The Dueling First Amendments: Government as Funder and the Establishment Clause[1]

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> The public events and public speeches respondents call in question are part of the open discussion essential to democratic self-government. The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns. The exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies sustains a free society.
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> Kennedy, J. concurring in *Hein v. Freedom from Religion Foundation*[2]

Posing the question of standing in *Hein* as an issue of interfering with dialogue and with the free exchange of ideas and information between the federal government—here, the Executive Branch—and its constituencies, Justice Kennedy provides the fifth vote to deny standing to members of the Freedom from Religion Foundation in the 2007 *Hein* case. That the Freedom from Religion Foundation could not bring their Establishment Clause challenge before the Court, we now know. What more we know from *Hein* is quite uncertain—as is the fate of taxpayer challenges to the use of public funds in support of religion.

In *Hein*, Justice Kennedy both joined the opinion of Justice Alito (in which Roberts, C.J. also joined) and wrote his own additional concurrence. At the same time, he did not join the concurrence in denial of standing penned by Justice Scalia (with Justice Thomas), arguing that *Flast* should be overturned. Seven justices held that *Flast*, properly understood, remained good constitutional law; four of these believed that Freedom from Religion Foundation should have been granted standing under *Flast* (the dissenters: Souter, J. with whom Justices Stevens, Ginsburg, and Breyer joined). But six justices (the four dissenters plus Justices Scalia and Thomas) could find no distinction between the *Hein* challenge to Executive Branch expenditure and specific acts passed by Congress under the spending clause. Justice Scalia said he (and Justice Thomas) joined the bewilderment of the dissenters as to "why the plurality fixates on the amount of *additional* discretion the Executive Branch enjoys under the law beyond the only discretion relevant to the Establishment Clause issue: whether to spend taxpayer funds for a purpose that is unconstitutional."[3] Scalia rejects the express allocation line of argument made by his colleagues denying standing:

> The plurality would deny standing to a taxpayer challenging the President's disbursement to a religious organization of a discrete appropriation that Congress had not explicitly allocated to that purpose, even if everyone knew that Congress and the President had informally negotiated that the entire sum would be spent in that precise manner. See

[1] The author would like to thank Nicholas Buttino, Swarthmore College class of 2009, for research assistance and suggestions for this paper.

[2] Hein v. Freedom from Religion Foundation, http://www.supremecourtus.gov/opinions/06pdf/06-157.pdf. Kennedy, J. concurring, slip concurrence, p. 2.

[3] Scalia, J., with whom Thomas, J. joins, concurring in the judgment, Hein v. Freedom from Religion Foundation, slip concurrence, p. 14.

> ante, at 17, n. 7 (holding that nonstatutory earmarks are insufficient to satisfy the express-allocation requirement).[4]

For Scalia, the "psychic injury" approach to standing for purported Establishment Clause violations is nonsense, and this is how he characterizes the *Flast* approach. The danger, Scalia argues, is "a future in which ideologically motivated taxpayers could 'roam the country in search of governmental wrongdoing and . . . reveal their discoveries in federal court,' transforming those courts into 'ombudsmen of the general welfare' with respect to Establishment Clause issues."[5] Notice that the focus on taxpaper's "purely psychological displeasure that his funds are being spent in an allegedly unlawful manner," not only lacks the concreteness of a "wallet injury" but that it constitutes an ideological motivation and a viewpoint? There is no judicially cognizable injury: only disagreements about policy. For Justice Souter and the dissenters, however, the "'injury' alleged in Establishment Clause challenges to federal spending" is "the very 'extract[ion] and spen[ding]' of 'tax money' in the aid of religion."[6] For the dissenters, claims about the violation of the Establishment Clause occasioned by government spending decisions are not mere ideas. It is about more than raised hackles of disagreement about the policy supported.[7] If taxpayer money in identifiable amounts is funding conferences that promote religion, there is an identifiable injury—even if the amount of an individual taxpayer's tax going to this purpose is miniscule.

With the Court in disarray over the proper approach to taxpayer standing under the Establishment Clause, the day may not be far off if Justice Kennedy's approach to *Hein*, with its emphasis on ideas, comes to prevail. I maintain that the Court's posture on a specific line of freedom of speech cases helps us understand—and even predict--the fate of recent Establishment Clause challenges. It seems as if the implicit, though not explicit, convergence of these First Amendment trajectories, combined with *Hein*'s reading of Establishment Clause standing requirements, could provide the Executive Branch—and even Congress--with nearly unassailable opportunities to rewrite the boundaries of church-state relations.

