B. Standing to Challenge Establishment Clause Violations

FLAST v. COHEN, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

392 U.S. 83 (1968)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), this Court ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. That ruling has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers. In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment.

Appellants filed suit in the United States District Court for the Southern District of New York to enjoin the allegedly unconstitutional expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965. It is clear from the complaint that the appellants were resting their standing to maintain the action solely on their status as federal taxpayers.

The gravamen of the appellants' complaint was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment. The Government moved to dismiss the complaint on the ground that appellants lacked standing to maintain the action.

This Court first faced squarely the question whether a litigant asserting only his status as a taxpayer has standing to maintain a suit in a federal court in *Frothingham* v. *Mellon* and that decision must be the starting point for analysis in this case. The taxpayer in *Frothingham* attacked as unconstitutional the Maternity Act of 1921, which established a federal program of grants to those States which would undertake programs to reduce maternal and infant mortality. The taxpayer alleged that Congress had exceeded the powers delegated to it under Article I and had invaded the legislative province reserved to the several States by the Tenth Amendment. The taxpayer complained that the result of the allegedly unconstitutional enactment would be to increase her future federal tax liability and "thereby take her property without due process of law." The Court noted that a federal taxpayer's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminable" and that "the effect upon future taxation, of any payment out of the [Treasury's] funds, . . . [is] remote, fluctuating and uncertain." As a result, the Court ruled that the taxpayer had failed to allege the type of "direct injury" necessary to confer standing.

Although the barrier *Frothingham* erected against federal taxpayer suits has never been

breached, the decision has been the source of some confusion and the object of considerable criticism. The confusion has developed as commentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled. The opinion delivered in *Frothingham* can be read to support either position. Yet the concrete reasons given for denying standing to a federal taxpayer suggest that the Court's holding rests on something less than a constitutional foundation. For example, the Court conceded that standing had previously been conferred on municipal taxpayers to sue in that capacity. However, the Court viewed the interest of a federal taxpayer in total federal tax revenues as "comparatively minute and indeterminable" when measured against a municipal taxpayer's interest in a smaller city treasury. This suggests that the petitioner in *Frothingham* was denied standing not because she was a taxpayer but because her tax bill was not large enough. In addition, the Court spoke of the "attendant inconveniences" of entertaining that taxpayer's suit because it might open the door of federal courts to countless such suits. Such a statement suggests pure policy considerations.

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. The judicial power of federal courts is restricted to "cases" and "controversies." Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Justiciability is itself a concept of uncertain meaning and scope. Part of the difficulty in giving precise meaning and form to the concept of justiciability stems from the uncertain historical antecedents of the case-and-controversy doctrine. Additional uncertainty exists in the doctrine of justiciability because that doctrine has become a blend of constitutional requirements and policy considerations. And a policy limitation is "not always clearly distinguished from the constitutional limitation." The "many subtle pressures" which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.

It is in this context that the standing question presented by this case must be viewed and that the Government's argument on that question must be evaluated. As we understand it, the Government's position is that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, present an absolute bar to taxpayer suits challenging the validity of federal spending programs. The Government views such suits as involving no more than the mere disagreement by the taxpayer "with the uses to which tax money is put." According to the Government, the resolution of such disagreements is committed to other branches of the Federal Government and not to the judiciary. Consequently, the Government contends that, under no circumstances, should standing be conferred on federal taxpayers to challenge a federal taxing or spending program. An analysis of the function served by standing limitations

compels a rejection of the Government's position.

Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of "the most amorphous [concepts] in the entire domain of public law." Some of the complexities peculiar to standing problems result because standing "serves, on occasion, as a shorthand expression for all the various elements of justicability." In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.

Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. A proper party is demanded so that federal courts will not be asked to decide "ill-defined controversies over constitutional issues," or a case which is of "a hypothetical or abstract character." So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits, or those which are feigned or collusive in nature.

When the emphasis in the standing problem is placed on whether the person invoking a federal court's jurisdiction is a proper party to maintain the action, the weakness of the Government's argument in this case becomes apparent. The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy," and whether the dispute touches upon "the legal relations of parties having adverse legal interests." A taxpayer may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case. Therefore, we find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III.

The various rules of standing applied by federal courts have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. Our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power. Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.

The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds.[1] In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.

The allegations of the taxpayer in *Frothingham* v. *Mellon*, were quite different from those made in this case, and the result in *Frothingham* is consistent with the test of taxpayer standing announced today. The taxpayer in *Frothingham* attacked a federal spending program and she, therefore, established the first nexus required. However, she lacked standing because

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[1] Almost $ 1,000,000,000 was appropriated to implement the Elementary and Secondary Education Act in 1965.

her constitutional attack was not based on an allegation that Congress had breached a specific limitation upon its taxing and spending power. The taxpayer in *Frothingham* alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Art. I, § 8, and that Congress had thereby invaded the legislative province reserved to the States by the Tenth Amendment. To be sure, Mrs. Frothingham made the additional allegation that her tax liability would be increased as a result of the allegedly unconstitutional enactment, and she framed that allegation in terms of a deprivation of property without due process of law. However, the Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability, and the taxpayer in *Frothingham* failed to make any additional claim that the harm she alleged resulted from a breach by Congress of the specific constitutional limitations imposed upon an exercise of the taxing and spending power. In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power.

We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, § 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress. Consequently, we 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. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review. Under such circumstances, we feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution.

MR. JUSTICE DOUGLAS, concurring.

While I have joined the opinion of the Court, I do not think that the test it lays down is a durable one for the reasons stated by my Brother HARLAN. I think, therefore, that it will suffer erosion and in time result in the demise of *Frothingham* v. *Mellon*. It would therefore be the part of wisdom to be rid of *Frothingham* here and now.

I do not view with alarm, as does my Brother HARLAN, the consequences of that course. *Frothingham*, decided in 1923, was in the heyday of substantive due process, when courts were sitting in judgment on the wisdom or reasonableness of legislation. It was that judicial attitude, not the theory of standing to sue rejected in *Frothingham*, that involved "important hazards for the continued effectiveness of the federal judiciary." A contrary result in

Frothingham in that setting might well have accentuated an ominous trend to judicial supremacy. But we no longer undertake to exercise that kind of power.

Most laws passed by Congress do not contain even a ghost of a constitutional question. The case or controversy requirement comes into play only when the Federal Government does something that affects a person's life, his liberty, or his property. The wrong may be slight or it may be grievous. It therefore does not do to talk about taxpayers' interest as "infinitesimal." The restraint on "liberty" may be fleeting and passing and still violate a fundamental constitutional guarantee. The "three pence" mentioned by Madison may signal a monstrous invasion by the Government into church affairs, and so on.

The States have experimented with taxpayers' suits and with only two exceptions 2 now allow them. A few state decisions are frankly based on the theory that a taxpayer is a private attorney general seeking to vindicate the public interest. Some of them require that the taxpayer have more than an infinitesimal financial stake in the problem. At the federal level, Congress can of course define broad categories of "aggrieved" persons who have standing to litigate cases or controversies. But, contrary to what my Brother HARLAN suggests, the failure of Congress to act has not barred this Court from allowing standing to sue.

Taxpayers can be vigilant private attorneys general. Their stake in the outcome of litigation may be de minimis by financial standards, yet very great when measured by a particular constitutional mandate. We have a written Constitution; and it is full of "thou shalt nots" directed at Congress and the President as well as at the courts. And the role of the federal courts is not only to serve as referee between the States and the center but also to protect the individual against prohibited conduct by the other two branches of the Federal Government.

There has long been a school of thought here that the less the judiciary does, the better. It is often said that judicial intrusion should be infrequent. The late Edmond Cahn, who opposed that view, stated my philosophy. He emphasized the importance of the role that the federal judiciary was designed to play in guarding basic rights against majoritarian control. The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.

Marshall wrote in *Marbury* v. *Madison* that if the judiciary stayed its hand in deference to the legislature, it would give the legislature "a practical and real omnipotence." My Brother HARLAN's view would do just that, for unless Congress created a procedure through which its legislative creation could be challenged quickly and with ease, the momentum of what it had done would grind the dissenter under.

We have a Constitution designed to keep government out of private domains. But the fences have often been broken down; and *Frothingham* denied effective machinery to restore them. The Constitution even with the judicial gloss it has acquired plainly is not adequate to protect the individual against the growing bureaucracy in the Legislative and Executive Branches. He faces a formidable opponent in government, even when he is endowed with

funds and with courage.

There need be no inundation of the federal courts if taxpayers' suits are allowed. There is a wise judicial discretion that usually can distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing, and the like. When the judiciary is no longer "a great rock" in the storm, when the courts are niggardly in the use of their power and reach great issues only timidly and reluctantly, the force of the Constitution in the life of the Nation is greatly weakened.

MR. JUSTICE STEWART, concurring.

I join the judgment and opinion of the Court, which I understand to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment. Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution.

As the Court notes, "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." Today's decision no more than recognizes that the appellants have a clear stake as taxpayers in assuring that they not be compelled to contribute even "three pence . . . of [their] property for the support of any one establishment."

MR. JUSTICE FORTAS, concurring.

I would confine the ruling in this case to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause. There is no reason to suggest that there may be other types of congressional expenditures which may be attacked by a litigant solely on the basis of his status as a taxpayer.

I agree that *Frothingham* does not foreclose today's result. I agree that the congressional powers to tax and spend are limited by the prohibition upon Congress to enact laws "respecting an establishment of religion." This thesis, slender as its basis is, provides a direct "nexus," as the Court puts it, between the use and collection of taxes and the congressional action here. Because of this unique "nexus," in my judgment, it is not far-fetched to recognize that a taxpayer has a special claim to status as a litigant in a case raising the "establishment" issue. This special claim is enough, I think, to permit us to allow the suit, coupled, as it is, with the interest which the taxpayer and all other citizens have in the church-state issue. In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer -- and upon the life of all citizens.

MR. JUSTICE HARLAN, dissenting.

The problems presented by this case are narrow and relatively abstract, but the principles

by which they must be resolved involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system. The nub of my view is that the end result of *Frothingham* v. *Mellon* was correct, even though I do not subscribe to all of its reasoning and premises. Although I therefore agree with certain of the conclusions reached today by the Court, I cannot accept the standing doctrine that it substitutes for *Frothingham*, for it seems to me that this new doctrine rests on premises that do not withstand analysis.

The Court's analysis consists principally of the observation that the requirements of standing are met if a taxpayer has the "requisite personal stake in the outcome" of his suit. This does not, of course, resolve the standing problem; it merely restates it. The Court implements this standard with the declaration that taxpayers will be "deemed" to have the necessary personal interest if their suits satisfy two criteria: *first*, the challenged expenditure must form part of a federal spending program, and not merely be "incidental" to a regulatory program; and *second*, the constitutional provision under which the plaintiff claims must be a "specific limitation" upon Congress' spending powers. The difficulties with these criteria are many and severe, but it is enough for the moment to emphasize that they are not in any sense a measurement of any plaintiff's interest in the outcome of any suit. As even a cursory examination of the criteria will show, the Court's standard for the determination of standing and its criteria for the satisfaction of that standard are entirely unrelated.

It is surely clear that a plaintiff's interest in the outcome of a suit in which he challenges the constitutionality of a federal expenditure is not made greater or smaller by the unconnected fact that the expenditure is, or is not, "incidental" to an "essentially regulatory" program. An example will illustrate the point. Assume that two independent federal programs are authorized by Congress, that the first is designed to encourage a specified religious group by the provision to it of direct grants-in-aid, and that the second is designed to discourage all other religious groups by the imposition of various forms of discriminatory regulation. Equal amounts are appropriated by Congress for the two programs. If a taxpayer challenges their constitutionality in separate suits, are we to suppose, as evidently does the Court, that his "personal stake" in the suit involving the second is necessarily smaller than it is in the suit involving the first, and that he should therefore have standing in one but not the other?

Presumably the Court does not believe that regulatory programs are necessarily less destructive of First Amendment rights, or that regulatory programs are necessarily less prodigal of public funds than are grants-in-aid, for both these general propositions are demonstrably false. The Court's disregard of regulatory expenditures is not even a logical consequence of its apparent assumption that taxpayer-plaintiffs assert essentially monetary interests, for it surely cannot matter to a taxpayer *qua* taxpayer whether an unconstitutional expenditure is used to hire the services of regulatory personnel or is distributed among private and local governmental agencies as grants-in-aid. His interest as taxpayer arises, if at all, from the fact of an unlawful expenditure, and not as a consequence of the expenditure's form. Apparently the Court has repudiated the emphasis in *Frothingham* upon the amount of the plaintiff's tax bill, only to substitute an equally irrelevant emphasis upon the form of the challenged expenditure.

