A Call for Judicial Restraint: Federal Taxpayer Grievances Challenging Executive Action

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I. INTRODUCTION

Article III of the Constitution describes the judicial power of the United States as extending to "cases" and "controversies."[1] The plain meaning of these words, however, offers little insight into what the Framers intended should be the proper scope of the federal judicial power.[2] To discern the Framers' intent, the Supreme Court has looked to common understandings about what activities are appropriately resolved through the judicial process.[3] Based upon those understandings, the Court has developed a set of rules—standing, mootness, and ripeness, among others—through which it defines the limits of the Judiciary's power in relation to the powers of the coordinate branches of government.[4]

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1. U.S. CONST. art. III, § 2. *See also* Allen v. Wright, 468 U.S. 737, 750 (1984) ("Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'").

2. As the Supreme Court has noted, an executive inquiry may be called a "case" and a legislative dispute may be called a "controversy." Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992). However, despite these labels, neither an executive inquiry nor a legislative dispute would be "appropriately resolved through the judicial process." *See id.* at 559–60.

3. *Id.*

4. *See Allen*, 468 U.S. at 750.

> [T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several

It is important to limit the Judiciary because its power is uniquely susceptible to abuse: the Judiciary is the only branch of government that is not elected and the only branch that can define the limits of its own power.[5] Therefore, it is critical that the Judiciary applies its own rules of limitation fairly and consistently. Otherwise, if the Judiciary inconsistently interprets its own rules or capriciously expands its power, it imperils not only its own integrity, but one of the Constitutional foundations of our government: separation of powers.

The law of standing, which is one dimension of the case-and-controversy requirement, addresses the important question of whether a party who brings a claim in federal court is a proper party to invoke federal court jurisdiction.[6] To have standing to litigate a cause of action under modern standing doctrine, a party must allege that he or she has actually suffered or will imminently suffer a concrete and particular injury caused by the defendant.[7] Nothing less will satisfy the Constitution.[8] The alleged injury must be actual or imminent, not conjectural or hypothetical.[9]

Requiring plaintiffs to allege an injury serves two primary concerns. First, it frames the legal question sought to be adjudicated in a factual context within which a court is capable of making decisions.[10]

> doctrines that have grown up to elaborate that requirement are "founded in concern about the proper-and properly limited-role of the courts in a democratic society."

Id. (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

5. *See* Walter Berns, *The Least Dangerous Branch, But Only if . . ., in* THE JUDICIARY IN A DEMOCRATIC SOCIETY 1 (Leonard J. Theberge, ed., 1979).

> [T]he judicial power of the United States is described in the Constitution, but it is the Court that defines it, from which it follows that the judicial power is whatever the Court makes of it. And if it is whatever the Court makes of it, it cannot be used. This is an argument that has to be met . . . for if the judicial power cannot be abused, it cannot be properly used.

Id.

6. Flast v. Cohen, 392 U.S. 83, 99–100 (1968).

7. *Lujan*, 504 U.S. at 560. *See also infra* notes 280–84 and accompanying text.

8. *Lujan*, 504 U.S. at 560.

9. *Id.* "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Id.* at 564 n.2 (citation, quotation marks, and emphasis omitted).

10. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

> 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, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

Unlike the Legislative Branch, the Judiciary does not have the ability to call hearings, make reports, conduct investigations, or otherwise make an exploratory record.[11] Rather, the courts completely depend on the parties in each case to present the relevant facts and the claims sought to be adjudicated.[12] Second, the concrete injury requirement insures the framing of relief no broader than required by the precise facts, which is especially important when adjudication would produce a confrontation with one of the coordinate branches of government.[13] Thus, the concrete injury requirement serves to prevent the Judiciary from invading the province of the other branches of government unless necessary under the particular circumstances of a case.[14] These dual concerns, i.e., the limited competency of the Judiciary and the idea of separation of powers, provide strong justifications for the concrete injury requirement in standing law.

The two Constitutional concerns just outlined—the limited competency of the Judiciary and separation of powers—strongly justify requiring all parties to allege a concrete injury in order to invoke the jurisdiction of the federal courts. Despite this strong Constitutional justification, the courts have carved out an exception to the concrete injury requirement when the plaintiff is a taxpayer challenging congressional spending. The resulting doctrine of *taxpayer standing* is at odds with the demands made and Constitutional protections otherwise afforded by standing doctrine.[15]

Generally speaking, taxpayers have no standing because a taxpayer's grievance about the government's allocation of its largesse is generally abstract and ideological in nature.[16] In such a case, the taxpayer does not suffer from the actual or imminent concrete injury that is so essential to the Judiciary's ability to render legal decisions.

Id. (citations and quotation marks omitted). *See also* discussion *infra* Part VI.B.

11. *Schlesinger*, 418 U.S. at 221 n.10. *See also* discussion *infra* Part VII.

12. *Schlesinger*, 418 U.S. at 221.

13. *Id.* at 222.

14. As summarized in *Schlesinger*, "[t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would . . . distort the role of the Judiciary in its relationship to the Executive and the Legislature." *Id.* (quotation marks omitted).

15. According to Justice Powell,

> All standing cases, even the most recent ones, include references to the need for particularized injury or similar language. None of them as yet has equated the interest of a taxpayer or citizen, suing in that status alone, with the particularized interest that standing doctrine has traditionally demanded. To take that step, it appears to me, would render the requirement of direct or immediate injury meaningless and would reduce the Court's consistent insistence on such an injury to mere talk.

United States v. Richardson, 418 U.S. 166, 194 n.16 (1974) (Powell, J., concurring).

16. *See infra* notes 300–03 and accompanying text.

It makes sense, therefore, that for most of the twentieth century, taxpayers had no special standing.[17] The Supreme Court considered but rejected a special taxpayer standing doctrine in the famous 1923 case of *Frothingham v. Mellon*.[18] In that case, the Court held that the federal Judiciary is not a proper forum for taxpayers to air their general grievances concerning the government's allocation of federal tax dollars.[19] As that holding implies, the representative branches of government are better suited to respond to taxpayer grievances.[20]

However, in *Flast v. Cohen*, decided in 1968, the Court reversed over four decades of standing jurisprudence and for the first time backpedaled from its original position and created a separate standing doctrine for certain taxpayer suits.[21] In *Flast,* the Supreme Court held that the federal Judiciary is a proper forum for taxpayers challenging congressional spending alleged to violate the Establishment Clause of the First Amendment. The Court based its decision on a standing paradigm that depends on the substantive issues in a case, rather than the injury to the particular complainant.[22] By adopting this paradigm, the Court ignored not only the carefully circumscribed role of the Judiciary in our federal system of government, but also the Judiciary's core competency within that system.[23] Moreover, because the Constitution absolutely requires that plaintiffs allege a concrete injury, and because the *Flast* Court held that taxpayers who could not meet that requirement nonetheless had standing, that decision cast a shadow on the legitimacy of the Judiciary.[24]

To be sure, the Supreme Court has since applied the *Flast* standing model only in a narrow class of cases.[25] Specifically, the Court has said that the federal courts are proper forums for taxpayer grievances only when the taxpayer demonstrates a "nexus between the taxpayer's stand-

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17. *See* discussion *infra* Part II.A–C.

18. 262 U.S. 447 (1923). *See also* discussion *infra* Part II.A.

19. *Id.* at 488–89.

20. *See* discussion *infra* Part VII.

21. 392 U.S. 83 (1968). *See also* discussion *infra* Part II.C.

22. *Flast,* 392 U.S. at 105–06.

23. *See* discussion *infra* Part VI.A.

24. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982).

> [R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.

Id. (quoting United States v. Richardson, 418 U.S. 166, 188 (Powell, J., concurring)).

25. *See, e.g.*, *Richardson*, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); *Valley Forge*, 454 U.S. 464; Bowen v. Kendrick, 487 U.S. 589 (1988).

ing as a taxpayer and the *congressional* exercise of taxing and spending power."[26] However, this nexus requirement, even when stringently applied, does not provide any sort of sensible measurement of the extent, if any, of a taxpayer's concrete injury.[27]

Recently, the Court of Appeals for the Seventh Circuit again propelled the issue of taxpayer standing into the forefront of federal jurisprudence, paving a doctrinal crossroads of sorts for the Supreme Court.[28] In *Freedom from Religion Foundation, Inc. v. Chao* (hereinafter *Freedom*), the Seventh Circuit held that the plaintiff taxpayers had standing to challenge the constitutionality of the Executive Branch's dedication of federal funds to the Faith Based and Community Initiatives program.[29] The plaintiffs claimed that this use of federal monies to the program violated the Establishment Clause.[30]

In holding that the plaintiffs had standing, the *Freedom* court broadened the *Flast* standing model to encompass a new class of taxpayer cases. Previously, taxpayers had standing only when they challenged a particular appropriation statute on the grounds that Congress's taxing and spending power was restricted in that case by a specific Constitutional provision.[31] The *Freedom* standing model, however, recognizes the standing of taxpayers who allege that virtually any executive program violates the Establishment Clause.[32]

Authored by Judge Posner, the watershed majority opinion in *Freedom* spawned a strong dissenting opinion from Judge Ripple.[33] As characterized by Judge Ripple, the majority opinion reflects an overconfident view about the nature of Article III judicial power.[34] Judge Ripple's dissent was joined by three more judges when the defendants' petition for rehearing was denied.[35] In addition, Chief Judge Flaum and Judge Easterbrook concurred in the denial of rehearing, but only because they

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26. *Bowen*, 487 U.S. at 620 (emphasis added); *see also Schlesinger*, 418 U.S. at 228 (denying taxpayer standing because "respondents did not challenge an enactment under [Article I, Section 8], but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status").

27. *See* discussion *infra* Part VI.C.

28. *See* discussion *infra* Part III.

29. 433 F.3d 989, 996–97 (7th Cir. 2006).

30. *Id.* at 993–94.

31. Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

32. *See Freedom*, 433 F.3d at 996–97.

33. *Id.* at 997–1001 (Ripple, J., dissenting).

34. *See id.* at 997.

35. Judge Ripple was joined by Judges Manion, Kanne, and Sykes. Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988 (7th Cir. 2006).

thought the matter should be resolved by the Supreme Court.[36] Apparently the Court agreed with this assessment because on December 1, 2006, the Court granted certiorari review, and the case is presently pending.[37]

This Article calls upon the Supreme Court to stay the Judiciary's hand in taxpayer grievances concerning purely executive action. Parts II and III of the Article provide the relevant background material for an understanding of the subject matter. Specifically, Part II recounts the evolution of taxpayer standing, taking the reader from the Supreme Court's decision in *Frothingham* to its counterpoint decision in *Flast*. Part III summarizes the Seventh Circuit's unprecedented decision in *Freedom*.[38] Part IV demonstrates that taxpayer standing as conceived by the *Freedom* court does not conform to the standing paradigm formulated in *Flast*, and moreover, directly conflicts with the holdings of seminal post-*Flast* Supreme Court cases.

Parts V and VI posit that even assuming arguendo that *Freedom* does not directly conflict with Supreme Court precedent, the decision should not be affirmed for two other reasons. First, as discussed in Part V, the *Freedom* court's conception of taxpayer standing should not be sustained because there is no logical nexus between taxpayer status and a claim challenging executive action that violates the Establishment Clause. Second, as discussed in Part VI, the *Freedom* court's expansion of taxpayer standing cannot be reconciled with modern standing doctrine and the requirement of a concrete injury. Part VII proposes that through general oversight authority and the power of the purse, the Legislative Branch is more competent to address and remedy taxpayer grievances challenging executive spending abuses. In the concluding remarks, the Article provides the Supreme Court with a roadmap to follow in charting its course through the doctrinal crossroads paved by the *Freedom* court.

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36. *Id.* at 988 (Flaum, J., concurring) ("[M]y vote to deny the petition for rehearing en banc is not premised upon a conclusion that the taxpayer standing issue . . . is free from doubt. . . . However, the obvious tension which has evolved in this area of jurisprudence . . . can only be resolved by the Supreme Court."); *id.* at 989 (Easterbrook, J., concurring) ("The problem is not of our creation and cannot be resolved locally."). The defendants filed a petition for writ of certiorari to the Supreme Court on August 1, 2006.

37. Hein v. Freedom from Religion Found., Inc., 127 S.Ct. 722 (2006).

38. Part III of this Article identifies three "conditions" upon which the *Freedom* court rested its standing decision. Those conditions help to frame the standing discussion in the rest of the Article.

II. THE EVOLUTION OF TAXPAYER STANDING DOCTRINE: FROM *FROTHINGHAM* TO *FLAST*

Early in the twentieth century, a plaintiff's status as a federal taxpayer was never a proper basis to invoke federal court jurisdiction; by the late twentieth century, taxpayer status had evolved into a viable basis in a narrow set of cases. As early as 1923, in the case of *Frothingham v. Mellon*, the Supreme Court held in broad terms that a federal court is not a proper forum for taxpayers to air their general grievances concerning Congress's appropriation of federal tax dollars.[39] It was not until 1968, in *Flast v. Cohen*, that the Court opened the federal courthouse doors to a very narrow set of taxpayers, namely, those challenging congressional spending programs on Establishment Clause grounds.[40] This Part explicates the *Frothingham* and *Flast* decisions in detail, with particular emphasis on the narrowness of the *Flast* decision, and provides some historical background helpful to an understanding of those decisions.

A. Frothingham v. Mellon*: The General Rule Against Taxpayer Standing*

In *Frothingham,* the plaintiff brought suit against the Secretary of Treasury and others, challenging the constitutionality of the Maternity Act of 1921.[41] The Maternity Act provided financial grants to states participating in programs aimed at reducing maternal and infant mortality and improving maternal and infant health.[42] The plaintiff, a federal taxpayer, sought to enjoin execution of that appropriation act.[43] Mrs. Frothingham alleged that execution of the Maternity Act would "increase the burden of future taxation and take her property, under the guise of taxation, without due process of law."[44]

The initial question before the *Frothingham* Court was standing. The Court posed the question of whether "a taxpayer [may maintain an action in federal court] to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes."[45] In a well-reasoned opinion authored by Justice Sutherland, the Court held that a federal taxpayer does not have standing to seek to

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39. 262 U.S. 447, 488–89 (1923).

