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GOD, GAIA, THE TAXPAYER, AND THE LORAX: STANDING, JUSTICIABILITY, AND SEPARATION OF POWERS AFTER *MASSACHUSETTS* AND *HEIN*

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INTRODUCTION

The Supreme Court's October 2006 term marked the onset of a conservative legal revolution, according to many press accounts and commentaries.[1] The addition of Chief Justice John Roberts and Associate Justice Samuel Alito created "the Supreme Court that conservatives had long yearned for and that liberals feared," according to Linda Greenhouse of the *New York Times*.[2] Professor Erwin Chemerinsky declared the October 2006 term to be "the most overwhelmingly conservative term since the 1930s."[3] By such accounts, a five-Justice majority consistently moved the Court's jurisprudence in a rightward direction in a string of ideologically charged cases, from abortion restrictions and race-based school assignments to campaign-finance regulations and litigant access to federal courts.[4]

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[1] Where this Article uses the terms "conservative" and "liberal" to describe shifts in legal doctrine, it is adopting the conventional usages of these terms in legal commentary.

[2] Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at 1, *available at* http://www.nytimes.com/2007/07/01/washington/01scotus.html?ex=1341028800&en=43ad643ff11e471e&ei=5124&partner=permalink&exprod=permalink; *see generally* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007) (discussing emergence of conservative majority on Supreme Court).

[3] Erwin Chemerinsky, *Conservative Justice*, L.A. TIMES, June 29, 2007, at A35, *available at* http://www.latimes.com/news/opinion/la-oe-chemerinsky29jun29,0,5235222.story.

[4] *See* Greenhouse, *supra* note 2 ("Fully a third of the court's decisions, more than in any recent term, were decided by 5-to-4 margins. Most of those, 19 of 24, were decided along ideological lines, demonstrating the court's polarization whether on constitutional

There is no question that the October 2006 term was marked by an unusually high number of 5-4 decisions decided along seemingly ideological lines. A single Justice, Anthony Kennedy, was in the majority in every 5-4 decision,[5] meaning that the outcome of a case often depended on whether he broke to the right or to the left. But the Court's apparent rightward drift could have been an artifact of case selection and the Court's ever-dwindling docket.[6] In some cases, such as the Court's approach to Article III standing, any conservative shift was wholly illusory.

The Supreme Court considered standing in two high-profile cases during the October 2006 term: *Hein v. Freedom from Religion Foundation*[7] and *Massachusetts v. EPA*.[8] Both were 5-4 decisions in which the Court decided along traditional, ideological lines, and both decisions may provide an indication of the future direction of the Supreme Court. Yet neither case fits the conventional narrative of a narrow majority shifting the law in a conservative direction.

In *Hein*, a five-Justice majority denied taxpayer standing to challenge the Bush Administration's so-called "faith-based initiatives" as a violation of the First Amendment's Establishment Clause. Writing in *The New York Review of Books*, Anthony Lewis claimed that in *Hein* a five-Justice majority "covertly overruled earlier decisions . . . recognizing the standing of members of the public to challenge measures that assist religious activities."[9] Yet what is striking about *Hein* is not that it overturned prior decisions or shifted the Court's jurisprudence, but rather that it hewed closely to precedent, leaving the law of standing in place.

Massachusetts was a far more consequential case than *Hein*, even if it did not receive the same level of attention at the close of the Court's

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fundamentals or obscure questions of appellate procedure."); *see also* Jeffrey Toobin, *Five to Four*, THE NEW YORKER, June 25, 2007, at 35, *available at* http://www.newyorker.com/talk/comment/2007/06/25/070625taco_talk_toobin.

5 *See* Greenhouse, *supra* note 2, at 18.

6 *See*, *e.g.*, Jonathan H. Adler, *How Conservative Is this Court?*, NAT'L REV. ONLINE, July 5, 2007, http://article.nationalreview.com/?q=Y2Y3NjNkM2ZkYTcxNzQwYTBhZWZkNzEyZGYyMWExMjE=.

7 127 S. Ct. 2553 (2007).

8 127 S. Ct. 1438 (2007).

9 Anthony Lewis, *The Court: How 'So Few Have So Quickly Changed So Much'*, THE N.Y. REV. OF BOOKS, Dec. 20, 2007, at 58, 59, *available at* http://www.nybooks.com/articles/20899. *See also* Stephanie Mencimer, *Supreme Court: Taking Care of Business*, MOTHER JONES, Jan. 25, 2008, *available at* http://www.motherjones.com/washington_dispatch/2008/01/supreme-court-pro-business-out-of-touch.html (stating that the decision in *Hein* "overturned years of precedent").

term.[10] In *Massachusetts*, the Court broke new ground as it took several steps in a decidedly "liberal" direction.[11] The five Justice majority's conclusion that Massachusetts had standing to challenge the Environmental Protection Agency's refusal to regulate greenhouse-gas emissions from new motor vehicles is potentially quite consequential. *Massachusetts* may have produced greater substantive change than any other decision of the October 2006 term, despite the Court majority's claims of adhering to precedent.[12]

Both *Hein* and *Massachusetts* are potentially significant standing opinions—the latter for what it did, and the former for what it did not do. Both decisions involved generalized grievances about federal-government policies that affect citizens as a whole, but point in opposite directions. Only Justice Kennedy joined the judgment in both opinions—indeed, only Justice Kennedy seemed satisfied with the two holdings. In many respects, the opinions are in significant tension with each other and embrace competing conceptions of the role of the judiciary in the separation of powers. What neither decision did, however, is etch a conservative imprint on the law of standing.

The rather modest aim of this Article is to untangle what the Supreme Court did, or did not do, with regard to standing last term. This analysis may not produce any profound conclusions about the future course of the Roberts Court. It can, however, illuminate how the current Court approaches the question of justiciability and, as a consequence, the Court's approach to the separation of powers and its conception of its own role in policing executive conduct in contested policy areas.

Part I of this Article provides a brief overview of standing doctrine as it has been traditionally conceived and its role in the separation of powers, particularly in the context of generalized grievances. Parts II and III turn to *Hein* and *Massachsuetts* respectively, explaining what the Court did (and did not do) with regard to standing in each case. Part IV considers what the *Hein* and *Massachusetts* decisions suggest about the Court's conception of separation of powers and highlights some tensions between and conceptual problems within the Court's approach to judicial oversight of executive action in the two cases.

