Legal Standing Under the First Amendment's Establishment Clause

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Summary

The Establishment Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion." The Establishment Clause prohibits government actions that would provide preferential treatment of one religion over another or preferential treatment of religion generally over nonreligion. Alleged violations under the Establishment Clause must meet a threshold requirement known as standing, the legal principle that governs whether an individual is the proper party to raise an issue before the courts.

Standing is a constitutional principle that serves as a restraint on the power of federal courts to render decisions. Under general standing rules that apply to any case, an individual must have an individualized interest that has actually been harmed under the law or by its application that can be redressed by the lawsuit in order to bring that case to court. In some instances, such as the Establishment Clause, an individual may wish to challenge a governmental action that injures the individual as a member of society. The individual may assert that injury as a citizen dissatisfied with a governmental action, as a taxpayer dissatisfied with a governmental expenditure, or as a citizen dissatisfied with treatment of other citizens. The U.S. Supreme Court has construed the requirements to raise such cases narrowly, and individuals seeking to litigate such alleged injuries must meet both constitutional and prudential standing requirements.

The Court has made some exceptions to the general rules of standing and specifically allowed taxpayer standing for certain claims arising under the Establishment Clause. Under the *Flast* exception to the general prohibition on taxpayer standing, taxpayers may raise challenges of actions exceeding specific constitutional limitations (such as the Establishment Clause) taken by Congress under Article I's Taxing and Spending Clause. The Court has maintained its narrow interpretation of this exception, refusing to extend it to permit taxpayer lawsuits challenging executive actions or taxpayer lawsuits challenging actions taken under powers other than taxing and spending.

This report analyzes the constitutional issues associated with standing, specifically related to cases arising under the Establishment Clause. It provides a background on the doctrine of standing, including the U.S. Supreme Court's interpretation of various types of standing, including standing to sue as a citizen, as a taxpayer, and on behalf of another party. It also examines the current standing rules related to the Establishment Clause and the implications of the Court's 2007 decision in *Hein v. Freedom From Religion Foundation*, which further limited the circumstances under which Establishment Clause challenges could be brought. The report also discusses *Salazar v. Buono*, an Establishment Clause case scheduled for arguments before the Court in October 2009.

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The Establishment Clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion.... "[1] The Establishment Clause prohibits government actions that would provide preferential treatment of one religion over another or preferential treatment of religion generally over nonreligion.[2] Alleged violations of the Establishment Clause must meet a threshold requirement known as standing, the legal principle that governs whether a particular individual is the proper party to raise an issue before the courts.

This report analyzes the constitutional issues associated with standing, specifically related to cases arising under the Establishment Clause. It provides a background on the doctrine of standing, including the U.S. Supreme Court's interpretation of various types of standing, such as standing to sue as a citizen, as a taxpayer, and on behalf of another party. It also examines the current standing rules related to the Establishment Clause and the implications of the Court's 2007 decision in *Hein v. Freedom From Religion Foundation*, which further limited the circumstances under which Establishment Clause challenges could be brought. The report also discusses *Salazar v. Buono*, an Establishment Clause case scheduled for arguments before the Court in October 2009.

Legal Issues Related to Standing Generally

Standing is a constitutional principle that serves as a restraint on the power of federal courts to render decisions.[3] Under general standing rules that apply to any case, an individual must have an individualized interest that has actually been harmed under the law or by its application to bring that case to court.[4] As a principle, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[5] In some instances, such as the Establishment Clause, an individual may wish to challenge a governmental action that injures the individual as a member of society. The individual may assert that injury as a citizen dissatisfied with a governmental action, as a taxpayer dissatisfied with a governmental expenditure, or as a citizen dissatisfied with treatment of other citizens. The U.S. Supreme Court has construed the requirements to raise such cases narrowly, and individuals seeking to litigate such alleged injuries must meet both constitutional and prudential standing requirements.

[1] U.S. Const. amend. I.

[2] *See* Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

[3] *See* U.S. Const. art. III, § 2, cl. 1.

[4] There are generally three constitutionally required elements to standing: (1) the individual must have personally suffered an actual or threatened injury; (2) the injury must be fairly traced to the challenged action; and (3) the injury must be likely to be redressed by a favorable decision. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[5] Flast v. Cohen, 392 U.S. 83, 99 (1968). "When standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Thus, a party may have standing in a particular case, but the federal court may nevertheless decline to pass on the merits of the case." *Id.* at 99-100.

