperscript{76}. Federal courts are particularly reluctant to intervene in state fiscal decisions, as the recent decision in\textit{Horne v. Flores} attests. 129 S. Ct. 2579, 2579 (2009). Consequently, when a lower federal court enjoins a state spending measure on constitutional grounds, the state is almost sure to petition for review, and the Supreme Court is highly likely to grant certiorari.
decisions by Congress. Imagine, for example, the outcry if the Court had denied certiorari in the various recent cases challenging the constitutionality of the so-called "individual mandate" in health care reform legislation.77

Enter the issue of standing. What if it were possible to slow down the pace and frequency of decision on the most pesky establishment issues, not only in the Supreme Court but in the lower courts as well? If the Court could somehow cut back on the whole federal docket of Establishment Clause cases, it might be possible to secure the period of relative decisional inactivity that the Court needs to work its way toward a new way of thinking. This would be particularly true if the standing rule cut off jurisdiction in a class of cases where the Court’s views were the least well formulated (or the most consistently divided), leaving jurisdiction intact in other circumstances where the formulation of a coherent new set of principles seemed more promising. It would also be particularly true if the cutoff of jurisdiction happened in cases where any lower court decisions going against the government would involve the kind of inter-branch confrontation that would put intense pressure on the Justices to intervene.

From this "breathing space" standpoint, the advantages of cutting back on taxpayer standing are particularly attractive for at least three reasons. First, the taxpayer standing rule of Flast is Establishment-Clause-specific. Given that taxpayer standing is already largely forbidden everywhere else,78 a decision to cut off that means for mounting an Establishment Clause challenge will not have any significant spillover to any other legal issue. There will be few, if any, unintended consequences for other areas of federal jurisdiction or federal law. Often, on jurisdictional matters, courts have to exercise care lest by deciding that they do not like standing in one class of cases, their decision creates precedent applicable to another class of cases where they think standing is appropriate. Not so here. Since Flast is a legal-issue-specific ruling, so is a rule rejecting Flast.

Second, the standing decision in this situation is categorical.79 Very often—as, for example, in some of the environmental standing cases80—a

79. In this respect, a rule rejecting taxpayer standing under the Establishment Clause would mirror the effect of the Court's ruling in United States v. Richardson, 418 U.S. 166, 179–80 (1974), denying taxpayer standing under the Statements and Accounts Clause, U.S Const. Art. I, § 9, cl. 7. The effect of Richardson has been to render the constitutional obligations of the Accounts Clause (whatever they might be) both unreviewable and unenforceable by the courts. There is virtually no decisional law on that issue, because no one can bring it into court.
decision regarding standing is based on factual criteria that if denied in one instance can, in subsequent decisions, be effectively overcome by a sufficiently determined set of would-be plaintiffs assisted by sufficiently clever and diligent legal counsel. Here, in contrast, a decision of no standing for the taxpayers in Hein or in Arizona Christian is effectively a decision of no standing for all taxpayers in comparable legal circumstances. It is the status of the plaintiff and the type of her injury, not the amount or timing of it, which controls the outcome. No other taxpayer will be able to surmount the standing barrier, either. Nor will anyone get the case to court on some alternative standing theory.

Third, the impact of ruling is asymmetrical in relation to substantive disputes about the content of the Establishment Clause. Denying taxpayer standing affects only those litigants who want stricter separation of church and state. It insulates from review only measures that tend to favor greater church-state interaction and that betoken potential increases in government financial support for religiously affiliated activities and organizations. Standing does not always have that kind of outcome-determinative valence, but it certainly does here. If that is (as I strongly suspect it is) the direction that any new substantive doctrinal departure from the Roberts Court is likely to take, the cutoff of taxpayer standing both prefigures and dovetails with the coming doctrinal shift.