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[10] One potential explanation for the relative lack of attention to *Massachusetts* at the end of the Court's term is the timing of the respective opinions. Whereas *Hein* was among the high-profile decisions handed down at the end of the term, *Massachusetts* was decided over two months earlier, on April 2, 2007.

[11] *See* Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 61 (2007), http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf (discussing the legal implications of *Massachusetts*); Ronald A. Cass, Massachusetts v. EPA: *The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 73 (2007), http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf (discussing departures from precedent in the *Massachusetts* decision).

[12] *See* Cass, *supra* note 11.

I. STANDING AND SEPARATION OF POWERS

Standing is a key element of justiciability. For a plaintiff to invoke the jurisdiction of an Article III court, he or she must demonstrate the existence of standing. This entails satisfying requirements that demonstrate a given plaintiff is the proper individual to bring the issue to federal court. Without standing, there is no "case or controversy" under Article III of the Constitution.[13] "Courts resolve *cases,* not philosophical disputes, beauty contests, or questions of foreign policy," comments Professor Eugene Kontorovich.[14] Standing cases are particularly important because standing doctrine helps determine who can, and who cannot, pursue certain claims in federal court.

There is some debate over the constitutional grounding and historical provenance of the standing requirement.[15] Scholars dispute whether the text or original meaning of Article III imposes a standing requirement. By some accounts, standing did not emerge as a requirement of justiciability until the early twentieth century, as courts sought to limit litigation against the growing administrative state.[16] What is not in dispute, however, is that standing is now understood to be an essential component of justiciability under Article III.

There are several justifications for the standing requirement, such as the need to ensure sufficient adversity between the parties[17] and to

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> [13] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

[14] Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1670 (2007).

[15] *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance,* 40 STAN. L. REV. 1371 (1988); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

[16] *See, e.g.,* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (arguing standing doctrine was fabricated by the Supreme Court in the twentieth century).

[17] *See, e.g.*, Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 545–49 (2006) (Article III's case or controversy requirement ensures adequate adversity between the parties.). *But see* Richard A. Epstein, *Standing and*

vindicate individual rights.[18] For several decades, however, standing doctrine has been grounded in contemporary notions of separation of powers and the role of the judiciary in providing a check on the other branches. As Justice O'Connor wrote for the Court in 1984, "the law of Art. III standing is built on a single basic idea—the idea of separation of powers."[19] The law of standing helps define the role of the federal judiciary under the Constitution. Indeed, it can be said that "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'"[20]

Contemporary standing doctrine grows out of the 1923 case of *Frothingham v. Mellon* in which the Court held that generalized grievances, such as a federal taxpayer's complaint that federal funds are being spent in an illegal or unconstitutional fashion, are insufficient to confer standing on a litigant.[21] In *Frothingham*, a taxpayer sought to challenge the constitutionality of the federal Maternity Act of 1921 on the ground that the law exceeded the scope of Congress's spending power.[22] Rather than address the merits of the petitioner's claims, the Court dismissed the case for want of jurisdiction, explaining that an individual taxpayer did not have a sufficiently personal injury to invoke federal-court jurisdiction.[23] The Court explained that

> 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 an appeal to the preventive powers of a court of equity.[24]

The principles motivating contemporary-standing doctrine predate *Frothingham*, however, and can be traced to the founding era. As Chief Justice John Marshall noted in *Marbury v. Madison*, "[t]he province of the court is, solely, to decide on the rights of individuals . . . ."[25] Such

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Spending—The Role of Legal and *Equitable Principles*, 4 CHAP. L. REV. 1, 46–47 (2001) (arguing ideological plaintiffs are likely to be sufficiently adverse to satisfy this concern).

[18] *See, e.g.,* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 306–15 (1979) (among the purposes of standing is the proper representation of individuals and self-determination); *see also* Kontorovich, *supra* note 14, at 1666 (standing "prevent[s] inefficient dispositions of constitutional entitlements" and enables individuals to determine the best use of their own rights).

[19] Allen v. Wright, 468 U.S. 737, 752 (1984).

[20] Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976)).

[21] 262 U.S. 447, 486–87 (1923).

[22] *Id.* at 479.

[23] *Id.* at 480, 487.

[24] *Id.* at 487.

[25] 5 U.S. (1 Cranch) 137, 170 (1803).

cases stand in contrast to those that are "political" in that "[t]hey respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."[26] Where the rights of individuals are at stake, the judiciary is within its element, and properly exercises the authority of judicial review, even if that means second-guessing or overruling the actions of a coordinate branch. Yet when individual rights are not at stake, constitutional questions are properly left to the political branches, each of which has an independent obligation to uphold and enforce the Constitution. As Chief Justice Roberts observed in a law review article in 1993, "By properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution."[27]

All citizens may have an interest in seeing to it that the government complies with the Constitution and laws enacted pursuant to constitutional authority. But this does not mean that all citizens suffer a judicially cognizable injury when the federal government fails to abide by the legal limits of federal power. As the Court explained in *Lujan v. Defenders of Wildlife*, "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, . . . does not state an Article III case or controversy."[28] Such grievances are best brought to the attention of elected representatives and the electorate at large, rather than Article III courts.

One thing that flows from these principles is that federal courts lack jurisdiction to hear claims that consist of nothing more than "generalized grievance[s]" that are "'common to all members of the public.'"[29] As the Court explained in *Schlesinger v. Reservists Committee to Stop the War*, "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national—or even international—importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"[30] This would not be a proper role for the judiciary. As Chief Justice Marshall himself warned, "If the judicial power extended . . . to every *question* under the laws . . . of the

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[26] *Id.* at 166.

[27] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993).

[28] 504 U.S. 555, 573–74 (1992).

[29] United States v. Richardson, 418 U.S. 166, 176–77 (1974) (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam)).

[30] *Schlesinger*, 418 U.S. at 222.

United States[,] . . . [t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary."[31] This is so even if this means that there are constitutional questions that, as a consequence, may never come before the courts in a justiciable case. As strange as it may sound to some, not all constitutional questions must be resolved in federal court. Some constitutional questions are left to the political branches.

The constitutional requirements of standing to sue in federal court are injury,[32] causation,[33] and redressability.[34] Article III standing requires an "injury-in-fact" that is both actual or imminent and concrete and particularized.[35] The cause of this injury must be "'fairly . . . trace[able] to the challenged'" conduct.[36] Finally, the injury must be redressable by a favorable ruling on the merits of the claim.[37] Taken together, these three elements are understood as the "irreducible constitutional minimum" required to demonstrate standing.[38]

These traditional requirements create problems for federal taxpayers who wish to challenge the expenditure of funds by the federal government.[39] While the illegal or unconstitutional expenditure of tax dollars may well constitute a concrete injury, federal taxpayers, as such, do not suffer any *particularized* injury from such expenditures, nor can they claim that any injury to them, again *as taxpayers*, will be redressed by a favorable court ruling. In the typical case, a federal taxpayer cannot plausibly claim that a court judgment that a given expenditure or appropriation is unconstitutional will reduce his or her tax burden.