Citizen Standing

The Supreme Court has held that individuals generally do not have standing to sue based solely on their status as citizens with a grievance against a government action.[6] In *Schlesinger v. Reservists Committee to Stop the War*, an association of officers and enlisted members of the Reserves and several individual members of the association alleged that Members of Congress who serve in the Reserves while also serving in Congress were acting in violation of the U.S. Constitution's prohibition on "holding any Office under the United States" while also serving as a Member of Congress.[7] The Reservists Committee asserted their claims on the basis that as citizens and taxpayers, they were injured by the threat that simultaneous service created "the possibility of undue influence by the Executive Branch, in violation of the concept of independence of Congress implicit in Art. I of the Constitution."[8] The Court held that the committee lacked standing to raise the claim.[9] The Court also held that the alleged injury was abstract, speculative, and generalized, and therefore was not a litigable matter for the courts to decide under the standing principles of the U.S. Constitution.[10]

Taxpayer Standing

Similar to the Court's refusal to recognize standing based merely on status as a citizen in opposition of a government action, the Court generally has not recognized standing for claims that challenge government actions based an alleged injury to a taxpayer because of the expenditure of tax revenue. The Court, however, has allowed a narrow exception to this general rule against taxpayer standing and has permitted certain Establishment Clause cases to proceed under taxpayer standing (as discussed later in this report).[11]

In *Frothingham v. Mellon*, one of the first cases to address taxpayer standing, the Court dismissed a case brought by a taxpayer claiming that disbursements of federal money to a program alleged to be unconstitutional would injure her as a taxpayer. [12] The taxpayer alleged that she would be injured because her taxes would be raised in the future to support the unconstitutional appropriation of federal funds. The Court held that a taxpayer's "interest in the moneys of the Treasury ... is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded" for the taxpayer to have standing on the matter.[13] The Court noted that a party seeking to litigate a government action "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as

[6] *See* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

[7] *Id.* at 209 (internal quotations omitted).

[8] *Id.* at 212 (internal citations omitted).

[9] *Id.* at 209 (internal citations omitted).

[10] *See id.* at 217. "The Court has previously declined to treat 'generalized grievances' about the conduct of Government as a basis for taxpayer standing." *Id.* (citing Flast v. Cohen, 392 U.S. 83 (1968)). The Court noted its earlier ruling in another case brought under the Incompatibility Clause, which held that private individuals must show actual or imminent danger of a direct injury resulting from the government action challenged, not "merely a general interest common to all members of the public.'" *Id*. at 219 (citing *Ex parte* Levitt, 302 U.S. 633 (1937)).

[11] *See Flast*, 392 U.S. 83 (1968).

[12] Frothingham v. Mellon, 262 U.S. 447 (1923).

[13] *Id.* at 487.

the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally."[14]

The Court later noted a need for clarification regarding whether the refusal to grant taxpayer standing was a constitutional determination or a policy consideration that would be considered as a matter of prudential standing (discussed in the following paragraph).[15] The Court provided a two-part test that a taxpayer must meet in order to have standing under constitutional requirements. First, the taxpayer must be challenging a government action under the congressional power provided by the Taxing and Spending Clause of the Constitution.[16] Second, the taxpayer must show that the government action "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."[17] The Court has continued to apply this standard in taxpayer cases.[18]

Prudential Standing

In addition to the baseline constitutional requirements for standing, individuals seeking to litigate a governmental action in court must also have prudential standing. The Court has held that other factors may call for the courts to refuse to hear certain cases. That is, a court may determine that an individual lacks standing "under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."[19] The Court has identified three general prudential rules for standing: (1) the individual's interest injured by the government action must fall within the zone of interest arguably protected by the constitutional or statutory provision in question;[20] (2) the individual may not litigate generalized grievances shared by a large group of individuals;[21] and (3) the individual generally may not assert the interest of another to challenge a government action.

[14] *Id.* at 488.

[15] *See Flast*, 392 U.S. at 92 ("confusion has developed as commentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled.").

[16] *Id.* at 102.

[17] *Id.* at 102-03.