The Court's second criterion is similarly unrelated to its standard for the determination of standing. The intensity of a plaintiff's interest in a suit is not measured, even obliquely, by the

fact that the constitutional provision under which he claims is, or is not, a "specific limitation" upon Congress' spending powers. Thus, among the claims in *Frothingham* was the assertion that the Maternity Act deprived the petitioner of property without due process of law. The Court has evidently concluded that this claim did not confer standing because the Due Process Clause of the Fifth Amendment is not a specific limitation upon the spending powers. Disregarding for the moment the formidable obscurity of the Court's categories, how can it be said that Mrs. Frothingham's interests in her suit were, as a consequence of her choice of a constitutional claim, necessarily less intense than those, for example, of the present appellants? I am quite unable to understand how, if a taxpayer believes that a given public expenditure is unconstitutional, and if he seeks to vindicate that belief in a federal court, his interest in the suit can be said necessarily to vary according to the constitutional provision under which he states his claim.

Although the Court does not altogether explain its position, the essence of its reasoning is evidently that, because of the Establishment Clause's historical purposes, taxpayers retain rights under it quite different from those held by them under other constitutional provisions. The difficulties with this position are several. First, we have recently been reminded that the historical purposes of the religious clauses of the First Amendment are significantly more obscure and complex than this Court has heretofore acknowledged. Above all, the evidence seems clear that the First Amendment was not intended simply to enact the terms of Madison's Memorial and Remonstrance against Religious Assessments. I do not suggest that history is without relevance to these questions, or that the use of federal funds for religious purposes was not a form of establishment that many in the 18th century would have found objectionable. I say simply that, given the ultimate obscurity of the Establishment Clause's historical purposes, it is inappropriate for this Court to draw fundamental distinctions among the several constitutional commands upon the supposed authority of isolated dicta extracted from the clause's complex history. In particular, I have not found historical evidence that properly permits the Court to distinguish, as it has here, among the Establishment Clause, the Tenth Amendment, and the Due Process Clause of the Fifth Amendment as limitations upon Congress' taxing and spending powers.

The Court's position is equally precarious if it is assumed that its premise is that the Establishment Clause is in some uncertain fashion a more "specific" limitation upon Congress' powers than are the various other constitutional commands. The provisions with which the Court is concerned contain nothing that is expressly directed at the expenditure of public funds. The specificity to which the Court repeatedly refers must therefore arise, not from the provisions' language, but from something implicit in their purposes. If the Court accepts the proposition, as I do, that the number and scope of public actions should be restricted, there are, as I shall show, methods more appropriate, and more nearly permanent, than the creation of an amorphous category of constitutional provisions that the Court has deemed, without adequate foundation, "specific limitations" upon Congress' spending powers.

Even if it is assumed that such distinctions may properly be drawn, it does not follow that federal taxpayers hold any "personal constitutional right" such that they may each contest the validity under the Establishment Clause of all federal expenditures. The difficulty, with which the Court never comes to grips, is that taxpayers' suits under the Establishment Clause are not

in these circumstances meaningfully different from other public actions. If this case involved a tax specifically designed for the support of religion, I would agree that taxpayers have rights under the religious clauses that would permit them standing to challenge the tax's validity in the federal courts. But this is not such a case, and appellants challenge an expenditure, not a tax. Where no such tax is involved, a taxpayer's complaint can consist only of an allegation that public funds have been, or shortly will be, expended for purposes inconsistent with the Constitution. The interests he represents, and the rights he espouses, are those held in common by all citizens. To describe those rights and interests as personal, and to intimate that they are in some unspecified fashion to be differentiated from those of the general public, reduces constitutional standing to a word game played by secret rules.

Apparently the Court, having successfully circumnavigated the issue, has merely returned to the proposition from which it began. A litigant, it seems, will have standing if he is "deemed" to have the requisite interest, and "if you . . . have standing, then you can be confident you are" suitably interested.

It seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary. Although I believe such actions to be within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they press to the limit judicial authority. There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government. The powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government.

Presumably the Court recognizes at least certain of these hazards, else it would not have troubled to impose limitations upon the situations in which, and purposes for which, such suits may be brought. Nonetheless, the limitations adopted by the Court are wholly untenable. This is the more unfortunate because there is available a resolution of this problem that entirely satisfies the demands of the principle of separation of powers. This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits. I would adhere to that principle. Any hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President. I appreciate that this Court does not ordinarily await the mandate of other branches of the Government, but it seems to me that the extraordinary character of public actions, and of the mischievous, if not dangerous, consequences they involve for the proper functioning of our constitutional system, and in particular of the federal courts, makes such judicial forbearance the part of wisdom.

Such a rule could be applied to this case. Although various efforts have been made in Congress to authorize public actions to contest the validity of federal expenditures in aid of religiously affiliated schools and other institutions, no such authorization has yet been given.

This does not mean that we would, under such a rule, be enabled to avoid our constitutional responsibilities. The question here is not whether the religious clauses of the

First Amendment are hereafter to be enforced by the federal courts; the issue is simply whether plaintiffs of an *additional* category, heretofore excluded from those courts, are to be permitted to maintain suits. The recent history of this Court is replete with illustrations that questions involving the religious clauses will not, if federal taxpayers are prevented from contesting federal expenditures, be left "unacknowledged, unresolved, and undecided."

VALLEY FORGE CHRISTIAN COLLEGE v. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC.

454 U.S. 464 (1982)

JUSTICE REHNQUIST delivered the opinion of the Court.

I

Article IV, § 3, cl. 2, of the Constitution vests Congress with the "Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." Shortly after the termination of hostilities in the Second World War, Congress enacted the Federal Property and Administrative Services Act of 1949. The Act was designed, in part, to provide "an economical and efficient system for . . . the disposal of surplus property." In furtherance of this policy, federal agencies are directed to maintain adequate inventories of the property under their control and to identify excess property for transfer to other agencies able to use it. Property that has outlived its usefulness to the Federal Government is declared "surplus" and may be transferred to private or other public entities.

The Act authorizes the Secretary of Health, Education, and Welfare (now the Secretary of Education) to assume responsibility for disposing of surplus real property "for school, classroom, or other educational use." Subject to the disapproval of the Administrator of General Services, the Secretary may sell or lease the property to nonprofit, tax-exempt educational institutions for consideration that takes into account "any benefit which has accrued or may accrue to the United States" from the transferee's use of the property.[1] By regulation, the Secretary has provided for the computation of a "public benefit allowance," which discounts the transfer price of the property "on the basis of benefits to the United States from the use of such property for educational purposes."[2]

The property which spawned this litigation was acquired by the Department of the Army

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[1] The property is to "be awarded to the applicant having a program of utilization which provides, in the opinion of the Department [of Education], the greatest public benefit."

[2] In calculating the public benefit allowance, the Secretary considers factors such as the applicant's educational accreditation, sponsorship of public service training, plans to introduce new instructional programs, commitment to student health and welfare, research, and service to the handicapped.

in 1942, as part of a larger tract of land northwest of Philadelphia. The Army built on that land the Valley Forge General Hospital, and for 30 years thereafter, that hospital provided medical care for members of the Armed Forces. In April 1973, the Secretary of Defense proposed to close the hospital, and the General Services Administration declared it to be "surplus property."

The Department of Health, Education, and Welfare (HEW) eventually assumed responsibility for disposing of portions of the property, and in August 1976, it conveyed a 77-acre tract to petitioner, the Valley Forge Christian College. The appraised value of the property at the time of conveyance was $ 577,500. This appraised value was discounted, however, by the Secretary's computation of a 100% public benefit allowance, which permitted petitioner to acquire the property without making any financial payment for it. The deed from HEW conveyed the land in fee simple with certain conditions subsequent, which required petitioner to use the property for 30 years solely for the educational purposes described in petitioner's application. In that description, petitioner stated its intention to conduct "a program of education . . . meeting the accrediting standards of the State of Pennsylvania, The American Association of Bible Colleges, the Division of Education of the General Council of the Assemblies of God and the Veterans Administration."

Petitioner is a nonprofit educational institution operating under the supervision of a religious order known as the Assemblies of God. By its own description, petitioner's purpose is "to offer systematic training on the collegiate level to men and women for Christian service as either ministers or laymen." Faculty members must "have been baptized in the Holy Spirit and be living consistent Christian lives," and all members of the college administration must be affiliated with the Assemblies of God. In its application for the 77-acre tract, petitioner represented that, if it obtained the property, it would make "additions to its offerings in the arts and humanities," and would strengthen its "psychology" and "counseling" courses to provide services in inner-city areas.

In September 1976, respondents Americans United for Separation of Church and State, Inc. (Americans United), and four of its employees, learned of the conveyance through a news release. Two months later, they brought suit to challenge the conveyance on the ground that it violated the Establishment Clause. In its amended complaint, Americans United described itself as a nonprofit organization composed of 90,000 "taxpayer members." The complaint asserted that each member "would be deprived of the fair and constitutional use of his (her) tax dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution." Respondents sought a declaration that the conveyance was null and void, and an order compelling petitioner to transfer the property back to the United States.

The District Court granted summary judgment and dismissed the complaint. The court found that respondents lacked standing to sue as taxpayers. Respondents appealed to the Court of Appeals for the Third Circuit, which reversed the judgment of the District Court by a divided vote. All members of the court agreed that respondents lacked standing as taxpayers to challenge the conveyance under *Flast* v. *Cohen* since that case extended standing to taxpayers *qua* taxpayers only to challenge congressional exercises of the power to tax and spend conferred by Art. I, § 8, of the Constitution, and this conveyance was authorized by

legislation enacted under the authority of the Property Clause, Art. IV, § 3, cl. 2. Notwithstanding this significant factual difference from *Flast*, the majority of the Court of Appeals found that respondents had standing merely as "citizens," claiming "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" In the majority's view, this "citizen standing" was sufficient to satisfy the "case or controversy" requirement of Art. III. Because of the unusually broad and novel view of standing to litigate a substantive question in the federal courts adopted by the Court of Appeals, we granted certiorari and we now reverse.

II

This Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated. The term "standing" subsumes a blend of constitutional requirements and prudential considerations. At an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." In this manner does Art. III limit the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."

The requirement of "actual injury redressable by the court" serves several of the "implicit policies embodied in Article III." It tends to assure that the legal questions presented to the court will be resolved in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The "standing" requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch. While the propriety of such action by a federal court has been recognized since *Marbury* v. *Madison*, it has been recognized as a tool of last resort throughout its nearly 200 years of existence.

Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," most appropriately addressed in the representative branches. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

Merely to articulate these principles is to demonstrate their close relationship to the policies reflected in the Art. III requirement of actual or threatened injury amenable to judicial remedy. But neither the counsels of prudence nor the policies implicit in the "case or

controversy" requirement should be mistaken for the rigorous Art. III requirements themselves. Satisfaction of the former cannot substitute for a demonstration of "'distinct and palpable injury' . . . that is likely to be redressed if the requested relief is granted." That requirement states a limitation on judicial power, not merely a factor to be balanced in the weighing of so-called "prudential" considerations.

We need not mince words when we say that the concept of "Art. III standing" has not been defined with complete consistency in all of the various cases decided by this Court. But of one thing we may be sure: Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States.

III

The injury alleged by respondents in their amended complaint is the "[deprivation] of the fair and constitutional use of [their] tax dollar." In *Flast* v. *Cohen*, 392 U.S. 83 (1968), the taxpayer plaintiffs sought to enjoin the expenditure of federal funds under the Elementary and Secondary Education Act of 1965, which they alleged were being used to support religious schools in violation of the Establishment Clause. The Court developed a two-part test to determine whether the plaintiffs had standing to sue. First, the Court held that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." Second, the Court required the taxpayer to "show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." The plaintiffs in *Flast* satisfied this test because "[their] constitutional challenge [was] made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare," and because the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8."

Unlike the plaintiffs in *Flast*, respondents fail the first prong of the test for taxpayer standing. Their claim is deficient in two respects. First, the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property.[3] *Flast* limited taxpayer standing to challenges directed "only [at] exercises of congressional power."

Second, and perhaps redundantly, the property transfer about which respondents complain was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8. The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2. Respondents do not dispute this conclusion, and it is decisive of any claim of taxpayer standing under the *Flast* precedent.

Respondents, therefore, are plainly without standing to sue as taxpayers. The Court of Appeals apparently reached the same conclusion. It remains to be seen whether respondents

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[3] Respondents do not challenge the constitutionality of the Federal Property and Administrative Services Act itself, but rather a particular Executive Branch action arguably authorized by the Act.

have alleged any other basis for standing to bring this suit.

IV

Although the Court of Appeals properly doubted respondents' ability to establish standing solely on the basis of their taxpayer status, it considered their allegations of taxpayer injury to be "essentially an assumed role." "Plaintiffs have no reason to expect, nor perhaps do they care about, any personal tax saving that might result should they prevail. The crux of the interest at stake, the plaintiffs argue, is found in the Establishment Clause, not in the supposed loss of money as such. As a matter of primary identity, therefore, the plaintiffs are not so much taxpayers as separationists. . . ."

In the court's view, respondents had established standing by virtue of an "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" The court distinguished this "injury" from "the question of 'citizen standing' as such." Although citizens generally could not establish standing simply by claiming an interest in governmental observance of the Constitution, respondents had "set forth instead a particular and concrete injury" to a "personal constitutional right."

