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## REPLY

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### TAXPAYER STANDING FROM *FLAST* TO *HEIN*

*Carl H. Esbeck\**

There are two preliminary matters with respect to Professor Maya Manian’s response<sup>1</sup> to my extended essay<sup>2</sup> that need addressing. First, Manian’s overall lament is that my essay concerning Justice Alito’s plurality opinion controlling the result in *Hein v. Freedom From Religion Foundation, Inc.*<sup>3</sup> pays insufficient homage to strict separation of church and state. My essay could just as easily have elicited a passionate scold that I was woefully undervaluing the doctrine of separation of powers which *Hein* slighted by not overruling *Flast v. Cohen*.<sup>4</sup> However, church-state separation and separation of powers are of equal value in the Constitution. As my essay candidly admits, the Court in *Hein* had before it the proverbial “hard choice” of trying to sensibly mediate between clashing constitutional imperatives. Policing the line between church and state, while at the same time policing the Judicial Branch so that it does not exceed its powers by entertaining cases where the plaintiff is without standing, are constitutional “goods” of equal merit, and

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<sup>1</sup> Maya Manian, Response, *Hein and the Goldilocks Principle*, 79 MISS. L.J. MISSING SOURCES 178 (2010), [http://mslj.law.olemiss.edu/mlj\\_online/volume79/responses/Manian.pdf](http://mslj.law.olemiss.edu/mlj_online/volume79/responses/Manian.pdf).

<sup>2</sup> Carl H. Esbeck, *What the Hein Decision Can Tell Us about the Roberts Court and the Establishment Clause*, 78 MISS. L.J. 199 (2008).

<sup>3</sup> 551 U.S. 587 (2007) (plurality opinion). The controlling plurality was written by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy. *Id.* at 592. Justice Kennedy wrote a concurring opinion. *Id.* at 615. Justice Scalia, joined by Justice Thomas, wrote an opinion concurring in the judgment. *Id.* at 618.

<sup>4</sup> 392 U.S. 83 (1968). In a challenge under the Establishment Clause to federal legislation that provided limited funding to primary and secondary schools, including religious schools, the Court concluded that plaintiffs had standing to bring the lawsuit as federal taxpayers. *Id.* at 103-06.

Justice Alito's opinion made a plausible case for striking the line between no-establishment and standing based on doing the least harm to these two restraints. Curiously, Manian has little to say about separation of powers as honored in *Hein* by maintaining the traditional requirements for standing. Separation of powers was the motor that caused *Hein* to be decided the way it was decided, yet Manian's response warms only when chatting on about the separation of church and state. I too value church-state separation, but candor compels me to acknowledge that it is but one "good" nested in a Constitution of multiple "goods." The Constitution provides no sliding scale for privileging one "good" above others. Indeed, it is *Flast* taxpayer standing that is the "exception to the rule," as Manian thrice reminds us.<sup>5</sup>

This brings me to the second preliminary matter. Manian's response repeatedly exaggerates the scope of the principle of law stated in the *Hein* plurality. Her second paragraph, for example, says that *Hein* declined to extend "taxpayer standing as a means to challenge executive expenditures that violate the Establishment Clause."<sup>6</sup> The line drawn by the *Hein* plurality, however, is not between congressional expenditures and executive expenditures. Rather, the focus is on *discretionary* expenditures by the executive. Indeed, the line is not even drawn where the executive has *some discretion* with respect to the expenditure being challenged. For example, where a congressional social-service program awards grants to private-sector providers, it is left to the Executive Branch to exercise *discretion* with respect to selecting those grant applications that are most in line with the purposes of the program.<sup>7</sup> What the controlling plurality in *Hein* said is that *Flast* taxpayer standing is not

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<sup>5</sup> Manian, *supra* note 1, at 178-79, 182.

<sup>6</sup> *Id.* at 178; *see also id.* at 178-80.

