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Standing Doctrine, Judicial Technique, and the Gradual Shift from Rights-Based Constitutionalism to Executive-Centered Constitutionalism

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ARTICLE

STANDING DOCTRINE, JUDICIAL TECHNIQUE, AND THE GRADUAL SHIFT FROM RIGHTS-BASED CONSTITUTIONALISM TO EXECUTIVE-CENTERED CONSTITUTIONALISM

Laura A. Cisneros[†]

ABSTRACT

Although scholars have long criticized the standing doctrine for its malleability, its incoherence, and its inconsistent application, few have considered whether this chaos is related to the Court's insistence that standing be used as a tool to maintain separation of powers.[1] *Most articles on*

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1 Scholarship focusing specifically on the Court's separation of powers rationale is comparatively sparse. The first significant article on this topic was published in 1983 in the

standing, at least those written in the last thirty years, do not question whether standing should be freighted with separation of powers principles, but whether the standing doctrine, as applied in a given case, is consistent with those principles.[2] *These treatments, which largely accept that the constitutional aspect of standing derives from separation of powers, are unsatisfying because they do not effectively consider the more fundamental query—i.e., why has a political concept (separation of powers) been attached to a legal framework (standing)? Nothing in the general conception of separation of powers would seem to require the intricate standing rules the Court has developed.*

This Article addresses why the Supreme Court under Chief Justice Warren Burger began to deploy separation of powers language when evaluating whether a particular plaintiff had standing to sue the federal government, and why this trend continued through William Rehnquist's tenure as Chief Justice and affects the Roberts Court today. My analysis indicates that the Burger and Rehnquist Courts radically changed the standing inquiry by freighting it with political concepts, and in so doing were able to weaken the rights-based constitutionalism that had marked the Warren Court era. This, in turn, made more room for executive branch policy-making and action. I conclude that the standing

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Suffolk University Law Review, by then-Judge Antonin Scalia: Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (concluding that separation of powers principles are vital to the standing inquiry because they limit the types of cases courts may hear in general, and would prevent the court from hearing widespread injury cases and cases where the judiciary would clash with the political branches in particular). *But see* Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 641 (1985) [hereinafter Nichol, *Abusing Standing*] (arguing that the *Allen* Court's decision to infuse the standing doctrine with yet another value-laden criterion, i.e., separation of powers principles, stretched the doctrine beyond its limits); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 397–99 (1996) (arguing that the Court's misguided conception of separation of powers has created an incoherent standing doctrine, which could be corrected by understanding and applying the Federalist ideas of justiciability and separated government, namely accepting that the dual nature of separation of powers included both the efficiency theory of government and the checking and balancing theory).

[2] *See, e.g.*, Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008) (defining three separation of powers functions of the standing doctrine and discussing the doctrine's failings in each); Dana S. Treister, Note, *Standing to Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689, 691 (1994) (suggesting that comingling of powers within the three branches of government is necessary to ensure proper government function).

decisions of the Burger and Rehnquist Courts, by merging the legal discourse of standing to sue with the political discourse of separation of powers, laid the foundation for the Roberts Court to initiate a move away from a rights-based jurisprudence to a jurisprudence that provides constitutional space for a unitary executive.

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INTRODUCTION

The Roberts Court is the heir to more than three decades of tortured constitutional discourse on the nature and function of the standing doctrine. It has also inherited an intense debate concerning the viability and scope of the unitary executive theory. The purpose of this Article is to determine whether there is a connection between the two and, assuming a discernable one exists, to assess how that connection developed and what it means for the constitutional balance of power among the three branches of government.

Treating standing to sue simply as a legal doctrine, justified by the authority of precedent, does little to advance our understanding of how standing's confused jurisprudence fits within the overall constitutional order.[3] As I will demonstrate, the standing doctrine has evolved over the last thirty-plus years to include distinct, though perhaps not obvious, political components that reflect the

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[3] Here I rely on an affiliation with the definition used by Mark Tushnet, who defines "constitutional order" or "regime" as "a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions." MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1 (2003).

conservative political thought of the Burger, Rehnquist, and Roberts Courts. Still, focusing solely on the ideology of individual Justices to explain what drives the Court's decision-making in standing cases leaves the analysis incomplete. The debate between judicial activism and judicial restraint has gone on so long that it has hardened into a kind of rhetorical stasis with little heuristic value. Likewise, it has become doctrinaire to depict the Warren Court as excessively liberal and activist and the Burger and Rehnquist Courts as conservative and restrained. Again, however, these characterizations, while not necessarily false, simply do not go far enough. They do not describe these changes in a dynamic legal or political context; they do not articulate how or why this important shift occurred.

This thesis moves beyond conventional partisan line-drawing (though not politics per se) to explain the role standing has played in redefining the Supreme Court's constitutional jurisprudence when faced with suits challenging the executive branch. I argue that the Burger Court, as well as the Rehnquist and Roberts Courts that followed, inherited from the Warren Court a set of institutional arrangements that could not be dismantled overtly (if at all), and, therefore, each was forced to chip away at Chief Justice Earl Warren's rights-based constitutionalism by more subtle means—namely, by altering the procedural rules by which rights-based cases against the federal government could be brought. Specifically, I assert that the Burger, Rehnquist, and Roberts Courts have inserted separation of powers concerns, which form a distinctly political discourse, into the standing doctrine, which is a legal discourse.[4] By conflating these two autonomous, largely unrelated analyses, the Court has given itself a means to move away from the rights-based constitutionalism of the Warren era to a nascent executive-centered constitutionalism that creates the space necessary to legitimize (and protect) the unitary executive.[5]

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4 Discourses are about what can be said and thought, but also about who can speak, when, and with what authority. The issue in discourse analysis is why, at a given time, out of all the possible things that could be said, only certain things were said. French philosopher Michel Foucault framed the inquiry this way: "[H]ow is it that one particular statement appeared rather than another?" MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 27 (A.M. Sheridan Smith trans., Tavistock 1974). Discourses embody meaning and relationships, social, political, and legal. They constitute both subjectivity and power relations. *Id.* at 49 (explaining that discourses are "practices that systematically form the objects of which they speak"). Thus, the possibilities for meaning and for definition are pre-empted through the social and institutional position held by those who use them. What this Article suggests is that the Burger Court launched an attack on the Warren Court's egalitarian jurisprudence by using this idea of statement inclusion and exclusion in the Court's discussions about procedure.

5 For a discussion of the institutional and theoretical literature on executive constitutionalism, see Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 683 (2005) (defining executive constitutionalism as

This Article traces the nearly four-decade history of the modern standing doctrine to reveal its role in moving American constitutional jurisprudence away from a distinctively court-centered "rights" orientation to an orientation that is executive-branch-centered. For this reason, the Article's narrative begins with the Warren Court and concludes with the Roberts Court.

Part I briefly describes the Warren Court's largely successful effort to articulate a court-centered "rights-based" constitutionalism and embed that constitutionalism firmly in American political and legal discourse, fundamentally altering the institutional arrangements it (the Warren Court) would leave to its successors. Part II explains how and why the Burger Court modified the standing doctrine to reformulate the constitutional norms handed down to it by the Warren Court, all the while touting judicial restraint and appearing to leave much of the Warren era jurisprudence unmolested. Part III carries the analysis into the Rehnquist Court, where the standing doctrine, now infused with separation of powers principles, became a tool for creating constitutional space for the President—and the executive branch as a whole—to operate more freely without congressional or judicial oversight. In this section, I examine the text of a number of key Rehnquist Court decisions to demonstrate how political ideas make their way into federal judicial consciousness and then into the Court's actual written opinions, though in the latter case, they are often disguised in legal garb. Finally, Part IV examines the Roberts Court's struggle with the modern standing doctrine in light of the tendency of President George W. Bush's administration to adopt an aggressive form of "unitary executive" decision-making, placing the Court squarely within the ongoing debate between the Presidentialist and Pluralist interpretations of separation of powers.[6] This debate suggests that the Roberts Court is at a cross-roads with respect to which camp will receive the imprimatur of the Supreme Court. I

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non-court centered constitutional interpretation whereby the executive plays "a significant generative role in elaborating a distinctive executive vision of constitutional obligation that could supplement," or "supplant, the Court's").

6 Proponents of the Presidentialist view argue that the Constitution vests a fixed and expansive category of executive authority in the President that is largely immune from congressional oversight or judicial review. *See, e.g.*, Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 CORNELL J.L. & PUB. POL'Y 503, 534 (2003). In contrast, the Pluralist view holds that checks and balances are an essential element of separation of powers. Its proponents dispute the notion of fixed executive power and in fact see separation of powers interpretations as necessarily calling for persistent monitoring by each branch of the other. *See, e.g.*, Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 195 (1995).

argue that the Roberts Court has already begun to show favor, and is using the standing doctrine to make its preference felt, as illustrated by its 2007 decision in *Hein v. Freedom from Religion Foundation, Inc.*[7]

I conclude that the standing decision in *Hein*, at least on the domestic front, poses a significant threat to the checks and balances system of separated government because it gives primacy to the executive's constitutional interpretation of the Establishment Clause, thus protecting the executive branch from judicial review. Although the Bush administration has failed in its aggressive attempts[8] to expand the scope of the unitary executive in the foreign policy context, *Hein* represents a major victory for the Presidentialists in the West Wing and the Department of Justice. *Hein* is more than the innocuous "procedural" case it appears to be; it marks an early and important step toward executive-centered constitutionalism.

I. THE WARREN COURT ADVANCED AND ENTRENCHED RIGHTS-BASED CONSTITUTIONALISM

To a significant degree, the Warren Court successfully articulated a rights-based constitutionalism that it embedded firmly in American political and legal discourse. In so doing, it fundamentally altered the institutional arrangement it would leave to its successors. As Lucas Powe, law professor and leading historian of the Supreme Court, points out in *The Warren Court and American Politics*, "[t]he Warren Court created the image of the Supreme Court as a revolutionary body, a powerful force for social change."[9] As a result, later Courts would be evaluated in terms of their acceptance or rejection of the idea that the Supreme Court, as an institution, is an instrument of social change—the very idea that defined the Warren Court.

This aspect of the Warren Court legacy presented opportunities and challenges to subsequent Courts that opposed the pro-New Deal/Great Society ideology and the judicial activism that

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7 127 S.Ct. 2553 (2007) (holding that federal taxpayers did not have standing under Article III of the Constitution to challenge the Executive Office's Faith-Based Community Initiatives Program as violating the Establishment Clause of the First Amendment because the exception to the bar on federal taxpayer standing only applied to specific Acts or appropriations of Congress).

8 *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 482–83 (2004) (holding that the habeas corpus statute, 28 U.S.C. § 2241, entitled the detainees to challenge the validity of their detention at the Guantanamo Bay Naval Base in the U.S. federal court system); Hamdan v. Rumsfeld, 548 U.S. 557, 593–94 (2006) (holding that military commissions set up by the Bush administration to try detainees at Guantanamo Bay lacked authority because they lacked congressional authorization and did not comply with the Uniform Code of Military Justice and the Geneva Convention).

9 LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 1 (2000).

characterized the Warren Court. It is important to understand, however, that the Warren Court's rights-based constitutionalism was not limited to substantive law, but was coupled with procedural safeguards that would give litigants access to the new rights and make them meaningful. Indeed, there would be no benefit to having the constitutional protections of individual liberty and minority rights if litigants could not invoke the jurisdiction of the federal courts to challenge actions of the federal government. The standing doctrine the Warren Court inherited actually facilitated the emergent transformation of America into a "democracy of rights." Ultimately, it allowed the Warren Court to redefine the judiciary in American legal consciousness as the protector of individual liberties and egalitarian principles.

A. The Supreme Court Develops a Rights-Based Jurisprudence

1. Rejecting Judicial Restraint to Facilitate Protection of Individual Rights

During the 1960s, the Warren Court rejected Justice Felix Frankfurter's concept of the politically restrained judiciary and reframed the Court's role as one of advancing and protecting "a democracy of rights."[10] A leading exponent of judicial restraint, Justice Frankfurter believed that "the core principle of American constitutional democracy was majoritarianism and the chief danger was judicial tyranny."[11] In Justice Frankfurter's view, the judicial branch, especially the Supreme Court, was not to legislate or make policy, regardless of whether a particular case stimulated the political sympathies of the individual Justices.[12] Nevertheless, Chief Justice

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[10] Leading American constitutional theorist, Stephen M. Griffin notes, "The United States has not always been a democracy of rights." Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 282 (2002). Griffin attributes the transformation of America into a democracy of rights to the Civil Rights Movement. *Id.* He writes that the concept of "democracy of rights" describes a political system where all "government actors take it for granted that it is desirable to create, enforce, and promote individual constitutional and legal rights. Hence, the political branches of government (not just the courts) are seeking constantly to maintain and extend the system of rights they have created through democratic means." *Id.* As I use the phrase here, I mean to refer both to the political system created when the judicial and political branches partner to create and protect individual rights, and the Court's actual rights-based jurisprudence.

[11] THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 41 (2004).

[12] For discussions of Justice Felix Frankfurter as judicial restraint's strongest advocate and his constant promotion of the importance of judicial deference to legislative judgments, see generally PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 5 (1971); MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES

Warren and those Justices who made up the majority of the Court believed that the Court had the capacity to act as the engine of reform where the political processes failed to protect individuals and groups that had historically been underserved (if not outright persecuted) by the local, state, and federal governments.[13] Whereas Justice Frankfurter admonished his fellow Justices to avoid reaching constitutional questions whenever possible, even at the expense of logic, the Warren Court did not evade constitutional issues in the cases before it. For the Warren Court, the legal opinions it published were the most effective means of imprinting the new "democracy of rights" on the American legal and political consciousness.

2. Court as "Active" Protector of Individual Rights Against the Government

The source of the Warren Court's theory of judicial activism in the service of individual rights is the subject of considerable debate. The conventional view, at least according to historian John Morton Blum,[14] holds that the Warren Court's rights jurisprudence was derived from Justice Harlan Stone's famous Footnote Four in *United States v. Carolene Products Co.*[15] There, Justice Stone articulates when heightened judicial scrutiny is required to safeguard the public from the government.[16] According to Footnote Four, there are three situations where such judicial activity is warranted: (1) when enforcing specific constitutional limitations on government power, specifically those limitations contained in the Bill of Rights; (2) when protecting the channels of democratic government, i.e., safeguarding fairness in the electoral process; and (3) when protecting "discrete and insular" minorities from political or societal discrimination.[17] Justice Stone recognized that a new constitutional foundation was required to justify the Court's heightened protection of individual and minority rights against encroachment from an increasingly pervasive modern state; but it was the Warren Court that established this

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32 (1991).

[13] *See, e.g.*, MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1998) (outlining the "liberal" changes the Warren Court created in America's civil liberties jurisprudence); THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993) [hereinafter WARREN COURT PERSPECTIVE] (examining the Warren Court as an actor in 1960s politics).

[14] JOHN MORTON BLUM, YEARS OF DISCORD: AMERICAN POLITICS AND SOCIETY, 1961–1974, at 188–90 (1991).

[15] 304 U.S. 144 (1938) (upholding a congressional regulation of filled milk).

[16] *Id.* at 153 n.4.

[17] *Id.*

foundation and permanently fixed it within the public's perception of the Supreme Court.[18] For the Warren Court, Footnote Four justified an expanded notion of judicial review allowing the Court to address unequal or discriminatory social conditions and to reform the very structure of public institutions.[19] So convincing was the Warren Court in this effort that, even today, many Americans view this to be the Court's primary role in the governmental system.[20]

3. The Warren Court's Rights-Based Jurisprudence: A Compliment to Presidential and Congressional Efforts to Rein in "Retrograde" States in the South and Northeast

It is important to recognize that the Warren Court's heightened scrutiny of political processes was predominantly aimed at state governments, which had been slow to embrace their responsibilities under the Fourteenth Amendment. As Powe has noted, the federal government, first under President John F. Kennedy, then under President Lyndon B. Johnson, was committed to defending the rights of "those most in need of help."[21] During the Warren era, "those most in need of help" were individuals and minority groups who received inadequate protection (and occasionally unwarranted interference) from selected states. For example, the Court intervened to eradicate offensive southern practices regarding racial inequality, the rights of criminal defendants, and religious freedom, as well as to eliminate the stringent regulations of contraception in the Catholic Northeast.[22] Rather than conflicting with the contemporary political climate, the

[18] *See* Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (defining Footnote Four as "[t]he great and modern charter for ordering the relation between judges and other agencies of government" and discussing the Warren Court's implementation of Footnote Four to usher in structural reform litigation).

[19] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (banning segregation of public schools); *see also* United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (faculty desegregation); Bradley v. Sch. Bd., 382 U.S. 103 (1965) (per curiam) (same).

[20] *See* WARREN COURT PERSPECTIVE, *supra* note 13, at 1 ("The Warren Court's definition of the Supreme Court's role in government remains prominent in contemporary political discussion . . . .").

[21] *See* POWE, *supra* note 9, at 489.

[22] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (holding that law enforcement must inform criminal suspects in custody of their right to consult with an attorney and of their right against self-incrimination prior to interrogation); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (striking down a state law that prohibited the use and distribution of contraceptives); Reynolds v. Sims, 377 U.S. 533 (1964) (formulating the "one-man, one-vote" standard for state legislative redistricting, dramatically altering the relative power of rural regions in many states); Wesberry v. Sanders, 376 U.S. 1 (1964) (applying the "one-man, one-vote" standard to congressional districts); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring law enforcement to give all felons—including the indigent—Sixth Amendment right to legal counsel); Braunfeld v. Brown, 366 U.S. 599, 603 (1961) (declaring that "[t]he freedom to hold religious beliefs and opinions is absolute"); *Brown*, 347 U.S. 483.

rights-protecting landmark decisions of the Warren Court complimented the efforts of the legislative and executive branches, both of which were actively trying to impose a national set of civil rights.[23] Thus, although the Warren Court assumed an activist posture against the states, it did so as part of a coordinated effort with the political branches of the federal government to enforce national values against infringement by local outliers.[24]

This is an important point of contrast with the Burger and Rehnquist Courts that followed. Whereas the Warren Court addressed alleged constitutional transgressions by state and local governments, the Burger and Rehnquist Courts were more often presented with cases that challenged actions of the *federal* government, thus implicating the Constitution's tri-partite power structure. Such cases raise a host of jurisdictional questions, including: When does an individual have the right to sue the President or the administrative agencies he controls? And, assuming that right exists, should the Court enforce it?

This is not to say that the Warren Court never confronted these issues. It did, as we shall see below. However, the Court's desire to build a new rights-based jurisprudence overwhelmed any "provincial" concerns of the executive branch over separation of powers. On the contrary, the Warren Court took aggressive steps to increase public access to the federal court system, especially where plaintiffs had charged government actors—be they of the local, state, or federal variety—with violations of the law. For this reason, the Warren Court did all that it could to keep the standing bar low.[25]

B. Facilitating a Rights-Based Constitutionalism and the Protective Judicial Role Through Footnote Four and Standing to Sue

The two definitive standing decisions of the Warren Court were *Baker v. Carr*[26] and *Flast v. Cohen*.[27] In *Baker*, the Court granted standing to voters to bring an Equal Protection Clause challenge to a

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[23] *See* POWE, *supra* note 9; Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 218 (Vincent Blasi ed., 1983).