In finding that respondents had alleged something more than "the generalized interest of all citizens in constitutional governance," the Court of Appeals decided that "it is at the very least arguable that the Establishment Clause creates in each citizen a 'personal constitutional right' to a government that does not establish religion." To the extent the Court of Appeals relied on a view of standing under which the Art. III burdens diminish as the "importance" of the claim on the merits increases, we reject that notion. The requirement of standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Moreover, we know of no principled basis on which to create a hierarchy of constitutional values or a complementary "sliding scale" of standing which might permit respondents to invoke the judicial power of the United States. "The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."

Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[That] concrete adverseness which sharpens the presentation of issues" is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

In reaching this conclusion, we do not retreat from our earlier holdings that standing may be predicated on noneconomic injury. We simply cannot see that respondents have alleged an *injury of any* kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D. C.

They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.

V

The Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing. It appears to have done so out of the conviction that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege "'distinct and palpable injury to himself,' . . . that is likely to be redressed if the requested relief is granted."

Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause. Respondents' claim of standing implicitly rests on the presumption that violations of the Establishment Clause typically will not cause injury sufficient to confer standing under the "traditional" view of Art. III. But "[the] assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." This view would convert standing into a requirement that must be observed only when satisfied. Moreover, we are unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit. The law of averages is not a substitute for standing.

Were we to accept respondents' claim of standing in this case, there would be no principled basis for confining our exception to litigants relying on the Establishment Clause. Ultimately, that exception derives from the idea that the judicial power requires nothing more for its invocation than important issues and able litigants. The existence of injured parties who might not wish to bring suit becomes irrelevant. Because we are unwilling to countenance such a departure from the limits on judicial power contained in Art. III, the judgment of the Court of Appeals is reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

It is apparent that the test of standing formulated by the Court in *Flast* sought to reconcile the developing doctrine of taxpayer "standing" with the Court's historical understanding that the Establishment Clause was intended to prohibit the Federal Government from using tax funds for the advancement of religion, and thus the constitutional imperative of taxpayer standing in certain cases brought pursuant to the Establishment Clause. The two-pronged "nexus" test offered by the Court, despite its general language, is best understood as "a determinant of standing of plaintiffs alleging only injury as taxpayers who challenge alleged violations of the Establishment and Free Exercise Clauses of the First Amendment," and not as a general statement of standing principles. The test explains what forms of governmental

action may be attacked by someone alleging *only* taxpayer status, and, without ruling out the possibility that history might reveal another similarly founded provision, explains why an Establishment Clause claim is treated differently from any other assertion that the Federal Government has exceeded the bounds of the law in allocating its largesse. Thus, Flast required, as the first prong of its test, that the taxpayer demonstrate a logical connection between his taxpayer status and the type of legislation attacked. Appellants' challenge to a program of grants to educational institutions clearly satisfied this first requirement. As the second prong, appellants were required to show a connection between their status and the precise nature of the infringement alleged. They had no difficulty meeting this requirement: the Court agreed that the Establishment Clause jealously protects taxpayers from diversion of their funds to the support of religion through the offices of the Federal Government.

The nexus test that the Court "announced" sought to maintain necessary continuity with prior cases, and set forth principles to guide future cases involving taxpayer standing. But *Flast* did not depart from the principle that no judgment about standing should be made without a fundamental understanding of the rights at issue. The two-part *Flast* test did not supply the rationale for the Court's decision, but rather its exposition: That rationale was supplied by an understanding of the nature of the restrictions on government power imposed by the Constitution and the intended beneficiaries of those restrictions.

It may be that Congress can tax for *almost* any reason, or for no reason at all. There is, so far as I have been able to discern, but one constitutionally imposed limit on that authority. Congress cannot use tax money to support a church, or to encourage religion. That is *"the* forbidden exaction." In absolute terms the history of the Establishment Clause of the First Amendment makes this clear. History also makes it clear that the federal taxpayer is a singularly "proper and appropriate party to invoke a federal court's jurisdiction" to challenge a federal bestowal of largesse as a violation of the Establishment Clause. Each, and indeed every, federal taxpayer suffers precisely the injury that the Establishment Clause guards against when the Federal Government directs that funds be taken from the pocketbooks of the citizenry and placed into the coffers of the ministry.

Blind to history, the Court attempts to distinguish this case from *Flast* by wrenching snippets of language from our opinions, and by perfunctorily applying that language under color of the first prong of *Flast*'s two-part nexus test. The tortuous distinctions thus produced are specious, at best: at worst, they are pernicious to our constitutional heritage.

The Court finds this case different from *Flast* because here the "source of [plaintiffs'] complaint is not a *congressional* action, but a decision by HEW to transfer a parcel of federal property." This attempt at distinction cannot withstand scrutiny. *Flast* involved a challenge to the actions of the Commissioner of Education, and other officials of HEW, in disbursing funds under the Elementary and Secondary Education Act of 1965 to "religious and sectarian" schools. Plaintiffs disclaimed "any [intention] to challenge . . . all programs under . . . the Act." Rather, they claimed that defendant-administrators' approval of such expenditures was not authorized by the Act, or alternatively, to the extent the expenditures were authorized, the Act was "unconstitutional and void." In the present case, respondents challenge HEW's grant of property pursuant to the Federal Property and Administrative Services Act of 1949, seeking to enjoin HEW "from making a grant of this and other property to the [defendant] so

long as such a grant will violate the Establishment Clause." It may be that the Court is concerned with the adequacy of respondents' pleading; respondents have not, in so many words, asked for a declaration that the "Federal Property and Administrative Services Act is unconstitutional and void to the extent that it authorizes HEW's actions." I would not construe their complaint so narrowly.

More fundamentally, no clear division can be drawn in this context between actions of the Legislative Branch and those of the Executive Branch. To be sure, the First Amendment is phrased as a restriction on Congress' legislative authority; this is only natural since the Constitution assigns the authority to legislate and appropriate only to the Congress. But it is difficult to conceive of an expenditure for which the last governmental actor, either implementing directly the legislative will, or acting within the scope of legislatively delegated authority, is not an Executive Branch official. The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance.

Plainly hostile to the Framers' understanding of the Establishment Clause, and *Flast*'s enforcement of that understanding, the Court vents that hostility under the guise of standing, "to slam the courthouse door against plaintiffs who [as the Framers intended] are entitled to full consideration of their [Establishment Clause] claims on the merits." Therefore, I dissent.

JUSTICE STEVENS, dissenting.

For the Court to hold that plaintiffs' standing depends on whether the Government's transfer was an exercise of its power to spend money, on the one hand, or its power to dispose of tangible property, on the other, is to trivialize the standing doctrine.

Today the Court holds, in effect, that the Judiciary has no greater role in enforcing the Establishment Clause than in enforcing other "[norms] of conduct which the Federal Government is bound to honor." Ironically, however, its decision rests on the premise that the difference between a disposition of funds pursuant to the Spending Clause and a disposition of realty pursuant to the Property Clause is of fundamental jurisprudential significance. With all due respect, I am persuaded that the essential holding of *Flast* v. *Cohen* attaches special importance to the Establishment Clause and does not permit the drawing of a tenuous distinction between the Spending Clause and the Property Clause.

HEIN v. FREEDOM FROM RELIGION FOUNDATION, INC.

127 S. Ct. 2553 (2007)

JUSTICE ALITO announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

This is a lawsuit in which it was claimed that conferences held as part of the President's Faith-Based and Community Initiatives program violated the Establishment Clause because, among other things, President Bush and former Secretary of Education Paige gave speeches that used "religious imagery" and praised the efficacy of faith-based programs in delivering

social services.

I

In 2001, the President issued an executive order creating the White House Office of Faith-Based and Community Initiatives within the Executive Office of the President. The purpose of this new office was to ensure that "private and charitable community groups, including religious ones . . . have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes" and adhere to "the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality." The office was specifically charged with the task of eliminating unnecessary bureaucratic, legislative, and regulatory barriers that could impede such organizations' ability to compete equally for federal assistance.

By separate executive orders, the President also created Executive Department Centers for Faith-Based and Community Initiatives within several federal agencies and departments. These centers were given the job of ensuring that faith-based community groups would be eligible to compete for federal financial support without impairing their independence or autonomy, as long as they did "not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization." To this end, the President directed that "no organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs." Petitioners, who have been sued in their official capacities, are the directors of the White House Office and various Executive Department Centers.

No congressional legislation specifically authorized the creation of the White House Office or the Executive Department Centers. Rather, they were "created entirely within the executive branch . . . by Presidential executive order." Nor has Congress enacted any law specifically appropriating money for these entities' activities. Instead, their activities are funded through general Executive Branch appropriations.

The respondents are Freedom From Religion Foundation, Inc., a corporation "opposed to government endorsement of religion," and three of its members. Respondents brought suit alleging that petitioners violated the Establishment Clause by organizing conferences designed to promote, and had the effect of promoting, religious community groups over secular ones. The only asserted basis for standing was that the individual respondents are federal taxpayers who are "opposed to the use of Congressional taxpayer appropriations to advance and promote religion."

II

As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing. In *Flast*, the Court carved out a narrow exception to the general constitutional prohibition against taxpayer standing.

III

Respondents argue that this case falls within the *Flast* exception, which they read to cover

any "expenditure of government funds in violation of the Establishment Clause." But this broad reading fails to observe "the rigor with which the *Flast* exception to the *Frothingham* principle ought to be applied."

The expenditures challenged in *Flast* were funded by a specific congressional appropriation and were disbursed to private schools pursuant to a direct and unambiguous congressional mandate. Given that the alleged Establishment Clause violation in *Flast* was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional mandate, the Court concluded that the taxpayer-plaintiffs had established the requisite "logical link between [their taxpayer] status and the type of legislative enactment attacked." *Flast* "limited taxpayer standing to challenges directed 'only [at] exercises of congressional power'" under the Taxing and Spending Clause.

The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly authorize, direct, or even mention the expenditures of which respondents complain. Those expenditures resulted from executive discretion, not congressional action.

We have never found taxpayer standing under such circumstances. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), we held that a taxpayer lacked standing to challenge "a decision by [the federal Department of Health, Education and Welfare] to transfer a parcel of federal property" to a religious college because this transfer was "not a congressional action." In fact, the connection to congressional action was closer in *Valley Forge* than it is here, because in that case, the "particular Executive Branch action" being challenged was at least "arguably authorized" by the Federal Property and Administrative Services Act of 1949, which permitted federal agencies to transfer surplus property to private entities. Nevertheless, we found that the plaintiffs lacked standing because *Flast* "limited taxpayer standing to challenges directed 'only [at] exercises of congressional power'" under the Taxing and Spending Clause.[1]

Bowen v. Kendrick, 487 U.S. 589 (1988), is not to the contrary. In that case, we held that the taxpayer-plaintiffs had standing to mount an as-applied challenge to the Adolescent Family Life Act (AFLA). The Court found "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power," notwithstanding the fact that the "the funding authorized by Congress had flowed through and

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[1]*Valley Forge* also relied on a second rationale: that the authorizing Act was an exercise of Congress' power under the Property Clause of Art. IV, § 3, cl. 2, and not the Taxing and Spending Clause of Art. I, § 8. But this conclusion merely provided an additional -- "and perhaps redundant" -- basis for denying a claim of standing that was already foreclosed because it was not based on any congressional action.

been administered" by an Executive Branch official.

But the key to that conclusion was the Court's recognition that AFLA was "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers," and that the plaintiffs' claims "called into question how the funds authorized by Congress [were] being disbursed *pursuant to the AFLA's statutory mandate*." AFLA not only expressly authorized and appropriated specific funds for grant-making, it also expressly contemplated that some of those moneys might go to projects involving religious groups. Unlike this case, *Kendrick* involved a "program of disbursement of funds pursuant to Congress' taxing and spending powers" that "Congress had created," "authorized," and "mandated."

Respondents attempt to paint their lawsuit as a *Kendrick*-style as-applied challenge, but this effort is unavailing for the simple reason that they can cite no statute whose application they challenge. The best they can do is to point to unspecified, lump-sum "Congressional budget appropriations" for the general use of the Executive Branch -- the allocation of which "is an administrative decision traditionally regarded as committed to agency discretion." Characterizing this case as an "as-applied challenge" to these general appropriations statutes would stretch the meaning of that term past its breaking point.

In short, this case falls outside the "the narrow exception" that *Flast* created. Because the expenditures that respondents challenge were not expressly authorized or mandated by any specific congressional enactment, respondents' lawsuit is not directed at an exercise of congressional power, and thus lacks the requisite "logical nexus" between taxpayer status "and the type of legislative enactment attacked."

IV

Respondents argue that it is "arbitrary" to distinguish between money spent pursuant to congressional mandate and expenditures made in the course of executive discretion, because "the injury to taxpayers in both situations is the very injury targeted by the Establishment Clause and *Flast* -- the expenditure for the support of religion of funds exacted from taxpayers."

But *Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures. *Flast* itself distinguished the "incidental expenditure of tax funds in the administration of an essentially regulatory statute," and we have subsequently rejected the view that taxpayer standing "extends to 'the Government as a whole, regardless of which branch is at work.'" Moreover, we have repeatedly emphasized that the *Flast* exception has a "narrow application in our precedent" that must be applied with "rigor."

