

Court's jurisdictionality jurisprudence incoherent.⁶⁵ While this observation may be true for the moment, it is not because the recent cases preferred by the dissent should have carried the day (since they had not equipped the Court with the jurisdictionality-determining tools to decide *Bowles's* case). Nor is it because the majority in *Bowles* refused to grapple with the precedents the dissent preferred (although the Court should have engaged more fully with these precedents, the Court's too-easy statutory reasoning was latent in precisely those decisions). Instead, the lamented incoherence is — or can be — that of a mid-point in doctrinal development. The project of limiting jurisdictional treatment to rules serving jurisdictional ends has been engaged, but satisfactory boundaries, based on institutional capacity, constitutional powers, and the need for finality, have not yet been drawn.⁶⁶ The challenge for the Court, and particularly for the dissenters in *Bowles*, is to recognize the Court's ruling, however flawed and insufficient, as a developmental step in establishing the grounds and limits of its still-forming jurisdictionality jurisprudence.

C. Standing

Taxpayer Standing — Establishment Clause Violations. — The Supreme Court has tried throughout its history to uphold the Founders' vision of three branches of government that each have a distinct purpose. In undertaking the difficult task of policing the relationship between Congress and the Executive,¹ the Court has deployed a variety of nondelegation canons that regulate congressional delegation of legislative authority to the Executive.² Congress thus makes the tough policy choices, and thereby mitigates factional power, ensures accountability, and promotes caution.³ Last Term, in *Hein v. Freedom from Religion Foundation, Inc.*,⁴ the Supreme Court denied standing to

⁶⁵ *Id.* at 2370. To be sure, had the Court determined the rule was *not* jurisdictional, it might still have found that, nevertheless, it was an inflexible rule. This was the approach of the opinion for the Court in *Eberhart*. *United States v. Eberhart*, 126 S. Ct. 403, 407 (2006) (per curiam) (holding a rule inflexible because of its “insistent demand for a definite end to proceedings”). Such a ruling would have been consistent with the dissent's reasoning, but done nothing about the “intolerable” treatment it deplores. See *Bowles*, 127 S. Ct. at 2367 (Souter, J., dissenting).

⁶⁶ *Cf.* *Lees*, *supra* note 46, at 1487–91 (urging an understanding of jurisdictionality based on preservation of institutional identity).

¹ See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (debating the permissible breadth of the delegation of power by Congress to the Environmental Protection Agency); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (discussing the appropriate breadth of executive and congressional action).

² See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) (discussing the importance of congressional limits on executive power exercised under delegations).

³ See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 239–40 (discussing these consequences of legislative control over policymaking).

⁴ 127 S. Ct. 2553 (2007).

taxpayers in Establishment Clause disputes where Congress had not specifically authorized the allegedly unconstitutional spending of funds. Because the Supreme Court had previously held that taxpayers have standing where Congress appropriated the allegedly unconstitutional funds, Justice Alito's plurality opinion, likely the opinion lower courts will follow in future taxpayer standing cases,⁵ drew an illusory distinction between congressional and executive action. The result in *Hein* incentivizes Congress to avoid explicitly expressing its policy choices, thereby undermining nondelegation principles. Given the Court's historic commitment to the notion that one branch of government cannot yield its constitutional prerogatives to another, *Hein* suggests a troubling break with tradition.

Following on the heels of his closely contested victory in the 2000 election, President Bush worked to fulfill his "compassionate conservative" agenda in part by promoting greater partnership between government and faith-based organizations.⁶ To facilitate this partnership, President Bush established the White House Office of Faith-Based and Community Initiatives, as well as similar centers in various federal departments.⁷ Sponsoring conferences throughout the country to educate faith-based organizations about the availability of federal funding,⁸ these offices sought to ensure that "private and charitable community groups, including religious ones, . . . ha[d] the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve[d] valid public purposes."⁹ The President neither sought nor