[24] Some of the Warren Court's contemporary supporters defended it on precisely these grounds. *See, e.g.*, ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM (1968).

[25] *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 48 (Kermit L. Hall et al. eds., 1992) (juxtaposing the relaxed standing tendencies of the Warren Court with the restrictive tendencies of the Burger Court to illustrate the significance of the Warren Court's contribution to the standing doctrine).

[26] 369 U.S. 186 (1962).

[27] 392 U.S. 83 (1968).

state redistricting statute.[28] In *Flast*, the Court granted standing to federal taxpayers to bring an Establishment Clause challenge to a congressional act that appropriated funds to parochial schools.[29] These decisions illustrate that the standing doctrine did not present an obstacle to the Warren Court's protection of individuals and minority groups against government infringement; the Court simply construed standing to sue as a prudential doctrine meant to ensure that federal courts resolved only those issues presented in a clear, adversarial context. For the Warren Court, the standing inquiry implicated no separation of powers concerns.

1. Baker v. Carr

Baker v. Carr represents a classic Footnote Four case. The Warren Court's interpretation of the standing doctrine in *Baker* allowed the Court to reach Tennessee's re-apportionment policies, which operated to reduce the political power of urban centers where African-Americans made up the majority of the electorate. In *Baker*, a group of voters in Tennessee challenged a state redistricting statute on grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.[30] Despite state law, which required Tennessee to redraw legislative districts every ten years according to the federal census to provide for districts of substantially equal population, Tennessee had not redistricted since the census of 1901.[31] By the time of Baker's lawsuit, the population in his district, which included most of the City of Memphis, had nearly ten times as many residents as some of the rural districts. The state's failure to redistrict meant that the votes of rural citizens were worth more than those of urban citizens. This functionally diluted the black-majority district's votes.

The Court granted the plaintiffs standing, holding that "the gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[32] The voter's injury, the Court stated, was that the statute affected a "gross disproportion of representation to [a] voting population" placing the voters "in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in

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[28] *Baker*, 369 U.S. at 204–08.
[29] *Flast*, 392 U.S. at 85–88.
[30] *Baker*, 369 U.S. at 188.
[31] *Id.* at 190.
[32] *Id.* at 204.

irrationally favored counties."[33] In granting standing, the Court concluded that the injury the voters sought to remedy and protect was sufficiently personal.[34]

The *Baker* decision's jurisdictional analysis indicates that the Court viewed the standing doctrine as a device to ensure that plaintiffs bring only concrete adversarial issues to the Court for adjudication.[35] In the midst of the civil rights era—after the Montgomery Bus Boycott and during the Freedom Rides—the Warren Court's decision to grant standing in *Baker* allowed the Court to dramatically alter the nature of political representation in those regions of the United States still yoked to de facto racial segregation.

2. Flast v. Cohen

Six years after *Baker*, in 1968, *Flast v. Cohen* presented the Court with another opportunity to apply its Footnote Four philosophy. This time, however, the plaintiffs asked the Court to enforce the protections of the First Amendment against the Secretary of Health, Education and Welfare. In *Flast*, federal taxpayers complained that certain expenditures of federal funds under the Elementary and Secondary Education Act of 1965 violated the Establishment Clause of the First Amendment.[36] The taxpayers alleged that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects, and to purchase textbooks and other instructional materials in religious schools.[37] The government brought a standing challenge to the taxpayers' suit and moved for dismissal.[38] The government argued that the plaintiffs lacked standing due to Article III limitations on federal court jurisdiction and separation of powers considerations.[39]

The Court disagreed. Relying on the *Baker* decision's articulation of the standing function, the Court in *Flast* declared, "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[40] More importantly, the Court rejected the government's separation of powers argument, finding that:

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[33] *Id.* at 207–08.

[34] *Id.* at 207 (finding the injury that voters sought to remedy was "an interest of their own").

[35] *Id.* at 199.

[36] *Flast*, 392 U.S. at 85.

[37] *Id.* at 85–86.

[38] *Id.* at 88.

[39] *Id.* at 92.

[40] *Id.* at 99.

> When the emphasis in the standing problem is placed on whether the person invoking a federal court's jurisdiction is a proper party to maintain the action, the weakness of the Government's argument in this case becomes apparent. *The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems* related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated. Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has "a personal stake in the outcome of the controversy" . . . .[41]

The Court held that the taxpayers in *Flast* had standing to bring the Establishment Clause challenge to the congressional exercise of taxing and spending power under the Elementary and Secondary Education Act of 1965.[42] The Court reasoned that the logical nexus between the taxpayers' status as taxpayers and the challenged legislation assured meaningful presentation of the issues to warrant judicial review.[43] For the Warren Court, the standing inquiry, at its core, was a standard jurisdictional examination not freighted with constitutional demands or separation of powers concepts.

Taken together, *Baker* and *Flast* illustrate that the Supreme Court during the Warren era focused its standing analysis on whether the plaintiff in question had properly presented the case in an adversarial context. While acknowledging the constitutional backdrop in both cases, the Court expressly rejected separation of powers as an essential element of the standing inquiry. As these cases show, the Warren Court believed that the standing analysis was simply an aid to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[44] It was a standard jurisdictional examination that did not involve issues of constitutional

[41] *Id.* at 100–01 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)) (emphasis added).
[42] *Id.* at 88, 106.
[43] *Id.* at 102–03.
[44] *Id.* at 95.

structure or power divisions among the branches of government. By limiting the standing inquiry to whether the plaintiff had alleged an injury capable of judicial resolution, the Court was able to grant standing to voters in *Baker* and federal taxpayers in *Flast*, even though political sensitivities were implicated in both cases, and even though the political process might well have remedied the plaintiffs' injuries.

C. The Lasting Imprint of Warren Era "Rights Consciousness"

The civil rights movement in general, and the Warren Court in particular, profoundly transformed American democracy, resulting in producing "a growing inclination of people and organized groups to define politics in terms of rights, a growing willingness of the federal government to enforce individuals' claims to constitutional rights, and a widening of the domain of 'politics' propelled by rights-consciousness."[45] Indeed, some of the rights the landmark cases of the Warren Court enforced survive as the bedrock of American legal culture.[46] As will be discussed below, this focus on rights-based constitutionalism presents profound challenges to lawyers, legal theorists, politicians, and judges who either (a) disagree with rights-based constitutional orders generally or (b) wish to replace the liberal rights orientation of the Warren Court with a more conservative version. To reverse the Warren Court legacy, if possible at all, would require a kind of judicial stealth where procedural rules such as standing are manipulated to block access to the federal courts. For without access to courts, the "democracy of rights" is reduced to a mere abstraction incapable of being realized.

II. THE BURGER COURT RECONSTRUCTS CONSTITUTIONAL NORMS THROUGH JUDICIAL TECHNIQUE AND PROCEDURAL CHANGE

By the end of the Warren era, judicially enforceable constitutional rights had become entrenched as a core feature of American democracy. And although the conservatives on the Burger Court had criticized the Warren Court's "rights revolution" for undermining the rule of law, they recognized that this revolution could not easily be reversed without sacrificing the integrity of the Court and inviting counter-charges of judicial activism.[47] In view of this limitation, the

[45] MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE 242 (1998).

[46] *See* cases cited *supra* note 22.

[47] *See generally* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975); PHILIP B.

Burger Court followed the logical path laid open in the wake of the Warren Court—affect procedure generally, and the standing doctrine in particular, to dislodge some of the key elements of the prior regime without sacrificing too much in the way of judicial credibility.

Even so, the Burger Court still had to operate within the institutional constraints inherited from the Warren Court. The rights-based constitutionalism of the Warren Court changed the rhetorical landscape of judicial opinions by framing issues in rights discourse.[48] Unable to outright reject this discourse, the Burger Court redirected the currents of constitutional authority and legitimacy by developing its own language strategy to reconstitute the meaning of judicially enforceable constitutional liberties. The resultant discourse had to blend access to courts with polity principles and thereby locate responsibility for constitutionalism outside the Court: enter Standing and Separation of Powers (*writ large*).

A. The Infeasibility of a Frontal Assault on the Warren Court Decisions

Richard Nixon's election as President of the United States, in November 1968, marked the beginning of a conservative shift in American politics.[49] However, scholars have lamented that President Nixon's appointment of Warren Burger as the new Chief Justice in 1969 failed to effect the conservative evisceration of the Warren Court's liberal holdings and constitutional rights.[50] Indeed, by 1969, individual liberties and minority rights, so profoundly expanded under the Warren Court, had become firmly entrenched in American politics and legal discourse[51] making them difficult to dislodge quickly

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KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 57 (1970); Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 543–63 (1976).

[48] *See, e.g.*, Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8 (1993) ("One of the most fascinating aspects of the Warren Court revolution is the resurrection of rights discourse which, prior to the Warren Court's tenure, had been more or less discredited among Progressives.").

[49] *See, e.g.*, DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 179–83 (1999) (discussing Nixon's election in 1968 as a political shift).

[50] *See, e.g.*, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983) [hereinafter THE BURGER COURT] (presenting a series of commentaries by students of the Burger Court's work); THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969–1986 (Herman Schwartz ed., 1987) (compiling practical and theoretical analyses from scholars and experts on the Burger Court's rulings); Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1437–41 (1987) (detailing the inconsistency of the Burger Court's decisions).

[51] Ronald Dworkin observed as early as the 1970s that "[t]he language of rights now

without sacrificing the integrity of the judiciary.[52] Because of these considerations, the Burger Court's approach proved more subtle and complex.

1. Understanding Inherited Institutional Arrangements

During his 1968 presidential campaign, candidate Nixon promised to reshape the Court by appointing "'strict constructionists'" who would rein in the "activism" of the Warren Court.[53] True to his word, President Nixon appointed four Justices in his first term.[54] Despite the change in personnel, however, the Court moved slowly and incrementally in terms of developing a conservative constitutional jurisprudence, largely confounding those scholars who had expected a rapid conservative turnaround.[55] Part of the difficulty with any attempt to assess changes to constitutional development in terms of speed is that such attempts fail to appreciate fully the cumulative and residual effects of what was actually achieved; institutional shifts can rarely be captured in a snap-shot. In *The Most Activist Supreme Court in History*, political science professor Thomas M. Keck points to this complexity to explain why the conservative regime that succeeded the constitutional order of the New Deal/Great Society did not supplant the extension of rights that took place under the Warren Court. Keck writes: "constitutional development does not in fact proceed by means of the smooth, wholesale replacement of an existing constitutional

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dominates political debate in the United States." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184 (1978).

52 For discussions on the Burger Court's expansion of the Warren Court legacies concerning minority rights, see generally HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 275 (5th ed. 2008) ("The Burger Court, far from reversing or otherwise undoing its predecessor Warren Court, was marked by a generally surprising penchant for selective liberal judicial activism, even in such unexpected areas as civil rights and civil liberties."); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1116 (1994) (commenting that the Burger Court "limit[ed] rights for criminal defendants," but "ultimately disappointed conservatives" by moving "in liberal directions on so many other important issues, most notably in abortion and affirmative action").

53 A.E. Dick Howard, *He Was Not What They Expected*, NAT'L L.J., July 10, 1995, at A20 (recalling President Nixon's promise to put "'political conservatives'" and "'strict constructionists'" on the bench).

54 President Nixon's four appointments were: Warren E. Burger as Chief Justice in 1969, Justice Harry Blackmun in 1970, and Justices Lewis F. Powell and William Rehnquist in 1971.

55 Fifteen years after Nixon's election, the leading scholarly description of the Burger Court described it as "the counter-revolution that wasn't." THE BURGER COURT, *supra* note 50. While this may have been an accurate assessment of the force of the retrenchment policies of the Burger Court in 1983, the strength of Blasi's claim weakens when viewed through the eyes of the Rehnquist Court, which advanced conservative constitutional values based on the Burger Court's "incremental changes."

order with an emergent one."[56] Mark Tushnet's use of temporally distinct "constitutional orders" to describe the displacement of "the New Deal/Great Society constitutional order" fits into Robert A. Dahl's political characterization of the Court. "Rather, like political change more generally, all constitutional change 'proceeds upon a prior ground, a site, of political arrangements, rules, leaders, ideas, practices, attitudes, and so on, already in existence.'"[57]

Simply put, Keck argues that the Court is subject to the same constraints on rapid political change that restrict the movement of other institutions. This realization enlightens our understanding of a particular Court's impact on constitutional development because it allows us to evaluate what they *did* in terms of the limits of what they *could* do.

The Burger Court, like all Courts in American history, inhabited a distinctive political environment that set the limits on its ability to act and maneuver. In this regard, Stephen Skowronek's exploration of the contextual nature of presidential leadership is instructive. In *The Politics Presidents Make*, Skowronek examines presidential leadership based on presidents' structural placement within the succession of presidents.[58] He defines leadership as contingent and bound by context, and suggests that the authority to act derives from the political regime, "the commitments of ideology and interest embodied in preexisting institutional arrangements."[59] Thus, depending on how presidents relate to the larger political order, some strategic options become easier to pursue, while others become more difficult.[60]

Skowronek crafted a typology that conceptualizes four types of presidents—reconstructive, oppositional, affiliated, and disjunctive.[61]

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[56] KECK, *supra* note 11, at 4; *see also* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (suggesting that justices are themselves members of the national "lawmaking majorit[y]" because they are drawn from and appointed by the dominant governing coalition, and therefore, their decisions can be explained by reference to the policy preferences of the administration that appointed them).

[57] KECK, *supra* note 11, 4 (quoting Karen Orren & Stephen Skowronek, History and Governance in the Study of American Political Development (presented at the annual meeting of the American Political Science Association, Washington, D.C., Aug. 30–Sept. 3, 2000)).

[58] STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH (1993).

[59] *Id.* at 34.

[60] *Id.* at 34–36. Skowronek refers to the four types of presidents as reconstructive, disjunctive, preemptive, and articulative. *See also* Keith E. Whittington, *The Political Foundations of Judicial Supremacy*, *in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 261, 265–66 (Sotirios A. Barber & Robert P. George eds., 2001). Whittington refers to the four types with slightly different titles—reconstructive, preemptive, affiliated, and disjunctive.

[61] This basic framework draws on Skowronek's more general analysis of presidential leadership. *See generally* SKOWRONEK, *supra* note 58, at 33–58. *See also* Whittington, *supra*

Which category a particular President falls into depends on the resources at his (or her) disposal when pursuing a given agenda.[62] *Reconstructive* presidents are antagonistic to the commitments of the existing, though failing, order and seek to reconstruct a new one. They accomplish this by reinterpreting the fundamental commitments of the inherited regime in new ways consistent with their own substantive political values and, in this way, reconfigure existing institutional arrangements in their own image.[63] *Preemptive* or *oppositional* presidents come to power by seeking to overthrow the existing and still dominant governmental philosophy. Not surprisingly, preemptive presidents are rare in American history, as they tend to lack the wherewithal to topple an incumbent who remains popular. Preemptive presidents, however, may win election by hiding their oppositional intentions during the campaign, only to activate them once in office.[64] *Affiliated* presidents support the dominant governing philosophy. They seek "to extend and consolidate what they have inherited."[65] The last category is the *disjunctive* president. These leaders are technically the last affiliated president before a reconstructive president emerges and establishes a new governing regime.[66]

Presidents, however, are not the only order-dismantling actors on the American political stage. The Supreme Court also serves as an important political agent. Like presidents, the Supreme Court inherits both a political and constitutional situation, which defines its ability to repudiate or advance the reigning government philosophy. Indeed, the Court must understand this political and constitutional context to sense what it can and cannot accomplish. Although direct application of Skowronek's work on presidential leadership to the Supreme Court is inadequate, the concepts underlying his typology are useful for assessing the Burger Court's attempt to restructure the liberal constitutional paradigm inherited from the Warren Court. For one thing, it shows that while individual character is relevant, it does not define the actions of a particular Court. For a moment, it reminds us that a Court's "success" is not measured solely by what it *did*, but also by what it chose not to do. By placing a given Court in its larger

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note 60, at 261, 265–66.

[62] SKOWRONEK, *supra* note 58, at 34–36; *see also* Whittington, *supra* note 60, at 261, 265–66.

[63] SKOWRONEK, *supra* note 58, at 36–39; Whittington, *supra* note 60, at 265.

[64] SKOWRONEK, *supra* note 58, at 43–45; *see also* Whittington, *supra* note 60, at 265.

[65] Whittington, *supra* note 60, at 265–66.

[66] SKOWRONEK, *supra* note 58, at 40.

political and constitutional context, Skowronek's analytic approach permits one to critically assess that Court's actions and inactions vis-à-vis its political competitors—i.e., its ability to retain power by knowing when and when not to move. As we shall see, the Burger Court *did* move, but only cautiously and in a field of inquiry largely hidden from the lay public: federal civil procedure.

2. *The Burger Court as Oppositional*

In reviewing its response to the Warren legacy, we see that the Burger Court most resembles Skowronek's "oppositional" leader. The core characteristic of an oppositional leader is, frankly, its opposition to the dominant governing philosophy. Such leaders are committed to reversing or changing the inherited dominant governing regime; however, they do not have the benefit of political capital and resources to the same extent as reconstructive leaders. Again, presidential studies are instructive. In *The Opposition Presidency*,[67] David Crockett describes three methods of conducting an opposition presidency: the president can mount a frontal attack; undermine the dominant regime indirectly by constraining it at the margins but leaving its core principles intact; or proceed with "steady administration of the law at the expense of energetic leadership."[68]

Oppositional leaders, whether they be presidents or Supreme Court majorities, often find themselves frustrated by the intransigence of the institutional arrangements they have inherited. As Crockett points out, opposition leaders are

> nascent redefiners who are forced to operate in a political context that will not allow them to achieve their ideal goals. They are constrained by a definition of politics that took place before they acquired power, and they must seek a different path to advance their party or personal agenda.[69]

Crockett argues that for someone in an oppositional situation, a strategy of moderation is often more appropriate and effective than ideological warfare. He concludes that instead of openly dismantling the governing philosophy and structure, the more successful oppositional leaders will seek a different method to advance their agenda, which they accomplish by placing a greater emphasis on the

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[67] DAVID A. CROCKETT, THE OPPOSITION PRESIDENCY: LEADERSHIP AND THE CONSTRAINTS OF HISTORY (2002).

[68] *Id.* at 46.

[69] *Id.*

steady administration of the law.[70] This particular form of oppositional leadership well-describes the Burger Court and its particular posture vis-à-vis the Warren Court, and it helps explain the gradual but steady ascendance of conservative constitutionalism over the last thirty-eight years. Below, I explore how the Burger Court, in this "quiet" form of opposition to the newly established rights-based jurisprudence of its predecessor, reset the terms of constitutional discourse and made the emergent conservative politics the new reference point for future constitutional contests.