The traditional requirements for standing have also posed a particular problem for environmentalist plaintiffs. Environmental injuries have not always translated into judicially cognizable injuries-in-fact, fairly traceable to allegedly illegal government conduct that can be redressed by a favorable court ruling. Much environmental litigation involves alleged harms to the environmental commons—unowned or

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[31] C.J. John Marshall, Speech at the House of Representatives, on the Resolutions of The Honorable Edward Livingston (Mar. 7, 1800), *in* 4 THE PAPERS OF JOHN MARSHALL 82, 95 (Charles T. Cullen & Leslie Tobias eds., 1984).

[32] *Lujan*, 504 U.S. at 560 (citing Allen v. Wright, 468 U.S. 737, 756 (1984)).

[33] *Id.*

[34] *Id.* at 561 (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)).

[35] *Id.* at 560 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); *Allen*, 468 U.S. at 756).

[36] *Id.* (quoting *Simon*, 426 U.S. at 41).

[37] *Id.* at 561 (citing *Simon*, 426 U.S. at 38, 43).

[38] *Id.* at 560.

[39] *See* Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771 (2003) (noting differences between standing for federal taxpayers in suits against the federal government and standing for state or local taxpayers suing state or local governments).

public spaces in which few, if any, have distinct and particularized legal interests. Especially where such plaintiffs have sought to address widespread environmental harms, such as those due to global climate change or other widely dispersed phenomena, it is difficult for plaintiffs to demonstrate that they have suffered actual, discrete, particularized injuries of the sort that Article III requires.

Both federal taxpayers and environmentalist plaintiffs present claims that are often best characterized as the sort of "generalized grievances" unfit for judicial resolution in an Article III court. Over the past few decades, federal courts have been required to revisit the standing of federal taxpayers and environmental plaintiffs time and again. In *Hein* and *Massachusetts*, the Court addressed both, but with not entirely consistent results.

II. *HEIN V. FREEDOM FROM RELIGION FOUNDATION*

The *Hein* litigation arose from a challenge to the Bush Administration's so-called "faith-based initiative."[40] In 2001, the President created the Office of Faith-Based and Community Initiatives ("OFCI") as a part of the Executive Office of the President through an executive order.[41] The stated purpose of this office was to provide religious organizations the opportunity to "compete on a level playing field" with their secular counterparts in receipt of federal funds and provision of social services.[42] No legislation specifically authorized the creation of this office.[43] Rather, the President created the faith-based initiative unilaterally and funded its activities out of general appropriations to the Executive Branch.[44]

The Freedom from Religion Foundation ("FRF") filed suit in federal court alleging that the initiative violated the First Amendment's Establishment Clause.[45] Specifically, FRF objected to conferences organized by OFCI at which speakers used excessively religious imagery and extolled the effectiveness of faith-based organizations at delivering needed social services.[46] Particularly objectionable to FRF was the suggestion that faith-based programs might be more effective *because* they are faith-based. Such activities, FRF maintained, had the intent or

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40 *Hein*, 127 S. Ct. at 2559.

41 *See id.*; Exec. Order No. 13,199, 3 C.F.R. 752 (2001), *reprinted in* 3 U.S.C. Ch. 2 (Supp. I). Through separate executive orders, the President also created similar offices in various executive agencies.

42 *Hein*, 127 S. Ct. at 2559; Exec. Order, *supra* note 41.

43 *Hein,* 127 S. Ct. at 2560.

44 *Id.*

45 *Id.* The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

46 *Hein*, 127 S. Ct. at 2560.

effect of promoting religious social service organizations over their secular counterparts, in violation of the First Amendment's prohibition on the establishment of religion.[47] From the start, this was a "lawsuit destined to go nowhere . . . ."[48] Under existing precedent, FRF's substantive claims were quite a stretch. Yet the case nonetheless found its way to the High Court on the threshold question of FRF's standing to raise its claim at all.

FRF lacked the sort of connection to the OFCI's activities that would normally suffice to establish standing for an Establishment Clause claim. No member of FRF was subjected to these remarks or attended the relevant OFCI conferences, nor did any members of FRF claim that they had been excluded from participation in OFCI activities because of their secular orientation or criticism of religious organizations. Rather, the *sole* asserted basis for FRF's standing to challenge the OFCI was that the plaintiffs were federal taxpayers who were "'opposed to the use of Congressional taxpayer appropriations to advance and promote religion.'"[49]

FRF's only alleged injury was the expenditure of taxpayer dollars by OFCI on activities that allegedly violated the Establishment Clause. This made FRF's case difficult from the start. As noted above, taxpayer standing is generally disfavored. Under longstanding precedent, federal taxpayers do not have distinct interests that can justify invoking the power of the federal courts. In simple terms, "interests of the taxpayer are, in essence, the interests of the public-at-large . . . ."[50] Were such suits allowed, and "every federal taxpayer could sue to challenge any Government expenditure," the result would be that "the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."[51]

FRF sought to rely on *Flast v. Cohen*, a 1968 case in which a divided Court found taxpayer standing to challenge Congressional appropriations allegedly violative of the Establishment Clause.[52] *Flast* involved a challenge to federal grants to religious schools under the Elementary & Secondary Education Act of 1965.[53] In *Flast*, the Court held that taxpayers could have standing to challenge legislative

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47 *Id.* at 2561.

48 Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom from Religion Foundation *and the Future of Establishment Clause Adjudication* 1–2, 2008 BYU L. REV. 115, 116.

49 *Hein*, 127 S. Ct. at 2561 (quoting Petition for Writ of Certiorari, app. at 69a ¶ 10, *Hein*, 127 S. Ct. 2553 (No. 06-157), 2006 WL 2161324).

50 *Id.* at 2563.

51 *Id.* at 2559.

52 392 U.S. 83 (1968).

53 *Id.* at 85.

exercises of the federal taxing and spending power under Article I, Section 8 of the Constitution that allegedly exceed specific constitutional limitations on federal power, such as the Establishment Clause.[54] Whereas citizens cannot generally sue the federal government seeking nothing more than compliance with the Constitution, a taxpayer could challenge the constitutionality of a Congressional appropriation that allegedly violated the prohibition on government establishment of religion.