⁵ When the Supreme Court issues both a plurality opinion and an opinion concurring in the judgment, it is usually the latter opinion that constitutes the case's "holding" because it is usually the latter opinion that reflects the narrowest ground of argument on which five justices agree. See *Marks v. United States*, 430 U.S. 188, 193-94 (1977). In the instant case, however, Justice Scalia's opinion concurring in the judgment is broader than Justice Alito's plurality opinion and thus under the reasoning of *Marks* is not controlling. See Posting of David Stras to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2007/06/whose_opinion_i.html (June 25, 2007, 7:50 PM). But see Ira C. Lupu & Robert W. Tuttle, *Jay Hein, Director of the White House Office of Faith-Based and Community Initiatives v. Freedom from Religion Foundation, Inc.*, ROUNDTABLE ON RELIGION & SOC. WELFARE POL'Y, July 2, 2007, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=60 (arguing that Justice Kennedy's concurring opinion might be controlling because, within a case that upheld *Flast v. Cohen*, 392 U.S. 83 (1968), it concluded that *Flast* is correct, and thus arguably is narrower than Justice Alito's opinion, which is less sanguine about *Flast*).

⁶ For a discussion of this aspect of President Bush's agenda, see Adam Clymer, *Filter Aid to Poor Through Churches, Bush Urges*, N.Y. TIMES, July 23, 1999, at A1 (describing then-Governor Bush's plans to aid faith-based organizations).

⁷ See *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 993 (7th Cir. 2006).

⁸ *Id.*

⁹ Exec. Order No. 13,199, 3 C.F.R. 752 (2002), reprinted in 3 U.S.C. ch. 2 (Supp. V 2005). For an overview of the program's goals, see GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION (2001), <http://www.whitehouse.gov/news/reports/faithbased.pdf>.

received congressional authorization for the program; rather, it was funded through general executive branch appropriations.¹⁰

Freedom from Religion Foundation, Inc., an organization “opposed to government endorsement of religion,”¹¹ and three of its members sued the director of the White House Office of Faith-Based and Community Initiatives in the U.S. District Court for the Western District of Wisconsin.¹² The plaintiffs alleged that the executive branch violated the Establishment Clause¹³ by “organizing conferences at which faith-based organizations . . . ‘are singled out as being particularly worthy of federal funding . . . and the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services.’”¹⁴ Decrying the purported promotion of sectarian interests over nonsectarian ones, the plaintiffs contended that they had standing to sue because they were “federal taxpayers” who disagreed with the policy.¹⁵ The district court dismissed the suit for lack of standing,¹⁶ finding that the exception for taxpayer standing delineated in *Flast v. Cohen*¹⁷ applied only to taxpayer challenges of “exercises of congressional power under the taxing and spending clause of Art. I, § 8.”¹⁸

A divided panel of the Seventh Circuit vacated the district court’s judgment.¹⁹ Writing for the majority, Judge Posner²⁰ interpreted *Flast* and its progeny to support the conclusion that the conferences were “financed by a congressional appropriation,”²¹ even if not through spe-

¹⁰ *Hein*, 127 S. Ct. at 2560 (plurality opinion). Perhaps suggestive of the effects of a lack of congressional appropriation for the program, there is no consistency across departments as to how money is allocated to pay for the offices and centers. Thus, while Department of Education funding for the center comes from appropriations for the Office of the Secretary of Education, Department of Housing and Urban Development appropriations are drawn from that department’s salaries and expenses account. *See id.*

¹¹ Petition for a Writ of Certiorari at 68a, *Hein*, 127 S. Ct. 2553 (No. 06-157), 2006 WL 216324.

¹² *Hein*, 127 S. Ct. at 2560 (plurality opinion).

¹³ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

¹⁴ *Hein*, 127 S. Ct. at 2560 (plurality opinion) (quoting Petition for a Writ of Certiorari, *supra* note 11, at 73a).

¹⁵ *Id.* at 2561.

¹⁶ *See id.*

¹⁷ 392 U.S. 83 (1968).

¹⁸ *Hein*, 127 S. Ct. at 2561 (plurality opinion) (quoting Petition for a Writ of Certiorari, *supra* note 11, at 31a) (internal quotation marks omitted). The district court found dispositive the fact that the offices overseeing the faith-based initiatives were created by the President, directed at the request of the President, and funded by general executive branch appropriations. The initiatives therefore lacked a nexus with Congress sufficient to be an exercise of congressional power as required by *Flast*. *See id.*

¹⁹ *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 997 (7th Cir. 2006).

²⁰ Judge Posner was joined by Judge Wood.