A categorical rule on standing could, in theory, present difficulties for a Court intent on eventually replacing existing substantive doctrine if it cut off from consideration the very cases that could afford vehicles for announcing the change. But in the Establishment Clause context that is not really a problem, because there will be other Establishment Clause cases that remain in the Court's jurisdiction, and in some respects they may be better vehicles for making a doctrinal sea-change. In the United States, government support for religion usually comes in one of two different varieties. The first is substantive or functional support, which typically involves transfers of wealth through the auspices of tax benefits, spending, transfers of property, or some combination. The second is more formal, expressive, or symbolic support, as occurs when religious expression is privileged in a public space; the government absorbs religious messages into its own expression or symbolism; or the government exercises its regulatory power to advance religious activity.80 An anti-Flast rule cuts off

litigation on the first kind of government support at the pass. It simply stops those cases from coming to federal court, but it does little or nothing to affect jurisdiction in the other kinds of government support case—the ones where religious messages or activities get privileged or endorsed. In those arenas, the Court has allowed standing based on other personal characteristics besides taxpayer status, and it has acknowledged the presence of intangible psychic harm as a ground for "injury in fact." Unless the Court were to amend its standing views in those cases, they would remain on the lower court dockets, and the lower court decisions would provide continuing opportunities for eventual Supreme Court review.

The overall effect would be this: one entire class of difficult Establishment Clause cases where denying certiorari will be most difficult would go away, while another class of difficult Establishment Clause cases would remain. Establishment Clause litigation would by no means disappear, but its content would shift toward issues of expression and symbolism or coercive power rather than money, and toward matters of form rather than function. Since those cases rarely present the same sort of sweeping challenge to the existence of legislative and executive power, using certiorari denial as a way of keeping at least some of them off the Court docket may well be more satisfactory. And allowing lower court decisions to stand while the Court hunts a new doctrine will arguably do less overall long-term damage, since the merits decisions will often rest on factual nuances that facilitate ready legal distinction.

One interesting consequence of a move to cut off taxpayer standing in federal court is that it could well push some taxpayer cases into state court. The Supreme Court's dictates about the limits on judicial power under Article III obviously do not bind state courts, which derive their judicial power not from Article III but from their state constitutions. In many state courts, moreover, taxpayer standing is a relatively common (or at least not entirely unheard of) phenomenon, and jurisdictional limitations on suits by taxpayers are considerably more flexible than they are at the federal level. Theoretically, then, one response to an overruling of Flast at the federal level would be for challengers of state schemes for funding religion to take their claims to state court. Those courts would be obliged to apply federal constitutional doctrine to the merits, but as a practical matter their decisions

82. See discussion in Part I, supra.
would be immune from substantive Supreme Court review unless they ruled against the government. Given the historic tendency of state courts to favor greater church-government interaction than their federal counterparts, coupled with the prospect that most state courts will be loathe in any event to intervene on federal constitutional grounds in decisions by their own legislatures or executives, the need for the Court to take jurisdiction from this source presumably would be rare.

If state courts were particularly vigilant in giving existing Establishment Clause doctrine a separationist cast, this jurisdictional consequence could theoretically impede Supreme Court efforts to forge a new (assumedly more permissive) approach. But that is unlikely. Particularly in matters like Arizona Christian where the challengers are facing off against the state’s governor and legislature, the likelihood of a state court intervening to upset the other branches’ taxing or spending choices seems remote. This is particularly true where popular opinion runs in favor of religious support, and it is especially true in jurisdictions where the state judges themselves may eventually face election. Historically, with a few exceptions, state courts have taken a largely flexible and accommodating view of their own state constitutional restrictions on support of religion. So if taxpayer cases go to state court, the more likely outcome is that the courts’ substantive decisions will help rather than hinder a project of reframing Establishment Clause doctrine in a more permissive direction.

III. DOCTRINAL IMPLICATIONS

What I have discussed thus far treats jurisdiction and doctrine as interrelated but still analytically separate categories of reasoning. But in the Establishment Clause context, there are particularly strong reasons to think that a decision about jurisdiction is also very much a decision about merits. This is especially true when a decision about jurisdiction equally affects an entire class of potential plaintiffs, with the result of curtailing jurisdiction for an entire class of Establishment Clause cases. Such a decision is more than a decision on standing. It is also a substantive interpretation of the Establishment Clause.