As handled by the Court's majority, *Flast* created an exception for challenges to a subset of federal *legislative* acts involving exercise of the Congressional taxing and spending power.[55] *Hein*, on the other hand, involved a challenge to an *executive* act: the administration of funds used by the presidentially created OFCI. Therefore, plaintiffs could not avail themselves of the *Flast* exception to the bar on taxpayer standing. As a consequence, FRF lacked standing and federal courts lacked Article III jurisdiction over the case. That the expenditures at issue were ultimately derived from appropriations approved by Congress was deemed immaterial, as the specific expenditures were not expressly approved by a legislative act.[56] The OFCI was wholly a creation of the Executive Branch.

The *Flast* distinction relied upon by the Court's majority is not particularly compelling. Indeed, a majority of the *Hein* Court joined opinions explicitly rejecting any constitutional grounds for differentiating between challenges to legislative and executive acts for standing purposes. Justice Scalia, joined by Justice Thomas, concurred separately to call for overruling *Flast* entirely,[57] while four Justices—Stevens, Ginsburg, Souter and Breyer—dissented, arguing for a more permissive approach to taxpayer standing in Establishment Clause cases.[58]

Justice Alito's opinion for the Court, joined by Chief Justice Roberts and Justice Kennedy, repeatedly stressed that it declined to extend *Flast*

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[54] *Id.* at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.

Id.

[55] *Hein*, 127 S. Ct. at 2566 ("*Flast* 'limited taxpayer standing to challenges directed only [at] exercises of congressional power' under the Taxing and Spending Clause." (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 479 (1982) (alteration in original)).

[56] *Id.* at 2566–69.

[57] *See id.* at 2573–74, 2582–84 (Scalia, J., concurring).

[58] *See id.* at 2584–86 (Souter, J., dissenting).

to permit challenges to executive allocations of federal tax dollars,[59] and that the executive–legislative distinction had been embraced in subsequent decisions such as *Valley Forge Christian College v. Americans United for Separation of Church and State*.[60] Yet Justice Alito's opinion conspicuously failed to defend the *Flast* holding on its own terms.[61] Rather, Justice Alito explained, principles of *stare decisis* did not require expanding such a questionable precedent "to the limit of its logic."[62]

Only one member of the Court, Justice Kennedy, sought to defend the *Flast* holding without seeking to expand it to all taxpayer Establishment Clause challenges to allegedly unconstitutional use of federal funds. "*Flast* is correct and should not be called into question," Justice Kennedy briefly explained, because it embraced "the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion."[63] At the same time, Justice Kennedy stated that *Flast* did not require judicial oversight of executive activities. Allowing challenges to discretionary executive functions, such as the content and conduct of conferences sponsored by various White House offices, would involve excessive intrusion into the functioning of the Executive Branch, threatening to turn courts into "speech editors for communications issued by executive officials and event planners for meetings they hold."[64] This did not relieve the Executive Branch of its constitutional obligations, Justice Kennedy hastened to add. Denying standing to federal taxpayers in such cases would not excuse executive-branch officials "from making constitutional determinations in the regular course of their duties" and obeying constitutional limitations on federal power.[65] It would, however, limit judicial enforcement of such constitutional limits.

Justice Kennedy's opinion did not offer a particularly compelling defense of the *Flast* rule as applied in *Hein*. Perhaps this is because such

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[59] *Id.* at 2565–66, 2568 (majority opinion).

[60] 454 U.S. 464 (1982).

[61] Justice Alito's opinion even criticized *Flast* for its failure to give sufficient weight to separation of powers concerns. *Hein*, 127 S. Ct. at 2569.

[62] *Id.* at 2571; *see also id.* at 2568 ("*Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures.").

[63] *Id.* at 2572 (Kennedy, J., concurring). Justice Kennedy explained that "[t]he courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties." *Id.* at 2573.

[64] *Id.*

[65] *Id.*

a rule is difficult to defend.[66] As noted above, Justice Kennedy is the only member of the Court to even suggest that whether a taxpayer seeks to challenge legislative or executive action should make a difference for standing purposes.

The most compelling explanation offered for the Court's holding was stare decisis.[67] *Flast* contained limiting language stressing the "nexus" between a federal taxpayer and the authorization of funds by Congress under the taxing and spending power of Article I, Section 8.[68] The Court's subsequent decision in *Valley Forge Christian College* explicitly reaffirmed the distinction between legislatively authorized expenditures and discretionary allocations of federal dollars by executive officials.[69] Thus, whatever *Hein*'s faults, overturning (or even curtailing) existing precedent was not among them. While the decision may not have yielded a particularly coherent holding, nothing in *Hein* explicitly or implicitly moved the law in a "conservative" direction or closed the courthouse door on parties that previously had access. For good or ill, it applied existing precedent and left the law as it was.

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[66] During a humorous portion of the *Hein* oral argument, United States Solicitor General Paul Clement noted the difficulty of making sense of *Flast* and other related precedents:

> JUSTICE ALITO: General Clement, are you—are [you] arguing that these lines that you're drawing make a lot of sense in an abstract sense? Or are you just arguing that this is the best that can be done that this is the best that can be done [sic] within the body of precedent that the Court has handed down in this area?
> GENERAL CLEMENT: The latter, Justice Alito.
> (Laughter.)
> GENERAL CLEMENT: And I appreciate—I appreciate the question.
> JUSTICE SCALIA: Why didn't you say so?
> (Laughter.)
> JUSTICE SCALIA: I—I've been trying to make sense out of what you're saying.
> (Laughter.)
> GENERAL CLEMENT: Well, and I've been trying to make sense out of this Court's precedents.
> (Laughter.)

Transcript of Oral Argument at 20, *Hein*, 127 S. Ct. 2553 (No. 06-157), 2007 WL 609740.

[67] *See Hein*, 127 S. Ct. at 2571.

[68] *Flast*, 392 U.S. at 102; *see also Hein*, 127 S. Ct. at 2565 ("Given that the alleged Establishment Clause violation in *Flast* was funded by a specific congressional appropriation and was undertaken pursuant to an express congressional mandate, the Court concluded that the taxpayer-plaintiffs had established the requisite 'logical link between [their taxpayer] status and the type of legislative enactment attacked.'" (quoting *Flast*, 392 U.S. at 102)).

[69] *See* 454 U.S. at 479 (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974)).