While Justice Kennedy cautioned that federal officials must make a conscious effort to obey the Constitution even when their activities cannot be challenged in a court of law, he was more concerned with the alternate scenario had standing been granted: the possibility that the "courts would soon assume the role of speech editors for communications issued by executive officials and event planners for the meetings they hold." [8] Accepting too broad a view of standing, then, would entangle the Court in oversight in areas in which the other branches of government should have wide discretion.

Treating the activities of the White House Office of Faith-Based and Community Initiatives as government speech[9] puts a different cast on already difficult Establishment Clause challenges to

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[4] Scalia, J. with Thomas J. concurring in the judgment, Hein, slip concurrence at 13.
[5] Scalia, J. with Thomas J. concurring in the judgment, Hein, slip concurrence at 16.
[6] Souter, J. with whom Justices Stevens, Ginsburg, and Breyer join, dissenting, Hein, slip dissent at 1, quoting Daimler Chrysler Corp. v. Cuno (2006, slip opinion at 13) and its quoting of Flast.
[7] Souter, supra note 6 at 2.
[8] Hein v. Freedom from Religion Foundation, http://www.supremecourtus.gov/opinions/06pdf/06-157.pdf. Kennedy, J. concurring.
[9] On Justice Kennedy's speech approach to Hein, see also Lauren S. Michaels, "Hein v. Freedom From Religion Foundation: Sitting This One Out – Denying Taxpayer Standing to Challenge Faith-Based Funding," 43 Harv. C.R.-C.L. L. Rev. 213, 224-225 (2008).

governmental expenditures. And Kennedy's approach resonates with a set of First Amendment precedents involving government as funder—precedents that Justices Scalia and Thomas have already embraced and that might readily attract Justices Roberts and Alito.

The government-funded conferences and workshops providing grant-writing tutorials that were at issue in *Hein* were designed for faith-based groups, so that they could better access federal funds. They were funded by executive branch appropriations, pursuant to President Bush's Executive Order establishing the White House Office of Faith-Based and Community Initiatives. The purpose of the Office was to use federal funding to "expand the role" and "increase capacity" of religious organizations, coordinating a national effort to expand opportunities for these kinds of groups; efforts led to increased numbers of government grants to religious organizations.[10]

Standing for many Establishment Clause challenges is difficult to obtain because the purported injuries are often broadly distributed. *Flast* , permitting taxpayer standing for an Establishment Clause challenge to a federal statute providing aid to religious schools, has certainly been limited by more recent Court decisions, as Justice Scalia notes approvingly.[11] It had been reread as limited only to government action under the congressional taxing and spending clause by 1982.[12] And standing has been further circumscribed by Justice Scalia's own opinion in *Lujan*, a case involving standing under the Endangered Species Act. Here, despite protests from Justices Blackmun and O'Connor that the majority is waging a "slash-and-burn expedition through the law of environmental standing," Scalia strongly suggests that the barriers to standing based on Article III's case or controversy language, requiring perceptible injury (injury in fact) cannot be overcome by congressional citizen suit provisions—that is, only those citizens who can meet the Article III threshold can seek to have the Court hear their complaint against government or an executive branch official over enforcement.[13] According to Scalia, "When . . . the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question" that he has standing. . .When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed."[14] Otherwise, there is risk of serious interference with executive power--a "transfer from the President to the courts" of "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[15] There is certainly a tendency to read the Article III barriers to standing as posing a more formidable barrier than before Scalia joined the Court.

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[10] Lauren S. Michaels, supra note 4, quoting from Executive Order No. 13,199, 66 Fed. Reg. 8499 (January 29, 2001) establishing the White House Office of Faith-Based and Community Initiatives within the Executive Office of the President.

[11] Antonin Scalia, "The Doctrine of Standing as an Element of the Separation of Powers," in Mark W. Cannon and David M. O'Brien, eds., *Views from the Bench* (Chatham, NJ: Chatham House, 1985), 210-11; Flast v. Cohen, 392 U.S. 83 (1968).

[12] Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982).

[13] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); see Blackmun, J. and O'Connor, J. dissenting.

[14] Lujan quote and ellipses are from Cass Sunstein, "What's Standing after *Lujan*? Of Citizen Suits, 'Injuries', and Article III," 91 Michigan Law Review 163, 165 (1992).