[18] *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974) (denying standing to a taxpayer attempting to challenge the secret nature of Central Intelligence Agency expenditures because the challenge would be an improper attempt to litigate generalized grievances); *Schlesinger*, 418 U.S. 208 (denying standing to taxpayers attempting to challenge simultaneous service of Members of Congress in the Armed Forces Reserves because the challenge was not brought under the Taxing and Spending Clause).

[19] Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

[20] *See* Association of Data Processing Service Organization v. Camp, 397 U.S. 150, 153 (1970).

[21] *See Richardson*, 418 U.S. at 173-76.

Congress's Role in Standing Requirements

Occasionally, however, Congress has provided statutory grounds under some circumstances that would entitle citizens to sue the government if a government action adversely affected them.[22] An individual would have standing in such instances if the individual suffered an injury-in-fact and if the interest he or she seeks to protect is arguably within the zone of interests protected or regulated by the statute in question.[23] Thus, although standing is generally understood as a constitutional principle, Congress may facilitate standing through statutory creations of interests, which may allow individuals who could not qualify under the constitutional requirements to bring their cases to court.

Although constitutional standing requirements cannot be waived or amended by statutory action, Congress retains the ability to confer standing by removing prudential constraints on judicial review.[24] The Court has limited the extent to which taxpayers have standing under the constitutional requirements, but if a statute provides individuals an entitlement that is later denied, the Court has recognized an injury to such individuals.[25] Under such circumstances, the Court has held that the injury "is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."[26]

Standing in Establishment Clause Cases

The general rules regarding standing to challenge governmental actions are designed to ensure that courts are addressing actual cases that can be resolved by the judicial system. However, in some circumstances, individuals may seek to challenge governmental actions for which neither those individuals nor any other individuals could meet standing requirements. Indeed, the Supreme Court has noted that in some instances "it can be argued that if [someone with a generalized grievance] is not permitted to litigate this issue, no one can do so."[27] Generally, the Court has noted, "lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [one's] views in the political forum or at the polls."[28]

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[22] *See, e.g.*, Endangered Species Act, P.L. 93-205, § 11(g), 16 U.S.C. § 1540(g). The Administrative Procedure Act provides for judicial review of agency actions. *See* 5 U.S.C. § 702 ("person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[23] *See Association of Data Processing Service Organization*, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

[24] *See* Federal Election Commission v. Akins, 524 U.S. 11, 20 (1998) ("Nor do we agree ... that Congress lacks the constitutional power to authorize federal courts to adjudicate this lawsuit. Article III, of course, limits Congress' grant of judicial power to 'cases' or 'controversies.' That limitation means that respondents must show, among other things, an 'injury in fact'....") (*FEC*).

[25] *See, e.g.*, Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982).

[26] *FEC*, 524 U.S. at 25.

[27] *Richardson*, 418 U.S. at 179.

[28] *Id.*

However, the ability of individuals to effect change through political and democratic means does not eliminate all cases where a large group of individuals would be affected by the challenged governmental action. In particular, the Court has specifically allowed taxpayer standing for claims arising under the Establishment Clause. Under the *Flast* exception to the general prohibition on taxpayer standing, taxpayers may raise challenges of actions exceeding specific constitutional limitations (such as the Establishment Clause) taken by Congress under Article I's Taxing and Spending Clause.[29] The Court has maintained its narrow interpretation of this exception, refusing to extend it to permit taxpayer lawsuits challenging executive actions or taxpayer lawsuits challenging actions taken under powers other than taxing and spending.[30]

These exceptions, the Court has explained, result because the Establishment Clause is a constitutional limit on the government's ability to act. According to the Court, the framers of the Constitution feared abuse of governmental power that might result in favoring one religion over another.[31] It is difficult to imagine circumstances in which potential abuses of the Establishment Clause could be enforced without this exception.

Litigation Arising Under the Taxing and Spending Clause

Although the Court in *Frothingham* held that taxpayers generally could not challenge the constitutionality of federal statutes, the Court later lowered the barrier to taxpayer standing for such lawsuits. In 1968, a group of taxpayers challenged the constitutionality of funding dispersed under the Elementary and Secondary Education Act of 1965. The lawsuit, known as *Flast v. Cohen*, alleged that federal funds were being used to support education in religious schools in violation of the First Amendment.[32]

In its decision, the Court noted that *Frothingham* had generally addressed the issue of taxpayer standing, but also noted that the strict limitation in *Frothingham* raised debate over whether the prohibition was constitutionally required or a judicial policy consideration.[33] The Court held that there was "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs."[34] The Court distinguished *Frothingham*'s general prohibition on taxpayer standing, noting that the taxpayer in *Frothingham* was challenging a federal statute as a violation of the Tenth Amendment, which reserves certain powers for the states rather than the federal government.[35] As a result, the taxpayer could not suffer a direct injury by such an action.[36]

[29] *See Flast*, 392 U.S. at 105.