Initially, as I have argued at length elsewhere, a decision to deny taxpayer standing under the Establishment Clause makes a powerful statement about what does (and more importantly what does not) constitute harm—

85. ASARCO, 490 U.S. at 617–18 (parties who lose a state court action on a matter of federal law have standing to seek Supreme Court review because “they are under a defined and specific legal obligation . . . which causes them direct injury”).
what counts as injury for constitutional purposes, and what does not.\textsuperscript{86} To fully understand this statement about the nature of injury, one must reconstruct what \textit{Flast} said and did, as well as how \textit{Flast} has been understood subsequently. \textit{Flast} did not rest its finding of standing solely on the financial interest of taxpayers. Rather, it coupled that financial interest with what the Court then perceived to be a closely connected psychic harm—the injury one experiences by being compelled to give financial support to religion. In \textit{Flast}, the Court drew on the origins of the Establishment Clause to recognize that government-compelled exactions to support religion were unacceptable to the framers, and that the psychic burden of such compelled exaction falls directly on taxpayers.\textsuperscript{87} It was the financial harm (which was admittedly slight) plus the Establishment Clause-specific psychic harm caused by an impermissible compelled exaction (which the Court regarded as both real and substantial) that supplied the requisite injury in fact.

By linking taxpayer standing under the Establishment Clause with taxpayer standing in other venues, Justice Kennedy’s opinion in \textit{Arizona Christian} disregards that historic connection.\textsuperscript{88} His opinion thus essentially treats the harm caused to taxpayers by taxing and spending to support religion as little different from the harm caused by any other allegedly illegal or unconstitutional taxing or spending measure. The logical thrust of this reasoning is to demote the constitutional status of the psychic harm itself. Government financial support for religion is no longer a form of constitutionally cognizable injury. It is not, therefore, the kind of harm that the Establishment Clause was meant to prevent. Or, alternatively, it was something the Establishment Clause was meant to prevent, but the framers failed to provide any workable constitutional method of preventing it. Either the First Amendment gives no right to prevent compelled exaction in aid of religion, or it gives a “right” that is effectively unenforceable—one to which the power of judicial review does not run. This is presently the situation for individuals attacking executive grant practices under \textit{Hein} and individuals attacking tax benefits under \textit{Arizona Christian}; if \textit{Flast} goes it will be the situation for all taxing and spending measures that funnel financial benefits to religious groups or uses.

Similarly, the Court’s reliance in \textit{Arizona Christian} on taxpayer standing decisions outside the Establishment Clause context, and particularly their separation of powers rationale, says something substantive about es-

\textsuperscript{86} Rahdert, \textit{supra} note 12, at 1055–56, 1072–73.
\textsuperscript{87} \textit{Flast v. Cohen}, 392 U.S. 83, 103–04 (1968).
There is a “positive pregnant” in the Court’s claim that it is not the business of the courts to adjudicate complaints about religious taxing and spending. The positive implication in that negative claim is that religious taxing and spending is the business (and exclusively so) of the political branches. By disclaiming judicial authority, the Court is reinforcing legislative and executive authority. Indeed, the Court is making that authority nearly exclusive by making it virtually unreviewable. It is, in effect, delegating the task of constitutional interpretation regarding the constitutional limits on state financial support for religion to the political branches, and hence to the dictates of majority rule. Taxing and spending for purposes of supporting religion becomes effectively a kind of “political question” where the applicable standards and outcomes are entrusted to the legislative and/or executive branches of government.