<sup>7</sup> *See* *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007). Justice Alito notes the continuing validity of the holding in *Bowen v. Kendrick*, but distinguishes it from the facts in *Hein*. *Id.* at 606-08 (citing *Bowen*, 487 U.S. 589 (1988)). On the question of standing, *Bowen* held that federal taxpayer standing under *Flast* was permitted where plaintiffs challenged, on Establishment Clause grounds, a congressional appropriation to a social-service program where private-sector organizations, including religious organizations, were eligible for *discretionary* grant awards by the Secretary of Health, Education and Welfare to operate counseling programs addressing the needs surrounding teen sexuality. *Bowen*, 487 U.S. at 618-20.

permitted when the congressional appropriation is for the general operations of the Executive Branch, as it was in *Hein* where the appropriation was for the operations of the Executive Office of the President. Money spent on those operations is deeply imprinted with the policy initiative of the President. Accordingly, Justice Alito's plurality withheld standing to file a lawsuit challenging the signature domestic policy of an elected President by plaintiffs, self-proclaimed strict separationists who could show no more injury than that they paid federal taxes and professed displeasure with the President's policy. If ever there was a time for the Judicial Branch to refrain from interfering with the internal workings of a coordinate Branch, this would be that time. To do otherwise would permit anyone who registered opposition to the President's policies at the ballot box on the first Tuesday in November to then get a second chance at defeating the President's policies by suing on the next twentieth of January. Moreover, in this second go around, in Manian's view the opposition gets to enlist the aid of the Judicial Branch.

With those two preliminary matters behind us, I turn to my central problem with Professor Manian's response. Unlike Manian, my extended essay was not squarely about what is the right view or the wrong view of the Establishment Clause with respect to government appropriations—well-trod ground that fill to overflowing the pages of law journals. Rather, as the title to the essay suggested, I sought to take the reader behind that question and to look at how the Supreme Court's position on standing is a proxy for the modern Court's presuppositions back of its sometimes bewildering applications of the Establishment Clause. When I published the essay in the early fall of 2008, there was keen interest in *Hein* because both Chief Justice Roberts and Justice Alito were new to the Court.<sup>8</sup> We had only

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<sup>8</sup> Since the decision in *Hein*, the Court has handed down only one additional case indicating the justices' substantive views on the Establishment Clause. As in *Hein*, a badly splintered Court in *Salazar v. Buono* held that a federal trial court had erred when it enjoined the Department of Interior from implementing a congressional land-transfer statute which had the effect of changing a plot of land on which stood a Latin cross from government-owned land to privately owned land. *Salazar*, 130 S. Ct. 1803 (2010) (plurality opinion). The basis for the trial court's ruling had been that the Latin cross unconstitutionally endorsed religion. *Id.* at 1812. Given the overall context, a three-justice plurality on the Court was of the belief that the Latin cross was a war

inklings with respect to their substantive positions on the Establishment Clause, and it is never known how being elevated to the High Bench might cause one's earlier views to evolve. Equally interesting was that Justice O'Connor had recently retired from the Court and hence her "endorsement test" might wane. Additionally, Justice Kennedy, a swing justice along with Justice O'Connor on no-establishment matters, might re-adjust his role given that he alone was expected to control the balance of power on a 4-1-4 Court when it came to many church-state questions.

Manian said she understood my essay to be about how standing can be used as a lens to determine the Court's substantive approach to the Establishment Clause.<sup>9</sup> But she seems not to comprehend how this is done. Manian misstates the Court's meaning of the term "generalized grievance,"<sup>10</sup> a term essential to understanding how it is that *Flast* taxpayer stand-

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memorial, not an unconstitutional endorsement of Christianity. *Id.* at 1816-17. Accordingly, the Court plurality held that the trial court was wrong to enjoin the congressionally ordered transfer of the plot on which the cross stood to private ownership. *Id.* at 1820. Nevertheless, by a 4-4 vote the Court remanded the case for further proceedings. *See id.* at 1820-21 (Kennedy, J., joined by Chief Justice Roberts); *id.* at 1824 (Scalia, J., joined by Justice Thomas, stating the Court had no jurisdiction over the appeal because plaintiff lacked standing). Assuming plaintiff still wants to pursue the matter, the trial court is to reopen the record as well as hear argument on whether passage of the congressional land-swap statute unconstitutionally endorsed religion. *Id.* Justice Kennedy wrote the plurality opinion, joined by Chief Justice Roberts and joined in part by Justice Alito. *Id.* at 1808. Chief Justice Roberts wrote a brief concurring opinion. *Id.* at 1821. Justice Alito wrote an opinion substantially concurring with Justice Kennedy, but dissenting with respect to the need to remand the case. Justice Alito believed that the record was sufficient and that Congress' land-swap statute did not endorse religion. *Id.* at 1821. Justice Scalia, joined by Justice Thomas, concurred in the judgment. *Id.* at 1824. Justice Stevens, joined by Justices Ginsburg and Sotomayor, dissented. *Id.* at 1828. Justice Breyer dissented in a separate opinion. *Id.* at 1842.