[30] *See Valley Forge Christian College*, 454 U.S. 464 (1982) (refusing to allow a taxpayer challenge of government transfer of property to a sectarian institution without charge because the action was taken by an executive agency exercising power under the Property Clause); Hein v. Freedom from Religion Foundation, 551 U.S. 587 (2007) (refusing to allow a taxpayer challenge of activities of the White House Office of Faith-Based and Community Initiatives because the funding was made through discretionary executive spending).

[31] *See Flast*, 392 U.S. at 103-04.

[32] *Flast*, 392 U.S. 83.

[33] *Id.* at 92-94.

[34] *Id.* at 101.

[35] *Id.* at 91.

[36] *Id.* at 92.

The Court clarified the requirements for taxpayer standing in *Flast* based on this distinction. It held that "it 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."[37] In other words, for a taxpayer to have standing to challenge a government action, that action must be sufficiently related to the taxpayer's interest (*i.e.*, his or her tax dollars). The Court explained that taxpayers challenging government actions related to the Establishment Clause would meet its two-part test for standing under *Flast*. First, the Court found that "the challenged program involves a substantial expenditure of federal tax funds."[38] Second, the Court noted the constitutional history of the Establishment Clause and concern during the drafting of the Constitution that the Establishment Clause would be necessary to prevent abuse of the taxing and spending power in favor of one religion over another or religion generally over nonreligion. Thus, the Court held that Establishment Clause challenges could be brought by individuals acting based on their status as taxpayers because the Establishment Clause is a "specific constitutional limitation upon the exercise of Congress of the taxing and spending power."[39]

The Court's decision in *Flast* does not guarantee all taxpayers the right to challenge any government action under the Establishment Clause, though. Other cases have addressed the more specific considerations regarding standing of taxpayers to challenge government actions under the Establishment Clause. For example, the Court has recognized a more direct injury to local taxpayers regarding local expenditures than cases raised by federal taxpayers regarding federal expenditures.[40] Under this rule, the Court has allowed a taxpayer to challenge public funding of transportation to parochial schools as a violation of the Establishment Clause.[41] Standing to challenge actions related to the Establishment Clause is not always recognized in non-federal actions, though. The Court refused to recognize standing for a taxpayer seeking to challenge a state statute that required daily Bible reading at public schools.[42] In that case, there was "no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school."[43] The Court also noted that there was "no assertion that she was injured or even offended thereby or that she was compelled to accept, approve or confess agreement with any dogma or creed or even to listen when Scriptures were read."[44] The Court concluded that "it is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference" and denied standing to the claimant.[45]

[37] *Id.* at 102.

[38] *Id.* at 103.

[39] *Id.* at 104.

[40] *See* Crampton v. Zabriskie, 101 U.S. 601, 609. *See also Frothingham*, 262 U.S. at 486 ("The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate.").

[41] *See* Everson v. Board of Education, 330 U.S. 1 (1947).

[42] Doremus v. Board of Education, 342 U.S. 429 (1952).

[43] *Id.* at 433.

[44] *Id.* at 432.

[45] *Id.* at 434.

Litigation Arising Under the Property Clause

The Court has refused to extend taxpayer standing to individuals or organizations seeking to challenge executive actions that are undertaken under legislation authorized by the Property Clause.[46] In *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Court held that an organization of taxpayers did not have standing to challenge the transfer of property to a religiously affiliated college as an unconstitutional government action under the Establishment Clause.[47]

Congress had authorized the Secretary of Health, Education, and Welfare to dispose "of surplus real property 'for school, classroom, or other educational use.'"[48] Under that authority, the Secretary conveyed a tract of land declared to be surplus property to Valley Forge Christian College. The college acquired the property without making any financial payment and with certain conditions attached to the conveyance, which required the property to be used for educational purposes for 30 years.[49] Following the *Flast* standard, the Court held that Americans United did not have standing because the action they were challenging was an action by an executive agency and was authorized by legislation under the Property Clause, rather than the Taxing and Spending Clause.