B. Retreating into the Politics of Judicial Technique and Procedural Change

It is not exceptional to describe the Supreme Court under Chief Justice Warren as decidedly focused on public values. Under the Warren Court, "schools were ordered desegregated, the Bill of Rights was made enforceable against the states, First Amendment guarantees were bolstered, a right to privacy was 'discovered,' criminal procedure protections were strengthened, and orchestrated school prayer was made illegal."[71] None of this, however, would have been accomplished had the Court inherited and been forced to apply a restrictive standing doctrine. This procedural bar would have prevented the Warren Court from protecting the substantive rights that have since become its legacy.[72]

However, in judicial decision-making, as in Newtonian physics, each action invites an equal and opposite reaction. This is no less true of the Warren Court's liberal standing doctrine. Review of the major standing cases of the Burger Court reveals an effort to construct limits on Article III standing as a means of discouraging federal judges from taking cases that, however socially or politically deserving, intrude into the decision-making province of either the legislative or the executive branch.[73]

This policy shift on standing occurred in two stages. In the first, the Court used language that tethered its in-house rules of standing to Article III, elevating the inquiry from a prudential analysis to a constitutional one. In the second, the Court injected separation of powers principles into the now-constitutionalized standing rules,

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[70] *Id.* at 46–47.

[71] Gene R. Nichol, *Is There a Law of Federal Courts?*, 96 W. VA. L. REV. 147, 148–49 (1993) (footnotes omitted).

[72] *Id.* at 149. Dean Nichol observes that from 1954 to the early 1970s, "not only was a cascade of new substantive rights produced, the Justices also installed a variety of procedural mechanisms to ensure that the guarantee of those rights would be actually realized." *Id.*

[73] *See infra* text accompanying notes 66–115.

causing the analysis to drift away from the plaintiff and his or her injury and into the substance of the claim itself. In this way, the Burger Court began to use the standing inquiry to dip into the merits of the case to determine if separation of powers concerns were implicated, then return to the surface and make the jurisdictional determination of standing.

It should be noted that the Constitution does not discuss standing to sue or the other justiciability doctrines historically employed by the Supreme Court. Nor does the Constitution ever employ the phrase "separation of powers." Nevertheless, the Burger Court successfully accomplished this two-step transformation through the strategic use of language that affected legal procedure in the short-term and the base of constitutional interpretive authority in the long-term. A closer look at the transformation of the standing doctrine during the Burger Court suggests that these two procedural moves—characterizing some standing rules as constitutional barriers and adding separation of powers discourse to the standing analysis—are more significant to the retrenchment from rights-based constitutionalism than conventionally assumed.

The point is not simply that the Court can manipulate the standing doctrine to "give greater credence to interests of privilege than to outsider claims of disadvantage."[74] Rather, the point is that the Court's stated use of standing to defend the conservative ideal of limited federal court jurisdiction after the Warren era is far more complicated than its mythic narrative of judicial restraint asserts.

1. Constitutionalizing the Standing Inquiry by Grounding It in Article III's "Case and Controversy" Requirement

Once the Burger Court was assured of a conservative majority among the Justices, it began to redraw the rules of standing and then relocate the source of those rules squarely within the language of Article III. In a series of cases beginning in 1975, the Court defined the rules of the standing doctrine to require a plaintiff to show: (1) that he has suffered a concrete and particularized "injury in fact,"[75] which is imminent rather than hypothetical;[76] (2) that the injury is fairly traceable to the conduct of the defendant and not some

[74] Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002).

[75] *See* Warth v. Seldin, 422 U.S. 490, 508 (1975) (holding that a plaintiff must allege specific, concrete facts showing that the action he has challenged harms him personally).

[76] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (requiring that plaintiff demonstrate a "'live and active claim'").

third party not before the court;[77] and (3) that a favorable decision from the Court will likely redress the injury.[78] According to the Burger Court, by limiting federal court jurisdiction to disputes that met these definitional requirements, Article III ensured that unelected federal judges would not interfere unnecessarily with policies adopted through the democratic processes of the political branches of the federal government or by the states.

Linking the rules of the standing doctrine to the Constitution was linguistically and politically a brilliant move. It permitted the Court to assume an objective, legalistic, and superficially apolitical posture when deciding whether to hear cases brought against the federal government that implicate individual liberties or egalitarian principles. Indeed, over the course of its tenure, the Burger Court stiffened the language and reworked the logic of the elements of the standing doctrine to narrow the cases eligible for Article III adjudication.[79] First, the Court cluttered the "injury alone" analysis with causation and redressability issues, which invited discussions—at the jurisdictional stage of litigation—that go to the merits. Next, the Court modified the language of these additional elements so that "fairly traceable" was understood as "caused by," and "reasonable likelihood" was understood as a "guaranteed certainty." Consequently, the standing discussion moved away from whether the proper plaintiff was before the Court to whether the evidence connected the defendant's conduct to the alleged harm. Thus, the Court would no longer grant standing on a simple showing of "adverseness;" instead, it now imposed a more demanding test rife with causation elements. What is more, the Court was able to give this more rigorous test an air of legitimacy and permanence by claiming it was consistent with, if not required by, Article III of the Constitution. To appreciate this point fully, one must trace the trajectory of the Burger Court's effort to connect the new standing rules to the Constitution, starting with the case of *Warth v. Seldin.*

[77] *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976) (stating that Article III's "case or controversy" language limits the power of federal courts to redress only those injuries that are traceable to the defendant's action and not those that result from the actions of an absent party).

[78] *See id.* at 38 ("[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.").

[79] The power to define is the power to control any long-term agenda. *See, e.g.*, SKOWRONEK, *supra* note 58, 68–69, 415.

a. Warth v. Seldin

In *Warth v. Seldin*[80] in 1975, the Court redefined the basic function of the standing doctrine when it replaced the adverseness standard articulated in *Baker* and *Flast* with a concrete injury standard.[81] In *Warth*, the plaintiffs challenged a Penfield, New York zoning ordinance that barred construction of low and moderate-income housing.[82] The plaintiff groups included low-income individuals seeking affordable housing, taxpayers in a neighboring city who were forced to assume the burden for extra construction of low-income housing, a civic action group who claimed they were harmed by the exclusion of low-income citizens from their town, and two other entities, including real estate developers, who claimed they would have built affordable housing in the area but for the restrictive ordinance.[83] The Court denied standing to the complainants, holding that they did not allege a sufficiently "distinct and palpable" injury as the result of defendant's conduct because none of the plaintiffs had "a present interest" in any property subject to the ordinance.[84] The language the Court used in *Warth* signals a new type of standing analysis. Words like "concrete" and "palpable" and "distinct" indicate that the injury in question, to confer standing, must be personally felt by the would-be plaintiff and result in real pain of the physical, psychological, or economic kind. Although a plaintiff might articulate a claim that makes him or her "adverse" to the government defendant, this is not enough. According to the Court in *Warth*, the Constitution requires that the plaintiff present with an injury that can be quantified, measured, photographed, or healed—i.e., an injury that is "distinct and palpable." This is more than raising the bar on standing, it is imbuing new language with constitutional authority. Indeed, the Court's statement that "distinct," "palpable" and "particularized" injury is required to cast a legal dispute "in a form *traditionally capable* of judicial resolution" functions as rhetorical misdirection, falsely leading the reader to believe that such concrete injury has historically been a standing requirement, when in fact it has not.

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[80] 422 U.S. 490 (1975).
[81] *Id.* at 499–501, 507.
[82] *Id.* at 493–94.
[83] *Id.* at 494–95, 497–98.
[84] *Id.* at 501, 504.

b. Simon v. Eastern Kentucky Welfare Rights Organization

The year following *Warth v. Seldin*, the Court decided *Simon v. Eastern Kentucky Welfare Rights Organization*,[85] in which it constitutionalized the remaining two elements of its Article III case or controversy requirement: causation and redressability. In *Simon*, several indigent individuals and the organizations representing them brought action against the Secretary of the Treasury and the Commissioner of the Internal Revenue Service ("IRS") challenging an IRS revision of a Revenue Ruling limiting the amount of free medical care that hospitals receiving tax-exempt status were required to provide.[86] Previously, to secure tax-exempt status, hospitals were required to provide free care to indigents.[87] Under the revision, only emergency medical treatment of indigents was required.[88] The indigents alleged that the revision caused them injury because it permitted tax-exempt hospitals to deny them all but emergency medical treatment.[89] The Court required that the plaintiffs' injury "fairly [could] be traced" to the defendant's conduct and imposed a burden on the plaintiffs to show that the injury was likely to be redressed by a favorable decision.[90] The Court denied standing on grounds that the plaintiffs failed to satisfy the causation and redressability prongs of the standing inquiry.[91]

As with the terms "distinct," "palpable," and "particularized" injury in *Warth*, the concept of being "fairly traceable" was new to the Court's judicial lexicon, at least in the standing context. Even more than the concrete injury rule, however, the "fairly traceable" requirement demanded an evidentiary showing of causation. The focus of the inquiry no longer was whether the plaintiff could state an adverse claim against the defendant, but whether the defendant's actions actually caused injury to the plaintiff. "Redressability" was also a new term as applied to standing, as it looked not at the dispute between the plaintiff and defendant, but at the court's ability to fashion a remedy—again, not an issue typically assessed during threshold determinations of jurisdiction under Article III.

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85 426 U.S. 26 (1976).
86 *Id.* at 28.
87 *Id.* at 28–30.
88 *Id.* at 28.
89 *Id.* at 33.
90 *Id.* at 41–42.
91 *Id.* at 42–46 (discussing that plaintiffs' inability to prove, first, that the IRS revision caused the hospitals to reduce the amount of care to the poor, and, second, that the requested remedy, a court order rescinding the revision, would produce plaintiffs' desired effect of causing the hospital to restore its medical service to the indigents to pre-revision levels).

There is nothing inherently constitutional about injury, causation, and redressability. The *Warth* and *Simon* Courts, however, elevated these rules of the standing doctrine to constitutional status. *Warth*'s shift of the standing inquiry focus from adverseness to concrete injury coupled with *Simon*'s discussion of the significance of causation and redressability provided the Court with the foundational components of its standing analysis. Six years later, in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,[92] the Court would confer upon the entire tripartite analysis the full weight and legitimacy of the Constitution.

c. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.

In *Valley Forge*, the plaintiffs (federal taxpayers), brought suit challenging a transfer of federal property made by the Department of Health, Education, and Welfare under the Federal Property and Administrative Services Act.[93] According to the plaintiffs, the Department transferred the land to the Valley Forge Christian College for the express purpose of training men and women for Christian service, thus violating the Establishment Clause of the First Amendment.[94] The Court denied standing, concluding that the plaintiffs had not suffered a sufficiently cognizable injury.[95] When addressing whether the plaintiffs had a right to seek federal judicial redress, Justice Rehnquist summarized the newly constitutionalized standing analysis as a three-part test of injury in fact, causation, and redressability:

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." . . .
>
> As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit. The term "standing" subsumes a blend of constitutional requirements and prudential considerations, and it has not always been clear in the

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[92] 454 U.S. 464 (1982).

[93] *Id.* at 467–69; *see* Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377.

[94] *Valley Forge*, 454 U.S. at 469–70; *see* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[95] *Valley Forge*, 454 U.S. at 476–82.

> opinions of this Court whether particular features of the "standing" requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution.
>
> A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."[96]

Valley Forge neatly capped the Burger Court's piecemeal definitional adjustments to the standing doctrine. The opinion queried whether the rules of standing obtained authority from Article III, making them constitutional, or from judicial creativity, making them prudential. The decision affirmed the rules' constitutional status simply by declaring it so. Notwithstanding the admitted ambiguity of the case law, the opinion simply relied on its own earlier decisions, i.e., *Warth* and *Smith*. This is problematic precisely because the Court largely rejected authorities that disputed its interpretation of the constitutional status of the standing rules, i.e., *Flast* and *Baker*. Despite the existence of this dispute, the opinion failed to consider in any meaningful way the actual status issue. The Court's exclusive reliance on only one line of cases to justify its contention that the standing features derived from Article III merely accords with its own earlier descriptions of the standing doctrine. Although the support on which the majority opinion relied does not justify the Court's conclusion, the opinion indelibly endowed the features of the standing analysis with the authority of the Constitution.

2. *The Burger Court Infuses Standing with the Discourse of Separation of Powers*

As shown above, the Burger Court, through certain linguistic shifts and some rather bold judicial declarations, effectively constitutionalized the standing doctrine and its three fundamental

[96] *Id.* at 471–72 (citing Warth v. Seldin, 422 U.S. 490, 498 (1975); Flast v. Cohen, 392 U.S. 83, 97 (1968)) (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); *Simon*, 426 U.S. at 38, 41).

elements: injury in fact, causation, and redressability. Simultaneously with this effort, the Burger Court also began to redesign the function of the standing inquiry as a whole, morphing it from a threshold jurisdictional question, concerned with whether the proper party was before the Court, into a political determination regarding the proper role of the federal judiciary in a separated government.

On its face, this was a strange thing to do that was hardly intuitive at all. Not only is the separation of powers discourse at odds with the development of the standing doctrine, it uses language and concepts foreign to the standing inquiry's very function. Even the Burger Court's new standing rules—injury, causation, and redressability—are unrelated to separation of powers. The injury element requires that the plaintiff have something at stake, and the causation and redressability elements ensure that the defendant's conduct, and the Court's relief, are related to the plaintiff's injury. None of these elements logically entails separation of powers principles. What, then, compelled the Burger Court to begin freighting the standing inquiry with separation of powers discourse?

Below, I attempt to answer this question by assessing four of the major standing decisions the Burger Court issued. Each builds upon the other, as the Court incrementally refashions the standing inquiry from a threshold test of the plaintiff's ability to present an adversarial claim, to a loose, standardless assessment of the political limits of the Court's authority vis-à-vis the federal agency implicated in the suit.

a. United States v. Richardson

In *United States v. Richardson*,[97] a taxpayer filed suit to compel the Central Intelligence Agency to publish its budget.[98] Plaintiffs alleged that the Central Intelligence Act of 1949, which authorized secrecy for the Agency's accounts,[99] violated the Statement and Account Clause of the Constitution.[100] The Court characterized Richardson's injury as a generalized grievance about the conduct of government and denied standing because his alleged injury was "'common to all members of the public.'"[101] The majority was

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97 418 U.S. 166 (1974).

98 *Id.* at 168–69.

99 *Id.* at 169. The Act permits the Agency to account for its expenditures "solely on the certificate of the Director." 50 U.S.C. § 403j(b) (2000).

100 *Richardson*, 418 U.S. at 167–68; *see* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

101 *Richardson*, 418 U.S. at 176–77 (quoting *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (holding that plaintiffs did not have standing to challenge the validity of the appointment of

satisfied that the absence of a unique injury in the plaintiff "gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."[102] Implicit in the Court's rationale was the idea that, under separation of powers principles, claims against the federal government, if shared by all citizens, should be reserved exclusively to the elected branches.[103]

b. Schlesinger v. Reservists Committee to Stop the War

In the second case, *Schlesinger v. Reservists Committee to Stop the War*,[104] a companion case to *Richardson*, military reservists challenged the constitutionality of a policy allowing members of Congress to serve concurrently in the Reserves. The plaintiffs, an anti-war group and certain named members, alleged the policy violated the Incompatibility Clause of the Constitution.[105] They sought relief through a writ of mandamus against the Secretary of Defense to force him to remove members of Congress from the Reserves.[106] The Court held that plaintiffs had neither taxpayer nor citizen standing, and stressed the importance of a "discrete factual context within which the concrete injury occurred."[107] The Court reasoned that without the "discrete factual context," the plaintiffs' claim was a generalized grievance, which would require that the

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Supreme Court Justice Hugo Black, who had been nominated while a member of the Senate, under the Ineligibility Clause of Article I, § 6 of the Constitution because whatever Lévitt's injury, "it [was] not sufficient that he ha[d] merely a general interest common to all members of the public")).

[102] *Id.* at 179.

[103] Justice Powell, concurring, expanded on this last point. He argued:

> Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.

Id. at 188 (Powell, J., concurring) (footnotes omitted).

[104] 418 U.S. 208 (1974).

[105] *Id.* at 209–11; *see* U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

[106] *Schlesinger*, 418 U.S. at 211.

[107] *Id.* at 222.

Court fashion relief beyond the needs of the parties before it.[108] The Court concluded that this danger of overreaching was especially problematic "when the relief sought produces a confrontation with one of the coordinate branches of the Government."[109] Thus, in part, the Court denied standing in *Schlesinger* because it felt the plaintiffs' injury too abstract. However, as it did in *Richardson*, the Court implied that it may consider separation of powers principles during its jurisdictional determination and deny standing based on the implications of interfering with the other branches.

One must stop for a moment to grasp how poorly these two concepts work together in a judicial opinion. It is one thing to demand a high level of specificity with respect to the plaintiff's injury; one may gain some comfort in the fact that this requirement relates thematically to the traditional standing inquiry and the need for courts to assure themselves that they have before them a proper plaintiff. It is something different altogether, however, to mix this analysis with one involving concerns of inter-branch intrusion, and then to claim that this odd blend of analyses is what Article III requires prior to a finding of federal court jurisdiction. Neither the text of the Constitution nor logic generally supports such a determination.

c. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.

The Burger Court intensified its politicization of the standing doctrine eight years later in *Valley Forge*.[110] In denying standing, Justice Rehnquist, writing for the majority, located the source of the plaintiff's challenge not in the constitutionality of a congressional act, the Federal Property Administrative Services Act,[111] but rather a particular executive branch action arguably authorized by the Act. This was a subtle, deftly-powerful intellectual move, and it marked an important break with the Warren Court's approach to cases brought against the federal government.

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[108] *Id.*

[109] *Id.*

[110] Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464 (1982). Note that I use the term "politicization" in a non-pejorative sense (if that is possible). It simply means that the Court had incorporated political concerns regarding separation of powers into the standing inquiry, which is conventionally understood to be a strictly *legal* analysis.

[111] *Id.* at 466–67; *see* Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377..

This requires amplification. Recall that in *Flast*, the plaintiffs filed suit against the Secretary of Health, Education and Welfare, alleging that the Elementary and Secondary Education Act of 1965—or the Secretary's implementation of the Act—was unconstitutional. The Warren Court granted standing, without trying to tease apart these alternative claims, no doubt thinking that for purposes of adjudicating the complaint, the distinction between them was immaterial. In *Valley Forge*, however, Rehnquist seized on this distinction. With *Flast* well in mind, Rehnquist opted to differentiate between acts of Congress—which are legislative—and the actions of the President and his staff—which are executive. While the first have been subject to judicial review since *Marbury v. Madison*,[112] the second have not and, in Rehnquist's view, should never be. What makes Rehnquist's position significant is that it sets in motion the process by which the Court created space for the executive branch to operate with minimal judicial oversight.

Ultimately, Rehnquist's majority opinion in *Valley Forge* held that no one had standing to sue—i.e., no one could be a plaintiff—to challenge the decision of the federal government to give a seventy-seven-acre plot of federal land to a Christian college with the self-described mission of "'train[ing] leaders for church related ministries.'"[113] Although the Court's stated rationale for denying standing was plaintiff's failure to present a sufficiently concrete particularized injury,[114] the extensive discussion about reluctance to review the conduct of the executive branch signaled the Court's growing reliance on separation of powers principles to deny standing. Indeed, the Court in *Valley Forge* effectively recast the standing doctrine as a constitutional check against judicial intrusion into the policy prerogatives of the political branches: "[i]n this manner does Art. III limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'"[115]

Yet nothing in the language of *Valley Forge*—or that of any other Supreme Court opinion—effectively explains why separation of powers concerns must be entwined with the standing inquiry. Indeed,

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[112] 5 U.S. (1 Cranch) 137 (1803).