III. *MASSACHUSETTS V. EPA*

Whereas *Hein* conformed to existing (albeit irrational) precedent, *Massachusetts* staked out new territory. In finding that the Commonwealth of Massachusetts had standing to challenge the EPA's failure to regulate greenhouse-gas emissions under the Clean Air Act, the Court departed from existing precedent and invented new doctrine.[70] Even where the Court purported to follow prior decisions, it applied those holdings in a particularly flexible fashion. While *Massachusetts* did not produce what most would characterize as a "conservative" result, it was nonetheless one of the most consequential decisions of the term.

The *Massachusetts* litigation arose out of a rulemaking petition filed with the EPA in 1999 calling upon the Agency to regulate greenhouse-gas emissions from new motor vehicles under Section 202 of the Clean Air Act.[71] At the time, the EPA's General Counsel accepted the claim that the EPA possessed the authority to adopt such regulations,[72] but under the Clinton Administration the EPA declined to act, neither accepting nor rejecting the rulemaking petition. Once the Bush Administration took over, the EPA disavowed any intention to regulate greenhouse gases under the Clean Air Act. When environmentalist groups threatened legal action, the Bush EPA formally rejected the initial petitions on the grounds that the EPA lacked the legal authority to regulate greenhouse gases without express approval from Congress.[73] Although there is language in the Clean Air Act that could be applied to greenhouse gases, the EPA maintained that these provisions were designed to address conventional air pollution problems, such as soot and smog, rather than control global atmospheric pollutants.[74] Even if the EPA had such authority, the EPA now argued, it would be unwise to do so given scientific uncertainty and the need for coordinated international action on climate change.[75]

After the EPA denied the rulemaking petition, several states and environmentalist groups promptly filed suit, alleging that the EPA had adequate statutory authority to control vehicular emissions of greenhouse gases and that the agency failed to offer an adequate

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[70] *See* Adler, *supra* note 11; Cass, *supra* note 11.

[71] Clean Air Act, sec. 202, § 202(a)(6), 104 Stat. 2399, 2473–74 (1990) (codified as amended at 42 U.S.C. § 7521(a)(1) (2000)).

[72] *See* Memorandum from Jonathan Z. Cannon, General Counsel, EPA, to Carol M. Browner, Administrator, EPA (Apr. 10, 1998), *available at* http://www.virginialawreview.org/inbrief/2007/05/21/cannon-memorandum.pdf.

[73] *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 59,925–29 (Sept. 8, 2003).

[74] *See id.* at 59,926–27.

[75] *See id.* at 52,931.

explanation for failing to regulate.[76] A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit splintered over the petitioners' substantive claims, as well as over the threshold question of whether Massachusetts or any other party had standing to file suit.[77] Judge Tatel would have found that Massachusetts had standing to sue because of the threat of sea-level rise posed to the Commonwealth's coastline.[78] Judge Sentelle, on the other hand, argued that global climate change, as a global phenomenon, did not produce the sort of particularized injury standing requires.[79] Judge Randolph assumed standing, without resolving the question, and held for the EPA on other grounds, producing a 2-1 split in favor of the Agency.[80] Given the fractured ruling of the D.C. Circuit, and the subsequent opinions dissenting from the Circuit's denial of rehearing en banc,[81] Supreme Court review was inevitable.

It was always clear standing would figure prominently in the Court's decision. Standing questions occupied a significant portion of oral argument. Yet few expected the Court to cavalierly loosen existing standing requirements, let alone announce a new rule for state standing in lawsuits brought against the federal government—and yet that is what the Court did. Faced with a claim that did not easily satisfy the traditional requirements of standing, a five-Justice majority proceeded to put its thumb on the scales so the case could proceed.

An initial difficulty for petitioners' standing claim was the undifferentiated nature of greenhouse warming. Global climate change, by definition, affects the *global* climate. Emissions anywhere on the globe affect the overall concentration of greenhouse gases in the atmosphere for the earth as a whole. The resulting greenhouse effect is likewise a global phenomenon, even if it could produce different effects in different regions. As a consequence, injuries predicated on global warming would seem to constitute the archetypal "generalized grievance" common to all members of the public and thus be unfit for judicial resolution. In this regard, claims of injury from global warming are much like the claims of injury asserted by federal taxpayers in

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[76] *See* Final Brief for the Petitioners in Consolidated Cases at 14, 54–56, Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) (Nos. 03-1361 to 03-1368), 2005 WL 257460.

[77] Massachusetts v. EPA, 415 F.3d 50, 54–56 (D.C. Cir. 2005), *rev'd*, 127 S. Ct. 1438 (2007).

[78] *Id.* at 65 (Tatel, J., dissenting) (citing Tozzi v. U.S. Dep't of Health & Human Servs., 271 F.3d 301, 310 (D.C. Cir. 2001)).

[79] *Id.* at 60 (Sentelle, J., dissenting in part and concurring in the judgment).

[80] *Id.* at 55–56, 58 (majority opinion).

[81] Massachusetts v. EPA, 433 F.3d 66, 67 (D.C. Cir. 2005) (per curiam) (denying Petition for Rehearing En Banc).

taxpayer suits. The common and undifferentiated nature of the injury precludes justiciability. The question is not whether climate change is real, or whether human activities have contributed and will contribute to a warming of the atmosphere, but rather whether global changes that affect all citizens of the United States—indeed all citizens of the world—are sufficiently concrete and particularized to satisfy Article III's requirements.

Insofar as petitioners alleged current harm from changes in the global climate, they alleged a grievance they "suffer[] in some indefinite way in common with people generally."[82] Indeed, one could argue that the harms from anthropogenic climate change are even more dispersed and generalized than the injuries allegedly suffered by individual taxpayers when funds are spent unconstitutionally. Current changes in the global climate are felt by all U.S. citizens—indeed by all citizens of the world. Yet as the Court noted in another context, "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury *to the plaintiff*."[83] That climate change is an urgent concern matters not at all in the standing analysis, for the question is one of whether federal *courts* should intervene, not whether a given question is worthy of federal action.

Massachusetts's injury—or at least the only injury considered by the majority—was its claim of present and future sea-level rise exacerbated by human contributions to the greenhouse effect.[84] While some portion of sea-level rise is due to natural phenomena, the petitioners submitted affidavits detailing estimates and projections of future increases in sea level over the next several decades that would be due, in part, to human emissions of greenhouse gases. Insofar as petitioners' standing claim was dependent on such future projections, such as potential losses of coast "by 2100,"[85] the injuries alleged were too remote and distant in time to satisfy the traditional requirement that an alleged injury be "actual or imminent"; a *future* injury would not do. In

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[82] Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

[83] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181 (2000) (emphasis added).