40. 392 U.S. 83, 105–06 (1968).

41. 262 U.S. at 479.

42. *Id.*

43. *Id.* at 486.

44. *Id.* at 480, 486. She also alleged that the Maternity Act was an attempt by Congress to exercise the power of local government reserved to the states by the Tenth Amendment. *Id.* at 479.

45. *Id.* at 486.

enjoin execution of a federal appropriation act.[46] In arriving at this conclusion, the Court employed two distinct lines of reasoning.[47]

In the first line of reasoning, the *Frothingham* Court focused on the attenuated relationship between a single federal taxpayer and the federal government. The Court observed that a taxpayer's interest in the moneys of the treasury, which is shared with millions of others, is "minute and indeterminable."[48] Similarly, the Court commented that the effect upon future taxation of any single payment out of the treasury is "remote, fluctuating and uncertain."[49] Because a taxpayer's interest in the moneys of the federal treasury was indirect and remote, the Court opined that the remedy of injunction to prevent their misuse was inappropriate.[50] The Court stated that "no basis [was] afforded for an appeal to the preventive powers of a court of equity."[51]

In connection with its discussion of the relation of a taxpayer to the federal government, the Court commented that the administration of a federal appropriation statute was "essentially a matter of public and not of individual concern."[52] The *Frothingham* Court was concerned that if it recognized standing in that case, the floodgates would open to two types of taxpayer cases.[53] First, if one taxpayer could challenge an appropriation statute, then every other taxpayer could do the same.[54] Second, if an appropriation statute could be challenged, then every other statute whose administration requires an outlay of public money could also be challenged.[55] The Court noted that the potential for such a result "sustained

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46. *Id.* at 487.

47. *See id.* at 480, 486–89. The *Frothingham* Court dismissed the complaint because "[t]he appellant . . . [had no] interest in the subject-matter, nor [was any] injury inflicted or threatened, as [would] enable her to sue." *Id.* at 480.

48. *Id.* at 487.

49. *Id.* As noted in *Frothingham*, the interest of a municipal taxpayer in municipal funds is "direct and immediate," similar to the interest of a stockholder of a private corporation. *Id.* at 486–87 (citing Roberts v. Bradfield, 175 U.S. 291, 295 (1899); Crampton v. Zabriskie, 101 U.S. 601, 609 (1880)). For that reason, federal courts have generally taken a relaxed approach to the standing of municipal taxpayers challenging local government spending projects. *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 835 (2003) (finding based upon an empirical study of taxpayer standing in federal courts that "many federal judges are friendly, if not outright solicitous, to state and municipal taxpayers challenging local government spending projects."). The matter of municipal taxpayer standing is beyond the scope of this Article.

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

51. *Id.*

52. *Id.*

53. *Id.* at 487–88.

54. *Id.*

55. *Id.*

the conclusion which [it] reached,"[56] but the opinion did not suggest that its conclusion was based on the "floodgates" problem.

In the second line of reasoning, the *Frothingham* Court indicated that it did not possess the power to adjudicate the taxpayer suit because the plaintiff had not alleged a "direct injury" so as to warrant invasion of the province of the Legislative Branch.[57] Reflecting upon the nature of our tripartite system of government,[58] the Court opined that the Judiciary cannot review a congressional act unless "some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act."[59] To invoke the federal judicial power, a litigant cannot rest on the mere assertion that he or she "suffers in some indefinite way in common with people generally."[60] Because the plaintiff had not alleged a direct injury sustained as a result of enforcement of the Maternity Act, the Court concluded the case did not present a judicial controversy.[61]

Although the word *standing* does not appear in the *Frothingham* opinion,[62] the case is commonly regarded as a standing decision, if not

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56. *Id.*

57. *Id.* at 488. As discussed in Part VI.B., the principle of separation of powers is now recognized as the "single basic idea" underlying modern Article III standing doctrine. *See* Allen v. Wright, 468 U.S. 737, 752 (1984).

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

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other.

Id.

59. *Id.*

60. *Id.*

61. *Id.* at 488–89 ("To do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.").

62. The concept of standing as an Article III limitation on a federal court's power first appears in Justice Frankfurter's concurring opinion in *Coleman v. Miller*, 307 U.S. 433, 464–68 (1939). *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1378 (1988). The same concept appears later in the Supreme Court's majority opinion in Stark v. Wickard, 321 U.S. 288, 302 (1944). *See* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-In-Fact Rule, and the Framers' Plan for Federal Courts on Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 7 (2001). In *Stark*, the Court stated:

> It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which *constitutionally* permits adjudication by courts under their general powers.

321 U.S. at 304 (emphasis added) (footnotes omitted).

the origin of the standing doctrine itself.[63] Indeed, it is now well-established that *Frothingham* stands for the general proposition that a federal taxpayer does not have standing to invoke the power of the federal Judiciary to challenge the constitutionality of a federal appropriation statute.[64]

As discussed above, the *Frothingham* Court's decision to dismiss the taxpayer suit rested on two distinct concerns: (1) the attenuated relationship between a single federal taxpayer and the monies in the federal treasury, and (2) the lack of a direct injury that would warrant invasion of the province of another branch of government.[65] Due to the dualistic nature of the Court's rationale, many scholars and courts have debated whether the rule established in *Frothingham* emanates from constitutional or prudential concerns.[66] As noted by Justice Brennan, "the principal interpretative difficulty lies in the manner in which *Frothingham* chose to blend the language of policy with seemingly absolute statements about jurisdiction."[67] According to Brennan, the first line of reasoning—the attenuated relationship between a taxpayer and treasury monies—denotes a prudential consideration, not a distinction recognized by the

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63. Most scholars trace the origin of standing doctrine to *Frothingham*. *See* Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 1 (2001) ("The rise of modern standing doctrine in American Constitutional Law can be traced with some precision to Justice Sutherland's opinion for a unanimous Supreme Court in Massachusetts v. Mellon, and its companion case of Frothingham v. Mellon."); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 622 (2004) ("[T]he Supreme Court first devised the doctrine of standing (applicable to all plaintiffs in federal court) in Frothingham v. Mellon."). Other scholars trace the origin of standing doctrine to *Fairchild v. Hughes*, 258 U.S. 126 (1922), a case in which the Supreme Court dismissed a complaint brought by a plaintiff who, as citizen, taxpayer, and member of the American Constitutional League, sought to challenge the process by which the Nineteenth Amendment to the Constitution was ratified. *E.g.*, *Winter*, *supra* note 62, at 1376. In *Fairchild*, Justice Brandeis, writing for the Court, reasoned that the plaintiff did not have a sufficient interest in the matter to afford a basis for the lawsuit. 258 U.S. at 129. Although Brandeis did not specifically address the issue of taxpayer standing, he presaged his restrictive position on standing when he stated that "the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted . . . does not entitle a private citizen to institute in the federal courts a suit." *Id.*

64. Flast v. Cohen, 392 U.S. 83, 85 (1968).

65. *See Frothingham*, 262 U.S. at 487–88.

66. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 496 (1982) (Brennan, J., dissenting). *See also Flast*, 392 U.S. at 92–93 & n.6 (citing Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302–303 (1961); Arthur Garfield Hays, *Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 BUFF. L. REV. 35, 48–65 (1962); Kenneth Culp Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 386–391 (1955)).

67. *Valley Forge*, 454 U.S. at 496 (Brennan, J., dissenting).

Constitution.[68] On the other hand, the concluding sentence of the *Frothingham* opinion states that to take jurisdiction of the taxpayer's suit in the absence of an injury "would not be to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."[69] As Brennan observed,[70] that sentence implies a constitutional rule.[71]

While the dualistic aspect of the *Frothingham* Court's rationale provides some justification for this debate,[72] the Court's use of jurisdiction-related words, such as "power," "judicial controversy," and "authority," denotes constitutional concerns. In that respect, the *Frothingham* opinion may be best understood as establishing, at least in part, a constitutional rule. Under *Frothingham*, a federal taxpayer does not have constitutional standing to challenge the constitutionality of a congressional appropriation act because a federal taxpayer suffers no direct injury as a result of the execution of an appropriation act.

Notwithstanding the debate surrounding the rationale, the rule in *Frothingham* stood undisturbed for nearly half of a century as an "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers."[73]

B. The Intervening Years from Frothingham *to* Flast: *A Time of Doctrinal Unrest*

After the Supreme Court rendered its decision in *Frothingham*, standing doctrine outside the arena of taxpayer standing began to evolve. Indeed, the fifty-year period after *Frothingham* proved to be a time of doctrinal unrest, which set the stage for the Court's pivotal decision in *Flast*.

In the 1930s and 1940s, the Court developed an onerous legal interest standing test. To have standing to sue in federal court, plaintiffs were required to allege a "direct injury" caused by an act of the defendant,[74]

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68. *Id.* at 497 n.8. The prevailing view of the commentators is that *Frothingham* intended to announce only a non-constitutional rule of self-restraint. *See Flast*, 392 U.S. at 92 n.6.

69. *Frothingham*, 262 U.S. at 488–89.

70. *Valley Forge*, 454 U.S. at 496 n.8 (Brennan, J., dissenting).

71. *Flast*, 392 U.S. at 92–93.

72. *See id.* at 93 n.7.

73. *Id.* at 85. *See also, e.g.*, Horne v. Fed. Reserve Bank, 344 F.2d 725, 729 (8th Cir. 1965) (dismissing an action brought by a plaintiff, as a citizen of the United States and a federal taxpayer, challenging the constitutionality of the National Bank Act and the Federal Reserve Act).

74. *See* Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938) (citing Massachusetts v. Mellon, 262 U.S. 477, 486 (1923)).

but "[t]he term 'direct injury' [was] used in its legal sense, as meaning a wrong which directly results in the violation of a legal right." [75] An allegation of an injury-in-fact would not suffice.[76] Rather, the standing question asked whether a plaintiff had alleged an invasion of some legally protected interest or legal right created by a statute, the Constitution, or common law.[77]

Courts commonly answered this question with reference to the field of law upon which a plaintiff based his or her claim, asking whether that field of law granted the plaintiff the right to sue.[78] For example, in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, the Court denied standing to the plaintiffs, private power companies alleging the unconstitutionality of the statutory plan that allowed the Tennessee Valley Authority to generate and sell electricity.[79] Although the plaintiffs claimed an injury to their competitive positions, the Court denied their standing because they failed to allege an invasion of a "legal right—one

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75. *Alabama Power*, 302 U.S. at 479.

76. *See id.* "It is an ancient maxim, that a damage . . . without an injury in this sense . . . does not lay the foundation of an action." *Id.* The Latin phrase for this maxim is *damnum absque injuria*. *Id.*

77. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring).

> A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute. But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially.

Id. (citations and footnote omitted); *see also* Chicago Junction Case, 264 U.S. 258, 272–73 (1924) (Sutherland, J., dissenting).

> A private injury, for which the law affords no remedy, cannot be converted into a remediable injury, merely because it results from an act of which the public might complain. In other words, the law will afford redress to a litigant only for injuries which invade his own legal rights; and since the injuries here complained of are not of that character, and do not result from the violation of any obligation owing to the complainants, it follows that they are without legal standing to sue.

Id.

78. Michael E. Rosman, *Standing Alone: Standing Under The Fair Housing Act*, 60 MO. L. REV. 547, 553–54 (1995).

> The critics of modern standing doctrine, for the most part, seem to agree that the "legal interest" test had more going for it than current doctrine. In any standing case, they say, the question should really be whether the positive law upon which the plaintiff bases his or her claim grants that plaintiff the right to sue.

Id.; Kenneth E. Scott, *Standing in the Supreme Court, A Functional Analysis*, 86 HARV. L. REV. 645, 650 (1973) ("By using [the legal interest] formula, the Court was in effect seeking guidance from other fields of law on whether plaintiff's interest was sufficient to warrant judicial protection."); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992) ("Without a cause of action, there was no case or controversy and hence no standing.").

79. 306 U.S. 118, 147 (1939).

of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[80]

In 1962, in the case of *Baker v. Carr*, the Court signaled dissatisfaction with the legal interest test.[81] Writing for the Court, Justice Brennan reframed the "gist of the question of standing" as whether "the appellants alleged such a personal stake in the outcome of the controversy as to assure [the presence of] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[82] Applying that formulation, the Court considered whether the plaintiffs, a group of voters, had standing to challenge a state legislative apportionment statute on the ground that the statute deprived them of equal protection of the laws and caused a dilution of their votes.[83] Although "[t]he notion of dilution of any particular vote is as abstract and indefinable as the effect on a taxpayer of a questioned action requiring a modicum of expenditure,"[84] the Court held that the voters had standing to sue under this new formulation.[85] In so holding, the Court noted that it was not necessary to decide whether the impairment of the plaintiffs' votes would produce a legally cognizable injury.[86] The Court did not, however, provide any guidance as to the meaning of the newfound concepts "personal stake" and "concrete adverseness," thereby "le[aving] [the] courts at sea in applying the law of standing."[87]

Hence, in the mid-1960s, standing doctrine was in a state of flux and uncertainty. In addition to the scholarly debate surrounding the rationale for the taxpayer standing decision in *Frothingham*,[88] the *Baker* Court had evinced dissatisfaction with the legal interest test and had framed an amorphous standing test that was unproven and ill-defined.[89]

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80. *Id.* at 137; *see also* Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (denying standing in a group of iron and steel producers alleging a loss of government contracts as a result of the Secretary of Labor's minimum wage determination because "no legal rights of respondents were shown to have been invaded or threatened"); *Alabama Power*, 302 U.S. at 479 (denying standing in a plaintiff alleging a threatened loss of business attributable to federal loan-and-grant agreements awarded to four municipal corporations).