[113] *Valley Forge*, 454 U.S. at 468.

[114] *Id.* at 485. The Court concluded that access to federal court is predicated on the complainant's ability to "identify any personal injury suffered . . . *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.*

[115] *Id.* at 472 (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).

by tangling separation of powers principles with standing, the Court has injected an undefined set of analytically unrelated concepts about the role of separated government into the jurisdictional determination of whether the plaintiff before the Court has presented a dispute framed in an adversarial context, which the Court is able to resolve. Intellectually, this is a very unsatisfactory (and unsatisfying) mixture of disparate ideas. However, from a juridical or political perspective, linking separation of powers to standing has a certain brilliance, as it imposes a jurisdictional barrier to the kind of rights-based litigation that flourished during the Warren Court, while allowing the Court to assume a non-activist posture.

d. Allen v. Wright

Although the text of *Valley Forge* clearly indicated that separation of powers concerns play a role in the standing inquiry, it was somewhat vague as to just how large that role is or should be. Any confusion on this point, however, was erased four years later in the case of *Allen v. Wright.*[116] Indeed, more than any other decision of the Burger Court, *Allen* worked the most profound change in the Court's rhetoric concerning the purpose of the standing doctrine. In forceful, declarative language, Justice O'Connor's majority opinion made the Court's position clear: "the law of Art. III standing is built on a single basic idea—the idea of separation of powers."[117] With this one sentence, the Court completed its effort to reformulate the standing inquiry as a separation of powers tool.

In *Allen*, the parents of black schoolchildren sued the IRS, alleging that the IRS's failure to deny tax-exempt status to private schools that practiced racial discrimination constituted federal support for such schools and interfered with efforts to desegregate public schools.[118] The Court, for the first time, expressly relied on separation of powers principles to deny plaintiffs standing. While conceding that the plaintiffs' injury—diminished ability to attend racially integrated schools—was sufficiently concrete to satisfy the traditional injury in

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[116] 468 U.S. 737 (1984).

[117] *Id.* at 752. Unlike implicit references to separation of powers considerations to the standing inquiry made in previous cases, O'Connor's opinion in Allen

> explicitly notes that separation of powers concerns do not underlie article III jurisdictional limitations merely in the sense that plaintiffs who lack standing are outside the area of judicial responsibility. Rather, the three components of article III standing are themselves to be interpreted in light of "separation of powers principles."

Nichol, *Abusing Standing*, *supra* note 1, at 641 (footnotes omitted).

[118] *Allen*, 468 U.S. at 746.

fact component of Article III standing, the Court determined that the plaintiffs' claim failed the causation element because the alleged injury was not "fairly traceable to the Government conduct" that the plaintiffs had challenged.[119] This causation analysis, however, was infused with separation of powers considerations because the Court emphasized the importance of dismissing suits that challenged "particular programs [that government] agencies establish to carry out their legal obligations."[120]

With the *Allen* decision, the Burger Court transformed the standing doctrine's function from determining the plaintiff's right to litigate to determining the proper role of the federal courts when government actors are sued.[121] The decision also finished the job begun in other decisions. Where *Richardson*, *Schlesinger*, and *Valley Forge* had chipped away at the traditional notions of standing, *Allen* smashed them and replaced them with something completely different. The *Baker* and *Flast* standard of ensuring adverseness of the parties no longer directed the standing inquiry; instead, preserving separation of powers controlled.

As I have shown in this section, the Burger Court developed rules to define its standing inquiry and then located those rules within the Constitution. That is, it grounded the rules of standing in the "Case or Controversy" language of Article III, thus making the specifics of a prudentially-crafted standing inquiry a constitutional mandate. Coupled with, and dependent upon, this development was the Court's effort to incorporate separation of powers concerns into the standing inquiry. The Burger Court's infusion of separation of powers discourse into the inherited standing analysis of the Warren Court was a strategic use of language. Given that the Burger Court's political task was to reinterpret the old regime—i.e., to reconcile the Court's new political commitments (mostly conservative) with the inherited constitutional order (mostly liberal)—it could not simply claim legitimacy on completely new grounds. The new Court had to work subtly, behind the dual screens of legal procedure and judicial language, neither of which is easily penetrated by the lay public, no matter how observant. The importance of these two shifts in the Court's jurisdictional analysis cannot be overstressed, as together they

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[119] *Id.* at 757.

[120] *Id.* at 759.

[121] *Id.* at 761. The *Allen* Court expressly stated that the proper role of the federal courts, "grounded as it is in the idea of separation of powers," is to refrain from interfering with the executive branch's ability to establish its own policies. *Id.* Separation of powers principles "counsel[] against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Id.*

lay the foundation upon which subsequent Courts have realized the shift from rights-based constitutionalism to executive-centered constitutionalism.

It is ultimately impossible to ascertain the Burger Court's precise motivation in reformulating the standing doctrine. Still, Skowronek's theory of the "oppositional" leader allows us to understand the Burger Court's actions in a political context. Burger and his fellow conservative Justices inherited from the Warren Court a set of constraints and pathways that presented both risks and opportunities. In light of the Burger Court's desire to dial back the rights-based jurisprudence of the Warren era, it is not surprising that it selected the standing doctrine as its preferred tool for achieving this objective: it has the dual benefit of being both superficially innocuous and practically devastating. Viewed in this light, the Burger Court's decision to reframe the discourse on standing was highly rational. Yet, even if one dismisses this interpretation as overly calculating, the Court's efforts to recast the standing inquiry can also be explained as sensitivity to propriety—i.e., a sense of appropriateness about what kinds of behaviors or motivations are considered acceptable under certain circumstances.[122] Taking either posture with the Burger Court—calculation or propriety—the result is the same: what a Court can do is dictated by context. A review of how the Burger Court analyzed standing is enough to realize the overall effect of its standing jurisprudence: to limit access where parties sought resolution of controversial social issues and vindication of rights the Constitution was designed to protect.[123]

The Burger Court decisions refused to recognize that *Flast* explicitly rejected the notion that Article III limitations intersected with separation of powers problems.[124] This refusal blurs the difference between compelling prudential reasons for the Court not to interfere and a jurisdictional duty "to say what the law is."[125] This difference goes to the heart of the distinction between whether judicial power exists versus whether judicial power should be

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[122] *See, e.g.*, Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365, 394 (2001) (discussing orientation to context from a presidential leadership perspective).

[123] *See, e.g.*, Michael A. Berch, *Unchain the Courts—An Essay on the Role of the Federal Courts in the Vindication of Social Rights*, 1976 ARIZ. ST. L.J. 437; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1304–05 (1976); Robert Allen Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 873–74 (1977); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663–64 (1977).

[124] *See* Flast v. Cohen, 392 U.S. 83, 100–01 (1968).

[125] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

exercised. What the Burger Court did by constitutionalizing the standing doctrine analysis and infusing it with separation of powers concerns was to obscure this distinction beyond recognition.

III. THE REHNQUIST COURT USED THE STANDING DOCTRINE TO CREATE A CONSTITUTIONAL "SPACE" FOR PRESIDENTIAL ACTION

The preceding analysis of the Burger Court's standing decisions indicates that the Court made a steady, if incremental, effort to embed the modern rules of standing in Article III's limitation of judicial power. The analysis also reveals that the Court added a separation of powers component to the standing inquiry, even though neither the Constitution nor the history of standing jurisprudence suggested that standing must or should carry the water on such a deeply political issue. Because of these changes, the rights-based constitutionalism of the Warren Era, while nominally undisturbed, began to lose ground. Plaintiffs bringing rights-based challenges against federal actors increasingly found their access to federal courts curtailed.

However, to appreciate fully what the Burger Court achieved in the name of constitutional conservatism, one must look at the decisions of the Rehnquist Court that followed, for the Rehnquist Court built upon the jurisdictional foundations laid down by its predecessor and moved the political core of the Court well to the right, where it has remained ever since. In the process, the Rehnquist Court enhanced the independence and power of the President, often at the expense of the very class of litigants that the Warren Court sought to empower—individuals with grievances against government actors. Indeed, the quiet legacy of the Rehnquist Court is its manipulation of the standing doctrine to create a kind of protective space for the executive branch where it could act without judicial intrusion.

Scholars have remarked that the congressional delegation of certain legislative functions to the executive branch, coupled with presidential use of executive orders and signing statements, have changed the dynamic of power in the federal government.[126] Power

[126] For historical discussions of shifts in institutional power in favor of the executive, see, for example, M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998); Hugh Helco, *What Has Happened to the Separation of Powers?*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT 131, 138 (Bradford P. Wilson & Peter W. Schramm eds., 1994). For more contemporary treatments, see PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION ix (2002) (revealing that there has been virtually no significant policy area or level of government that presidents have not sought to enter and control by virtue of their use of executive orders, presidential memoranda, proclamations, national security directives, and signing statements, instruments Cooper defines as "presidential power tools"); KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE

has shifted markedly in favor of the President.[127] Under the guise of separation of powers, the judiciary has contributed to this shift by relinquishing its authority to address potential constitutional violations and abuses by the executive branch.[128] Moreover, the judiciary has resisted legislative efforts to create legal constraints on presidential prerogative.[129] Below, I argue that the Rehnquist Court used the reformulated standing doctrine inherited from the Burger Court to divest Congress of the authority to grant standing to citizens seeking to challenge alleged executive branch violations of law.[130] This, in turn, created constitutional space for the President to act, largely immune from congressional oversight and public enforcement. In this way, the Court has helped provide the presidency with the institutional and legal means to extend its reach beyond the powers granted it under Article II of the Constitution. By articulating the standing doctrine in this way, the Rehnquist Court also facilitated the Presidentialists' theory of the unitary executive and allowed them to promote it as a viable alternative power structure for the federal government.

In this section, I describe the basic facets of the unitary executive theory and discuss its emergence and development during the administrations of Ronald Reagan, George H.W. Bush, and Bill

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ORDERS AND PRESIDENTIAL POWER 81 (2001) (concluding that executive orders have become more substantive in nature over time, that the number of significant executive orders issued each year has increased since the 1950s, and that the "percentage of executive orders that deal with foreign affairs, executive branch administration, and domestic policy has grown significantly since the 1930s"); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 2 (2002) ("The increased use of executive orders and other presidential directives is a fundamental problem in modern-day America."); Leanna M. Anderson, Note, *Executive Orders, "The Very Definition of Tyranny," and the Congressional Solution, the Separation of Powers Restoration Act*, 29 HASTINGS CONST. L.Q. 589, 611 (2002) (discussing an increase in the use of executive orders and their ability to "upset the balance of the separation of powers by concentrating legislative power in the executive branch").

[127] *See, e.g.*, HAROLD J. KRENT, PRESIDENTIAL POWERS (2005); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006).

[128] *See* LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW (2001) (arguing that, during the tenure of Chief Justices Burger and Rehnquist, the Supreme Court excessively invoked the constitutional avoidance doctrine to surrender its authority to make substantive decisions in hard and important cases, preferring instead to rely on avoidance strategies such as the doctrines of justiciability, federalism, and separation of powers). *But see* Bush v. Gore, 531 U.S. 98, 111 (2000) (concluding that the judiciary was required to address the Article II question without even mentioning the political question doctrine). Indeed, in *Bush v. Gore*, the Justices took for granted that they had the "responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Id.*

[129] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *see also infra* discussion accompanying notes 212–40.

[130] *See Lujan*, 504 U.S. 555.

Clinton—i.e., 1981 to 2001, the two decades that form the core of the Rehnquist Court. Next, I address the case of *Morrison v. Olson*,[131] in which a near-unanimous Court rejected the Reagan administration's efforts to advance the unitary executive theory in a blatant conflict with Congress over the independent counsel provisions of the Ethics in Government Act. While this case would appear to run counter to my argument concerning the Rehnquist Court's acceptance of unilateral presidential action, it was actually the first and necessary step in introducing the unitary executive theory into the judicial context. Moreover, as I show, the *Morrison* decision did not solidify judicial resistance to expanded presidential power under the unitary executive theory. Despite *Morrison*, the Court did not reject all claims of unitary executive power, as one might have expected. Instead, the Court accepted a toned-down version of the unitary executive theory, one that fit more easily within the existing judicial arrangement. The Rehnquist Court accomplished this, in part, by embedding notions of executive branch primacy in the standing doctrine. None of this, of course, would have been possible without the earlier efforts of the Burger Court to infuse the standing inquiry with separation of powers concerns and paint it with a constitutional gloss.

The connection between the Court's modern standing doctrine and the unitary executive is not obvious; but neither is it unexpected. The Court's gradual move to (1) impose stricter standing criteria, and (2) freight the standing inquiry with separation of powers concerns, pushed back the rights-based jurisprudence of the Warren Court and created a protective space for executive branch action. And although that space nascently existed during the Warren Court, it was obliterated when the Watergate scandal caused the public to distrust the office of the President. In short, the new standing doctrine responds to both the Warren Court's constitutionalism and the post-Watergate constraints on executive action. The unitary executive theory was borne out of the same concerns and responds to the same threats to presidential authority. Indeed, both developments—the changes to the standing doctrine and the emergence of the unitary executive theory—occurred (roughly speaking) at the same time.

A. The Unitary Executive Theory

After Watergate and the publication of Arthur Schlesinger's, *The Imperial Presidency*,[132] the public and Congress sought to rein in presidential power. Consequently, the presidential office looked for

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[131] 487 U.S. 654 (1988).

[132] ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

other outlets that would allow the President to govern with minimal interference from Congress and the courts. Administrative agencies provided the President with a logical power-base from which to circumvent congressional oversight. Indeed, executive branch agencies would allow the President to accomplish what he was unable to accomplish legislatively. Thus, it was during this period that the importance of executive orders and signing statements began to increase steadily.[133] This blending of traditional presidential power with quasi-legislative authority epitomizes in practice the theory of the unitary executive.

A product of the late twentieth century, the theory of the unitary executive advocates a form of consolidated presidential power that effectively insulates the executive branch from regulation and oversight from Congress and the judiciary, while giving the President the authority to make laws outside the conventional legislative process. Ironically, this tends to immunize such laws from judicial challenge. The theory serves as the foundation for a governmental scheme that places the executive at the apex of the political and legal system. It is, in short, a response to the movement to curb presidential power in the wake of executive abuses during the late sixties and seventies.[134] Every President since Reagan has embraced this theory in practice, though some more overtly than others. What is more, each of these presidents has recast what was initially a defensive response to legislative constraints on presidential action into an offensive strategy to promote executive power.

Rather than discuss the relative merits and dangers of the unitary executive—a task shouldered by others elsewhere[135]—it is sufficient

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[133] *See, e.g.*, COOPER, *supra* note 126, at 13–16 (discussing the president's use of executive orders).

[134] *See generally* SCHLESINGER, JR., *supra* note 132 (discussing events such as President Johnson's Gulf of Tonkin Resolution and President Nixon's secret war in Cambodia and the Watergate break-in).

[135] *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (undertaking a detailed historical and legal examination of presidential power and arguing that all presidents have been committed proponents of the theory of the unitary executive); *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). *But see* JOHN P. MACKENZIE, ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION (2008) (arguing that the unitary executive theory has no basis in history and is subversive of a constitutional system of checks and balances); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1347 (1994) ("[A] proper structural analysis of the Constitution undermines the constitutional case for an executive branch with a chain of command organized along military lines and instead emphasizes the existence of a discernible balance between Congress's role in structuring the executive and the President's inherent and default powers."); Cass R. Sunstein, *The Myth of the Unitary Executive*, 7 ADMIN. L.J. AM. U. 299, 300–01 (1993)

here to recognize that debate over the unitary executive theory began during the Reagan years and has never ceased. Full engagement in that debate is outside the scope of this Article. My purpose here is to argue that the very existence of that debate requires that one take a closer look at the Supreme Court's transformation of the standing doctrine as a tool that can be used to advance the unitary executive theory.

The unitary executive theory has three basic components: (1) departmentalism, which asserts that the President's power to interpret the Constitution is at least equal to that of the Court or Congress; (2) exclusivism, which asserts that all executive power under the Constitution rests solely with the President; and (3) executive power protectionism, which holds that the executive powers of the President may not constitutionally be appropriated, divested, or diluted by Congress.[136]

1. "Departmentalism" in Constitutional Interpretation

The unitary executive theory grows out of the principles of "'departmentalism'" and "'coordinate construction,'" which hold that "all three branches of the federal government have the power and duty to interpret the Constitution and that the meaning of the Constitution is determined through the dynamic interaction of all three branches."[137] In other words, departmentalists and coordinate constructionists believe that presidents and other government officers can and should engage in independent constitutional reasoning.[138] For

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(arguing that the idea that the Constitution "put the President on top of a pyramid, with the administration below him . . . is an ahistorical myth").

[136] *See generally* CALABRESI & YOO, *supra* note 135.

[137] Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 606 (2005).

[138] *See, e.g.*, EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT vii, 15, 61 (1938) (providing a historical and theoretical treatise bifurcating the doctrine of judicial review into a "juristic" conception, granting the courts supreme authority to interpret the Constitution, and a "departmentalist" conception, removing constitutional interpretation from the peculiar province of the courts and placing responsibility for interpretive authority equally among the three branches. The question of primacy in interpretation is resolved by determining the degree of deference the Constitution requires the political branches give to relevant judicial decisions. This reconceptualization then confines judicial interpretations to the case in which it is pronounced. Accordingly, judicial interpretations are "not final against the political forces to which a changed opinion may give rise."); *see also* Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 417 (1986) (analyzing judicial supremacy, legislative supremacy, and departmentalism to construct a "modified version of departmentalism" that relies on assessing "degrees of deference one institution owes another under varying circumstances").

unitary theorists, departmentalism provides constitutional support for their assertion that the President's interpretive power is at least co-equal to that of the other branches. In support of this position, they cite James Madison's *Federalist 49*, in which Madison states, "[t]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . . ."[139]

In its most non-threatening form, departmentalism is merely the "dialogue" that occurs naturally between the branches as each takes action consistent with its view of the Constitution and as they work together toward a common understanding of what the Constitution requires.[140] Such dialogues do not cause concern because they do not meaningfully challenge judicial primacy in interpreting the Constitution for purposes of actual legal precedent and enforcement. The more aggressive form of departmentalism, however, does not accept judicial primacy per se and argues that when the two political branches clash, the judiciary's constitutional interpretation will not necessarily defeat that of the President.[141]

2. *All Executive Power Rests in the President*

The unitary executive theory holds that all executive power rests in the office of the President. For this proposition, unitary theorists rely on the Vesting Clause of Article II, which states, "[t]he executive Power shall be vested in a President of the United States of America."[142] Proponents of the unitary executive theory use this language in conjunction with that of the Take Care Clause, "[the President] shall take Care that the Laws be faithfully executed,"[143] to argue that the Constitution creates a "hierarchical, unified executive department under the direct control of the President."[144] By definition,

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[139] THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

[140] *See, e.g.*, NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE (1996); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988) (discussing constitutional interpretation as a political convergence of judicial and non-judicial interpretations among the three branches of government); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

[141] *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 110, 222 (2004) (contrasting judicial supremacy and departmentalism and claiming that the President should refuse to enforce judicial decrees he determines are unconstitutional after "executive review").