²¹ *Freedom from Religion Found.*, 433 F.3d at 997.

cific congressional grants.²² He read *Flast* to permit taxpayer standing “so long as ‘the marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause’ is greater than ‘zero.’”²³ Judge Ripple dissented. Calling the majority’s recasting of *Flast* “a dramatic expansion of current standing doctrine,”²⁴ he asserted that standing was not only a prudential doctrine of judicial restraint, but also, and more importantly, a constitutional requirement.²⁵ In the instant case, the plaintiffs were challenging the President’s decision to use the funds for the conferences,²⁶ a challenge to which *Flast*’s narrow holding about congressional action did not extend.²⁷

The Supreme Court reversed. Writing for a plurality of three Justices, Justice Alito²⁸ began by recounting the narrow taxpayer standing exception carved out by *Flast*.²⁹ Under *Flast*, taxpayers could challenge an expenditure as unconstitutional only if they had established “a logical link between [their] status [as taxpayers] and the type of legislative enactment attacked” and “a nexus between that status and the precise nature of the constitutional infringement alleged.”³⁰ According to Justice Alito, the plaintiffs did not satisfy *Flast*’s first requirement because there was no specific congressional mandate that the appropriations in question be spent on religious activity.³¹ *Flast* spoke in terms of congressional action, and Justice Alito found no basis for an extension of its holding to discretionary executive action.³² Moreover, he read the Court’s subsequent standing precedents to preclude taxpayers from challenging exercises of executive discretion.³³

²² *Id.* at 994.

²³ *Hein*, 127 S. Ct. at 2561 (plurality opinion) (quoting *Freedom from Religion Found.*, 433 F.3d at 995). Judge Posner found this conception of *Flast* appealing precisely because he rejected the distinction between specific congressional appropriations for a program and use of general expenditures to create a program. See *Freedom from Religion Found.*, 433 F.3d at 994–95.

²⁴ *Freedom from Religion Found.*, 433 F.3d at 997 (Ripple, J., dissenting).

²⁵ *Id.*

²⁶ *Id.* at 998.

²⁷ See *id.* at 1001. The Seventh Circuit denied a motion for rehearing en banc. *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988, 988 (7th Cir. 2006) (mem.). Chief Judge Flaum, concurring in the denial, noted that the “tension” in taxpayer standing doctrine meant the case was ripe for Supreme Court review. *Id.* (Flaum, C.J., concurring in the denial of rehearing en banc).

²⁸ Justice Alito was joined by Chief Justice Roberts and Justice Kennedy.

²⁹ *Hein*, 127 S. Ct. at 2563 (plurality opinion) (“As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable ‘personal injury’ required for Article III standing.”). The Court did not question the longstanding rule that one can challenge “the collection of a specific tax assessment as unconstitutional.” *Id.*

³⁰ *Id.* at 2564 (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)).

³¹ *Id.* at 2568.

³² *Id.*

³³ See *id.* Justice Alito cited two precedents for the proposition that the Supreme Court had never found taxpayer standing in cases where executive discretion was responsible for the expenditure of funds. *Id.* (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church*

Justice Alito went on to note the potential prudential and separation of powers concerns that would accompany an expansion of *Flast* to cover *Hein*'s facts.³⁴ He argued that such a reading of *Flast* lacked a “workable limitation” on the exercise of standing and so would open the courts to a flood of litigation.³⁵ However, despite his apparent distaste for *Flast*,³⁶ Justice Alito did not see *Hein* as “requir[ing the Court] to reconsider that precedent.”³⁷ Recognizing *Flast* as a “narrow exception” to the general preclusion of taxpayer standing, he simply declined to extend it to cover discretionary acts by the Executive.³⁸

Justice Kennedy concurred, writing separately only to give further air to the separation of powers concerns suggested by Justice Alito.³⁹ Like Justice Alito, Justice Kennedy believed that to allow standing to challenge a purely executive act would be to sanction “intrusive and unremitting judicial management of the way the Executive Branch performs its duties.”⁴⁰ Nevertheless, Justice Kennedy affirmed the continuing vitality of *Flast*, noting that any separation of powers concerns emerging from *Flast* were mitigated by the fact that the case recognized the “Constitution’s special concern that freedom of conscience not be compromised by government taxing and spending in support of religion.”⁴¹