In this regard it is important to remember the categorical nature of the Court’s incipient no-taxpayer-standing rule. In other contexts, when one challenger is denied standing, there is usually some other kind of challenger who can step forward to adjudicate the claim. Not here. Consider, for example, the tax credits involved in Arizona Christian. If Arizona taxpayers cannot challenge them, who can? Beyond the taxpayers who receive the credit and the schools that benefit from them (all of whom experience benefit rather than injury and have no motive to challenge the law), the only parties immediately affected are those who must pay the taxes that offset the lost revenues resulting from the credits. But they are all in the same category as the challengers in Arizona Christian, meaning that the rule against taxpayer standing cuts off all their claims.

Is there anyone else? The only other options I can think of are legislators who voted against the tax breaks in the belief they were illegal, and/or others who lobbied for similar tax breaks for other activities but didn’t get them. But of course, legislative standing is nearly as frowned upon as tax-

89. Particularly noteworthy in this context is the Court’s heavy reliance on DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006), which rejected taxpayer standing in a strictly economic setting. In doing so, the Court effectively ignored the possibility of psychic harm resulting from governmental financial support for religious schools through its tax credit system.

90. Arizona Christian’s anti-taxpayer-standing rule functions in this regard in much the same way as the “political question” doctrine: as a determination that a question has been given over to another branch of government. Cf. Baker v. Carr, 369 U.S. 186, 217 (treating political question doctrine as applicable where there is “a textually demonstrable commitment of the issue to a coordinate political department”).

91. Id.

92. In her dissent, Justice Kagan suggested that some school children and their parents might potentially have standing to challenge Arizona’s tax credit scheme, but she did not elaborate on how their claims might arise. Ariz. Christian, 131 S. Ct. at 1457 n.7.
payer standing, and the injury of other would-be tax-credit-beneficiaries is far too speculative to survive even a casual application of the Court's traditional three-step standing "test." Even if their inability to secure comparable tax benefits qualified as an injury, it is hard to see how it was caused by the grant of tax benefits to private-school donors, and the injury is almost certainly incapable of judicial redress, since prohibiting one form of tax credit won't trigger the creation of another.

So the outcome (as it was for property transfers after Valley Forge and most likely will be for faith-based grant preferences after Hein) is that in many instances no one can sue. As commentators on the political question doctrine have observed, when a jurisdictional ruling amounts to a conclusion that no one can sue, it also amounts to a substantive conclusion that courts have no power to rule on the question. And when courts cannot rule on a question of constitutional law, their incapacity effectively delegates final authority to interpret the provision in question (at least in that context) to one or both of the other branches of government. In Hein and Valley Forge, the authority went to the federal executive. In Arizona Christian, it goes to the state legislature—except, as I noted above, to the extent that state courts are willing to step in.

This substantive ramification arguably tells us a great deal about the direction of the Court's future doctrinal thinking. If spending in support of religion is just like spending in support of, say, the automotive industry, and if no greater or more constitutionally significant injury happens when one occurs than when the other, then religious spending is just another feature of the pork-barreled, lobbying-dominated world of earmarked spending and targeted tax breaks. Like every other would-be special interest beneficiary of government and largesse, religion needs to roll up its sleeves, roll out its grass-roots, and hire influence-peddling agents to get what it wants and needs from government. As is always the case in that process, there will be winners and losers. Some religions will be more successful than others, and some may fail entirely in their appeals for government help. But as far as the courts are concerned, so be it. As Justice Scalia

94. Allen v. Wright, 468 U.S. 737, 751 (1986) (requiring "injury in fact" that is "traceable" to (or caused by) defendant's conduct and "redress[able]" by the courts).
implied in a partly related context in Employment Division v. Smith, that's just the way the democratic cookie crumbles.\textsuperscript{96}

**CONCLUSION**

Whether the imminent elimination of taxpayer standing in establishment matters is a good or bad development depends very much on what future direction one thinks law on the Establishment Clause should take. If one believes that financial arrangements between church and state are generally permissible, and that the democratically elected majorities in Congress and state legislatures can be trusted to set for themselves appropriate limits on how, when, and to what degree to lend government financial support to religious activities and services, then a rule which denies taxpayers standing to challenge those arrangements on First Amendment grounds seems unobjectionable. All it does is avoid unnecessary and inappropriate judicial meddling with what ought to be, from this perspective, legitimate grist for the legislative mill.