[84] It is worth noting that the majority opinion misquotes the relevant affidavits so as to overstate the contribution of global warming to sea-level rise. The majority asserts that "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming." *Massachusetts*, 127 S. Ct. at 1456. Yet the affidavit cited for this proposition is more circumspect, merely stating that warming-induced melting of glaciers and thermal expansion of the oceans "were the major contributions" to the estimated sea-level rise of 10 to 20 centimeters over the past century. *Massachusetts*, 127 S. Ct. 1438, J.A. at 225 (2007) (No. 05-1120) (Declaration of Michael MacCracken at ¶ 5(c)) 2006 WL 2569818.

[85] *Massachusetts*, 127 S. Ct. at 1456 n.20 (citing Declaration of Christian Jacqz) (discussing "possible" effects of sea-level rise over the next century).

this regard, the *Massachusetts* petitioners faced a dilemma: It might be possible to argue that their injuries were concrete and particularized *or* actual or imminent, but not both at the same time.

Justice Stevens's opinion for the majority took two steps to avoid these difficulties and ease the path to standing, altering or inventing precedent in the process. First, he declared "that States are not normal litigants for the purposes of invoking federal jurisdiction."[86] Rather, Stevens announced, states are subject to "special solicitude" when seeking to invoke the jurisdiction of federal courts.[87] Such a special standard had not been identified before; it was a totally new rule. Where did it come from? A century-old case called *Georgia v. Tennessee Copper Co*.[88]

In *Tennessee Copper,* the State of Georgia brought suit in federal court against a polluting factory across the border in Tennessee under the federal common-law of nuisance.[89] The case had nothing to do with standing. Rather it was an interstate-nuisance suit of the sort that would be preempted by the Clean Air Act were it brought today.[90] Specifically, the case involved Georgia's effort to obtain an injunction against upwind polluters across the Tennessee state border.[91] Justice Holmes held for the Court that Georgia could obtain equitable relief—unavailable to private parties—because of the state's "*quasi*-sovereign" interest in its territory.[92] Yet, it is one thing to hold that one state cannot foul the air of its neighbor and that the neighboring state may seek equitable relief on behalf of its citizenry in federal court. It is quite another to maintain that a state's ability to vindicate such a claim on behalf of its citizens gives rise to a "special solicitude" when a state sues in federal court to invoke the regulatory apparatus of administrative agencies.

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[86] *Id.* at 1454.

[87] *Id.* at 1455.

[88] 206 U.S. 230 (1907).

[89] *Id.* at 236–37.

[90] *See* Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 768–69 n.476 (2004) (citing Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law To Affect the Location of Pollution*, 27 ENVTL. L. 403, 474 (1997)).

> Although the Supreme Court has not directly addressed the question of whether the federal Clean Air Act preempts federal common law in disputes over transboundary air pollution, it is widely assumed to do so, particularly in light of the Clean Air Act Amendments of 1990, which created a comprehensive federal permit scheme similar to that established by the Clean Water Act.

Id.

[91] *Tennessee Copper*, 206 U.S. at 236.

[92] *Id.* at 237.

Interestingly enough, *Tennessee Copper* was nowhere to be found in Massachusetts's briefs. Neither, for that matter, was it cited by any of the parties or amici in their briefs, nor was it considered by any of the opinions below. State amici Arizona et al., argued that states had unique interests worthy of consideration in the standing inquiry, but still did not mention *Tennessee Copper*.[93] This was not surprising for, as noted above, *Tennessee Copper* had nothing to do with the law of standing. So why did the Court rely on *Tennessee Copper*? As best as one can tell, the idea of relying upon *Tennessee Copper* came from Justice Kennedy, the swing vote in *Massachusetts*, who referenced the *Tennessee Copper* opinion as Massachusetts's "best case" supporting standing during oral argument.[94]

Even with *Tennessee Copper* supporting injury, Massachusetts faced a significant standing hurdle—a hurdle the majority opinion leaped without much care for the meaning of prior caselaw. The *Massachusetts* Court was not simply "solicitous" of states. It weakened the traditional requirements for Article III standing as well. As noted above, under *Lujan v. Defenders of Wildlife*, standing requires that the plaintiff have suffered an "injury in fact" that is "actual or imminent" and "concrete and particularized."[95] The injury must be "fairly trace[able]" to the conduct complained of, and it must be likely that "the injury will be 'redressed by a favorable decision.'"[96] The Court purported to adhere to this "most demanding" standard in evaluating Massachusetts's claims. In actuality the *Massachusetts* majority interpreted *Lujan's* requirements in a most forgiving way, particularly with regard to causation and redressability.

To evade the traditional standing requirements, the majority opinion relied upon language from *Lujan* noting that the "normal standards for redressability and immediacy" are relaxed when a statute vests a litigant with a "procedural right . . . ."[97] In Justice Kennedy's words, "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'"[98] This is the rationale for recognizing environmental litigants' standing to enforce other laws that impose only procedural

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[93] *See* Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners, *Massachusetts*, 127 S. Ct. 1438 (2007) (No. 05-1120), 2006 WL 2563380.

[94] Transcript of Oral Argument at 15, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120), 2006 WL 3431932.

[96] *See supra* Part I.

[96] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41–43 (1976)).

[97] *Id.* at 572 n.7.

[98] *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

obligations on regulatory agencies, such as the National Environmental Policy Act of 1969,[99] ("NEPA"), which requires government agencies to conduct environmental analyses before undertaking actions that could have adverse environmental effects.[100] Such provisions are common in environmental law, NEPA being the paradigmatic example. Section 307(b) of the Clean Air Act is not such a provision, however. Rather, Section 307(b) is a simple jurisdictional provision; it does not create a new cause of action.[101] Nor did it meet the requirement, restated by the majority, that "'Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.'"[102] The Court cited this provision and the language in *Lujan* justifying a relaxed consideration of the redressability requirement nonetheless.