Justice Scalia concurred in the judgment.⁴² Writing with vigor, Justice Scalia stated that he would overrule *Flast*, finding it “wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that [the] Court has repeatedly confirmed are embodied in the doctrine of standing.”⁴³ Justice Scalia characterized the Supreme Court’s standing jurisprudence as “notoriously inconsistent,” owing in large part to the fact that the Court has defined “‘concrete and particularized’ ‘injury in fact’” — “‘the irreducible constitutional mini-

& State, Inc., 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (rejecting taxpayer standing where a challenge was not brought under the Taxing and Spending Clause of the Constitution)). Moreover, Justice Alito distinguished *Bowen v. Kendrick*, 487 U.S. 589 (1988), in which the Court held that taxpayers had standing to challenge federal grants to religious community service organizations, on the ground that in that case, even though the executive branch had administered the funds, Congress had passed the authorizing statute. See *Hein*, 127 S. Ct. at 2567 (plurality opinion).

³⁴ See *Hein*, 127 S. Ct. at 2569 (plurality opinion).

³⁵ *Id.* at 2570.

³⁶ *Id.* at 2571 (noting that *Flast* did not adequately take into account separation of powers concerns).

³⁷ *Id.*

³⁸ *Id.* at 2572.

³⁹ *Id.* (Kennedy, J., concurring).

⁴⁰ *Id.* at 2573.

⁴¹ *Id.* at 2572.

⁴² Justice Scalia was joined by Justice Thomas.

⁴³ *Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring in the judgment).

num of standing” — in two ways.⁴⁴ First, the Court has allowed standing where a plaintiff suffered a “Wallet Injury,” in which the government’s allegedly unconstitutional action increased his or her tax assessment.⁴⁵ Second, the Court has allowed standing, as in *Flast*, where the plaintiff suffered a “Psychic Injury,” which “consists of the taxpayer’s *mental displeasure* that money extracted . . . is being spent in an unlawful manner.”⁴⁶ The Supreme Court’s standing jurisprudence, Justice Scalia argued, has used both iterations of injury inconsistently, never attempting to catalogue why, for example, Psychic Injury is sufficient for standing in one case, but not in another, similar one.⁴⁷

Justice Scalia saw two ways to resolve this inconsistency: either find Psychic Injury sufficient to satisfy the “concrete and particularized” requirement in all standing cases, or else overrule *Flast*.⁴⁸ Finding Psychic Injury too broad to place any meaningful limits on taxpayer standing and wary of “transforming . . . courts into ‘ombudsmen of the general welfare,’”⁴⁹ Justice Scalia urged the Court to take his latter tack and overrule *Flast*.⁵⁰

Justice Souter dissented.⁵¹ He found no reason, in “either logic or precedent,” to distinguish between legislative and executive causation of injury in a way that would allow standing in the former case but not in the latter case.⁵² According to Justice Souter, taxpayers have standing to challenge an alleged Establishment Clause violation so long as taxpayer money is spent on religion.⁵³ Because “there is no dispute that taxpayer money in identifiable amounts is funding conferences, and these are alleged to have the purpose of promoting religion,” *Flast*’s requirements were satisfied.⁵⁴

Nor, in Justice Souter’s view, was the plurality rescued by its invocation of separation of powers concerns. He questioned why the Court would show more respect for executive action than for legislative ac-

⁴⁴ *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

⁴⁵ *Id.*; see *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433 (1952) (denying standing where an alleged Establishment Clause violation did not increase plaintiffs’ taxes).

⁴⁶ *Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring in the judgment).

⁴⁷ See *id.* at 2574–75.

⁴⁸ *Id.* at 2582.

⁴⁹ *Id.* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982)).

⁵⁰ *Id.* at 2584. In perhaps the most memorable passage of the entire opinion, Justice Scalia castigated the plurality for “laying just claim to be honoring *stare decisis*” while at the same time “beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive.” *Id.*

⁵¹ Justice Souter was joined by Justices Stevens, Ginsburg, and Breyer.

⁵² *Hein*, 127 S. Ct. at 2584 (Souter, J., dissenting).

⁵³ *Id.* at 2587.