<sup>9</sup> Manian, *supra* note 1, at 179.

<sup>10</sup> Manian says that "generalized grievances" occur when citizens sue because they believe the government is not following the law. *Id.* at 178. That is not right. The Court has never recognized citizen standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982) (collecting cases). Instead, the Court's focus was on federal taxpayers in both *Flast* and *Hein*. *See Flast v. Cohen*, 392 U.S. 83, 85 (1968); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007). More importantly, however, "generalized grievances" are not about denying standing because the class of plaintiffs is too many in number. *See Esbeck, supra* note 2, at 204 n.31 and accompanying text. Rather, a "generalized grievance" is where there is a structural violation and yet no one has individualized injury and thus no one has standing. *Id.* at 205, 209-10, 213-14.

ing is directly linked to the modern Court's application of the no-establishment principle as structural rather than as rights-based.<sup>11</sup> Because it was explained at length in the essay, I will only summarize the logic here. A review of the Supreme Court's cases shows that in each instance when the Court denied standing because the claim was a "generalized grievance," it was because a structural clause in the Constitution was ostensibly violated but no one had suffered individualized injury.<sup>12</sup> Lack of individualized injury does not always occur when constitutional structure is violated, for sometimes a plaintiff does suffer consequential "injury in fact" and thus has traditional standing.<sup>13</sup> But when a structural clause is violated and no one has personalized "injury in fact," the Court will always announce a "generalized grievance" and dismiss for lack of standing. Always, that is, until 1968 when the case of *Flast* came before the Court. In *Flast*, an alleged violation of the Establishment Clause failed to result in any potential plaintiff with "injury in fact." *Flast* was thus a "generalized grievance" case, and such cases only occur when the underlying claim on the merits is structural in nature. It follows that the modern Court was applying the Establishment Clause as structural. There is no other explanation for the presence of the "generalized grievance" in *Flast*. The structural violation in *Flast* was that the congressional appropriation to religious schools was a failure to properly separate these two centers of authority, church-related schools and government.

Rather than dismiss for lack of standing, the *Flast* Court carved out an exception for certain congressional expenditures

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<sup>11</sup> This conception of the clause was first noted in Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 33-40 (1998). Professors Ira Lupu and Robert Tuttle have since agreed. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 64-65 n.273 (2005). Professor Douglas Laycock, who initially opposed the concept, says that he is now open to considering the Establishment Clause as affording structural protection of church-state relations. See Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 260-65 & 278 (2009).

<sup>12</sup> Esbeck, *supra* note 2, at 205-07 (discussing three illustrative Supreme Court cases).

<sup>13</sup> See *id.* at 215-16 nn.72-74 and accompanying text (collecting five Supreme Court cases illustrative of Establishment Clause violations that did result in consequential "injury in fact," and thus the plaintiffs had traditional standing).

under the Taxing and Spending Power.<sup>14</sup> The carve-out uniquely allowed a dispensation to an otherwise longstanding and universal bar to federal taxpayer standing. Moreover, that the Court in *Flast* was doing so made perfect sense. It made sense because beginning with its all-important 1947 decision in *Everson v. Board of Education*,<sup>15</sup> the Court's no-establishment principle was being transformed in both rhetoric<sup>16</sup> and practice into one of separating church and state. The details of what *Everson* meant in particular applications had to be worked out case-by-case, but presuppositionally and in practice, the Establishment Clause was about policing the line between government and organized religion. But, when a case like *Flast* came along and no one had "injury in fact," how was the Judicial Branch to perform its role of policing that boundary? The obstacle was overcome by resorting to the *Flast* carve-out, one where the Court entertains the legal fiction that every federal taxpayer has sufficient injury to prosecute a case, but only where government appropriations are making their way into the hands of religious groups.<sup>17</sup> That also explains why to this day the Court has never permitted federal taxpayer standing in any type of case other

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<sup>14</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>15</sup> 330 U.S. 1 (1947). On the transformation brought about by *Everson*, see Carl H. Esbeck, *The 60th Anniversary of the Everson Decision and America's Church-State Proposition*, 23 J.L. & RELIGION 15 (2007-08).