It is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts. We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause. We have similarly refused to extend *Flast* to permit taxpayer standing for Establishment Clause challenges that do not implicate Congress' taxing and spending power.

While respondents argue that Executive Branch expenditures in support of religion are no different from legislative extractions, *Flast* itself rejected this equivalence: "It will not be

sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." Because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action to Establishment Clause challenge by any taxpayer in federal court. To see the wide swathe of activity that respondents' proposed rule would cover, one need look no further than the amended complaint in this action, which focuses largely on speeches and presentations made by Executive Branch officials. Such a broad reading would ignore the first prong of *Flast*'s standing test, which requires "a logical link between [taxpayer] status and the type of legislative enactment attacked."

It would also raise serious separation-of-powers concerns. As we have recognized, *Flast* itself gave too little weight to these concerns. By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* "failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-a-vis the other branches." Respondents' position, if adopted, would deputize federal courts as "'virtually continuing monitors of the wisdom and soundness of Executive action,'" and that, most emphatically, "is not the role of the judiciary."

Both the Court of Appeals and respondents implicitly recognize that unqualified federal taxpayer standing to assert Establishment Clause claims would go too far, but neither the Court of Appeals nor respondents has identified a workable limitation. The Court of Appeals conceded only that a taxpayer would lack standing where "the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause" is "zero."

But if we take the Court of Appeals' test literally -- that any marginal cost greater than zero suffices -- taxpayers might well have standing to challenge some (and perhaps many) speeches. As Judge Easterbrook observed: "The total cost of presidential proclamations and speeches by Cabinet officers that touch on religion (Thanksgiving and several other holidays) surely exceeds $500,000 annually; it may cost that much to use Air Force One and send a Secret Service detail to a single speaking engagement." At a minimum, the Court of Appeals' approach would create difficult and uncomfortable line-drawing problems.

Respondents take a somewhat different approach, contending that their proposed expansion of *Flast* would be manageable because they would require that a challenged expenditure be "fairly traceable to the conduct alleged to violate the Establishment Clause." Applying this test, they argue, would "screen out . . . challenge[s to] the content of one particular speech as an Establishment Clause violation."

We find little comfort in this vague and ill-defined test. Respondents fail to explain why the (often substantial) costs that attend, for example, a Presidential address are any less "traceable" than the expenses related to the Executive Branch statements and conferences at issue here. Indeed, respondents concede that even lawsuits involving *de minimis* amounts of taxpayer money can pass their proposed "traceability" test.

Moreover, the "traceability" inquiry, depending on how it is framed, would appear to prove either too little or too much. If the question is whether an allegedly unconstitutional

executive action can somehow be traced to taxpayer funds *in general*, the answer will always be yes: Almost all Executive Branch activities are ultimately funded by *some* congressional appropriation. If, on the other hand, the question is whether the challenged action can be traced to the contributions of a *particular* taxpayer, the answer will almost always be no: As we recognized in *Frothingham*, the interest of any individual taxpayer in a particular federal expenditure "is comparatively minute and indeterminable . . . and constantly changing."

Respondents set out a parade of horribles that they claim could occur if *Flast* is not extended to discretionary Executive Branch expenditures. For example, they say, a federal agency could use its discretionary funds to build a house of worship or to hire clergy of one denomination and send them out to spread their faith. Or an agency could use its funds to make bulk purchases of Stars of David, crucifixes, or depictions of the star and crescent for use in its offices or for distribution to the employees or the general public. Of course, none of these things has happened, even though *Flast* has not previously been expanded in the way that respondents urge. In the unlikely event that any of these actions did take place, Congress could quickly step in. And respondents make no effort to show that these improbable abuses could not be challenged by plaintiffs who would possess standing based on grounds other than taxpayer standing.

Over the years, *Flast* has been defended by some and criticized by others. But the present case does not require us to reconsider that precedent. That was the approach that then-Justice Rehnquist took in *Valley Forge*, and it is the approach we take here. We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.

JUSTICE SCALIA says that we must either overrule *Flast* or extend it to the limits of its logic. His position is not "insane," inconsistent with the "rule of law," or "utterly meaningless." But it is wrong. JUSTICE SCALIA does not seriously dispute either (1) that *Flast* itself spoke in terms of "legislative enactments" and "exercises of congressional power" or (2) that in the four decades since *Flast* was decided, we have never extended its narrow exception to a purely discretionary Executive Branch expenditure. We need go no further to decide this case.

JUSTICE KENNEDY, concurring.

The separation-of-powers design in the Constitution is implemented, among other means, by Article III's case-or-controversy limitation and the resulting requirement of standing. The Court's decision in *Flast v. Cohen*, and in later cases applying it, must be interpreted as respecting separation-of-powers principles but acknowledging as well that these principles must accommodate the First Amendment's Establishment Clause. The clause expresses the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion. In my view the result reached in *Flast* is correct and should not be called into question. For the reasons set forth by JUSTICE ALITO, however, *Flast* should not be extended to permit taxpayer standing in the instant matter. And I join his opinion in full.

Flast established a "narrow exception" to the rule against taxpayer standing. To find standing in the circumstances of this case would make the narrow exception boundless. The

public events and public speeches respondents seek to call in question are part of the open discussion essential to democratic self-government. The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns. Permitting taxpayers to challenge the content of these prototypical executive operations and dialogues would lead to judicial intervention so far exceeding traditional boundaries on the Judiciary that there would arise a real danger of judicial oversight of executive duties. And were this constant supervision to take place the courts would soon assume the role of speech editors for communications issued by executive officials and event planners for meetings they hold.

The Court should not authorize the constant intrusion upon the executive realm that would result from granting taxpayer standing in the instant case. Even where parties have no standing to sue, members of the Legislative and Executive Branches must obey the Constitution whether or not their acts can be challenged in a court of law.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

Today's opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently. If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast* should be applied to *all* challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision specifically limiting the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing.

I

A

There is a simple reason why our taxpayer-standing cases involving Establishment Clause challenges to government expenditures are notoriously inconsistent: We have inconsistently described the first element of the "irreducible constitutional minimum of standing," which minimum consists of (1) a "concrete and particularized" "'injury in fact'" that is (2) fairly traceable to the defendant's alleged unlawful conduct and (3) likely to be redressed by a favorable decision. We have alternately relied on two entirely distinct conceptions of injury in fact, which for convenience I will call "Wallet Injury" and "Psychic Injury."

Wallet Injury is the type of concrete and particularized injury one would expect to be asserted in a *taxpayer* suit, namely, a claim that the plaintiff's tax liability is higher than it would be, but for the allegedly unlawful government action. The stumbling block for suits challenging government expenditures based on this conventional type of injury is quite predictable. The plaintiff cannot satisfy the traceability and redressability prongs of standing. It is uncertain what the plaintiff's tax bill would have been had the allegedly forbidden

expenditure not been made, and it is even more speculative whether the government will, in response to an adverse court decision, lower taxes rather than spend the funds in some other manner.

Psychic Injury, on the other hand, has nothing to do with the plaintiff's tax liability. Instead, the injury consists of the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner. This shift in focus eliminates traceability and redressability problems. Psychic Injury is directly traceable to the improper *use* of taxpayer funds, and it is redressed when the improper use is enjoined, regardless of whether that injunction affects the taxpayer's purse. *Flast* and the cases following its teaching have invoked a peculiarly restricted version of Psychic Injury, permitting taxpayer displeasure over unconstitutional spending to support standing *only if* the constitutional provision allegedly violated is a specific limitation on the taxing and spending power. Restricted or not, this conceptualizing of injury in fact in purely mental terms conflicts squarely with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated.

As the following review of our cases demonstrates, we initially denied taxpayer standing based on Wallet Injury, but then found standing in some later cases based on the limited version of Psychic Injury described above. The basic logical flaw in our cases is thus twofold: We have never explained why Psychic Injury was insufficient in the cases in which standing was denied, and we have never explained why Psychic Injury, however limited, is cognizable under Article III.

B

Two pre-*Flast* cases are of critical importance. In *Frothingham* v. *Mellon*, the taxpayer challenged the constitutionality of the Maternity Act of 1921. The Court held that the taxpayer lacked standing. After emphasizing that "the effect upon future taxation . . . of any payment out of [Treasury] funds" was "remote, fluctuating and uncertain," the Court concluded that "the party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." The Court was thus describing the traceability and redressability problems with Wallet Injury, and rejecting Psychic Injury as a generalized grievance rather than concrete and particularized harm.

The second significant pre-*Flast* case is *Doremus v. Board of Ed. of Hawthorne*. There the taxpayers challenged a state law requiring public-school teachers to read the Bible at the beginning of each school day. Relying extensively on *Frothingham*, the Court denied standing. After first emphasizing that there was no allegation that the Bible reading increased the plaintiffs' taxes or the cost of running the schools, the Court concluded that the "grievance which [the plaintiffs] sought to litigate here is not a direct dollars-and-cents injury but is a religious difference." *Doremus* rejected Psychic Injury in unmistakable terms. The opinion's deprecation of a mere "religious difference," in contrast to a real "dollars-and-cents injury," can only be understood as a flat denial of standing supported only by taxpayer disapproval of the unconstitutional use of tax funds.

Sixteen years after *Doremus*, the Court took a pivotal turn. In *Flast v. Cohen*, taxpayers challenged the Elementary and Secondary Education Act of 1965, alleging that funds expended pursuant to the Act were being used to support parochial schools. The Court held that the taxpayers had standing. Purportedly in order to determine whether taxpayers have the "personal stake and interest" necessary to satisfy Article III, a two-pronged nexus test was invented.

The first prong required the taxpayer to "establish a logical link between [taxpayer] status and the type of legislative enactment." The Court described what that meant as follows: "[A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." The second prong required the taxpayer to "establish a nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." The Court elaborated that this required "the taxpayer [to] show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." The Court held that the Establishment Clause was the type of specific limitation on the taxing and spending power that it had in mind because "one of the specific evils feared by" the Framers of that Clause was that the taxing and spending power would be used to favor one religion over another or to support religion generally.

Because both prongs of its newly minted two-part test were satisfied, *Flast* held that the taxpayers had standing. Wallet Injury could not possibly have been the basis for this conclusion, since the taxpayers in *Flast* were no more able to prove that success on the merits would reduce their tax burden than was the taxpayer in *Frothingham*. Thus, *Flast* relied on Psychic Injury to support standing, describing the "injury" as the taxpayer's allegation that "his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power."

But that created a problem: If the taxpayers in *Flast* had standing based on Psychic Injury, and without regard to the effect of the litigation on their ultimate tax liability, why did not the taxpayers in *Doremus* and *Frothingham* have standing on a similar basis? Enter the magical two-pronged nexus test. It has often been pointed out, and never refuted, that the criteria in *Flast*'s two-part test are *entirely unrelated* to the purported goal of ensuring that the plaintiff has a sufficient "stake in the outcome of the controversy." In truth, the test was designed for a quite different goal. Each prong was meant to disqualify from standing one of the two prior cases that would otherwise contradict the holding of *Flast.* The first prong distinguished *Doremus* as involving a challenge to an "incidental expenditure of tax funds in the administration of an essentially regulatory statute," rather than a challenge to a taxing and spending statute. Did the Court proffer any reason why a taxpayer's Psychic Injury is less concrete and particularized, traceable, or redressable when the challenged expenditures are incidental to an essentially regulatory statute (whatever that means)? Not at all. *Doremus* had to be evaded, and so it was. In reality, of course, there is simply no material difference between *Flast* and *Doremus* as far as Psychic Injury is concerned: If taxpayers upset with the government's giving money to parochial schools had standing to sue, so should the taxpayers who disapproved of the government's paying public-school teachers to read the Bible.

Flast's dispatching of *Frothingham* via the second prong of the nexus test was only marginally less disingenuous. Not only does the relationship of the allegedly violated provision to the taxing and spending power have no bearing upon the concreteness or particularity of the Psychic Injury, but the existence of that relationship does not even genuinely distinguish *Flast* from *Frothingham.* It is impossible to maintain that the Establishment Clause is a more direct limitation on the taxing and spending power than the constitutional limitation invoked in *Frothingham*.

Coherence and candor have fared no better in our later taxpayer-standing cases. *Flast* was dismissively and unpersuasively distinguished just 13 years later in *Valley Forge*. *Flast*'s first prong was not satisfied: Rather than challenging a congressional taxing and spending statute, the plaintiffs were attacking an agency decision to transfer federal property pursuant to Congress's power under the Property Clause.

In distinguishing between the Spending Clause and the Property Clause, *Valley Forge* achieved the seemingly impossible: It surpassed the high bar for irrationality set by *Flast*'s distinguishing of *Doremus* and *Frothingham*. I cannot fathom why Article III standing should turn on whether the government enables a religious organization to obtain real estate by giving it a check drawn from general tax revenues or instead by buying the property itself and then transferring title.