[15] Lujan quote and ellipses are from Cass Sunstein, supra note 9. Sunstein argues that Scalia's turn on the doctrine of standing is simply judicially created, and that "read for all it is worth," Lujan could be the most important shift in standing doctrine since World War II. It should be noted that Lujan has NOT been given this broad reading in subsequent Court decisions, although new blood on the Court provided by President Bush could be important to what this precedent will be come.

In that much-watched case from 2004, *Elk Grove Unified School District v. Newdow*, the Supreme Court accepted a case in which the Ninth Circuit had held that the Establishment Clause was violated when public school teachers led students in reciting the Pledge of Allegiance containing the phrase "one nation under God." However, the Court reversed the decision on grounds that Newdow, a non-custodial parent never married to the child's mother—lacked standing in the case. [16] A revival of this case, with parents who overcame the Supreme Court's barrier to standing, seems currently to remain in process in the Ninth Circuit.[17] In an interesting recent case that may eventually find its way to the Supreme Court, the Sixth Circuit narrowly held that teacher plaintiffs had standing to claim an Establishment Clause violation (some as individuals and some as municipal taxpayers) when their jobs were eliminated as local school board outsourced special education to the Kingswood Academy, a Christian private school.[18] Facing budget cuts, the Board of Education determined that Kingswood could replace the alternative school program at a lesser cost. Kingswood personnel would not be considered employees of the Board, nor would the Director of Schools supervise or evaluate employees who provided these alternative school services for children with behavioral or emotional problems. The Kingswood School "is unique because we offer children a Christian environment of love and encouragement." Furthermore, "Kingswood was founded with the intent to insure that each child placed in its care receives Christian religious training. A unique feature of the Kingswood program is the emphasis that is placed upon instilling in each child a personal faith in God, and the assurance of the saving grace of Jesus Christ while remaining unaffiliated with any specific denomination or Church."[19] Because the question of whether the public school students in the day program were, indeed, subjected to Christian education was not clearly resolved, the case was remanded for further proceedings. Here, it would appear that parents, at least, of children attending Kingswood could establish standing; it is less clear how the current Supreme Court would treat standing for the teachers, given the split on the Sixth Circuit on this matter.[20]

Approaching the issue in *Hein* as one of government as speaker—even when using taxpayer money—reverberates with a trajectory of First Amendment jurisprudence that has been interesting and controversial since at least 1991. Since *Rust v. Sullivan*, the Court has been deferential to government when it advances particular viewpoints with taxpayer money. In *Rust*, Chief Justice Rehnquist, writing for the majority on a closely divided Court, argued that

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same

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

[17] These cases are identified as 05-17257, 05-17344, and 06-15093. While the Ninth Circuit heard oral arguments in December, 2007, no opinion seems to have yet been recorded.

[18] Smith v. Jefferson County Board of School Commissioners (06-6533), decided November 24, 2008, 2008 U.S. App. LEXIS 24050; 2008 FED App. 0415P (6th Cir.)

[19] Court record on background of the case, Smith v. Jefferson County Board of School Commissioners (06-6533), decided November 24, 2008, 2008 U.S. App. LEXIS 24050; 2008 FED App. 0415P (6th Cir.)

[20] Some teachers found other jobs with the school district, some found other jobs elsewhere, and some did not. Who would be permitted to raise the question of the School Board's decision to outsource alternative education services, even to a Christian school? Judge Rogers, in dissent, held that plaintiffs are all without standing to assert an Establishment Clause claim. "Plaintiffs as employees have not shown that they suffered an injury protected by the Establishment Clause; as municipal taxpayers, they have not shown an injury-in-fact."

> time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[21]

Court majorities had already allowed that government funders generally enjoyed wide latitude when choosing among competing demands for public funds. Whatever right a woman had to seek an abortion, for example, posed no special obstacle to the exercise of this discretion. Justice Powell, writing for the majority in *Maher v. Roe* in 1977, saw no implied limitation on "the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[22] Federal government refusal to fund programs mentioning abortion as an acceptable method of family planning under Health and Human Services rulemaking was a perfectly acceptable corollary, and Chief Justice Rehnquist cited *Maher* as an authority for this posture.[23] The government, he wrote for the Court, "has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."[24] While no one could get such a claim before the Court, can I idly speculate that it is quite possible to view this approach as government expenditure in furtherance of a religious viewpoint?