81. 369 U.S. 186 (1962).

82. *Id.* at 204.

83. *Id.* at 204–08.

84. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1046 n.45 (1968).

85. *Baker*, 369 U.S. at 198.

86. *Id.* at 208.

87. Allen v. Wright, 468 U.S. 737, 751 (1984).

88. *See supra* note 66 and accompanying text.

89. *See supra* notes 81–87 and accompanying text.

Amidst this doctrinal unrest, the Court was presented with the seminal taxpayer standing case of *Flast v. Cohen*,[90] discussed below.

C. Flast v. Cohen*: A Narrow Window for Taxpayers Suits*

In *Flast*, the Court recognized, for the first time, the standing of taxpayers challenging the government's allocation of federal funds. The subset of taxpayer cases falling within *Flast* is narrow, however, because the Court only slightly lowered the *Frothingham* barrier.[91] As illustrated below, the power to lower that barrier came from an unlikely source: the might of the Establishment Clause as a specific bulwark against congressional spending abuses.

In *Flast*, the taxpayers claimed that the Elementary and Secondary Education Act of 1965 (Education Act) as applied by the Secretary of Health, Education, and Welfare was unconstitutional under the Establishment Clause.[92] The taxpayers complained that federal funds appropriated under the Education Act were being used to finance instruction in, and purchase materials, for religious schools.[93] The sole issue before the Court was standing: "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and the Free Exercise Clauses of the First Amendment."[94]

The *Flast* Court started its analysis with a discussion of the standing rule in *Frothingham*.[95] But rather than resolve the doctrinal debate surrounding that decision, the Court undertook a "fresh examination of the limitations upon standing to sue in a federal court."[96] The Court opined that the Article III limitations on standing are "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."[97] According to the Court, a taxpayer may maintain an action only when the taxpayer has a personal stake in the outcome of the controversy in order to impart the necessary concrete adverseness of the litigation.[98] To make that determination, it was necessary to ascertain

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90. 392 U.S. 83 (1968).

91. *See id.* at 105–06.

92. *Id.* at 85, 87–88. Alternatively, the plaintiffs claimed that the Secretary's actions in approving expenditures of federal funds for use by religious schools were unauthorized by Title I of the Education Act. *Id.* at 85.

93. *Id.* at 85–86. The plaintiffs sued the Secretary charged by Congress with administering the Education Act, and sought injunctive and declaratory relief. *Id.* at 85, 87–88.

94. *Id.* at 85.

95. *Id.*

96. *Id.* at 94.

97. *Id.* at 101.

98. *Id.*

whether there was "a logical nexus between the status asserted [by the taxpayer] and the claim sought to be adjudicated."[99]

When federal taxpayers challenge the constitutionality of a federal spending program, the *Flast* Court explained, the presence of the requisite nexus is determined by a two-prong test. First, the taxpayer must show a sufficient "logical link" between his or her taxpayer status and the type of legislative enactment.[100] 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 [Article I, Section 8], of the Constitution."[101]

Narrowing the first link even further, the Court admonished, "[i]t will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute."[102] Rather, to have standing under the first prong of the *Flast* nexus test, a taxpayer must challenge the constitutionality of a congressional spending program.

Second, "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 [Article I, Section 8]."[103] If a taxpayer meets both requirements, the taxpayer is "deemed" to have the requisite personal stake in the outcome of the controversy sufficient to establish standing to invoke the Judiciary's power.[104] Thus, under *Flast*, "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."[105] In that case, the Court noted that the taxpayer's injury would be that "his tax money is being extracted

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99. *Id.* at 102 ("[I]t is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."). The Court's approach to the standing problem was unique. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 78–79 (1978) ("No cases have been cited outside of the context of taxpayer suits where we have demanded this type of subject-matter nexus between the right asserted and the injury alleged, and we are aware of none."); FEC v. Akins, 524 U.S. 11, 22 (1998) (same).

100. *Flast*, 392 U.S. at 102.

101. *Id.*

102. *Id.*

103. *Id.* at 102–03.

104. *Id.* at 103.

105. *Id.* at 105–06.

and spent in violation of specific constitutional protections against such abuses of legislative power."[106]

Applying the two-prong nexus test to the allegations in *Flast*, the Court found that the plaintiffs had challenged a congressional exercise of authority under the Taxing and Spending Clause, and that the challenged program involved a substantial expenditure of federal tax funds.[107] Second, the Court found that the plaintiffs had alleged that the challenged expenditures violated the Establishment Clause.[108] Reflecting on the history behind the Framers' drafting of the Establishment Clause, the Court noted that those who drafted it specifically feared that the taxing and spending power would be used in favor of one religion over another or to support religion in general.[109] Accordingly, the Court held that the Establishment Clause was a specific constitutional limitation imposed upon Congress's taxing and spending power.[110] Because the plaintiffs had met both prongs of the nexus test, the Court concluded that the plaintiff-taxpayers in *Flast* had established standing.[111]

Rather than ending its inquiry there, the *Flast* Court announced that its two-prong nexus test was consistent with the result in *Frothingham*.[112] The taxpayer in *Frothingham* met the first prong of the standing test because she challenged an exercise of congressional authority under the Taxing and Spending Clause, namely the Maternity Act of 1921.[113] However, the taxpayer did not have standing because she did not meet the second prong of the nexus test.[114] She alleged a violation of the Due Process Clause, which in the Court's view, was not a specific limitation on Congress's taxing and spending power.[115] The Court made clear that when a taxpayer does not meet the two-prong nexus requirement, the general rule against taxpayer standing announced in *Frothingham* continues to apply—a taxpayer generally may not use a "federal court as a

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106. *Id.* at 106. Notably, unlike the complaint in *Frothingham*, the complaint in *Flast* did not allege that the challenged expenditure would increase the plaintiffs' tax burden.

107. *Id.* at 103.

108. *Id.*

109. *Id.* at 103–04.

110. *Id.* The *Flast* Court countenanced the possibility that there might be specific limitations on Congress' taxing and spending power other than the Establishment Clause, but left that determination to future cases. *Id.* at 105. *See also* discussion *infra* Part V.B.

111. *Id.* at 106.

112. *Id.* at 104.

113. *Id.* at 104–05.

114. *Id.* at 105.

115. *Id.*

forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."[116]

In sum, *Flast* recognizes the standing only of taxpayers who raise a specific constitutional challenge to an exercise of congressional authority under the Taxing and Spending Clause.[117] Although the *Flast* decision may be challenged on a number of bases,[118] it has become well-settled standing law.

The next Part of this Article discusses the Seventh Circuit's *Freedom* decision, which recognized the standing of taxpayers challenging executive, not congressional, spending action. The discussion provides background material helpful to an understanding of this Article's later critique of the *Freedom* decision.

III. FREEDOM FROM RELIGION FOUNDATION, INC. V. CHAO

In 2006, approximately thirty-eight years after *Flast*, the Seventh Circuit rendered its decision in *Freedom*, which dramatically expanded the category of taxpayers who have standing to sue in that circuit.[119] In *Freedom*, the Freedom from Religion Foundation, Inc., a non-stock corporation, and several individual taxpayers, brought suit against several Executive Branch officials, challenging the constitutionality of the Faith Based and Community Initiatives (FBCI), on the ground that it violated the Establishment Clause.[120] The FBCI is a policy initiative designed to establish a national effort to expand opportunities for faith-based and other community organizations, and to strengthen their capacities to meet social needs.[121] President Bush created the program through a series of Executive Orders, which established a central operating office in the White House and several centers in various federal departments.[122] The department centers coordinate efforts to eliminate regulatory, contracting, and other programmatic obstacles that would prevent faith-based and

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116. *Id.* at 106.

117. *Id.* at 105–06 ("[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." (emphasis added)).

118. *See infra* Part VI.A-B.

119. *See* Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006).

120. *Id.* at 994.

121. *See* Exec. Order No. 13,199, 3 C.F.R. 752 (2002), *reprinted in* 3 U.S.C. ch. 2 (Supp. II 2003).

122. *See id.*; Exec. Order No. 13,198, 3 C.F.R. 750 (2002), *reprinted in* 5 U.S.C. § 601 (Supp. II 2003); Exec. Order No. 13,280, 3 C.F.R. 262 (2003), *reprinted in* 5 U.S.C. § 601; Exec. Order No. 13,342, 3 C.F.R. 180 (2005), *reprinted in* 5 U.S.C.A. § 601 (West Supp. 2005); Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006).

other community organizations from providing social services.[123] Accordingly, the department centers hold conferences to provide faith-based and secular community organizations with information about the federal grant process, funding opportunities, and the conditions attached to the receipt of federal funds.[124]

The crux of the plaintiffs' complaint was that the FBCI program is designed to promote religious community organizations over secular ones.[125] The plaintiffs claimed that the agencies use the conferences as propaganda vehicles for religion.[126] The complaint did not allege that any of the plaintiffs had participated in the conferences or had been denied funding as a result of the conferences or the program.[127] Rather, the plaintiffs asserted their standing to maintain the action based only on their status as taxpayers.[128]

In an opinion written by Judge Posner, the *Freedom* court held that the plaintiffs, as taxpayers, had Article III standing to challenge the constitutionality of the FBCI program under an extension of the *Flast* exception.[129] The court rested its holding on three apparent conditions or considerations. First, the court indicated that the plaintiffs had challenged an Executive Branch activity funded by monies derived from congressional appropriations, as opposed to voluntary donations by citizens.[130] Because congressional appropriations were the source of the monies that the Executive Branch allocated in its discretion to the FBCI program, the *Freedom* court apparently found that the plaintiffs' challenge to the constitutionality of the program sufficiently implicated the Taxing and Spending Clause to meet the first prong of the *Flast* nexus test.[131]

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123. *See* Exec. Order No. 13,198, 3 C.F.R. 750 (2002), *reprinted in* 5 U.S.C. § 601 (Supp. II 2003); Exec. Order No. 13,280, 3 C.F.R. 262 (2003), *reprinted in* 5 U.S.C. § 601; Exec. Order No. 13,342, 3 C.F.R. 180 (2005), *reprinted in* 5 U.S.C.A. § 601 (West Supp. 2005); Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (2006). In an Executive Order, the President opined that a faith-based organization, like its secular counterpart, which applies for, or participates in, a social service program supported with federal financial assistance may retain its independence and may continue to carry out its mission. *See* Exec. Order No. 13,279, 3 C.F.R. 258, § 2(f) (2003). The difference, the President has said, is that a faith-based organization that participates in a social service program supported with Federal financial assistance may "not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization." *Id.*

124. *Freedom,* 433 F.3d at 993 (citing a FBCI Conference website, http://www.dtiassociates.com/FBCI/).

125. *Id.*

126. *Id.* at 994.

127. *See id.*

128. *See id.*

129. *Id.* at 996–97.

130. *Id.* at 994.

131. *Id.*

Second, the court observed that the challenged activity involved an expenditure of tax funds incurred for religious purposes[132] and indicated that there would be no standing "when the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero."[133] It is important to recall that under the *Flast* nexus test, a taxpayer does not have standing to challenge an "incidental expenditure of tax funds in the administration of an essentially regulatory statute."[134] Under *Flast*, then, a taxpayer has standing to challenge the constitutionality only of a congressional spending program, not a congressional expenditure incidental to a regulatory aim. The *Freedom* court, on the other hand, expressly refused to recognize an analogous distinction. The court stated that under its formulation of taxpayer standing, a taxpayer would have standing to bring an Establishment Clause challenge against an expenditure of tax funds, regardless of whether the expenditure was made as part of a grant-making program or as an incident to the administration of a policy initiative.[135] Thus, even though the plaintiffs were challenging the use of expenditures incidental to a policy initiative, the *Freedom* court nevertheless held that the plaintiffs had standing.[136]

Third, and finally, the court indicated that the plaintiffs challenged the constitutionality of an executive program, not individual action.[137] The court stated that a plaintiff would not have standing if he or she claimed merely that "government employees involved in [an otherwise constitutional] program sometimes wandered out of the neutral zone."[138] However, because the plaintiffs had challenged the constitutionality of the FBCI program itself, they were within the *Freedom* court's conception of standing.[139]

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132. *Id.*

133. *Id.* at 995. The court offered the following example:

> Imagine a suit complaining that the President was violating the clause by including favorable references to religion in his State of the Union address. The objection to his action would not be to any expenditure of funds for a religious purpose; and though an accountant could doubtless estimate the cost to the government of the preparations, security arrangements, etc., involved in a State of the Union address, that cost would be no greater merely because the President had mentioned Moses rather than John Stuart Mill. In other words, the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause would be zero.

Id.

134. *Id.*

135. *Id.* at 996–97.

136. *Id.*

137. *Id.* at 996.

138. *Id.*

139. *See id.* at 996–97.