If the majority stretched the standing inquiry at the margins to accommodate the petitioners' claim of injury, it rent *Lujan*'s fabric in considering causation and redressability. Under *Massachusetts*, *any* contribution of *any* size to a cognizable injury is sufficient for causation, and *any* step, no matter how small, is sufficient to provide the necessary redress. While citing the requirement that a favorable decision must "'relieve a *discrete injury*'" to the plaintiff,[103] the majority held that any government action that, all else equal, reduces (or at least retards the growth of) global emissions of greenhouse gases by *any* amount, however small, will suffice. After all, Justice Stevens explained, "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[104] Yet, given the rate of growth in greenhouse-gas emissions worldwide, irrespective of what happens in the United States, this is anything but a self-evident proposition. The most Massachusetts could hope for is a reduction of projected sea-level rise of a few centimeters over the next century. It is hard to argue that such insignificant relief would satisfy a "rigid" application of the redressability requirement outlined in prior cases. If *Hein* involved the narrow application of precedent, there was nothing particularly precedented about the holdings in *Massachusetts*.

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[99] 42 U.S.C. §§ 4331–4347 (2000).

[100] *See id.* § 4332 (2000 & Supp. IV).

[101] *See* Clean Air Act of 1970 § 307(b), 42 U.S.C. § 7607(b)(1) (2000).

[102] *Massachusetts*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

[103] *Id.* at 1458 (emphasis added) (quoting Larson v. Valente, 456 U.S. 228, 244 n.15 (1982)).

[104] *Id.*

IV. SEPARATION OF POWERS IN *HEIN* AND *MASSACHUSETTS*

Both *Hein* and *Massachusetts* involved types of generalized grievances. As such, both involved the sort of claim for which separation of powers concerns are greatest. Of the two cases, *Massachusetts* challenged settled law and modified current doctrine. *Hein*, on the other hand, upheld and stood fast by an older precedent, albeit a precedent that was poorly reasoned and widely criticized.

The two cases' respective treatment of precedent is not the only respect in which the two cases differ. Below the surface, the two decisions embody contrasting conceptions of the role of standing in the separation of powers. It may not be fair to ascribe this doctrinal tension to the Court as a whole, however. Only one member of the Court, Justice Kennedy, was in the majority in both cases. Yet insofar as Justice Kennedy is the controlling vote in cases such as these in which the Court is closely divided, and insofar as each case's holding was responsive to Justice Kennedy's own idiosyncratic views about standing and justiciability, this doctrinal tension warrants investigation.

In preserving *Flast*, *Hein* embraced the importance of allowing taxpayer standing to challenge legislative exercises of the taxing and spending power that violate the Establishment Clause. The Executive Branch, on the other hand, should, in the words of Justice Kennedy, "be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns."[105] According to Justice Kennedy, "courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties."[106] Even if there were no individual with standing to challenge the conduct at issue, executive officials "are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations."[107] Yet the existence of such an obligation does not ensure compliance with constitutional limitations, nor does it obviate any need for judicial review. Preserving executive latitude in policymaking and administration may increase the likelihood of Establishment Clause violations, even if only because of an occasional, poorly informed understanding of relevant constitutional limits. It will also reduce the proportion of such violations that are ever redressed. This is the

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[105] *Hein*, 127 S. Ct. at 2572 (Kennedy, J., concurring).

[106] *Id.* at 2573.

[107] *Id.*

unavoidable consequence of ensuring the Executive is free to "discover new ideas" and "find creative responses" to new issues. Limiting judicial review of executive actions effectively prevents the full enforcement of relevant constitutional limitations.

This permissive approach to potential Executive-Branch misconduct is quite different from that which we observe in the environmental context. Most major federal environmental laws contain expansive citizen-suit provisions that authorize private suits against implementing agencies and regulated firms. The explicit purpose of these provisions is to allow for "private attorneys general" to invoke the jurisdiction of the courts to oversee executive fealty to the law. Such private attorneys general are delegated authority to assume the mantle of the Lorax and "speak for the trees."[108] Trees cannot have standing themselves, but people can have standing to sue in their stead.

Environmental citizen-suit provisions typically provide standing to the limits of Article III. The rationale here is that such broad standing is necessary because the Executive cannot be trusted to fully enforce existing environmental laws. Government agencies are constrained by limited resources, dispersed information, and political pressures. Different administrations will also have different priorities for regulatory implementation and enforcement. Even assuming that every administration would like to fully enforce those environmental rules on the books—a highly questionable assumption—this is not possible.[109] As in the Establishment Clause context, citizen suits are "a mechanism for controlling unlawfully inadequate enforcement of the law."[110] In the words of the late Judge Skelly Wright, citizen suits help ensure "that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[111]

Insofar as the Court has adopted a broad conception of judicially cognizable injuries in environmental cases, it has endorsed the idea that judicial oversight of executive activity is necessary and proper. Insofar as *Massachusetts* expands the ability of states, and perhaps individuals, to

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[108] *See* DR. SEUSS, THE LORAX 23 (1971) ("I am the Lorax. I speak for the trees . . . for the trees have no tongues.").

[109] *See* Richard Lazarus, *Panel II: Public Versus Private Regulation*, 21 ECOLOGY L.Q. 431, 472 (1994) ("It is not feasible to assume that the government is going to engage in the inspections and the enforcement necessary to ensure compliance with the standards . . . .").

[110] Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

[111] *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971); *cf.* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) (arguing that one purpose of standing limitations is to allow some actions to be "lost or misdirected" within the federal bureaucracy).

invoke federal jurisdiction for fairly broad, undifferentiated harms, it provides for further judicial oversight of executive compliance with relevant legal requirements. *Massachusetts* explicitly suggested that this is necessary because states surrendered portions of their sovereignty in adopting the Federal Constitution, justifying "special solicitude" to state requests for judicial intervention.[112]

The argument for broad standing in environmental cases runs counter to the rationale for limiting taxpayer standing to challenges of legislative actions. Unlike in the Establishment Clause context, environmental citizen-suits seek to enforce statutory mandates, rather than constitutional limitations. An underlying premise is that Congress is unable (or unwilling) to enforce its own enactments. Yet why is this so? The legislative branch maintains many oversight and enforcement powers. If it wants environmental laws to be followed to the letter, it can use statutory mandates, the appropriations process, and oversight hearings to ensure adequate enforcement. In this context, the argument for second-guessing executive decision-making when there is a broad, generalized grievance—a "political" matter as discussed in *Marbury*[113]—seems relatively weak. Where an environmental concern affects the nation as a whole, however, why should we assume that ideologically or otherwise motivated private litigants are in a better position to ensure the proper level of environmental enforcement than the people's representatives in Congress and the Executive? If the legislature fails to exercise effective oversight of executive implementation of a federal statute, perhaps this indicates that legislative majorities no longer support pre-existing statutes.[114] After all, Congress routinely fails to provide adequate funding for complete enforcement of regulatory programs. Less-than-complete enforcement of environmental statutes may be the result of majority preferences. If not, there is at least a potential opportunity for political redress.