[142] U.S. CONST. art. II, § 1, cl. 1.

[143] U.S. CONST. art. II, § 3, cl. 4.

[144] Calabresi & Rhodes, *supra* note 135, at 1165. For the seminal article advancing the unitary executive theory, see *id.*; *see also* Michael Herz, *Imposing Unified Executive Branch*

then, this argument posits that the Constitution prohibits Congress from creating agencies and special counsels independent of the executive branch, as these would violate executive unity.

3. Executive Power Cannot Be Appropriated, Divested, or Diluted by Congress

Not only does the unitary executive theory maintain that Congress has no constitutional right to exercise executive power on its own, it also holds that Congress has no right to appropriate, divest, or dilute the executive powers that rest in the President.[145] According to the unitary executive theory, Congress may not lawfully create independent agencies, authorities, or other entities that (1) are not controlled by the President and (2) exercise discretionary executive, and sometimes quasi-legislative or quasi-judicial powers.[146] This constitutional prohibition is categorical and applies even if the congressionally created agency or entity is to be governed by officials nominated by the President. This "protectionist" rationale assumes that under Article II and basic separation of powers principles, the Constitution vests only the President with the authority to execute the laws in the executive branch. Thus, the President, and the President alone, may (1) "remove subordinate policy-making officials at will"; (2) "direct the manner in which subordinate officials exercise discretionary executive power"; and (3) "veto or nullify such officials' exercises of discretionary executive power."[147]

B. The Unitary Executive Theory: Political Discourse Arguing for Consolidated Presidential Power over the Executive Branch

Despite the questionable validity of the unitary executive theory, its influence on modern presidential politics is undeniable. It has also had a significant impact on the academy, especially in the area of constitutional law. Not surprisingly, the two individuals most often cited for advancing the unitary executive theory, the Honorable Edwin Meese, III, and Steven G. Calabresi, herald from the same place—the Department of Justice ("DOJ") of the Reagan

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Statutory Interpretation, 15 CARDOZO L. REV. 219, 228 (1993) (arguing that the Take Care Clause obligates the President to faithfully execute the law personally and to oversee that the executive branch agencies faithfully execute the law).

[145] Calabresi & Prakash, *supra* note 135, at 594–95.

[146] Calabresi & Rhodes, *supra* note 135, at 1165–66.

[147] Yoo, Calabresi & Colangelo, *supra* note 137, at 607; *see also* Calabresi & Rhodes, *supra* note 135, at 1165–66.

administration. Meese was Reagan's Attorney General, while Calabresi joined the DOJ in 1985 after co-founding the Federalist Society in 1982. Since 1990, Calabresi has been a law professor at Northwestern University School of Law where he has written extensively on the unitary executive.[148]

That Meese and Calabresi both came out of the DOJ is significant in that these two individuals—and virtually every Presidentialist who has followed them—believed the unitary executive theory to have distinct and real judicial ramifications. Meese, especially, was unafraid to push the practical legal aspects of the theory.[149] Under his direction, for example, the DOJ produced research reports devised to lobby for conservative changes to the constitutional legal culture.[150] In his public statements, Meese often struck similar themes, invoking departmentalism to argue that the President was not bound by the Supreme Court's constitutional interpretation.[151]

For his part, Calabresi has published prolifically on the unitary executive theory.[152] Indeed, he has recently published a book that

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[148] *See, e.g.*, Steven G. Calabresi, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive in Historical Perspective*, ADMIN. & REG. L. NEWS, Fall 2005, at 5; Steven G. Calabresi, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611 (2006).

[149] *See, e.g.*, Yoo, Calabresi & Colangelo, *supra* note 137, at 701 ("Meese explicitly questioned the constitutionality of independent agencies in a major speech, which was widely noticed at the time. He also made a speech defending departmentalism—the notion that all three branches of the federal government are co-equal interpreters of the Constitution—that was worthy of Thomas Jefferson or Abraham Lincoln. Meese's so-called Tulane speech defending departmentalism is every bit as ringing as Abraham Lincoln's similar speech responding to Dred Scott." (citing, inter alia, Edwin Meese III, Address Before the Federal Bar Association Annual Banquet (Sept. 13, 1985), *in* 32 FED. B. NEWS & J. 406, 406–08 (1985); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987)))

[150] *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988), *available at* http://islandia.law.yale.edu/acs/conference/meese-memos/year2000.pdf (discussing the future of judicial review with regard to specific constitutional issues); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, ECONOMIC LIBERTIES PROTECTED BY THE CONSTITUTION (1988) (discussing private property rights).

[151] *See, e.g.*, Edwin Meese III, U.S. Attorney General, The Law of the Constitution, Address at the Tulane University Citizens' Forum on the Bicentennial of the Constitution (Oct. 21, 1986), *in* 61 TUL. L. REV. 979 (1987) (distinguishing between the constitutional law that arises out of the Supreme Court's jurisprudence and the Constitution itself, and arguing that only the latter is truly binding).

[152] *See, e.g.*, CALABRESI & YOO, *supra* note 135; Calabresi & Rhodes, *supra* note 135; Calabresi & Prakash, *supra* note 135; Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamden *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U. CHI. L. REV. 469 (2006) (book review); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive in*

compiles a number of his articles into one source advocating the authenticity of the unitary executive theory through illustrations of instances of presidential unilateral behavior.[153]

As initially conceived, the unitary executive theory concerned itself with recovering from Congress control of executive agencies—control first obtained during the New Deal then lost in the wake of Watergate.[154] Consequently, each President since Reagan has attempted (with some success) to expand executive control over the regulatory activities of federal agencies.[155] However, it was only a matter of time before the unitary executive theory moved beyond the purely political arena and insinuated itself into the judicial arena.

John MacKenzie, in his book *Absolute Power*,[156] describes the first attempt to introduce the unitary executive theory into a legal proceeding. In *Bowsher v. Synar*[157] the Court held that the Gramm-Rudman-Hollings Act[158] was an unconstitutional usurpation of executive power. The Act authorized the Comptroller General to make fiscal calculations that resulted in budget reductions. Because the Comptroller General was an agent of the legislature, Congress could remove him by a process other than impeachment. However,

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Historical Perspective, ADMIN. & REG. L. NEWS, Fall 2005, at 5; Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1 (2004); Steven G. Calabresi, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Yoo, Calabresi & Colangelo, *supra* note 137.

153 *See* CALABRESI & YOO, *supra* note 135.

154 The Honorable Edwin Meese, III, U.S. Attorney General, Towards Increased Government Accountability, Address Before the Federal Bar Association Annual Banquet (Sept. 13, 1985), *in* FED. BAR NEWS & J. 406, 408 (1985) (questioning the constitutionality of independent agencies by stating that accountability required that "[i]t should be up to the President to enforce the law, and to be directly answerable to the electorate for his success or failure in carrying out this responsibility," that "[p]ower granted by Congress should be properly understood as power granted *to the Executive*").

155 For a discussion of examples of the Reagan, Bush, and Clinton Administrations' use of the unitary executive theory to advance presidential policy preferences by controlling the executive branch, see Christopher S. Kelley, Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency 14–20 (Apr. 7–10, 2005) (unpublished conference paper, prepared for the 63rd Annual Meeting of the Midwest Political Science Association), *available at* http://www.users.muohio.edu/kelleycs/paper.pdf. For a discussion of examples identifying Clinton's device for controlling administrative agencies, which she calls "presidential administration," and examples of Clinton's public announcement tactics, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2283–84 (2001) (discussing, *inter alia*, Clinton's 1995 presidential news conference announcing publication of a proposed rule to prohibit youth smoking and Clinton's 1999 presidential announcement directing the Secretary of Labor to issue rules allowing States to offer paid leave to new parents).

156 MACKENZIE, *supra* note 135.

157 478 U.S. 714 (1986).

158 Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 STAT. 1038 (codified at 2 U.S.C. §§ 901–922 (1982 & Supp. III)).

the Court determined that the Comptroller's duties under the law were executive in nature and that the Act, therefore, was an unconstitutional exercise of Congressional removal power at the expense of the executive.

MacKenzie notes that the brief filed by Solicitor General Charles Fried on behalf of the Reagan administration "cit[ed] [Alexander] Hamilton's *Federalist* No. 70 about the energetic executive, sa[ying], 'The Framers deliberately settled upon a *unitary executive* in order to promote a sense of personal responsibility and accountability to the people in the execution of the laws—and thereby to ensure vigorous administration of the laws and protection of the liberty, property, and welfare of the people.'"[159] Relying on Hamilton, the Solicitor General argued that the Constitution "precluded assigning an executive task—the politically consequential fiscal calculation—to an officer who owed his job to another branch."[160]

Although the quote from Hamilton's *Federalist No. 70* marked the first use of the phrase "unitary executive" in federal court pleadings, MacKenzie observes that "[t]he term was not signaled to the general public."[161] Likewise, the phrase was not recorded during oral argument or written into the Court's opinion.[162] Still, it had been introduced and its origins described in a federal court brief prepared and submitted by the President's legal team. Given its explosive potential to cause paradigmatic shifts among the branches of government, the concept of the unitary executive was bound to reemerge in lawsuits filed in federal court. And it did.

C. The Unitary Executive Theory Discourse Enters the Federal Judiciary

The "unitary executive" fully entered the federal judicial discourse in 1988 in *In re Sealed Case.*[163] Writing for the majority in a three-judge panel, Judge Laurence H. Silberman, Circuit Judge for the Court of Appeals for the District of Columbia Circuit, characterized appellants' general claim as follows: "More broadly, appellants assert that the [Ethics in Government] Act as a whole jettisons traditional adherence to constitutional doctrines of separation of powers and a *unitary executive*, and in so doing, seriously weakens constitutional structures that serve to protect individual liberty."[164] Judge

[159] MACKENZIE, *supra* note 135, at 22 (emphasis added).
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).
[164] *Id.* at 480 (emphasis added).

Silberman's use of the phrase marked the first in a federal court opinion.[165]

The Supreme Court took up *In re Sealed Case* on appeal, ultimately deciding the presented issues in a case that became known as *Morrison v. Olson.*[166] *Morrison* is heralded as the Supreme Court decision that "demolished the unitary executive as a matter of constitutional reason."[167] But, as I will show, *Morrison* did not have the devastating effect that some believed it did. As the Court increasingly used the standing doctrine to advance its views on separation of powers, it simultaneously created space for the unitary executive theory to reassert itself, albeit in a muted form.

The issue in *Morrison* was whether the independent counsel provision of the Ethics in Government Act of 1978 was constitutional.[168] Congress passed the Ethics in Government Act in response to Watergate and other scandals that impaired the legislative and executive offices in the late 1970s.[169] Notably, the Act allowed a special court to appoint an independent counsel to investigate and prosecute certain high-ranking officials within the executive branch. The Act further indicated that the independent counsel could only be removed for cause.

In a seven to one decision,[170] the Court held that the provisions of the Act did not "violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor [did] they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers."[171] The decision dealt a blow to the "unitarians" in the Reagan administration who contested any feature of administrative agency power located anywhere other than in the executive.

However, defeat in this context was not absolute, since so much of legal development is incremental and occurs as certain phrases, certain snippets of language, enter the legal vocabulary of the courts and those who practice within them. Thus, although the decision in

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[165] A WESTLAW Search in the ALLFEDS (all federal cases) database for "'unitary executive' & da(bef 1988)" (before the date of 1988) found no documents.

[166] 487 U.S. 654 (1988).

[167] MACKENZIE, *supra* note 135, at 55; *see also* Karl Manheim & Allan Ides, *The Unitary Executive*, LOS ANGELES LAW., Sept. 2006, at 24, 27, *available at* http://www.lacba.org/Files/LAL/Vol29No6/2305.pdf (observing that the *Morrison* decision was "[p]erhaps the most noteworthy" of "[t]he Reagan administration's efforts to apply and enforce its unitary executive theory [which] met with an almost uniform judicial resistance").

[168] *Morrison*, 487 U.S. at 660; *see* 28 U.S.C. §§ 49, 591–599 (1982 & Supp. V).

[169] Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

[170] Newly appointed Justice Kennedy took no part in the consideration or decision of the case.

[171] *Morrison*, 487 U.S. at 660.

Morrison was a victory for Congress, it did not signal the death of the unitary executive theory as a legal argument. From *Morrison* on, the concept of the unitary executive would be part of the judicial discourse.

To better understand the significance of *Morrison*—how it shaped the way presidential administrations would frame unitary executive arguments in future cases, and how it established a judicial threshold beyond which the Court would not entertain such arguments—one must delve into the back-story of the case and the text of the opinion.

1. Setting the Stage for a Discussion of the Unitary Executive Theory: Challenging the Ethics in Government Act in Morrison

Under the Ethics in Government Act, Congress could appoint an independent counsel to investigate and prosecute claims against high-ranking members of the federal government. The Special Division, created by the Act, would then adjudicate these claims.[172] The key legal issues in *Morrison* involved (1) the process by which the independent counsel was appointed, (2) the particular powers granted to the independent counsel, and (3) the circumstances under which the independent counsel could be removed, and by whom.

According to the Act, the appointment process started with the Attorney General. If the Attorney General received sufficient information indicating that a person subject to the Act had violated federal criminal law, Title VI of the Act permitted him to conduct a preliminary investigation. If, based on his investigation, the Attorney General determined that there were "reasonable grounds to believe that further investigation or prosecution [was] warranted," he would inform the special court established under the Act—known as the Special Division—and request that it appoint an independent counsel to complete the investigation and prosecute the subject of the inquiry.[173]

Title VI of the Act gave broad powers and autonomy to the office of the Independent Counsel. Indeed, the counsel had "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the DOJ, the Attorney General, and any other

[172] The Special Division was a division of the United States Court of Appeals for the District of Columbia Circuit. It was a three-member panel consisting of three circuit judges or Justices appointed by the Chief Justice of the Supreme Court of the United States. The Act required that one of the judges be from the United States Court of Appeals of the District of Columbia Circuit, and no two of the remaining judges could be named from the same court. 28 U.S.C. § 49 (1982 & Supp. V).

[173] *Id.* § 592(c)(1).

officer or employee of the Department of Justice."[174] The counsel's duties included: conducting investigations and grand jury proceedings, prosecuting civil and criminal actions against the persons indicted under the Act, and appealing any adverse decisions in those actions. Moreover, the counsel's powers included, "initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States."[175] Finally, the counsel could appoint employees, request and receive assistance from the DOJ, accept referrals from the Attorney General, and dismiss matters if he or she deemed them unworthy of investigation.[176] As these broad powers indicate, the Independent Counsel functioned as both an investigator and a prosecutor. Note that under the Act Congress could remove the Independent Counsel under only two circumstances: (1) at the Attorney General's request upon a showing of good cause; or (2) if the office itself was terminated.[177] The President, by contrast, had no ability to remove the Independent Counsel, even for cause. Congress controlled the entire process.

2. *The Facts Giving Rise to* Morrison

In 1982, two House Subcommittees issued subpoenas to the Environmental Protection Agency ("EPA") for documents related to its enforcement of the Superfund Act.[178] President Reagan, acting on the advice of the DOJ, directed the EPA administrator to invoke executive privilege and inform Congress that the EPA would not surrender the requested documents, asserting that the documents contained "'enforcement sensitive information.'"[179] In response to the administrator's refusal to provide the documents, the House voted to hold him in contempt.[180] Although the Administrator and the United States filed a complaint against the House in response to the contempt charges, the dispute over the EPA records was resolved in 1983 when the Reagan administration agreed to grant the House limited access to the documents.[181]

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[174] *Id.* § 594(a).
[175] *Id.* § 594(a)(9).
[176] *Id.* § 594(c).
[177] *Id.* § 596(a)(1).
[178] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. § 9601–9675).
[179] Morrison v. Olson, 487 U.S. 654, 665 (1988).
[180] *Id.*
[181] *Id.*

However, the conflict did not end there. One year later, the House Judiciary Committee opened an investigation to assess the DOJ's role in withholding the documents.[182] One of the individuals called to testify before the House Subcommittee during its investigation was Theodore Olson.[183] Olson had been Assistant Attorney General in the Office of Legal Counsel at the time President Reagan gave the order to exert executive privilege.[184] Olson's testimony came in the middle of a tug of war between the DOJ and the House Subcommittee over subsequent requests for more documents.[185] The DOJ complied with some requests for documents straight away, while it denied others for months until eventually capitulating.[186] In 1985, the House completed its investigation and issued a detailed report of its findings.[187] In addition to criticizing the DOJ for its role in the executive privilege dispute, the report[188] suggested that the Assistant Attorney General had perjured himself, saying "Olson had given false and misleading testimony to the Subcommittee . . . and . . . [other administrative officials] had wrongfully withheld certain documents from the Committee, thus obstructing the Committee's investigation."[189]

The Committee Chairman submitted a copy of the report to the Attorney General with a request that he invoke Section 592(c) of the Ethics in Government Act[190] and ask the Special Division to appoint an independent counsel to investigate the allegations against Olson.[191]

In May and June of 1987, the independent counsel (Morrison) issued grand jury subpoenas for testimony and documents to Olson and other government officials.[192] Olson and the others moved to quash the subpoena asserting, *inter alia*, that the Act's creation of an independent counsel was unconstitutional, and that, as a result, Morrison had no authority to issue the subpoenas.[193] In July, the District Court for the District of Columbia declared the Act constitutional and held Olson and the others in contempt for failing to

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[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at 666.

[186] *Id.*

[187] *Id.*

[188] Report on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982–83, H.R. REP. NO. 99-435 (1985).

[189] *Morrison*, 487 U.S. at 666.

[190] 28 U.S.C. § 592(c) (1982 & Supp. V).

[191] *Morrison*, 487 U.S. at 666.

[192] *Id.* at 668.

[193] *Id.*

comply with the subpoenas.[194] The court then stayed the contempt orders pending expedited appeal of the matter.[195]

3. A Dialogue Among the Judiciary

The Court of Appeals for the District of Columbia Circuit split two to one, with the majority reversing the trial court decision.[196] The case was then submitted to the Supreme Court, which granted certiorari. By a vote of seven to one, the Supreme Court reversed the Court of Appeals and reinstated the trial court decision. However, for purposes of this paper, the lopsided score is less important than the manner in which the Supreme Court, through the pens of Chief Justice Rehnquist and Justice Scalia, engaged in a judicial dialogue with one another and with Judge Silberman over the "unitary executive."