<sup>16</sup> In *Everson*, the Court drew upon Thomas Jefferson's letter of January 1802 wherein he had written the Danbury Baptist Association in Connecticut that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" 330 U.S. at 16.

<sup>17</sup> Like any legal fiction, the one *Flast* was designed to achieve was an objective not altogether achievable by logic. The fiction was that every federal taxpayer's conscience suffers coercion when his tax monies are appropriated by Congress to a purpose that violates the separation of church and state. *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968). That this is a fiction is easily demonstrated, made plausible only by distorting the meaning of coercion. See Steven D. Smith, *Taxes, Conscience, and the Constitution*, 23 CONST. COMMENT. 365 (2006). Only where a tax is earmarked for an expressly religious purpose would the tax be coercive of conscience. See Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1787*, 7 GEO. J.L. & PUB. POL'Y 51, 75-81 & 89-90 (2009) (explaining that Patrick Henry's proposed legislation for a religious tax to pay the salaries of Christian clergy in Virginia was an earmarked tax defeated by the efforts of James Madison and others in 1884-85, but that such an earmark tax is not precedent for the legal fiction entertained in *Flast*).

than one alleging a taxing or spending violation of the Establishment Clause.<sup>18</sup>

Accordingly, the primary thrust of my essay on *Hein* was that Chief Justice Roberts and Justice Alito had shown evidence that for now they would continue to approach the Establishment Clause as structural, one where the aim is to draw a line separating the spheres of government and institutional religion.<sup>19</sup> If that was not their position then Chief Justice Roberts and Justice Alito had no reason to maintain the fiction undergirding *Flast* taxpayer standing. Justice Kennedy was already of that persuasion, as his separate concurrence reaffirmed *Flast*. Justices Scalia and Thomas, on the other hand, had been increasingly restive, with an understanding of church and state occupying differing spheres of authority as policed by the Establishment Clause.<sup>20</sup> Justice Scalia's full-throated condemnation of *Flast* left little doubt as to where these two justices will stand in future cases.<sup>21</sup>

Given that the *Hein* plurality had to balance church-state separation against separation of powers, I had a little fun at Justice Alito's expense by calling the Court's plurality in *Hein* a "Goldilocks stance," not too hot and not too cold.<sup>22</sup> Manian took the liberty of elevating my "Goldilocks" adjective to a principle, and her response veers off from there. Manian is certainly an unabashed devotee of the separation of church and state. Therefore, if my conclusion about Chief Justice Roberts and Justice Alito in *Hein* are correct, she ought to have been relieved because her separationist position was vindicated in its essentials. Granted, she lost the battle because no standing was found on the facts in *Hein*, but she won the war because no-

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<sup>18</sup> Esbeck, *supra* note 2, at 211 n.57 and accompanying text.

<sup>19</sup> *Id.* at 221-23.

<sup>20</sup> *Id.* at 222.

<sup>21</sup> Justice Scalia, joined by Justice Thomas, again wrote separately in *Salazar v. Buono*, opining that the plaintiff lacked standing to sue because he had no "injury in fact." *Salazar*, 130 S. Ct. 1803, 1824 (2010). The increasing practice of these two justices joining in a separate opinion concurring in the judgment isolates them and thereby reduces their influence on the Court. This works to the advantage of those justices who would retain *Flast* taxpayer standing. Unfortunately, it also reduces the number of five-justice majority opinions and thus keeps church-state law in an unsettled state.

<sup>22</sup> Esbeck, *supra* note 2, at 224.

establishment still structures relations between church and state. The outcome in *Hein* could have been so much worse. Given that Chief Justice Roberts and Justice Alito were center to center right appointments to the Court, Manian's separationism still came out intact. It is time to recognize *Hein* for what it is: a victory where the presuppositions of both *Everson* and *Flast* have the backing of seven justices, thus securing church-state separation and its stepchild, taxpayer standing, for now.