The Court explained its decision for maintaining limits on standing based on the need for some limits on the exercise of the judicial power to preserve the balance of power between the three branches of government.[50] The Court rejected the argument that "the Establishment Clause demands special exceptions from the requirement that a plaintiff allege distinct and palpable injury to himself ... that is likely to be redressed if the requested relief is granted."[51] Rather, the Court held that the Establishment Clause deserved no more protection than other constitutional provisions, and that to permit federal courts to consider alleged constitutional errors by the government without a direct injury to the claimant would conflict with the principles guiding the proper role of the judiciary in the government.[52]

The Court noted that its conclusion in *Valley Forge* was not a "retreat from our earlier holdings that standing may be predicated on noneconomic injury."[53] Rather, the Court emphasized that the litigants in this particular case had not "alleged an injury of any kind, economic or otherwise, sufficient to confer standing," noting that they could show no geographic or other link to the land at issue in the case.[54]

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[46] U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

[47] 454 U.S. 464 (1982).

[48] *Id.* at 467 (quoting the Federal Property and Administrative Services Act of 1949, 63 Stat. 387, as amended, 40 U.S.C. § 484(k)(1)).

[49] *Id.* at 468.

[50] *Id.* at 472-76.

[51] *Id.* at 488 (quotations and citations omitted).

[52] *Id.* at 488-89.

[53] *Id.* at 486.

[54] *Id.* at 486-87 ("Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare.").

Litigation of Issues Raised on Behalf of Another Individual

The Court has also limited Establishment Clause cases because the litigants lacked prudential standing. In *Elk Grove Unified School District v. Newdow*, a father challenged the policy of his daughter's school district that required each class to recite the Pledge of Allegiance daily. [55] The lawsuit alleged that mandating the Pledge of Allegiance including the words "under God" violated the Establishment Clause.

The Court held that Newdow, as the child's non-custodial parent under California law, did not have the standing required to sue on her behalf.[56] In this case, the Court ruled that Newdow was prohibited from litigating the issue by requirements of prudential standing, specifically the general prohibition on third-party standing and lawsuits on behalf of other individuals.[57] There is an exception to the prudential standing requirements concerning the rights of minors, which provides that the parent of a child generally may sue on the child's behalf. However, under California law, only the parent with sole legal control over the child may bring a suit on her behalf.[58] Because the father was not the custodial parent, the Court held that he could not litigate his objection on his daughter's behalf.

Litigation Related to Executive Branch Actions

The Court's decision in *Hein v. Freedom From Religion Foundation* in 2007 has raised questions regarding the future range of eligible litigants seeking to challenge government actions under the Establishment Clause. In *Hein*, a group of taxpayers challenged the constitutionality of events held for programs under the White House Office of Faith-Based and Community Initiatives, an executive office created in 2001 to remove barriers to religious and community groups seeking federal assistance.[59] It is significant to note that *Hein* was a plurality opinion, rather than a majority opinion, indicating that the Court has varied interpretations of the principles of standing related to the Establishment Clause.

The Court held that the taxpayers did not have standing under the *Flast* standard. In *Flast*, the Court conferred standing for taxpayers who were challenging expenditures "funded by a specific congressional appropriation and were dispersed ... pursuant to a direct and unambiguous congressional mandate."[60] In contrast, the taxpayers in *Hein* were not challenging "any specific congressional action or appropriation; nor [were they asking] the Court to invalidate any congressional enactment or legislatively created program as unconstitutional."[61] Rather, the expenditures challenged in *Hein* were "general appropriations to the Executive Branch to fund its day-to-day activities" and "resulted from executive discretion, not congressional action."[62]

[55] Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

[56] *Id.* at 16-18.

[57] *See also Allen*, 468 U.S. at 751.

[58] *See* Newdow v. U.S. Congress, 313 F.3d 500, 502 (9th Cir. 2002).

[59] *Hein*, 551 U.S. at 592-94.

[60] *Id.* at 604.

[61] *Id.* at 605.