Contrast this with the dynamic observed in the Establishment Clause context. The reason for the Establishment Clause is to prevent a religious majority from enshrining its religious preferences at the expense of a religious minority. In taxpayer suits, the purpose of standing is to prevent the allocation of tax dollars to support

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[112] *Massachusetts*, 127 S. Ct. at 1455.

[113] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

[114] Such underenforcement may also reflect the political obstacles to effective mobilization of diffuse constituencies that support greater environmental protection. *See* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 45 (2001) (summarizing arguments). The difficulty with these and other theoretical arguments suggesting a need for broad citizen-suit standing is that they do not seem to conform with the available empirical evidence and may not actually enhance environmental protection. *See id.* at 46–51.

majoritarian religious preferences at the expense of those with minority preferences. Whatever degree of "separation" one believes the Establishment Clause requires, this is the nature of the harm that judicial review is designed to avoid. If a religious majority were to establish religion at the expense of religious minorities through legislative action, there is little prospect of a sufficient "political" remedy for a disadvantaged religious (or even secular) minority. In such cases, broad standing is necessary for judicial review to serve a counter-majoritarian function and protect minority interests

This rationale would seem to apply equally to executive action. If the Executive Branch were to establish a minority religious preference, we have relatively high confidence that political remedies will be sufficient to curtail the violation. A religious majority has ample means to protect its interests through the political process, so the legislature is unlikely to sit idly by where the Executive acts unconstitutionally in this regard. Yet where the Executive takes action to establish a majority religious preference, we have comparatively little confidence in the likelihood of effective legislative or political oversight.[115] A religious majority is much less likely to seek to correct such unconstitutional actions; it may even support them. If anything, given the unitary nature of executive authority, and inertia within the legislative process, the risk of executive transgressions would seem to be greater than the risk of legislative violations.

The point here is not that the Court should have granted standing in *Hein*. Rather, the point is that *if* the justification for allowing taxpayer standing in Establishment Clause cases is to check the tendency of the political process to entrench majoritarian religious preferences, then the argument for broad citizen standing would seem to be *greater* in the Establishment Clause context than in the environmental context, for it is only in the former that the judiciary is called upon to play a counter-majoritarian role. If legislative oversight and political checks are ever sufficient to obviate the need for judicial review of executive action, it will be where the legislature is protecting its own interests, or those of a political majority. Such checks will be *least* sufficient where executive violations of constitutional limitations come at the expense of political minorities. Thus, the Court—or at least the controlling vote of Justice Kennedy—has it backwards. In *Hein* and *Massachusetts*, the Court is more permissive where the argument for judicial oversight is stronger, and exercises greater scrutiny where the case for judicial oversight is weaker.

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[115] *Cf. Hein*, 127 S. Ct. at 2571 ("In the unlikely event" of executive actions violating the Establishment Clause "Congress could quickly step in.").

The argument sketched here only concerns the relative strength of the arguments for altering traditional standing rules in the context of generalized grievances. If both cases involve questions of generalized grievances one could still conclude that neither (or both) should be justiciable. Both cases involved questions of extreme importance that relate to fundamental values—our relationship with God and our obligations to the earth and future generations. Yet such value-laden questions are typically matters left to the political process, rather than the judiciary, save in rare circumstances where judicial review is necessary to play a counter-majoritarian role.

CONCLUSION

Hein and *Massachusetts* did not capture as much public or media attention as other cases from the October 2006 term. Citizen standing may not be as "sexy" a topic as abortion, race, or free speech. Yet standing cases are particularly important within our legal system, and have implications for the separation of powers. Whether Article III jurisdiction extends to certain classes of cases directly affects the extent of judicial oversight of the political branches.

Separation of powers is a fundamental aspect of American constitutional government. As the Court observed over thirty years ago, "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."[116] The importance of separation-of-powers principles "transcends the convenience of the moment."[117] Thus it should raise concerns that recent cases reflect a confused understanding or arbitrary application of separation-of-powers principles. In my view, the urgency of environmental concerns or the importance of the Establishment Clause do not justify transgressing the traditional bounds of Article III. All I have sought to show here, however, is that the importance of such matters cannot justify the particular contours of standing doctrine embedded in the Court's recent standing holdings.

It may be unsettling to consider that standing doctrine presumes that some cases can never be heard in federal court. Some constitutional questions must be resolved through the political process. Standing is but one way of enforcing such limits on judicial power, but it is a limitation that courts may be reluctant to impose. The jurisprudence of what we might call the "Kennedy Court" exhibits a reluctance to acknowledge the

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[116] Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam).

[117] Clinton v. City of New York, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring) (citing Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276–77 (1991)).

existence of issues lying beyond the scope of judicial power. *Massachusetts* involved the omnipresent concern of global warming, and a court majority could not bear to stay away. Even where limitations on judicial authority are maintained, as in *Hein*, the Court clings to its reluctance to shut the courthouse door on such claims.

In the long run, excessive judicial involvement could threaten the vitality of separation of powers and can undermine the vitality of self-government. This is particularly so in areas such as the environment and religious establishment, that touch upon fundamental, deeply held values. When we think about the purposes of standing, we may wish to consider the words of Justice Sutherland from his opinion in *Frothingham v. Mellon*:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. . . . We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power 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 the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented[,] the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.[118]

What Justice Sutherland contemplates is a more limited role for federal courts in pressing social and political conflicts. It is a far cry from

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[118] 262 U.S. 447, 488–89 (1923).

the "judicial supremacy" that marked the Rehnquist Court,[119] but it may well be a more proper role for the Court in our democratic republic.

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[119] *See* Walter Dellinger, *In Memoriam: William H. Rehnquist, the Man Who Devised the Natural Law of Federalism*, SLATE, Sept. 4, 2005, http://www.slate.com/id/2125685/ ("Chief Justice Rehnquist's most significant jurisprudential contribution will not ultimately be states' rights, however, but the steps his court took firmly to entrench the supremacy of the judicial branch over the president, the Congress, and the states."); Jeffrey Rosen, *Rehnquist the Great?*, THE ATLANTIC, April 2005, at 79, 87 ("[U]nder [Rehnquist's] leadership the Court indulged in an overconfident rhetoric of judicial supremacy and struck down thirty federal laws in one seven-year period—a higher rate than in any other Court in history.").