Chief Justice Rehnquist, writing for the majority, noted that Judge Silberman considered "several alternative grounds for its conclusion that the statute was unconstitutional,"[197] one of which was that all executive power rested in the executive branch and could not be appropriated or diluted by an act of Congress—the unitary executive theory dressed in legal garb. Chief Justice Rehnquist's dismissive response to Judge Silberman's finding provided Justice Scalia, the lone dissenter in *Morrison*, with a platform from which to launch an attack against the majority and make a pitch for the unitary executive theory.[198] It is to Judge Silberman's "alternative grounds"—and Justice Scalia's arguments in support of them—that I now turn.

a. The Rhetorical Strategy of the Court of Appeals for the District of Columbia Circuit

The first thing that one notices about the Court of Appeals opinion in *In re Sealed* is that it need not have addressed the unitary executive issue at all. Indeed, Judge Silberman made it clear that the Ethics in Government Act violated the Appointments Clause of Article II of the Constitution, thus providing sufficient ground to nullify the statute. However, apparently Judge Silberman and his fellow judge on the appellate panel were not content to let the matter end there. They

[194] *In re* Sealed Case, 665 F. Supp. 56 (D.D.C. 1987), *rev'd*, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

[195] *Morrison*, 487 U.S. at 668.

[196] *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

[197] *Morrison*, 487 U.S. at 668–69.

[198] Yoo, Calabresi & Colangelo, *supra* note 137, at 729–31. Justice Scalia's dissent in *Morrison* has been characterized as one of the most "definitive statements in support of the unitary executive." *Id.* at 730.

wanted to place the issue of the unitary executive squarely in the lap of the Supreme Court.

> The Act's failure to comply with the appointments clause is sufficient to render it unconstitutional. We decide appellants' other constitutional claims, however, so that if this decision is appealed, and the Supreme Court decides that these additional claims must be reached, it will not have to "either proceed without the usual benefit of a lower-court opinion or else delay final disposition by remanding for that purpose." The appellants claim, and we agree, that even if the independent counsel were an inferior officer, and so did not have to be appointed by the President with the advice and consent of the Senate, the Act would violate the Constitution because it impermissibly interferes with the President's constitutional duty to "take Care that the Laws be faithfully executed."[199]

With this paragraph, the appellate court effectively opened a discourse within the judiciary regarding the unitary executive theory, bringing it out of the political sphere and into the legal one.

Like most adherents to the unitary executive theory, Judge Silberman begins his comments on the issue by citing *Federalist No. 70*, in which Hamilton argues against the idea of a plural executive.[200] Hamilton believed that the populace could more easily monitor and hold to account one executive than several: "'[I]t is far more safe there should be a single object for the jealousy and watchfulness of the people; and in a word that all multiplication of the executive is rather dangerous than friendly to liberty.'"[201] Moreover, Hamilton argued forcefully that the government of the United States must be administered by a "vigorous" and "energetic" executive whose powers are unified within a single man, lest the nation lapse into chaos along the Roman model. For Hamilton, the "unity" of executive power is what allowed the President to meet the various difficult circumstances that might arise.

> That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more

[199] *In re* Sealed, 838 F.2d at 487 (quoting Synar v. United States, 626 F. Supp. 1374, 1383 (D.D.C. 1986); U.S. CONST. art. II, § 3) (citations omitted).

[200] THE FEDERALIST NO. 70 (Alexander Hamilton).

[201] *In re Sealed*, 838 F.2d at 489 (citing THE FEDERALIST NO. 70, at 479 (Alexander Hamilton) (J. Cooke ed., 1961)).

> eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.[202]

Unity, according to Hamilton, is destroyed by vesting executive power in more than one person, or by vesting such power in a single man but subjecting his actions to the control or approval of others within the government. What gives Hamilton's *Federalist No. 70* such persuasive force, apart from its logic and fine prose, is that it addresses one of the critical flaws of the Articles of Confederation—a weak and feeble executive. For this reason, *Federalist No. 70* functions as a kind of Rosetta Stone for unitary executive theorists, both in the academy and on the federal bench.

In her dissent, then-Judge Ruth Bader Ginsburg exposed the defect in the majority's attempt to bestow upon the theory of the unitary executive the same constitutional pedigree as traditional constitutional doctrines, such as separation of powers,[203] by channeling the Federalists. She notes:

> The majority places great weight on the concept of a "unitary executive." In my colleagues' view, encroachment on the unity of the executive—the singleness of the Presidency—is synonymous with encroachment on the executive's power "to take Care that the Laws be faithfully executed." Their approach suggests that it is a per se constitutional violation to place any check upon absolute executive branch control of prosecution.[204]

The majority, however, was unmoved by Judge Ginsburg's critique, and did not soften its position on the unitary executive or retreat from its reliance on *Federalist No. 70.*

Structurally, the majority opinion is of considerable interest. After indicating that the constitutionality of the Act and the case as a whole could be decided based on an assessment of the Appointments Clause, the majority devotes no less than seventeen pages (more so than any other section dealing with any other issue) to the Act's encroachment into the executive's power to faithfully execute the law. The strengths and weaknesses of the majority's arguments on this point, while interesting, are less compelling than the fact that the majority

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[202] THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[203] *In re Sealed*, 838 F.2d at 482 ("Central to the government instituted by the Constitution are the doctrines of separation of powers and a unitary executive . . . .").

[204] *Id.* at 524 n.19 (Ginsburg, J., dissenting) (citation omitted).

discussed the unitary executive at all and did so at such length. It is rare for an appellate decision to spend so much time addressing an issue that is not central to the holding of the case under review. The majority's exposition on the unitary executive was not mere dicta; it was a judicial expression of political theory. And the sheer length of the discussion demonstrates that, at least for this appellate court, the unitary executive theory was not simply a debate point for academics, but a bona fide approach to modern constitutional government—one that invokes separation of powers principles to create a protective space within which the President may perform his executive functions without interference from Congress or the courts.

Judge Silberman, however, did more than structure the majority opinion to emphasize, perhaps disproportionately, the importance of the unitary executive; he also took pains to link the phrase "unitary executive" to "separation of powers" five times,[205] thus suggesting that both enjoyed a similar constitutional pedigree:

- "[T]he Act as a whole jettisons traditional adherence to constitutional doctrines of separation of powers and a unitary executive . . . ."[206]

- "Central to the government instituted by the Constitution are the doctrines of separation of powers and a unitary executive . . . ."[207]

- "[A]ll of these examples are so at odds with the doctrine of separation of powers or the President's unitary executive authority . . . ."[208]

- "The Act further trenches on the concept of a unitary executive and departs from separation of powers doctrine . . . ."[209]

- "We believe each of these provisions to be a departure from the related doctrines of separation of powers and of a unitary executive . . . ."[210]

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[205] Two uses of the phrase appear in the context of the Federalist discussing the concept of a unitary versus plural executive. *See id.* at 488, 490 (majority opinion). Two are conclusory statements declaring the unitary executive a constitutional doctrine. *See id.* at 496 n.36, 503.

[206] *Id.* at 480.

[207] *Id.* at 482.

[208] *Id.* at 495.

[209] *Id.* at 496.

[210] *Id.* at 503.

Judge Silberman's linkage of a burgeoning partisan political development (unitary executivism) to the sanctity of separation of powers is masterful, as it gives the former an immediate patina of legitimacy. This rhetorical move is one we have seen before. As discussed in Part II of this Article, by infusing the polity principle of separation of powers into the standing doctrine, the Court elevated the doctrine's importance and, by extension, the Court's power to frame and decide policy issues. Here, Judge Silberman attempts a similar strategy. In so doing, he not only engages the dissenting judge on his own court (then-Judge Ginsburg) in a discussion about the relationship between separation of powers and the unitary executive, he ultimately entices the majority and dissent at the Supreme Court to join the fray.

b. The Attempt to Disassociate Unitary Executive Theory and Separation of Powers

Judge Silberman faced a formidable adversary in then Judge Ruth Ginsburg, the third member on the appellate panel in the *In re Sealed* case. In her dissent, she not only took aim at the majority's use of pre-Constitutional authority—Hamilton's *Federalist No. 70*—but she also argued that the majority had improperly conflated the "singleness of the Presidency" (a descriptive idea) with the political concept of absolute executive control of the executive branch (a normative idea).[211] Not wishing to grant Judge Silberman's rigid formalist approach to the issue, Judge Ginsburg provided a functionalist framework for analyzing separation of powers questions—one unencumbered by the unitary executive theory that the majority had foisted on it:

> The Court's discrete separation of powers analyses in *Bowsher* and *Schor* should guide our way in this case. Where one branch appropriates the functions of another the separation of powers issue arises most pointedly. In these cases a straightforward, "formalistic" analysis is indeed the order of the day. But a measure such as the one before us presents a more subtle problem. The danger of creating an imbalance among the three branches by taking some business away from one of them is in all cases a vital concern, but the actual effects of each apparent limitation should be examined with care. A more fluid, functional approach is appropriate if

[211] *Id.* at 524 n.19 (Ginsburg, J., dissenting).

> we are to preserve the full range of structural values encompassed under the heading of separation of powers.[212]

Judge Ginsburg's attempt to divorce the unitary executive theory from separation of powers provided the Supreme Court majority with the analytical structure it would later use to dispose of Silberman's "alternative grounds." Specifically, when Chief Justice Rehnquist finally addressed the separation of powers issue (he placed it last in his opinion), he actually adopted the three factors in Ginsburg's functionalist analysis: (1) "the extent of the removal," (2) "whether the limitation affects a core executive function, and" (3) "the purposes of the legislation."[213] Based on these factors, the Court concluded "that the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch."[214] However, this rejection of the unitary executive as a constitutional issue did not end the debate between formalist and functionalist approaches to separation of powers issues. On the contrary, Rehnquist's adoption of Ginsburg's functionalist criteria only incited Justice Scalia to swing back hard in response.

c. Survival of the Unitary Executive Theory in Substance if Not in Form

Perhaps more than any other sitting Justice, Justice Scalia has argued that separation of powers principles place the federal courts on inferior footing relative to the political branches. This judicial philosophy creates for the executive branch a significant range of motion. His dissent in *Morrison* builds upon these ideas to articulate a formalist theory of the unitary executive.[215] Although he uses the phrase "unitary Executive" only twice,[216] he employs the principles of the theory to frame his separation of powers analysis.[217] His main

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[212] *Id.* at 524 (citation omitted).

[213] *Id.* at 525.

[214] Morrison v. Olson, 487 U.S. 654, 697 (1988).

[215] *Id.* at 697–734 (Scalia, J., dissenting).

[216] *Id.* at 727, 732.

[217] Here, I provide an exegesis of Justice Scalia's *Morrison* dissent to examine how Scalia's use of language created an accepted constitutional argument for the unitary executive theory within the legal sphere. Other scholars, however, have used the dissent to facilitate discussions about presidential power in the political sphere. *See, e.g.*, I DISSENT: GREAT OPPOSING OPINIONS IN LANDMARK SUPREME COURT CASES 191–209 (Mark Tushnet ed., 2008). Professor Tushnet mentions Justice Scalia's partial description and use of the phrase "unitary Executive" to introduce his commentary on the Bush Administration's pursuit of an executive-centered "constitutional vision." *Id.* at 206. Professor Tushnet observes that while the Administration initially argued inherent authority to exert power, once it was placed in a weakened political position it could not rely on the "unitary executive theory" alone to legitimize its actions, and it therefore buttressed its arguments for expanded executive power by

argument is a basic tenet of the unitary executive theory: "Article II, § 1, cl. 1, of the Constitution provides: 'The executive Power shall be vested in a President of the United States.' As I described at the outset of this opinion, this does not mean *some of* the executive power, but *all of* the executive power."[218] He casts the executive power in absolute terms and then presses his main theme by way of repetition.

- "The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. . . . And the provision at issue here, Art. II, § 1, cl. 1, provides that '[t]he executive Power shall be vested in a President of the United States of America.'"[219]

- "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are."[220]

- "We should say here that the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States."[221]

Justice Scalia follows Judge Silberman's lead by citing pre-Constitution documents to show the Framers' intent to make the unitary executive an integral part of separation of powers. He begins with a brief official statement from the drafters of the Massachusetts State Constitution about separated government and then proceeds to the Framers: "The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government."[222] By identifying the concept of separation of powers with the origins of American constitutional thought, Scalia gives it a kind of unassailable legitimacy.[223]

citing to congressional authorization. *Id.* at 206–08. Thus, Professor Tushnet suggests that political rather than legal constraints are what ultimately hinder an administration's pursuit of unilateral power.

[218] *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

[219] *Id.* at 697–98 (brackets in original).

[220] *Id.* at 709.

[221] *Id.* at 710.

[222] *Id.* at 697.

[223] *See, e.g.*, KENNETH BURKE, A RHETORIC OF MOTIVES 21, 55 (University of California

Having orchestrated this critical identification, Scalia then explicitly argues that a unitary executive is not only allowed under standard separation of powers doctrine, it is fundamental to that doctrine and to individual liberty. "The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom."[224] The rhetorical impress permits only one conclusion: That the Court, to adhere properly to separation of powers, must accept that the Constitution calls for a unitary executive.

As previously discussed, Justice Scalia's opinion did not hold sway with the majority. This is not surprising given the context of the case and the particular facts giving rise to Olson's indictment. However, what is significant is that the dialogue among the judiciary had placed the theory of the unitary executive within constitutional adjudication. From that moment on, the theory would be part of the debate about executive power—not just in the political science departments at universities, but in the federal courts as well.

Again, however, the facts of *Morrison* made it less than ideal as a platform for advancing the unitary executive theory. American legal culture was not ready to give the President the right to protect from legal scrutiny agency administrators who withhold documents from Congress and then lie about it. As Skowronek points out in his study of presidential leadership, the inherited institutional arrangements of any political actor—in this case Justice Scalia—will dictate the limits of any proposed change to the prevailing order. With respect to Justice Scalia's interest in advancing the unitary executive theory, *Morrison* was a poor choice of vehicle. The historical context (residual post-Watergate distrust of the presidency) and the factual context of the case itself (a defiant agency administrator) made it difficult for a majority of the Court to accept his ideas, at least in the very public forum that is a Supreme Court legal opinion. A better case, with more sympathetic facts, would have to be found to place the theory of the unitary executive in softer light. Only in this way would the majority of the Court, and the public at large, accept it.

Such a case came in 1991, when the Court granted certiorari in an action involving the geographic scope of the Endangered Species Act

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Press 1969) (asserting that rhetorical effectiveness in essence is a function of identification that produces an "acting together" or "consubstantiality" between author and audience, for, in the broadest sense, "[y]ou persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his").

[224] *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting).

(ESA): *Lujan v. Defenders of Wildlife*.[225] As shown below, Justice Scalia's majority opinion in *Lujan* not only made a convincing argument for the unitary nature of the executive branch (without ever using the phrase "unitary executive"), but he also persuaded most of his fellow Justices that the standing inquiry must take into account whether the case at bar would operate to *destroy* that unity. Thus, *Lujan* marks the first time the Court used the standing doctrine to create constitutional space for the unitary executive.

D. The Court Embraces the Unitary Executive Theory Through Standing to Sue: Lujan v. Defenders of Wildlife

1. The Facts Giving Rise to Lujan

Lujan involved Section 7(a) of the ESA, which requires federal agencies to "consult" with the Fish and Wildlife Service whenever they propose an action that may affect threatened or endangered species.[226] The purpose of the Section 7(a) consultation requirement is to ensure that proper precautions are put in place so that the proposed action will not push the species towards extinction or otherwise jeopardize its continued viability.

In *Lujan*, the Defenders of Wildlife and other environmental organizations challenged the Secretary of the Interior's decision to amend one of the Section 7 implementing regulations.[227] The original version extended the consultation requirement to all federal actions, including those that involved projects in foreign countries.[228] However, the amended version reduced the scope of the consultation requirement so that it applied only to actions in the United States and on the high seas; further, federally-funded projects abroad were exempted.[229] The plaintiffs in *Lujan* sued the Secretary seeking to have the old regulation reinstated.[230]

The Secretary moved for dismissal on grounds that the plaintiffs lacked standing and the District Court agreed.[231] The plaintiffs appealed to the Court of Appeals for the Eighth Circuit, which reversed on the standing issue and remanded the case back to the

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225 504 U.S. 555 (1992).

226 16 U.S.C. § 1536(a)(2) (2006).

227 *See Lujan*, 504 U.S. at 557–58.

228 *See* Interagency Cooperation—Endangered Species Act of 1973, 43 Fed. Reg. 874 (Jan. 4, 1978) (to be codified at 50 C.F.R. pt. 402).

229 *See* 50 C.F.R. § 402.01 (1991); Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19926 (June 3, 1986) (to be codified at 50 C.F.R. pt. 402).

230 *See Lujan*, 504 U.S. at 559.

231 *Id.*

District Court for further proceedings on the merits.[232] This time the District Court granted the plaintiffs' motion for summary judgment against the Secretary, holding that the new rule impermissibly allowed federal actions in foreign countries to go forward without the required Section 7 consultation.[233] The Secretary appealed to the Eighth Circuit, which affirmed.[234] The Secretary then sought certiorari with the Supreme Court, which was granted.[235]

The Supreme Court, by a vote of seven to two reversed.[236] Justice Scalia, writing for the majority, determined that the plaintiffs failed to satisfy (at the very least) the injury in fact and redressability elements of Article III standing.[237] In the course of arguing these points, he further tightened the relationship between standing and separation of powers, and he made it clear that neither Congress—through the adoption of "citizen suit" provisions—nor the courts—through the exercise of jurisdiction over federal agency decision-making—had the constitutional right to disturb the unitary nature of the executive branch.[238]

As discussed below, Justice Scalia was able to persuade a majority of the Court of his position in part because the facts of *Lujan* were so favorable to the government. Indeed, at least in Justice Scalia's handling of them, many of the plaintiffs' arguments seem facially absurd, which put the dissenters at a distinct disadvantage and allowed Scalia to drive his points home without the kind of resistance he encountered in *Morrison*.

2. *Separation of Powers and the Unities of the Executive: Justice Scalia's Majority Opinion*

Although Scalia and the Court majority found that the plaintiffs failed to satisfy both the injury in fact *and* the redressability requirements of the standing doctrine, only the first need concern us here, as it relates specifically to separation of powers and the "unities" of the executive branch. Therefore, the discussion to follow only addresses the "injury in fact" portion of the Court's opinion.

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[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] Lujan v. Defenders of Wildlife, 500 U.S. 915 (1991).
[236] *Lujan*, 504 U.S. at 578.
[237] *Id*, at 562.
[238] *Id*, at 577.

a. Scalia Dispatches Plaintiffs' "Injury in Fact" Arguments

The plaintiffs had not challenged any particular federal action but instead had attacked the amended regulation itself.[239] According to Justice Scalia, this created fatal "injury in fact" problems for the plaintiffs because, without reference to a particular project and its impacts on endangered species, the plaintiffs could not establish that the amended regulation had actually harmed them personally.[240]

The plaintiffs tried to overcome this difficulty by making three arguments: First, they asserted that (1) certain members of the plaintiff organizations, in the past, had observed endangered species in foreign countries, (2) these species now are threatened with extinction by projects funded in part by agencies of the United States government, and (3) as a result, the members would no longer be able to observe those species in the future.[241] Scalia dispatched this argument quickly on grounds that the harm asserted was speculative in the extreme; the affidavits provided by the plaintiffs simply evinced no immediate harm:

> [T]he affiants' profession of an 'inten[t]' to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.[242]

Plaintiffs next tried to establish standing through a series of "nexus" theories.[243] The first, referred to as the "ecosystem nexus," claimed that any person who used any part of a "contiguous ecosystem" adversely affected by a federally-funded activity has standing, even when the activity takes place a great distance away.[244] Scalia noted that such a theory runs counter to the Court's decision in *Lujan v. National Wildlife Federation*,[245] and then went on to draw a

[239] *Id.* at 561.