[62] *Id.*

The *Hein* plurality opinion emphasized the Court's history of interpreting taxpayer standing narrowly and its strict requirement that some "logical nexus" exist between the taxpayers and the action being challenged.[63] The opinion noted that the Court previously had recognized taxpayer standing to challenge expenditures administered by executive officials.[64] However, it distinguished that decision because it "involved a program of disbursement of funds pursuant to Congress' taxing and spending powers that Congress had created, authorized, and mandated."[65] In *Hein*, the taxpayers had not challenged a specific statute as a violation of the Establishment Clause and thus failed the *Flast* standing requirements.

The Court held that the expenditures by the Executive Branch alleged to violate the Establishment Clause could be treated differently than legislative actions. The *Hein* opinion noted the broad impact that a decision to the contrary would have, stating that "because almost all Executive Branch activity is ultimately funded by some congressional appropriation, extending the *Flast* exception to purely executive expenditures would effectively subject every federal action—be it a conference, proclamation, or speech—to Establishment Clause challenge by any taxpayer in federal court."[66] The opinion also elaborated on its separation of powers rationale for narrow taxpayer standing rules. According to *Hein*, the "relaxation of standing requirements is directly related to the expansion of judicial power, and lowering the taxpayer standing bar to permit challenges of purely executive actions would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government."[67] In other words, if the Court were to broaden taxpayer standing requirements, individual litigants could effect changes in the courts rather than through the national political process.

The *Hein* decision has had a notable impact on Establishment Clause litigation. Many recent Establishment Clause lawsuits have challenged Executive Branch programs that provide funding to religious organizations. The *Hein* decision has left the probability of reaching the merits in such lawsuits uncertain. Several courts have dismissed such lawsuits, ruling that the litigants lacked standing in light of *Hein*.[68] Other litigants have voluntarily dropped their lawsuits, expecting that *Hein* would cast skepticism on their standing to bring the case. However, some lawsuits have proceeded successfully.[69]

Future Developments: *Salazar v. Buono*

In October 2009, the Court will hear arguments in *Salazar v. Buono*, an Establishment Clause case involving the display of a large cross that stands on the Mojave National Preserve in California, which is managed by the National Park Service (NPS).[70] The cross display had been erected by the Veterans of Foreign Wars (VFW) as "a memorial to fallen service members" in

[63] *Id.* at 605-09.

[64] *See id.* at 606-07 (discussing Bowen v. Kendrick, 487 U.S. 589 (1988) (holding that taxpayers had standing to challenge a federal statute that authorized federal grants to religious organizations)).

[65] *Id.* at 607 (internal quotations omitted).

[66] *Id.* at 610.

[67] *Id.* at 611.

[68] Pedreira v. Kentucky Baptist Homes for Children, Inc., 553 F. Supp. 2d 853 (2008); Hinrichs v. Speaker of the House of Representatives of the Indiana General Assembly, 506 F.3d 584 (7th Cir. 2007).

[69] Americans United for Separation of Church and State v. Prison Fellowship Ministries, 509 F.3d 406 (2007).

[70] *See* Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008), *cert. granted*, 77 USLW 3243 (U.S. Feb. 23, 2009).

1934.[71] NPS denied a request to erect a Buddhist shrine near the cross in 1999, leading to controversial debate over whether the cross is constitutional under the Establishment Clause.[72] After NPS indicated that the cross would be removed to avoid constitutional problems, Congress passed legislation that prohibited the use of federal funds to remove the cross[73] and passed additional legislation that designated the cross and adjoining land as a national memorial to World War I veterans.[74]

In 2001, a former employee (Frank Buono) of the preserve filed a lawsuit alleging that the cross display violated the Establishment Clause, particularly because the cross was displayed on public property on which displays of other religious symbols were not also permitted. Buono "does not generally object to displays of crosses, but instead has only the ideological objection that public lands on which crosses are displayed should also be public fora on which other persons may display other symbols."[75] The district court held the display on public land to be a violation of the Establishment Clause and issued an injunction that prohibited the government from permitting the display.[76] Congress subsequently enacted legislation directing the conveyance of approximately one acre of land on which the cross was displayed to the VFW.[77] In a second lawsuit challenging that land transfer, the U.S. Court of Appeals for the 9th Circuit held that the transfer of land did not cure the Establishment Clause violation and that the transfer could not "be validly executed without running afoul of the injunction."[78] The court reasoned that "carving out a tiny parcel of property in the midst of this vast Preserve ... will do nothing to minimize the impermissible governmental endorsement."[79] The 9th Circuit noted, but did not adopt, the U.S. Court of Appeals for the 7th Circuit's presumption in a previous case that transfer of land with a religious symbol was sufficient to avoid an Establishment Clause violation.[80] The 9th Circuit reasoned that precedent related to public displays of religious symbols indicated a need for fact-specific analysis of such displays rather than adoption of a presumption as the 7th Circuit did.[81]