There is more mileage to be gotten out of thinking about abortion decisions in light of the Establishment Clause. In the matter of parental consent provisions in state abortion statutes, Helena Silverstein has recently documented how judicial bypass provisions are frequently abused by members of the bench, who may compel minors to submit to religious counseling from pro-life evangelicals. She argues that judges make calculated efforts to convey their religious views and persuade minors to carry fetuses to term.[25] Does this fail as an Establishment Clause matter because the young women were ultimately not compelled to deliver children they sought to abort? Or because their issues had become moot if they could not obtain a judicial bypass and did not or could not obtain parental consent? While Alabama Chief Justice Roy Moore's refusal to remove the Ten Commandments from his courtroom was a high drama Establishment Clause issue, why are we so very much more concerned with stone tablets and framed displays than with proselytizing by government officials or their surrogates—proselytizing to minors, nonetheless? Because the judges may have outsourced at least some of the counseling so that it did not take place in the courtroom, does this save the religious counseling from the same kind of infirmity that doomed a nondenominational prayer at a high school graduation in *Lee v. Weisman*?[26] In the case of compelled pro-life counseling, I would argue that government-sponsored speech indeed represents an establishment.

If government as funder can choose to prefer live childbirth over abortion with taxpayer dollars, government may also choose to require the National Endowment for the Arts to take into account "general standards of decency and respect for the diverse believes and values of the American public," as directed by the Helms Amendment. [27] Artists who claimed that the restrictions were a form of

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[21] Rust v. Sullivan, 500 U.S. 173 (1991).
[22] See Maher v. Roe, 432 U.S. 464 (1977) and Harris v. McRae, 448 U.S. 297 (1980).
[23] Rust v. Sullivan, 500 U.S. 173 (1991)
[24] Rust, supra note 21.
[25] Helena Silverstein, *Girls on the Stand: How Courts Fail Pregnant Minors*. (New York: NYU Press, 2007).
[26] Lee v. Weisman, 505 U.S. 577 (1992), majority opinion written by Justice Kennedy. I don't want to go too far afield here, but are female minors seeking judicial bypass for an abortion so very different from impressionable students who don't want to skip their high school graduation?
[27] National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

viewpoint discrimination were told by Justice O'Connor and the majority that a) the language in the Helms Amendment was merely hortatory (a position the NEA had taken as well), that b) the NEA had limited resources, had to deny funding to many projects, and had to make judgments about artistic worth—i.e., it made value judgments all the time; and therefore c) no one's freedom of expression had been curtailed since government subsidy was in no way promised or certain in any case. While I think O'Connor's opinion weaseled out of the hard issues in this case, Justice Scalia, joined by Justice Thomas, did join the issue directly. When government acts as funder, government is permitted to express a viewpoint.

Government, Justice Scalia (joined by Justice Thomas) argued, was permitted to establish "content-and viewpoint-based criteria upon which grant applications are to be evaluated." Government can mandate that factors in the Hyde Amendment be considered—e.g. "disrespect for the diverse beliefs and values of the American public or fail[ure] to comport with general standards of decency."[28] Likewise, in *United States v. American Library Association*, the Court held that a public library receiving federal subsidies was not subject to unconstitutional conditions when it was required to install filtering software that blocked internet access to obscenity, child pornography, or other indecent materials harmful to minors. Quoting *Rust*, Justice Rehnquist, writing for the plurality, held that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[29]

The final nail in the argument that government need not be content or viewpoint-neutral may well have been delivered *via* Justice Scalia's claim in *Finley* that "It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary."[30] He is right at some level: governmental policies certainly do favor some values over others and make choices among values. In that sense, governmental spending decisions are value decisions, and if a party wins the White House and the Congress, it gets to make decisions about directions and values. That sounds very much like the position of Oliver Wendell Holmes, who believed that the interests that win elections generally should have their way. Holmes wrote Felix Frankfurter, "I quite agree that a law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell."[31] So citizens express their preferences through elections, and elected leaders seek to implement the preferences of those who put them in Washington or in their state capitols.[32]

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[28] Scalia, J. with whom Justice Thomas joins, concurring only in the judgment, National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

[29] Rehnquist, C.J., joined by Justices O'Connor, Scalia and Thomas, United States v. American Library Association, 539 U.S. 194 (2003). Justices Kennedy and Breyer wrote concurrences.

[30] Scalia, supra note 28.