On the other hand, if one believes that the Establishment Clause was meant to prohibit most forms of government financial support for religion, and that government financial support for religiously affiliated services and activities should be closely monitored for constitutionality by the courts, then a rule against taxpayer standing impairs the capacity of the judiciary to perform its proper constitutional function and leaves the political branches free to disregard the First Amendment's command at will. Without taxpayer standing, there is a substantial risk that unconstitutional government measures to subsidize preferred religious groups or activities will effectively evade meaningful judicial review.\textsuperscript{97}

In a similar vein, if one believes that the Establishment Clause is primarily about limits on regulatory power and/or symbolism, but that it has little if anything to say about formally neutral but functionally preferential systems of financial aid to religion, then a no-taxpayer-standing rule only cuts off claims that are of no particular constitutional moment. Conversely, if one believes that functional and formal government benefits for religion are of equal importance in striking the proper constitutional relationship

\textsuperscript{96} 494 U.S. 872, 890 (1990) ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

\textsuperscript{97} As I have expressed elsewhere, this is my personal view. See Rahdert, supra note 12, at 1014 (concluding that "the Hein Court may well have taken the wrong fork" on taxpayer standing in Establishment Clause cases).
between church and state, then a no-taxpayer-standing rule risks a doctrinal imbalance in which the formalities of government-church interaction are judicially supervised but underlying functional financial interactions escape judicial cognizance.

Reading the tea leaves of jurisdiction, then, gives us a glimpse into what may be the impending doctrinal shift on the Supreme Court. If the Court overrules *Flast*, its action will send a strong signal that the Court intends to set functional financial government support for religion largely free from judicial oversight, and to concentrate its efforts instead on more formal regulatory, symbolic, or programmatic church-state interactions. As a consequence, the new doctrine under development on the Court is likely to be relatively unconcerned with “primary effect” or “entanglement,” because these inquiries look at functional outcomes rather than formal inputs. Instead, the Court’s new doctrine is more likely to be concerned with matters like “religious purpose,” “coercion,” and perhaps some forms of “endorsement,” because these inquiries potentially concern formal government actions for which religious difference and psychic harm still evidently matter. But in these areas what will matter most is whether the government is aiming by its actions to secure religious advantage for some faith or group of faiths. Outright government promotion of a religious message or activity because of its religious content may still be prohibited, but use of religious means to accomplish either non-religious or mixed (religious and nonreligious) ends will be treated much more flexibly, so long as the government steers clear of specific, overt, and concretely demonstrable religious preferences.

If this looks like a substantial trimming of the Establishment Clause’s doctrinal shrubbery, that is because it probably is. The same judicial impulses that favor what I have termed Establishment Clause “court reform” also probably support similar paring of operating Establishment Clause principles. If (as I suspect) the Court is working its way toward a new constitutional Establishment Clause doctrine, it is likely to select, from among the various criteria and factors that have been at play in recent case law, a streamlined set of criteria that emphasizes only those factors that are most closely related to the now stripped-down focus of the Court on Establishment Clause issues.

In this regard, it may well be significant that *Lemon* was about government spending to support religious education, and that the taxpayer suits in the case were enabled by *Flast*. Thus the Court’s *Lemon* test, though it

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98. One might call this impulse a desire for “Establishment Clause simplification.”
gathered together criteria from earlier cases that did not involve funding, was forged in the context of defining functional limitations on government financial religious support. With Flast gone, and most religious funding cases with it, the Court may be able to find new criteria that deal more directly with the other kinds of establishment issues remaining on its docket, and that better reflect for those milieux the permissive approach that the Court majority is presumably aiming to achieve. If this is correct, then the elimination of taxpayer standing is not only a mechanism for finding breathing space, but an actual prelude to emergent new Establishment Clause thinking.