⁵⁴ *Id.* at 2585; see also *id.* (noting that the injury in an Establishment Clause case is “the very ‘extract[ion] and spend[ing]’ of ‘tax money’ in aid of religion” (alterations in original) (quoting *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (2006)) (internal quotation marks omitted)).

tion, concluding that the former could undermine the dictates of the Establishment Clause just as much as the latter could.⁵⁵ Moreover, the Court's own precedent militated against the plurality's distinction. In *Bowen v. Kendrick*,⁵⁶ the Court "recognized the equivalence between a challenge to a congressional spending bill and a claim that the Executive Branch was spending an appropriation, each in violation of the Establishment Clause."⁵⁷ For these reasons, Justice Souter would have permitted standing in this case.⁵⁸

The plurality's opinion in *Hein* draws an illusory distinction between congressional spending and executive spending in order to preclude challenges to executive discretion in federal court while at the same time plausibly claiming acceptance of the stare decisis effects of *Flast*'s rule of decision. The Court's distinction is compelled neither by precedent nor prudence, and is actually contradicted by both, as both Judge Posner's opinion in the Seventh Circuit and Justice Souter's dissent demonstrate. Of course, neither questionable fealty to stare decisis nor illogic is necessarily constitutionally problematic. But by precluding taxpayers from challenging as a violation of the Establishment Clause executive use of general appropriations for arguably religious activities, while at the same time maintaining *Flast*-like challenges to congressional appropriations, the Supreme Court has undermined the nondelegation principles that undergird the maintenance of separation of powers. That is, if the government wants to act in a controversial and constitutionally ambiguous field such as religion, the Constitution would prefer that to happen in the light of (congressional) day and not under the table through executive discretion; Justice Alito's opinion incentivizes Congress to act in the latter manner.⁵⁹

The Constitution commands, and the Supreme Court has repeatedly reaffirmed, that it is for Congress to exercise the legislative power, and that even in an era of an ever-expanding federal government, such power should continue to remain in Congress's hands.⁶⁰ Although it

⁵⁵ *Hein*, 127 S. Ct. at 2586 (Souter, J., dissenting) ("[I]f the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.")

⁵⁶ 487 U.S. 589 (1988).

⁵⁷ *Hein*, 127 S. Ct. at 2586 (Souter, J., dissenting).

⁵⁸ *Id.* Justice Souter also suggested that, contrary to the worry of the plurality, allowing standing in the instant case would not open the courts to a flood of litigation. Rather, courts could dismiss frivolous suits for failure to state a claim upon which relief could be granted. *See id.* at 2586 n.1.

⁵⁹ The subsequent analysis is about the dangers accompanying the distinction on which Justice Alito's opinion is predicated, not whether the distinction should have been avoided in favor of either Justice Souter's or Justice Scalia's resolution.

⁶⁰ *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); *see also, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) ("[W]e long have insisted that 'the integrity and maintenance of the system of government

has accepted the rise of the administrative state, the Court has not stepped back from this commitment.⁶¹ In the words of Professor John Manning, such a system ensures “the promotion of legislative responsibility for society’s basic policy choices and the preservation of a carefully designed constitutional process for legislation — bicameralism and presentment.”⁶² The Court protects these structural interests through a series of nondelegation canons, which have the collective goal of ensuring that the executive branch does not make important policy choices on its own.⁶³ There is no single source for these canons of construction,⁶⁴ but together they reflect the principle of ensuring “that certain highly sensitive decisions should be made by Congress, and not by the executive pursuant to open-ended legislative instructions.”⁶⁵ Additionally, by protecting the prerogatives of the legislative process, nondelegation canons “make[] it more difficult for factions . . . to capture the legislative process for private advantage.”⁶⁶

Justice Alito’s opinion runs afoul of these nondelegation principles in two ways. It has the odd effect of making constitutional values regarding the establishment of religion less secure when the apparent intrusion is effected pursuant to a delegation rather than an outright legislative choice. The opinion also makes it politically feasible for Congress to support public incantations of religion without publicly acknowledging its policy choices. To be sure, as a purely formal matter, the decision does not grant the Executive any particular power

ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.” (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

⁶¹ See, e.g., *Loving v. United States*, 517 U.S. 748, 757–58 (1996); *Touby v. United States*, 500 U.S. 160, 164–65 (1991).

⁶² Manning, *supra* note 3, at 223–24 (footnote omitted).