While *Valley Forge*'s application of the first prong to distinguish *Flast* was unpersuasive, the Court was at least not trying to hide the ball. Its holding was forthrightly based on a resounding rejection of the very concept of Psychic Injury:

> [Plaintiffs] fail to identify any personal injury suffered by them, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest.

Of course, in keeping with what was to become the shameful tradition of our taxpayer-standing cases, the Court's candor about the inadequacy of Psychic Injury was combined with a notable silence as to why *Flast* itself was not doomed.

A mere six years later, *Flast* was resuscitated in *Bowen v. Kendrick*. The taxpayers there brought facial and as-applied Establishment Clause challenges to the Adolescent Family Life Act (AFLA), which provided grants to organizations to combat premarital adolescent pregnancy and sex. The as-applied challenge focused on whether particular grantees selected by the Secretary of Health and Human Services were constitutionally permissible recipients. The Solicitor General argued that, under *Valley Forge*'s application of *Flast*'s first prong, the taxpayers lacked standing for their as-applied claim because that claim was really a challenge to executive decisionmaking. The Court rejected this contention, holding that the taxpayers' as-applied claim was still a challenge to Congress's taxing and spending power even though disbursement of the funds authorized by Congress had been administered by the Secretary.

Kendrick, like *Flast* before it, was obviously based on Psychic Injury. But by relying on Psychic Injury, *Kendrick* perfectly revealed the incompatibility of that concept with the outcome in *Doremus*. Just as *Kendrick* did not care whether the appropriated funds would have been spent anyway so also *Doremus* should not have cared that the teachers would likely receive the same salary once their classroom activities were limited to secular conduct. *Flast* and *Kendrick*'s acceptance of Psychic Injury is fundamentally at odds with *Frothingham*, *Doremus*, and *Valley Forge*.

There are only two logical routes available to this Court. We must initially decide whether Psychic Injury is consistent with Article III. If it is, we should apply *Flast* to *all* challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power; if it is not, we should overturn *Flast*.

II

The plurality today avails itself of neither principled option. Instead, it limits *Flast* to challenges to expenditures that are "expressly authorized or mandated by . . . specific congressional enactment." It offers no intellectual justification for this limitation. It virtually admits that express congressional allocation *vel non* has nothing to do with whether the plaintiffs have alleged an injury in fact that is fairly traceable and likely to be redressed.

Yet the plurality is also unwilling to acknowledge that the logic of *Flast* (its Psychic Injury rationale) is simply wrong, and *for that reason* should not be extended to other cases. Despite the lack of acknowledgment, however, that is the only plausible explanation for the plurality's indifference to whether the "distinguishing" fact is legally material, and for its determination to limit *Flast* to its "'*result*.'"

Because the express-allocation line has no mooring to our tripartite test for Article III standing, it invites demonstrably absurd results. For example, the plurality would deny standing to a taxpayer challenging the President's disbursement to a religious organization of a discrete appropriation that Congress had not explicitly allocated to that purpose, even if everyone knew that Congress and the President had informally negotiated that the entire sum would be spent in that precise manner. And taxpayers lack standing to bring Establishment Clause challenges to the Executive Branch's use of appropriated funds when those expenditures have the *added vice* of violating congressional restrictions. If, for example, Congress instructs the President to disburse grants to hospitals that he deems worthy, and the President instead gives all of the money to the Catholic Church, "the link between congressional action and constitutional violation that supported taxpayer standing in *Flast* [would be] missing." Indeed, taking the plurality at its word, Congress could insulate the President from *all Flast*-based suits by codifying the truism that no appropriation can be spent by the Executive Branch in a manner that violates the Establishment Clause.

Any last pretense of minimalism -- of adhering to prior law but merely declining to "extend" it -- is swept away by the fact that the Court's holding flatly contradicts *Kendrick*. The whole point of the as-applied challenge in *Kendrick* was that the Secretary, not Congress, had chosen inappropriate grant recipients. Both *Kendrick* and this case equally involve attacks on executive discretion rather than congressional decision. I thus share the dissent's bewilderment as to why the plurality fixates on the amount of additional discretion the

Executive Branch enjoys under the law beyond the only discretion relevant to the Establishment Clause issue: whether to spend taxpayer funds for a purpose that is unconstitutional.

While I have been critical of the Members of the plurality, I by no means wish to give the impression that respondents' legal position is any more coherent. Respondents argue that the injury in *Flast* was merely the governmental extraction and spending of tax money in aid of religion. Respondents refuse to admit that their argument logically implies, for the reasons already discussed, that *every* expenditure of tax revenues that is alleged to violate the Establishment Clause is subject to suit under *Flast*.

Of course, such a concession would run headlong into the denial of standing in *Doremus*. Respondents' only answer to *Doremus* is the cryptic assertion that the injury there was not fairly traceable to the unconstitutional conduct. This makes no sense. On *Flast*'s theory of Psychic Injury, the injury in *Doremus* was perfectly traceable and not in any way attenuated. It consisted of the psychic frustration that tax funds were being used in violation of the Establishment Clause, which was directly caused by the paying of teachers to read the Bible, and which would have been remedied by prohibition of that expenditure.

The logical consequence of respondents' position finds no support in this Court's precedents or our Nation's history. Any taxpayer would be able to sue whenever tax funds were used in alleged violation of the Establishment Clause. So, for example, any taxpayer could challenge the fact that the Marshal of our Court is paid, in part, to call the courtroom to order by proclaiming "God Save the United States and this Honorable Court." As much as respondents wish to deny that this is what *Flast* logically entails, it blinks reality to conclude otherwise. If respondents are to prevail, they must endorse a future in which ideologically motivated taxpayers could "roam the country in search of governmental wrongdoing and . . . reveal their discoveries in federal court," transforming those courts into "ombudsmen of the general welfare" with respect to Establishment Clause issues.

Ultimately, the arguments by the parties in this case and the opinions of my colleagues serve only to confirm that *Flast*'s adoption of Psychic Injury has to be addressed head-on. Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law, which is logic and reason. Either *Flast* was correct, and must be accorded the wide application that it logically dictates, or it was not, and must be abandoned in its entirety. I turn, finally, to that question.

III

Is a taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner ever sufficiently concrete and particularized to support Article III standing? The answer is plainly no. The "consistent" view of this Court has been that "a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy."

Nor does *Flast*'s limitation on Psychic Injury -- the limitation that it suffices only when the two-pronged "nexus" test is met -- cure the Article III deficiency. The fact that it is the alleged violation of a specific constitutional limit on the taxing and spending power that produces the taxpayer's mental angst does not change the fundamental flaw. It remains the case that the taxpayer seeks "relief that no more directly and tangibly benefits him than it does the public at large." And it is of no conceivable relevance to this issue whether the Establishment Clause was originally conceived of as a specific limitation on the taxing and spending power.

Moreover, *Flast* is damaged goods, not only because its fanciful two-pronged "nexus" test has been demonstrated to be irrelevant to the test's supposed objective, but also because its cavalier treatment of the standing requirement rested upon a fundamental underestimation of that requirement's importance. *Flast* was explicitly and erroneously premised on the idea that Article III standing does not perform a crucial separation-of-powers function.

Overruling prior precedents is a serious undertaking, and I understand the impulse to take a minimalist approach. But laying just claim to be honoring *stare decisis* requires more than beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive. Even before the addition of the new meaningless distinction devised by today's plurality, taxpayer standing in *Establishment Clause* cases has been a game of chance. We had an opportunity today to erase this blot on our jurisprudence, but instead have simply smudged it.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

We held in *Flast* that the "'injury' alleged in Establishment Clause challenges to federal spending" is "the very 'extraction and spending' of 'tax money' in aid of religion." As the Court said in *Flast*, the importance of that type of injury has deep historical roots going back to the ideal of religious liberty in James Madison's Memorial and Remonstrance Against Religious Assessments, that the government in a free society may not "force a citizen to contribute three pence only of his property for the support of any one establishment" of religion. Madison thus translated into practical terms the right of conscience described when he wrote that "the Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."

The right of conscience and the expenditure of an identifiable three pence raised by taxes for the support of a religious cause are therefore not to be split off from one another. The three pence implicates the conscience, and the injury from Government expenditures on religion is not accurately classified with the "Psychic Injury" that results whenever a congressional appropriation or executive expenditure raises hackles of disagreement with the policy supported.

Here, there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion. The taxpayers therefore seek not to "extend" *Flast*, but merely to apply it. When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes

the same thing, taxpayers suffer injury.

The plurality points to the separation of powers to explain its distinction between legislative and executive spending decisions, but there is no difference on that point of view between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one. We owe respect to each of the other branches, and no one has suggested that the Establishment Clause lacks applicability to executive uses of money. It would surely violate the Establishment Clause for the Department of Health and Human Services to draw on a general appropriation to build a chapel for weekly church services (no less than if a statute required it), and for good reason: if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.

So in *Bowen v. Kendrick* we recognized the equivalence between a challenge to a congressional spending bill and a claim that the Executive Branch was spending an appropriation, each in violation of the Establishment Clause. We held that the "claim that . . . funds [were] being used improperly by individual grantees [was no] 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."

The plurality points out that the statute in *Bowen* "expressly authorized and appropriated specific funds for grantmaking" and "expressly contemplated that some of those moneys might go to projects involving religious groups." That is all true, but there is no reason to think it should matter. In *Bowen* we already had found the statute valid on its face before we turned to the as-applied challenge, so the case cannot be read to hold that taxpayers have standing only to claim that congressional action, but not its implementation, violates the Establishment Clause. Thus, after *Bowen*, the plurality's distinction between a "congressional mandate" and "executive discretion" is at once arbitrary and hard to manage: if the statute itself is constitutional, all complaints must be about the exercise of "executive discretion," so there is no line to be drawn between *Bowen* and the case before us today.

While *Flast* standing to assert the right of conscience is in a class by itself, it would be a mistake to think that case is unique in recognizing standing in a plaintiff without injury to flesh or purse. The question, ultimately, has to be whether the injury alleged is "too abstract, or otherwise not appropriate, to be considered judicially cognizable." *Flast* speaks for this Court's recognition (shared by a majority of the Court today) that when the Government spends money for religious purposes a taxpayer's injury is serious and concrete enough to be "judicially cognizable."

ACLU OF GEORGIA v. RABUN COUNTY CHAMBER OF COMMERCE

698 F.2d 1098 (11th Cir. 1983)

This case presents important questions concerning the scope of the Establishment Clause of the First Amendment and the plaintiffs-appellees' ability to demonstrate Article III standing thereunder. The operative facts of this case are relatively simple. In 1979 the Rabun

County Chamber of Commerce (Chamber), with initial approval from the State of Georgia, erected an illuminated Latin cross on a 85 foot structure in Black Rock Mountain State Park. The ACLU of Georgia and five individuals brought suit in federal district court, seeking to enjoin the maintenance of the cross on public property. The district court held that the plaintiffs-appellees had met the Article III requirements for standing and that the maintenance of the cross in the state park violated the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. We affirm.

I. BACKGROUND

In 1956 a private corporation erected a large iron structure atop a rock outcropping on Black Rock Mountain, which is located in a state park in Rabun County, Georgia. This structure, when lighted, formed the shape of a Christmas tree. In 1957 the structure was altered by superimposing a second circuit of lights in the shape of a cross. The structure remained lighted, alternatively in the shape of a Christmas tree or a cross, for a number of years. Easter Sunrise Services, which had been held at this site prior to 1956, continued to be held at the base of the structure throughout this time period. Sometime between 1974 and 1976 the structure fell into a state of ill repair and was removed.

In early 1979, the Rabun County Chamber of Commerce approved a plan for the erection of a new cross on Black Rock Mountain to replace the old structure. Chamber representatives then discussed four possible sites for the cross with the Park Superintendent, an employee of the Georgia Department of Natural Resources. A small knoll located in the corner of the park between two camping areas was ultimately chosen as the site for the cross. From this location the cross, when illuminated, not only floods the two camping areas with light but is visible for several miles from the major highways which, transverse the mountains.[1]

On March 5, 1979, the Executive Director of the Chamber wrote to the Georgia Department of Natural Resources (Department) seeking approval of the Chamber's project. The letter, which indicated that the Chamber would take full responsibility for the fund-raising of both the construction and maintenance costs, stated that the Chamber hoped to have the cross ready for dedication on Easter Sunday. By letter of March 19, 1979, the Department approved the Chamber's request for permission to erect the cross in the state park. Although the construction of the cross was not completed by Easter morning, the district court found that it was dedicated at the Easter services.

Shortly thereafter, the Chamber and the Department received objections from the ACLU of Georgia to the placement of the cross on state property. At the Department's suggestion, a proposed resolution designating the cross as a memorial for deceased persons was drafted,

[1] The dimensions of the cross itself are approximately 26 feet by 35 feet. The cross contains thirty-one 175 watt mercury vapor lights. Prior to this suit the cross was illuminated for approximately 2 1/2 to 4 hours nightly.

although never passed.[2] After further correspondence between the Department and the Chamber, the Department, in June of 1979, ordered the Chamber to remove the cross from state property. The Chamber refused to remove the cross, however, and the state failed to take any affirmative action requiring it to do so.