Buono raises two issues for the Court to consider: (1) whether a person who objects to the lack of an open forum for displays rather than the display itself has standing to litigate such a lawsuit, and (2) whether it was proper for the 9th Circuit to invalidate the statute ordering the transfer of the land. Because a litigant must have standing to pursue a lawsuit, the Court will address the second issue regarding the effect of the transfer of the land only if it finds that Buono has standing to sue.

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[71] *Id.*

[72] For a legal analysis of the constitutionality of public displays of religious symbols, *see* CRS Report RS22223, *Public Display of the Ten Commandments and Other Religious Symbols*, by Cynthia Brougher.

[73] P.L. 106-554, § 133, 114 Stat. 2763 (2000).

[74] P.L. 107-117, § 8237(a), 115 Stat. 2278 (2002).

[75] Petition for a Writ of Certiorari (No. 08-472) at 9, Salazar v. Buono, *cert. granted*, 129 S.Ct. 1313 (2009). A copy of the petition is available at http://www.scotusblog.com/wp/wp-content/uploads/2009/02/08-472_pet.pdf.

[76] Buono v. Norton, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

[77] P.L. 108-87, § 8121, 117 Stat. 1100.

[78] Buono v. Kempthorne, 527 F.3d 758, 783 (9th Cir. 2008).

[79] *Id.*

[80] *Id.* at 779, fn 13.

[81] *See* McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

It appears that Buono's standing to sue in this case may be open to question. The transfer of land occurred under the Property Clause rather than the Taxing and Spending Clause, and Buono does not appear to have a specific legal interest in the land at issue or other related individualized injury. In *Valley Forge*, the Court held that taxpayers do not have standing to challenge government transfers of land used by private parties for religious purposes.[82] Thus, the case could possibly be dismissed for lack of standing to challenge land transfers under the Property Clause.

Furthermore, some may question whether Buono has suffered a legally recognized individualized injury as a result of the cross display. The Court has recognized standing for litigants claiming injury based on non-economic harms (*e.g.*, environmental, aesthetic, etc.), particularly in environmental cases where the litigant's enjoyment of a park or recreational area is threatened by pollution or other action.[83] Even in such cases, whatever harm might be alleged, regardless of whether it has a financial or psychological effect, must affect the person claiming the injury directly.[84] The Court's previous holdings regarding third-party standing suggest that Buono may lack standing on these grounds as well. In this case, it appears that he is acting on behalf of others who may want to erect a different religious display on the land. As a former employee, Buono may have a generalized interest in the operation of the preserve, but because Buono has testified that he is not offended by a religious symbol being displayed on public property, he may not appear to the Court to be personally harmed by the display.[85]

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[82] *See Valley Forge Christian College*, 454 U.S. 464.

[83] *See* United States v. SCRAP, 412 U.S. 669 (1973) (recognizing standing for alleged injury based on harm to local environment and resources used and enjoyed by litigants); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (requiring concrete plans of future visits to the site of the challenged action to indicate a direct and imminent injury to the litigant sufficient to meet standing requirements).

[84] *See, e.g.*, American Civil Liberties Union v. City of St. Charles, 794 F.2d 265, 268 (7th Cir. 1986) (explaining that distress or dislike of a challenged action is insufficient to confer standing and recognizing standing if the litigant can demonstrate that the action has led him or her to alter behavior accordingly); Saladin v. Milledgeville, 812 F.2d 687, 691 (11th Cir. 1987) (claims of constitutional violations are insufficient to establish standing and must be accompanied by "a personal injury suffered as a consequence of the violation beyond the psychological consequences of observing the conduct with which he or she disagrees").

[85] Petition for a Writ of Certiorari, Salazar v. Buono, 77 U.S.L.W. 3467 (No. 08-472).