⁶³ See *id.* at 223.

⁶⁴ Locating the canons within administrative law doctrine is both historically inaccurate and too narrow to capture the importance of nondelegation generally. On the historical point, it is not jurisprudentially correct to speak of a monolithic nondelegation doctrine in administrative law given that the doctrine was not enforced prior to 1935 and has not been enforced since. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1740 (2002); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down a statute that contained a high degree of vagueness in a grant of power to private groups to develop fair labor codes); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (overturning part of the National Industrial Recovery Act for failing to provide any restrictions on how the President was to utilize power to restrict trade). More importantly, although the nondelegation doctrine in administrative law implicates the value of ensuring that only Congress exercises legislative power, see, e.g., Manning, *supra* note 3, at 223, it concerns only legislative delegations to administrative agencies, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 131–34 (1980). The nondelegation principles at issue in this comment are much broader than reference only to administrative law would suggest. See Sunstein, *supra* note 2, at 316 (discussing the various iterations of nondelegation canons).

⁶⁵ Sunstein, *supra* note 2, at 317–18.

⁶⁶ Manning, *supra* note 3, at 239 (citing THE FEDERALIST NO. 62, at 346–47 (James Madison) (Clinton Rossiter ed., 1961)).

that it did not possess previously.⁶⁷ As a practical matter, however, the fact that the opinion forecloses an entire class of individuals from suing for violations of the Establishment Clause means the protections of the Establishment Clause likely will be underenforced. It has long been observed that the distinction between rights and remedies is tenuous at best; willingness to accept remedies has often defined the scope of rights.⁶⁸ Although this breakdown of the rights/remedies distinction has found less acceptance in constitutional law,⁶⁹ some have argued that judicial remedies define constitutional rights.⁷⁰ *Hein* is likely the sort of case where a lack of remedy contributes to the under-enforcement of the right, potentially erasing the line between rights and remedies.

Because *Hein* suggests that the Executive may take general appropriations and use them to fund public support for religion, Congress may become, wittingly or unwittingly, marginalized in the debate about the role of religion in public life. On the assumption that there is some zone around the Free Exercise and Establishment Clauses within which activity may or may not be a constitutional violation,⁷¹ the Supreme Court's decision potentially casts this debate into the hands of the Executive. Although one can argue about whether the

⁶⁷ Indeed, the Court noted that even though its decision precluded taxpayers from challenging executive discretion, other plaintiffs may still be able to bring suit. See *Hein*, 127 S. Ct. at 2571 (plurality opinion).

⁶⁸ See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) (describing the way that rights and entitlements are intertwined with remedies in contract and property law); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (describing legal duties and rights as “nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court”).

⁶⁹ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82–84, 90 (1977); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

⁷⁰ See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861 (1999); *id.* at 857 (“The right/remedy distinction in constitutional law serves to maintain the illusion that rights are defined by courts through a mystical process of identifying ‘pure’ constitutional values without regard to the sorts of functional, fact-specific policy concerns that are relegated to the remedial sphere.”).

⁷¹ Notwithstanding James Madison's objection to the state's spending even “three pence” in support of a church, JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in *WRITINGS* 29, 31 (Jack N. Rakove ed., 1999), religion has always played a major role in political and private life. As such, activities that might seem to violate the Establishment or Free Exercise Clauses have often been found constitutional. See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005) (permitting the display of the Ten Commandments on the grounds of a state capitol because of their historical meaning); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the opening of legislative sessions with sectarian prayers because of historical custom); Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *THE PORTABLE ABRAHAM LINCOLN* 320, 320–21 (Andrew Delbanco ed., 1992) (discussing repeatedly the will of the “Almighty” in the conflict between the North and the South).