Apparently because the plaintiffs satisfied these three conditions, they did not lose their standing to challenge the FBCI program merely because it was an executive rather than a congressional program.[140] In the *Freedom* court's view, none of the Supreme Court cases dealing with taxpayer standing[141] precluded the standing of taxpayers to challenge an Executive Branch program.[142] The court indicated that "it would be too much of a paradox" to recognize the standing of a taxpayer who challenges a congressional spending program on Establishment Clause grounds, but not that of a taxpayer who challenges an Executive Branch's appropriation of un-earmarked funds on the same grounds.[143] Thus, the "[t]he difference cannot be controlling."[144] As a result, the *Freedom* court vacated the district court's order and recognized that the plaintiffs had standing to sue.[145]

The majority's decision prompted a strong dissenting opinion from Judge Ripple, who refused to accept the majority's view "that the applicable Supreme Court precedent permits such a dramatic expansion of current standing doctrine."[146] A majority of the active members of the Court of Appeals denied a petition for rehearing en banc.[147] Judge Ripple, joined by Judges Manion, Kanne, and Sykes, dissented from the denial of the petition for rehearing.[148] The case is presently pending before the Supreme Court.[149]

IV. THE *FREEDOM* DECISION CANNOT BE RECONCILED WITH SUPREME COURT PRECEDENT

Having discussed the evolution of taxpayer standing, including the narrow *Flast* standing exception and a brief orientation to the *Freedom* case, this Article will now critique the *Freedom* decision. *Freedom* is the brainchild of an intermediate appellate court, and thus, this critique is guided by the overarching principle that federal courts of appeals must

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140. *Id.*

141. *E.g.*, United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State Inc., 454 U.S. 464 (1982); Bowen v. Kendrick, 487 U.S. 589 (1988).

142. *Freedom*, 433 F.3d at 996.

143. *Id.* at 994.

144. *Id.*

145. *Id.* at 997.

146. *Id.* at 997 (Ripple, J., dissenting).

147. Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988 (7th Cir. 2006).

148. *Id.* at 990.

149. Hein v. Freedom from Religion Found., Inc., 127 S.Ct. 722 (2006).

follow the decisions of the Supreme Court.[150] The first issue, therefore, is whether the *Freedom* court's decision conflicts with Supreme Court precedent.

As an initial matter, it cannot be seriously argued that the *Freedom* decision directly conflicts with the holdings in *Flast* or *Frothingham*. The *Freedom* court held that taxpayers have standing to challenge the constitutionality under the Establishment Clause of any executive program involving an expenditure of funds derived from congressional appropriations.[151] The Court's holdings in *Frothingham* and *Flast*, on the other hand, dealt with the standing of taxpayers challenging congressional action. Specifically, the *Frothingham* Court held that a taxpayer may not bring a suit in federal court challenging the constitutionality of a congressional appropriation act.[152] Carving out a narrow exception to that rule, the *Flast* Court held that a taxpayer may bring a suit alleging that congressional action under the Taxing and Spending Clause is a derogation of those constitutional provisions that restrict Congress's taxing and spending power.[153] Thus, the *Freedom* court's decision does not directly run afoul of *Flast* or *Frothingham*.

Although the *Freedom* decision does not conflict with *Flast* or *Frothingham*, the decision directly conflicts with the holdings of the Supreme Court in two post-*Flast* taxpayer standing cases, *Schlesinger v. Reservists Committee to Stop the War*,[154] and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*,[155] both of which involved challenges to executive action. In *Schlesinger*, decided just five years after *Flast*, the Court held that a taxpayer could not maintain a suit challenging the constitutionality of the Executive Branch's payment of Armed Forces Reserve funds to members of Congress.[156] Similarly, in *Valley Forge*, decided in 1982, the Court held that

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150. *See* Roper v. Simmons, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting) ("[I]t remains this Court's prerogative alone to overrule one of its precedents .... That is so even where subsequent decisions or factual developments may appear to have significantly undermined the rationale for our earlier holding." (citation, quotation marks, and emphasis omitted)); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("The Court of Appeals was correct in applying that principle despite disagreement with [Albrecht v. Herald Co., 390 U.S. 145 (1968)], for it is this Court's prerogative alone to overrule one of its precedents."); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

151. *Freedom*, 433 F.3d at 996–97.

152. Frothingham v. Mellon, 262 U.S. 447, 488–89 (1923).

153. Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

154. 418 U.S. 208 (1974).

155. 454 U.S. 464 (1982).

156. *Schlesinger*, 418 U.S. at 228.

a taxpayer could not maintain a suit challenging the constitutionality of the Executive Branch's transfer of a parcel of land to a Christian college.[157]

This Part provides a detailed discussion of *Schlesinger* and *Valley Forge* and argues that the *Freedom* decision directly conflicts with the holdings of both cases. In addition, this Part argues that the *Freedom* decision is not saved by the Court's most recent taxpayer standing case of *Bowen v. Kendrick*,[158] the lone case in which the Court has recognized the standing of federal taxpayers since *Flast*.

A. The Freedom *Decision Conflicts with* Schlesinger

The most significant problem concerning the Seventh Circuit's decision in *Freedom* is that it directly conflicts with the Supreme Court's holding in *Schlesinger*, which rejected the standing of taxpayers challenging purely executive action.

In *Schlesinger*, the plaintiffs, the Reservists Committee to Stop the War and certain named members, filed suit against the Secretary of Defense and other officials, claiming that congressional membership in the Armed Forces Reserve (Reserve) violated the Incompatibility Clause of the Constitution.[159] As part of their complaint, the plaintiffs claimed that the Executive Branch's payment of Reserve funds to Members of Congress was unconstitutional under the Incompatibility Clause.[160] The plaintiffs sought an order reclaiming any monies received by Reservists during their membership in Congress and requiring the defendants to strike all Members of Congress from the rolls of the Reserve, among other relief.[161]

The plaintiffs claimed standing on multiple bases, namely as federal taxpayers, reservists, opponents of the Vietnam War, and citizens of the United States.[162] The district court rejected the plaintiffs' assertion of standing as taxpayers, reservists, and opponents of the Vietnam War, but allowed them to proceed as citizens and granted partial summary

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157. *Valley Forge*, 454 U.S. at 482.

158. 487 U.S. 589 (1988).

159. *Schlesinger*, 418 U.S. at 210–11.

160. *Id.* at 209. The Incompatibility Clause states,

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art. I, § 6, cl. 2.

161. *Schlesinger*, 418 U.S. at 211.

162. *Id.*

judgment in their favor.[163] The court of appeals affirmed.[164] On appeal to the Supreme Court, the defendants-petitioners challenged the plaintiffs' standing to sue, raising the question of whether the plaintiffs had standing as taxpayers or citizens.[165]

After rejecting the plaintiffs' assertion of citizen standing, the *Schlesinger* Court considered whether the plaintiffs had standing to sue as federal taxpayers.[166] The Court began by observing that *Flast* "established that status as a taxpayer can, under certain limited circumstances, supply the personal stake essential to standing."[167] After reciting the *Flast* nexus test, the Court concluded that the plaintiffs did not meet the first prong of the nexus test because they had challenged executive action, not an enactment of Congress under the Taxing and Spending Clause.[168] Specifically, the Court explained that the plaintiffs did not "challenge an enactment under [Article I, Section 8], but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status."[169] The Court noted that the relief the plaintiffs were seeking would flow from "the invalidity of Executive action in paying persons who could not lawfully have been Reservists, not from the invalidity of statutes authorizing pay to those who lawfully were Reservists."[170] On that basis alone, the plaintiffs were denied standing as federal taxpayers for failure to satisfy the *Flast* nexus test.[171]

Schlesinger reflects the Supreme Court's unabashed refusal to recognize the standing of a taxpayer challenging purely executive spending action. When a taxpayer challenges executive action in expending funds, instead of the congressional acts authorizing the expenditures, the taxpayer cannot meet the literal terms of the first prong of the *Flast* test, and under *Schlesinger*, that is a sufficient reason to deny standing.[172]

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163. *Id.* at 213–14.
164. *Id.* at 214.
165. *Id.*
166. *Id.* at 227–28.
167. *Id.* at 227.
168. *Id.* at 228.
169. *Id.*
170. *Id.* at 228 n.17.
171. *Id.*
172. *See* Dist. of Columbia Common Cause v. Dist. of Columbia, 858 F.2d 1, 4 (D.C. Cir. 1988) (citing *Schlesinger* for the proposition that the Supreme Court "has refused to extend *Flast* to exercises of executive power"); Public Citizen, Inc. v. Simon, 539 F.2d 211, 217 (D.C. Cir. 1976) ("the *Schlesinger* challenge failed because it was directed at executive conduct"); *Schlesinger*, 418 U.S. at 229 (noting that plaintiffs lacked standing to sue as taxpayers under *Flast* because "there is simply no challenge to an exercise of the taxing and spending power").

The *Freedom* court's attempt to distinguish *Schlesinger* fails. The *Freedom* court suggested that *Schlesinger* is distinguishable because "taxpayer standing to enforce [a provision] of the Constitution other than the establishment clause was rejected."[173] The plaintiffs in *Schlesinger* did seek to enforce the Incompatibility Clause, not the Establishment Clause.[174] However, the *Schlesinger* Court's denial of plaintiffs' standing as taxpayers expressly and exclusively rested on plaintiffs' failure to challenge an enactment under Article I, Section 8.[175]

As in *Schlesinger*, the plaintiffs in *Freedom* did not challenge an enactment under Article I, Section 8. Rather, they challenged Executive action in holding the FBCI conferences.[176] Similarly, the relief that the *Freedom* plaintiffs sought flowed from the invalidity of executive action in paying for the costs associated with the FBCI conferences, not from the invalidity of statutes appropriating the funds used to pay the costs.[177] Thus, *Freedom* falls squarely within the holding of *Schlesinger*.

In sum, under *Schlesinger,* plaintiffs may not assert their status as taxpayers to challenge purely executive spending action. Thus, the plaintiffs in *Freedom* have no standing to challenge the Executive Branch's use of monies to fund the FBCI, even if those monies were derived from congressional appropriations.

B. The Freedom *Decision Conflicts with* Valley Forge

The *Freedom* court's decision also conflicts with the holding in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*[178] In that case, the Court again denied taxpayer standing to plaintiffs challenging purely executive action.

In *Valley Forge*, an association and four of its employees challenged a transfer of land made by the Secretary of the Department of Health, Education, and Welfare to Valley Forge Christian College on the ground that the transfer violated the Establishment Clause.[179] The Secretary transferred the property pursuant to the Federal Property and Administrative Services Act of 1949 (Federal Property Act).[180] The Federal Property Act was designed, in part, to provide an "economical and

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173. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 996 (7th Cir. 2006).
174. *Schlesinger*, 418 U.S. at 209.
175. *Id.* at 228.
176. *Freedom*, 433 F.3d at 993.
177. *See id.* at 996.
178. 454 U.S. 464 (1982).
179. *Id.* at 468.
180. *Id.* at 467–68.

efficient system . . . for the disposal of surplus property."[181] The plaintiffs asked the district court to declare the conveyance void and order the college to transfer the property back to the United States.[182]

The plaintiffs premised their standing to sue on their taxpayer status.[183] They asserted that as a result of the transfer, they were deprived of the fair and constitutional use of their tax dollars.[184] The sole issue before the Court was whether the plaintiffs had standing to sue.[185]

The *Valley Forge* Court concluded that the plaintiffs did not have standing because they failed to meet the first prong of the *Flast* test in two ways.[186] First, the source of the plaintiffs' complaint was not congressional action, but a decision made by the Executive Branch to transfer a parcel of federal property.[187] The Court noted that under the *Flast* nexus test, a taxpayer's challenge must be directed "only [at] exercises of congressional power."[188] Second, the property transfer was not an exercise of authority conferred by the Taxing and Spending Clause.[189] Because the plaintiffs failed the first prong of the nexus test, the plaintiffs lacked standing as taxpayers.[190]

Like *Schlesinger*, *Valley Forge* confirms that a taxpayer has standing to challenge only exercises of congressional power, not decisions made by the Executive Branch. And as with its attempt to distinguish *Schlesinger*, the *Freedom* court's attempt to distinguish *Valley Forge* is misguided. The *Freedom* court suggests that the lack of standing in *Valley Forge* turned on the fact that the legislation authorizing the challenged transfer was promulgated under the Property Clause, not the Taxing and Spending Clause.[191] However, the *Valley Forge* Court made clear that the plaintiffs also failed the first prong of the *Flast* test because "the source of their complaint is not a congressional action."[192]

Justice Brennan, in his *Valley Forge* dissent, disagreed with this interpretation of *Flast* and counseled against drawing any distinctions

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181. *Id.* at 466 (quoting 40 U.S.C. § 471 (1976)).

182. *Valley Forge*, 454 U.S. at 469.

183. *Id.*

184. The district court dismissed the complaint for lack of standing. *Id.* The Court of Appeals for the Third Circuit reversed, reasoning that the plaintiffs had standing as citizens, but not as taxpayers. *Id.* at 470.

185. *Id.*

186. *Id.* at 479–80.

187. *Id.* at 479.

188. *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)).

189. *Valley Forge*, 454 U.S. at 480.

190. *Id.* at 479.

191. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 992 (7th Cir. 2006).

192. *Valley Forge,* 454 U.S. at 479–80.

between the actions of the legislative branch and those of the executive branch for the purpose of taxpayer standing.[193] As characterized by the *Valley Forge* majority,[194] Brennan opined that a taxpayer should have a right "to challenge a federal bestowal of largesse" for religious purposes,[195] "regardless of which branch is at work in a particular instance."[196] The majority in *Valley Forge*, however, expressly rejected Brennan's "revisionist reading" of *Flast*.[197] *Valley Forge* is therefore properly read to reject the standing of taxpayers challenging purely executive action.

The plaintiffs in *Valley Forge* lacked standing in part because they did not challenge an exercise of congressional power.[198] Like the plaintiffs in *Valley Forge*, the plaintiffs in *Freedom* also did not challenge an exercise of congressional power.[199] Unlike the plaintiffs in *Valley Forge*, however, the plaintiffs in *Freedom* were deemed to have standing.[200] Consequently, the *Freedom* court's decision runs directly counter to *Valley Forge*.

C. The Freedom *Decision Falls Outside of the Purview of* Kendrick

Bowen v. Kendrick is the only case since *Flast* in which the Supreme Court has recognized the standing of federal taxpayers.[201] In doing so, however, the Court confirmed the requirement of a "nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power."[202] The *Freedom* court opined that *Kendrick* governed the factual situation before it,[203] but for the reasons explained below, the *Freedom* court viewed *Kendrick* incorrectly.