[31] See Albert Alschuler, *Law Without Values* (Chicago: University of Chicago Press, 2000), including the quote above, p. 58.

[32] We won't talk about all the reasons why this simple model doesn't work! The author will simply refer readers to Larry Bartels, *Unequal Democracy* (Princeton: Princeton University Press, 2008). See also Spencer Overton, *Stealing Democracy* (New York: W.W. Norton, 2006), Sanford Levinson, *Our Undemocratic Constitution* (New York: Oxford, 2006) and McCarty, Poole, and Rosenthal, *Polarized America* (Cambridge: M.I.T Press, 2006) .

Former Chief Justice Rehnquist, in ALA, stated flatly that "Government entities do not have First Amendment rights."[33] As one recent scholar notes, "the Speech Clause is typically understood as a bulwark of protection against - rather than a source of rights for - government."[34] However, we see that the Court insists that government is permitted to advance viewpoints when it speaks, and it certainly looks as if advancing "ideas" (Kennedy's terminology) such as the appropriate use of faith-based initiatives in public programs is protected against most Establishment Clause challenges. Government as funder is also permitted to promote specific aims, and funding these aims—such as in the case of funding conferences to encourage and funding workshops to help prepare funding proposals from faith-based groups--seems also to be protected against most Establishment Clause challenges. Government-as-speaker looms in cases from *Rust* onward; the Court has increasingly come to realize this category for purposes of analysis. Of course, for some purposes, the Court considers money to be speech, as in the line of cases concerning campaign expenditures from *Buckley* through *Randall v. Sorrell*. [35] Justice Kennedy has been particularly vocal in arguing that campaign contributions are also core political speech, insisting upon the abolition of the distinction between contributions and expenditures.[36] Even though government entities don't have First Amendment rights, I would contend that the Court is behaving as if they do as they close off avenues through which citizens can challenge government taxing and spending in support of religion.

While government may be able to express its viewpoint with money, government cannot simply say whatever it likes. It cannot simply endorse a particular religion, for example. It cannot, apparently, endorse religion in general, although I would argue that practice makes this less clear. When government funds faith-based initiatives, is government the speaker?[37] That is, when government funds actors and organizations in the "private" sector to perform tasks and services that government might have undertaken itself--whether it be running prisons, schools, contracting operations in Iraq, or provision of community social services—what constitutional standards govern the expressive activities (and indeed, actions) of these entities? Are they governmental actors or merely private ones, or something in between?[38] The concept of government speech is a relatively recent one; one of its recent manifestations came in *Johanns v. Livestock Marketing Association* in 2005.[39]

Recent Court decisions on Establishment contribute to the current problem we are having with Establishment. It appears that government need only be neutral in its funding; if it does not exclude religious organizations when it funds programs with a valid secular purpose, and if no one is indoctrinated more than they would have been if government aid were not present, there is no Establishment Clause problem.[40]

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[33] Rehnquist, C.J., supra note 29.
[34] David Fagundes, "State Actors as First Amendment Speakers," 100 Nw. U.L. Rev. 1637 (2006).
[35] Buckley v. Valeo, 424 U.S. 1 (1976); Randall v. Sorrell, 548 U.S. 230 (2006)
[36] See, for example, Kennedy, J. dissenting in Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000).
[37] Caroline Mala Corbin, "Mixed Speech: When Speech is Both Private and Governmental," 83 N.Y.U.L. Rev. 605 (2008)
[38] See Caroline Mala Corbin, supra note 37.
[39] Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005). See also Caroline Mala Corbin, supra note 37.
[40] See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) with Rehnquist, C.J., writing for the Court, and Mitchell v. Helms, 530 U.S. 793 (2000), with Justice Thomas writing the plurality opinion. According to Justice Thomas, "As we indicated in Agostini . . . the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." Furthermore, he writes, "If the religious, irreligious, and

The trajectory of First Amendment speech jurisprudence seems to silence the kinds of Establishment Clause challenges posed by the activities of the White House Office of Faith-Based and Community Initiatives. If taxpayers ultimately are barred from standing to challenge alleged Establishment Clause violations caused by government taxing and spending to support religion, don't the interests and prerogatives of government-as-speaker or government-as-funder ultimately trump the "ideological" or "psychological" injuries of disgruntled citizens? Isn't this a strange way to ask the Establishment Clause question?

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areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." Justice O'Connor claimed the Thomas opinion was one of unprecedented breadth and that it ignored the difference between direct and indirect aid.