[240] *Id.* at 562 (noting that when a regulation impacts someone else standing is more difficult to establish because the injury in fact test requires respondent be personally injured).

[241] *Id.* at 563.

[242] *Id.* at 564 (second brackets in original).

[243] *Id.* at 565.

[244] *Id.*

[245] 497 U.S. 871, 887–89 (1990).

distinction between the ESA's stated objectives, on one hand, and the rights of action the ESA creates, on the other.

> To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.[246]

Plaintiffs' other two theories—the "animal nexus" and the "vocational nexus"—fared no better. According to the former, anyone with an interest in studying or seeing an endangered animal anywhere on the globe has standing; according to the latter, anyone with a professional interest in such animals can bring suit.[247] Justice Scalia makes quick work of them:

> Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not a "an ingenious academic exercise in the conceivable" . . . .[248]

In making such a poor showing of actual injury, the plaintiffs had handed Justice Scalia a fact pattern that he could use effectively to demonstrate why the modern standing criteria must be applied scrupulously. And by advancing arguments so extreme in scope and consequence, plaintiffs weakened their case further and made the often extreme Justice Scalia appear moderate.

b. Scalia Rejects Plaintiffs' Argument that Congress Conferred Standing Independent of the Article III Requirements

Plaintiffs' third—and potentially most persuasive—argument for standing was that Congress, through the ESA's "citizen suit" provision, had conferred upon all persons the right to sue the Secretary for failing to comply with Section 7's consultation mandate, even though the alleged failure causes no actual harm to the putative

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[246] *Lujan*, 504 U.S. at 566.

[247] *See id.*

[248] *Id.* (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688, (1973)).

plaintiff.[249] In other words, Congress had authorized the citizenry to enforce the ESA's procedural directives. At first blush, this argument would appear to pose serious problems for the Secretary (and for Justice Scalia), as the text of the ESA's citizen provision is both clear and far-reaching in the "oversight" rights it creates. Under this section of the statute, "any person may commence a civil suit on his own behalf—(A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."[250]

The Court of Appeals found this language compelling and determined that it provided an independent basis for granting standing, the plaintiffs' arguments notwithstanding.[251] Perhaps recognizing the appeal and strength of the Court of Appeals' position on this question, Justice Scalia elected to circle around it before attacking it head-on with his formalist 'standing is a separation-of-powers doctrine' argument.

> To understand the remarkable nature of this holding [that Congress conferred standing on plaintiffs by virtue of the ESA's citizen suit provision] one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.[252]

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[249] *Id.* at 571–72.
[250] 16 U.S.C. § 1540(g) (2006).
[251] *Lujan*, 504 U.S. at 571–72.
[252] *Id.* at 572–73 (footnotes omitted).

Justice Scalia then turns to the heart of his argument—that Congress cannot trump the standing requirements of Article III by allowing "generalized grievances"—without violating the separation of powers and the unities of the executive.[253] He asserts that neither the legislative nor the judicial branch has the authority to ignore the concrete injury mandate and become watchdogs over the President and the agencies that implement his policies.[254] He asks rhetorically whether the Constitution would permit the public interest to be served by granting to all persons—either by statute or by judicial declaration—the right to sue federal agencies for violations of the law.

> If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed." It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'"[255]

It is interesting to compare the language of this passage with that of *Flast v. Cohen*, which granted broad rights to individuals seeking redress under federal law. Whereas the Warren Court opinion described federal courts as the protectors of individual liberty against the abuses of government, Justice Scalia's opinion in *Lujan* moved in the opposite direction, identifying the courts, Congress, and the public they empower as unnecessary—indeed, unconstitutional—interlopers who frustrate the executive's efforts to implement the law. For Justice Scalia, as a proponent of the unitary executive theory, the idea that Congress could statutorily empower the public to police the activities of the executive branch was anathema to the structure of the Constitution and the unified powers of the President. For Justice

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[253] *See id.* at 574.

[254] *See id.* at 576.

[255] *Id.* at 577 (quoting U.S. CONST. art. II, § 3; Massachusetts v. Mellon, 262 U.S. 447, 489 (1923); Allen v. Wright, 468 U.S. 737, 760 (1984)).

Scalia, that the courts would bless this intrusion into the province of the executive branch is equally unconscionable.

In the end, Justice Scalia convinced four other Justices that the plaintiffs lacked standing and that the Eighth Circuit's decision should be overturned. Justice Kennedy, in a concurrence that also won the support of Justice Souter, indicated he was persuaded that Congress could not bypass the injury in fact requirement; however, he walked lightly through the minefield Justice Scalia had laid out, not wanting to grant, as a categorical matter, too much space to the executive branch, as to do so would allow the ever-growing administrative state to skirt the law with impunity.

> As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, or Ogden seeking an injunction to halt Gibbons' steamboat operations. In my view, 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, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, 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.[256]

The references to Marbury's commission and Gibbons' steamboat may have been directed at Justice Scalia's oft-trumpeted originalism. That presumption would allow one to think of the citations as Justice Kennedy's way of signaling to Justice Scalia, and to the other Justices, that he believed the modern state has created different kinds of injuries not known previously, and that the Court should not prevent Congress from trying to address them. Still, on the facts of the case before him, Justice Kennedy sided with Justice Scalia on the ESA's citizen suit provision.

> The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to

[256] *Id.* at 580 (Kennedy, J., concurring) (citations omitted).

> entertain citizen suits to vindicate the public's nonconcreto interest in the proper administration of the laws.[257]

It is possible that the Warren Court, if it had been given the *Lujan* case (or its facts), would have come to the same conclusions reached in Justice Scalia's majority opinion and Justice Kennedy's concurrence, but that seems unlikely. It is hard to imagine the Warren Court chastising Congress for granting citizens the right to sue the government for violations of the law. Whereas Justice Scalia decried the creation of "individual rights" to vindicate the public's "undifferentiated" interest in seeing that the law is followed, the Warren Court, at least as evidenced by its decision in *Flast*, would probably have welcomed this legislative effort to rein in the metastasizing administrative state. It is also worth noting that, despite its proclaimed adherence to separation of powers, the Court in *Lujan* was going to violate that doctrine no matter what it did. If it affirmed the Eighth Circuit's decision, it would aid and abet Congress' efforts to encroach upon the executive branch; and if it overturned the Eighth Circuit, it would directly invade the congressional province by refusing to enforce the citizen suit provision of the ESA. That the Court ultimately chose to protect the executive branch at the expense of the legislative branch says a great deal.

c. The Role of Lujan *in the Rehnquist Court Legacy*

When placed in the context of the modern standing doctrine, the importance of *Lujan* becomes apparent. It does more than simply restate that separation of powers concerns form the core of the standing doctrine; it demands that the standing inquiry be searching enough to ensure that neither Congress nor the courts puncture the walls of Article II and damage the "unities" of the executive branch. While *Allen* secured the policy intentions of the Court with respect to the fundamental purpose of the standing doctrine, and *Morrison* presumably settled the unitary executive theory question in the negative, the Court's dramatic implementation of separation of powers-based limitations on access to federal courts in *Lujan* affirmed the former and functionally reversed the latter.

In short, *Lujan* effectively divested Congress of the authority to grant standing to citizens to challenge executive branch violations of federal law, absent independent satisfaction of the three constitutional requirements of standing: injury in fact, causation, and redressability. Given that most federal agency conduct is not directed at individuals,

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[257] *Id.* at 580–81.

but is instead meant to implement the policies of the President, it is difficult to see how Congress could craft citizen suit statutes that would satisfy Article III as the *Lujan* Court interpreted it. Even if Congress could draft and adopt such statutes, they would have to reserve a significant constitutional space for the President to act largely immune from congressional oversight, public enforcement, and judicial review.

This is the legacy of the Rehnquist Court, at least with respect to the modern standing doctrine. While the Constitution may not be able to absorb the unitary executive theory in its naked, aggressive form (à la *Morrison*), it will admit a more politically sensitive version (*Lujan*). In all events, however, the Constitution will not tolerate attempts by the federal courts—whether on their own or at the instigation of Congress—to disturb the unified powers of the executive branch. The valve for maintaining the balance between too much judicial oversight and too little is the standing doctrine. It governs what cases gain access to the court system and which do not. But, as we shall see below, operating this valve effectively is increasingly difficult because the guidebook (i.e., the set of rules established by legal precedent) is incomplete, chaotic, and often contradictory. Enter the Roberts Court.

IV. THE ROBERTS COURT ENLISTED THE STANDING DOCTRINE TO LEGITIMIZE EXECUTIVE-CENTERED CONSTITUTIONALISM

It is perhaps too soon to tell exactly what the Roberts Court will do with the standing doctrine, but two trends have emerged. First, the Court has added to, not reduced, the chaos and confusion that has plagued standing analyses over the last 40 years. Second, the Court has generally continued the march toward reducing public access to federal courts, at least when actions of the executive Branch are challenged. More than ever, the Court emphasizes the separation of powers component of the standing inquiry, though it invokes separation of powers concerns far more often to protect the President than to protect Congress. In short, the space created for the unitary executive under the Rehnquist Court has expanded in the brief period that John Roberts has been Chief Justice.

This expansion, however, has been uneven and largely limited to the domestic realm. Where the Bush administration has pushed the bounds of traditional constitutionalism on the foreign policy front—namely, in prosecuting the War on Terror—the Court has been less accommodating, perhaps in part because the President's actions in this arena have at times been extremely aggressive and have overtly

challenged the Court's authority to say what the Constitution requires, allows, and forbids when the nation is engaged in unconventional military conflicts. However, at home the unitary executive has enjoyed increased freedom of movement. The process of replacing the Warren Court's rights-based constitutionalism with a more executive-centered version—a process that began in the middle years of Chief Justice Burger's tenure and was pursued with quiet persistence by the Rehnquist Court—has been effectively continued by the conservative Justices who make up the majority of the current Roberts Court.

No case proves this fact better than *Hein v. Freedom from Religion Foundation, Inc.*,[258] which eviscerates *Flast v. Cohen*—the seminal Warren Court case on standing—without officially overturning it. Although both cases involved taxpayer actions alleging federal agency violations of the First Amendment's Establishment Clause, they were decided differently. Whereas the Warren Court granted plaintiffs standing in *Flast*, the Roberts Court denied standing in *Hein*. Whereas the *Flast* opinion rejected the role of separation of powers in the standing inquiry, the *Hein* opinion identifies separation of powers as the raison d'être of standing. And whereas the Court in *Flast* had no trouble holding the Secretary of Education to account for disbursing federal funds to private religious schools under the Elementary and Secondary Education Act of 1965, the Court in *Hein* was not inclined to do the same with respect to the Director of the President's Office of Faith-Based and Community Initiatives and his use of federal funds to advance religious causes.

Because *Hein* is nearly a mirror image of *Flast*, and because it marks the culmination of the Court's incremental reshaping of the standing doctrine from a low-threshold inquiry of adverseness to a powerful separation of powers tool, it will dominate my discussion of the Roberts Court in this final section. Two additional factors make *Hein* a pivotal case for our discussion here. First, it pits Justice Alito, author of the Court's plurality opinion, against Justice Scalia, whose stinging concurrence manages to be both logical and extreme at the same time. Second, the debate in *Hein* between Justices Alito and Scalia not only exposes the intellectual weakness of the Court's standing jurisprudence, it also puts on display the different ways these two Justices arrive at the same conclusion—Justice Alito, politic and careful not to upset the institutional arrangements the Court has inherited and must continue to negotiate, and Justice Scalia, radical

[258] 127 S. Ct. 2553 (2007).

and dismissive of false poses to preserve a legal precedent (*Flast*) that he believes is wrong and should be overturned.

In this regard, Justices Alito and Scalia represent two different kinds of oppositional political actors, as defined by Stephen Skowronek. Whereas Justice Alito maintains that *Flast* is still good law and that the Court should simply decline to extend its holding beyond its facts, Justice Scalia wants to eliminate any pretense of legitimacy that may still attach to *Flast* (and, by extension, to the Warren Court as a whole). Alito works within existing institutional structures; Justice Scalia wishes to obliterate them.

As discussed below, Justice Scalia's opinion is the more satisfying of the two—both in terms of its logic and in terms of its candor. However, it is Justice Alito's opinion, with its hair-splitting distinctions and less than rigorous reasoning that carries the day (and wins the vote of the Chief Justice). Why?

I argue the answer is that Justice Scalia's opinion, while sparkling, falls outside the accepted (and acceptable) discourse on standing generally and the Establishment Clause in particular. Justice Alito's opinion seems safer; it is more respectful of the Warren era and the public's still-potent belief that the Warren Court decisions ushered in a new and continuing jurisprudence based on the protection of individual rights. Nevertheless, both Justices Alito and Scalia would allow the executive branch to fund religious activities and enterprises without judicial oversight; they just arrive at this conclusion by different approaches. And it is Justice Alito's approach that is the more dangerous, if only because it is subtle and painless and therefore draws less attention. It has the added defect of contributing to the Court's slide into an Article III jurisprudence that lacks consistently applicable rules or standards.

A. Flast *for the Twenty-first Century:* Hein v. Freedom from Religion Foundation, Inc.

Nearly forty years ago, the Supreme Court held in *Flast v. Cohen*[259] that federal taxpayers had standing to sue the executive branch (specifically, Wilbur Cohen, the Secretary of the Department of Health, Education, and Welfare) for spending funds on religious schools in violation of the Establishment Clause of the First Amendment.

In 2007, Freedom from Religion Foundation, Inc. (the "Foundation"), a non-profit organization, filed suit against the

[259] 392 U.S. 83 (1968).

executive branch (specifically, the Director of the White House Office of Faith-Based and Community Initiatives, Jay F. Hein) challenging the federal agency's use of federal money to fund conferences to promote the President's "faith-based initiatives."[260] The litigation arose in response to the President's 2001 executive order creating the Office of Faith-Based and Community Initiatives (OFCI).[261] The office's raison d'être was to remove "legislative, regulatory, and other bureaucratic barriers that impede[d]" faith-based organizations' ability to obtain federal assistance.[262] These department centers were "created entirely within the executive branch . . . by Presidential executive order."[263] In other words, congressional legislation did not specifically authorize the centers' creation, nor had Congress enacted any law appropriating money for their activities.[264] Funding for the centers' activities emanated entirely from general executive branch appropriations.[265]

The Foundation challenged the initiative, alleging that it violated the Establishment Clause of the First Amendment.[266] Specifically, the Foundation alleged that the department center directors violated the Establishment Clause by organizing conferences that "'singled out [religious organizations] as being particularly worthy of federal funding . . . '" by suggesting that the organizations' effectiveness in providing social services was because of the fact that the programs *were* faith-based.[267] In particular, they argued that the *Flast* exception covered all government expenditures in violation of the Establishment Clause because distinguishing between money spent via congressional mandate and money spent via executive discretion was arbitrary.[268] The district court dismissed the Foundation's claims concluding that they did not have standing.[269] The district court

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[260] *Hein*, 127 S. Ct. at 2559.

[261] Exec. Order No. 13,199, 3 C.F.R. 752 (2002).

[262] *Id.* at 753. The President expanded the reach of his policy agenda through concurrent and subsequent executive orders creating Executive Department Centers for Faith-Based and Community Initiatives within additional federal agencies and departments, namely, the Departments of Justice, Labor, Health and Human Services, Housing and Urban Development, Education, and Agriculture. *See, e.g.*, Exec. Order No. 13,198, 3 C.F.R. 750 (2002); Exec. Order No. 13,280, 3 C.F.R. 262 (2003); Exec. Order No. 13,342, 3 C.F.R. 180 (2005); Exec. Order No. 13,397, 71 Fed. Reg. 12,275 (Mar. 9, 2006).

[263] Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 997 (7th Cir. 2006), *rev'd sub nom.* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007).

[264] *Hein*,127 S. Ct. at 2560.

[265] *Id.*

[266] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[267] Hein, 127 S. Ct. at 2560.

[268] *Id.* at 2565–70.

[269] *Id.* at 2561; *see* Freedom from Religion Found., Inc. v. Towey, No. 04-C-381-S (W.D. Wis. Nov. 15, 2004).

narrowly read the *Flast* exception to extend only to """exercises of congressional power under the taxing and spending clause of Art. I, § 8.""""[270] The Seventh Circuit Court of Appeals reversed. The court, under a broader reading of *Flast* held that "federal taxpayers [had] standing to challenge Executive Branch programs on Establishment Clause grounds so long as the activities are 'financed by a congressional appropriation.'"[271] The appellate court pragmatically concluded that "'congressional appropriation'" included direct funding via statutory programs and legislative appropriations "'for the general administrative expenses, over which the President and other executive branch officials have a degree of discretionary power.'"[272] The Seventh Circuit denied en banc review[273] and the Supreme Court took up the issue on certiorari[274] and reversed. The Supreme Court held that, because the department center directors were acting on behalf of the President and were not charged with administering a formally mandated congressional program, the challenged activities did not authorize taxpayer standing under *Flast*.[275] In other words, the plurality opinion held that *Flast* "'limited taxpayer standing to challenges directed "only [at] exercises of congressional power"' under the Taxing and Spending Clause."[276]

B. Striking the Pose of Minimalism: Justice Alito's Plurality Opinion

In his plurality opinion (joined by Chief Justice Roberts, and Justice Kennedy), Justice Alito demonstrates how a Supreme Court Justice can so limit the holding of a prior case as to render it meaningless as legal precedent—all the while paying it homage and appearing restrained. The potentially immovable object in *Hein* is *Flast v. Cohen*, the 1968 opinion authored by then-Chief Justice Warren, which granted standing to a group of taxpayers challenging the Elementary and Secondary Education Act of 1965 on grounds that the Act—or more accurately, the Secretary's implementation of it—violated the Establishment Clause.[277] Rather than attack *Flast* head-on, or declare it bad law, or seek to overturn it, Justice Alito took a

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[270] *Hein*, 127 S. Ct. at 2561 (quoting *Towey*, No. 04-C-381-S (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968))).

[271] *Id.* (quoting Freedom from Religion Found., Inc. v. Chao, 433 F.3d 989, 997) (7th Cir. 2006)).

[272] *Id.* (quoting *Chao*, 433 F.3d at 994).

[273] Freedom from Religion Found., Inc. v. Chao, 447 F.3d 988 (7th Cir. 2006).

[274] Hein v. Freedom from Religion Found., Inc., 549 U.S. 1047 (2006).

[275] *Hein*, 127 S. Ct. at 2565–66.

[276] *Id.* at 2566 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 479 (1982)).