On November 2, 1979, the ACLU of Georgia and five individuals filed suit seeking to permanently enjoin the maintenance of the cross on public property as a violation of the Establishment Clause. Following a full evidentiary hearing on the merits, the district court held in favor of the plaintiffs-appellees and ordered the cross to be removed. After the Chamber filed its notice of appeal, the district court stayed its order of removal pending determination of the appeal by this Court. An injunction against the illumination of the cross, however, continues to remain in effect.

II. STANDING

Few issues involving First Amendment analysis have engendered as much debate in recent years as the question of standing to bring an Establishment Clause claim. The difficulties of defining and applying the constitutional requirements and prudential considerations reflected by the case and controversy language of Article III have often been noted. In the context of an Establishment Clause claim, the difficulties of applying principles of standing are enhanced by the reality that included among the various motivations for pursuing such a claim are the spiritual, value-laden beliefs of the plaintiffs. Because of these inherent difficulties and in light of the special and sensitive treatment accorded First Amendment rights in general, courts have often placed Establishment Clause cases in a separate category of standing concerns. Recently, however, in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464 (1982), the Supreme Court has clarified this area of the law by retreating from a more specialized approach towards citizen standing under the Establishment Clause. Thus, in *Valley Forge*, the Supreme Court stated that there is no "sliding scale" of standing, and that neither a mere spiritual stake in the outcome nor an intense commitment to separation of church and state is a "permissible substitute for a showing of injury itself." Moreover, the Court expressly held that the mere "psychological consequence presumably produced by observation of conduct with which one disagrees" is not a cognizable injury.

Relying primarily upon *Valley Forge*, the appellant in this case asserts that we must reverse the district court's judgment for the plaintiffs-appellees on the basis that they had no standing to initiate the suit. The district court, in an opinion issued prior to the decision in *Valley Forge*, held that the plaintiffs had standing based on their "spiritual stake in First Amendment values." While we agree with the appellant that the district court's rationale is inconsistent with the teachings of *Valley Forge*, we believe that the plaintiffs-appellees have demonstrated a cognizable injury in fact sufficient to invoke the jurisdiction of this Court.

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[2] The Department's suggestion concerning a memorial came soon after the ACLU of Georgia began investigating the cross. At least one court has held that a cross dedicated as a secular memorial for deceased veterans does not violate the Establishment Clause.

The plaintiffs in the instant case include the ACLU of Georgia and five individuals. The ACLU of Georgia is a nonprofit organization committed to the preservation of individual constitutional liberties, especially those emanating from the First Amendment. The five individual plaintiffs have been residents of the State of Georgia for many years. One of these individuals, plaintiff Guerrero, appears both as a member of the ACLU of Georgia and in his personal capacity. Although the plaintiffs originally relied solely on their status as separationists to establish standing, evidence of noneconomic injury was also presented at trial. In essence, plaintiffs allege that they have been injured in fact because they have been deprived of their beneficial right of use and enjoyment of a state park. The cross is situated on public land to which all residents of Georgia have a right of access. Substantial evidence supports the district court's finding that the Latin cross is a universally recognized symbol of Christianity. Moreover, the record contains the uncontroverted testimony of a witness that the cross, when illuminated, floods two of the campgrounds with a light almost bright enough to enable one to read at night. Other witnesses testified to the religious aura created in the camping area by the illuminated cross. Plaintiff Guerrero testified that the ACLU received complaints about the cross. Each of the individual plaintiffs testified unequivocally at trial that they would not use Black Rock Mountain State Park so long as the cross remained there. More particularly, two of the individual plaintiffs testified that they were campers. Prior to this litigation, plaintiff Karnan had camped at Red Top Mountain State Park,[3] a state park in Georgia, and at a federal parkland near the Black Rock Mountain State Park in northern Georgia. Plaintiff Guerrero testified that he is a regular camper and camps approximately three to four times each year. Plaintiffs Guerrero and Karnan further testified that they would not camp in Black Rock Mountain State Park because of the cross.

It is well established that in order to satisfy the "case or controversy" requirement of Article III, a plaintiff must demonstrate that he personally has been subjected to an "actual or threatened injury," and that there exists "a 'fairly traceable ' causal connection between the claimed injury and the challenged conduct." In its interpretation of the "injury in fact" requirement, the Supreme Court has repeatedly emphasized that a showing of noneconomic injury is sufficient to confer standing.

Several of the Supreme Court's decisions on noneconomic injury involve factual situations similar to that presented in the instant case. Indeed, the underpinnings of plaintiffs' claim of noneconomic injury based on deprivation of their right to the use of public land may be found in the Supreme Court's implicit holding in *Sierra Club v. Morton*, 405 U.S. 727 (1972). In that case, the Sierra Club, a nonprofit organization committed to conservation of national parks, challenged the federal government's approval of a skiing development in Sequoia National Forest. The Supreme Court indicated that if the plaintiff had alleged that individual members' use of the park would be affected by this action, the requirements for standing would have been satisfied. Moreover, in *United States v. SCRAP*, 412 U.S. 669 (1973), the Supreme Court found that the plaintiffs had alleged precisely the type of specific

[3] Plaintiff Karnan, a Unitarian minister, also testified that he regularly travels on U.S. Highway 441 to his church's conference center in Highlands, North Carolina. Karnan stated that the cross is clearly visible at night from both the highway and the conference center.

injury to individuals which was lacking in the *Sierra Club* decision. More recently, in *Duke Power Co. v. Carolina Environmental Study Group, Inc*., 438 U.S. 59 (1978), the Court extended standing to an environmental organization and several individuals residing near nuclear power plants to challenge the constitutionality of the Price Anderson Act under the Due Process Clause of the Fifth Amendment. In concluding that the plaintiffs had alleged sufficient injury in fact, the Court made it clear that, outside the context of taxpayer standing cases, a noneconomic injury was sufficient to confer standing to assert any type of constitutional right.

Each of these cases supports the view that, in the context of environmental concerns, an effect on an individual's use and enjoyment of public land is a sufficient noneconomic injury to confer standing to challenge governmental actions. This specific type of noneconomic injury has also been recognized in the context of an Establishment Clause case. In *Allen v. Hickel*, 424 F.2d 944 (D.C.Cir.1970) the Court of Appeals for the District of Columbia Circuit held that the plaintiffs, residents of the District of Columbia, had standing to challenge the placement of an illuminated life size nativity scene in Ellipse, a national park located across the street from the White House. While noting that all citizens of the United States had the right to use and enjoy public parklands, the Court relied at least in part on the plaintiffs' individual burden with respect to their use of the park:

> The standing issue was perhaps clarified, in terms of perspective, when Government counsel put it at argument that if the plaintiffs didn't like to look at the creche, they could avoid walking near the Ellipse while it was occupied by the creche. Plaintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public use; a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional.

Id. at 947.

Thus, at least prior to the *Valley Forge* decision, it seemed clear that one who demonstrated that his use of public lands was or would be affected by the particular challenged action had stated a sufficient noneconomic injury to confer standing. We must next determine whether this type of noneconomic injury can provide a basis for standing to initiate an Establishment Clause claim under the Supreme Court's analysis in *Valley Forge*.

In *Valley Forge*, the plaintiffs, a nonprofit organization and four of its employees, brought suit to enjoin the transfer of surplus federal property to an educational institution affiliated with a religious order known as the Assemblies of God. After determining that the plaintiffs were unable to satisfy the criteria necessary to establish standing to sue as taxpayers, the Court addressed the issue of "citizen standing." The lower court's holding that the plaintiffs had satisfied the requirements of Article III standing was based in part on the theory that the "challenged governmental action caused 'injury in fact ' to [the plaintiffs '] shared individuated right to a government that 'shall make no law respecting the establishment of religion. '" In rejecting this theory, the Supreme Court held that the plaintiffs' status as separationists alone was, in no significant respect, distinguishable from the "generalized

interest of all citizens in constitutional governance." Noting that such "generalized grievances" have consistently been found insufficient to confer standing to assert violations of other constitutional provisions, the Court found that there was no principled basis for affording standing to one who asserted merely a violation of the Establishment Clause. In concluding that the plaintiffs failed to allege any cognizable injury in fact, the Court stated:

> Although they claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by the plaintiffs *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. This is not an injury sufficient to confer standing under Art. III, even though it is phrased in constitutional terms.

Id., 454 U.S. at 485. Moreover, the Court held that the intensity of the plaintiffs' interest in the separation of church and state could not substitute for a showing of injury in fact.

As we have noted previously, the Court, in finding that the plaintiffs in *Valley Forge* had not alleged an injury of any kind, reaffirmed its prior holdings that noneconomic injury could serve as a basis for standing. Moreover, in distinguishing *Valley Forge* from other Establishment Clause cases where standing to sue was found to exist, the Court provided us with specific examples of the type of noneconomic injury which would overcome the deficiencies of *Valley Forge*. Thus, the Court specifically reaffirmed its holding in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), where school children and their parents were found to have standing to contest a law requiring Bible reading in public schools. Unlike the plaintiffs in *Valley Forge*, the plaintiffs in *Abington* had demonstrated an injury in fact, because they "were forced to assume special burdens" to avoid "unwelcome religious exercises." Thus, the Court concluded that the *Abington* decision was clearly distinguishable from the situation presented by the plaintiffs in *Valley Forge*.

The Chamber asserts that the instant case is more like the *Valley Forge* than the *Abington* decision and points to several common characteristics of the plaintiffs in these cases. Thus, the Chamber relies on the statements by the Court that none of the plaintiffs in *Valley Forge* resided within the state where the property to be transferred (a closed hospital) was located, that all of the plaintiffs had learned of the transfer through a news release, and that an alleged violation of the Establishment Clause "does not provide a special license to roam the country in search of governmental wrongdoing. . . ." 454 U.S. at 487. Although conceding that in this case the plaintiffs are residents of Georgia, the Chamber notes that each of the plaintiffs resides in Atlanta, which is more than 100 miles from the state park. Moreover, only plaintiff Karnan had actually seen the cross prior to the time the suit was filed and that sighting was from an airplane. Finally, the other plaintiffs derived their information about the cross from anonymous phone calls and news releases.

We do not find the existence of these similarities to be crucial when the Court's statement

in *Valley Forge* are read in the context of the entire opinion.[4] In describing the plaintiffs in *Valley Forge*, the Court highlighted the total lack of connection between the plaintiffs and the subject matter of the action. By contrast, the plaintiffs in this case are residents of Georgia who make use of public parks which are maintained by the State of Georgia; these factors thus provide the necessary connection, which was missing in *Valley Forge*, between the plaintiffs and the subject matter of the action.

A comparison of the theory of noneconomic injury presented in the instant case with the factual situations involved in the *Valley Forge* and *Abington* decision logically permits only one conclusion. Although the underlying motivations of the plaintiffs in all three cases can be described as either a spiritual belief or a commitment to separation of church and state, the plaintiffs in the instant case have demonstrated an individualized injury, other than a mere psychological reaction, which they have suffered "as a consequence" of the challenged action. Plaintiffs Karnan and Guerrero are residents of Georgia, who have the right to use the state parks for camping purposes.[5] They have demonstrated the effect that the presence of the cross has on their right to the use of Black Rock Mountain State Park both by testifying as to their unwillingness to camp in the park because of the cross and by the evidence of the physical and metaphysical impact of the cross. In explaining why the plaintiffs in *Abington* had demonstrated a sufficient injury in fact, the Supreme Court in *Valley Forge* specifically emphasized the dilemma facing the plaintiffs: the schoolchildren were "subjected to unwelcome religious exercise or were forced to assume special burdens to avoid them." 454

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[4] Several considerations support this conclusion. First, to the extent that the Chamber is asserting that the relevant factor is the distance between the plaintiffs and the park, we reject this argument. While close proximity may be of controlling significance in some cases, such a requirement in this case would be inconsistent with the function of a state park in providing recreational facilities for state vacationers, regardless of the distance between the park and their residence. Similarly, we can conceive of no rational basis for requiring the plaintiffs to view in person the subject matter of the action prior to filing the suit. Each plaintiff found his option to use the Georgia state public parklands restricted, upon learning of the cross, just as each parent in *Abington* found his or her right to participate in the public school system jeopardized, even without actually seeing teachers reading the Bible to school children. Even if the Court in *Valley Forge* intended for this factor to be controlling, we note that at least one of the plaintiffs in this case viewed the cross prior to the filing of the suit.

[5] Although plaintiffs Karnan and Guerrero have used parklands for camping purposes, appellant points out that neither of them has actually camped in Black Rock Mountain State Park. In determining the significance of this fact, however, it must be remembered that a cross has been lighted in Black Rock Mountain State Park almost continually since 1957. Plaintiffs Karnan and Guerrero have testified unequivocally that they would not camp in the park because of the presence of the cross. It would be anomalous to require these plaintiffs either to compromise their principles by subjecting themselves to the religious symbolism of the cross or to demonstrate that they used the park prior to the erection of the cross more than twenty-five years ago. The "case and controversy" requirements of Article III cannot be reduced to such mere technicalities.