In *Kendrick*, the Court considered a challenge to the constitutionality of the Adolescent Family Life Act (AFLA), a statute that provided grants to organizations for services relating to adolescent sexuality and pregnancy.[204] Seeking declaratory and injunctive relief against the Secretary of Health and Human Services, the plaintiffs, a group of federal taxpayers, claimed that the statute violated the Establishment Clause on its

193. *Id.* at 511 (Brennan, J., dissenting).
194. *Id.* at 485 n.20 (majority opinion).
195. *Id.* at 509 (Brennan, J., dissenting).
196. *Id.* at 511 (Brennan, J., dissenting).
197. *Id.* at 485 n.20 (majority opinion).
198. *Id.* at 479.
199. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 996–97 (7th Cir. 2006).
200. *Id.*
201. 487 U.S. 589 (1988).
202. *Id.* at 620.
203. *Freedom*, 433 F.3d at 993.
204. *Kendrick*, 487 U.S. at 593.

face and as applied.[205] Although there was no dispute that the plaintiffs had standing to attack the constitutionality of the statute on its face, the Court considered whether the plaintiffs, as taxpayers, had standing to raise an "as applied" challenge to the constitutionality of the statute.[206] The defendants claimed that the plaintiffs' challenge to the statute "as applied" was deficient under the *Flast* test because the challenge attacked executive, not congressional, action.[207]

The *Kendrick* Court rejected defendants' argument because it found there was a nexus between the plaintiffs' claim and congressional action.[208] The Court reasoned that the plaintiffs' claim was, by its nature, a challenge to the congressional taxing and spending power even though the funding authorized by Congress had flowed through and been improperly administered by the Secretary.[209] Like the claim in *Flast*, the plaintiffs' claim in *Kendrick* was brought against the Secretary who administered a spending program that Congress, not the Executive Branch, had created.[210] In addition, the AFLA was essentially a program of disbursement of funds, not merely a regulatory statute entailing only an incidental expenditure of funds.[211] As such, the *Kendrick* Court found that "there [was] . . . a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute."[212] Thus, the Court concluded that the plaintiffs had standing to maintain their "as-applied" Establishment Clause claim.[213]

The *Freedom* court misused the decision in *Kendrick*, which requires a nexus between taxpayer status and congressional action. *Kendrick* confirms that a taxpayer has standing to challenge the constitutionality only of an exercise of congressional taxing and spending power under the Establishment Clause, although the challenge may be brought as a facial challenge or an attack on the statute as applied.[214] The plaintiffs in *Kendrick* had taxpayer standing because they challenged a

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205. *Id.* at 597.
206. *Id.* at 618.
207. *Id.* at 619.
208. *Id.* at 620.
209. *Id.* at 619.
210. *Id.* at 619–20.
211. *Id.*
212. *Id.* at 620.
213. *Id.* at 620–21. As to the merits, the *Kendrick* Court concluded that the statute was constitutional on its face, but remanded the case for a determination as to whether any of the grants made pursuant to the statutory scheme violated the Establishment Clause. *Id.* at 620.
214. *See id.* at 619–20.

disbursement statute as applied by the Executive Branch.[215] In contrast, the FBCI, challenged by the plaintiffs in *Freedom*, is not a congressional disbursement program.[216] Congress did not specifically authorize the use of federal tax funds for the FBCI.[217] Rather, the FBCI is strictly an executive policy initiative.[218] Hence, the plaintiffs' challenge in *Freedom* is not analogous to the challenge in *Kendrick*.

In conclusion, the *Freedom* court's decision conflicts with the holdings in two seminal taxpayer standing cases, namely, *Schlesinger* and *Valley Forge*. In both cases, the Court refused to recognize taxpayer standing in cases involving execution action. Moreover, the *Freedom* case is not governed by *Kendrick* because the plaintiffs in *Freedom* did not challenge an appropriation act as applied by the Executive Branch. For these reasons, the *Freedom* decision must be reversed as contrary to Supreme Court precedent.

V. THE *FREEDOM* DECISION CANNOT BE JUSTIFIED BASED UPON ANY REASONABLE EXTENSION OF THE *FLAST* NEXUS TEST

This Part demonstrates that even if the *Freedom* decision were determined to be consistent with Supreme Court precedent, it should be reversed because there is no nexus between the plaintiffs' status as taxpayers and the claim sought to be adjudicated. This nexus is lacking for at least two reasons. First, there is no logical link between taxpayer status and a claim challenging executive action. Second, there is no nexus between taxpayer status and the precise nature of the constitutional infringement alleged, namely, the Establishment Clause.

A. There is No Logical Link Between Taxpayer Status and Executive Action

The conceptual nexus between a taxpayer's status and congressional action arises from the fact that Congress is the branch of government that both enacts tax legislation[219] and appropriates the funds that a

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215. *Id.* at 620.

216. *See* Exec. Order No. 13,199, 3 C.F.R. 752 (2002), *reprinted in* 3 U.S.C. ch. 2 (Supp. II 2003).

217. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 994 (7th Cir. 2006).

218. *See id.*

219. *See* U.S. CONST. art. I, § 8 ("The Congress shall have the Power To lay and collect Taxes . . . ."); U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . . ."); *see also* Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340 (1974) ("Taxation is a legislative function, and [Congress] is the sole organ for levying taxes.").

taxpayer contributes.[220] A citizen becomes a taxpayer when Congress exercises its power to tax, and Congress's power to spend is made possible because taxpayers contribute tax dollars. There is, therefore, a direct, reciprocal relationship between a taxpayer's status and Congress's exercise of its taxing and spending powers. That relationship is the linchpin of the first prong of the *Flast* nexus test.[221]

Unlike Congress, the Executive Branch does not have the constitutional power to tax or spend, but has the more general responsibility of executing the laws.[222] Its constitutionally-assigned function, therefore, is not conceptually related in any direct sense to a taxpayer's status. The lack of a conceptual relationship between a taxpayer's status and executive action was aptly explained by the Court of Appeals for the District of Columbia in *Public Citizen, Inc. v. Simon*.[223]

In *Public Citizen*, the plaintiffs, a non-profit organization and an individual taxpayer, claimed that members of the White House staff were devoting a substantial amount of their work time to political activities instead of official business.[224] The plaintiffs sought an injunction requiring the Secretary of Treasury to reclaim the funds paid to the staff for the time spent on political activities.[225] The plaintiffs asserted standing based on their status as taxpayers.[226] They claimed that the *Flast* test did not announce an exclusive test for federal taxpayer suits, but merely stated the requirements for suits challenging legislative enactments.[227] The *Public Citizen* court disagreed, stating that a taxpayer must "clear the hurdles set by the express terms of the *Flast* 'nexus' test."[228] The court explained that taxing and appropriations statutes are "in their very nature [] directed toward taxpayers as a class."[229] In contrast, when the challenged action is "mere executive activity that entails some expenditures, there is no

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220. *See* U.S. CONST. art. I, § 8 ("The Congress shall have the Power . . . to provide the common Defence and general Welfare of the United States . . . ."); U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

221. Flast v. Cohen, 392 U.S. 83, 102 (1968) ("[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.").

222. *See* U.S. CONST. art. II, § 3.

223. 539 F.2d 211 (D.C. Cir. 1976).

224. *Id.* at 212–13.

225. *Id.* at 213. Plaintiffs alleged that this activity violated the Appropriations Clause of the Constitution and 31 U.S.C. § 628, and that the defendant was under duties implied from these provisions to ensure that all congressional appropriations were being used for their designated purposes and to recover the misspent appropriations for the United States Treasury. *Id.*

226. *Id.*

227. *Id.* at 216.

228. *Id.* at 216–18.

229. *Id.* at 218.

similar arrow aimed at taxpayers as a class, but an activity of concern to the public at large."[230] In other words, "[i]t is this very narrow relationship between the taking of one's tax dollars and Congress's power to tax and spend which elevates the relationship to the level of a logical link referred to by the [*Flast*] Court."[231] That narrow relationship does not subsist in a taxpayer suit challenging purely executive action.

The loose connection between taxpayer status and executive action is further exacerbated by the *Freedom* court's refusal to draw any distinctions between executive spending action and executive policy action. As noted above, the second of the *Freedom* court's "conditions" to a grant of taxpayer standing is merely an expenditure of tax funds without regard to whether the expenditure is made as part of a grant program or is incidental to the administration of a policy initiative.[232] As a result, the critical distinction made in *Flast* between spending measures (where there is standing) and regulatory action entailing an incidental expenditure of tax funds (where there is no standing) does not exist under the *Freedom* court's concept of standing.[233] When the spending/policy distinction falls out of the equation, there is simply no special relationship between a taxpayer's status and the action challenged. As stated in *Public Citizen*, when the challenged action is "mere executive activity that entails some expenditures, there is no similar arrow aimed at taxpayers as a class, but an activity of concern to the public at large."[234]

The *Freedom* court's final "condition" to a grant of taxpayer standing also fails to provide the nexus between taxpayer status and executive action. In satisfaction of its third "condition," the *Freedom* court noted that the plaintiffs had challenged the constitutionality of the FBCI program as a whole, and not simply actions of particular wayward government employees.[235] However, this peculiarity does not supply the necessary relationship between the taxpayer's status and executive action. It may narrow the class of cases, but the subject-matter link is not any more direct because the transgression covers an entire program.

In summary, there is an insufficient nexus between taxpayer status and executive action. Thus, even if the *Freedom* decision were

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230. *Id.* at 218–19. The court noted that the plaintiffs' assertion that they claimed the same "dollars-and-cents impact as *Flast*" was "a necessary but not sufficient aspect of *Flast*." *Id.* at 218.

231. *Id.* at 219 n.32 (quoting Morrison v. Callaway, 369 F. Supp. 1160, 1162 (D.D.C. 1974)).

232. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 996–97 (7th Cir. 2006).

233. *See* Flast v. Cohen, 392 U.S. 83, 102 (1968). As noted in *Flast*, taxpayer standing does not extend to challenges made to "incidental expenditure[s] of tax funds in the administration of an essentially regulatory statute." *Id.*

234. *Public Citizen*, 539 F.2d at 218–19.

235. *Freedom*, 443 F.3d at 996.

determined to be consistent with Supreme Court precedent, *Freedom* should be reversed because there is no readily discernible conceptual nexus between a taxpayer's status and a claim challenging executive action.

B. The Establishment Clause Was Not Designed as a Specific Bulwark Against Executive Spending Abuses

As discussed above, many of the significant problems with recognizing taxpayer standing within the context of executive action revolve around the first prong of the *Flast* nexus test. An expansion of taxpayer standing to cover challenges to executive action also raises questions concerning the second prong of the nexus test. Under the second prong of the *Flast* nexus test, a taxpayer challenging an enactment must show that it exceeds *specific* constitutional limitations imposed on Congress's taxing and spending power; standing is not established by showing that an enactment generally exceeds the powers delegated to Congress by Article I, Section 8.[236] The *Flast* Court found that the Establishment Clause was a *specific* constitutional limitation imposed upon Congress's taxing and spending power.[237] The Court reasoned that one of the specific evils feared by those who drafted the clause was that the taxing and spending power would be used in favor of one religion over another or to support religion in general.[238] This section posits that the Establishment Clause was not intended as a *specific* bulwark against executive spending abuses, and thus, there is no logical nexus between taxpayer status and the Establishment Clause.

When the Establishment Clause is examined from a purely textual perspective, it applies only to Congress, not to the other branches of the federal government. The Establishment Clause reads "Congress shall make no law respecting an establishment of religion."[239] It was included in the Bill of Rights to assure anti-federalists that Congress would not use its powers (such as taxation or spending) to make laws establishing

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236. *Flast*, 392 U.S. at 102–03.

237. *Id.* The *Flast* Court countenanced the possibility that there might be specific limitations on Congress's taxing and spending power other than the Establishment Clause, but left that determination to the fate of future cases. *Id.* at 105.

238. *Id.* at 103–04.

239. U.S. CONST. amend. I. *See* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1170 (1986) (positing that based upon the history behind the Establishment Clause the word "Congress" was intentionally inserted to limit the scope of the clause's restrictions to that single branch). The point here is not to argue that the placement of the word "Congress" limits the scope of the Establishment Clause to that single branch, but that the Clause was not originally intended as a specific limitation on the Executive Branch's spending action.

religion.[240] The language in the Establishment Clause that "Congress shall make no law" is the inverse of the language in the Necessary and Proper Clause, which provides that "Congress shall have Power . . . To make all Laws."[241] This textual parallelism suggests that the drafters of the Constitution crafted the Establishment Clause as a specific limitation on Congress's power to make laws.[242] The commonly accepted position that the First Amendment applies to the other branches of federal government finds support in other constitutional sources, such as the "reflex" character of the First Amendment,[243] the Due Process Clause of the Fifth Amendment,[244] and the general structure of the Constitution,[245] not the text itself.

The history behind the drafting of the Establishment Clause also suggests that the clause was intended as a specific limitation on

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240. *Id.* at 1169.

241. *See* U.S. CONST. art. I, § 8, cl. 18.

242. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 814 (1999). Professor Amar observed what he called a "textual interlock" between the First Amendment and the Necessary and Proper Clause. *Id.* He noted that the operative words "Congress," "shall," "make," and "law," appear in the same order in both the clauses. *Id.* He opined that the textual link was no coincidence but part of a deep structural design, as "[t]he First Amendment was drafted to reassure all concerned that Congress lacked enumerated power to restrict speech and press (or to regulate religion, for that matter) in the states, notwithstanding the Necessary and Proper Clause." *Id.*

243. *See* Robert Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 371 (noting that in Justice Harlan's dissenting opinion in Patterson v. Colorado, 205 U.S. 454, 464 (1907), Harlan indicated that the First Amendment is to be regarded as having a reflex character that applies to all levels of government).