[277] *See supra* discussion Part I.

softer approach, drawing distinctions (some artful, some forced) between the facts of *Flast* and those of the case at hand.[278] He claimed, in fact, to be applying the rules of *Flast*, not disregarding them; he simply was not willing, he wrote, to extend *Flast* to cover the present case.[279] A close review of the text reveals that Justice Alito's opinion is at once a marvel of faux judicial restraint and a logician's nightmare.

His first effort to distinguish *Flast* centers around the source of funding that ultimately paid for the acts which the plaintiffs claim injured them (i.e., federally-sponsored religious enterprises). For Justice Alito (and for Justices Roberts and Kennedy), the key differences between the two cases is that the plaintiffs in *Flast* challenged a specific statute—the 1965 Education Act—whereas the plaintiffs in *Hein* challenged executive branch activities that are funded through *general* appropriations provided by Congress to the President:

> In *Flast v. Cohen*, we recognized a narrow exception to the general rule against federal taxpayer standing. Under *Flast*, a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause. In the present case, Congress did not specifically authorize the use of federal funds to pay for the conferences or speeches that the plaintiffs challenged. Instead, the conferences and speeches were paid for out of general Executive Branch appropriations. The Court of Appeals, however, held that the plaintiffs have standing as taxpayers because the conferences were paid for with money appropriated by Congress.
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> The question that is presented here is whether this broad reading of *Flast* is correct. We hold that it is not. We therefore reverse the decision of the Court of Appeals.[280]

However, the distinction drawn by Justice Alito proves to be both misleading and irrelevant. Contrary to Alito's representations, the 1965 Education Act did not "specifically authorize" the use of federal funds for programs at religious schools. The Act simply provided money to the Department of Education to be disbursed to public and private schools. The Act left it to the discretion of the Secretary to

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[278] *Hein*, 127 S. Ct. at 2559.
[279] *Id.* at 2568.
[280] *Id.* at 2559 (citation omitted).

determine which schools and programs would actually receive funding. Thus, the central issue in *Flast*—use of federal funds to support religious schools—was generated by an executive branch decision, not congressional action per se. Justice Alito, in a footnote, tries to skirt this issue by pointing out that in 1965, 78.2 percent of private elementary and secondary schools in the United States were affiliated with religious institutions—the implication being that Congress was well aware of this fact when it passed the 1965 Education Act and therefore tacitly authorized disbursement of federal funds for religious schools, which was an illegal use of Congress's taxing and spending power: "Congress surely understood that much of the aid mandated by the statute would find its way to religious schools."[281] According to Justice Alito, *Hein* is different because the general appropriations provided to the executive branch in the present case were for the day-to-day operations of the President and his staff, not for specific programs approved by Congress.

But here the facts get in the way. The plaintiffs in *Hein* were not targeting the amorphous and multi-tentacled organism that is the executive branch as a whole, but something very particular: the President's specially created Office of Faith-Based and Community Initiatives ("OFCI"), which was established by executive order. For the OFCI, religious activities were not "incidental" to its larger tasks and objectives (as incorrectly described by Justice Alito); they were the very essence of those tasks and objectives.[282] Moreover, Congress clearly knew that the OFCI would use specific portions of the executive branch appropriations. As Alito admits, Congress had informally "earmarked" funds for this purpose.[283] Still, Justice Alito insists that the distinction between *Flast* (congressional action) and *Hein* (executive action) is both real, and jurisdictionally dispositive:

> The link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing here. Respondents do not challenge any specific congressional action or appropriation; nor do they ask the Court to invalidate any congressional enactment or legislatively created program as unconstitutional. That is because the expenditures at issue here were not made pursuant to any Act of Congress. Rather, Congress provided general appropriations to the Executive Branch to fund its day-to-day activities. These appropriations did not expressly

[281] *Id.* at 2565 n.3.
[282] *See supra* note 261 and accompanying text.
[283] *See Hein*, 127 S. Ct. at 2568 n.7; *see also* H.R. REP. NO. 107-342, at 108 (2001).

> authorize, direct, or even mention the expenditures of which [plaintiffs] complain. Those expenditures resulted from executive discretion, not congressional action.
>
> We have never found taxpayer standing under such circumstances.[284]

"*Flast* itself distinguished the 'incidental expenditure of tax funds in the administration of an essentially regulatory statute.'"[285]

Perhaps sensing danger with this line of reasoning, Justice Alito abruptly changes tack and begins a gentle critique of *Flast*'s failure to give sufficient weight to the separation of powers implications of the standing doctrine.

> Such a broad reading [of the *Flast* exception to taxpayer standing] would ignore the first prong of *Flast*'s standing test, which requires a "logical link between [taxpayer] status and the type of legislative enactment attacked."
>
> It would also raise serious separation-of-powers concerns. As we have recognized, *Flast* itself gave too little weight to these concerns. By framing the standing question solely in terms of whether the dispute would be presented in an adversary context and in a form traditionally viewed as capable of judicial resolution, *Flast* "failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-a-vis the other branches, concrete adverseness or not." Respondents' position, if adopted, would repeat and compound this mistake.[286]

However, as Justice Souter points out in his dissent the Court's concerns regarding separation of powers, if they are to be meaningful, should exist with respect to both political branches, not just the executive. And if the Court in *Flast*, and again here in *Hein*, sees no problem momentarily violating the separation of powers to grant taxpayer standing in lawsuits challenging congressional action, there is no logical separation of powers reason to object to similar suits aimed at executive agencies or special offices created by the President.

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[284] *Hein*, 127 S. Ct. at 2566 (footnote omitted).
[285] *Id.* at 2568 (quoting Flast v. Cohen, 392 U.S. 83, 102 (1968)).
[286] *Id.* at 2569–70 (citations omitted).

> The plurality points to the separation of powers to explain its distinction between legislative and executive spending decisions, but there is no difference on that point of view between a Judicial Branch review of an executive decision and a judicial evaluation of a congressional one. We owe respect to each of the other branches, no more to the former than to the latter, and no one has suggested that the Establishment Clause lacks applicability to executive uses of money. It would surely violate the Establishment Clause for the Department of Health and Human Services to draw on a general appropriation to build a chapel for weekly church services (no less than if a statute required it), and for good reason: if the Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.[287]

That Justice Alito makes this distinction between congressional acts and executive actions belies a constitutional perspective that assigns primacy to the executive branch and extends protections to its officers greater than those extended to Congress. In many respects, Justice Alito's position (shared by Chief Justice Roberts) evinces a particularly strong form of unitary executivism, one potentially more radical than that advanced by Justice Scalia. It not only accepts that the executive can and should act according to its own lights when constitutional issues arise, it places executive decision-making on a plane above congressional action and outside the reach of judicial review.[288] In Justice Alito's view, the executive operates above the

[287] *Id.* at 2586 (Souter, J., dissenting) (citation omitted). Justice Scalia makes this same point in his concurrence when referring to the *Valley Forge* case, in which the Court denied standing to taxpayers who challenged a real estate transaction in which the federal government purchased property and then transferred title to a religious organization:

> Like the dissenters in *Valley Forge*, I cannot fathom why Article III standing should turn on whether the government enables a religious organization to obtain real estate by giving it a check drawn from the general tax revenues or instead by buying the property itself and then transferring title.

Id. at 2578 (Scalia, J., concurring) (citations omitted).

[288] For literature extolling the practice of executive authority to interpret the Constitution, see generally Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 914–15 (1990) (espousing the virtues of executive interpretive judgments); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (advocating executive branch authority to interpret the Constitution); *see also* Calabresi & Prakash, *supra* note 135, at 594–95 (analyzing the relationship between "executive" officers and the President); Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, LAW & CONTEMP. PROBS., Autumn 1993, at 35 (offering a "unified theory" to analyze presidential power).

judicial fray; Congress does not. However, Congress can achieve a modicum of the protection enjoyed by the President by "laundering" issues—and money—through the executive branch. This is the inescapable conclusion of Alito's plurality opinion in *Hein.*

There is much to admire in Justice Alito's opinion, particularly his diplomatic and largely successful effort to embrace *Flast* while distancing himself from it. Yet it suffers from clear defects of logic and often creates legal fictions to achieve its objective—two things that Justice Scalia cannot abide, even when he agrees with the ultimate result of the case. It is to his concurrence that I now turn.

C. The Immodesty of Legal Reasoning: Justice Scalia's Concurrence

It is perhaps no coincidence that Alito's plurality opinion relies almost entirely on newer, Roberts Court standing cases, such as *DaimlerChrysler Corp v. Cuno,*[289] and never mentions or refers to Justice Scalia's majority opinion in *Lujan v. Defenders of Wildlife.* As someone often described as "Scalito," or "Scalia-Lite," Justice Alito likely wanted to separate himself from Scalia's influence and thereby dispel any notion that he is Justice Scalia's protégé.[290] Despite the comparisons, Justice Scalia wasted no time going after Justice Alito's failure of judicial courage. He opens his concurrence as follows:

> Today's opinion is, in one significant respect, entirely consistent with our previous cases addressing taxpayer standing to raise Establishment Clause challenges to government expenditures. Unfortunately, the consistency lies in the creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently. If this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides: Either *Flast v. Cohen* should be applied to (at a minimum) *all* challenges to the governmental expenditure of general tax revenues in a manner alleged to violate a constitutional provision

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[289] 547 U.S. 332 (2006).

[290] The nicknames surfaced in the media because of a resemblance in judicial philosophy between the two justices. *See, e.g.*, Peter Baker, *Alito Nomination Sets Stage for Ideological Battle*, WASH. POST, Nov. 1, 2005, at A1 ("Alito has drawn comparisons to Scalia, to the point that some have dubbed him 'Scalito'—as if he were the next generation of the Supreme Court's most powerful conservative intellect."); Damien Cave, *Scalito: What's in a Nickname? A Melding of the Minds*, N.Y. TIMES, Dec. 25, 2005, at C3; Edward Epstein, *Both Sides Prepare for Fight Over Alito*, S.F. CHRON., Nov. 1, 2005, at A1.

> specifically limiting the taxing and spending power, or *Flast* should be repudiated. For me, the choice is easy. *Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing.[291]

Scalia then goes on to explain that the ills of the current taxpayer standing cases derive from the Court's failure to separate "Wallet Injury" from "Psychic Injury."[292] His basic point is that few, if any, taxpayer plaintiffs have satisfied, or could ever satisfy, the "traceability" and "redressability" requirements of standing when alleging a wallet injury, because the plaintiff's tax obligation to the government is so small, and the potential judicial remedy so speculative.[293] Psychic injuries, on the other hand, would meet the traceability and redressability requirements, but have "nothing to do with the plaintiff's tax liability," as "the injury consists of the taxpayer's *mental displeasure* that money extracted from him is being spent in an unlawful manner."[294] According to Justice Scalia, the Court began to run into trouble when it mixed these two different forms of injury in an attempt to hold government actors to account for violations of law:

> As the following review of our cases demonstrates, we initially denied taxpayer standing based on Wallet Injury, but then found standing in some later cases based on the limited version of Psychic Injury described above. The basic logical flaw in our cases is thus twofold: We have never explained why Psychic Injury was insufficient in the cases in which standing was denied, and we have never explained why Psychic Injury, however limited, is cognizable under Article III.[295]

For Justice Scalia, it was *Flast* that opened the door to taxpayers claiming psychic injuries—a critical mistake that can only be corrected through direct and overt repudiation of *Flast*'s holding and reasoning.[296] But this, Justice Scalia argues, is exactly what the Court has repeatedly failed to do to: "Coherence and candor have fared no

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[291] *Hein*, 127 S. Ct. at 2573–74 (Scalia, J., concurring) (citation omitted).
[292] *Id.* at 2574.
[293] *Id.*
[294] *Id.*
[295] *Id.* at 2574–75.
[296] *Id.* at 2576–77.

better in our later taxpayer-standing cases."[297] Justice Scalia goes on to state: "Of course, in keeping with what was to become the shameful tradition of our taxpayer-standing cases, the Court's candor about the inadequacy of Psychic Injury was combined with a notable silence as to why *Flast* itself was not doomed.[298] Justice Scalia further continues:

> We must initially decide whether Psychic Injury is consistent with Article III. If it is, we should apply *Flast* to *all* challenges to government expenditures in violation of constitutional provisions that specifically limit the taxing and spending power; if it is not, we should overturn *Flast*.
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> . . . .
>
> The plurality today avails itself of neither principled option. Instead, essentially accepting the Solicitor General's primary submission, it limits *Flast* to challenges to expenditures that are "expressly authorized or mandated by . . . specific congressional enactment." It offers no intellectual justification for this limitation, except that "[i]t is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic." . . . As the dissent correctly contends and I shall not belabor, *Flast* is *indistinguishable* from this case for purposes of Article III. Whether the challenged government expenditure is expressly allocated by a specific congressional enactment *has absolutely no relevance* to the Article III criteria of injury in fact, traceability, and redressability.
>
> Yet the plurality is also unwilling to acknowledge that the logic of *Flast* (its Psychic Injury rationale) is simply wrong, and *for that reason* should not be extended to other cases.[299]

What seems to bother Justice Scalia most is not that the plurality actually intends to acknowledge psychic injuries by granting standing to taxpayers who allege psychic harm, but that the plurality refuses to be honest about its true position, thus giving false hopes to taxpayers who bring actions against the federal government. For Justice Scalia, there is nothing honorable in characterizing a bad case (in this

[297] *Id.* at 2577.
[298] *Id.* at 2578.
[299] *Id.* at 2579–80 (citations omitted) (first ellipses and brackets in original).

instance, *Flast*) as binding precedent, but then reducing its impact to zero by limiting it to its unique factual circumstance.

> Why, then, pick a distinguishing fact[, congressional act versus executive decision,] that may breathe life into *Flast* in future cases, preserving the disreputable disarray of our Establishment Clause standing jurisprudence? Why not hold that only taxpayers raising Establishment Clause challenges to expenditures pursuant to the Elementary and Secondary Education Act of 1965 have standing? That, I suppose, would be too obvious a repudiation of *Flast*, and thus an impediment to the plurality's pose of minimalism.[300]

In the lexicon of conservative jurisprudence, this last line is a serious and wounding charge. False minimalism is no different than judicial activism, which is anathema to the Court's carefully-fostered image as the most constrained and least political branch of the United States government.

D. The Impact of Hein *on Rights-Based Constitutionalism*

Justice Scalia's phrase—"pose of minimalism"—describes in three short words the Court's nearly forty-year effort to repudiate not just *Flast* but also the entire rights-based constitutionalism of the Warren Court. The Burger, Rehnquist, and (now) Roberts Courts have constructed this "pose" by incrementally adjusting the judiciary's jurisdictional doctrines while leaving undisturbed most of the substantive holdings of the Warren Court.

The question is: was this "pose of minimalism" necessary for the Court to shift from rights-based constitutionalism to an executive-centered constitutionalism? The answer, I believe, is yes, because without the "pose" the public and the academy would have recognized immediately that the individual rights protections earned during Warren's tenure were at risk. The political and public backlash against the Court would have been sharp and sustained. However, the "pose of minimalism" has allowed the Court to continue its efforts to empower the executive branch at the expense of private enforcement efforts with little fear of inciting public discontent. Justice Alito, perhaps better than Justice Scalia, understood the institutional arrangements and constraints that dictate the Court's public actions; he simply adjusted the text of his opinion accordingly—i.e., struck the proper pose.

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[300] *Id.* at 2580.

Of course, the irony is that Justice Scalia is the one who brings this pose out into the light and subjects it to criticism. After all, it was Scalia who, in 1983, while still a federal court judge, published the seminal article calling on the Court to deploy standing as a separation of powers tool;[301] and it was Justice Scalia, first in *Morrison* and then more persuasively in *Lujan*, who convinced a plurality of his fellow Justices that the standing inquiry could and should be used to preserve the unitary nature of the executive branch. In these efforts, Justice Scalia benefited from the pose as much as anyone else, though in *Hein* he decided to betray the Court's secret and demand candor.

In this, there is something both admirable and tragic. Admirable in that Justice Scalia is admonishing the new Court leadership (Chief Justice Roberts, Justice Alito, and, by virtue of his "swing" status, Justice Kennedy) to be more transparent in its legal decision-making, even at the risk of tarnishing the Court's public image as the protector of individual rights. Tragic in that Justice Scalia, at least as evidenced by the way the votes fell in *Hein*, may have pushed himself to the margins of the Court's dialogue, appearing too extreme to win the support of more than one or two Justices.

Ultimately, Justice Alito's plurality opinion in *Hein*, like Warren's opinion in *Flast*, may be constrained to its facts and not applied to future cases. However, for the moment it is the prevailing law and provides the President and Congress with a blueprint for circumventing the Establishment Clause. So long as the funding for religious activities comes to the executive branch in non-categorical lump sums, those funds will be beyond the legal reach of any aggrieved citizen. Thus, the Court has tacitly sanctioned a shadow government, which (1) operates solely at the direction of the President, and (2) may pursue potentially unconstitutional objectives without fear of judicial oversight or intervention.

CONCLUSION

After the Warren Court, the Courts have been oppositional in nature—seeking to reconstruct the established order along new lines. The Burger Court came to power opposed to the constitutional regime established by the Warren Court. As a result, it was primarily concerned with destroying the last vestiges of the old regime and articulating the foundations of a new one. However, judicial authority is maximized through the confluence of the Court's capacity to disrupt existing legal doctrine and the shaky legitimacy of the status

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[301] *See* Scalia, *supra* note 1.

quo. The entrenchment of constitutional rights in the American political consciousness made it impossible for the Burger Court to destroy immediately the results of the Warren Court's judicial activism. Its opposition had to be accomplished from within. The Rehnquist Court can be characterized as an affiliated Court, meaning that it was primarily concerned with continuing, extending, and more creatively reconceptualizing the fundamental commitments made by its earlier oppositional leader. The Roberts Court is in a unique position, at the convergence of multi-layered constitutional and governmental regimes.

The unitary executive thesis helps us to understand why attaching a separation of powers analysis to the standing doctrine is problematic. Moreover, although the balance of this Article has been concerned with the advancement of conservative constitutionalism through the conjunction of standing and the unitary executive theory, the overall exposition of this phenomenon suggests that this same paradigm of presidential power can be used to advance the principles of liberal constitutionalism given the appropriate circumstances. The fact that the reality of American political and legal development over the last thirty years has been in a decidedly conservative direction should not obstruct the more important insight that this overall governmental organization upsets the structure of the balance of power among the three branches and offends the fundamental principles of American democracy.

The small number of cases in which the Court denies standing based on a separation of powers rationale belies the significant exercise and enhancement of the Court's judicial power. An effect of the Court's dismissals based on standing is to signal to litigants that the Court may be willing to revisit the issue in the future and in another context; placing no areas of law and policy off limits to judicial action.

The growth of the administrative state and the emergence of a disproportionately powerful President pose significant juridical problems. The degree of deference and protection afforded by the Court to the President will wax and wane as the composition of the Court changes and as presidents come and go, but the basic structural deformity will remain, and may become worse, unless the Court takes steps to reassert itself in the face of presidential power. This necessarily entails a radical change in the Court's standing doctrine. Regardless of whether a Justice is politically liberal or conservative, reflexive use of a separation of powers infused standing doctrine

poses dangers because it encourages and endorses executive-centered constitutionalism without judicial review.