U.S. at 487 n. 22. No less can be said of the plaintiffs in the instant case. Plaintiffs Guerrero and Karnan are presently forced to locate other camping areas or to have their right to use Black Rock Mountain State Park conditioned upon the acceptance of unwanted religious symbolism. In addition, because the cross is clearly visible from the porch of his summer cabin at the religious camp which he directs as well as from the roadway he must use to reach the camp, plaintiff Karnan has little choice but to continually view the cross and suffer from the spiritual harm to which he testified. Karnan's injury is particularly disturbing and intrusive because it manifests itself at his special place of religious contemplation and retreat.

In sum, we are unable to find any qualitative differences between the injury suffered by the plaintiffs in this case and that which the Court found in *Abington*. Furthermore, the Supreme Court has made it clear that no minimum quantitative limit is required to establish injury under either a constitutional or prudential analysis:

> "Injury in fact" . . . serves to distinguish a person with a direct stake in the outcome of a litigation -- even though small -- from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake . . . than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax.

United States v. SCRAP, 412 U.S. 669, 689 n. 14. Thus, we find that plaintiffs Guerrero and Karnan have sufficiently demonstrated particular and personalized noneconomic injury to distinguish them from the general citizenry who may be as equally offended on a philosophical basis but who are not as specifically or perceptibly harmed, consistent with both the prior precedent defining noneconomic injuries in general and the decision in *Valley Forge*, to provide them with a "personal stake in the controversy." Because we have determined that at least these two individuals have met the requirements of Article III, it is unnecessary for us to consider the standing of the other plaintiffs in this action.

III. ESTABLISHMENT CLAUSE

At the core of the Establishment Clause is the requirement that a government justify in secular terms its purpose for engaging in activities which may appear to endorse the beliefs of a particular religion. Although courts have rarely looked behind the stated legislative purposes, it is clear that an avowed secular purpose, if found to be self serving, may "not be sufficient to avoid conflict with the First Amendment." When a government permits religious symbols to be constructed on public property, its ability to articulate a secular purpose becomes the crucial focus under the Establishment Clause.

In the instant case, the district court specifically found that the cross was erected "out of religious stirrings and for a religious purpose." In reviewing this decision on appeal, we note that findings of fact made by a district court can only be set aside if they are determined to be clearly erroneous. The district court's finding of religious purpose in this case is supported by ample evidence in the record. Thus, we are unable to conclude that the district court's finding was clearly erroneous.

Finding that the Chamber has failed to establish a secular purpose, we hold that the

maintenance of the cross in a state park violates the Establishment Clause of the First Amendment.

Freedom From Religion Foundation, Inc., Phyllis Grams, Annie Laurie Gaylor, and Anne Nicol Gaylor, Plaintiffs-Appellants, v. Patrick Zielke, individually and as Mayor of the City of La Crosse, Wisconsin, Common Council of La Crosse, Wisconsin, and City of La Crosse, Wisconsin, Defendants-Appellees

845 F.2d 1463 (7th Cir. 1988)

FLAUM, Circuit Judge.

Phyllis Grams, Annie Laurie Gaylor, Anne Nicol Gaylor, and the Freedom from Religion Foundation, Inc. (collectively "the appellants") filed an action in federal court pursuant to 42 U.S.C. § 1983 to enjoin the City of La Crosse from displaying a monument of the Ten Commandments in a city park.[1] The appellants alleged that the display violated their rights under the first and fourteenth amendments to the Constitution to be free from public and governmental support for religion. The district court dismissed the appellants' action on the ground that they lacked standing to bring the suit and we affirm.

I.

In 1899 the City of La Crosse, Wisconsin purchased a one-acre plot of land for $ 6,000 and created a public park. The park, called Cameron Park, is located near the La Crosse business district. In 1964 the Fraternal Order of Eagles donated a monument of the Ten Commandments to the city for display in Cameron Park. The La Crosse City Park Commission voted to accept the monument, which was dedicated on June 19, 1965.

The monument resembles a tombstone, and contains an English translation of one version of the Ten Commandments. It is about five feet, four inches high, thirty-three inches wide and ten inches deep; the monument is located eight feet from the sidewalk that surrounds the park, and is clearly visible from the sidewalk. At night the monument is lighted from the roof of the Eagles' building across the street from Cameron Park. Aside from a few park benches, the monument is the only man-made structure in the park. Although the City of La Crosse owns and maintains Cameron Park, the city did not buy the monument nor does it expend funds on the monument's maintenance.

In 1985 Phyllis Grams, a resident of La Crosse, became aware of the monument when a friend brought it to her attention. Grams then went to see the monument for herself. At trial, Grams testified that she was offended by the display because she viewed it as a message from the city about the religious beliefs that private citizens should hold. Grams was sufficiently

[1] Phyllis Grams is a resident of La Crosse, Wisconsin; Annie Laurie Gaylor is the editor of the Freedom From Religion Foundation's publication *Free Thought Today*; and Anne Nicol Gaylor is the President of the Freedom From Religion Foundation.

offended by the Ten Commandments monument that she complained about it to the Common Council of La Crosse. Appellant Anne Nicol Gaylor, President of the Freedom From Religion Foundation, also wrote a letter to the Common Council complaining about the monument. After receiving these complaints, the Common Council held a public hearing on the question of the monument's presence in Cameron Park. Following the hearing, the Common Council decided not to take any action on the monument.

As a result, the appellants filed an action in district court pursuant to 42 U.S.C. § 1983 to enjoin the appellees from continuing to display the monument in Cameron Park. The appellants contended that the continued display of a monument of the Ten Commandments in a city-owned park was a governmental endorsement and establishment of religion which violated the first and fourteenth amendments to the United States Constitution.

Following a bench trial, the district court concluded that the appellants failed to meet the "case or controversy" requirement of Article III of the Constitution. The district court therefore dismissed the action because the appellants lacked standing to contest the constitutionality of the monument's presence in Cameron Park.

II.

The sole issue on appeal is whether the appellants have standing to challenge the constitutionality of the monument on display in Cameron Park. An analysis of a litigant's standing to bring an action in federal court focuses not on the claim itself, but on the party who is bringing the challenge. Standing is a threshold question in every federal case because if the litigants do not have standing to raise their claims the court is without authority to consider the merits of the action.

Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." For a party to have standing, at a minimum Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." Thus, at a minimum the appellants must be able to establish that they suffered a distinct and palpable injury as a result of the actions of the City of La Crosse.

Provided a litigant alleges the existence of a distinct and palpable injury, even a minor injury can satisfy the case or controversy requirement of Article III. *See American Civil Liberties Union of Illinois v. City of St. Charles,* 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986) (plaintiffs' averment that they altered their normal routes of travel to avoid viewing a lighted cross displayed on public property satisfied Article III standing requirements). Furthermore, standing can be predicated on a non-economic injury. The injury that the appellants claim they have suffered as a result of the Cameron Park display is a non-economic injury. They allege that the display is a rebuke to their religious beliefs and that they are offended by its presence; but they admit that they have not altered their behavior as a result of the monument. The psychological harm that results from witnessing conduct with which one disagrees, however, is not sufficient to confer standing on a litigant.

The appellants in this case have failed to meet the minimum case or controversy requirement of Article III. The appellants concede that they did not alter their behavior in any

manner as a result of the Ten Commandments monument; they allege only that they have suffered "a rebuke to [their] religious beliefs respecting religion by virtue of being subjected to a governmental endorsement of unequivocally religious precepts and confusions." But this is exactly the type of psychological harm that the Supreme Court has held cannot confer standing on an aggrieved party. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486-87 n.22 (1982).[2] Because the appellants do not have constitutional standing, we need not consider whether any prudential considerations may deny the appellants standing to challenge the constitutionality of the Cameron Park display.

The appellants also argue that Phyllis Grams has standing simply as a result of her close proximity to the allegedly unconstitutional display in Cameron Park. In *City of St. Charles* this court indicated that, for purposes of standing analysis, perhaps it

> ought to make a difference if . . . a plaintiff is complaining about the unlawful establishment of religion by the city, town, or state in which he lives, rather than about such an establishment elsewhere; he might be intensely distressed to find himself living in a jurisdiction that had an established church.

794 F.2d at 268. *See also Valley Forge*, 454 U.S. at 486-87 (the Court stressed the geographical distance between the plaintiffs who lived in Maryland and Virginia and the challenged property transfer in Pennsylvania when finding that the plaintiffs lacked standing).

Although Grams lives in the City of La Crosse, the appellants did not demonstrate that she lives anywhere near Cameron Park, that the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park. The appellants also failed to establish that Grams suffered any injury simply because of her close proximity to the monument. Although in some circumstances proximity to the offending conduct may suffice

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[2] The appellants allege that their psychological injury should suffice to fulfill the Article III standing requirements because they have demonstrated the severity of their distress by complaining to the Common Council of La Crosse about the monument and then filing this lawsuit. These acts of complaining alone do not constitute an injury in fact. If the appellants were unwilling to go to Cameron Park because of the presence of the Ten Commandments monument, they would have adequately alleged a distinct and palpable injury because their right to the use of a public park would have been adversely affected by the presence of a possibly unconstitutional display. The appellants, however, affirmatively testified that they have not been deprived of the use or enjoyment of Cameron Park; they have not altered their behavior in any fashion or suffered any detriment other than mere psychological discomfort.

The Supreme Court has held that irrespective of the fervor with which a litigant is committed to the principle of separation of church and state, that commitment alone does not satisfy the standing doctrine. *Valley Forge*, 454 U.S. at 485-87. Similarly, the appellants' commitment to the principal of separation of church and state, evidenced by their willingness to complain about the monument to the Common Council and to file this lawsuit, cannot substitute for their failure to demonstrate that they have suffered any distinct and palpable injury.

to confer standing, Grams failed to prove her proximity to the allegedly unconstitutional display. We therefore conclude that Grams cannot establish Article III standing simply on the basis of her alleged but unproven proximity to the offending conduct.

The Freedom From Religion Foundation also asserts that it has independent organizational standing to challenge the constitutionality of the Cameron Park display. The Foundation neither alleged nor proved that it has itself suffered any distinct and palpable injury as a result of the monument. But "even in the absence of injury to itself, an association may have standing solely as the representative of its members." If an organization does not allege an injury to itself, however, its assertion of standing cannot be different from the standing of the members it represents.

In the present case, the appellants have not claimed or established that any member of the Foundation could allege a distinct and palpable injury sufficient to allow them to bring this suit. Thus, the Foundation does not have organizational standing to bring this action.

III.

The appellants also assert that Phyllis Grams has municipal taxpayer standing. The seminal case on the issue of taxpayer standing is *Frothingham v. Mellon*, 262 U.S. 447. *Frothingham* held that federal taxpayers generally do not have standing to challenge the constitutionality of federal expenditures. The Court noted, however, that it did not intend to disturb the general rule that municipal taxpayers do have standing to challenge the improper use of tax revenues. In *Flast v. Cohen*, 392 U.S. 83, 102 (1968), the Court established a limited exception to the general rule that federal taxpayers do not have standing to challenge federal expenditures.

There has been some question regarding the possible restrictive effect of the Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), on the doctrine of municipal taxpayer standing. Because *Valley Forge* involved a challenge by federal taxpayers to an allegedly unconstitutional transfer of federal property, its holding -- that the taxpayers did not have standing because they were not complaining about an exercise of authority under the taxing and spending clause of Article I, § 8 of the Constitution -- does not affect the viability of the doctrine of municipal taxpayer standing. Thus, the Court's decision in *Valley Forge*, which related only to the issue of federal taxpayer standing, does not affect the doctrine of municipal taxpayer standing.

Although a litigant may have standing as a municipal taxpayer to challenge unconstitutional acts that affect public finances, the appellants in this case did not satisfy two threshold criteria for establishing municipal taxpayer standing. First, the appellants failed to allege or prove that Grams actually is a La Crosse municipal taxpayer. Second, even if we presume that Grams is a taxpayer, the appellants did not establish that the City of La Crosse has used tax revenues on the allegedly unconstitutional display in Cameron Park.

A plaintiff's status as a municipal taxpayer is irrelevant for standing purposes if no tax money is spent on the allegedly unconstitutional activity. The appellants concede that no tax money has been spent on the monument; rather, they contend that the city's initial expenditure of $ 6,000 in 1899 to purchase the land for the park satisfied the revenue expenditure

requirement of municipal taxpayer standing. We disagree. The allegedly unconstitutional activity in this case is the display of a monument of the Ten Commandments in Cameron Park, and the appellants concede that no tax money has been spent on this activity. Thus, Grams' possible status as a municipal taxpayer is irrelevant, and we do not reach the question of the appellants' apparent failure to prove that Grams actually is a La Crosse taxpayer. The appellants therefore did not establish municipal taxpayer standing.

IV.

We agree with the district court that the appellants did not establish standing to challenge the constitutionality of the Ten Commandments monument on display in Cameron Park. The district court's judgment dismissing the appellants' claims for lack of standing is AFFIRMED.