244. *See* Shrum v. City of Coweta, 449 F.3d 1132, 1142–43 (10th Cir. 2006). In *Shrum*, Judge McConnell opined that the meaning behind the use of the word "Congress" in the First Amendment must derive from one of the two structural purposes of the Bill of Rights, which were to limit the reach of the protections of the personal rights in the first eight amendments to the federal government, and to set forth the individual freedoms in a document separate from the main body of the constitutional document. *Id.* at 1140–41. His primary position was that because the limitation of the First Amendment to Congress would not advance either of these two purposes, there was likely no intention to confine the reach of the First Amendment to the legislative branch. *Id.* at 1141. Notably, however, he suggested that "if the First Amendment itself applied narrowly only to Congress and only to the making of 'laws,'" the protections afforded by the First Amendment apply to the executive branch by virtue of the Due Process Clause of the Fifth Amendment. *Id.* at 1142–43. He noted that because the Due Process Clause forbids the Executive Branch from taking away liberties except pursuant to "law," it follows that the First Amendment, through the Fifth, protects against executive as well as legislative abridgement. *Id.* at 1143.

245. *See* Destro, *supra* note 243, at 372–75 ("[T]he only instances in which the President could make a plausible argument that the religious liberty guarantees of the First Amendment do not apply to executive action are those in which the chief executive is authorized by the Constitution to act independently of Congress."). As provided in the Appropriations Clause of the Constitution, the President is not authorized to spend money independently of congressional authorization. *See* U.S. CONST. art. I, § 9, cl. 7. Therefore, by virtue of the structural constraints imposed upon the Executive Branch, the religious liberty guarantees of the First Amendment apply to executive action. *See* Destro, *supra* note 243, at 372–75.

congressional, rather than executive, power. That history was vividly illustrated by the Supreme Court in *Everson v. Board of Education*.[246] As noted in *Everson*, prior to 1789, nearly every American colony exacted a tax for church support.[247] The colonies forced men and women, whether believers or non-believers, to pay taxes to support government-sponsored churches.[248] When colonists failed to pay the taxes and tithes, spoke disrespectfully of the views of ministers of the government-sponsored churches, or did not attend church, they were subjected to severe punishments, including fines, imprisonment, torture, or death.[249] These practices "shock[ed] the freedom-loving [colonists] into a feeling of abhorrence" and "aroused their indignation."[250] As these practices began to thrive, dissenting colonists, including most notably James Madison, formed a movement aimed toward achieving individual religious liberty in America.[251]

The movement reached a climax when the Virginia Legislature was about to renew its tax levy for church support.[252] In opposition to the Virginia church tax, Madison wrote the famous *Memorial and Remonstrance Against Religious Assessments*.[253] In that document, Madison argued that no person should be taxed to support a religious institution of any kind.[254] He posited that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."[255] He conveyed his concern that if the tax bill were renewed, "the will of the *Legislature* [would be] the only measure of their authority."[256] Specifically, he feared that "in the plenitude of this authority, [the Legislature] may sweep away all our fundamental rights . . . [and] may swallow up the Executive and Judiciary Powers."[257]

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246. Everson v. Board of Education, 330 U.S. 1, 8 (1947).

247. *Id.* at 10 n.8.

248. *Id.* at 10.

249. *Id.* at 9.

250. *Id.* at 11. "The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation." *Id.*

251. *Id.* at 11–12. "The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general." Flast v. Cohen, 392 U.S. 83, 103–04 (1968).

252. *Everson*, 330 U.S. at 11.

253. *Id.* at 11–12.

254. *See* JAMES MADISON, MEMORIAL & REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, ¶ 2 (1785), *reprinted in Everson*, 330 U.S. at 65, app.

255. *See id.* at ¶ 3, *reprinted in Everson*, 330 U.S. at 65–66 app.

256. *Id.* at ¶ 15 (emphasis added).

257. *Id.*

As a result of the efforts of Madison, as well as those of Thomas Jefferson and others, the Virginia tax levy was never reenacted.[258] The same strong sentiments that led to the renunciation of the Virginia tax found expression in the First Amendment,[259] which has been consistently construed with reference to its history and the evils it was designed to suppress.[260]

The history of the Establishment Clause leads to the conclusion that the colonists feared abuses specifically perpetuated by the Legislature. Against this historical backdrop, Justice Warren penned the *Flast* exception to the rule against taxpayer standing and opined that the Establishment Clause was designed as a specific constitutional limitation imposed on Congress's taxing and spending power.[261] But when the history of the Establishment Clause is compounded with the textual parallelism between the Establishment Clause and Article I, there is a fair argument that the Establishment Clause was not intended as a *specific* bulwark against *executive* spending abuses.

If the Establishment Clause is not specifically intended to prevent executive spending, a taxpayer who challenges an executive spending program is in the same position in which Mrs. Frothingham found herself.[262] Such a taxpayer cannot claim that the Executive Branch has breached any specific constitutional limitations imposed upon its "spending power."

The "reflex" character of the First Amendment, the Due Process Clause of the Fifth Amendment, and the general structure of the Constitution were almost certainly not *specifically* intended to protect taxpayers against increases in tax liability. Therefore, like Mrs. Frothingham, taxpayers challenging executive spending must resolve their grievances through the political process, as the federal court system is not the proper

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258. *Everson*, 330 U.S. at 12. Instead, the Virginia Legislature enacted the Virginia Bill for Religious Liberty, whose preamble stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Thomas Jefferson, Virginia Bill for Religious Liberty, pmbl. 12 W.W. Hening, Statutes at Large of Virginia 84 (1823) *reprinted in Everson*, 330 U.S. at 13 app.

259. *Everson*, 330 U.S. at 13.

260. *Id.*

261. Flast v. Cohen, 392 U.S. 83, 103 (1968).

262. *See* discussion *supra* Part II.A. Mrs. Frothingham claimed that her tax liability would be increased as a result of the allegedly unconstitutional enactment of the Maternity Act of 1921. 392 U.S. at 105. She was unsuccessful in part because she did not "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." *Id.*

forum in which to "air [] generalized grievances about the conduct of government or the allocation of power in the Federal System."[263]

For these reasons, even if it were determined to be consistent with Supreme Court precedent, the *Freedom* decision should be reversed because there is no nexus between the plaintiffs' status as taxpayers and their challenge. There is no logical link between their status as taxpayers and the Executive Branch's FBIC program, nor is there a nexus between their taxpayer status and the Establishment Clause.

VI. THE *FREEDOM* COURT'S EXPANSIVE CONSTRUCTION OF *FLAST* IS UNTENABLE UNDER MODERN STANDING DOCTRINE

This Part demonstrates that even if the *Freedom* decision were determined to be consistent with Supreme Court precedent, it should be reversed for an additional reason: the *Freedom* court's expansion of taxpayer standing is untenable under modern standing doctrine.

For background purposes, section A begins with a discussion of the theory of standing upon which the *Flast* decision was premised. Section B then presents a brief primer on the modern standing doctrine that has developed since *Flast*. Section C argues that taxpayer standing is at odds with modern standing doctrine because a taxpayer bringing a suit challenging governmental spending does not suffer the concrete injury required under modern standing law. Most importantly, section D finally posits that the concept of taxpayer standing prescribed in the *Freedom* decision cannot be sustained under modern standing doctrine.

A. The Flast *Court's View of Standing*

This section takes a closer look at the concept of standing upon which the 1968 *Flast* decision was based. This background material is helpful to understanding the concept of standing under modern doctrine.

In addressing the issue of standing, the *Flast* Court started its analysis by identifying the limitations embedded in the "case-and-controversy" requirement of federal court jurisdiction.[264] The Court observed there are two complementary limitations embedded in the case-and-controversy requirement.[265] First, the case-and-controversy requirement limits the business of the federal courts to "questions presented in an adversary context and in a form historically viewed as capable of

263. *Id.* at 106.
264. *Id.* at 94.
265. *Id.* at 94–95.

judicial resolution."[266] Second, the Court stated, the case-and-controversy requirement prevents the judiciary from invading areas committed to the other branches of government.[267]

After setting out these two limitations, the *Flast* Court opined that the standing inquiry speaks only to the first limitation concerning the type of question presented, not to the second limitation concerning the separation of powers.[268] The Court opined that the standing question "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."[269] Instead, Article III limits the question of standing 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."[270] To make that determination, the Court stated that examining the substantive issues is both appropriate and necessary "to determine whether there is a logical nexus between the status asserted [by the litigant] and the claim sought to be adjudicated."[271]

Hence, at the time of *Flast*, the Supreme Court did not conceive of standing as an issue raising separation of powers concerns, nor did it require the plaintiff to allege a concrete injury suffered as a result of the defendants' actions. The *Flast* Court did not have the benefit of Justice Powell's wise words that "[r]elaxation of standing requirements is directly related to the expansion of judicial power," which in turn "alter[s] the allocation of power at the national level, with a shift away from a democratic form of government."[272] With this background in mind, the following section discusses the idea of standing under modern doctrine.

B. The Evolution of Standing Doctrine After Flast*: Separation of Powers and Concrete Injury*

Since *Flast*, standing doctrine has dramatically changed. Now, the Supreme Court recognizes that "the law of [Article] III standing is built

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266. *Id.* at 95. The Court explained that the concept of standing, along with the rules against political questions, advisory opinions, and mooted questions, constitute the family of principles that serve to limit the jurisdiction of the federal court to "cases" and "controversies." *Id.*

267. *Id.*

268. *Id.* at 100–01.

269. *Id.* at 100.

270. *Id.* at 101.

271. *Id.* at 102. The Court's approach to the standing problem was unique. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 78–79 (1978) ("No cases have been cited outside of the context of taxpayer suits where we have demanded this type of subject-matter nexus between the right asserted and the injury alleged, and we are aware of none."); FEC v. Akins, 524 U.S. 11, 22 (1998) (same).

272. United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

on a single basic idea—the idea of separation of powers."[273] Justice Scalia has observed that when *Flast* was decided, "it was thought that the only function of the constitutional requirement of standing was 'to assure that concrete adverseness which sharpens the presentation of issues.'"[274] However, it is now thought that "the constitutional requirement is a means of defining the role assigned to the judiciary in a tripartite allocation of power."[275]

As a means to achieving this conceptual end, in the 1970 cases of *Association of Data Processing Service Organizations, Inc. v. Camp*[276] and *Barlow v. Collins*,[277] the Supreme Court adopted the "injury-in-fact" requirement, which is the centerpiece of modern standing doctrine. As the Court has observed, the requirement of a concrete injury to establish standing places the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.[278] The concrete injury requirement also serves to "limit the federal judicial power to those disputes which confine the 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."[279]

Through a myriad of standing cases, the injury-in-fact requirement has evolved into a three-part test. To invoke the jurisdiction of a federal court, first, a plaintiff must suffer from an injury-in-fact that is "concrete and particularized, and [] actual or imminent, not conjectural or hypothetical."[280] As used in standing doctrine, "particularized" means that the injury must affect the plaintiff in a personal and individual way.[281] Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent

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273. Allen v. Wright, 468 U.S. 737, 752 (1984). As noted above, the *Flast* Court improvidently presumed that the standing inquiry speaks only to whether the question posed for adjudication is presented in an adversary context and in a form historically viewed as capable of judicial resolution. *See Flast*, 392 U.S. at 100. The Court opined that the standing question "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." *Id.*

274. *See* Spencer v. Kemna, 523 U.S. 1, 11 (1998) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

275. *Spencer*, 523 U.S. at 11 (quotation marks, brackets, and citations omitted).

276. 397 U.S. 150 (1970).

277. 397 U.S. 159 (1970).

278. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982); Sierra Club v. Morton, 405 U.S. 727, 740 (1972).

279. *Valley Forge*, 454 U.S. at 472 (citation and quotation marks omitted).

280. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted).

281. *Id.* at 560 n.1.

action of some third party not before the court."[282] Third, "it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision."[283] A plaintiff alleging a personal injury that meets these three requirements satisfies the Article III standing requirement.[284]

C. The Concept of Taxpayer Standing is at Odds with the Concrete Injury Requirement

As Judge Easterbrook rhetorically asked, the critical question under modern standing doctrine is "Where's the concrete injury?"[285] As demonstrated below, the answer is that a taxpayer bringing a suit challenging governmental spending does not suffer any concrete injury. Hence, the concept of taxpayer standing does not comport with modern Article III standing doctrine.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the Supreme Court theorized that "a taxpayer alleges injury only by virtue of his liability for taxes."[286] Although the meaning of this statement is not altogether clear, it likely does not mean that a taxpayer suffers injury in the form of an increase in his tax liability—that position was properly rejected in *Frothingham*.[287] The likelihood of any tax increase as a result of a single expenditure is remote and speculative. The average federal taxpayer's tax liability is deter-

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282. *Id.* at 560 (citation, quotation marks, brackets, and ellipses omitted).

283. *Id.* at 561 (citation and quotation marks omitted). "The 'fairly traceable' and 'redressability' components of the constitutional standing inquiry were initially articulated by [the Supreme] Court as two facets of a single causation requirement." Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (quotation marks and citations omitted). "To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." *Id.*

284. *Lujan*, 504 U.S. at 560. The Supreme Court's previous opinions were unclear as to whether particular features of the standing requirement were required by Article III or were merely rules of judicial restraint. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). A line of decisions in the 1970s clarified that the injury-in-fact requirement is, indeed, an Article III constitutional requirement. *Id.* at 472. In addition to the injury-in-fact constitutional requirement, the Supreme Court has identified three more limitations on its judicial power that serve as prudential rules of self-restraint. *See id.* at 474–75. First, there is a rule barring adjudication of generalized grievances widely shared by a large class of citizens. *Id.* Second, the prudential component of standing generally prohibits a litigant from raising another person's legal rights. *Id.* Third, a plaintiff's complaint must fall within the zone of interests protected by the statutory or constitutional guarantee in question. *Id.*

285. Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988, 989 (7th Cir. 2006) (Easterbrook, J., concurring).