Executive is more politically accountable than Congress,⁷² the Executive is institutionally constructed in such a way as to render it more likely than Congress to become dominated by faction.⁷³ If one accepts the assumption that some public discourse of religion in public life is both good and necessary,⁷⁴ lodging such decisions in the hands of the Executive, without some degree of popular control, may promote a greater amount of government entanglement with religion than is both popularly desired and constitutionally efficacious.⁷⁵

Justice Alito's opinion also incentivizes Congress to make policy that is controversial under the Establishment Clause without ever publicly acknowledging its new position. A majority in Congress can enact new policies sub silentio so long as it knows that the Executive's preferences are similar to its own. This arrangement, however, runs counter to the principles of nondelegation that inform much of Supreme Court jurisprudence. Indeed, as Professor Cass Sunstein contends, nondelegation operates in part "[s]imply by virtue of requiring legislators to agree on a relatively specific form of words," which "raise[s] the burdens and costs associated with the enactment of federal law."⁷⁶ Justice Alito's opinion, however, will *lower* the costs associated with the enactment of federal law by pushing the process out of the public eye and thus reducing congressional accountability. Thus, assuming congressional appropriations are still amenable to taxpayer challenges under *Flast*, there is an incentive for Congress to disburse money as general appropriations, thereby allowing the Executive Branch to enact policy choices simply by deciding how to spend the

⁷² Compare, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001) (arguing that the President is particularly responsive to public preferences because he deals with issues national in scope and has no particular constituency demanding benefits in exchange for votes), with ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–18 (2d ed. 1986) (noting that majoritarianism expressed through legislative enactment is the precondition for constitutional democracy).

⁷³ See THE FEDERALIST NO. 10 (James Madison), *supra* note 66, at 50.

⁷⁴ See NOAH FELDMAN, *DIVIDED BY GOD* 237 (2005) (suggesting that it is beneficial to "offer greater latitude for public religious discourse and religious symbolism" in order to mitigate the negative effects of religion).

⁷⁵ Cast in other terms, the Establishment and Free Exercise Clauses may be read like the Eighth Amendment, which some argue was left substantively unspecified by the Founders so that the prohibition on cruel and unusual punishment might be redefined over generations by public mores and values. See DWORKIN, *supra* note 69, at 133–36; see also *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (noting the "evolving standards of decency" underlying Eighth Amendment jurisprudence (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion))). Indeed, given the uniqueness of religion, contested questions of Establishment Clause or Free Exercise Clause violations should arguably be decided by the people. Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (discussing popular constitutionalism); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 15–16, 157–69 (2001) (suggesting that the people should have some role in constitutional interpretation).

⁷⁶ Sunstein, *supra* note 2, at 320.

blank check proffered by Congress. Such a system neither provides fair notice to citizens about potential changes in policy nor cabins the discretion of unelected administrators and officials, unlike when Congress takes the lead in enacting legislation.⁷⁷ By creating an uneven system of review over congressional and executive action, Justice Alito's opinion runs counter to the structural constitutional commitments embodied by nondelegation principles.

Although one may applaud the Supreme Court's gesture to stare decisis of refusing to overrule *Flast* even while severely limiting its reach, Justice Alito's opinion nevertheless contravenes structural constitutional interests. At the heart of constitutional democracy in the United States is the tripartite system of government: in the phrasing of junior high school civics, the legislature makes the laws, the executive enforces the laws, and the judiciary interprets the laws. Such platitudes aside, these divisions should be jealously guarded by the courts, a task that the myriad canons of nondelegation that ensure policy choices are made by Congress seek to do. Justice Alito's opinion, however, steps backward from this structure, potentially incentivizing Congress to evade the costs associated with tough policy choices. As with the croquet game in *Alice's Adventures in Wonderland*, where the mallets become flamingos and the balls become hedgehogs, Justice Alito's opinion, mistaken as an unremarkable attempt to distinguish precedent, has come alive as a decided break with tradition for a Court known to embrace nondelegation principles.

III. FEDERAL STATUTES AND REGULATIONS

A. *Antiterrorism and Effective Death Penalty Act*

"Clearly Established Law" in Habeas Review. — Designed to promote "comity, finality, and federalism,"¹ the Antiterrorism and Effective Death Penalty Act of 1996² (AEDPA) sought to extricate federal courts from a tangled, "tutelary relation"³ with state courts. Section 2254(d)(1) of AEDPA tightly circumscribes grants of habeas relief to a limited set of state court decisions: those "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."⁴ Last Term, in *Carey v. Musladin*,⁵ the

⁷⁷ See *id.* (noting that the loss of congressional control over the legislative process implicates rule of law values).

¹ *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

² Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

³ *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997).

⁴ 28 U.S.C. § 2254(d)(1) (2000).

⁵ 127 S. Ct. 649 (2006).