ACLU OF NEW JERSEY v. TOWNSHIP OF WALL

246 F.3d 258 (3d Cir. 2001)

ALITO, Circuit Judge:

This is an appeal from a District Court decision holding that a holiday display exhibited by Wall Township, New Jersey, did not violate the Establishment Clause. We hold that the plaintiffs lack standing under Article III to challenge the display to which they now object, and we therefore vacate the decision of the District Court.

I.

Since at least 1997, Wall Township has exhibited a holiday display near the entrance to the municipal building housing much of the Township's government. The individual plaintiffs in this case, Eleanor and Randy Miller, are taxpayers and residents of the Township and members of the organizational plaintiff, the American Civil Liberties Union of New Jersey ("ACLU"). The Millers frequently visit the complex in which the municipal building sits for a variety of personal and professional reasons.

In 1998, while visiting the complex, the Millers observed the Township's holiday display and found it objectionable. The display consisted principally of a creche with traditional figures, a lighted evergreen tree, two decorated urns that are part of the complex, and four snowman banners attached to light posts at the complex.

On February 18, 1999, plaintiffs brought suit in the United States District Court for New Jersey, alleging that the display violated the United States and New Jersey Constitutions. In July 1999, the Township moved to dismiss plaintiffs' complaint for lack of standing. The Court denied defendant's motion on October 5, 1999, finding that the plaintiffs possessed standing as a result of their "direct personal contact with the government-sponsored religious display" that has made them "feel less welcome, less accepted, tainted and rejected."

In December 1999, the Township again exhibited a holiday display. The 1999 display was different than the 1998 display, however. In addition to a creche, the 1999 display included a donated menorah, candy cane banners rather than the less prominent snowman banners, a

larger evergreen tree, and two signs reading: (1) "Through this and other displays and events through the year, Wall Township is pleased to celebrate our American cultural traditions, as well as our legacy of diversity and freedom" and (2) "Merry Christmas Happy Hanukkah."

Mr. Miller observed the modified display on December 2, 1999. On December 20, 1999, plaintiffs moved for a temporary restraining order and preliminary injunction. At a December 23, 1999 hearing, the Court denied plaintiffs' motion for a restraining order and consolidated plaintiffs' motion for [a] preliminary injunction with a future trial on the merits.

In early 2000, the Township moved for summary judgment. The District Court invited and received additional evidence from the parties, including a January 26, 2000 Township resolution directing the purchase of "twig-style reindeer and a sleigh" to add to the display and formalizing the future components of the display.

Based on the evidence submitted and without a formal trial, the District Court ruled on the merits of plaintiffs' suit on June 22, 2000. The Court found that the Township's holiday display, as modified and memorialized in the 2000 resolution, did not violate the federal or New Jersey Constitutions and entered judgment for the Township.

Plaintiffs appealed, contesting the conclusion that the Township's display is constitutional. In their arguments, plaintiffs made clear that they seek relief only as to the 1999 display.

II.

On appeal, the Township again asserts that plaintiffs lack standing to challenge the constitutionality of the holiday display. We review the issue of standing de novo. If plaintiffs do not possess Article III standing, both the District Court and this Court lack subject matter jurisdiction to address the merits of plaintiffs' case.

Plaintiffs bear the burden of proving standing. Plaintiffs must carry that burden "in the same way as any other matter on which the plaintiff bears the burden of proof. The ACLU rests its standing on the interests of its members, the Millers, rather than on an independent injury to the organization. The Millers claim standing based on their status as municipal taxpayers or on non-economic injuries resulting from the display. As we explain below, the Millers failed to establish standing in either capacity.

The Supreme Court recognized in *Doremus v. Board of Education of Hawthorne*, 342 U.S. 429, 434 (1952), that a municipal taxpayer may possess standing to litigate "a good-faith pocketbook action." See also *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 282 (5th Cir. 1999) ("To establish . . . municipal taxpayer standing . . . a plaintiff must show only that (1) he pays taxes to the relevant entity, and (2) tax revenues are expended on the disputed practice.").[1]

The plaintiffs in *Doremus* were state and municipal taxpayers who challenged a state law mandating Bible reading in public schools. The Supreme Court found that the plaintiffs failed to establish a direct monetary injury that would confer standing to raise such a challenge, as

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[1]The standing requirements for federal taxpayers are more stringent than those for municipal taxpayers. See Flast v. Cohen, 392 U.S. 83, 102-03 (1968).

they did not allege that the Bible reading was "supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." Likewise, the plaintiffs failed to provide any "information . . . as to what kind of taxes" they paid or to aver "that the Bible reading increased any tax they [did] pay or that as taxpayers they are, will, or possibly can be out of pocket because of " the activity. In short, the plaintiffs failed to establish more than a potential de minimis drain on tax revenues due to the challenged reading. As a result, the plaintiffs lacked standing to sue.

The same result has obtained in cases in other courts of appeals. In *Doe v. Duncanville Independent School District*, for example, the plaintiffs failed to show that the defendant school district spent any money on the distribution of Bibles by the Gideon Society in public school. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995). The Gideons supplied the Bibles and placed them on a table in the school foyer. "No school district employee handled the Bibles," and "there [was] no evidence that the school district bought the table especially for the Bible distribution or that the table [had] been set aside for [that] sole purpose." Recognizing that "in order to establish . . . municipal taxpayer standing . . ., a plaintiff must not only show that he pays taxes to the relevant entity, he must also show that tax revenues are expended on the disputed practice," the Fifth Circuit found that plaintiffs lacked standing to challenge the Bible distribution.

The Seventh Circuit reached the same conclusion in *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1466 (7th Cir. 1988), in which plaintiffs sought to enjoin the display of a monument of the Ten Commandments in a park owned and maintained by the defendant city. While the city had spent money in 1899 to acquire the property for the park, the city had not spent any funds on maintaining the donated monument. The Seventh Circuit noted that "[a] plaintiff's status as a municipal taxpayer is irrelevant for standing purposes if no tax money is spent on the allegedly unconstitutional activity" and concluded that plaintiffs lacked standing to sue.[2]

In this case, plaintiffs have provided uncontradicted testimony that they pay property taxes to the Township. However, as in the cases above, plaintiffs have failed to establish that the Township has spent any money, much less money obtained through property taxes, on the religious elements of the 1999 display.

Plaintiffs did allege that "the [1998] Nativity display was erected and maintained with public funds including tax revenues collected by the Township." However, the Township denied this allegation and plaintiffs presented no evidence on the issue. Moreover, the record establishes that both the Nativity display and the menorah were donated to the Township.

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[2] For cases in which other circuits have recognized that municipal taxpayers lack standing to sue where there is no evidence of expenditure, see *Doe v. Madison School District No. 321*, 177 F.3d 789, 794, 797 (9th Cir. 1999) (en banc) (Even though tax money was allegedly spent on the "ordinary costs of graduation," such as printing programs, plaintiff lacked standing to challenge graduation prayer where she conceded that no tax funds were "spent solely on" that activity.), and *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988) ("Municipal taxpayers do not have standing when no tax moneys are spent.")

While the Township thus owns the Nativity display, and presumably the menorah, and the overall display is set up with defendant's support, direction and/or approval, the Township denies that it "maintains" the display. Plaintiffs have thus failed to establish an expenditure on the challenged elements of the display.

Even if we were to assume that the holiday display was erected by paid Township employees, there is no indication that the portion of such expenditure attributable to the challenged elements of the display would have been more than the de minimis expenditure that was involved in the Bible reading in Doremus. Similarly, we cannot simply assume that the Township expends more than a de minimis amount in lighting the religious elements of the display. Cf. *ACLU v. City of St. Charles*, 794 F.2d 265, 267-68 (7th Cir. 1986) (Lighting for challenged cross was "put up by the city's volunteer firemen, on their own time, and the minuscule cost of the electricity required to keep the lights lit [was] defrayed by voluntary contributions from city residents.").

As a result, we cannot find that plaintiffs have carried their burden of proving an expenditure of revenues to which they contribute that would make their suit "a good-faith pocketbook action." *Doremus*, 342 U.S. at 434. Consequently, plaintiffs cannot invoke federal jurisdiction as taxpayers.

Nor have plaintiffs established standing based on non-economic injuries suffered as a result of the challenged 1999 display. The Millers provided substantial evidence regarding their contact with and reaction to the 1998 display. The Millers testified that they frequently visit the municipal complex to fulfill personal, professional, and political responsibilities. Both saw the 1998 holiday display and found it objectionable. Both were troubled by the display's placement near the entrance of the municipal building, the seat of the Township's government.

Mr. Miller believed the 1998 display to be a demonstration by the Township "that it . . . has a special, close relationship with Christian religious institutions." He felt that "governmental entities . . . have no business erecting religious displays, let alone a religious display of only one religion in a place which is symbolic of the Township's power ." He resented "the Township appearing to . . . act as a representative of the Catholic religion [of which he is an adherent] in erecting the Nativity display." To him, "the display [was] an affront to and rejection of [his] political and philosophical beliefs and an intrusion into the area of [his] religion."

Similarly, Mrs. Miller interpreted the 1998 display as an endorsement of the Christian religion. As one who believes in the prohibition against establishment of religion, she found the display to be "an arrogant announcement that Wall Township is a Christian municipality--not one which is open to diversity and includes all of its residents on an equal basis." Moreover, as one who does not have a "religious background" but who is "not anti-religious," she "believes that religion plays an important part in society and that our society should be tolerant of diverse religious philosophies and practices as well as those who choose not to practice any religion at all." The display made her "feel less welcome in the community, less accepted and tainted in some way."

Before the Millers' suit was expanded to include the 1999 display, the District Court

found that this evidence sufficiently established the Millers' standing to raise their constitutional claims. The question is a close one.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the plaintiffs learned of the conveyance [of federally-owned land in Pennsylvania to Valley Forge Christian College] through a news release." The standing of the organization was dependent on that of the employee-plaintiffs, and the Supreme Court found that these named plaintiffs, who lived in Virginia and Maryland, lacked standing. The Court wrote:

> Respondents fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III.

The Court added:

> We simply cannot see that respondents have alleged an injury of any kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the *Establishment Clause* does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.

It can be argued that the Millers' alleged injuries from observance of the 1998 display--Mr. Miller's resentment, and Mrs. Miller's feelings of being "less welcome in the community, less accepted and tainted in some way," --are tantamount to the "psychological consequences . . . produced by observation of conduct with which one disagrees," *Valley Forge,* 454 U.S. at 485, and that these psychological consequences are insufficient to establish standing.

Decisions of other circuits, however, suggest that the Millers' evidence might be sufficient to establish standing with respect to the 1998 display because, unlike the named plaintiffs in *Valley Forge*, the Millers had personal contact with the display. The Tenth Circuit, for example, found standing to challenge the religious element of a city logo displayed in the city hall, on city vehicles, and on city stationary where the plaintiff had "direct, personal contact" with the logo on a daily basis and was offended and intimidated by it. *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989). Similarly, the Eleventh Circuit found that plaintiffs who felt like second class citizens because the city seal contained the word "Christianity" had standing to sue where they received correspondence and documents bearing the seal. *Saladin v. City of Milledgeville,* 812 F.2d 687, 692-93 (11th Cir. 1987). Plaintiffs' "direct contact with the offensive conduct" served to distinguish the Eleventh Circuit plaintiffs from the plaintiffs in *Valley Forge*. *Id.* at 692.

We need not decide whether the Millers' evidence would be sufficient to confer standing to challenge the 1998 display, however, because plaintiffs do not press their challenge to that

display on appeal. Plaintiffs seek relief only as to the modified display exhibited in 1999.

We do not believe that the Millers' proffered evidence would establish standing to challenge the 1999 display under the law of any circuit. The record contains no evidence that Mrs. Miller even saw the 1999 display. While Mr. Miller testified that he went to the municipal complex and observed the Township's 1999 display, it is unclear whether he did so in order to describe the display for this litigation or whether, for example, he observed the display in the course of satisfying a civic obligation at the municipal building; cf. *Suhre v. Haywood County*, 131 F.3d 1083, 1090 (4th Cir. 1997) (recognizing standing of plaintiff who, "as a participant in local government," had direct contact with a Ten Commandments display in county courtroom). Moreover, neither Mr. Miller nor Mrs. Miller provided testimony regarding their reaction to the 1999 display, which was significantly different from the display in 1998.

While we assume that the Millers disagreed with the 1999 display for some reason, we cannot assume that the Millers suffered the type of injury that would confer standing. Mere assumption would not satisfy the plaintiffs' burden to prove an element of their cause of action at this stage of the litigation and it cannot satisfy their burden to prove standing. Accordingly, we find that plaintiffs have failed to establish standing to challenge the Township's 1999 display. The order of the District Court is therefore vacated, and the case is remanded for the District Court to dismiss for lack of jurisdiction.

While the lack of standing prevents plaintiffs from obtaining a ruling from a federal court regarding the constitutionality of the Township's past display--which apparently will not be exhibited again--it does not prevent plaintiffs from attempting to challenge any future display that plaintiffs believe violates constitutional principles.