286. *Valley Forge*, 454 U.S. at 478.

287. *See* Frothingham v. Mellon, 262 U.S. 447, 487–88 (1923).

mined by a fixed tax rate and fixed exemption, deduction, and credits amounts. Historically, Congress has changed the tax rate and these amounts as a result of wars, changing economic cycles, inflation, and significant shifts in the role of government,[288] not as a result of a single expenditure of funds out of the treasury. At the time *Flast* was decided, there was no way to predict whether Congress would effectuate a tax rate hike as a result of the one billion dollars that it appropriated to the Executive Branch to implement the Elementary and Secondary Education Act in 1965, and the Supreme Court did not attempt to speculate whether it would.

Furthermore, as a practical matter, the concept of taxpayer standing cannot be justified based upon an inference of a monetary injury. As Professor Kenneth E. Scott has observed, the *Flast* opinion "devoted not a word to demonstrating Mrs. Flast's actual monetary stake as a taxpayer."[289] Instead, the opinion looked to the existence of a logical nexus between the status asserted and the claim sought to be adjudicated.[290] Indeed, Justice Harlan noted in his dissenting opinion in *Flast* that "[t]he complaint in this case, unlike that in *Frothingham*, contains no allegation that the contested expenditures will in any fashion affect the amount of these taxpayers' own existing or foreseeable tax obligations."[291]

More recently, the Court has conceptualized "the injury . . . to be the very extraction and spending of tax money in aid of religion alleged by a plaintiff."[292] This conception of taxpayer injury tracks language in the *Flast* opinion, but again a taxpayer cannot claim any *injury-in-fact* as

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288. *See generally* United States Dep't of the Treasury, History of the U.S. Tax System, http://www.treasury.gov/education/fact-sheets/taxes/ustax.shtml (last visited Feb. 19, 2007).

289. Scott, *supra* note 78, at 661.

> The opinion by Chief Justice Warren emphasizes the view that standing turns on whether the plaintiff has the "requisite personal stake in the outcome." However, if personal stake refers to the monetary difference the outcome of the litigation may make to the plaintiff as a taxpayer, the opinion and its distinctions become incomprehensible, for the opinion devoted not a word to demonstrating Mrs. Flast's actual monetary stake as a taxpayer, and it is doubtful that the Court could have made such a demonstration.

Id. at 661 (footnote omitted).

290. *See id.*

291. Flast v. Cohen, 392 U.S. 83, 118 (1968) (Harlan, J., dissenting).

292. DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1865 (2006) (citation, quotation marks, and brackets omitted); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 514 (1982) (Stevens, J., dissenting) ("[T]he plaintiffs' invocation of the Establishment Clause was of decisive importance in resolving the standing issue in [*Flast*]."). In *DaimlerChrysler*, the Court noted that "an injunction against the spending would of course redress that injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." 126 S. Ct. at 1862 (emphasis omitted).

a result of a government expenditure in aid of religion.[293] As Judge Easterbrook noted, "[t]o the extent that the Establishment Clause forbids taxation to support religion, people subject to the illegal levy may obtain relief."[294] However, taxpayers do not pay "one extra penny" as a result of a governmental expenditure in aid of religion.[295]

A federal taxpayer has no cognizable interest in the funds of the U.S. treasury.[296] As Justice Harlan noted in his dissenting opinion in *Flast*, tax payments received by the treasury become part of the Government's general funds, the congressional expenditure of which must "provide for the common Defense and general Welfare."[297] Any rights of the taxpayer with respect to his tax payments are extinguished when he releases his payments into the treasury.[298] Thereafter, the United States holds the general funds, not as a stakeholder or trustee for those who

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293. The Court was likely using the term "injury" in its legal sense, as meaning a wrong which directly results in the violation of a legal right. *See, e.g.*, Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938). There was standing in *Flast* because the plaintiffs alleged an invasion of a legally protected interest or legal right created by the Establishment Clause, as in that clause "every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution." *Flast*, 392 U.S. at 114 (Stewart, J., concurring). However, as the Supreme Court has noted,

> In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a 'case or controversy' appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 226–27 (1974). Moreover, the concept of a legal injury does not satisfy the injury-in-fact requirement of modern standing doctrine.

294. Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988, 989 (7th Cir. 2006) (Easterbrook, J., concurring).

295. *Id.*

296. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court appeared to reintroduce some notion of the "legal interest" test into standing doctrine. The Court noted that to satisfy the Article III injury requirement a plaintiff must allege an invasion of a "legally protected interest" which is concrete and particularized. *Id.* at 560. Since then, in *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court rejected the standing of plaintiffs seeking to challenge a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended Section 315(a)(1) of the Federal Election Campaign Act of 1971 (FECA) and increased certain FECA contribution limits. The plaintiffs asserted that the increases in hard-money limits enacted by the BCRA provision deprived them of an equal ability to participate in the election process based on their economic status. *Id.* at 227. Nevertheless, the Court refused to recognize the plaintiffs' standing, reasoning that it had "never recognized a *legal right* comparable to the broad and diffuse injury asserted by the [plaintiffs]." *Id.* (emphasis added). The *McConnell* Court's reference to the lack of a legally protected right is notable because it is unrelated to the principle of an injury-in-fact and is reminiscent of standing doctrine prior to *Data Processing* and *Barlow*. *See supra* text accompanying notes 276–77. To the extent that *Lujan* and *McConnell* indicate that a plaintiff must assert a legally protected interest to have standing, the entire concept of taxpayer standing would seem to fold.

297. *Flast*, 392 U.S. at 118–19 (Harlan, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 1).

298. *See id.* at 119 (Harlan, J., dissenting).

have contributed to the treasury, but for the population at large.[299] Hence, any unconstitutional use of the funds in the treasury would not violate any present interest or right of the taxpayer.[300]

Moreover, there is no cognizable injury to a taxpayer's conscience and sensibilities in observing the government expend tax money in aid of religion. The Court has "repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."[301] For example, in *Schlesinger v. Reservists Committee to Stop the War*, the Court rejected a claim of citizen standing involving a challenge to the constitutionality of the Armed Forces Reserve membership of certain members of Congress.[302] Writing for the majority, Chief Justice Burger reasoned that the plaintiffs had not alleged a concrete injury, only the "the abstract injury in nonobservance of the Constitution asserted by respondents as citizens."[303] Burger further explained that "[t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process [and] distort the role of the Judiciary in its relationship to the Executive and the Legislature."[304]

Supreme Court precedent has also established that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under [Article] III even [if] the disagreement is phrased in constitutional terms."[305] Such an injury is not sufficiently personalized to warrant invo-

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299. *Id.*; *cf.* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1356 (1988) ("All funds belonging to the United States—received from whatever source, however obtained, and whether in the form of cash, intangible property, or physical assets—are public monies, subject to public control and accountability.").

300. *See Flast*, 392 U.S. at 118–19 (Harlan, J., dissenting). Justice Harlan also explained that

> The interests [the taxpayer] represents, and the rights he espouses, are, as they are in all public actions, 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.

Id. at 128–29.

301. Allen v. Wright, 468 U.S. 737, 754 (1984) (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); Laird v. Tatum, 408 U.S. 1 (1972)).

302. *Schlesinger*, 418 U.S. 208.

303. *Id.* at 223 n.13.

304. *Id.* at 222.

305. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485–86 (1982) (disagreeing with the court of appeals's view that plaintiffs had established standing by virtue of an injury-in-fact to their alleged right to a government that does not establish religion). Of course, the *Valley Forge* Court did not suggest that a psychological injury can never be

cation of federal court jurisdiction. Of course, "the intensity of a litigant's interest or the fervor of his advocacy" may suggest concrete adverseness, but concrete adverseness "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."[306] Although a taxpayer may invest his tax dollars in the federal government and thereby have a "pecuniary stake" in good governance,[307] that stake would only serve to intensify the taxpayer's interest in a controversy or the increase the fervor of his advocacy; it does not satisfy the requirement of an injury itself.[308]

Finally, it is not sufficient that others may have suffered from the spending action that the taxpayer challenges. The Court has rejected the standing of plaintiffs who have alleged not a personal harm, but harm suffered by others or the public generally.[309] *Allen v. Wright* is perhaps the best example.[310] In that case, the Court refused to recognize the standing of parents of black public school children seeking to challenge the Internal Revenue Service's (IRS) procedures in granting of tax exemptions to racially discriminatory private schools.[311] The plaintiffs claimed injury in the denigration they suffered as a result of the government's provision of financial aid to discriminatory private schools.[312] The Court rejected the notion that such "stigmatizing injury" to persons who are not personally subject to unequal treatment accords a basis for standing and reiterated well-established law that a mere complaint that the government is violating the law is not enough to confer standing.[313] As Justice O'Connor stated, "[r]ecognition of standing in such circum-

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a sufficient basis for the conferral of Article III standing, but its sufficiency as a basis for standing depends on the directness of the harm alleged. *See, e.g.*, Am. Civil Liberties Union of Ohio Found. v. Ashbrook, 375 F.3d 484, 489 n.3 (6th Cir. 2004).

306. *Valley Forge*, 454 U.S. at 486; *see also Schlesinger*, 418 U.S. at 226 ("Respondents' motivation has indeed brought them sharply into conflict with petitioners, but as the Court has noted, motivation is not a substitute for the actual injury needed by the courts and adversaries to focus litigation efforts and judicial decision making.").

307. Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555, 583 (2002). "The pecuniary stake in *Flast*, for example, was somewhere in the range of $0.12 to $2.40." *Id.* (citations omitted).

308. *See Valley Forge*, 454 U.S. at 486.

309. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984).

310. *Id.*

311. *Id.* at 753–54.

312. *Id.* at 755.

313. *Id.* at 755–56.

stances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[314]

Similarly, in *Sierra Club v. Morton*, the Supreme Court denied standing to an organization seeking to enjoin federal officials from approving an extensive ski development in the Mineral King Valley in the Sequoia National forest.[315] Although the Court noted that injuries other than economic harm are sufficient to create standing, it clarified that the injury-in-fact test requires that the party seeking review be among the injured.[316] Since the complaint failed to allege that any of the members of the Sierra Club used Mineral King for any purpose, the Court concluded that the organization lacked standing.[317]

In summary, courts and scholars have criticized *Flast's* criteria for taxpayer standing "for failing to provide a measurement of the adverse interest of a plaintiff in the outcome."[318] Professor Scott opined that the *Flast* nexus test may be best understood as "an expedient by a court retreating from the absolute barrier of *Frothingham*, but not sure how far to go and desirous of a formula that would enable it to make case by case determinations in the future."[319] As demonstrated above, that expedient cannot be reconciled with modern standing law.

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314. *Id.* at 756 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973)). Justice O'Connor observed that "[i]f the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school." *Allen*, 468 U.S. at 755–56. O'Connor indicated that "[c]onstitutional limits on the role of the federal courts preclude such a transformation." *Id.* at 756.

315. 405 U.S. 727, 734–35 (1972).

316. *Id.* According to the Court,

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

Id.

317. *Id.* at 735. The opinion in *Sierra Club* constitutes a clear rejection of the view that the scope of the Judicial power includes the power to entertain "public actions." *See* Scott, *supra* note 78, at 667.

318. *See* Public Citizen, Inc. v. Simon, 539 F.2d 211, 215 (D.C. Cir. 1976) (citation omitted). As noted in Justice Harlan's dissent in *Flast*, "[t]he difficulties with [the *Flast*] 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." Flast v. Cohen, 392 U.S. 83, 121 (1968) (Harlan, J., dissenting).

319. Scott, *supra* note 78, at 661; *see also* Leonard & Brant, *supra* note 62, at 124 ("Flast was an under-the-table attempt to establish an exception to the personal stake requirement for Establishment Clause claims.").

To be clear, the foregoing section does not call on the Supreme Court to overrule the *Flast* decision, which has become well-settled law in federal jurisprudence. However, because of the conflict between the concept of taxpayer standing and modern standing doctrine, the *Flast* exception should not be extended beyond its moorings, as discussed in the next section.

D. The Freedom *Court's Concept of Taxpayer Standing Conflicts with Modern Standing Doctrine*

Even assuming arguendo that the *Freedom* decision does not directly conflict with Supreme Court precedent, the decision should nevertheless be reversed because the *Freedom* court's concept of taxpayer standing is untenable under modern standing doctrine. As discussed below, when a taxpayer challenges the Executive Branch's expenditure of money in consequence of a congressional appropriation of un-earmarked funds, as was the case in *Freedom*, not only is the likelihood of an increase in tax liability remote and speculative, but there are also significant implications for the separation of powers of government.

In *Freedom*, the plaintiffs challenged an executive policy initiative for which Executive Branch officials appropriated un-earmarked funds handed them by Congress.[320] The plaintiffs' theory of injury in such a case would be contingent upon a string of speculative events: (1) federal agencies increasing their total annual estimated budget levels as a direct result of the expenses attributable to the FBCI, as opposed to reducing other aspects of their budgets; (2) the President, with the guidance of the Office of Management and Budget, increasing the overall budget proposals provided to Congress as a direct result of the increased budget needs of the federal agencies due to the FBCI; (3) Congress approving the requested budget increases associated with the FBCI; and (4) Congress enacting a tax rate hike as a result of an increase in the overall budget due to the FBCI.[321] The speculative nature of the taxpayer's injury is highlighted by recent budget estimates indicating that the federal government will receive total gross revenue in 2006 of $2,403,000,000,000.[322]

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320. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989 (7th Cir. 2006).

321. *See generally* OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOV'T, FISCAL YEAR 2007 375–96 (2007), *available at* http://www.whitehouse.gov/omb/budget/fy2007/pdf/concepts.pdf.

322. U.S. CONG. BUDGET OFFICE, THE BUDGET & ECONOMIC OUTLOOK: AN UPDATE Table 1–3 (2006), *available at* http://www.cbo.gov/ftpdocs/74xx/doc7492/08-17-BudgetUpdate.pdf.

The Supreme Court has rejected similar attempts to premise standing to sue based upon speculative injuries.[323] As Chief Justice Rehnquist once said, "[a]llegations of possible future injury do not satisfy the requirements of [Article] III."[324]

More importantly, the concept of taxpayer standing to challenge executive spending action does not honor the separation of powers principle that forms the basis of standing doctrine.[325] In the famous case of *Marbury v. Madison*, Chief Justice Marshall stated that "[t]he province of the court is, solely, to decide on the rights of individuals."[326] In contrast,

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323. *See* Whitmore v. Arkansas, 495 U.S. 149, 156–61 (1990). In *Whitmore*, the Supreme Court rejected the standing of a death row inmate challenging the validity of a death sentence imposed on another death row inmate, Ronald Gene Simmons, who elected to forego his right of appeal to the state supreme court. *Id.* Whitmore argued that the State of Arkansas' system of comparative review in death penalty cases would ultimately injure him when the state supreme court failed to review Simmons' death sentence. *Id.* at 156–57. The *Whitmore* Court concluded that "the alleged injury [was] too speculative to invoke the jurisdiction of an Art. III court." *Id.* at 157. The Court explained that the alleged injury was contingent on, first, Whitmore's failure to secure federal habeas relief; second, another trial, conviction, and death sentence; and finally, the refusal of the Supreme Court of Arkansas to set aside his second death sentence based upon its failure to review Simmons' death sentence. *Id.*; *see also* O'Shea v. Littleton, 414 U.S. 488 (1974).

In *O'Shea*, the Supreme Court denied standing in a case where the claimed injury was contingent on the plaintiff first being arrested for, and charged with, a violation of a criminal law, and then being subjected to bond proceedings, trial, or sentencing before the defendant magistrate and circuit court judge charged with the unlawful conduct. *Id.* at 497. The Court declined to exercise jurisdiction because the injury took it "into the area of speculati[on] and conjecture." *Id.* Similarly, in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Supreme Court refused to recognize the standing of a plaintiff whose speculative injury was contingent on him being stopped for an offense by an officer or officers who would then use the challenged chokehold on him without any provocation or resistance on his part. *Id.* at 105.

At the very outer limit of the law of standing, in *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973), the Court recognized the standing of several environmental groups complaining that a general freight rate increase sought by substantially all of the railroads in the United States, which was approved by the Interstate Commerce Commission,

> would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

Id. at 688. Despite the fact that string of events had to occur before the alleged injury would materialize, the *SCRAP* Court found that the environmental groups' alleged injury was not speculative. *Id.* at 689–90. The *Whitmore* Court distinguished *SCRAP* because "the plaintiffs in *SCRAP* may have been able to show at trial that the string of occurrences alleged would happen immediately[,]" whereas Whitmore could not responsibly make a similar claim of immediate harm. 495 U.S. at 159. Like Whitmore, taxpayers challenging executive spending action, such as the plaintiffs in *Freedom*, cannot responsibly make a claim of immediate harm, as there is no possibility that taxpayers could prove at trial a chain of events culminating in an imminent tax increase.

324. *Whitmore*, 495 U.S. at 158 ("A threatened injury must be certainly impending to constitute injury in fact.") (citations and quotation marks omitted).

325. *See* Allen v. Wright, 468 U.S. 737, 752 (1984).

326. 5 U.S. 137, 170 (1803).

as Justice Scalia has said, "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[327] This system of distribution of grievances reflects the essence of our democratic system of government. The Judiciary was never intended to have general oversight authority over the elected branches of government.[328]

In the absence of an actual present or immediately threatened injury, it is not the role of the Judiciary to serve as "continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse.'"[329] In other words, the Founders did not intend for the Judiciary to serve, in the nature of a New England town meeting, to oversee the conduct of the national government by means of lawsuits in federal courts.[330] As Justice Powell remarked, the vitality of the representative branches would erode if the Judiciary were to repeatedly utilize its power to negate the actions of the other branches.[331]

In conclusion, under principles of modern standing law, the *Freedom* court's decision recognizing the standing of taxpayers challenging executive action should not be sustained. The *Freedom* decision's expansion of taxpayer standing conflicts with the constitutional requirement of a concrete injury and upsets the balance of powers of government.

VII. THE LEGISLATIVE BRANCH IS THE APPROPRIATE BRANCH OF GOVERNMENT TO RESOLVE TAXPAYER GRIEVANCES

The Legislative Branch is well suited to respond to general taxpayer grievances in part because the legislative function is inherently general rather than particular.[332] As Chief Justice Burger observed, "Congress can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions."[333] Whereas the staffing of a federal judge's chambers is relatively thin, the machinery of con-

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327. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).

328. *See* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring). Justice Powell explained that were the non-representative Judiciary to oversee the elected branches by entertaining taxpayer and citizen suits, that use of power would contradict our democratic form of government. *Id.*

329. Laird v. Tatum, 408 U.S. 1, 15 (1972).

330. *Richardson*, 418 U.S. at 179.

331. *Id.* at 188 (Powell, J., concurring).

332. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 n.10 (1974).

333. *Id.*

gressional oversight is enormous.[334] Indeed, the Appropriations Committee in each House has more than a dozen subcommittees, each of which may hold hearings and question agency officials about agency activities, policies, and procedures.[335] "Hearings may include testimony from members of the public about how agency action has affected them and also from nongovernmental experts on the consequences of government policy."[336]

In addition, Congress has created the Governmental Accountability Office (GAO) for the purpose of overseeing the activities of the Executive Branch.[337] That institution employs nearly 3,300 people and has a budget of over $460 million.[338] The GAO's primary responsibilities include studying how the federal government spends taxpayer dollars, auditing federal expenditures, and reporting its findings to Congress.[339] Thus, through its own oversight activities and those of the GAO, Congress has ample means of overseeing the spending activities of the Executive Branch.

The argument that the Judiciary should allow unrestricted taxpayer and citizen suits essentially underestimates the ability of the representative branches of federal government.[340] It also ignores the fact that taxpayer or citizen advocacy has a potentially broad base.[341] Taxpayers as a class have the type of leverage that can effectively command the attention of the branches that were intended to be responsive to general public grievances.[342] In contrast, the success of a taxpayer suit is dependent upon the resources and skill of a particular plaintiff or set of plaintiffs.[343]

Furthermore, through its power of the purse, the Legislative Branch is uniquely suited to resolve matters of executive spending. As noted by

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334. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 124 (2006) ("The machinery of congressional oversight is enormous.").

335. *Id.*

336. *Id.* at 125.

337. *Id.* at 127–28.

338. *Id.* at 128–29.

339. *Id.*

340. United States v. Richardson, 418 U.S. 166, 188–89 (1974) (Powell, J., concurring).

341. *Id.* at 189.

342. *Id.*

343. *Id.* at 190-91.

> [S]ince the Judiciary cannot select the taxpayers or citizens who bring suit or the nature of the suits, the allowance of public actions would produce uneven and sporadic review, the quality of which would be influenced by the resources and skill of the particular plaintiff. And issues would be presented in abstract form, contrary to the Court's recognition that "judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury."

Id. (quoting Sierra Club v. Morton, 405 U.S. 727, 740–41 n.16 (1972)).

James Madison, "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[344]

The power of the purse is articulated in the Appropriations Clause,[345] which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[346] The Appropriations Clause has been described as "the most important single curb in the Constitution on Presidential power."[347]

Through the Appropriations Clause, Congress has a number of ways to control executive spending action. First, it may appropriate more money for programs it favors and less (or no funds) for disfavored programs.[348] Second, it may use appropriations riders to prohibit the expenditure of funds for particular executive programs.[349] For example, for several years during President Clinton's presidency, Congress prevented OSHA from spending funds for the issuance of ergonomics regulations.[350] Additionally, in the 1980s, Congress forbade the Federal Communications Commission from spending funds to reexamine or reverse broadcast licensing preferences for women and minorities.[351] Indeed, through the use of appropriation riders, Congress could prohibit the various agency departments from spending funds in support of the FBCI, insofar as it violates the Establishment Clause. Third, it may "earmark" funds for a very particular purpose or program.[352] Finally, under the Account and Statement Clause, Congress has "plenary power to spell out the details of precisely when and with what specificity Executive agen-

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344. THE FEDERALIST No. 58 (James Madison).

345. Paul E. Salamanca, *The Constitutionality of an Executive Spending Plan*, 92 KY. L.J. 149, 163 (2003).

346. U.S. CONST. art. I, § 9, cl. 7.

347. U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1–3, n.2 (2d ed. 1991) (quoting EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 134 (H.W. Chase & C.R. Ducat 14th ed. 1978)); *see also* Stith, *supra* note 299, at 1344 ("[T]he power of the purse in Congress . . . is at the foundation of our constitutional order."). Indeed, James Madison noted in the House of Representatives that "appropriations of money [are] of a high and sacred character; [they are] the great bulwark which our Constitution [has] carefully and jealously established against Executive usurpations." Salamanca, *supra* note 345, at 163 (citation and quotation marks omitted).

348. *See* Beermann, *supra* note 334, at 84–85.

349. *Id.* at 85 ("Congress has used what are known as appropriation riders to supervise the execution of the laws in a very direct and particularized way.").

350. *Id.* at 85–86.

351. *Id.* at 86.

352. *Id.* at 89–90.

cies must report the expenditure of appropriated funds."[353] Hence, the Constitution empowers the Legislative Branch with several means to remedy a taxpayer's grievance concerning the Executive Branch's allocation of federal funds. Because the Legislative Branch is armed with the necessary oversight machinery and fiscal power to address taxpayer grievances, federal court jurisdiction is unnecessary.

Notably, in *Freedom*, the court of appeals held that standing was appropriate under a line of Supreme Court decisions rendered in the 1990s upholding the standing of plaintiffs who challenged some aspect of the federal election process.[354] However, in each of those cases, federal court jurisdiction was perhaps a necessary response to abuses of the political system so pervasive as to undermine democratic processes.[355] In contrast, federal court jurisdiction is not a necessary response in cases challenging executive spending abuses. Unlike the cases cited by the *Freedom* court, taxpayer suits do not implicate the federal election process and thus do not undermine democratic processes. In taxpayer cases challenging executive spending abuses, the Legislative Branch is the appropriate branch of government to respond to the concerns.

Finally, the Legislative Branch's resolution of taxpayer grievances involving the soundness of executive policies is consistent with our democratic form of government. The Constitution allocates policy-making authority to the representative branches of government, not the unrepresentative federal Judiciary. That allocation of power is reflected in the following passage written by Alexander Hamilton in the Federalist Papers:

> The Executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL,

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353. United States v. Richardson, 418 U.S. 166, 178 n.11 (1974).

354. Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 990 (7th Cir. 2006) (citing Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 331 (1999) (voter standing to challenge the use of statistical sampling for census); FEC v. Akins, 524 U.S. 11, 20–25 (1998) (standing to sue for lists of donors to political action committees); Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion) (voter standing to challenge newly-created congressional districts as racially gerrymandered).

355. *See Richardson*, 418 U.S. at 195 n.17 (Powell, J., concurring) ("Baker v. Carr may have a special claim to sui generis status. It was perhaps a necessary response to the manifest distortion of democratic principles practiced by malapportioned legislatures and to abuses of the political system so pervasive as to undermine democratic processes.").

> but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[356]

For the foregoing reasons, the Legislative Branch, through its general oversight authority and its power of the purse, is the proper branch of government to address taxpayer grievances concerning the Executive Branch's allocation of the federal largesse.

VIII. CONCLUSION

The Seventh Circuit's recent decision in *Freedom* has paved a doctrinal crossroads for the Supreme Court. In holding that the plaintiffs have standing as taxpayers under Article III to challenge the constitutionality of President Bush's FBCI program,[357] the *Freedom* court has presented the Supreme Court with an opportunity to either abridge or expand taxpayer standing doctrine. This Article has made the case for abridgment. The concept of taxpayer standing upheld in *Freedom* is unsupported by, and contrary to, Supreme Court precedent. It falls outside of the literal terms of the *Flast* paradigm and is irreconcilable with the post-*Flast* taxpayer standing cases of *Schlesinger*, *Valley Forge*, and *Kendrick*. Furthermore, taxpayer standing to challenge purely executive action does not fit within any reasonable extension of the *Flast* nexus paradigm. Finally, under modern standing doctrine, the *Freedom* plaintiffs are unsuitable parties to invoke federal court jurisdiction because they have not suffered any concrete, actual, or imminent injury.

For these reasons, the Supreme Court would be well advised to stay the Judiciary's hand in the kind of taxpayer grievance sought to be adjudicated in *Freedom*, thereby preventing any further perpetuation of the doctrinal confusion introduced in *Flast*.[358] In doing so, the Court need not overrule *Flast* since the taxpayer grievance in *Freedom* falls outside the ambit of that case; indeed, an attempt to do so would constitute mere dicta. Rather, the Court's refusal to recognize standing should be grounded in modern standing doctrine and the tenet of separation of powers upon which the case-and-controversy requirement and standing doctrine are based. Such a step toward uniform application of modern standing law would bolster the public's confidence in both the integrity of the Judiciary and the vitality of the representative branches of gov-

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356. THE FEDERALIST No. 78 (Alexander Hamilton).

357. *Freedom*, 433 F.3d at 996.

358. *See Richardson*, 418 U.S. at 180 (Powell, J., concurring).

ernment. The public is entitled to a Judiciary that uses its power of self-definition fairly, consistently, and judiciously.[359]

359. *See* Berns, *supra* note 5.